VIII.

8. *Of the change of the Value of Money.*

In the Loan of Money the Debtor is obliged only to repay the ſame Sum: and if it happens that after the Loan the Species riſes in Value, he is not bound to pay the preſent Value of the Species which he received, but only ſo much as they were worth when he borrowed them. And if on the contrary the Value of the Species is diminiſhed, the Debtor nevertheleſs is bound to pay the Sum he borrowed [l].

[l] Quia in genere ſuo functionem recipiunt per ſolutionem. *l.* 2. §. 1. *ff. de reb. cred.* Id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, qua datum ſit. *l.* 3. *in f. ff. de reb. cred.*

IX.

9. *Of the change of the Value of Proviſions.*

In the Loan of Corn, Wine, and other Things of the like nature, whereof the Price riſes or falls, the Debtor owes the ſame Quantity which he has borrowed, and neither more nor leſs, whether the Price be riſen or fallen [l]. Unleſs it be that in the caſe of Augmentation of the Price, it ſhould appear by the circumſtances that the Creditor had made an Uſurious Loan, as thoſe do, for Example, who in the time of Harveſt lend their Corn, which is then at a low Price, that they may receive the ſame Quantity in another Seaſon, when it will be dearer.

[l] Mutuum damus recepturi idem genus. *l.* 2. *ff. de reb. cred.* Quatenus mutua vice fungantur, qua tantundem præſtent. *l.* 6. *in f. ff. eod.* See the fifth Article of the third Section.

X.

10. *A Loan in appearance, which is a Sale.*

If one gives Money to receive Corn, or other Things of the like Nature, or gives theſe kinds of Things to receive Money; it is not a Loan, but a Sale, lawful or unlawful, according to the circumſtances [m].

[m] *This is a Conſequence of the Nature of Loan, and of that of Sale.*

XI.

11. *A Thing given to be ſold, in order to lend the Price of it.*

If one of whom another deſires to borrow Money, gives him Gold, or Silver Plate, or any other Thing to ſell, that he may keep the Price, as Money lent; he who has taken it will become Debtor on the ſcore of Loan, till after the Sale is made. But if the Thing periſhes in his hands before the Sale, by an accident, the loſs will fall upon him, becauſe the thing was given him for his benefit. But if the Owner of the ſaid Plate had a deſign to ſell it however, and prevented the Borrower's requeſt, by aſking him to take the trouble of ſelling the ſaid Plate, and promiſing him as an encouragement, to let him keep the Price, as Money lent; then in that caſe if the Thing periſhes before the Sale by an accident, the loſs will fall upon the Owner; for it was for his own intereſt that he gave the Thing [n].

[n] Rogaſti me ut tibi pecuniam crederem: ego, cùm non haberem, lancem tibi dedi, vel maſſam auri, ut eam venderes, & nummis uterēris. Si vendideris, puto mutuam pecuniam factam. Quod ſi lancem vel maſſam ſine tua culpa perdideris, priuſquam venderes: utrùm mihi, an tibi perierit, quæſtionis eſt. Mihi videtur Nervæ diſtinctio veriſſima, exiſtimantis, multùm intereſſe, venalem habui hanc lancem vel maſſam, nec ne: ut ſi venalem habui, mihi perierit, quemadmodum ſi alii dediſſem vendendam. Quod ſi non fui propoſito hoc ut venderem, ſed hæc cauſa fuit vendendi, ut tu utereris, tibi eam periiſſe, & maximè, ſi ſine uſuris credidi. *l.* 11. *ff. de reb. cred.* Qui rem vendendam acceperit ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *eod.* See the following Article.

XII.

12. *Money depoſited in order to be lent.*

If he who borrows with a deſign to purchaſe, or to lay out the Money ſome other way, takes the Money into his keeping, on condition that the Loan ſhall not be contracted till the Purchaſe is made, or the Money be otherwiſe employed, and it happens that the Money is loſt by ſome accident, this perſon with whom it was depoſited will be anſwerable for it in the ſame manner as if the Loan were conſummated, becauſe it was for his behoof that the Money was left with him [o].

[o] Si quis nec cauſam nec propoſitum fœnerandi habuerit, & tu empturus prædia, deſideraveris mutuam pecuniam, nec volueris creditæ nomine antequam emiſſes ſuſcipere, atque ita creditor quia neceſſitatem fortè proficiſcendi habebat, depoſuerit apud te hanc eamdem pecuniam, ut ſi emiſſes crediti nomine obligatus eſſes: hoc depoſitum periculo eſt ejus qui ſuſcepit, nam & qui rem vendendam acceperit, ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *ff. de reb. cred.*

SECT. II.

Of the Engagements of the Lender.

The CONTENTS.

1. *The Lender ought to be Owner of the Thing, that he may transfer the Property of it to the Borrower.*
2. *If the Thing lent belongs to a third perſon.*
3. *Redhibition in Loan.*
4. *The Lender can aſk no more than what he has lent.*
5. *Payment of a part of the Debt which is not controverted.*

I. The

I.

1. The Lender ought to be Owner of the thing, that he may transfer the property of it to the Borrower.

THE firſt Engagement of one that lends Things to be reſtored in Kind, is that he be Owner of the Thing which he lends, in order to transfer the ſame Right to the Borrower. For people borrow theſe kinds of Things for no other end but to uſe them as their own, and to have the liberty of conſuming them [a].

[a] In mutui datione oportet dominum eſſe dantem. *l.* 2. §. 4. *ff. de reb. cred.* Inde mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl.* Et ideo ſi non fiat tuum, non nascitur obligatio. *d. l.* 2. §. 2. *ff. de reb. cred.* See the following Article.

II.

2. If the Thing lent belongs to a third perſon.

If the Lender is not Owner of the Thing which he lends, he does not convey the Property to the Borrower. And if he who is the true Owner of the Thing finds it in being, and claims it as his own, and proves his Right to it, the Borrower ſhall have his recourſe againſt the Lender, and recover Damages of him [b].

[b] Si ſocius propriam pecuniam mutuam dedit, omnino creditam pecuniam facit, licet cæteri diſſenſerint. Quod ſi communem numeravit, non aliàs creditam efficit, niſi cæteri quoque conſentiant, quia ſuæ partis tantùm alienationem habuit. *l.* 16. *ff. de reb. cred. v. l.* 13. *init. &* §. 1. *eod.* See the ſixth Article of the tenth Section of the Contract of Sale.

III.

3. Redhibition in Loan.

The ſecond Engagement of the Lender, is to give the Thing ſuch, that it be fit for its Uſe. For it is for this Uſe that it is borrowed. Thus, he ought to give Money that is neither counterfeited, nor cried down, and Corn, or Liquors that are not ſpoiled, or ſophiſticated. And he is to warrant them againſt all theſe defects, according to the Rules explained in the eleventh Section of the Contract of Sale [c].

[c] *This is a conſequence of the Nature of Loan, where a Thing is borrowed only for its uſe.*

IV.

4. The Lender can ask no more than what he has lent.

The third Engagement of the Lender, is not to exact any thing either in Value, or Quantity, over and above what he has lent [d].

[d] Si tibi dedero decem ut undecim debeas, putat Proculus amplius quàm decem condici non poſſe. *l.* 11. §. 1. *ff. de reb. cred.*

V.

5. Payment of a part of the debt which is not controverted.

If the Debtor of a Sum of Money, or of any other Thing, conteſts with ſome reaſon a part of the Debt, and offers to pay the Overplus, the Judge may oblige the Creditor to receive payment of that part which is not controverted; for the Judge is bound in Humanity, and by vertue of his Office, to leſſen the occaſions of Law-ſuits [e].

[e] Quidam exiſtimaverunt neque eum qui decem peteret cogendum quinque accipere & reliqua perſequi, neque eum qui fundum ſuum diceret partem dumtaxat judicio proſequi, ſed in utraque cauſa humaniùs facturus videtur prætor, ſi actorem compulerit ad accipiendum id quod offeratur. Cùm ad officium ejus pertineat lites diminuere. *l.* 21. *ff. de reb. cred.*

Altho' this Rule is but little obſerved, yet we have nevertheleſs inſerted it here in the ſenſe explained in the Article. For it is highly equitable, and it is juſt to obſerve it according to the circumſtances.

SECT. III.

Of the Engagements of the Borrower.

The CONTENTS.

1. *Payment at the term.*
2. *Accidents do not diſcharge the Debtor.*
3. *Intereſt due after the term, and legal demand.*
4. *Payment of the value of the Things lent.*
5. *Time and Place of the Eſtimation of Things lent.*
6. *Payment in the ſame Quantity, and Quality.*
7. *Intereſt of the Value of the Thing lent.*
8. *Intereſt of Intereſt unlawful.*

I.

1. Payment at the term.

THE firſt Engagement of the Borrower is to repay the ſame Sum, or the ſame Quantity, which he has borrowed, and to pay it at the term agreed on [a].

[a] Aliæ ejuſdem naturæ & qualitatis redduntur. *inſt. quib. mod. re contr. obl.* Dies ſolutionis, ſicuti ſumma, pars eſt ſtipulationis. *l.* 1. §. 2. *ff. de edendo.*

II.

2. Accidents do not diſcharge the Debtor.

Altho' the Thing lent have periſhed by an accident, ſuch as Fire, Shipwrack, or the Incurſion of an Enemy, before the Borrower could make uſe of it, he is nevertheleſs bound to reſtore as much; becauſe he was made Maſter of it by the Loan; and it is he that ought to bear the loſs [b].

[b] Is qui mutuum accepit, ſi quolibet fortuito caſu amiſerit quod accepit, veluti incendio, ruina, naufragio, aut latronum, hoſtiumve incurſu: nihilominus obligatus remanet. §. 2. *inſt. quib. mod. re contr. obl.* Incendium ære alieno non exuit debitorem. *l.* 11. *C. ſi cert. pet.*

III. If

III.

3. *Intereſt due after the Term, and Legal Demand.*

If he who has borrowed Money, fails to pay it at the term, he will be bound to pay Intereſt from the time that a Legal Demand of it has been made [c], that the Creditor may be indemnified for the loſs he ſuſtains by the delay.

[c] Mora fieri intelligitur non ex re, ſed ex perſona, id eſt, ſi interpellatus, opportuno loco non ſolverit. *l.* 32. *ff. de uſur.* See the fifth Article of the firſt Section of the Title of Intereſt.

IV.

4. *Payment of the value of the Things lent.*

If he who has borrowed other Things than Money, does not repay them at the term, or does not give them ſuch as they ought to be, he ſhall pay the Value of them [d].

[d] Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam, Caſſius ait quanti fuiſſet. *l. ult. ff. de condict. tritic.*

V.

5. *Time and Place of the Eſtimation of Things lent.*

The Eſtimation of a Thing lent which the Debtor delays to pay after the Term, ſuch as Wine, Corn, and other Things, is made according to the Price of that Commodity, at the Time and Place where it ought to be delivered, becauſe it was due at that Time, and in that Place: and if the Time and Place were not regulated by the Covenant, the Eſtimation will be made according to the Price which the Thing bears at the Time and Place where it is demanded [e]. Unleſs it be that the circumſtances of the caſe, and the preſumptions of the Intention of the Contracters ſhould require this Eſtimation to be regulated on another foot [f].

[e] Vinum, quod mutuum datum erat, per judicem petitum eſt. Quæſitum eſt: cujus temporis æſtimatio fieret; utrùm cùm datum eſſet, an cùm litem conteſtatus fuiſſet, an cùm res judicaretur? Sabinus reſpondit, ſi dictum eſſet quo tempore redderetur, quanti tunc fuiſſet, ſi non, quanti tunc cùm petitum eſſet. Interrogavi cujus loci pretium ſequi oporteat? Reſpondit, ſi conveniſſet, ut certo loco redderetur, quanti eo loco eſſet, ſi dictum non eſſet, quanti, ubi eſſet petitum. *l.* 22. *ff. de reb. cred.*

[f] *See before the ninth Article of the firſt Section.*

VI.

6. *Payment in the ſame Quantity and Quality.*

He who has borrowed Corn, Wine, or other Things of the like nature, without having them eſtimated at a certain Price, which would make a Sale, ought to reſtore Corn, Wine, and the other Things, not only in the ſame Quantity, but of the like Quality with thoſe which he had received [g].

[g] Cùm quid mutuum dederimus, & ſi non capimus ut æquè bonum nobis redderetur, non licet debitori deteriorem rem quæ ex eodem genere ſit reddere, veluti vinum novum pro vetere: nam in contrahendo, quod agitur pro cauto habendum eſt: id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, quâ datum ſit. *l.* 3. *ff. de reb. cred.* Ejuſdem naturæ & qualitatis. *inſt. quib. mod. re contr. obl.*

VII.

7. *Intereſt of the Value of the Thing lent.*

If he who owes theſe kinds of Things does not pay them at the Term, or their Value; he will be liable for the Intereſt of them on the foot of their Eſtimation, reckoning from the time that the Creditor made a Legal Demand of them [h].

[h] *See the third Article of this Section, and the firſt Section of the Title of Intereſt.*

VIII.

8. *Intereſt of Intereſt unlawful.*

The Debtor by a Contract of Loan can never owe Intereſt for the Intereſt which he is in arrears of to his Creditor [i].

[i] Nullo modo uſuræ uſurarum à debitoribus exigantur. *l.* 28. *Cod. de uſur.*

It is the ſame thing as to Intereſt due for other Cauſes. See the general Rule in the Title of Intereſt, Sect. 1. Art. 10. and 11.

SECT. IV.

Of the Prohibitions to lend Money to Sons living under the Paternal Juriſdiction.

Cauſes of theſe Prohibitions.

THE Lending of Money to Sons who are ſtill under the Power and Tuition of their Fathers, being to them an occaſion of Debauchery, is one of the pernicious effects of Uſury. And it was by reaſon of the facility of borrowing Money of Uſurers, that the corruption of the Manners of the Youth in *Rome* was come to ſuch a height, and attended with ſuch conſequences, that to reſtrain this Diſorder, a Regulation was made by a Decree of the Senate, called the *Macedonian Decree*, from the name of the Uſurer who gave occaſion to it; by which all Obligations of Sons living under the Paternal Juriſdiction, contracted by the Loan of Money, were declared null without any diſtinction. And if any Creditor had lent Money for a cauſe that was juſt and reaſonable, ſufficient to ſupport the Equity of the Obligation, it was by a favourable Interpretation of the Decree of the Senate,

that this caſe was to be excepted from the general Prohibition, according to the quality of the Uſe to which the Son put the Money which he had borrowed.

But becauſe the Lending of Money in general to Sons that are under the Paternal Juriſdiction, is not unlawful in itſelf, and becomes unjuſt only by the circumſtances of the bad uſe to which they put the Money; the general Prohibitions of Lending Money to thoſe who are under the Tuition of their Parents, not being part of the Law of Nature, but only a poſitive Law of the Commonwealth of *Rome*, they have not the force of a Law in *France*. And it is not agreeable to the uſage with us, to annul without diſtinction, as that Decree of the Senate did, all the Obligations of Loan to Sons living under the Power of their Fathers, but only thoſe where the Loan is an occaſion of Debauchery; and it depends on the prudence of the Judges to diſtinguiſh them according to their circumſtances. The Rules therefore which ſhall be laid down in this Section, are to be conſidered as Principles of Equity, which may be applied by the Judge, according as he ſees proper.

It is neceſſary to remark on this Subject of Lending Money to Sons living under the Juriſdiction of their Fathers, that this Regulation reſpects not only Sons who are Minors, for their Minority alone would be ſufficient to annul the Obligation; but that it extends to thoſe who being of full Age, are ſtill under the Paternal Juriſdiction, not having been emancipated. See the fifth and ſixth Articles of the ſecond Section of the Title of Perſons.

The CONTENTS.

1. *In what manner it is forbidden to lend Money to Sons living under the Paternal Juriſdiction.*
2. *The death of the Father does not validate the Loan made to the Son.*
3. *It is not forbidden to lend Money to a Son that is emancipated.*
4. *If the Obligation of the Son has been acquitted or approved.*

I.

1. In what manner it is forbidden to lend Money to Sons living under the Paternal Juriſdiction.

THoſe who lend Money to Sons living under their Father's Juriſdiction, without a juſt cauſe, and only to aſſiſt them in their Debauchery, cannot demand what they have lent in this manner [a]. And it would be the ſame thing, if inſtead of lending Money, the Lender had diſguiſed the Obligation under the colour of another Contract [b], or lent other Things than Money [c]. And it is by the circumſtances that we ought to judge of the motive of the Loan, and whether it ought to ſubſiſt, or be annulled [d].

[a] Verba Senatuſconſulti Macedoniani hæc ſunt. Cùm inter cæteras ſceleris cauſas Macedo quas illi natura adminiſtrabat, etiam æs alienum adhibuiſſet, & ſæpe materiam peccandi, malis moribus præſtaret: qui pecuniam (ne quid ampliùs diceretur) incertis nominibus crederet: placere ne cui, qui filio familias mutuam pecuniam dediſſet, etiam poſt mortem parentis ejus, cujus in poteſtate fuiſſet, actio petitioque daretur. Ut ſcirent qui peſſimo exemplo fœnerarent, nullius poſſe filii familias bonum nomen, expectata patris morte, fieri. *l.* 1. *ff. de Senat. Maced.*

[b] Is autem ſolus Senatuſconſultum offendit, qui mutuam pecuniam filio familiàs dedit, non qui aliàs contraxit —— quod ita demum erit dicendum, ſi non fraus Senatuſconſulto ſit cogitata. *l.* 3. §. 3. *ff. de Senat. Maced.*

[c] Si fraus ſit Senatuſconſulto adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut his diſtractis fructibus, uteretur pecunia, ſubveniendum eſt filio familias. *l.* 7. §. 3.

[d] *Touching the lawful cauſes of lending Money to Sons living under the Paternal Juriſdiction.* See *l.* 7. §. 13, & 14.

Juriſdiction.

II.

2. The death of the Father does not validate the Loan made to the Son.

The Obligation of Sons living under the Paternal Juriſdiction, which is liable to be vacated by reaſon of the Vice of the Motive of the Loan, will not be validated by the death of the Father [e]. For it was vicious in its Origine, and it is not ſo much in favour of the Son that it is annulled, as out of hatred to the Creditor, who had made an unlawful Loan [f].

[e] Placere ne cui, qui filio familiàs, mutuam pecuniam dediſſet, etiam poſt mortem parentis ejus: cujus in poteſtate fuiſſet, actio peritioque daretur. *l.* 1. *ff. de Senat. Maced.*

[f] Ob pœnam creditorum, actione liberantur, non quoniam exonerare eos lex voluit. *l.* 9. §. 4. *eod.*

III.

3. It is not forbidden to lend Money to a Son that is emancipated.

After the Son is emancipated from the Father's Juriſdiction, theſe Prohibitions ceaſe, and his Obligation ſubſiſts without any enquiry into the Motives of the Loan [g]. And it would be the ſame thing, if he who was not really emancipated did act ſo as to be publickly reputed Maſter of his own concerns [h].

[g] *The Prohibitions being only againſt lending Money to Sons who live under the Paternal Juriſdiction, they ceaſe with reſpect to him that is emancipated: for he is become Maſter of himſelf, and has the management of his own Affairs.* See the fifth and ſixth Articles of the ſecond Section of the Title of Perſons.

[h] Si quis patrem familias eſſe crediderit, non vana neceſſitate deceptus, nec juris ignorantia, ſed quia publicè pater familias pleriſque videbatur, ſic agebat,

agebat, ſic contrahebat, ſic muneribus fungebatur, ceſſabit Senatuſconſultum. Inde Julianus, libro duodecimo in eo qui vectigalia conducta habebat, ſcribit, & eſt ſæpe conſtitutum, ceſſare Senatuſconſultum. *l.* 3. *ff. de Senat. Maced. v. l.* 3. *ff. de off. Prat.*

IV.

4. If the Obligation of the Son has been acquitted, or approved.

If the Father has approved, or ratified the Obligation, if he pays a part of it, or if the Son acquits it himſelf, the Obligation, or the Payment, cannot afterwards be revoked[1].

[1] Si tantum ſciente patre creditum ſit filio dicendum eſt ceſſare Senatuſconſultum. *l.* 12. *ff. de Senat. Maced.* Tum hoc amplius ceſſabit Senatuſconſultum, ſi pater ſolvere cœpit, quod filius familias mutuum ſumpſerit; quaſi ratum habuerit. *l.* 7. §. 15. *eod.* Sed & ipſe filius (ſi ſolverit) non repetit. *l.* 9. §. 4. *eod.*

TITLE VII.

Of a Depoſitum, *and of Sequeſtration.*

Uſe of Depoſitum.

IT happens often, that the Owners, or Poſſeſſors of Things are obliged to entruſt them to the keeping of other perſons; either becauſe they themſelves happen to be in ſuch circumſtances that they cannot keep them themſelves, or becauſe the things would not be ſafe in their cuſtody, or for other cauſes. And in all theſe caſes care is taken of the Things, by putting them into the hands of perſons whom the Owners believe to be honeſt, and who are willing to take charge of them. It is this Covenant which is called a *Depoſitum*.

The conſequence of the fidelity of the Depoſitary.

Seeing a *Depoſitum* is made moſtly in private, and without writing, and it being a Contract of frequent and neceſſary uſe, and the ſafety of the thing depoſited depending on the honeſty of the perſon who takes charge of it[a]; ſo there is no Engagement which demands more particularly Fidelity, than that of the Depoſitary.

[a] Totum fidei ejus commiſſum. *l.* 1. *depoſ.*

Sequeſtration.

The firſt kind of *Depoſitum* is tranſacted only between two perſons, the one who depoſites the Thing, and the other who takes charge of it. But there is another ſort of *Depoſitum*, when two, or more perſons being in diſpute about the Rights of Property or Poſſeſſion, which every one of them pretends to have in one and the ſame Thing, they depoſite it into the hands of a third perſon, who is called *Sequeſtrator*, that he may keep it till the controverſy be decided, and then reſtore it to the perſon who ſhall be declared to be the right Owner. And the uſe of this Sequeſtration is to prevent the miſchiefs that would happen, in caſe any of the Parties ſhould attempt by force to take poſſeſſion of the Thing, and exclude the others. Thus, the effect of this Sequeſtration is, to preſerve to every one of the perſons that agree to it, the right which they have to the Thing ſequeſtred, by preſerving the Thing itſelf; and to deprive them all of the uſe of this Right, in ſo far as concerns the Poſſeſſion and Enjoyment, laying up ſafely the Fruits or other Revenues, if the thing produces any, that they may be reſtored together with the Thing it ſelf, to the perſon who ſhall be found to be the true Owner.

The Sequeſtrator may be named either by the common conſent of the Parties, when they all agree to it; or by the Judge, when the uncertainty of the true Owner of a Thing controverted, and the neceſſity of committing it to the care and keeping of ſome body, oblige the Judge to order the Thing to be ſequeſtred, pending the Suit. And this is a Judicial Sequeſtration, which is different from that made by conſent of Parties, this being a Covenant, and the other a Regulation made by the Judge.

The Judicial Sequeſtration does not come within the deſign of this Work, it being a part of the Order that is obſerved in Judicial Proceedings: But becauſe the Natural Rules of Sequeſtration by conſent of Parties, have for the moſt part their uſe in Judicial Sequeſtrations, we may apply to them the Rules of this Title which have any relation thereto.

Depoſitum of Things immoveable.

Altho' the uſe of a *Depoſitum* ſeems to be confined to Things that are Moveable, becauſe of the origine of the word, which implies the thing that is depoſited to be moved from one place to another: and that Sequeſtration is chiefly uſed in Things Immoveable, yet nevertheleſs Things that are Moveable may be ſequeſtred, when the Poſſeſſion is controverted: and Things Immoveable may be committed to one's keeping, by way of *Depoſitum*, when there is occaſion for it; as thoſe perſons do, who during their abſence give their Houſe, with all that is in it, in keeping to a Friend,

Friend, with whom they leave the keys: and the Houſe it ſelf is as it were depoſited into the hands of the perſon to whoſe care it is committed, whether he dwell in it, or not.

Wagers. There is another ſort of *Depoſitum* in Wagers, when the Wagerers depoſite the Bet in the hands of a third perſon. Thus people lay Wagers, where the Bet is to be given to the moſt ſkilful in ſome lawful Exerciſe, ſuch as Fencing, Wreſtling, Running, and others; and this was the only kind of Game where it was lawful by the *Roman* Law to play for Money; and even at this, the *Romans* were allowed to play but for a very ſmall matter; the wealthieſt were not to exceed a Shilling a time [b].

[b] Senatuſconſultum vetuit in pecuniam ludere, præterquam, ſi quis certet haſta, vel pilo jaciendo, vel currendo, ſaliendo, luctando, pugnando, quod virtutis cauſa fiat. In quibus rebus ex lege Titia, & Publicia, & Cornelia, etiam ſponſionem facere licet; ſed ex aliis ubi pro virtute certamen non ſit, non licet. *l.* 2. §. 1. *& l.* 3. *ff. de aleat. v. tot. tit. C. eod.*

Liceat quidem ditioribus, ad ſingulas commiſſiones, ſeu ad ſingulos congreſſus aut vices, unum aſſem, ſeu numiſma, ſeu ſolidum deponere & ludere, cæteris autem longè minori pecunia. *l.* 1. *in f. C. eod.*

Seeing this *Depoſitum* of Wagers has no other Rules beſides thoſe of other *Depoſitums*, and the Agreement of the Wagerers; we ſhall not inſert in this Title any thing concerning Wagers in particular.

A Neceſſary Depoſitum. There is yet another kind of *Depoſitum*, which is called Neceſſary; becauſe it is Neceſſity that forces people upon it. Thus, in a Fire, Earthquake, Shipwrack, or other caſes of the like nature, people give to their Neighbours, or to other perſons whom they accidentally meet with, the Things which they ſave from ſuch kinds of Loſſes: And altho' this *Depoſitum* is often made without Agreement, at leaſt without any expreſs Agreement, as when people throw Goods out of Houſes that are on Fire, into the Houſes of their Neighbours, Natural Equity ſtrictly obliges thoſe to whoſe keeping Things are committed on ſuch occaſions, to take care of them. And the *Roman* Laws puniſhed ſuch as did not readily reſtore Things that were depoſited on ſuch doleful occaſions, by obliging them to pay double the Value [c].

[c] L. 1. §. 1. & §. 4. *ff. depoſ.* §. 17. *Inſt. de action.*

Since this *Depoſitum*, altho' Neceſſary, is always a kind of Agreement, either expreſs or tacit, and that it obliges in the ſame manner, and by the ſame Rules, as other *Depoſitums*, it ſhall likewiſe be inſerted in this Title.

Depoſitum *of Things diſtrained.* We do not ſet down among the matters treated of under this Title, the *Depoſitum* of Things that are diſtrained from Debtors, and which the Magiſtrate commits to the keeping of certain perſons. For beſides that this *Depoſitum* is not a Covenant, it is a part of the Order of Judicial Proceedings, and does not belong to the deſign of this Work, altho' many of the Rules explained in this Title may be applied to it.

Things depoſited with Inn-keepers. There is likewiſe another ſort of *Depoſitum* of Cloaths, and Goods, which Travellers put into the hands of Inn-keepers, Maſters of Ships, and Carriers. But ſeeing this *Depoſitum* is only a conſequence of the Engagements of thoſe kinds of perſons, who are accountable not only for their own proper deed, but alſo for that of their Servants, and Agents, this matter will come in more properly under the ſixteenth Title of this Book, where the Engagements of ſuch Perſons ſhall be conſidered.

SECT. I.

Of the Nature of a Depoſitum.

The CONTENTS.

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15. *If the Depoſitary uſes the Thing depoſited.*
16. *A Thing depoſited for the behoof of the Depoſitary.*
17. *A Coffer depoſited, in which are many Things.*

I.

1. *Definition of a* Depoſitum.

A *Depoſitum* is a Covenant, by which one perſon gives to another ſome Thing to keep[a]; which he is to reſtore whenever the Depoſitor ſhall think fit to call for it[b].

[a] Depoſitum eſt quod cuſtodiendum alicui datum eſt. *l.* 1. *ff. dep.*

[b] Eſt autem & apud Julianum libro tertio decimo Digeſtorum ſcriptum, eum, qui rem depoſuit, ſtatim poſſe depoſiti actione agere. Hoc enim ipſo, dolo facere eum qui ſuſcepit, quòd depoſcenti rem non reddat. *l.* 1. §. 22. *eod.*

II.

2. *The* Depoſitum *ought to be gratuitous.*

The *Depoſitum* ought to be gratuitous; for otherwiſe it would be a Hiring and Letting to Hire, where the Depoſitary would let out his Care[c].

[c] Si veſtimenta ſervanda balneatori data perierunt: ſi quidem nullam mercedem ſervandorum veſtimentorum accepit, depoſiti eum teneri, & dolum dumtaxat præſtare debere puto: quod ſi accepit, ex conducto. *l.* 1. §. 8. *dep.*

III.

3. *Immoveables may be depoſited.*

Altho' a *Depoſitum* be properly only of Moveables, yet Immoveables may be depoſited, as a Houſe, or any other Tenement, with the Fruits ariſing from it[d].

[d] Si poſſeſſionem naturalem revocem, proprietas mea manet, Videamus de fructibus. Et quidem in depoſito, & commodato, fructus quoque præſtandi ſunt. *l.* 38. §. 10. *ff. de uſur. l.* 1. §. 24. *ff. dep.*

IV.

4. *People may depoſite the Goods of others; and a Thief may depoſite what he has ſtole.*

People may depoſite not only what is their own, but likewiſe what belongs to others; whether they came by the poſſeſſion of the thing honeſtly, as an Agent, or Factor; or whether they came by it diſhoneſtly. Thus even Thieves and Robbers may depoſite what they have taken by Theft, or Robbery. For it is reaſonable that the Thing ſhould be preſerved, in order to be reſtored to the true Owner[e].

[e] Si prædo, vel fur depoſuerint, & hos Marcellus, libro ſexto Digeſtorum, putat rectè depoſiti acturos. Nam intereſt eorum, eo quod teneantur. *l.* 1. §. 39. *ff. dep.*

V.

5. *Reſtitution of the Thing to its Owner.*

When one depoſites the Goods of another Man, the Depoſitary is not obliged to reſtore them to the perſon who depoſited them, if the right Owner appears, and claims his Goods. Thus, if it is a Thief that has depoſited what he ſtole, the fidelity required in a *Depoſitum* does not oblige the Depoſitary any longer to the Thief: but the knowledge of the Theft obliges him to reſtore the thing to its Owner[f]. But if there is any doubt as to the Right of the perſon who calls himſelf Owner, or if his Right is diſputed by the perſon who has depoſited the Thing; the Depoſitary becomes in that caſe a Judicial Depoſitary, and as it were a Sequeſtrator. And he is to wait for the deciſion of the controverſy, that he may reſtore the Thing to the perſon who ſhall be declared the true Owner of it.

[f] Incurrit hic & alia inſpectio, bonam fidem inter eos tantùm quos contractum eſt: nullo extrinſecus aſſumpto æſtimare debemus, an reſpectu etiam aliarum perſonarum, ad quas id quod geritur pertinet? exempli loco, latro ſpolia, quæ mihi abſtulit, poſuit apud Seium inſcium de malitia deponentis: utrùm latroni, an mihi reſtituere Seius debeat? Si per ſe dantem accipientemque intuemur, hæc eſt bona fides, ut commiſſam rem recipiat is qui dedit. Si totius rei æquitatem, quæ ex omnibus perſonis, quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quo facto ſceleſtiſſimo adempta ſunt, & probo hanc eſſe juſtitiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione. *l.* 31. §. 1. *ff. dep.*

VI.

6. *In what caſe the Thing depoſited may be reſtored to another than the Owner.*

If one depoſites a thing belonging to another, or a Servant that which is his Maſter's, the Depoſitary may reſtore it to the perſon who depoſited it, if he has no juſt cauſe to think he does ill in reſtoring it to him. Which he would certainly have, if he knew that this Servant, for Example, were not any longer in the Service of that perſon, or that he ought to miſtruſt his Honeſty. And it is by the circumſtances that we are to judge whether the Depoſitary ought to have reſtored it to another than the Owner[g].

[g] Quod ſervus depoſuit, is apud quem depoſitum eſt, ſervo rectiſſimè reddet, ex bona fide. Nec enim convenit bonæ fidei, abnegare id quod quis accepit, ſed debebit reddere ei à quo accepit. Sic tamen, ſi ſine dolo omni reddat. Hoc eſt, ut nec culpæ quidem ſuſpicio ſit. Denique Sabinus hoc explicuit, addendo, nec ulla cauſa intervenit, quare putare poſſit dominum reddi nolle. *l.* 11. *ff. depoſ.*

VII.

7. *The Thing depoſited may be re-*

Since it is the Nature of a *Depoſitum*, that the Things are not depoſited for the behoof

ken back when the Maſter pleaſes.

behoof of the Depoſitary, as Things are lent for the uſe of the Borrower, but for the bare advantage of the Depoſitor, he may take back the thing depoſited whenever he pleaſes; even altho' the time of Reſtitution were regulated by the Contract. For it depends on the Owner to take back the Thing depoſited, whenever he pleaſes, provided he do not do it at an unſeaſonable time, when the Depoſitary cannot reſtore it, becauſe of ſome impediment which he is not to blame for[h].

[h] Si depoſuero apud te, ut poſt mortem tuam reddas, & tecum, & cum hærede tuo poſſum depoſiti agere, poſſum enim mutare voluntatem, & ante mortem tuam depoſitum repetere. Proinde, & ſi ſic depoſuero, ut poſt mortem meam reddatur: potero & ego, & hæres meus agere depoſiti. Ego, mutata voluntate. *l.* 1. §. 45. §. 46. *ff. dep.*

Eſt autem & apud Julianum libro tertio decimo Digeſtorum, ſcriptum, eum qui rem depoſuit, ſtatim poſſe depoſiti actione agere. Hoc enim ipſo, dolo facere eum qui ſuſcepit, quod reposcenti rem non reddat. Marcellus autem ait, non ſemper videri poſſe dolo facere eum qui repoſcenti non reddat, quid enim ſi in provincia res ſit, vel in horreis quorum aperiendorum condemnationis tempore non ſit facultas, vel conditio depoſitionis non extitit. *l.* 1. §. 22. *ff. depoſ.*

VIII.

8. Of the place where the Thing depoſited ought to be reſtored.

The *Depoſitum* obliging the Depoſitary only to the bare cuſtody of the Thing, it is the Nature of this Contract that the Thing depoſited be reſtored in the place where it is kept; and the Depoſitary is not obliged to tranſport it in order to deliver it, unleſs he has knaviſhly removed it out of the place where he ought to have kept it[i].

[i] Depoſitum eo loco reſtitui debet, in quo, ſine dolo malo ejus eſt, apud quem depoſitum eſt. Ubi verò depoſitum eſt, nihil intereſt. *l.* 12. §. 1. *ff. depoſ.*

IX.

9. The Produce of the Thing depoſited is likewiſe comprehended in the Depoſitum.

The *Depoſitum* extends not only to the Thing that has been depoſited, but if the Thing produces any Fruits, or other Profits, whatever is the Produce of it will likewiſe be comprehended in the *Depoſitum*, and the Depoſitary will be charged with the Produce, as well as with the Thing it ſelf that was depoſited. Thus, he who has undertaken the charge of a Flock of Sheep, muſt reſtore the Wool, and the Lambs which they produce[l].

[l] Hanc actionem bonæ fidei eſſe dubitari non oportet. Et ideo & fructus in hanc actionem venire, & omnem cauſam, & partum dicendum eſt, ne nuda res veniat. *l.* 1. §. 23. & 24. *ff. depoſ.* In depoſito, & commodato fructus quoque præſtandi ſunt. *l.* 38. §. 10. *ff. de uſur.*

X.

10. Leave given to the Depoſitary to make uſe of the Thing depoſited.

If one depoſites Money, or any other Thing, giving leave to the Depoſitary to uſe it, and he makes no manner of uſe of it, he ſhall be liable only to the Engagements of a Depoſitary, and purſuant to the Rules which ſhall be explained in the third Section. But if he uſes the Thing depoſited, his Engagement changing its Nature, he ſhall be bound, either according to the Rules of the Loan of Things to be reſtored in Specie, if it is a Thing that is not deſtroyed by its Uſe, or according to the Rules of the Loan of Things to be reſtored in Kind, if the Thing is of ſuch a nature that it ceaſes to be in the Borrower's poſſeſſion as ſoon as he makes uſe of it[m].

[m] Si pecunia apud te ab initio ac lege depoſita ſit, ut ſi voluiſſes, utereris: priuſquam utaris, depoſiti teneberis. *l.* 1. §. 34. *ff. dep.*

XI.

11. If the Thing depoſited belongs to ſeveral Perſons.

If the Thing depoſited belongs to ſeveral perſons, whether it be that it had ſeveral Owners at the time that it was depoſited, or that it has paſſed to ſeveral Co-Heirs of the perſon who depoſited it; the Depoſitary ought not to reſtore it but to all of them together, if it is a Thing that cannot be divided; or he ought to give to every one his ſhare, if the Thing is diviſible, ſuch as a Sum of Money, and that all the Partners are agreed, as to their Portions. And if the Thing depoſited was ſealed up, it ſhall not be opened, but in preſence of all the Owners, that it may be delivered to them all together. But if any of them were abſent, or if there was a diſpute among thoſe that were preſent, the Depoſitary ought not to reſtore the Thing depoſited, till Security is given him that he ſhall not be moleſted by any of the Parties; or till he be Judicially diſcharged of his Truſt, by conſigning the Thing in Court, according to the uſual form, that the Judge may ſee to the opening, and dividing of the Thing depoſited, and take care of the Shares belonging to the Partners that are abſent[n].

[n] Si pecunia in ſacculo ſignato, depoſita ſit, & unus ex hæredibus ejus qui depoſuit, veniat repetens: quemadmodum ei ſatisfiat, videndum eſt. Promenda pecunia eſt, vel coram prætore, vel intervenientibus honeſtis perſonis, & exolvenda pro parte hæreditaria. Sed etſi reſignetur, non contra legem depoſiti fiet, cum vel prætore authore, vel honeſtis perſonis intervenientibus hoc eveniet: reſiduo, vel apud eum remanente, ſi hoc voluerit, ſigillis videlicet priùs ei impreſſis, vel à prætore, vel ab his quibus coram ſignacula remota ſunt: vel ſi hoc

hoc recuſaverit, in æde deponendo. Sed ſi res ſunt, quæ dividi non poſſunt, omnes debebit tradere, ſatisdatione idonea à petitore ei præſtanda, in hoc quod ſupra ejus partem eſt. Satisdatione autem non interveniente, rem in ædem deponi: & omni actione depoſitarium liberari. *l.* 1. §. 36. *ff. dep.* Si plures hæredes extiterint ei qui depoſuerit: dicitur ſi major pars adierit, reſtituendam rem præſentibus. Majorem autem partem non ex numero utique perſonarum, ſed ex magnitudine portionum hereditariarum intelligendam, cautela idonea reddenda. *l.* 14. *eod.*

XII.

12. *If after one of the Co-Heirs has received his portion of the Thing depoſited, the Depoſitary becomes inſolvent.*

If in the caſe of a Thing depoſited belonging to ſeveral Co-Heirs, after that one of them has received his Share, the Depoſitary becomes inſolvent, or loſes the Thing without any Fraud of his; this Co-Heir will not be bound to divide his Share with his Co-heirs[o]? For altho' what he has received did belong in common to them all, while it was in the hands of the Depoſitary, yet ſince that Heir received only his own Portion by his diligence, before the Inſolvency of the Depoſitary, or Loſs of the Thing, the others ought to bear the loſs of that Event, either as an effect of their own Negligence, or as an Accident happening to them.

[o] Supervacuam veterum differentiam è medio tollentes, ſi quis certum pondus auri, vel argenti confecti, vel in maſſâ conſtituti depoſuerit: & plures ſcripſerit hæredes, & unus ex his contingentem ſibi portionem à depoſitario acceperit, alter ſuperſederit, vel aliàs fortuito caſu impeditus, hoc facere non potuerit: & poſtea depoſitarius in adverſam inciderit fortunam, vel ſine dolo depoſitum perdiderit: ſancimus, non eſſe cohæredi ejus licentiam venire contra eum cohæredem ſuum, & ex ejus parte avellere quod ipſe ex ſua parte conſequi minimè potuit. Quaſi eo quod cohæres accepit communi conſtituto. Cùm ſi certæ pecuniæ depoſitæ fuerint, & ſuam partem unus ex hæredibus acceperit, nemini veniat in dubium bene eum accepiſſe partem ſuam. *l. ult. C. depoſ.*

XIII.

13. *If the Thing depoſited belonging to many Owners, it be agreed, that any one of them may call for it.*

If many perſons depoſite the ſame Thing, and it be agreed, that one of them, or every one of them ſingle may take back the whole Thing that is depoſited, the Depoſitary will be diſcharged of his Truſt, by reſtoring the Thing to the perſon who had right ſingly to call for it. And if it is not regulated to whom the Thing depoſited ſhall be delivered, it ſhall be reſtored according to the Rule explained in the eleventh Article[p].

[p] Si duo depoſuerint, & ambo agant, ſi quidem ſic depoſuerunt ut vel unus tollat totum, poterit in ſolidum agere. Sin vero pro parte pro qua eorum intereſt, tunc dicendum eſt, in partem condemnationem faciendam. *l.* 1. §. 44. *ff. depoſ.*

XIV.

14. *A Thing depoſited with ſeveral perſons.*

If two or more perſons are become Depoſitaries of one and the ſame Thing, each of them ſhall be bound for the Reſtitution of the whole. For the Thing depoſited is not reſtored, unleſs it be reſtored intire; and they ſhall be anſwerable for one another in caſe of any Fraud committed by any one of them; neither will the Action that is brought againſt one of the Depoſitaries, take away the right of ſuing afterwards all the others, until the whole Thing is reſtored[q].

[q] Si apud duos ſit depoſita res, adverſus unumquemque eorum agi poterit. Nec liberabitur alter, ſi cum altero agatur. Non enim electione, ſed ſolutione liberantur. Proinde ſi ambo dolo fecerunt, & alter quod intereſt præſtiterit, alter non convenietur: exemplo duorum tutorum. Quod ſi alter, vel nihil, vel minus facere poſſit, ad alium pervenietur. *l.* 1. §. 43. *ff. depoſ. V. l.* 15. *ff. de tutela & rat. diſt.* Nili pro ſolido res non poteſt reſtitui. *l.* 22. *ff. depoſ.*

XV.

15. *If the Depoſitary uſes the Thing depoſited.*

The Depoſitary who uſes the Thing depoſited, againſt the Owner's will, commits a ſort of Theft; and he will be liable for all the Damages which the Owner ſuffers thereby[r].

[r] Furtum fit non ſolùm cum quis intercipiendi cauſâ rem alienam amovet, ſed generaliter cùm quis alienam rem invito domino contrectat: itaque, ſive creditor pignore, ſive is apud quem res depoſita eſt, ea re utatur—— furtum committit. §. 6. *Inſt. de obl. quæ ex del. naſc.* Qui rem depoſitam, invito domino, ſciens prudenſque in uſus ſuos converterit, etiam furti delicto ſuccedit. *l.* 3. *C. depoſ.*

XVI.

16. *A Thing depoſited for the behoof of the Depoſitary.*

If the Thing is depoſited for the behoof of the Depoſitary, as if any Goods are left with him to be ſold, that he may keep the Price as Money lent: or if a Sum of Money is given him on condition that if he meets with a Purchaſe, he ſhall make uſe of the Money; and it happens that what was given him on that condition periſhes before it was uſed, this Depoſitary ſhall be bound to make it good, even altho' it periſhed by an Accident[s]. For he was not a Depoſitary under Obligation to reſtore the Thing to the Owner, but to ſell it, and to lay out the Money on his own Affairs, which changes the Nature and Effect of the *Depoſitum*.

[s] Si quis nec cauſam nec propoſitum fœnerandi habuerit, & tu empturus prædia, deſideraveris mutuam pecuniam, nec volueris creditæ nomine, antequam emiſſes, ſuſcipere, atque ita creditor quia neceſſitatem forte proficiſcendi habebat, depoſuerit apud te hanc eamdem pecuniam, ut ſi emiſſes creditî nomine obligatus eſſes: hoc depoſitum periculo

lo eſt ejus qui ſuſcepit. Nam & qui rem vendendam acceperit, ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *ff. de reb. cred.*

XVII.

17. *A Coffer depoſited, in which are many things.*

One may depoſite Things which are not ſhewn to the Depoſitary; as if one gives him in keeping a Coffer ſealed up, or under Lock and Key, without letting him know what is in it, whether it be Money, Papers, or other things. And in this caſe, he is bound only to reſtore the Coffer in the ſame condition, without being accountable for the Things which the Depoſitor may pretend to have put in it. But if he has ſhewn to the Depoſitary all the particular things that were in the Coffer, he ought to anſwer for every one of the things which he took charge of [c].

[c] Si ciſta ſignata depoſita ſit, utrùm ciſta tantùm peratur; an & ſpecies comprehendendæ ſint? & ait Trebatius ciſtam repetendam, non ſingularum rerum depoſiti agendum. Quod & res oſtenſæ ſunt, & ſic depoſitæ, adjiciendæ ſunt & ſpecies. *l.* 1. §. 41. *ff. depoſ.*

SECT. II.

Of the Engagements of the Depoſitor.

The CONTENTS.

1. *Expences of keeping the Thing depoſited.*
2. *The Charges of preſerving it.*
3. *The Charges of tranſportation.*
4. *Diſcharge of the Depoſitary.*

I.

1. *Expences of keeping the Thing depoſited.*

IF the Depoſitary finds himſelf obliged, either becauſe of the quality of the Thing depoſited, or becauſe of ſome event, to be at any charge in keeping it, he ſhall recover what he has laid out. As if, for Example, he was obliged to hire a Stable for keeping a Horſe, that was left with him in truſt [a].

[a] *This is a conſequence of the nature of a* Depoſitum, *which being made only for the behoof of the Depoſitor, ought to be no ways chargeable to the Depoſitary.* See the following Article.

II.

2. *The Charges of preſerving it.*

The Depoſitary will likewiſe recover whatever he has laid out on the preſervation of the Thing depoſited, as if he has made any Repairs in it: or if having in his cuſtody ſome Cattle, he has been at the charges of their Nouriſhment [b].

[b] Actione depoſiti conventus, ſervo conſtituto, cibariorum nomine apud eumdem judicem, utiliter experitur. *l.* 23. *ff. depoſ.* Sumptus cauſa qui neceſſariè factus eſt, ſemper præcedit, nam ducto eo, bonorum calculus ſubduci ſolet. *l.* 8. *in f. ff. eod.* See the ſeventh Article of the third Section of Letting and Hiring, and the fourth Article of the third Section of the Loan of Things to be reſtored in Specie.

III.

3. *The Charge of tranſportation.*

If to reſtore the Thing depoſited, Carriages are neceſſary for tranſporting it, the Depoſitary is not bound to be at the charges, and the Owner is obliged to go and fetch it, and to be at the charges of tranſporting it, if any are neceſſary, or to reimburſe the Depoſitary, if he has advanced the Money [c].

[c] Si in Aſia depoſitum fuerit ut Romæ reddatur: videtur id actum ut non impenſa ejus id fiat, apud quem depoſitum ſit, ſed ejus qui depoſuit. *l.* 12. *ff. depoſ.*

IV.

4. *Diſcharge of the Depoſitary.*

If the Depoſitary is not willing to keep the Thing depoſited any longer, and offers to reſtore it, either after the time fixt by the Contract, if any ſuch Regulation was made, or even before; the Depoſitor ſhall be bound to take back the Thing, provided it be not at an unſeaſonable time, when the Depoſitary being able to keep the Thing without any loſs, the Owner cannot conveniently take it back. For in this caſe, it would be neceſſary to regulate a time for diſcharging the Depoſitary of his Truſt [d].

[d] *By the ſame reaſon that the Depoſitor is permitted to take back the Thing depoſited before the time, and whenever he pleaſes.* See the ſeventh Article of the firſt Section of this Title. *V. l.* 1. §. 36. *ff. depoſ. in verbis*, ſi hoc voluerit: ſi hoc recuſaverit.

SECT. III.

Of the Engagements of the Depoſitary, and his Heirs, Executors or Adminiſtrators.

The CONTENTS.

1. *The foundation of the care of the Depoſitary.*
2. *Care of the Depoſitary.*
3. *Fraud, or Negligence near a-kin to it.*
4. *The ſame.*
5. *A Depoſitary negligent of his own Affairs.*

I.

1. The foundation of the care of the Depoſitary.

THE Depoſitary being obliged to keep the Thing intruſted with him, he is by conſequence bound to take ſome care of it [a]. But becauſe he does this ſervice for nothing, and only to do a kindneſs, his condition is diſtinguiſhed from that of other perſons, who for their own advantage have in their poſſeſſion things belonging to others; ſuch as he who borrows, and he who hires, and the Depoſitary is bound only according to the Rules which follow.

[a] Depoſitum eſt quod cuſtodiendum alicui datum eſt. *l.* 1. *ff. depoſ.*

II.

2. Care of the Depoſitary.

The Depoſitary is bound to take the ſame care of the Things depoſited, that he does of his own. And he would be unfaithful to his Truſt, if he were leſs careful of them than of what belongs to himſelf [b].

[b] Niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret. Nec enim, ſalva fide, minorem iis, quam ſuis rebus, diligentiam præſtabit. *l.* 32. *ff. depoſ.*

III.

3. Fraud, or Negligence near a-kin to it.

If the Depoſitary ſuffers the Thing depoſited to be loſt, to periſh, or be ſpoiled, thro' any Fraud or Knavery, or thro' any Fault or Negligence of his that cannot be excuſed, he ſhall be bound to make it good [c]: And the Fault will be of this nature, if it is ſuch as the Depoſitary would not have readily fallen into, according to his uſual Management of his own Concerns [d].

[c] Dolum ſolum, & latam culpam, ſi non aliud ſpecialiter convenerit, præſtare debuit. *l.* 1. *C. depoſ.*

Quod Nerva diceret, latiorem culpam dolum eſſe, Proculo diſpliicebat: mihi veriſſimum videtur. *l.* 32. *eod.*

[d] Niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret. *d. l.*

IV.

4. The ſame.

It is alſo an inexcuſable Fault, and which the Depoſitary ought to account for, if he fails to uſe ſuch precautions as no other perſon would omit, ſuch as keeping Money under Lock and Key [e].

[e] Latæ culpæ finis eſt, non intelligere id, quod omnes intelligunt. *l.* 223. *ff. de verb. ſignif.* *By the Law of God, the Depoſitary is anſwerable for Theft, becauſe it does not happen, but for want of care.* And if it be ſtolen from him, he ſhall make reſtitution unto the Owner thereof, *Exod.* xxii. 10, 12. See the third Article of the eighth Section of Letting and Hiring, and the ſecond Article of the ſecond Section of the Loan of Things to be reſtored in Specie.

V.

5. A Depoſitary negligent of his own Affairs.

If the Depoſitary is a perſon of a weak Judgment, or a Minor without experience, or one that is negligent in his own Affairs, ſuch as a Prodigal; he who has depoſited any Thing in the hands of ſuch a Depoſitary, cannot require of him the ſame care that a diligent and careful perſon would take of it. And if the thing depoſited periſhes thro' any fault which the ſaid perſon was not able to avoid, the Depoſitor ought to blame himſelf for having choſen ſuch a Depoſitary [f].

[f] Si quis non ad eum modum quem hominum natura deſiderat, diligens eſt. *l.* 32. *ff. depoſ.* Ex eo ſolo tenetur ſi quid dolo commiſerit. Culpæ autem nomine, il eſt, deſidiæ, ac negligentiæ, non tenetur. Itaque ſecurus eſt qui parum diligenter cuſtoditam rem furto amiſerit; quia qui negligenti amico rem cuſtodiendam tradit, non ei, ſed ſua facilitate id imputare debet. §. 3. *Inſt. quib. mod. re contr. obl.*

We muſt underſtand the expreſſions of this text in a ſenſe which agrees with the preceding Rules. For we ought not to diſcharge indifferently all Depoſitaries, of the loſſes which may happen thro' their Slothfulneſs and Negligence.

VI.

6. If the Thing is loſt without the Depoſitary's fault.

If the Thing depoſited happens to be loſt, or periſhes, whether thro' its own Nature, as if a Horſe, altho' he be kept, makes his eſcape and is loſt; or by an Accident, which cannot be imputed to the Depoſitary, he ſhall be diſcharged, by reſtoring whatever remains of the Thing depoſited [g].

[g] Si incurſu latronum, vel alio fortuito caſu, ornamenta depoſita apud interfectum perierint, detrimentum ad hæredem ejus qui depoſitum accepit, qui dolum ſolum & latam culpam (ſi non aliud ſpecialiter convenit) præſtare debuit, non pertinet. *l.* 1. *C. depoſ. v. l.* 12. §. 3. *l.* 14. §. 1. *ff. eod.* Caſus a nullo præſtantur. *l.* 23. *in f. ff. de reg. jur. v. l.* 5.

v. l. 5. §. 2. ff. de cond. caus. dat. caus. n. sec. in his verbis. Si ante decessum ille proponatur, nihil præstabit, si modo per eum factum non est. *V. l. 20. ff. depos.* Si comestum a bestia, deferat ad eum quod occisum est, & non restituet. *Exod.* xxii. 13.

VII.

7. *Agreement touching the quality of the Care to be taken by the Depositary.*

If because of some particular consideration, it has been regulated what the Depositary shall be bound to, his Engagement shall be to him in place of a Law. And he shall be bound to answer, either for what shall happen for want of the care which he promised to take, or for the Events which he has charged himself withal. For the Thing would not have been entrusted with him but upon this condition[h].

[h] Si convenit ut in depósito & culpa præstetur, rata est conventio, contractus enim legem ex conventione accipiunt. *l. 1. §. 6. ff. depos. & l. §. 35. l. 23. ff. de reg. jur. l. 1. C. depos.* Si quis pactus sit, ut ex causa depositi omne periculum præstet, Pomponius ait, pactionem valere: nec quasi contra juris formam, non esse servandam. *l. 7. §. 15. ff. de pact.* Sæpè evenit ut res depositæ, vel nummi periculo sint ejus apud quem deponuntur. Ut puta, si hoc nominatim convenit. *l. 1. §. 35. ff. depos.*

VIII.

8. *A Depositary that obtrudes himself.*

If the Depositary not being desired, offers of his own accord to take care of the Thing deposited, he shall be accountable not only for what he does fraudulently, and for gross Mistakes, but likewise for other Faults. For the Depositor might have chosen another Depositary that would have been more careful. But this Depositary shall not be answerable for what may happen without his fault thro' some Accident[i].

[i] Si quis se depósito obtulit, idem Julianus scribit, periculo se depositi illigasse: ita tamen non solum dolum, sed etiam culpam, & custodiam præstet, non tamen casus fortuitos. *l. 1. §. 35. ff. depos.*

IX.

9. *Of the Depositary who has sold the Thing deposited, and bought it again.*

If the Depositary having sold, or otherways alienated the Thing deposited, recovers it again and keeps it as a *Depositum*, he shall be accountable thereafter not only for what he does fraudulently, and for gross Errors, but also for the least Faults he commits, as a punishment of his former Knavery in selling the Thing[k].

[k] Si rem depositam vendidisti, eamque postea redemisti in causam depositi: etiam si sine dolo malo postea perierit, teneri te depositi: quia semel dolo feceris, cum venderes. *l. 1. §. 25. ff. depos.*

X.

10. *If the Depositary*

If the Thing deposited being demanded, the Depositary who is able to restore it delays to do it, his delay will make him answerable, not only for the least Faults he commits, but likewise for the Accidents that may fall out after the time of the legal Demand[m]. But if the Thing perishes thro' its own Nature, without any accident, and if it would have perished altho' the Depositary had restored it in time, this Loss not being an effect of his Delay, he is not accountable for it[n]. *delays to restore the Thing.*

[m] Depositum, eo die quo depositi actum sit, periculo ejus apud quem depositum fuerit, est, si judicii accipiendi tempore potuit id reddere reus, nec reddidit. *l. 12. §. 3. ff. depos.* See the third Article of the seventh Section of the Contract of Sale, and the second Article of the fourth Section of the Title of Damages occasioned by Faults.

[n] Si suâ naturâ res ante rem judicatam interciderit, veluti si homo mortuus fuerit, Sabinus, & Cassius, absolvi debere eum cum quo actum est, dixerunt: quia æquum esset naturalem interitum ad actorem pertinere: utique cùm interitura esset ea res, & si restituta esset actori. *l. 14. §. 1. ff. depos.* See the same third Article of the seventh Section of the Contract of Sale.

Altho' the Thing perishes thro' its own Nature, yet we must judge by the circumstances, whether the delay of the Depositary ought to go unpunished. For if the Thing deposited was in good case at the time of the demand, and the Proprietor could have sold it, as if it was a Horse deposited by a Jockey, the delay being without any just cause, it would be either Knavery, or a Fault in the Depositary that was able to restore it, which would make him answerable for the Loss. Si fortè distracturus erat petitor, si accepisset, moram passo debere præstari: nam si ei restituisset, distraxisset: & pretium esset lucratus. *l. 15. §. ult. ff. de rei vind.*

XI.

11. *When the Thing may be restored in any one of many places.*

If it is agreed that the Thing deposited shall be restored in any one of many places, the Depositary shall have the choice of the place[o].

[o] Si de pluribus locis convenit, in arbitrio ejus est, quo loci exhibeat. *l. 5. §. 1. ff. depos.*

XII.

12. *Executor, or Administrator of the Depositary.*

The Executor, or Administrator of the Depositary is accountable for the deed of the deceased, even for the Fraud which he has been guilty of[p].

[p] Datur actio depositi in hæredem, ex dolo defuncti in solidum. *l. 7. §. 1. ff. depos.*

XIII.

13. *If the Executor or Administrator of the Depositary sells the Thing deposited.*

If after the death of the Depositary, his Executor or Administrator being ignorant of the Trust, sells the Thing deposited, believing it to be a part of the Succession; as if it happen that the Memorandum which the Depositary had made to distinguish the Thing deposited from his own, being sealed up with other Papers, it is necessary in the mean while to sell some of the Moveables, and the Thing deposited chances to be among

mong them, having no Mark to diſtinguiſh it from the Goods of the deceaſced; as if it was a Horſe, who ſtanding in the Stable with other Horſes, had been ſold, the perſon who depoſited him having perhaps neglected to take him away; this Event would be as it were an Accident that would diſcharge this Executor, or Adminiſtrator, from making reſtitution of the thing depoſited, he paying always the Price which he got for the Thing when he ſold it [q]. The Proprietor would nevertheleſs retain his Right of claiming the Thing in whoſe hands ſoever he ſhould find it.

[q] Quia autem dolus dumtaxat in hanc actionem venit, quæſitum eſt, ſi hæres rem apud teſtatorem depoſitam, vel commodatam diſtraxit, ignarus depoſitam, vel commodatam: an teneatur? Et quia dolo non fecit, non tenebitur de re. An tamen vel de pretio teneatur, quod ad eum pervenit? Et verius eſt teneri eum. Hoc enim ipſo, dolo facit, quod id, quod ad ſe pervenit, non reddit. Quid ergo, ſi pretium nondum exegit? Aut minoris quam debuit vendidit? Actiones ſuas tantummodo præſtabit. *l.* 1. §. *ult. & l.* 2. *ff. depoſ.*

We have ſet down in this Article the particular circumſtances, which may juſtify the conduct of this Executor, or Adminiſtrator. For there may be other circumſtances, where the Executor, or Adminiſtrator, would not be eaſily diſcharged on his pretending Ignorance of the Truſt; ſince he is accountable for the deed of the deceaſed, as has been ſaid in the foregoing Article; and that the deceaſed was obliged to diſtinguiſh the Thing depoſited from his own by ſome mark, or ſome memorandum. Thus, it ſeems to be by the circumſtances of the quality of the perſons, and of the Thing depoſited, of the conduct of the Depoſitary, and his Executor, or Adminiſtrator, and other circumſtances of the like nature, that we ought to judge of the Obligation of the Depoſitary's Executor, or Adminiſtrator.

It is to be remarked on the Law quoted on this Article, that altho' it diſcharges the Executor, or Adminiſtrator of him who had borrowed a Thing, if the ſaid Executor, or Adminiſtrator, had ſold it, in the ſame manner as it diſcharges the Executor and Adminiſtrator of the Depoſitary; yet we have not ſet down this Rule in the Title of the Loan of Things to be reſtored in Specie. For whereas the Depoſitum *is only for the behoof of the Depoſitor, the Loan of a Thing for uſe is barely for the advantage of the Borrower. And for this reaſon it ſeems to be juſt that this leſs ſhould fall upon the Executor, or Adminiſtrator of the Borrower, rather than on the Lender. See* Exod. xxii. 14.

XIV.

14. *A Thing depoſited does not enter into Compenſation.*

The Depoſitary cannot detain the Thing depoſited with him, in compenſation of what the Depoſitor owes him; even altho' it were another *Depoſitum*: but each Depoſitary ſhall be obliged to reſtore the Thing depoſited with him [r].

[r] Si quis vel pecunias, vel res quaſdam per depoſitionis acceperit titulum, eas volenti qui depoſuit, reddere illicò modis omnibus compellatur: nullamque compenſationem, vel deductionem, vel doli exceptionem opponat, quaſi & ipſe quaſdam contra eum qui depoſuit, actiones perſonales vel in rem, vel hypothecariam prætendens: cùm non ſub hoc modo depoſitum receperit ut non conceſſa ei retentio generetur, & contractus qui ex bona fide oritur, ad perfidiam retrahatur. Sed & ſi ex utraque parte aliquid fuerit depoſitum, nec in hoc caſu compenſationis præpeditio oriatur: ſed depoſitæ quidem res, vel pecuniæ ab utraque parte quam celerrimè, ſine aliquo obſtaculo, reſtituantur ei videlicet primùm, qui primus hoc voluerit. *l.* 11. *C. depoſ. l. ult. C. de compenſ. in f.*

SECT. IV.

Of Sequeſtration by conſent of Parties.

The CONTENTS.

1. *Definition of a Sequeſtrator by conſent of Parties.*
2. *Every one of thoſe who have named the Sequeſtrator, may oblige him to the diſcharge of his Truſt.*
3. *Difference between a Depoſitary and a Sequeſtrator.*
4. *The Sequeſtrator's Poſſeſſion, and its effect.*
5. *The Sequeſtrator muſt account.*
6. *Diſcharge of the Sequeſtrator.*
7. *Rules of* Depoſitum, *which may be applied to Sequeſtration.*

I.

1. *Definition of a Sequeſtrator by conſent of Parties.*

THE Sequeſtrator by conſent of Parties, is a third perſon choſen by two or more perſons, to keep as a *Depoſitum* a Moveable or Immoveable Thing, the Property, or Poſſeſſion of which is controverted among them: and to reſtore it to the perſon who ſhall be acknowledged to be the true Owner. Thus every one of them is conſidered as if he alone had depoſited the whole Thing. Which diſtinguiſhes ſuch Depoſitors from thoſe who depoſiting a Thing that belongs to them in common, have only each of them their Share in it [s].

[s] Licèt deponere tam plures, quàm unus poſſunt: attamen, apud ſequeſtrem nonniſi plures deponere poſſunt. Nam tùm id fit, cùm aliqua res in controverſiam deducitur. Itaque hoc caſu in ſolidum unuſquiſque videtur depoſuiſſe. Quod aliter eſt, cùm rem communem plures deponunt. *l.* 17. *ff. depoſ.* proprie in ſequeſtre eſt depoſitum, quod à pluribus in ſolidum, certa conditione cuſtodiendum, reddendumque traditur. *l.* 6. *ff. eod.*

II.

2. *Every one of thoſe who have named the Sequeſtrator, may oblige him to the diſcharge of his Truſt.*

While a Thing is under Sequeſtration, each of the perſons who have depoſited it, is conſidered as capable of being declared the Owner of it. And this gives them all, and every one of them in particular, a right to ſee that the Sequeſtrator carefully perform the Truſt which he is bound to by his Office, whether it be

in preſerving the Thing; or if it is Houſes or Lands that are depoſited, in repairing and cultivating them [b].

[b] Itaque hoc caſu in ſolidum unuſquiſque videtur depoſuiſſe, quod aliter eſt, cum rem communem plures deponunt. *l.* 17. *ff. depoſ.* In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *eod.*

III.

3. *Difference between a Depoſitary and a Sequeſtrator.*

Seeing the perſon into whoſe hands a piece of Ground is ſequeſtred is bound to cultivate it, and to take care of it; this kind of *Depoſitum* is not uſually gratuitous. But the Sequeſtrator is allowed a Salary, beſides his Expences, for the time and pains he beſtows on the Execution of his Commiſſion. And this diſtinguiſhes Sequeſtration from a bare *Depoſitum*, which ought to be gratuitous, and obliges the Sequeſtrator to the ſame care that he is bound to who undertakes a Piece of Work to be done [c].

[c] Si quis ſervum cuſtodiendum conjecerit fortè in piſtrinum, ſi quidem merces intervenerit cuſtodiæ: puto eſſe actionem adversùs piſtrinarium ex conducto. *l.* 1. §. 9. *ff. depoſ.* See the eighth Section of the Title of Letting and Hiring.

IV.

4. *The Sequeſtrator's Poſſeſſion, and its effect.*

While a Thing is depoſited, the Owner retains the Poſſeſſion, and his Depoſitary poſſeſſes for him. And in Sequeſtration, the Poſſeſſion of the right Owner remains in ſuſpence; for it cannot be ſaid of any one of the pretenders to the Thing ſequeſtred, that he poſſeſſes the Thing, ſince on the contrary, they are all of them diveſted of the Poſſeſſion. But becauſe the Sequeſtrator poſſeſſes the Thing only in order to preſerve it to the perſon who ſhall be declared the true Owner; this Poſſeſſion, after the controverſy is ended, will be conſidered with reſpect to the Owner, as if he himſelf had always poſſeſſed it. And this Poſſeſſion will be allowed a good Poſſeſſion to eſtabliſh a title by Preſcription [d].

[d] Rei depoſitæ proprietas apud deponentem manet, ſed & poſſeſſio: niſi apud ſequeſtrem depoſita eſt. Nam tùm demum ſequeſter poſſidet: id enim agitur in depoſitione, ut neutrius poſſeſſioni id tempus procedat. *l.* 17. §. 1. *ff. depoſ.* Intereſſe puto, qua mente apud ſequeſtrum deponitur res. Nam ſi omittendæ poſſeſſionis cauſâ, & hoc apertè fuerit approbatum, & uſucapionem poſſeſſio ejus partibus non procederet. At ſi cuſtodiæ cauſâ deponatur, ad uſucapionem eam poſſeſſionem victori procedere conſtat. *l.* 39. *ff. de acq. vel am. poſſeſſ.*

V.

5. *The Sequeſtrator muſt account.*

After the controverſy is ended, the Sequeſtrator is obliged to account to the perſon who is adjudged to be Maſter, and to reſtore to him the Thing ſequeſtrated, with the Fruits, if it produces any, he being paid his Salary, and his Expences [e].

[e] *This is an eſſential condition of this kind of* Depoſitum, *which is granted only in order to preſerve the Thing to the perſon who ſhall be declared the right Owner.* In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *ff. depoſ.*

VI.

6. *Diſcharge of the Sequeſtrator.*

If the Sequeſtrator is deſirous to be diſcharged of his Truſt, and the perſons who named him, or any one of them does not conſent to it, he ought to apply himſelf to the Judge, and to get them all to be cited in order to name another perſon in his room. For he having accepted a Commiſſion which has divers conſequences, and which ought to have laſted till the Controverſy was ended; he ought not to be diſcharged without juſt cauſe [f].

[f] Si velit ſequeſter officium deponere, quid ei faciendum ſit. Et ait Pomponius: adire eum prætorem oportere, & ex ejus authoritate denuntiatione facta his qui eum elegerant, ei rem reſtituendam qui præſens fuerit. Sed hoc non ſemper verum puto: nam plerumque non eſt permittendum, officium quod ſemel ſuſcepit, contrà legem depoſitionis deponere: niſi juſtiſſima cauſa interveniente. *l.* 5. §. 2. *ff. depoſ.*

VII.

7. *Rules of Depoſitum, which may be applied to Sequeſtration.*

We may apply to Sequeſtration the Rules of a *Depoſitum*, which have any relation thereto [g].

[g] In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *ff. depoſ.*

SECT. V.

Of a Neceſſary Depoſitum.

The CONTENTS.

1. *Definition of a Neceſſary* Depoſitum.
2. *This* Depoſitum *is by agreement.*
3. *The duty of the Depoſitary in a Neceſſary* Depoſitum.
4. *The Rules of other* Depoſitums *may be applied to this.*

I.

1. *Definition of a Neceſſary* Depoſitum.

A Neceſſary *Depoſitum*, is that of Things which are ſaved in a Fire, an Earthquake, or Shipwrack; in an Incurſion of Robbers, a Tumult, or any other ſudden and accidental Occaſion, which obliges the Owners to put what they can ſave into the hands of the firſt perſons they meet with, whether it be Neighbours, or others [a].

[a] Meritò

[a] Meritò has cauſas deponendi ſeparavit prætor, quæ continent fortuitam cauſam depoſitionis, ex neceſſitate deſcendentem, non ex voluntate proficiſcentem. *l.* 1. §. 2. *ff. depoſ.* Tumultûs, incendii, ruinæ, naufragii cauſa. *V. d. l.* 1. §. 1.

II.

2. *This* Depoſitum *is by agreement.*

This *Depoſitum*, altho' Neceſſary, is nevertheleſs voluntary, and by agreement, becauſe the Delivery of the Things to the perſons with whom they are depoſited, is in place of a Covenant, expreſs or tacit [b].

[b] Is apud quem res aliqua deponitur, re obligatur. §. 3. *inſt. quib. mod. re contr. obl.*

III.

3. *The duty of a Depoſitary in a Neceſſary* Depoſitum.

He with whom a Thing is depoſited thro' Neceſſity, is bound to be as faithful to his Truſt, or rather more than any other Depoſitary, not only becauſe of the compaſſion which the occaſion of this *Depoſitum* demands, but becauſe of the Neceſſity which puts the Thing into his hands, the Owner not being at liberty to chuſe another Depoſitary [c]. And if he fails to reſtore the Thing depoſited, or miſbehaves in his Truſt, it is for the Publick Good that this Infidelity ſhould be revenged and reſtrained by ſome Puniſhment, ſuch as the Judge ſhall think fit to inflict according to the circumſtances [d].

[c] Prætor ait, quod neque tumultus, neque incendii, neque ruinæ, neque naufragii cauſa depoſitum ſit, in ſimplum: ex earum autem rerum quæ ſuprà comprehenſæ ſunt, in ipſum in duplum —— judicium dabo. *l.* 1. §. 1. *ff. depoſ.* Hæc autem ſeparatio cauſarum juſtam rationem habet. Quippe cùm quis fidem elegit, nec depoſitum redditur, contentus eſſe debet ſimplo: cùm verò extante neceſſitate deponat, creſcit perfidiæ crimen, & publica utilitas coercenda eſt vindicandæ reipublicæ cauſa. *l.* 1 §. 4. *ff. eod.*

[d] *Seeing we do not uſe this Penalty of the double, and that Penalties are arbitrary in* France, *we have thought proper to ſet down here this Rule in the manner that it is in the Article.*

IV.

4. *The Rules of other* Depoſitums *may be applied to this.*

We may apply to this kind of *Depoſitum* the other Rules which have been explained under this Title, according as they have relation thereto [e].

[e] *It will be eaſie to diſcern among the Rules of this Title, thoſe that are applicable to a Neceſſary* Depoſitum.

TITLE VIII.

Of PARTNERSHIP.

ALL Mankind together makes one Univerſal Society, in which thoſe who happen to be linked together by their Wants, form among themſelves different Engagements, proportioned to the Cauſes which render them neceſſary one to another. And among the different ways in which the Wants of men tie them together, this of *Partnerſhip*, which ſhall be the ſubject of this Title, is of neceſſary and frequent uſe: ſo that we ſee many Partnerſhips, and thoſe of many ſorts. *The Origin of this Contract, and its Uſe.*

The Origin of this kind of Union proceeds from the Nature of certain Works, of certain Commerces, and other Affairs, which are of ſo large an extent that they demand the Union, and Application of many perſons. It is this which engages Men to erect Companies for carrying on Manufactures, for Trading into Foreign Countries, for Farming the King's Revenues, or thoſe of particular perſons, and for managing other Affairs of ſeveral kinds, according as they demand the united Labour, Induſtry, Care, Credit, Purſe, and other Aſſiſtance of many perſons. And the uſe of theſe kinds of Partnerſhip is to facilitate the Undertaking, the Work, the Trade, or other Affair for which the Partnerſhip is contracted: and to ſecure to every one of the Partners out of the Share which he has contributed, in conjunction with his Co-Partners, ſuch Profits and Advantages as none of them could be able to make by themſelves.

This firſt ſort of Partnerſhip is limited to certain kinds of Affairs, or Commerces; but there are others, where the Partners enter into a community of all that they are able to make by their Induſtry and Labour. There are likewiſe ſome Partnerſhips, where the Partners agree to a reciprocal communication of all that they may acquire, by Donation, Succeſſion, or otherways. And there are ſome where the Partners agree to a Community of all Goods whatſoever without exception.

Theſe are the ſeveral ſorts of Partnerſhips, which differ from one another according to the Intereſt and Intention of

of the Perſons who join in them, that we ſhall treat of under this Title.

We ought not to ſet down in the number of Partnerſhips, the Unions of perſons that have any Thing, or any Affair in common, independently of their will, ſuch as Co-heirs, the Legatees of one and the ſame thing, and thoſe who thro' other cauſes chance to have ſomething between them that is not divided, or ſome Affair belonging to them in common without any agreement. For theſe ways of having a Thing in common, are quite of another nature than Partnerſhip, which is formed by conſent, and they ſhall have a place among the Matters to be treated of in the ſecond Book.

SECT. I.

Of the Nature of Partnerſhip.

I.

1. Definition of Partnerſhip.

PArtnerſhip is a Covenant between two or more perſons, by which they join in common, either their whole Subſtance, or a part of it: or unite in carrying on ſome Commerce, ſome Work, or ſome other Buſineſs, that they may ſhare among them all the Profit, or Loſs, which they may have by the Joint Stock which they have put into Partnerſhip.

[a] Societates contrahuntur, ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius. *l. 5. ff. pro ſocio.* Quæ coeuntium ſunt, continuò communicantur. *l. 1. in f. ff. eod.* Sicuti lucrum ita damnum quoque commune eſſe oportet. *l. 52. §. 1. in f. eod.* Societas cùm contrahitur, tam lucri, quàm damni communio initur. *l. 67. eod. l. 52. §. 4. in f. eod.*

II.

2. The Shares of Partners in the common Thing.

The Things or Affairs that are in common among Partners, belong to every one of them, for the Shares that are allotted to them by their Covenant [b].

[b] Ut fuerint partes ſocietati adjectæ. *l. 29. ff. pro ſoc.*

III.

3. Shares in the Gain, or Loſs.

The conſequences of the Partnerſhip, ſuch as the Contributions, the Gain, the Loſs, regard every one of the Partners, in proportion to the Share they have in the Stock, or according as they have agreed among themſelves [c].

[c] Sicuti lucrum, ita damnum quoque commune eſſe oportet. *l. 52. §. 4. ff. pro ſoc.* Ut fuerint partes ſocietati adjectæ. *l. 29. eod.*

IV.

4. Theſe Shares are equal, if nothing is ſaid to the contrary.

If the Portions of Loſs and Gain have not been adjuſted by the Covenant, they will be Equal: For if the Partners have made no diſtinction which gives more to one, and leſs to another, their conditions not being diſtinguiſhed, the condition of every individual Partner ought to be the ſame with that of the others [d].

[d] Si non fuerint partes ſocietati adjectæ, æquas eas eſſe conſtat. *l. 29. ff. pro ſoc. §. 1. inſt. eod.*

V.

5. The Share of the Profit regulates that of the Loſs.

Altho' the Partners have not expreſly marked, both the Portions of the Gain, and thoſe of the Loſs, yet if the Portions of the Gain have been expreſſed, thoſe of the Loſs will likewiſe be regulated on the ſame foot. And if, without ſaying any thing of the Gain, or Loſs, it be ſufficiently expreſſed what every one has put into the common Stock, the Portions of the Gain and Loſs, will be the ſame with thoſe of the Stock [e].

[e] Illud expeditum eſt ſi in una cauſa pars fuerit expreſſa (veluti in ſolo lucro, vel in ſolo damno) in altera verò omiſſa: in eo quoque quod prætermiſſum eſt, eandem partem ſervari. §. 3. *inſt. de ſocies.*

VI.

6. Difference of Contributions, and of Portions.

Seeing the Partners may contribute differently, ſome more, and others leſs of Labour, Induſtry, Credit, Favour, Money, or other Thing, it is free for them to regulate in an unequal manner, their Portions, or Shares, according as every one ought to have his condition

more or leſs advantageous, in proportion to the difference of what they contribute [f].

[f] Si placuerit ut quis duas partes, vel tres habeat, alius unam: an valeat? placet valere, ſi modò aliquid plus contulit ſocietati, vel pecuniæ, vel operæ, vel cujuſcumque alterius rei causâ. *l.* 29. *ff. pro ſoc.* Nec enim unquam dubium fuit quin valeat conventio, ſi duo inter ſe pacti ſint, ut ad unum quidem duæ partes & lucri, & damni pertineant, ad alium tertia. §. 1. *inſt. de ſocier.* Ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, gratiæ, pecuniæ in ſocietatem collaturus erat. *l.* 80. *ff. pro ſoc.*

VII.

7. Equality of Shares, notwithſtanding the difference of Contributions.

It is not neceſſary for the Equality of Shares of the Partners in the Profit ariſing from the Partnerſhip, that all their Contributions ſhould be Equal, that every one ſhould furniſh as much Money, as much Induſtry, as much Credit, as every one of the other Partners. But according as they contribute differently, one more Money, another more Induſtry, a third more Credit; their condition may be Equal, by the Equality of the Advantages ariſing from theſe different Contributions. And very often it is agreed, and with Reaſon, that one of the Partners ſhall contribute only his Induſtry, and the other all the Stock, and that nevertheleſs the Profit ſhall be equal, becauſe the Induſtry of the one is worth the Money of the other [g].

[g] Ita coïri poſſe ſocietatem non dubitatur, ut alter pecuniam conferat, alter non conferat; & tamen lucrum inter eos commune ſit. Quia ſæpè opera alicujus pro pecunia valet. §. 2. *Inſt. de ſociet. l.* 1. *C. eod.*

Societas coïri poteſt, & valet etiam inter eos qui non ſunt æquis facultatibus, cùm plerumque pauperior opera ſuppleat, quantùm ei per comparationem patrimonii deeſt. *l.* 5. §. 1. *ff. pro ſoc.*

VIII.

8. Inequality of the Share of the Gain, and of the Share of the Loſs.

This is another effect of the Inequality of the Contributions, that two Partners may agree, that the one ſhall have a greater ſhare of the Profit, than he ſhall bear of the Loſs; and that the other, on the contrary, ſhall bear a greater part of the Loſs, than he ſhall have in the Profit. And thus, for Example, the Partners may agree that one ſhall have two Thirds of the Profit, and bear one Third of the Loſs, and that the other ſhall have one Third of the Profit, and bear two Thirds of the Loſs. Which is to be underſtood in this manner, that in caſe in ſeveral Affairs of the Partnerſhip there be Gain on one ſide, and Loſs on another, that is only reckoned to be Gain, which ſhall remain clear after all the Loſſes are deducted [h].

[h] De illa ſanè conventione quæſitum eſt, ſi Titius & Seius inter ſe pacti ſint, ut ad Titium lucri duæ partes pertineant, damni tertia, ad Seium duæ partes damni, lucri tertia, an rata debeat haberi conventio? Quintus Mutius contra naturam ſocietatis talem pactionem eſſe exiſtimavit, & ob id non eſſe ratam habendam. Servius Sulpitius, cujus ſententia prævaluit, contrà ſenſit. Quia ſæpè quorundam ita pretioſa eſt opera in ſocietate, ut eos juſtum ſit conditione meliore in ſocietatem admitti. §. 2. *inſt. de ſociet. l.* 30. *ff. pro ſoc.* Quod tamen ita intelligi oportet ut ſi in alia re lucrum, in alia damnum illatum ſit: compenſatione facta, ſolùm quod ſupereſt intelligatur lucro eſſe. §. 2. *inſt. de ſociet.* Neque lucrum intelligitur niſi omni damno deducto, neque damnum niſi omni lucro deducto. *d. l.* 30.

IX.

9. One of the Partners diſcharged of all Loſs.

The ſame conſideration of the different Contributions of the Partners, may likewiſe juſtify the Covenant by which it is ſtipulated, that one of the Partners ſhall have a ſhare of the Gain, and be altogether free from Loſs; becauſe, for Example, of the uſefulneſs of his Credit, his Favour, his Intereſt, or of the Pains which he takes, the Journeys which he makes, and the Dangers to which he expoſes himſelf [i]. For theſe Advantages which the Company reaps from him, compenſate that which the Partners grant him, by freeing him of the Loſſes. And he might very lawfully have refuſed to engage himſelf, except on this condition, without which he would not have entred into the Partnerſhip, which perhaps could not have been ſettled and managed without him. But the Share which this Partner ſhall have in the Profits, is to be underſtood only of the clear Gain that remains, after deduction of all the Loſſes out of the Profits of the ſeveral Affairs of the Company, as has been ſaid in the foregoing Article [k].

[i] Contra Mutii ſententiam obtinuit, ut illud quoque conſtiterit, poſſe convenire, ut quis lucri partem ferat, de damno non teneatur. Quod & ipſum Servius convenienter fieri exiſtimavit. §. 2. *inſt. de ſociet.* Quia ſæpè quorundam ita pretioſa eſt opera in ſocietate, ut eos juſtum ſit conditione meliore in ſocietatem admitti. *d.* §. 2. Ita coïri ſocietatem poſſe, ut nullius partem damni alter ſentiat, lucrum verò commune ſit, Caſſius putat, quod ita demum valebit, ut & Sabinus ſcribit, ſi tanti ſit opera quanti damnum eſt. Plerumque enim tanta eſt induſtria ſocii, ut plus ſocietati conferat quàm pecunia. Item ſi ſolus naviget, ſi ſolus peregrinetur, periculo ſubeat ſolus. *l.* 29. §. 1. *ff. pro ſoc.*

[k] Quod tamen ita intelligi oportet, &c. *See this text as it is quoted on the preceding Article.*

X.

10. Fraudulent Partnerſhip.

All Partnerſhips in which there is any condition that is contrary to Equity and Honeſty, are unlawful. As if it ſhould be agreed, that the whole Loſs ſhould fall upon one of the Partners, without

his having any Share of the Profit, and that the whole Profit ſhould go to the other Partner, without his bearing any Share of the Loſs [m].

[m] Societas ſi dolo malo aut fraudandi causâ coïta ſit, ipſo jure nullius momenti eſt. Quia fides bona contraria eſt fraudi, & dolo. *l.* 3. §. *ult. ff. pro ſoc.*

Ariſto refert, Caſſium reſpondiſſe, ſocietatem talem coiri non poſſe, ut alter lucrum tantùm, alter damnum ſentiret. Et hanc ſocietatem leoninam ſolitum appellare. Et nos conſentimus talem ſocietatem nullam eſſe ut alter lucrum ſentiret, alter verò nullum lucrum, ſed damnum ſentiret. Iniquiſſimum enim genus ſocietatis eſt ex qua quis damnum, non etiam lucrum ſpectet. *l.* 29. §. 2. *ff. eod.*

XI.

11. *Unlawful Partnerſhip.*

We cannot enter into Partnerſhip, except it be of a Commerce, or other Thing, that is honeſt and lawful. And all Partnerſhips contrary to this Rule, would be Criminal [n].

[n] Si maleficii ſocietas coïta ſit, conſtat nullam eſſe ſocietatem. Generaliter enim traditur rerum inhoneſtarum nullam eſſe ſocietatem. *l.* 57. *ff. pro ſoc.* (ſocietas) flagitioſæ rei nullas vires habet. *l.* 35. §. 2. *ff. de contr. empt.* Delictorum turpis, atque fœda communio eſt. *l.* 53. *ff. pro ſocio.*

XII.

12. *Difference between Partnerſhip, and other Contracts, as to the Extent of the Engagements.*

The Contract of Partnerſhip is in this different from other Contracts, that every one of the other Contracts hath its Engagements limited and regulated by its particular Nature; whereas Partnerſhip has a general Extent to the Engagements of the different Affairs, and of the ſeveral Covenants into which the Partners enter. Thus, their Engagements are general and indefinite, ſuch as thoſe of a Tutor, or of one who undertakes the Care of another's Concerns in his abſence, and without his knowledge [o]. And likewiſe Honeſty and fair dealing have in this Contract an Extent proportioned to that of the Engagements [p].

[o] Sive generalia ſunt, (bonæ fidei judicia) veluti pro ſocio, negotiorum geſtorum, tutelæ: ſive ſpecialia, veluti mandati, commodati, depoſiti. *l.* 38. *ff. pro ſoc.* See the beginning of the ſecond Section of Tutors.

[p] In ſocietatis contractibus fides exuberet. *l.* 3. *C. pro ſoc.*

SECT. II.

In what manner Partnerſhip is contracted.

The CONTENTS.

1. *Partners ought to chuſe one another reciprocally.*
2. *Difference between having a Thing in common, and being in Partnerſhip.*
3. *The Heir, or Executor, of a Partner, is not a Partner.*
4. *It cannot be ſtipulated, that the Heirs, or Executors, ſhall be Partners.*
5. *The Partner of one of the Partners, is not in Partnerſhip with the others.*
6. *Partnerſhip may be contracted without Writing, and which way.*
7. *Of thoſe who buy a Thing together.*
8. *The Partners are at liberty to enter into all manner of lawful Pacts.*
9. *Pacts concerning the duration of the Partnerſhip.*
10. *Penal Clauſes.*
11. *Pacts for regulating the Shares.*
12. *A Gift under colour of a Partnerſhip.*

I.

1. *Partners ought to chuſe one another reciprocally.*

PArtnerſhip cannot be contracted, but by the conſent of all the Partners, who ought reciprocally to chuſe, and approve of one another [a], in order to form among themſelves a Tie, which is a kind of Brotherhood [b].

[a] Conſenſu fiunt obligationes in emptionibus, venditionibus, locationibus, conductionibus, ſocietatibus. *Inſt. de obl. ex conſ.*

[b] Societas jus quodammodo fraternitatis in ſe habet. *l.* 63. *ff. pro ſoc.*

II.

2. *Difference between having a Thing in common, and being in Partnerſhip.*

It is not enough to form a Partnerſhip, that two or more perſons have any Thing in common among them, ſuch as the Co-heirs of one and the ſame Inheritance, Legatees, Donees, or Purchaſers of one and the ſame Thing. For theſe ways of having ſomething in common among many, not implying the reciprocal Choice of the Perſons, do not link them together in Partnerſhip [c].

[c] Ut ſit pro ſocio actio, ſocietatem intercedere oportet. Nec enim ſufficit, rem eſſe communem, niſi ſocietas intercedit. Communiter autem res agi poteſt, etiam citrà ſocietatem ut putà, cùm non affectione ſocietatis incidimus in communionem: ut evenit in re duobus legata, item ſi à duobus ſimul empta res ſit, aut ſi hæreditas, vel donatio communiter nobis obvenit: aut ſi à duobus ſeparatim emimus partes eorum, non ſocii futuri. *l.* 31. *ff. pro ſoc. l.* 32. *eod.* See the ſeventh Article of this Section.

III.

3. *The Heir, or Executor, of a Partner, is not a Partner.*

The Choice of the Perſons is ſo eſſentially neceſſary to the conſtituting of a Partnerſhip, that even the Heirs, or Executors, of the Partners themſelves, do not ſucceed to this Quality of Partner [d], becauſe it may happen that they are not fit for it: and likewiſe that even they

they may not either reliſh the Commerce that is carried on by the Partnerſhip, or not approve of the Perſons of the Co-Partners. And hence it is, that ſince the Tie of Partners can be no other than voluntary, the Partnerſhip is broke off by the death of one of the Partners, in the manner which ſhall be explained in the fifth and ſixth Sections.

[d] Nec hæres ſocii ſuccedit. *l.* 65. §. 9. *ff. pro ſoc.* Hæres ſocius non eſt. *l.* 63. §. 8. *eod.*

IV.

4. It cannot be ſtipulated that the Heirs, or Executors, ſhall be Partners.

If it had been agreed among the Partners, that the Partnerſhip ſhould be continued between their Heirs, or Executors, this agreement would imply the condition, that the Heirs, or Executors, ſhould be liked by the Co-Partners, and that they alſo ſhould approve of the other Partners. And it would not have this effect, that perſons who could not ſort one with another, ſhould be linked together againſt their wills[e].

[e] Adeò morte ſocii ſolvitur ſocietas, ut nec ab initio paſciſci poſcimus, ut hæres etiam ſuccedat ſocietati. *l.* 59. *ff. pro ſoc.* Nemo poteſt ſocietatem hæredi ſuo ſic parere, ut ipſe hæres ſocius ſit. *l.* 35. *eod.* (Papinianus) reſpondit ſocietatem non poſſe ultrà mortem porrigi. *l.* 52. §. 9. *eod.*

V.

5. The Partner of one of the Partners, is not in Partnerſhip with the others.

If one of the Partners takes another perſon into Partnerſhip with him, this third perſon will not be Partner with the others, but only with the Partner who has aſſociated him[f]. And this will make among them a ſecond Partnerſhip, diſtinct from the firſt, and limited to the Share of that Partner who has aſſociated to himſelf another.

[f] Qui admittitur ſocius, ei tantùm ſocius eſt qui admiſit, & rectè. Cum enim ſocietas conſenſu contrahatur, ſocius mihi eſſe non poteſt, quem ego ſocium eſſe nolui. Quid ergo ſi ſocius meus eum admiſit, ei ſoli ſocius eſt. *l.* 19. *ff. pro ſoc.* Nam ſocii mei ſocius, meus ſocius non eſt. *l.* 20. *eod. l.* 47. §. 1. *ff. de reg. jur.*

VI.

6. Partnerſhip may be contracted without Writing, and which way.

As conſent may be given either in Writing, or without writing, and even among perſons that are abſent, by Letter, Proxy, or any other Mediator; ſo Partnerſhip may be contracted all theſe ways. And alſo by a tacit conſent, and by acts which make proof of it. As if perſons carry on a Joint Trade, and ſhare the Profit and the Loſs[g]. And the Partnerſhip laſts as long as the Partners are willing to continue in their Union[h].

[g] Societatem coïre, & re, & verbis, & per nuntium poſſe nos dubium non eſt. *l.* 4. *ff. pro ſoc.* See the eighth, tenth, and ſixteenth Articles of the firſt Section of Covenants.

[h] Manet ſocietas eo uſque donec in eodem conſenſu perſeveraverint. §. 4. *Inſt. de ſocier.* Tamdiu ſocietas durat, quamdiu conſenſu partium integer perſeverat. *l.* 5. *C. pro ſoc.* See the fifth Section of this Title.

VII.

7. Of thoſe who buy a Thing together.

If two or more perſons having a mind to buy the ſame Thing, agree, in order not to raiſe the Price by bidding againſt one another, to buy it jointly together, either by one of themſelves, or by a third perſon; this Agreement makes the Thing bought to belong to them in common, but it does not join them in Partnerſhip. For they are not linked together by the Choice of the Perſons, but only by the Thing which they have in common[i].

[i] In emptionibus —— qui nolunt inter ſe contendere, ſolent per nuntium rem emere in commune, quod à ſocietate longè remotum eſt. *l.* 33. *ff. pro ſoc.* Magis ex re —— quàm ex perſona ſocii actio naſcitur. *l.* 29. *ff. comm. divid.*

VIII.

8. The Partners are at liberty to enter into all manner of lawful Pacts.

People may in Partnerſhip, as in all other Contracts, make all manner of lawful Pactions. Thus, they may contract a conditional Partnerſhip, whether it be that they will have their Partnerſhip to commence only after the Condition has happened, or that they will have it to take its effect immediately, and to be diſſolved by the exiſtence of the Condition[k].

[k] Societas coïri poteſt —— ſub conditione. *l.* 1. *ff. pro ſoc.* De ſocietate apud veteres dubitatum eſt, ſi ſub conditione contrahi poteſt: putà, ſi ille conſul fuerit, ſocietatem eſſe contractam. Sed ne ſimili modo apud poſteritatem, ſicut apud antiquitatem hujuſmodi cauſa ventiletur, ſancimus ſocietatem contrahi poſſe, non ſolum purè, ſed etiam ſub conditione voluntates etenim legitimè contrahentium, omnimodo conſervandæ ſunt. *l.* 6. *C. eod.*

IX.

9. Pacts concerning the duration of the Partnerſhip.

Partnerſhip may be contracted ſo as to begin either immediately, or after a certain time, and to laſt either to the time agreed on, or during the Life of the Partners[m], and in ſuch a manner that if there are many Co-Partners, the death of one of them may not interrupt the Partnerſhip among the others[n].

[m] Societas coïri poteſt vel in perpetuum, id eſt, dum vivunt, vel ad tempus, vel ex tempore. *l.* 1. *ff. pro ſoc.*

[n] *Without this Agreement, the death of any one of the Partners would diſſolve the Partnerſhip, with reſpect to the others, as ſhall be ſhewn hereafter in the fourteenth Article of the fifth Section.*

X.

10. *Penal Clauſes.*

We may add to the Contract of Partnerſhip, Penal Clauſes againſt him who ſhall contravene what has been agreed on; whether it be by doing what he ought not, or not doing what he ought to have done[o]. But the effect which theſe kinds of Penalties are to have, is to be regulated by the prudence of the Judge, according to the circumſtances[p].

[o] Si quis a ſocio pœnam ſtipulatus ſit, pro ſocio non aget, ſi tantundem in pœnam ſit quantum ejus interfuit. Quod ſi ex ſtipulatu eam conſecutus ſit, poſtea pro ſocio agendo, hoc minus accipiet, pœna ei in ſortem imputata. *l.* 41, & 42. *ff. pro ſocio. V. l.* 71. *eod.*

[p] *By our Practice theſe kinds of Penal Clauſes are only commutatory, being added to Contracts, only that they may ſtand inſtead of a Reparation of Damages, which Reparation ought to be no greater than the Damage. Thus, it is by the circumſtances of the Events, that we judge of the effect, which the penal Clauſes ought to have. And as it is juſt to leſſen the Penalty, if it exceeds the Damage, or if any circumſtances may excuſe the Non-performance of the Articles of the Covenant; ſo it may likewiſe happen that it may be juſt to decree a Reparation of Damages greater than the Penalty; if it is not, for Example, expreſly ſaid that the Penalty ſhall ſtand in lieu of all Damages, or if the Agreement has been contravened thro' ſome Fraud, or ſome Fault of a different nature from thoſe which the Contracters did foreſee, and had a mind to prevent.* See the fifteenth Article of the third Section, and the nineteenth Article of the fourth Section of Covenants.

XI.

11. *Pacts for regulating the Shares.*

The Partners may either regulate themſelves the Shares which every one is to have in the Partnerſhip, or they may refer the matter to the Arbitration of other perſons; and if they have referred it to other perſons, or even to one of themſelves, it will be the ſame thing as if they had referred it to the Arbitration of ſkilful and reaſonable Men; and what is determined herein by the perſons named, will not take place, if any of the Partners has reaſon to complain of the Award[q].

[q] Societatem mecum coiſti ea conditione, ut Nerva amicus communis partem ſocietatis conſtitueret. Nerva conſtituit, ut tu ex triente ſocius eſſes, ego ex beſſe: quæris utrùm ratum id jure ſocietatis ſit, an nihilominus ex æquis partibus ſocii ſimus. Exiſtimo autem meliùs te quæſiturum fuiſſe, utrùm ex his partibus ſocii eſſemus, quas is conſtituiſſet, an ex his quas virum bonum conſtituere oportuiſſet. Arbitrorum enim genera ſunt duo. Unum ejuſmodi ut ſive æquum ſit, ſive iniquum, parere debeamus. Quod obſervatur, cùm in compromiſſo ad arbitrium itum eſt. Alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat, etſi nominatim perſona ſit comprehenſa, cujus arbitratu fiat. Veluti cùm lege locationis comprehenſum eſt, ut opus arbitrio locatoris fiat. In propoſita autem quæſtione, arbitrium viri boni exiſtimo ſequendum eſſe, eo magis quod judicium pro ſocio bonæ fidei eſt. Unde ſi Nervæ arbitrium ita pravum eſt, ut manifeſta iniquitas ejus appareat, corrigi poteſt per judicium bonæ fidei. *l.* 76. 77. 78. 79. & 80. *ff. pro ſoc.*

Si ſocietatem mecum coieris, ea conditione, ut partes ſocietatis conſtitueres, ad boni viri arbitrium ea res redigenda eſt. Et conveniens eſt viri boni arbitrio, ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, pecuniæ in ſocietatem collaturus ſit. *l.* 6. *ff. eod.* See the eleventh Article of the third Section of Covenants.

XII.

12. *A Gift under colour of a Partnerſhip.*

If a Partnerſhip were contracted only to colour a Deed of Gift from one of the Contracters to the other, ſo that the Profits ſhould belong wholly to one of the Partners; this would not be a Partnerſhip, there being only one perſon who reaps the whole Profit[r]. And if ſuch a Contract were entered into for the behoof of a perſon to whom the other cannot make over any thing by Deed of Gift, the Contract would be null and unlawful, as being made to elude the Law[s].

[r] Donationis cauſâ ſocietas rectè non contrahitur. *l.* 5. §. 2. *ff. pro ſoc.* Si quis ſocietatem per donationem mortis cauſâ inierit, dicendum eſt nullam ſocietatem eſſe. *l.* 35. §. 3. *ff. de mort. cauſ. donat.*

[s] Si inter virum & uxorem ſocietas donationis cauſâ contracta ſit. Jure vulgato nulla eſt. *l.* 32. §. 24. *ff. de donat. int. vir. & uxor.*

SECT. III.

Of the ſeveral Sorts of Partnerſhips.

The CONTENTS.

1. *Partnerſhips are general, or particular.*
2. *Partnerſhip of Profits, or pure and ſimple.*
3. *The Partnerſhip of Profits does not include Inheritances, Legacies, and Gifts.*
4. *A Partnerſhip of all manner of Eſtate and Goods, excludes nothing.*
5. *A Perſonal Reparation of Damages to one of the Partners, is to be put into the Joint Stock.*
6. *The Perſonal Condemnation of a Partner.*
7. *Unlawful Profits do not come into the Joint Stock.*
8. *Partnerſhips are limited to the Things put into the Community.*
9. *If there is any obſcurity in the Contract of Partnerſhip, to know what it comprehends.*
10. *Debts of the Community, and of the Partners.*
11. *What*

I.

1. Partnerships are general, or particular.

PArtnerships are either general, of all the Goods of the Partners; or particular, of ſome Goods, ſome Commerce, and of ſome Farm, or other Thing: And the Goods which are put into the Partnerſhip, become common to all the Partners, altho' they are not delivered, and altho' they remain in the poſſeſſion of the Partner who was the Owner of them before the Partnerſhip was contracted. For the intention of the Partners to communicate the Goods, makes a tacit Delivery of them, and each of the Partners poſſeſſes for all the others, the Thing belonging to them in common, which is in his cuſtody [a].

[a] Societates contrahuntur, ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius. *l. 5. ff. pro ſoc.* Societatem coire ſolemus aut totorum bonorum, quam Græci ſpecialiter κοινωνίαν appellant, aut unius alicujus negotiationis, veluti mancipiorum vendendorum emendorumque, aut olei, aut vini, aut frumenti emendi vendendique. *inſt. de ſociet. in princ.* In ſocietate omnium bonorum, omnes res quæ coëuntium ſunt, continuò communicantur. Quia licet ſpecialiter traditio non interveniat, tacita tamen creditur intervenire. *l. 1. §. 1. & l. 2. ff. pro ſoc.*

II.

2. Partnerſhip of Profits, or pure and ſimple.

If in a Contract of Partnerſhip, the Parties had omitted to expreſs of what Goods, what Buſineſs, or what Commerce the Partnerſhip was to conſiſt; and that it was barely ſaid, that they joined in Partnerſhip, or that the Partnerſhip ſhould be of the Gain and Profit which the Partners ſhould make, without naming any thing in particular; the Partnerſhip would extend only to the Profits which the Partners might make, by the Trade and Buſineſs which they ſhould carry on jointly together [b].

[b] Coïri ſocietatem & ſimpliciter licet. Et ſi non fuerit diſtinctum videtur coïta eſſe univerſorum, quæ ex quæſtu veniunt. Hoc eſt, ſi quod lucrum ex emptione, venditione, locatione, conductione deſcendit. Quæſtus enim intelligitur qui ex opera cujuſque deſcendit. *l. 7. & l. 8. ff. pro ſoc.* Cùm quæſtûs & compendii ſocietas initur, quidquid ex operis ſuis ſocius acquiſierit, in medium conferet. *l. 45. §. 1. ff. de acq. vel omit. hared.*

III.

3. The Partnerſhip of Profits does not include Inheritances, Legacies, Gifts, &c.

A Partnerſhip of Gains and Profits, does not comprehend Inheritances, Legacies, Gifts, whether they be Gifts that are to have their effect before, or after the death of the Giver; nor that which the Partners may have acquired any other way than by their Induſtry, or from the Effects which they have put into the Joint Stock. For theſe ſorts of Acquiſitions have their Cauſes, and their Motives, in the Perſons of thoſe to whom they happen; ſuch as ſome Merit, ſome Tie of Friendſhip or Relation, or the Natural Right of Inheriting; which are Advantages that the Partners did not mean to communicate to one another, unleſs the ſame be particularly expreſſed, becauſe they are not the ſame in every one of the Partners. Neither does this kind of Partnerſhip take in the Debts owing to the Partners, except they be ſuch as may have ariſen from the Affairs or Commerce of the Partnerſhip [c].

[c] Sed & ſi adjiciatur, ut quæſtus, & lucri ſocii ſint, verum eſt non ad aliud lucrum quàm quod ex quæſtu venit, hanc quoque adjectionem pertinere. *l. 13. ff. pro ſoc.* Duo colliberti ſocietatem coïerunt lucri, quæſtus compendii. Poſtea unus ex his à patrono hæres inſtitutus eſt: alteri legatum datum eſt. Neutrum horum in medium referre debere reſpondit. *l. 71. §. 1. eod.* Quæſtus intelligitur qui ex opera cujuſque deſcendit. Nec adjecit Sabinus hæreditatem, vel legatum, vel donationem mortis cauſa, ſive non mortis cauſa. Fortaſſis hoc ideo quia non ſine cauſâ conveniunt, ſed ob meritum aliquod accedunt. Et quia plerumque vel à parente, vel à liberto, quaſi debitum nobis hæreditas obvenit. Et ita de hæreditate, legato, donatione, Quintus Mutius ſcribit. *l. 8. 9. 10. & 11. ff. eod.* Quidquid ex operis ſuis ſocius acquiſierit, in medium conferet: ſibi autem quiſque hæreditatem acquirit. *l. 45. §. 2. ff. de acq. vel omitt. hared.* Sed nec æs alienum, niſi quod ex quæſtu pendebit, veniet in rationem ſocietatis. *l. 12. ff. pro ſocio.*

IV.

4. A Partnerſhip of all manner of Eſtate and Goods, excludes nothing.

A general Partnerſhip of all manner of Eſtate and Goods, includes every thing that may belong to the Partners, or be acquired by them, by any cauſe whatſoever. For the general expreſſion of *all manner of Eſtate and Goods*, leaves nothing out. And Succeſſions, Legacies, Donations, and all other ſorts of Acquiſitions and Profits, are comprehended under it, unleſs they are ſpecially reſerved [d].

[d] In ſocietate omnium bonorum omnes res quæ coëuntium ſunt, continuò communicantur. *l. 1. §. 1. ff. pro ſoc.* Cùm ſpecialiter omnium bonorum ſocietas coïta eſt, tunc & hæreditas, & legatum, & quod donatum eſt, aut quaqua ratione acquiſitum, communioni acquiretur. *l. 3. §. 2. eod.* Si ſocietatem univerſarum fortunarum coïerint, id eſt, earum quoque rerum quæ poſtea cuique acquirentur, hæreditatem cuivis eorum delatam, in communem redigendam. *l. 73. ff. eod.*

V.

5. A perſonal Reparation of Damages

In an univerſal Partnerſhip of all manner of Eſtate and Goods, each Partner

mages to one of the Partners, is to be put into the Joint Stock.

ner ought to communicate not only all his Eſtate, Real and Perſonal, and all that may accrue from his Induſtry; but likewiſe if it happens that in his particular he has been injured, or damaged in his perſon, or otherwiſe, he ought to put into the Joint Stock, whatever he receives in ſatisfaction of the Injury or Damage done him. And if the Co-Partner receives a Reparation of Damages on the account of another perſon, ſuch as his Son, or otherwiſe, he will alſo be bound to communicate it [e]. For a Partnerſhip of all manner of Eſtate and Goods, leaves nothing proper or peculiar to the Partner.

[e] Socium univerſi in ſocietatem conferre debere, Neratius ait, ſi omnium bonorum ſocius ſit. Et ideo ſive ob injuriam ſibi factam, vel ex lege Aquilia, ſive ipſius ſive filii corpori nocitum ſit, conferre debere reſpondit. *l.* 52. §. 16. *ff. pro ſocio.*

VI.

6. The Perſonal Condemnation of a Partner.

If on the contrary, one of the Partners is condemned on an Accuſation which he has drawn upon himſelf by his own folly, he alone ſhall bear the Puniſhment which he has merited. But if he is unjuſtly condemned, the Injuſtice ought to fall upon all the Partners, and not on him alone. And the ſame diſtinction is to be made in the other kinds of Condemnations in Civil Cauſes, according as the Co-Partner has been well or ill grounded in his Claim, or has defended himſelf ill or well [f]. Thus, in both theſe caſes, it will depend on the Equity of the Partners, or Prudence of their Arbitrators, to diſcern aright between the Loſſes which the Co-Partner ought to bear alone, and thoſe which ought to fall on the whole Partnerſhip.

[f] Per contrarium quoque apud veteres tractatur, an ſocius omnium bonorum, ſi quid ob injuriarum actionem damnatus præſtiterit, ex communi conſequatur, ut præſtet. Et Attilicinus, Sabinus, Caſſius, reſponderunt, ſi injuria judicis damnatus ſit; conſecuturum. Si ob maleficium ſuum, ipſum tantùm, damnum ſentire debere. Cui congruit, quod Servium reſpondiſſe, Auſidius, refert, ſi ſocii bonorum fuerint, deinde unus cùm ad judicium non adeſſet, damnatus ſit, non debere eum de communi id conſequi: ſi verò præſens injuriam judicis paſſus ſit, de communi ſarciendum. *l.* 52. §. *ult. ff. pro ſoc.*

VII.

7. Unlawful Profits do not come into the Joint Stock.

The unlawful and diſhoneſt Gains which a Co-Partner may make, do not enter into the Partnerſhip: and he who makes them ought alone to be chargeable with making Reſtitution of what he has ill got. But if the other Partners ſhare with him in his unlawful Gains, they will become his Accomplices; and be liable to the ſame Puniſhments which he may have deſerved [g].

[g] Neratius ait, ſocium omnium bonorum, non cogi conferre quæ ex prohibitis cauſis acquiſierit. *l.* 52. §. 17. *ff. pro ſoc.* Quod autem ex furto, vel ex alio maleficio quæſitum eſt, in ſocietatem non oportere conferri, palam eſt. Quia delictorum turpis atque ſœda communio eſt. *l.* 53. *eod.* Si igitur ex hoc conventus fuerit, qui maleficium admiſit: id, quod contulit, aut ſolum, aut cum pœna auferre. Solum auferret, ſi mihi proponas, inſciente ſocio eum in ſocietatis rationem hoc contuliſſe. Quod ſi ſciente, etiam pœnam ſocium agnoſcere oportet. Æquum eſt enim, ut cujus participavit lucrum, participet & damnum. *l.* 55. *in f. eod.*

VIII.

8. Partnerſhips are limited to the Things put into the Community.

Partnerſhips are limited to the kinds of Goods, Commerce, or other Things which the Partners are willing to join in common: and do not extend to thoſe Things which they have no mind to put into the Community. Thus, for Inſtance, if two Brothers enjoy in common the Inheritance of their Father, and continue in a Partnerſhip of the Profits and Loſſes which accrue from thence; they may for all this poſſeſs each of them in particular whatever they may acquire any other way [h].

[h] Si fratres, parentum indiviſas hæreditates ideò retinuerunt, ut emolumentum ac damnum in his commune ſentirent: quod aliunde quæſierint, in commune non redigetur. *l.* 52. §. 6. *ff. pro ſocio.*

IX.

9. If there is any obſcurity in the Contract of Partnerſhip, to know what it comprehends.

If the Partnerſhip happens to be contracted in terms which give occaſion to doubt whether all the Eſtate preſent and to come is comprehended in it, or only the preſent Eſtate in poſſeſſion, or that there are other ſuch like doubts; they are to be interpreted by the ways in which the Partners themſelves ſhall have executed their Contract, and by the circumſtances which may be able to ſhew their intention, according to the foregoing Rules, and the general Rules of the Interpretation of Covenants [i].

[i] Semper in ſtipulationibus, & in cæteris contractibus id ſequimur quod actum eſt. *l.* 34. *ff. de reg. jur.* Quod factum eſt cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l.* 168. *eod.*

See the eighth and the following Articles of the ſecond Section of Covenants.

X.

10. Debts of the Community and of the Partners.

The Debts owing by the Community, and its other Charges, are to be paid out of the Common Stock: and the Partnerſhip being ended, each Partner owes his Share of them, in proportion to the Share he has in the Joint Stock. But the Monies borrowed by a Partner, which have not been put into

the Common Caſh, or have not been laid out to the Uſe of the Community, are the peculiar Debt of him who borrowed them [l].

[l] Omne æs alienum quod manente ſocietate contractum eſt, de communi ſolvendum eſt, licet poſteaquàm ſocietas diſtracta eſt: ſolutum ſit. Igitur, & ſi ſub conditione promiſerat, & diſtractâ ſocietate conditio extitit, ex communi ſolvendum eſt. Ideoque, ſi interim ſocietas dirimatur, cautiones interponendæ ſunt. *l.* 27. *ff. pro ſoc.* ſed nec æs alienum, niſi quod ex quæſtu pendebit, veniet in rationem ſocietatis. *l.* 52. *eod.* Jure ſocietatis, per ſocium ære alieno, ſocius non obligatur: niſi in communem arcam pecuniæ verſæ ſunt. *l.* 82. *ff. eod.*

XI.

11. *What the Partner may, or may not take out of the Publick Stock.*

[m] In an Univerſal Partnerſhip of the whole Eſtate and Goods, of all Profits, and of all other Expences, each Partner can only diſpoſe of his own Share, and he ought not to take out of the Common Stock for his particular Expences, more than what is neceſſary for the maintenance of himſelf, and Family. Thus, Partners of their whole Eſtate and Goods, who have Children, educate and maintain them out of the Joint Stock, but they cannot take Marriage Portions out of it, for their Daughters. For a Marriage Portion is a Capital which the Partner ought to take out of his own Share, unleſs it be otherways regulated by Contract, or Cuſtom [m].

[m] Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint. *l.* 68. *ff. pro ſoc.* Idem Maximinæ reſpondit, ſi ſocietatem univerſarum fortunarum ita coierint, ut quidquid erogetur, vel quæreretur communis lucri, atque impendii eſſet: ea quoque, quæ in honorem alterius liberorum erogata ſunt, utrimque imputanda. *l.* 73. §. 2. *eod.* Si forte conveniſſet inter ſocios, ut de communi dos conſtitueretur, dixi pactum non eſſe iniquum. Utique ſi non de alterius tantùm filia convenit. *l.* 81. *eod.*

XII.

12. *Extraordinary Expences of a Partner.*

If in an Univerſal Partnerſhip, it had been agreed, that the Daughters Portions ſhould be taken out of the Joint Stock, and it happen that one of the Partners hath a Daughter to marry, and that the others have none; this Daughter will nevertheleſs have her Portion out of the Joint Stock [n]. And this Partner will have this advantage over the others, without any Injuſtice; for each of them might have had it. And the State in which they were all of them, under the ſame uncertainty of the Event, and with the ſame Right, having rendred their Condition equal, it made alſo their Agreement juſt.

[n] Si commune hoc pactum fuit, non intereſſe, quod alter ſolus filiam habuit. *d. l.* 81. *ff. pro ſoc.*

XIII.

The Expences which the Partners are at in Gaming, Debauchery, or other unlawful Practices, are not to be taken out of the Common Stock [o].

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[o] Quod in alea, aut adulterio perdiderit ſocius, ex medio non eſt laturus. *l.* 59. §. 1. *ff. pro ſoc.*

As to the Expences which are laid out on account of the Partnerſhip. See the eleventh Article of the following Section.

SECT. IV.

Of the Engagements of Partners.

The CONTENTS.

21. *This*

21. *This benefit does not extend to the Sureties, nor to the Heirs, or Executors of the Partners.*

22. *One Partner can do nothing in the Affairs of the Community, againſt the will of the other Partners.*

I.

Society among the Partners.

PArtners being united by a General Engagement [a], in a ſort of Fraternity [b], to act the one for the other as every one would do for himſelf, they owe reciprocally to one another an upright Fidelity and Integrity, ſuch as may engage every one of them to ſhare with the others whatever they have belonging to the Community, with all the Profits, Fruits, and other Revenues which they may reap from it: and not to keep any thing to themſelves, but what they may lawfully do by their Contract [c].

[a] *See the twelfth Article of the firſt Section.*

[b] *See the firſt Article of the ſecond Section.*

[c] Venit autem in hoc judicium pro ſocio bona fides. *l.* 52. §. 1. *ff. pro ſoc.* In ſocietatis contractibus, fides exuberet. *l.* 3. *C. eod.* Quæ coëuntium ſunt communicantur. *l.* 1. *in f. ff. eod.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes—— quoſve fructus ex his rebus cœperis——me conſecuturum. *l.* 38. §. 1. *eod.*

II.

2. Care and Vigilance of the Partners.

Beſides the Fidelity which the Partners owe to one another, they likewiſe owe their Care for the Affairs and Effects of the Community. But whereas their Fidelity admits of no bounds; they are obliged, with reſpect to the Care which they owe, to uſe only the ſame Application and Vigilance in the Common Affairs, as they uſe in their own [d].

[d] In ſocietatis contractibus fides exuberet. *l.* 3. *C. pro ſocio.* Sufficit talem diligentiam communibus rebus adhibere ſocium, qualem ſuis rebus adhibere ſolet. §. *ult. inſt. de ſocietate.*

III.

3. Partners accountable for Fraud, and groſs Faults.

This duty of Care and Vigilance which the Partners owe to one another, being regulated by the Care which they have of what is their own, it does not extend to the greateſt Exactneſs that the moſt careful and diligent perſons are capable of; but it is limited to make them reſponſible for all Deceit, and for all groſs Faults. And if a Partner who takes the ſame care of the common Affairs, as he does of his own, falls into ſome ſlight Fault without any evil intention, he is not accountable for it: and the other Partners ought to blame themſelves for not having made choice of a more careful Partner [e].

[e] Utrum ergo tantùm dolum, an etiam culpam præſtare ſocium oporteat, quæritur. Et Celſus, libro ſeptimo digeſtorum ita ſcripſit, ſocios inter ſe dolum & culpam præſtare oportet. *l.* 52. §. 3. *ff. pro ſoc.* Socius ſocio utrum eo nomine tantùm teneatur, pro ſocio actione, ſi quid dolo commiſerit, ſicuti is qui deponi apud ſe paſſus eſt, an etiam culpæ, id eſt deſidiæ, atque negligentiæ nomine quæſitum eſt. Prævaluit tamen etiam culpæ nomine teneri eum. Culpa autem non ad exactiſſimam diligentiam diligenda eſt. Sufficit enim talem diligentiam communibus rebus adhibere ſocium, qualem ſuis rebus adhibere ſolet. Nam qui parum diligentem ſocium ſibi aſſumit, de ſe queri, ſibique hoc imputare debet. §. *ult. inſt. de ſociet. l.* 72. *ff. pro ſoc.*

IV.

4. Accidents.

Partners are never reſponſible for any Accident; unleſs they have given occaſion to it by ſome Fault for which they ought to anſwer. As if a Partner has ſuffer'd a Thing which he had in his cuſtody to be ſtolen [f].

[f] Damna quæ imprudentibus accidunt, hoc eſt, damna fatalia, ſocii non cogentur præſtare: ideoque, ſi pecus eſtimatum datum ſit, & id latrocinio, aut incendio perierit, commune damnum eſt: ſi nihil dolo aut culpa acciderit, ejus qui æſtimatum pecus acceperit. Quod ſi à furibus ſubreptum ſit, proprium ejus detrimentum eſt. Quia cuſtodiam præſtare debuit, qui æſtimatum accepit. Hæc vera ſunt, & pro ſocio erit actio, ſi modò ſocietatis contrahendæ cauſa, paſcenda data ſunt, quamvis æſtimata. *l.* 52. §. 3. *ff. pro ſocio. See the twelfth Article of this Section.*

V.

5. If a Partner appropriates to himſelf, or converts to his own uſe, any Thing belonging to the Community.

If one of the Partners appropriates to himſelf, or conceals any Thing belonging to the Community, or if he puts it to his own uſe contrary to the intention of the Co-Partners, he commits a Theft [g]: and will be liable to make good their Damages. And if having in his hands ſome of the Money belonging to the Joint Stock, he lays it out on his own particular Affairs, he will be obliged to pay Intereſt for it, as a Reparation of Damages to his Co-Partners, and as a Puniſhment of his own Infidelity [h].

[g] Rei communis nomine cum ſocio furti agi poteſt, ſi per fallaciam dolove malo amovit: vel rem communem celandi animo, contrectet. *l.* 45. *ff. pro ſoc.*

[h] Socium qui in eo quod ex ſocietate lucrifaceret, reddendo moram adhibuit, cùm ea pecunia ipſe uſus ſit, uſuras quoque eum præſtare debere Labeo ait. *l.* 60. *ff. pro ſoc. l.* 1. §. 1. *ff. de uſur.*

VI.

6. Uſe of the common Thing without Fraud.

If a Partner happens to have in his cuſtody, without any Fraud, a Thing belonging to the Community, ſuch as any Moveable Thing which he has made ſome uſe of; it will not be preſumed, that becauſe he had the Thing in his cuſtody, and made uſe of it, that therefore he is guilty of Theft; but that he being

being the Owner of it in ſome part, did make uſe of his own Right, being confident of having the conſent of his Co-Partners.

[1] Meritò autem adjectum eſt, ita demùm furti actionem eſſe, ſi per fallaciam, & dolo malo amovit: quia cùm ſine dolo malo fecit, furti non tenetur: & ſanè plerumque credendum eſt, eum qui partis dominus eſt, jure potius ſuo, re uti, quam furti conſilium inire. *l.* 51. *ff. pro ſoc.*

VII.

7. *Loſs or Damage cauſed by a Partner.*

If by ſome Fault, Violence, or other unlawful means, a Partner occaſions Damage to the Community, he ſhall be bound to make it good[1].

[1] Si damnum in re communi ſocius dedit, Aquilia teneri eum, & Celſus, & Julianus, & Pomponius ſcribunt. Sed nihilominus, & pro ſocio tenetur, ſi hoc facto ſocietatem læſit. Si verbi gratia negotiatorem ſervum vulneraverit, vel occidit. *l.* 47. §. 1. *l.* 48. *l.* 49. *ff. pro ſocio.*

VIII.

8. *The Service which a Partner does, is not compenſated with the Loſs which he occaſions.*

If the ſame Partner who has cauſed any Damage, or who thro' his Fault and Negligence has given occaſion to ſome Loſs, which may be imputed to him, happens in other reſpects to have procured ſome Profit to the Community, the Profit which he has procured will not be compenſated with the Loſs which he has occaſioned. For he was bound to procure this Profit, and conſequently cannot compenſate it with the Loſs [m].

[m] Non ob eam rem minus ad periculum ſocii pertinet, quod negligentia ejus periſſet, quod in pleriſque aliis induſtria ejus ſocietas aucta fuiſſet. Et hoc ex appellatione Imperator pronuntiavit. Et ideo ſi ſocius quædam negligenter in ſocietatem egiſſet, in pleriſque ſocietatem auxiſſet, non compenſatur compendium cum negligentia, ut Marcellus, libro ſexto Digeſtorum ſcripſit. *l.* 25 & 26. *ff. pro ſoc. l.* 23. §. 1. *eod.*

If this loſs were not occaſioned by ſome Fraud, or other unfair way, if it were ſmall, and the Profit were conſiderable, and wholly owing to the Induſtry of that Partner, would this Compenſation be unjuſt?

IX.

9. *The Partner is anſwerable for the deed of the perſon whom he has taken into Partnerſhip for his Share.*

If one of the Partners has taken another perſon into Partnerſhip with him for his particular Share, and has ſuffer'd him to meddle in any Affair of the Community, he ſhall be accountable for the deed of the ſaid perſon: and muſt make good to his Co-Partners the Loſs which this third perſon ſhall have occaſioned to the Community. For it is his fault that he has made a bad choice, and that he did it without the knowledge and conſent of the other Partners [n].

[n] Puto omni modo eum teneri ejus nomine quem ipſe ſolus admiſit, quia difficile eſt negare, culpæ ipſius admiſſum. *l.* 23. *ff. pro ſoc.*

X.

10. *Loſs and Gain occaſioned by the Under-Partner.*

If this Under-Partner happens to have been the Author of Loſs in one reſpect, and of Profit in another, the Loſs and Profit will not be compenſated together in this caſe [o]; no more than in the caſe of the Loſs occaſioned by the Partner who had procured Profit, as has been already mentioned in the eighth Article, becauſe the act of this Under-Partner is the act of the Partner himſelf.

[o] Idem quærit an commodum, quod propter admiſſum ſocium acceſſit compenſari cum damno quod culpa præbuit debeat, & ait compenſandum, quod non eſt verum. Nam & Marcellus, libro ſexto Digeſtorum ſcribit, ſi ſervus unius ex ſociis ſocietati à domino præpoſitus, negligenter verſatus ſit: dominum ſocietati, qui præpoſuerit, præſtaturum: nec compenſandum commodum quod per ſervum ſocietati acceſſit, cum damno: & ita divum Marcum pronuntiaſſe. Nec poſſe dici ſocio, abſtine commodo, quod per ſervum acceſſit, ſi damnum petis. *l.* 23. §. 1. *ff. pro ſoc. See the remark on the eighth Article.*

XI.

11. *The Expences of the Partners.*

The Partners recover out of the Joint Stock, all their neceſſary, uſeful, and reaſonable Expences which regard the Community, and which they have been at on account of the Common Affairs. Such as Travelling Expences, whatever they have laid out on the Carriage of Perſons or Goods, Workmens Wages, neceſſary Repairs, and other the like Charges. And if the Partner who has been at theſe Expences had borrowed the Money upon Intereſt, or that he having advanced the Money himſelf, his Co-Partners have been backward in reimburſing him, he will likewiſe recover the Intereſt of the Money from the time that he advanced it, although he has not made any Legal Demand of it. But the Partners do not recover the Expences which they have laid out unneceſſarily, or for their own pleaſure [p].

[p] Si quis ex ſociis propter ſocietatem profectus ſit, veluti ad merces emendas: eos dumtaxat ſumptus ſocietati imputabit, qui in eam penſi ſunt. Viatica igitur & meritoriorum, & ſtabulorum, jumentorum, carrulorum vecturas, vel ſui, vel ſarcinarum ſuarum gratiâ, vel mercium rectè imputabit. *l.* 52. §. 15. *ff. pro ſoc.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes: quam impenſam in eas fecero——me conſecuturum. *l.* 38. §. 1. *eod.* Si in communem rivum impenſa facta ſit, pro ſocio eſſe actionem, ad recuperandum ſumptum Caſſius ſcripſit. *l.* 52. §. 12. *eod.* Herennius Modeſtinus reſpondit, ob ſumptus nullâ re urgente, ſed voluptatis causâ factos, eum de quo quæritur actionem non habere. *l.* 27. *ff. de neg. geſt.* Si quid unus ex ſociis neceſſariò de ſuo impendit in communi negotio, judicio ſocietatis ſervabit, & uſuras, ſi fortè mutuatus ſub uſuris, dedit. Sed etſi ſuam pecuniam dedit, non ſine cauſâ dicetur, quod uſuras quoque percipere debeat. *l.* 67. §. 2. *ff. pro ſoc. l.* 52. §. 10. *eod. v. l.* 18. §. 3. *ff. fam. erciſc.*

XII. If

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If a Partner ſuffers any particular Loſs in doing the Buſineſs of the Community, as if he expoſes himſelf to any danger, and, for Inſtance, in a Journey which he makes for the common Affairs, he is robbed of his Cloaths, and of the Money which he carries with him for an Affair of the Community, or for the Expences of his Journey, or that he himſelf is wounded, or any one of his Servants; theſe kinds of loſſes will be made good to him out of the Joint Stock; for it was the Affair of the Community that brought them upon him; and nothing on his part gave occaſion to them [q].

[q] Quidam ſagariam negotiationem coierunt. Alter ex iis ad merces comparandas profectus, in latrones incidit, ſuamque pecuniam perdidit: ſervi ejus vulnerati ſunt, reſque proprias perdidit. Dicit Julianus, damnum eſſe commune: ideoque actione pro ſocio damni partem dimidiam agnoſcere debere tam pecuniæ, quam rerum cæterarum, quas ſecum non tuliſſet ſocius, niſi ad merces communi nomine comparandas proficiſceretur. Sed & ſi quid in medicos impenſum eſt, pro parte ſocium agnoſcere debere, rectiſſimè Julianus probat. Proinde, & ſi naufragio quid periit, cùm non alias merces quam navi ſolerent advehi, damnum ambo ſentient. Nam ſicuti lucrum, ita damnum quoque commune eſſe oportet, quod non culpâ ſocii contingit, *l.* 52. §. 4. *ff. pro ſoc.* Et quod medicis pro ſe datum eſt, recipere poteſt. *l.* 61. *eod.* See the Article that follows, and the laſt Article of the ſecond Section of Proxies.

The ſequel of this fifty ſecond Law, §. 4. ſhews, that it is to be underſtood of Money that the Partner takes along with him for the Expences of his Journey, or for the Affair of the Community: for if the Partner were robbed of his own Money which he carried with him for his own particular Affairs; the Loſs of it would fall upon himſelf; becauſe it was for his own Affairs that he carried it. And the occaſion of the conveniency which the Affair of the Community gave him to do his own Buſineſs, ought not to be prejudicial to his Co-Partners.

It is neceſſary to remark on the fourth Section of this fifty ſecond Law, and on the ſixty firſt Law quoted on this Article, that their diſpoſition corrects the hardſhip of the laſt Section of the ſixtieth Law, which ſays, that a Partner who is wounded on occaſion of an Affair belonging to the Community, bears the charges of his own Cure; and that for this reaſon, becauſe that alſo' he ſuffers this Expence on account of the Community, yet it is not for the Community that the Expence is laid out.

XIII.

13. Particular Gains or Loſſes on account of the Partnerſhip.

If it happens that a Partner by the occaſion of ſome Affair of the Community, reaps ſome Profit; as if the Affairs of the Community give him acceſs to a Perſon from whom he receives a Favour, or if they give him Light into ſome particular Affair in which the Community is no ways concerned, and he makes advantage of it: or if, on the contrary, the Partnerſhip is to him an occaſion of Loſs, as if the Care of the Common Affairs makes him neglect his own: or if any one out of ſpite to the Society forbears to do him the good Offices they were wont to do; theſe kinds of Gains, and Loſſes, will concern him alone [r]. Becauſe theſe Events have for their Cauſes, either the particular Conduct of the ſaid Partner, or his Merit, or his Negligence; or ſome other Fault, or ſome Chance: and becauſe the Conjuncture which links together theſe Cauſes with the Occaſion of the Affairs of the Community, is as it were an Accident, which does not affect the Community, but only the Partner to whom theſe things may have happened.

[r] Si propter ſocietatem eum hæredem quis inſtituere deſiſſet, aut legatum prætermiſiſſet, aut patrimonium ſuum negligentius adminiſtraſſet, non conſecuturum. Nam nec compendium quod propter ſocietatem ei contigiſſet, venîret in medium. Veluti, ſi propter ſocietatem hæres fuiſſet inſtitutus, aut quid ei donatum eſſet. *l.* 60. §. 1. *ff. pro ſocio.*

XIV.

14. Loſs of Things deſigned to be put into the Common Stock.

All the Loſſes of the Joint Stock are common to the Partners. But in order to judge whether the Money, or other Thing which is loſt, ought to be conſidered as part of the Common Stock, it is not enough that it was deſigned to be put into it, but we muſt conſider the circumſtances in which the things are when the Loſs happens. Thus, for Example, if the Money which a Partner was to furniſh for buying of Merchandize, periſhes in his own hands, before he has put it into the common Caſh, or laid it out on the common Concern, the Loſs is his own. But if this Money was to be carried a Journey, in order to buy ſomething for the Publick Account, and it happens to be robbed on the way, the Community bears the Loſs of it, altho' it was not yet laid out on their account; becauſe it was on the Community's account that it was carried, and the Partner's deſtination of it to the Publick Uſe was accompliſhed on his part. So that the Money was tranſported at the peril of the whole Community. And in other ſuch like Events, the Loſs falls, or falls not upon the Community, according to the ſtate of things. And we muſt diſcern whether the Partnerſhip is already formed; what is the deſtination of the Money, or other Thing, that is to be put into the Joint Stock; what ſteps have been taken towards putting it in, and the other circumſtances by which we may be able to judge if the Thing which periſhes ought to be conſidered as being already in the Common Stock, or as belonging ſtill to the Perſon who was to put it in [s].

[s] Item

[r] Item Celſus tractat, ſi pecuniam contuliſſemus ad mercem emendam & mea pecunia periſſet, cui perierit ea. Et ait, ſi poſt collationem evenit ut pecunia periret, quod non fieret niſi ſocietas coita eſſet, utrique perire. Ut putà ſi pecunia cùm peregrè portaretur ad mercem emendam, periit. Si verò ante collationem: poſteaquam eam deſtinaſſes, tunc perierit, nihil eo nomine conſequeris, inquit, quia non ſocietati periit. *l.* 58. §. 1. *ff. pro ſoc.*

XV.

15. *Diſcovery of a Partner.*

If one of the Partners has advanced Money, or has entred into ſome Engagement, againſt which the Community ought to indemnify him; every one of the Partners muſt reimburſe, or indemnify him in proportion to their Shares. And if he is not able to recover the Share of one of the Partners who is inſolvent, or cannot for other reaſons get Payment of him; this Share of the deficient Partner muſt be paid by all the other Partners. For it was on the Community's account that this Partner advanced the Money, or entred into the Engagement; And the Loſſes as well as the Gains ought to be ſhared[s].

[s] An, ſi non omnes ſocii ſolvendo ſint, quod à quibuſdam ſervari non poteſt à cæteris debeat ferre (ſocius.) Sed Proculus putat hoc ad cæterorum onus pertinere, quod ab aliquibus ſervari non poteſt. Rationeque defendi poſſe: quoniam ſocietas cùm contrahitur, tam lucri quàm damni communio initur. *l.* 67. *ff. pro ſoc.*

XVI.

16. *One Partner cannot engage the others, unleſs they have impower'd him ſo to do.*

Partners, even thoſe who are in Partnerſhip of their whole Eſtate and Goods, can alienate only their own Share of the Common Stock, and cannot by their deed bind the Community, except in ſo far as it has impowered them; or that the Engagement into which they are entred has been uſeful, or approved of by the other Partners[t]. But if one of the Partners is choſen for directing the Affairs of the Society, and is intruſted with the chief Care of them, or if he is ſet over any particular Commerce, or any other Affair, the Engagements which he enters into will be common to all the Partners, in ſo far as they concern the Buſineſs with which he is intruſted[x].

[t] Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint. *l.* 68. *ff. pro ſoc. l.* 17. *cod.* Si ſocius propriam pecuniam mutuam dedit, omnimodò creditam pecuniam facit: licèt cæteri diſſenſerint. Quod ſi communem numeravit, non aliàs creditam efficit, niſi cæteri quoque conſentiant. Quia ſuæ partis tantùm alienationem habuit. *l.* 16. *ff. de rib. cred. v. l. unic. C. Si communis res pign. data ſit.* Jure ſocietatis per ſocium ære alieno ſocius non obligatur, niſi in communem arcam pecuniæ verſæ ſunt. *l.* 82. *ff. pro ſoc.*

[x] Magiſtri ſocietatum pactum prodeſſe, & obeſſe conſtat. *l.* 14. *ff. de pact.* Cui præcipua cura rerum incumbit, & qui magis quàm cæteri diligentiam & ſollicitudinem rebus quibus præſunt, debeat, hi magiſtri appellantur. *l.* 57. *ff. de verb. ſignif.* *See the 357th and 358th Articles of the Ordinance of* Blois, *and theſe words of the Declaration of the ſeventh of* September 1581, *on the Regiſtring the Partnerſhips of Bankers*, that every one may know who the perſons are that are to be bound. See the fifth Article of the ſecond Section of Covenants, and likewiſe the Title of Partnerſhips in the Ordinance of 1673.

XVII.

17. *A Partner cannot take out his Capital out of the Common Stock.*

The Partners cannot take out of the Common Stock that which they have put into it, becauſe the whole Stock belongs to the Community, and cannot be diverted nor diminiſhed but with the conſent of all the Partners while the Partnerſhip laſts[y]. And it is no more lawful for a Partner to diminiſh the Common Stock, than it is to break off from the Partnerſhip unfairly and with a ſiniſter view[z].

[y] *See the fifth Article of this Section.*

[z] *See the third and the following Articles of the fifth Section.*

XVIII.

18. *Of him who propoſes a Partner, and anſwers for him.*

If one is received into a Partnerſhip by order and upon the recommendation of a third perſon who propoſed him to the Partners, and who anſwers for him; this third perſon will be accountable for the deed of the Partner whom he recommended, in the ſame manner as he would be for his own proper deed, if he himſelf were a Partner[a].

[a] Quoties juſſu alicujus, vel cum filio ejus, vel cum extraneo, ſocietas coitur: directo cum illius perſona agi poſſe, cujus perſona in contrahenda ſocietate ſpectata ſit. *l. ult. ff. pro ſoc.*

XIX.

19. *Benefit of Partners as to the payment of what they owe to one another.*

If a Partner happens to be indebted to his Fellow-Partners on account of the Partnerſhip, without being chargeable with any Miſdemeanour, or Knavery; and that he is not able to pay all he owes, without being reduced to great neceſſity; his Co-Partners are obliged not only out of Humanity, but alſo becauſe of the Brotherly Tie that is between Partners, to have compaſſion on him, whether their Partnerſhip be univerſal of all their Eſtate and Goods, or only particular of certain Things. And they ought not to exact rigorouſly all that he owes them, if he is not able to pay it without being reduced to great extremity. But they ought to make the Payment eaſie to him, whether by taking Lands or Houſes, Moveables and other Effects at a reaſonable Price, or dividing the Payments, granting Delays, or other Favours and Eaſes, according to the circumſtances. And whatever

conſtraints they ſhould make uſe of beyond theſe Limits, and contrary to this Temperament, they may be mitigated by the Intervention of the Judge, according to the quality of the Partners, the nature and quantity of the Debt, the Goods of the Debtor, thoſe of the Creditor, and other views of the ſtate of things[b].

[b] Verum eſt, quod Sabino videtur, etiamſi non univerſorum bonorum ſocii ſunt, ſed unius rei, attamen in id quod facere poſſunt, quodve dolo malo fecerint, quominus poſſint, condemnati oportere. Hoc enim ſummam rationem habet, cùm ſocietas jus quodammodò fraternitatis in ſe habeat. *l.* 63. *ff. pro ſoc.* In condemnatione perſonarum, quæ in id quod facere poſſunt damnantur, non totum quod habent extorquendum eſt, ſed & ipſarum ratio habenda eſt ne egeant. *l.* 173. *ff. de reg. jur.* See the ninth and the following Articles of the Title of Partnerſhips in the Ordinance of 1673.

XX.

20. *If the Partner renders himſelf unworthy of this benefit.*

This Humanity which Co-Partners owe to one another, is not due to him who has knaviſhly made away his Effects that he might avoid Payment, or who to prevent Sentence being given againſt him diſowned the Quality of a Partner, or has in any other manner of way rendred himſelf unworthy of ſuch a favour[c].

[c] Hoc quoque facere quis poſſe videtur, quod dolo fecit quominus poſſit. Nec enim æquum eſt dolum ſuum quemquam relevare. *l.* 63. §. 7. *ff. pro ſoc.* Non aliàs ſocius in id quod facere poteſt condemnatur, quàm ſi confitetur ſe ſocium fuiſſe. *l.* 67. §. *ult. eod.*

XXI.

21. *This benefit does not extend to the Sureties, nor to the Heirs, or Executors of the Partners.*

The Sureties of a Partner, thoſe who are bound to anſwer for what he does, his Heirs or Executors, and other Succeſſors cannot claim this benefit; becauſe their Obligation is quite of another nature; the Sureties, and thoſe who are accountable for the deed of a Partner, being bound, with this view of the Partner's proving Inſolvent, to make good whatever he ſhall happen to owe; and the Heirs, or Executors and Adminiſtrators, having accepted of the Succeſſion, cannot leſſen the Charges of it[d].

[d] Videndum eſt, an & fidejuſſori ſocii id præſtare debeat, an verò perſonale beneficium ſit, quod magis verum eſt. *l.* 63. §. 1. *ff. pro ſoc.* Patri autem, vel domino ſocii, ſi juſſu eorum ſocietas contracta ſit, non eſſe hanc exceptionem dandam, quia nec hæredi ſocii, cæteriſque ſucceſſoribus hoc præſtabitur. *d. l.* 63. §. 2.

XXII.

22. *One Partner can do nothing in the Affairs of the Community, againſt the will of the other Partners.*

The Partners cannot do any thing in the Common Concerns, but what belongs to their Charge, or is agreed to by all the Partners. And if one Partner attempts to make any change, every one of his Fellow-Partners may hinder him. For among perſons that have the ſame Right, thoſe who refuſe to admit of any Innovation are better founded to oppoſe it, than they are to innovate, who make the attempt. But if the change which a Co-Partner has made, has been made in the preſence of the others, and they ſuffered it, they cannot afterwards complain of it, even altho' it ſhould be to their diſadvantage[e].

[e] Sabinus, in re communi neminem dominorum jure facere quicquam invito altero poſſe. Unde manifeſtum eſt, prohibendi jus eſſe. In re enim pari, potiorem cauſam eſſe prohibentis, conſtat. Sed & ſi in communi prohiberi ſocius à ſocio, ne quid faciat, poteſt, ut tamen factum opus tollat, cogi non poteſt, ſi cùm prohibere poterat, hoc prætermiſit. *l.* 28. *comm. divid.* Sin autem facienti conſenſit, nec pro damno habet actionem. *d. l.*

SECT. V.

Of the Diſſolution of the Partnerſhip.

The CONTENTS.

1. *The Partnerſhip is diſſolved by the conſent of the Partners.*
2. *Each Partner may break off Partnerſhip when he pleaſes.*
3. *A fraudulent Renunciation of Partnerſhip does not free the perſon who ſo renounces from his Engagements.*
4. *An unſeaſonable Renunciation.*
5. *We are to judge of the unſeaſonableneſs of the Renunciation by the intereſt of the whole Community.*
6. *Profit after the Renunciation.*
7. *A fraudulent and unſeaſonable Renunciation is never permitted.*
8. *The Renunciation is of no uſe till it is known; but is in the mean while prejudicial to him who has made it.*
9. *The term of the Partnerſhip being expired, every one withdraws himſelf with impunity.*
10. *Partnerſhip is diſſolved by conſent.*
11. *The Partnerſhip ceaſes when the Thing for which it was contracted ceaſes to be.*
12. *If a Partner becomes incapable of contributing, either in Money, or Induſtry.*
13. *The Guardian of the Prodigal and Madman may break off the Partnerſhip.*

14. *The Death of a Partner.*
15. *The Civil Death of a Partner.*
16. *Sharing of Profits, Losses and Charges.*

I.

1. *The Partnership is diſſolved by the conſent of the Partners.*

AS Partnerſhip is formed by conſent, ſo is it in the ſame manner diſſolved, and it is free for the Partners to break off their Partnerſhip, and to give it over whenever they pleaſe, even before the end of the term which it was to have laſted, if they all agree to it [a].

[a] Diximus diſſenſu ſolvi ſocietatem; hoc ita eſt, ſi omnes diſſentiunt. *l.* 65. §. 3. *ff. pro ſocio.* Tamdiu ſocietas durat quamdiu conſenſus partium integer perſeverat. *l.* 5. *C. eod.*

II.

2. *Each Partner may break off Partnerſhip when he pleaſes.*

The Tie which is among Partners, being founded on the reciprocal Choice which they make of one another, and on the hopes of ſome Profit; it is free for every one of the Partners to break off Partnerſhip whenever he pleaſes; whether it be becauſe there is no good agreement among the Partners, or that ſome neceſſary Abſence, or other Affairs make the Partnerſhip burdenſome to him who is deſirous to leave it: or that he does not like a Commerce which the Partners are about to undertake; or that he does not find his account in the Partnerſhip, or for other reaſons. And he may give over Partnerſhip without the conſent of the other Partners, and that even before the time at which it was to have ceaſed, and altho' it have been agreed, that none of the Partners ſhould break off the Partnerſhip till the time agreed on were expired. Provided that the Partner does not break off with ſome ſiniſter view; as if he quits the Partnerſhip, that he may buy for himſelf alone what the whole Community had a mind to purchaſe, or that he may make ſome other Profit, to the prejudice of the other Partners, by his leaving them: or provided he does not quit after ſome Buſineſs is begun, or at an unſeaſonable time, which may occaſion ſome Loſs or Damage to the Community [b].

[b] Voluntate diſtrahitur ſocietas renuntiatione. *l.* 63. *in fine ff. pro ſoc.* Sed & ſi convenit ne intra certum tempus, ſocietate abeatur, & ante tempus renuntietur, poſt rationem habere renuntiatio, nec tenebitur pro ſocio, qui ideo renuntiavit, quia conditio quædam qua ſocietas erat coita, ei non præſtatur. Aut quid, ſi ita injurioſus, & damnoſus ſocius ſit, ut non expediat eum pati: vel quòd ea re frui non liceat, cujus gratiâ negotiatio ſuſcepta ſit. Idemque erit dicendum, ſi ſocius renuntiaverit ſocietati, qui reipublicæ causâ diu & invitus ſit abſuturus. *l.* 14. *l.* 15. *&* 16. *eod.* Item ſi ſocietatem ineamus ad aliquam rem emendam, deinde ſolus volueris eam emere: ideoque renuntiaveris ſocietati, ut ſolus emeres, teneberis quanti intereſt mea. Sed ſi ideò renuntiaveris, quia emptio tibi diſplicebat: non teneberis, quamvis ego emero, quia hîc nulla fraus eſt. *l.* 65. §. 4. *eod.* Niſi renuntiatio ex neceſſitate quadam facta ſit. *d. l.* 65. §. 6. Tamdiu ſocietas durat, quamdiu conſenſus partium integer perſeverat. *l.* 5. *C. eod.* §. 4. *inſt. eod.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l.* 14. *ff. eod.* See the following Articles.

III.

3. *A fraudulent Renunciation of Partnerſhip does not free the perſon who ſo renounces from his Engagements.*

The Partner who breaks off Partnerſhip with an unfair deſign, diſengages his Co-Partners from all Engagements to him, but does not diſengage himſelf from his Obligations to them. Thus, he who ſhould withdraw himſelf from an Univerſal Partnerſhip of their whole Eſtate, preſent and to come, that he alone might inherit a Succeſſion fallen to him, would bear the whole Loſs, if the Succeſſion which he alone inherits ſhould prove burdenſome; but he would not deprive his Co-Partners of the Profit, if the Succeſſion ſhould prove advantageous, and they have a mind to ſhare in it. And in general, if a Partner breaks off at an unſeaſonable time, which occaſions the loſs of ſome Profit to the Community, which otherwiſe it might have made, or which cauſes any other Damage, he will be bound to make it good. As if he quits before the time to which the Partnerſhip was to have laſted, abandoning a Buſineſs with which he was charged. And he who breaks off the Partnerſhip in this manner, ſhall have no Share in the Profits which ſhall happen to be made afterwards; but he ſhall bear his part of what Loſſes ſhall afterwards happen, in the ſame manner as he would have been bound to do if he had not quitted the Partnerſhip [c].

[c] Diximus diſſenſu ſolvi ſocietatem: hoc ita eſt, ſi omnes diſſentiunt. Quid ergo ſi unus renuntiet? Caſſius ſcripſit, eum qui renuntiavit ſocietati, à ſe quidem liberare ſocios ſuos, ſe autem ab illis non liberare. Quod utique obſervandum eſt, ſi dolo malo renuntiatio facta ſit. Veluti ſi cum omnium bonorum ſocietatem iniſſemus, deinde cùm obveniſſet uni hæreditas, propter hoc renuntiavit. Ideoque ſi quidem damnum attulerit hæreditas, hoc ad eum qui renuntiavit pertinebit: commodum autem communicare cogetur actione pro ſocio. *l.* 65. §. 3. *ff. pro ſoc.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l.* 14. *eod.* Item qui ſocietatem in tempus coit, eam ante tempus renuntiando, ſocium à ſe, non ſe à ſocio liberat. Itaque ſi quid compendii poſtea factum erit, ejus partem non fert, at ſi diſpendium, æquè præſtabit portionem. *l.* 65. §. 6. *eod.* See the following Articles.

IV.

4. *An unſeaſonable Renunciation.*

The Partner who renounces the partnerſhip at an unſeaſonable time, not only

only does not free himſelf from his Engagements to his Co-Partners, but is anſwerable for all the Loſſes and Damages which his unſeaſonable Renunciation may have cauſed to the Society. Thus, if a Partner quits whilſt he is on a Journey, or engaged in any other Buſineſs for the Community; or if his quitting obliges the Partners to ſell any Merchandize before the time; he ſhall be bound to make good the Loſſes and Damages which his leaving the Partnerſhip under theſe circumſtances ſhall have occaſioned [d].

[d] Labeo poſteriorum libris ſcripſit, ſi renuntiaverit ſocietati unus ex ſociis, eo tempore, quo interfuit ſocii non dirimi ſocietatem, committere eum in pro ſocio actione. Nam ſi emimus mancipia inita ſocietate, deinde renunties mihi eo tempore, quo vendere mancipia non expedit: hoc caſu, quia deteriorem cauſam meam facis, teneri te pro ſocio judicio. *l.* 65. §. 5. *ff. pro ſocio.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l.* 14. *eod.*

V.

5. We are to judge of the unſeaſonableneſs of the Renunciation, by the intereſt of the whole Community.

In order to judge whether the Partner withdraws himſelf at an unſeaſonable time, it is neceſſary to conſider what is moſt profitable for the whole Community, and not for any one of the Partners in particular [e].

[e] Proculus hoc ita verum eſſe, ſi ſocietatis non interſit dirimi ſocietatem. Semper enim, non id quod privatim intereſt unius ex ſociis ſervari ſolet, ſed quod ſocietati expedit, *l.* 65. §. 5. *ff. pro ſoc.*

VI.

6. Profit after the Renunciation.

If after a fair and lawful Renunciation, the Partner who has quitted the Partnerſhip, begins anew to carry on any Commerce from which he reaps ſome Profit, he will not be bound to ſhare it with his former Partners [f].

[f] Quod ſi quid poſt renuntiationem acquiſierit, non erit communicandum, quia nec dolus admiſſus eſt in eo. *l.* 65. §. 3. *ff. pro ſoc.*

VII.

7. A fraudulent and unſeaſonable Renunciation is never permitted.

A fraudulent and unſeaſonable Renunciation, is never permitted, whether the Contract of Partnerſhip has provided againſt it, or not. For this would be repugnant to Fidelity, which being eſſential to the Contract of Partnerſhip, is always underſtood to be comprehended in it [g].

[g] In ſocietate coëunda nihil attinet de renuntiatione cavere: quia ipſo jure, ſocietatis intempeſtiva renuntiatio, in æſtimationem venit. *l.* 17. §. 2. *ff. pro ſocio.*

VIII.

8. The Renunciation is of no uſe

The Renunciation is of no uſe to the perſon who has made it, till it be made known to the other Partners: and if in the Interval after the Renunciation, and before it is known to the other Partners, he who has renounced makes any Profit, he will be obliged to ſhare it with his Co-Partners; but if he ſuffers any Loſs, it will all fall upon himſelf. And if in this ſpace of time the other Partners reap any Gain, he will have no ſhare in it: and if they ſuffer any Loſs, he muſt bear his part of it [h].

till it is known; but is in the mean while prejudicial to him who has made it.

[h] Si abſenti renuntiata ſocietas ſit, quoad is ſcierit, quod is acquiſivit qui renuntiavit, in commune rediGi. Detrimentum autem ſolius ejus eſſe, qui renuntiaverit. Sed quod abſens acquiſiit, ad ſolum eum pertinere: detrimentum ab eo factum commune eſſe. *l.* 17. §. 1. *ff. pro ſoc.*

IX.

9. The term of the Partnerſhip being expired, every one withdraws himſelf with liberty.

The time which the Partnerſhip was to laſt being expired, each Partner may withdraw himſelf without the imputation of having quitted fraudulently, or unſeaſonably [i]. Unleſs his withdrawing himſelf ſhould chance to prejudice ſome Affair which were not then quite finiſhed.

[i] Quod ſi tempus finitum eſt, liberum eſt recedere, quia ſine dolo malo id fiat. *l.* 65. §. 6. *in f. ff. pro ſoc.*

X.

10. Partnerſhip is diſſolved by conſent.

Partnerſhip, whether Univerſal or Particular, may be diſſolved in the ſame manner as it is contracted, as well among perſons abſent, as preſent, not only by the expreſs conſent of all the Partners, but tacitly, by acts which ſhew that they break off their Partnerſhip. As if every one of them drives ſeparately the ſame Trade and Buſineſs which they had before carried on in company together: if the Commerce in which they dealt happens to be prohibited: if they engage in a Law-Suit, with which it is impoſſible the Partnerſhip can ſubſiſt; or if they ſhew by any other ſigns and tokens that they break off their Partnerſhip [k].

[k] Itaque cùm ſeparatim ſocii agere cœperint, & unuſquiſque eorum ſibi negotietur: ſine dubio jus ſocietatis diſſolvitur. *l.* 64. *ff. pro ſoc.* Hoc ipſo quòd judicium ideo dictatum eſt, ut ſocietas diſtrahatur, renuntiatam ſocietatem, ſive totorum bonorum, ſive unius rei ſocietas coita ſit. *l.* 65. *eod.* Renuntiare ſocietati etiam per alios poſſumus, & ideò dictum eſt procuratorem quoque poſſe renuntiare ſocietati. *d. l.* 65. §. 7. See the ſixth Article of the ſecond Section.

XI.

11. The Partnerſhip ceaſes when the Thing for which it

If the Partnerſhip was only for a certain Commerce, or ſome particular Affair, it is at an end whenever that Commerce, or that Affair is finiſhed. And it

was contracted ceases to be.

it would be the same thing if the Partnership had relation to a Thing that happens to perish, or of which the Commerce ceases to be free; as if the Partnership was for the Farm of some Lands taken by the Enemy in a time of War[m].

[m] Item si alicujus rei societas sit, & finis negotio impositus, finitur societas. *l.* 65. §. 10. *ff. pro soc.* Neque enim ejus rei quæ jam nulla sit, quisquam socius est: neque ejus quæ consecrata publicatave sit. *l.* 63. §. *ult. eod.*

XII.

12. *If a Partner becomes incapable of contributing, either in Money, or Industry.*

If one of the Partners is reduced to such a condition, that he cannot contribute to the Community what he is obliged to furnish, whether in Money, or in Labour; the other Partners may exclude him from the Society; as if his Goods are seized on, if he has relinquished them to his Creditors, if he labours under any Infirmity, or any other inconvenience, that hinders him from acting; if he is excluded from the Management of his Concerns, as being a Prodigal, if he falls into a Frenzy. For in all these cases, the Partners may justly exclude from the Partnership, him who ceasing to contribute to it, ceases to have a right to it[n]. But this is to be understood only for the time to come, and the Partner who may chance to be excluded for any one of these causes, ought to lose nothing of the Profits which may come to his Share in proportion to the Contributions which he had already made.

[n] Dissociamur—— egestate. *l.* 4. *in f. pro socio.* Item bonis a creditoribus venditis unius socii distrahi societatem, Labeo ait. *l.* 65. §. 1. Item si quis ex sociis mole debiti prægravatus, bonis suis cesserit, & ideo propter publica, aut privata debita substantia ejus veneat, solvitur societas. Sed hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas, §. 8. *inst. de societ.*

We have not put down in this Article, what is said in the texts here quoted, that the Partnership is broke off by the Poverty and Disorder in the Affairs of one of the Partners. For according to our Usage, Covenants are not thus annulled, without the deed of the Parties, and whilst the Partners suffer him to continue in the Partnership whose goods have been seized on, and even sold, he is still considered as a Partner, and has his Share in the Profits, till he is excluded by the other Partners; which they cannot do without reserving to him the Rights which he has acquired, or which he cannot be deprived of by the said exclusion.

XIII.

13. *The Guardian of the Prodigal, and Madman may break off the Partnership.*

As the Partners may break off Partnership with a Prodigal, and a Madman; so likewise the Guardian of the Prodigal, and of the Madman, may renounce the Partnership in their names[o].

[o] Sancimus veterum dubitatione remota, licentiam habere furiosi curatorem, dissolvere, si maluerit, societatem furiosi, & sociis licere ei renuntiare. *l. ult. C. pro soc.*

XIV.

Since the Partnership cannot subsist, but by the Union of the Persons who have reciprocally chosen one another, and that it is sometimes supported by the Industry of one Person alone; the death of one of the Partners naturally dissolves the Partnership with regard to them all. Unless it be that they have agreed that it shall subsist among the Survivors: or that, without any such previous Agreement, the Survivors are willing to continue together in Partnership[p].

14. *The death of a Partner.*

[p] Morte unius societas dissolvitur, etsi consensu omnium coita sit, plures verò supersint, nisi in coeunda societate aliter convenerit. *l.* 65. §. 9. *ff. pro soc.*

Quid enim si is mortuus sit, propter cujus operam maximè societas coita sit? aut sine quo societas administrari non possit? *l.* 59. *eod.* See the last Article of the following Section.

Planè si hi qui sociis hæredes extiterint, animum inierint societatis in ea hæreditate novo consensu, quod postea gesserint, efficitur ut in pro socio actionem deducatur. *l.* 37. *ff. pro soc.*

XV.

The Civil Death of a Partner has the same effect with regard to the Partnership, as the Natural Death. For the person being out of a condition of acting, and his Goods being confiscated, he is with regard to the Partnership as if he were really dead[q].

15. *The Civil Death of a Partner.*

[q] Publicatione quoque distrahi societatem diximus, quod videtur spectare ad universorum bonorum publicationem, si socii bona publicantur. Nam cùm in ejus locum alius succedat, pro mortuo habetur. *l.* 65. §. 12. *ff. pro soc.* §. 7. *inst. eod.* Maxima, aut media capitis deminutione. *l.* 63. §. *ult. eod.*

XVI.

The Partnership being ended, the Partners reciprocally reimburse themselves of what they have advanced, and share their Profits; and if there remain any Debts to be paid off by the Society, any Expences to be laid out, and any future Profits or Losses, they take their respective Sureties for all these consequences[r].

16. *Sharing of Profits, Losses, and Charges.*

[r] *See before the eleventh Article of the fourth Section.* Si societas dirimatur, cautiones interponendæ sunt. *l.* 27. *ff. pro soc.* Pro socio arbiter prospicere debet cautionibus in furto damno, vel lucro pendente ex ea societate. *l.* 38. *eod.* Nam etsi distracta esset societas, nihilominus divisio rerum superest. *l.* 65. §. 13. *eod.*

SECT. VI.

Of the effect of the Partnerſhip, with regard to the Heirs and Executors of the Partners.

The CONTENTS.

1. *Rights and Engagements of the Heir, or Executor of a Partner.*
2. *In what manner the Heir, or Executor ſhares the Profits, and bears the Loſs.*
3. *The Heir, or Executor, bound to finiſh, what the deceaſed was under obligation to do.*
4. *The Heir, or Executor, bound for the Faults of the deceaſed.*
5. *The Partnerſhip is not interrupted by the death of a Partner, if the ſaid death is not known.*
6. *Of Partnerſhip in a Farm, with reſpect to the Heirs, or Executors of the Partners.*

I.

1. Rights and Engagements of the Heir or Executor of a Partner.

ALtho' the Heir, or Executor enters into all the Rights of the perſon to whom he ſucceeds[a], yet the Heir, or Executor of a Partner, not being a Partner himſelf, has no right to intermeddle in the Affairs of the Community, in the quality of a Partner. Thus he who ſucceeds to a Partner who was Book-Keeper to the Company, or who was imployed in buying Things, or doing other Buſineſs for the ſervice of the Company, cannot take upon him any of theſe Functions. But altho' this Heir, or Executor, has not the quality of Partner, yet he is with reſpect to the other Partners, what thoſe Perſons are to one another, who have any thing in common together without a Covenant. And this gives him a right to enquire into what paſſes in the Community, and to call the other Partners to account for the preſervation of his own Intereſt. And in fine, he enters into the Rights and Engagements which are annexed to the bare quality of Heir, or Executor, as ſhall be explained by the following Rules[b].

[a] Hæredem ejuſdem poteſtatis, juriſque eſſe, cujus fuit defunctus, conſtat. *l.* 59. *ff. de reg. jur. l.* 9. §. 12. *ff. de bon. inſt.* Nihil eſt aliud hæreditas, quam ſucceſſio in univerſum jus, quod defunctus habuit, *l.* 24. *ff. de verb. ſign. l.* 62. *ff. de reg. jur.*

[b] Licèt enim (hæres) ſocius non ſit, attamen emolumenti ſucceſſor eſt. *l.* 63. §. 8. *ff. pro ſocio.* See the third Article of the ſecond Section.

II.

2. In what manner the Heir, or Executor ſhares the Profits, and bears the Loſſes.

The Heir or Executor of the Partner partakes of the Profits which would have fallen to the perſon to whom he ſucceeds. Whether it be that he had already acquired them by any Commerce or Affair that was ended, or that they were to ariſe from ſome Affairs not yet finiſhed: And he ought likewiſe to bear his Share of the Charges and Loſſes accruing from the ſame Affairs[c].

[c] Nec hæres ſocii ſuccedit, ſed quod ex re communi poſtea quæſitum eſt, item dolus & culpa in eo quod ex ante geſto pendet, tam ab hærede, quam hæredi præſtandum eſt. *l.* 65. §. 9. *ff. pro ſoc. l.* 3. *C. eod.* In hæredem quoque ſocii, pro ſocio actio competit, quamvis hæres ſocius non ſit. Licèt enim ſocius non ſit, attamen emolumenti ſucceſſor eſt. *l.* 63. §. 8. *ff. pro ſoc.* Si in rem certam emendam, conducendamve coita ſit ſocietas: tunc, etiam poſt alicujus mortem, quidquid lucri, detrimentive factum ſit, commune eſſe Labeo ait. *l.* 65. §. 2. *eod.*

III.

3. The Heir, or Executor, bound to finiſh, what the deceaſed was under obligation to do.

Altho' the Heir, or Executor, be not a Partner, yet he is nevertheleſs obliged to make good the Engagements of the deceaſed that paſs to him: and he ought not only to pay in the Contributions, but alſo to ſatisfy what other demands may be made on account of the Partnerſhip. Thus, if the deceaſed had in his hands any Affair, or any Buſineſs of which the Management might be tranſmitted to his Heir, or Executor, he ought to finiſh what remains to be done, with the ſame Care, and the ſame Fidelity, that the deceaſed himſelf would have been obliged to[d].

[d] Hæres ſocii, quamvis ſocius non eſt, tamen ea quæ per defunctum inchoata ſunt, per hæredem explicari debent, in quibus dolus ejus admitti poteſt. *l.* 40. *ff. pro ſoc.* Si vivo Titio, negotia ejus adminiſtrare cœpi, intermittere mortuo eo, non debeo. Nova tamen inchoare neceſſe mihi non eſt. Vetera explicare, ac confervare neceſſarium eſt, ut accidit, cùm alter ex ſociis mortuus eſt. Nam quæcunque prioris negotii explicandi cauſa gerentur, nihilum refert, quo tempore conſummentur, ſed quo tempore inchoarentur. *l.* 21. §. 2. *ff. de neg. geſt.* In hæredem ſocii proponitur actio, ut bonam fidem præſtet. *l.* 35. *ff. pro ſoc.*

IV.

4. The Heir, or Executor, bound for the Faults of the deceaſed.

The Heir, or Executor of the Partner is likewiſe bound to the Community for the act of the deceaſed, and for all the Loſs or Damage which the deceaſed may have occaſioned, either by Knavery, or by Faults which he was to anſwer for.

[e] In hæredem ſocii proponitur actio ut bonam fidem præſtet. Et acti etiam culpam, quam is præſtiterit

præſtaret, in cujus locum ſucceſſit, licet ſocius non ſit. *l.* 35. *in fine & 36. ff. pro ſoc.*

V.

5. The Partnerſhip is not interrupted by the death of a Partner, if the ſaid death is not known.

If the death of a Partner happens before they have begun the Buſineſs for which they entred into Partnerſhip; and the ſaid Death is known to the other Partners, the Partnerſhip is at an end, at leaſt with reſpect to the perſon deceaſed, and his Heir, or Executor; and it is free for the Partners to exclude the ſaid Heir, or Executor, out of the Partnerſhip, as it is for him not to engage in it. But if the ſaid Death being unknown to the other Partners, they begin the Buſineſs, the Heir, or Executor of the deceaſed ſhall have his Share in it, and ſhall ſucceed to the Charges of it, and to the Profits, or Loſſes, which ſhall ariſe from it[f]. For the Contract of Partnerſhip has had this effect, that the Ignorance of the death of the Partner, and the upright Intention of the Partners, has made the Engagement of the deceaſed, upon which they had treated, to ſubſiſt; and has formed out of it a new Engagement, which is reciprocal between the ſurviving Partners and the Heir, or Executor, of the deceaſed Partner.

[f] Item ſi alicujus rei ſocietas ſit, & finis negotio impoſitus, finitur ſocietas. Quod ſi integris omnibus manentibus, alter deceſſerit: deinde tunc ſequatur res de qua ſocietatem coïerunt, tunc eadem diſtinctione utemur, qua in mandato, ut ſiquidem ignota fuerit mors alterius, valeat ſocietas: ſi nota, non valeat. *l.* 65 §. 10. *ff. pro ſoc.* See the ſeventh Article of the fourth Section of Proxies.

VI.

6. Of Partnerſhip in a Farm, with reſpect to the Heirs, or Executors of the Partners.

All that has been ſaid in divers places of this Title concerning the Diſſolution of Partnerſhip, whether by the death of one of the Partners, or by the will and conſent of them all: and touching the manner in which the Engagements of the Partners deſcend, or do not deſcend, to their Heirs, and Executors, is not to be underſtood indifferently of Partnerſhips in which other perſons are intereſted; ſuch as the Partnerſhips of Farmers, or Undertakers of any Work. For in theſe kinds of Partnerſhips we muſt diſtinguiſh two Engagements; one of the Partners among themſelves, and the other of all the Partners to the Perſon of whom they take either a Farm, or any Thing to do. And ſince this laſt Engagement deſcends to the Heirs, or Executors of the Partners [g]; it is a conſequence of it, that they being under a common Engagement to others, they be mutually engaged to one another. And if this Tie does not make them Partners, as thoſe are who have voluntarily choſen one another; yet it has this effect; that, for Example, the Executor, or Adminiſtrator of a Farmer being bound to perform the conditions of the Leaſe to the Leſſor, and having the Right to manage the Farm, or to cauſe it to be managed for his behoof, this Right, and this Engagement diſtinguiſhes his condition from that of the Executors or Adminiſtrators of other kinds of Partners, in that he cannot be excluded from the Farm, even altho' the Partners had not begun to manage it before the death of the Partner to whom he ſucceeds [h].

[g] *See the tenth Article of the firſt Section of Letting and Hiring.*

[h] In ſocietate vectigalium nihilominus manet ſocietas, & poſt mortem alicujus. *l.* 59. *ff. pro ſocio.* Licet (hæres) ſocius non ſit, attamen emolumenti ſucceſſor eſt. Et circa ſocietates vectigalium, cæterorumque idem obſervamus, ut hæres ſocius non ſit, niſi fuerit adſcitus: veruntamen omne emolumentum ſocietatis ad eum pertineat, ſimili modo & damnum agnoſcat, quod contingit, ſive adhuc vivo ſocio vectigalis, ſive poſtea. Quod non ſimiliter in voluntaria ſocietate obſervatur. *l.* 63. §. 8. *eod.*

TITLE IX.

Of DOWRIES, *or Marriage Portions.*

Two Engagements in Marriage.

MArriage makes two ſorts of Engagements; one whereof is formed by the Divine Inſtitution of the Sacrament, which unites the Huſband and the Wife; the other is made by the Contract of Marriage, which contains the Covenant relating to their Goods [a].

[a] *Theſe two ſorts of Engagements are expreſſed, and diſtinguiſhed in the Marriage of* Tobias.

Raguel called his daughter *Sarah*, and ſhe came to her father, and he took her by the hand, and gave her to be wife to *Tobias*, ſaying, Behold, take her after the Law of *Moſes*, and lead her away to thy father: and he bleſſed them; And called *Edna* his wife, and took paper, and did write an inſtrument of *Covenants*, and ſealed it. *Tobit.* vii. 13, 14.

The Engagement of the perſons.

The Engagement of Marriage, in what relates to the Union of the Perſons, the manner in which it ought to be celebrated, the cauſes which render it indiſſolvable except in ſome ſingular caſes, and other the like matters, are not within the Deſign of this Book, as has

has been obſerved in the Plan of Matters in the fourteenth Chapter of the Treatiſe of Laws.

The Covenants concerning the Goods.

As to the Covenants about the Goods, ſome of them come within the Deſign of this Book, and others not: and in order to diſtinguiſh them, we muſt divide them into three ſorts. The firſt is of thoſe Covenants which are not agreeable to the *Roman* Law, altho' they are in uſe with us in *France*, whether it be throughout the whole Kingdom, ſuch as the Renunciations made by Daughters of Succeſſions that may happen to fall to them[b]; Inſtitutions of Heirs or Executors by way of Contract, and which are irrevocable[c]; or which are peculiar only to ſome Provinces, ſuch as the Community of Goods between Huſband and Wife. The ſecond is of thoſe which are conformable to the *Roman* Law, but which are only receiv'd in ſome Provinces, ſuch as the Augmentation of Dowries after Marriage. And the third ſort is of ſuch Covenants as are agreeable both to the *Roman* Law, and to the general Uſage of this Kingdom, ſuch as thoſe which concern the Dowry, or the Goods which the Wife may have beſides her Dowry; which the *Romans* called by the name of *Paraphernalia*.

[b] *L. 3. C. de collat.*

[c] *L. 15. C. de pact. l. 5. C. de pact. conv.*

It is only this laſt ſort of Covenants, which being both agreeable to the *Roman* Law, and in uſe with us, that is of the number of the Matters which come within the Deſign of this Work. But as to the Community of Goods between Man and Wife, Jointures, the Augmentation of Marriage Portions, and other matters which are peculiar to ſome Cuſtoms, or to ſome Provinces, they have their proper Rules in the Cuſtoms of the Places where they are received, and which we are not to meddle with here. We ſhall only obſerve, that theſe Matters, as alſo thoſe of the Inſtitutions of Heirs or Executors by way of Contract, and of the Renunciations of Daughters, have many Rules taken out of the *Roman* Law, which will be found in this Book in their proper places, in the Matters to which they have relation. Thus many Rules of Partnerſhip, and of other Contracts, may be rightly applied to the Community of Goods between Man and Wife, wherever it is in uſe: and many of the Rules of Succeſſions, as alſo of Covenants, may be applied to the Contracts of Marriage which ſettle Inheritances as by Will.

The ſubject matters of this Title.

There remains then, for the ſubject matter of this Title, only the Rules of the *Roman* Law, which concern the Dowry, or Marriage Portion, and the Goods which the Wife has beſides her Portion; among which we ſhall only ſet down thoſe Rules which are of common uſe. But we ſhall not inſert among them ſome particular Cuſtoms of the *Roman* Law, altho' obſerved in ſome Countries; as, for Inſtance, the Privilege of the Dowry before the Creditors of the Huſband who were prior to the Contract of Marriage.

The foundation of the Rules of Dowries.

The Rules of Dowries have their foundation in the Natural Principles of the Band of Matrimony, by which the Huſband and Wife make one Body, of which the Huſband is the Head. For it is an effect of this Union, that the Wife putting her ſelf under the Power of the Huſband, ſubjects likewiſe to his Dominion her Goods, and which go to the Uſe of the Society, or Partnerſhip, which they form together[d].

[d] Bonum erat mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari. *l. 8. C. de pact. conv.*

Diſtinction of the Goods which are part of the Dowry, and thoſe which are called Paraphernal Goods.

According to this Principle, it would be natural for all the Goods of the Wife to be comprehended in her Dowry, and that ſhe ſhould have none but what enter into this Partnerſhip, and of which the Huſband, who bears the Charges of it, ſhould have the full enjoyment. But Cuſtom has determined, that the Huſband ſhall have for his Wife's Portion only the Goods which are ſpecified to be given on this account; and if the Wife does not give as a Marriage Portion all her Goods preſent and to come, but only certain Goods, the Dowry will be limited to the Goods which are expreſly given under this Name; and the other Goods, which are not ſpecified, will be reckoned Paraphernal Goods.

Atacit condition in Contracts of Marriage.

We muſt obſerve this difference between the Covenants in a Contract of Marriage, and thoſe of other Contracts; that whereas all other Covenants bind the contracting Parties irrevocably, and from the moment that the Contract is formed; the Covenants of the Contract of Marriage are in ſuſpenſe till the Marriage is ſolemnized; and imply this condition, that they ſhall not take place, but in caſe the Marriage be accompliſhed, and that they ſhall remain void, if it is not accompliſhed[e]. But when the Celebration of the Marriage follows

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the Contract, it gives the Contract a retroactive effect, and it has its effect from the day of its date. Thus, the Mortgage for the Security of the Dowry is acquired from the date of the Contract, and before the celebration of the Marriage.

[e] Omnis dotis promiſſio, futuri matrimonii, tacitam conditionem accipit. *l.* 68. *ff. de jur. dot. l.* 10. §. 4. *eod.*

Remarks on the Privileges of Dowries.

Some may perhaps take notice and find fault in reading this Title, that nothing is ſaid in it of ſome Maxims of the *Roman* Law in favour of Dowries; ſuch as thoſe which ſay in general, that the Cauſes relating to Dowries are favourable, and that it is for the Publick Intereſt that Dowries be preſerved[f]; that in doubtful Caſes Judgment ought to be given for the Dowry[g]: and in particular thoſe Maxims which give to Dowries certain Privileges, ſuch as the Privilege among Creditors, and the Preference even to thoſe that have prior Mortgages[h]; and that Privilege which, in favour of Dowries, validated the Obligation of a Woman who had bound her ſelf for the Dowry of another[i], altho' by the *Roman* Law Women could not be bound for other perſons. But as to theſe Privileges, that of the Preference of the Dowry to the Huſband's Creditors, even to thoſe that have prior Mortgages, is received only in ſome Places, and every where elſe it is looked upon as an Injuſtice. And the Law which validates the Obligation of a Woman for another's Dowry, is uſeleſs after the Edict of the Month of *Auguſt*, 1606, which permits Women to bind themſelves for others, as has been remarked on the firſt Article of the firſt Section of the Title of Perſons.

[f] Dotium cauſa ſemper & ubique præcipua eſt. Nam & publicè intereſt dotes mulieribus conſervari. *l.* 1. *ff. ſol. matr. l.* 2. *ff. de jur. dot.*

[g] In ambiguis pro dotibus reſpondere melius eſt, *l.* 70. *ff. de jur. dot. l.* 85. *ff. de reg. jur.*

Scimus favore dotium, & antiquos juris conditores ſeveritatem legis ſæpius mollire. *l. ult. C. de Senat. Vell.*

[h] *L.* 18. §. 1. *ff. de rebus auct. jud. poſſid. l. ult. C. qui potiores.*

[i] *L. ult. C. ad Senatus Vell.*

And as for theſe General Maxims, that the Cauſes of Dowries are favourable, that the Publick is intereſted in their preſervation, and that in doubtful Caſes Judgment ought to be given in favour of the Dowry; ſince they do not terminate in any thing particular, except to ſhew that they are Privileges of the *Roman* Law, and ſeeing they may be very readily miſapplied, it was not thought proper to ſet them down here as Rules.

It is likewiſe neceſſary to obſerve, that in the *Roman* Law there are other Regulations in relation to the matter of Dowries, which, altho' they be founded on Natural Equity, yet we have not thought fit to inſert under this Title. Thus, we have not put down this Rule, that the Huſband being ſued by the Wife for the Reſtitution of her Marriage Portion, or for other matters, or the Wife ſued by the Huſband for what ſhe may be indebted to him; they ought not to be conſtrained with the ſame ſeverity, as Debtors for other cauſes, and cannot be obliged to pay more than what they are able to do, without being reduced to Want[l]. And the reaſon why we have not made an Article for this Rule, is, that in the *Roman* Law it was a conſequence of Divorce which was allowed among the *Romans*, and which is unlawful; and that according to our Uſage the Wife having no Action againſt her Huſband, nor the Huſband againſt the Wife, except in the caſe of a Separation from Bed and Board, or a Separation only as to their Goods, this Rule has no relation either to the one or other of theſe two caſes; And that in fine, in all the caſes where Equity requires that the rigour of Proſecutions at the inſtance of Creditors ſhould be mitigated, it is cuſtomary with us to leave the mitigation of this ſeverity to the diſcretion of the Judge, according to the circumſtances. As to which it will be proper to ſee the twentieth Article of the fourth Section of Partnerſhip.

[l] Non tantùm dotis nomine maritus in quantum facere poſſit condemnatur, ſed ex aliis quoque contractibus, ab uxore judicio conventus, in quantum facere poteſt condemnandus eſt, ex Divi Pii conſtitutione. Quod & in perſona mulieris, æqua lance, ſervari æquitatis ſuggerit ratio. *l.* 20. *ff. de re jud.* §. 37. *inſt. de act.* Reverentiæ debitum maritali. *l. un.* §. 7. *C. de rei ux. act. l.* 14. *in f. ff. ſol. matr.* Maritum, in id quod facere poteſt, condemnari exploratum eſt. *l.* 12. *ff. ſol. matr.* In condemnatione perſonarum, quæ in id quod facere poſſunt, damnantur, non totum quod habent extorquendum eſt: ſed & ipſarum ratio habenda eſt, ne egeant. *l.* 173. *ff. de reg. jur.*

We have alſo omitted to ſet down under this Title that other Rule of the *Roman* Law, and which is likewiſe founded on a Principle of Equity, that the Fruits of the Dowry which are reaped the laſt year of the Marriage, ought to be divided between the Huſband and the Wife, in proportion to the time that the Marriage has laſted

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this laſt year [m]. By this Rule, if a Marriage had been contracted the firſt of *July*, before Harveſt, and had been diſſolved by a Divorce the firſt of *November*; the Huſband, who had gathered all the Fruits of the year, for four Months only that the Marriage had laſted, was obliged to reſtore to the Wife two Thirds of the Fruits. And this laſt year was reckoned to begin on the day of the year that the Marriage was ſolemnized: or if the Huſband did not enter into poſſeſſion of the Lands which he had in Marriage with his Wife till after the Solemnization of the Marriage, this laſt year was reckoned to begin from the ſame day of the year that the Huſband entred into Poſſeſſion of his Wife's Lands [n]. But this Rule, which in the caſe of Divorce was neceſſary for the doing of Juſtice both to the Wife and to the Huſband, is not ſo neceſſary in the caſe of the Diſſolution of the Marriage by the death of one or other of the Parties. For whereas in the caſe of Divorce it would have been very unjuſt that a Woman married juſt before the beginning of Harveſt, and divorced as ſoon as Harveſt was over, ſhould be ſtript of the Revenue of her Eſtate for the whole year; in the caſe of the Diſſolution of the Marriage by the death of the Huſband or Wife, the Juſtice which may be due to either the one or other of them, or to their Heirs, or Executors, is not limited preciſely to this Rule. And beſides this way of dividing the Fruits of the Wife's Dowry between the Survivor of the married Couple, and the Heirs, or Executors, of the deceaſed, our Cuſtoms have eſtabliſhed other ways altogether different. Thus in ſome Cuſtoms, the Fruits of the Wife's Dowry for the laſt year go to the Huſband, ſubject to the burdens which the ſaid Cuſtoms make him liable to; and in others, the Survivor gathers all the Fruits that are hanging by the Roots in the Eſtate that is reſtored, with the burden of paying half the charge of Tillage and Seed: and in others again, the Fruits are divided into two equal Shares. And theſe different Uſages have in general their Equity founded in this, that thoſe who marry do contract on the conditions of theſe Cuſtoms, unleſs they derogate from them by expreſs Clauſes. And in particular each Uſage is founded either upon the uncertainty of the Event which may give ſome advantage to the perſon who ſhall ſurvive, or upon other Motives which render theſe Partitions juſt and equitable.

[m] *L.* 7. §. 1. *ff. ſol. matr. d. l.* §. 9. *l.* 11. *eod. l.* 78. §. 2. *ff. de jur. dot. l. un.* §. 9. *C. de rei ux. act.*

[n] *L.* 5. *& l.* 6. *ff. ſol. matr.*

[*It may not be improper to obſerve here, that by the Law of* England *Marriage hath this effect as to the Eſtate of the Wife, that all her Moveable Goods, which are termed Chattels Perſonal, which ſhe brings with her, do preſently paſs into the Husband's Patrimony, nor can any part of them be reaſſumed by the Wife ſurviving her Husband, but her Woman's Apparel. And it is the ſame as to the Wife's Immoveables, or Chattels Real, if alienated by the Husband in his Life-time; but for thoſe which are not alienated, the Husband being dead, they ſhall return to the Wife. But if a Wife being Executrix, or Adminiſtratrix to a former Husband, marries a ſecond and ſurvives him, ſhe ſhall have all thoſe Goods, both Perſonal and Real, which ſhe brought unto him as poſſeſſed of by reaſon of that Relation and Office, and which are not alienated by her ſecond Husband, reſtored unto her without diminution. Cowel's* Inſtit. of the Law of *England*, lib. 1. tit. 10. §. 18. *Coke* 1 Inſtit. fol. 351. b.]

[*As to the Real Eſtate which the Wife is ſeiſed of, if the Husband hath iſſue by the ſame Wife, Male or Female, born alive, if the Wife dies before the Husband, he ſhall hold the Lands during his Life by the Law of* England. *And he is called Tenant by the Courteſie of* England. *But this Courteſie is likewiſe granted to Husbands in* Scotland, *where it is called* Curialitas Scotiæ. *And it is likewiſe received in* Ireland. *Coke* 1 Inſtit. fol. 29. a. Regiam Majeſt. Scotiæ. lib. 2. cap. 58.]

SECT. I.

Of the Nature of Dowries, or Marriage Portions.

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I.

1. The Definition of a Dowry.

A Dowry is the Goods which a woman brings in Marriage to her Huſband, that he may enjoy them, and have the Adminiſtration of them during their Marriage [a].

[a] Dotis cauſa perpetua eſt, & cum voto ejus qui dat ita contrahitur, ut ſemper apud maritum ſit. *l.* 1. *ff. de jur. dot.* Fructus dotis ad (maritum) pertinent. *l.* 10. §. 3. *eod.*

II.

2. The Huſband enjoys the Dowry, for the Charges of the Marriage.

The Revenues of the Dowry are deſtinated to be a help towards the Maintenance of the Huſband, the Wife, and their Family, and towards defraying the other Charges of the Marriage. And it is on the account of theſe Charges that the Huſband has a right to the enjoyment of it [b].

[b] Dotis fructum ad maritum pertinere debere, æquitas ſuggerit. Cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l.* 7. *ff. de jur. dot.*

Apud (maritum) dos eſſe debet, qui onera ſuſtinet. *l.* 65. §. *ult. ff. pro ſocio.* Pro oneribus matrimonii, mariti lucro fructus totius dotis eſſe. *l.* 20. *C. de jur. dot.*

III.

3. In what manner the Huſband is Maſter of the Dowry.

The Right which the Huſband has to the Dowry of his Wife, is a conſequence of their Union, and of the Power which the Huſband has over the Wife her ſelf. And this Right conſiſts in this, that he has the Adminiſtration and Enjoyment of the Goods of the Dowry, which the Wife cannot take from him; that he may ſue at Law, in his own Name as Huſband, for the Recovery of the Goods of the Dowry out of the hands of third perſons who detain them wrongfully, or are Debtors of them [c]: and that thus he exerciſes, in his own Name as Huſband, the Rights, and proſecutes the Actions which relate to the Dowry, in ſuch a manner as makes him to be conſidered as if he were Maſter of the Goods; but which does not hinder the Wife from retaining the Property of them [d]. And it is theſe ſeveral effects of the Rights of the Huſband, and of thoſe of the Wife, to the Dowry, which makes the Laws to conſider the Dowry, both as being the Goods of the Wife, and likewiſe the Goods of the Huſband.

[c] Dos ipſius filiæ proprium patrimonium eſt. *l.* 3. §. 5. *ff. de minor.*

Si res in dotem dentur, puto in bonis mariti fieri. *l.* 7. §. 3. *ff. de jur. dot.* Idem reſpondit, conſtante matrimonio, dotem in bonis mariti eſſe. *l.* 21. §. 4. *ff. ad municip.*

De his quæ in dotem data ac directa commemoras, mariti tui eſſe actionem, nulla eſt dubitatio. *l.* 11. *C. de jure dot.* Rei dotalis nomine, quæ periculo mulieris eſt, non mulier furti actionem habet, ſed maritus. *l.* 49. *in fine ff. de furt.* Doce ancillam de qua ſupplicas dotalem fuiſſe, in notione præſidis, quo patefacto, dubium non erit vindicari ab uxore tua nequiviſſe. *l.* 9. *C. de rei vind.*

[d] Cùm eædem res ab initio uxoris fuerint, & naturaliter in ejus permanſerint dominio: non enim, quod legum ſubtilitate tranſitus earum in patrimonium mariti videatur fieri, ideò rei veritas delcta vel confuſa eſt. *l.* 30. *C. de jur. dot.* Quamvis in bonis mariti dos ſit, mulieris tamen eſt. *l.* 75. *ff. eod.*

We have not put down in this article, what is ſaid in the texts here quoted, that the Wife her ſelf cannot bring an Action at Law for Recovery of the Goods which are part of her Marriage Portion; becauſe that by our Cuſtom, altho' the Husband may ſue in his own Name alone, yet the Wife may likewiſe ſue, not only when ſhe is ſeparated from her Husband, but even altho' ſhe be not ſeparated, provided that the Husband agree to it, and that he impower her to do it, or that, upon his Refuſal, the Judge authorizes her to do it.

IV.

4. Of the Dowry in Money, or in Things eſtimated.

The Dowry conſiſting of Money, or other Things, whether Moveable or Immoveable, which have been eſtimated in the Contract of Marriage at a certain Price, is the Property of the Huſband: and he becomes Debtor for the Money given in Dowry, or for the Price of the Things eſtimated. For this Eſtimation makes it a Sale of the Things to him: and the Dowry conſiſts in the Price agreed on [e].

[e] Si ante matrimonium æſtimatæ res dotales ſunt, hæc æſtimatio quaſi ſub conditione eſt. Namque hanc habet conditionem, ſi matrimonium fuerit ſecutum. Secutis igitur nuptiis, æſtimatio rerum perficitur, & fit vera venditio. *l.* 10. §. 4. *ff. de jur. dot.* Quoties res æſtimatæ in dotem dantur, maritus dominium conſecutus, ſummæ, velut pretii, debitor efficitur. *l.* 5. *C. de jur. dot.*

5. The Eſtimation makes the Thing to be

If the Things ... ed happen ... during the Marriage; it is t... who, being Proprietor of ... bears the Loſs of them, as he ... fit, if there were ... and the Loſs of the ... not been eſtimated ... who has always re... of them [f].

[f] Plerumque intereſt v... ne periculum rerum ad e... *jur. dot. l.* 10. *C. eod.* Q... res in dotem dantur, & n... lieri fiunt. *d. l.* 10. *ff. de j...* rum maritus quaſi empto...

& diſpendium ſubeat, & periculum expectet. *l. un. §. 9. in f. C. de rei ux. act.*

VI.

6. *Conſequences of this Eſtimation.*

In the caſe where the Things which are part of the Dowry are eſtimated, the Rules concerning them are the ſame with thoſe which have been explained in the Contract of Sale. For this Eſtimation is a true Sale[g].

[g] Quia æſtimatio venditio eſt. *l. 10. §. 5. in f. ff. de jur. dot. l. 1. & l. 10. C. eod.*

VII.

7. *The Dowry may be of all the Woman's Eſtate, or of a part of it.*

The Dowry may comprehend either all the Eſtate of the Wife preſent and to come, or only all the Eſtate ſhe has at preſent, or a part of it, according as it has been agreed between them[h]. And the Goods of the Wife which are no part of the Dowry, are called Paraphernal Goods, of which we ſhall ſpeak in the fifth Section.

[h] Nulla lege prohibitum eſt univerſa bona in dotem marito fœminam dare. *l. 4. C. de jur. dot. l. 72. ff. eod. Toto tit. ff. de jur. dot.*

VIII.

8. *Profits of the Dowry which are not Revenues.*

If the Huſband reaps from the Portion which he had in Marriage with his Wife any Profit which may be reckoned a Revenue, it belongs to him. But if the ſaid Profit is not of the nature of Fruits and Revenues, it is a Capital, which augments the Dowry. Thus, the Cuttings of Coppice Woods, the Trees which are taken out of Nurſeries, are Revenues. But if the Huſband ſells great Trees which the Wind has thrown down in a Wood, in a Warren, or an Orchard; if he ſells the Materials of an Edifice gone to decay, which it is neither uſeful nor neceſſary to rebuild; all the Profits which ariſe from theſe kinds of Things, the Expences being deducted, are Capital Stocks which go to the augmentation of the Dowry. And it would be the ſame thing if there ſhould happen any Addition to the Lands which are part of the Dowry, whether it be in their Extent, as if a Piece of Ground lying near a River happens to receive any Accretion from it; or in their Value, as if a Right of Service, or ſuch like, be diſcovered to belong to them[i].

[i] Si arbores cæduæ fuerunt, vel gremiales, dici oportet in fructus cedere. Si minus, quaſi deteriorem fundum fecerit maritus, tenebitur. Sed etſi vi tempeſtatis ceciderunt, dici oportet pretium earum reſtituendum mulieri: nec in fructum cedere, non magis quam ſi theſaurus fuerit inventus. In fructum enim non computabitur, ſed pars ejus dimidia reſtituetur, quaſi in alieno inventi. *l. 7. §. 12. ff. ſolut. matr. l. 8. ff. de fundo dot.* Sive ſuperficiem ædificii dotalis, voluntate mulieris, vendiderit, nummi ex ea venditione recepti ſunt dotis. *l. 32. ff. de jur. dot.*

Si grandes arbores eſſent, non poſſe eas cedere. *l. 11. ff. de uſufr.* Incrementum videtur dotis, non alia dos, quemadmodum ſi quid alluvione acceſſiſſet. *l. 4. ff. de jure dot.*

IX.

9. *Stones taken out of Quarries, and other matters.*

The Stones of Quarries, and the other matters which are taken out of a Ground, ſuch as Chalk, Plaiſter, Sand, and the like, are Revenues which belong to the Huſband. Whether it be that the ſaid matters appeared at the time of the Marriage: or that the Huſband made the firſt diſcovery of them[l]; in which caſe he recovers the Expences he has been at in putting the Ground in a condition of yielding this new Revenue[m]. But if theſe matters are ſuch, that they cannot be reckoned among the Fruits, and that they do not make a yearly Revenue; but a Profit to be made only for once; the ſaid Profit will be a Capital Stock, and the Dowry will be encreaſed by the Profit made out of theſe matters, the charges being firſt deducted[n].

[l] Sed ſi cretifodinæ —— vel cujus alterius materiæ ſint, vel arenæ, utique in fructu habebuntur. *l. 7. §. 14. ff. ſol. matr. l. 8. eod.*

[m] Vir in fundo dotali lapidicinas marmoreas aperuerat: divortio facto, quæritur, marmor quod cæſum, neque exportatum eſſet, cujus eſſet: & impenſam in lapidicinas factam mulier an vir præſtare deberet? Labeo, marmor, viri eſſe, ait, cæterùm viro negat quidquam præſtandum eſſe à muliere, quia nec neceſſaria ea impenſa eſſet, & fundus deterior eſſet factus. Ego non tantùm neceſſarias, ſed etiam utiles impenſas præſtandas à muliere exiſtimo, nec puto fundum deteriorem eſſe, ſi tales ſunt lapidicinæ in quibus lapis creſcere poſſit. *l. ult. ff. de fundo dot.*

[n] Si ex lapidicinis dotalis fundi, lapidem, vel arbores quæ fructus non eſſent, vendiderit, nummi ex ea venditione recepti, ſunt dotis. *l. 32. ff. de jure dot.* Nec in fructu eſt marmor, niſi talis ſit, ut lapis ibi renaſcatur quales ſunt in Gallia, ſunt & in Aſia. *l. 7. §. 13. ff. ſol. mat.*

As to theſe Expences, ſee the eleventh and the following Articles of the third Section, and the ſeventeenth Article of the tenth Section of the Contract of Sale.

X.

10. *Lands purchaſed with the Wife's Portion.*

The Lands which the Huſband purchaſes with the Money he got in Marriage with his Wife, are not part of the Dowry; but the Property of the Huſband[o].

[o] Ex pecunia dotali fundus à marito tuo comparatus, non tibi quæritur. *l. 12. C. de jur. dot.* Sive cùm nupſiſſes mancipia in dotem dediſti, ſive poſt datam dotem, de pecunia dotis, maritus tuus quædam comparavit, juſtis rationibus dominia eorum ad eum pervenerunt. *l. ult. C. de ſervo pig. dat. man.*

The fifty fourth Law, and the twenty ſixth and twenty ſeventh Laws, ff. de jure dot. *are to be underſtood of the Purchaſe made for the Wife, as appears by thoſe two laſt mentioned Laws.*

XI.

11. The Gains of the ſurviving Husband, or Wife.

It may be agreed, that the Huſband ſurviving the Wife ſhall have a certain Profit out of the Wife's Eſtate. And this Profit may be ſtipulated, either in caſe there be Children of the Marriage, or even in caſe there happen to be none [p]. And they may likewiſe regulate ſome Profit for the Wife, out of the Huſband's Eſtate, in caſe ſhe outlives him.

[p] Si deceſſerit mulier conſtante matrimonio, dos non in lucrum mariti cedat, niſi ex quibuſdam pactionibus. *l. un. §. 6. C. de rei ux. act.* Diminutio dotis. *l. 19. C. de donat. ante nupt.* Si pater dotem dederit, & pactus ſit ut mortua in matrimonio filiâ, dos apud virum remaneret, puto, pactum ſervandum, etiam ſi liberi non interveniant. *l. 12. ff. de pact. dot.* Si convenerit, ut quoquo modo diſſolutum ſit matrimonium, liberis intervenientibus, dos apud virum remaneret, &c. *l. 2. ff. de pact. dot. l. 26. eod. l. 1. ff. de dote prælog. v. l. 9. C. de pact. convent. & Nov. 97. c. 1. de æqual. dot. & propt. nupt. don. & augm. dot.*

It is to be remarked on this Article, that the Cuſtoms of Places regulate differently the Gains as well of the Huſband as of the Wife: and theſe Gains regulated by the Cuſtoms are acquired of right, altho' there were no expreſs agreement about them.

[At the end of the Preamble to this Title, we have already mentioned what Profit the ſurviving Husband has out of his Wife's Eſtate by the Law of England, *which is, that if there be a Child born alive of the Marriage, the Husband is entitled to hold the Lands during his Life. Which Privilege is called the Courteſie of* England. *So likewiſe by the Law of* England, *the Wife, if ſhe ſurvives her Husband, has a Right by Marriage, without any ſpecial Contract, to a Third part of all ſuch Lands and Tenements which her Husband was ſeiſed of in Fee, for her Life.* Cowel's Inſtit. lib. 1. tit. 10. §. ult. Coke 1 Inſt. fol. 30. b. *And as to the Perſonal Eſtate of the Husband, if he dies Inteſtate, leaving Children behind him, his Widow is entitled to one Third Part of his Perſonal Eſtate; and if there be no Children, to one Half.* Stat. 22 & 23. Car. II. cap. 10. *The Widows of Freemen of the City of* London *have this farther Privilege, that their Husbands, even by Will, cannot deprive them of their Right to a third Part of his Eſtate, without their own conſent. And if their Husbands die Inteſtate, they have not only a Right to their own Third Part by the Cuſtom, but likewiſe another Third Part is to be divided between the Widow and the Children, and the remaining Third Part goes wholly to the Children.* Privilegia Londini, pag. 279.]

XII.

12. Liberty of all lawful and honeſt Pacts.

In Contracts of Marriage, as in all others, the Parties contracting may make all manner of Agreements, whether relating to the Dowry, or otherwiſe; provided that the Agreement have nothing in it that is unlawful, diſhoneſt, or that is forbidden by any Law or Cuſtom [q].

[q] Si qua pacta interceſſerint, pro reſtitutione dotis, vel pro tempore vel pro uſuris, vel pro alia quacumque cauſa, quæ nec contra leges, nec contra conſtitutiones ſunt, ea obſerventur. *l. 1. §. ult. C. de rei ux. act.* See the twentieth Article of the firſt Section of the Rules of Law.

XIII.

13. The Husband cannot alienate the Lands he got in Marriage with his Wife.

The Lands which the Huſband got in Marriage with his Wife, can neither be alienated, nor mortgaged by the Huſband, even altho' the Wife ſhould conſent to it [r].

[r] Fundum dotalem non ſolùm hypothecæ titulo dare, ne conſentiente muliere maritus poſſit, ſed nec alienare, ne fragilitate naturæ ſuæ in repentinam deducatur inopiam. *l. un. §. 15. Cod. de rei ux. act.*

This Article is to be underſtood according to the Uſage of the Countries where the Wife cannot alienate her Dowry. But ſhe may alienate it in ſome Countries, with the Husband's conſent. It is neceſſary likewiſe to obſerve, that in ſome Countries, the Wife cannot ſo much as bind her ſelf, even with the conſent of her Husband; which preſerves her whole Dowry entire to her, whether it conſiſt in Moveables, or Immoveables.

[In England, *the Dowry of the Wife may be alienated by the joint conſent of the Husband and Wife; for they may join in levying a Fine for that purpoſe.* Vid. Stat. 4 H. VII. cap. 24.]

XIV.

14. Neither can he ſubject them to Services, or other Burdens.

The Prohibition of alienating the Lands, which are the Wife's Portion, includes that of ſubjecting them to Services, or ſuffering thoſe due to them to be loſt, and of making their condition worſe any other way [s].

[s] Julianus, libro ſexto decimo digeſtorum ſcripſit, neque ſervitutes fundo debitas poſſe maritum amittere, neque alias imponere. *l. 5. ff. de fund. dot.*

XV.

15. Exception for the alienating of the Dowry.

If during the Marriage there happens any extraordinary caſe, which may require the Alienation of the Wife's Dowry, ſuch as that of Redeeming out of Captivity, or out of Priſon, the Huſband, the Wife, or their Chil[dren], or other neceſſary Cauſes; [in] ſuch caſe the Alienation may [be] by a Decree of Cour[t] ing into the m[atter] to the circ[umſtances].

[t] Manent
has cauſas do
ut in exilium,
alimonia, aut u
ve, ſuſtineat. *l.*
ſol. matr. Sed et
ut à latronibus redi
mas: velut mulier v
ſuis aliquem, reputat
pars dotis ſit, pro ea p
dotis evaneſcit. *l. 21. ff*

We do not expreſs in this
theſe Laws permit the imploy
Portion, and even the whole Do
this particular is more reſerved:
reſtrained the permiſſion of alienati

neceſſity of providing Suſtenance for the Family, or to deliver the Husband out of Priſon. So that we thought it proper to add to this Rule, the Temperament of this Judicial Permiſſion, after full Cognizance of the matter; as is the Uſage with us.

XVI.

16. *The Settlement of the Dowry implys the Condition that the Marriage ſhall be accompliſhed.*

All Settlements of Dowries imply the Condition, that the Marriage ſhall be accompliſhed. And the Covenants relating to the Dowry, as all the other Covenants in a Contract of Marriage, are annulled, if the Marriage is not ſolemnized, or if for ſome cauſe it be declared null and void [u].

[u] Omnis dotis promiſſio futuri matrimonii tacitam conditionem accipit. *l.* 68. *ff. de jur. dot. l.* 10. §. 4. *eod.* Dotis appellatio non refertur ad ea matrimonia, quæ conſiſtere non poſſunt. Neque enim dos ſine matrimonio eſſe poteſt. Ubicunque igitur matrimonii nomen non eſt, nec dos eſt. *l.* 3. *ff. de jur. dot.*

SECT. II.

Of the Perſons who give the Dowry, and of their Engagements.

The CONTENTS.

I.

1. *The Father endows his Daughter.*

THE Daughter who marries, ought to be endowed by her Father, if he be alive. For the duty of the Father to take care of his Children, and to provide for them, implies that of giving the Daughter a Marriage Portion [a].

[a] Neque enim leges incognitæ ſunt, quibus cautum eſt omnino paternum eſſe officium, dotem pro ſua dare progenie. *l.* 7. *C. de dot. prom.* Capite trigeſimo quinto legis Juliæ, qui liberos, quos habent in poteſtate, injuria prohibuerint ducere uxores, vel nubere, vel qui dotem dare non volunt, ex conſtitutione divorum Severi & Antonini, per proconſules præſidesque Provinciarum, coguntur in matrimonium collocare, & dotare. *l.* 19. *ff. de ritu nup. v. Nov.* 115. *c.* 3. §. 11.

What is ſaid in this laſt Text concerning the Marriage of Daughters againſt the will of their Fathers, makes it neceſſary to obſerve the diſpoſition of the Edict of 1556. *and of the other Ordinances, which forbid the Marriages of Children without the conſent of their Parents; of Sons, till they attain the age of thirty years, and of Daughters till the age of twenty five.* See *Exod.* xxii. 17. xxxiv. 15. *Deut.* vii. 3.

II.

2. *The Maid, or Widow that is from under her Father's Juriſdiction, ſettles her own Dowry.*

When a Maid, or Widow, that is no longer under the Juriſdiction of her Father, marries, ſhe ſettles her own Dowry, and ſtipulates the Conditions of it [b].

[b] *Tot. tit. ff. de jur. dot.*

III.

3. *The Settlement of the Dowry of a Maid that is a Minor.*

When a Young Woman under Age marries after the death of her Father, ſeeing ſhe is Miſtreſs of her own Eſtate, altho' under the care of a Tutor, or Guardian, yet it is ſhe her ſelf that ſettles her Dowry, with the conſent and approbation of her Tutor, or Guardian [c].

[c] Mulier in minori ætate conſtituta, dotem marito, conſentiente generali vel ſpeciali curatore, dare poteſt. *l.* 28. *C. de jur. dot.*

IV.

4. *If the Father endows his Daughter, it is preſumed to be out of his own Eſtate, and not out of what the Daughter may have of her own beſides.*

If a Father, whoſe Daughter has an Eſtate of her own, which ſhe inherited of her Mother, or ſome other Perſon, and of which the Father has the Management, as being his Daughter's Tutor, or Guardian, ſettles on her a Marriage Portion, without ſpecifying whether it is out of the Daughter's proper Eſtate, or his own; he is reputed to give it, not as Tutor, or Guardian, to his Daughter, but as her Father, and becauſe of the duty incumbent on him to endow his Daughter, and that out of his own Eſtate. And it would be the ſame thing, altho' this Daughter were already emancipated [d].

[d] Cùm

[a] Cùm pater curator ſuæ filiæ, juris ſui effectæ, dotem pro ea conſtituiſſet, magis eum quaſi patrem id, quam quaſi curatorem feciſſe videri. *l.* 5. §. 12. *ff. de jur. dot.* Si pater dotem pro filia ſimpliciter dederit—— ſancimus ſiquidem nihil addendum exiſtimaverit, ſed ſimpliciter dotem dederit, vel promiſerit, ex ſua liberalitate hoc feciſſe intelligi, debito in ſua figura remanente. *l. ult. C. de dotis promiſſ.*

V.

5. The Dowry given by the Father is called Dos Profectitia.

The Dowry which the Father gives his Daughter out of his own Eſtate, is, with reſpect to him, diſtinguiſhed in the *Roman* Law by the Name of *Dos Profectitia*, becauſe it is from the Father that it proceeds [c].

[c] Profectitia dos eſt, quæ à patre vel parente profecta eſt, de bonis vel facto ejus. *l.* 5. *ff. de jur. dot.* Si pater pro filia emancipata dotem dederit, profectitiam nihilominus dotem eſſe nemini dubium eſt. *d. l.* 5. §. 11. *ff. de jur. dot.*

VI.

6. Reverſion of the Dowry which proceeds from the Father.

The Dowry which proceeds from the Father returns to him, if he ſurvives his Daughter, and ſhe dies without Children [d].

[d] Jure ſuccurſum eſt patri, ut filia amiſſa, ſolatii loco cederet, ſi redderetur ei dos ab ipſo profecta: ne & filiæ amiſſiæ, & pecuniæ damnum ſentiret. *l.* 6. *ff. de jur. dot.* Dos à patre profecta, ſi in matrimonio deceſſerit mulier filia familiàs, ad patrem redire debet. *l.* 4. *C. ſoluto matr. l.* 2. *C. de bon. quæ lib.* Si conditio ſtipulationis impleatur, & poſtea filia ſine liberis deceſſerit, non erit impediendus pater, quominus ex ſtipulatu agat. *l.* 40. *ff. ſol. matr.*

If the Daughter who is endowed by her Father, dies without Children, and makes a Teſtament, will the Right of Reverſion hinder the effect of the Daughter's Diſpoſition, ſo as that the Father may take back the whole Portion? V. l. 59. ff. ſol. matr. *It would ſeem by this Law, that the Daughter might diſpoſe of it by Will. Which muſt be underſtood, of that proportion of it which ſhe may give away without encroaching on the Legitime, or Legal Portion due to the Father.*

VII.

7. The Foundation and Uſe of this Right.

This Right of Reverſion of the Dowry is preſerved to the Father, altho' the Daughter had been ſet at Liberty from under the Father's Juriſdiction by Emancipation. For this Right is not annexed to that kind of Paternal Authority, which is loſt by Emancipation, but to the Natural Right which is inſeparable from the Name of Father [g]: and that it may be as a Comfort to him under the Loſs he ſuſtains by his Daughter's death [h].

[g] Non jus poteſtatis, ſed parentis nomen dotem profectitiam facit. *l.* 5. §. 11. *ff. de jur. dot.* Etiamſi in poteſtate non fuerit patris, dos ab eo profecta reverti ad eum debet. *l.* 10. *ff. ſol. matr.*

[h] Filia amiſſa, ſolatii loco. *l.* 6. *ff. de jur. dot.*

We inſert this Article to ſhew, by the Reaſon of the Law from whence it is taken, that the Mother, and the Aſcendants on the Mother's ſide, ought not to be diſtinguiſhed from the Father, as to this Right of Reverſion. See the eleventh Article of this Section, and the Remark on it. As to Emancipation, which is mentioned in this Article, ſee the fifth and ſixth Articles of the ſecond Section of Perſons.

VIII.

8. The Dowry which comes from the Father is ſubject to the Profits due to the Husband.

This Right of Reverſion does not hinder the Huſband from retaining out of the Dowry which came from the Father, that which belongs to him as his Profit, according as it has been agreed on [i]: or as the matter is regulated by the Cuſtoms of the Places.

[i] Si pater dotem dederit & pactus ſit, ut mortuâ in matrimonio filiâ, dos apud virum remaneret, puto pactum ſervandum: etiamſi liberi non interveniant. *l.* 12. *ff. de pact. dotal.*

IX.

9. If the Father is mad, or a Prodigal.

If the Father were put under the care of a Guardian, as being out of his Senſes, or as being a Prodigal, or for other Cauſes; or if he were abſent, or in any other condition which ſhould oblige the Magiſtrate to take care of the Marriage and Endowment of his Daughter; the Marriage Portion which ſhe receives out of her Father's Eſtate, will be conſidered as a Dowry proceeding from the Father, and ſettled by him on his Daughter [l].

[l] Si curator furioſi, vel prodigi, vel cujuſvis alterius, dotem dederit, ſimiliter dicemus dotem profectitiam eſſe. *l.* 5. §. 3. *ff. de jur. dot.* Sed etſi proponas prætorem vel præſidem decreviſſe, quantum ex bonis patris vel ab hoſtibus capti, aut à latronibus oppreſſi, filiæ in dotem detur: hæc quoque profectitia videtur. *d. l.* 5. §. 4.

X.

10. The Dowry coming from the Grandfather, and other Aſcendants on the Father's ſide.

All that has been ſaid of the Father, with reſpect to the Dowry coming from him, and reverting to him, is likewiſe to be underſtood of the Grandfather, and other Aſcendants on the Father's ſide [m].

[m] Profectitia dos eſt quæ à patre, vel parente profecta eſt. *l.* 5. *ff. de jur. dot.* See the Remark on the following Article.

XI.

11. Reverſion to Strangers.

All perſons, Parents, or Strangers, may give a Marriage Portion [n]. But they have not the Right of Reverſion, unleſs they have ſtipulated it. For it is a free and irrevocable Gift which they have been pleaſed to make [o].

[n] Promittendo dotem omnes obligantur, cujuſcunque ſexûs conditioniſque ſint. *l.* 41. *ff. de jure dot.*

[o] Si dotem marito libertæ veſtræ dediſtis, nec eam reddi ſoluto matrimonio ve[illegible] incontinenti pacto, vel ſtipulatione proſpexiſtis: hanc culpâ uxoris diſſoluto matrimonio penes maritum remanſiſſe conſtitit, licèt eam ingratam circa vos fuiſſe oſtenderitis. *l.* 24. *C. de jur. dot.* Accedit ei & alia

ſpecies ab rei uxoriæ actione, ſi quando etenim extraneus dotem dabat nulla ſtipulatione, vel pacto pro reſtitutione ejus in ſuam perſonam facto—— niſi expreſſim extraneus ſibi dotem reddi pactus fuerit, vel ſtipulatus, cùm donaſſe magis mulieri, quàm ſibi aliquod jus ſervaſſe extraneus non ſtipulando videatur. Extraneum autem intelligimus omnem citra parentem per virilem ſexum aſcendentem. *l. un.* §. 13. *C. de rei ux. act.*

Why ſhould not the Mother, and the Aſcendants by the Mother's ſide, have the Right of Reverſion, which they ſeem to be excluded from by this thirteenth Section, which ranks them in the number of Strangers? Have not they the ſame Reaſons as the Father, Ne filiæ amiſſæ, & pecuniæ damnum ſentiret. *l. 6. ff. de jure dot. Our Cuſtoms deprive the Aſcendants of the Succeſſions of their Children in Eſtates of Inheritance, which they do not ſuffer to aſcend, for fear they ſhould paſs from one Line to another. But they preſerve to the Mother, and the other Aſcendants on her ſide, the Right of Reverſion in the ſame manner as to the Father.* See the ſeventh Article of this Section.

XII.

12. *What the Father owes to the Daughter, is not conſidered as a Dowry coming from him.*

If the Father endows his Daughter only out of what he has of hers, or was obliged to give her, as if a Stranger had given a Sum of Money to the Father, on condition that he ſhould lay it out as a Portion for his Daughter, this Dowry will not be conſidered as coming from the Father[p]; but it will be reckoned a Portion proceeding from another perſon, and the Daughter's own Patrimony. And it would be the ſame thing, if the Father was indebted to the Daughter on any other account[q].

[p] Si quis certam quantitatem patri donaverit, ita ut hanc pro filia dari, non eſſe dotem profectitiam Julianus, libro ſeptimo decimo digeſtorum ſcripſit. Obſtrictus eſt enim ut det. *l. 5.* §. *9. ff. de jur. dot.*

[q] Parentis nomen dotem profectitiam facit, ſed ita demùm ſi ut parens dederit. Cæterùm ſi cùm deberet filiæ, voluntate ejus dedit, adventitia dos eſt. *d. l. 5.* §. *11.*

XIII.

13. *Dowry ſettled by the Mother.*

Altho' it be a duty properly incumbent on the Father to endow his Daughter, and that he cannot endow her out of the Moth[illegible]'s Eſtate[r]; yet if the Mother has C[illegible] which are no part of her ow[illegible] ay endow her Dau[illegible] And if the Fa- the[illegible] a Portion to his I[illegible] may in that caſe r own Dowry, obcraments which the in the like caſes[s].

[r] pro filia dotem dare cogitur, niſi habili cauſa, vel lege ſpecialiter excer de bonis uxoris ſuæ invitæ ullam rtem. *l. 14. C. de jur. dot.* Cùm quam pecuniam ſibi deberet, in munis dare juſſerit: & id feciſſe animadvertendum eſſe, utrùm eam xoris nomine dedit. Si ſuo, nihilo debere pecuniam: ſi uxoris nolum ab uxore liberatum eſſe. *l. 2.*

ff. de jure dot.

[s] Niſi pater aut non ſit ſuperſtes, aut egens eſt. *l. pen. ff. de agn. & alend. lib. Altho' theſe laſt words do not properly belong to the preſent ſubject, yet they may be applied to it. There are ſome Cuſtoms which altho' they do not allow a married Woman to alienate her Dowry, nor to bind her ſelf by an Obligation, yet they ſuffer her to lay out a certain part of her own Dowry in the Endowment of her Daughter, if the Father hath not wherewithal to endow her.*

XIV.

The perſons who give a Dowry, or Marriage Portion, whether it be in Money, Land, or Things of another Nature, can no more diſpoſe of what they have once given away, or promiſed; and they are obliged to warrant the Lands that are given, the Debts that are transferred, and the other Things, according to the Agreement made, or according to the Rules of Warranty which thoſe perſons are bound to who ſell or transfer any Thing[t]. 14. *Warranty of the Dowry.*

[t] Rem quam pater in dotem genero pro filia dedit, nec recepit, alienare non poteſt. *l. 22. C. de jur. dot. l. 17. eod.* Evictâ re quæ fuerat in dotem data, ſi pollicitatio, vel promiſſio fuerit interpoſita, gener contra ſocerum, vel mulierem, ſeu hæredes eorum, condictione, vel ex ſtipulatione agere poteſt: *l. 1. C. de jur. dot. l. un.* §. *1. C. de rei ux. act.* §. *29. inſt. de act.*

SECT. III.

Of the Engagements of the Husband with reſpect to the Dowry, and of the Reſtitution of the Dowry.

The CONTENTS.

15. *The Ground Charges are taken out of the Fruits.*
16. *Useful Expences, how they are recovered.*
17. *How we are to judge of the neceſſity or uſefulneſs of the Expences.*
18. *If the Repairs periſh by accident.*
19. *Expences for pleaſure.*
20. *Repairs for pleaſure.*

I.

1. *The Huſband's Engagement to bear the charges of the Marriage.*

THE Huſband having the Dowry in his Power, with a Right to enjoy it, that he may bear the charges of the Marriage, in maintaining himſelf, his Wife, and Family; the firſt of his Engagements, with relation to the Dowry, is to bear theſe charges[a].

[a] Dotis fructum ad maritum pertinere debere, æquitas ſuggerit. Cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l. 7. ff. de jur. dot. l. 20. C. eod.*

II.

2. *Of the care which the Huſband ought to take of the Effects pertaining to the Dowry.*

Seeing the Huſband enjoys the Dowry, and has it in his Poſſeſſion, as much for his own Intereſt, as his Wife's; he ought to take the ſame care of it, as he does of his own Affairs, and his own proper Goods. Thus he ought to ſue the Debtors, repair and cultivate the Lands and Tenements, and in general have a watchful eye over every thing that relates to the preſervation of the Effects pertaining to the Dowry. And if thro' his Fault, or Negligence, there happen Loſſes and Diminutions, or that he commits Waſte on the Eſtate, he ſhall be bound to make them good[b]. As likewiſe to make good the Accidents, which may be occaſioned thro' Faults for which he is accountable[c].

[b] Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, *ut in dote*, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l. 5. §. 2. ff. commod. l. 23. ff. de reg. jur.* In rebus dotalibus, virum præſtare oportet tam dolum quàm culpam, quia cauſa ſua dotem accipit. Sed etiam diligentiam præſtabit, quam in ſuis rebus exhibet. *l. 17. ff. de jur. dot. l. ult. C. de pact. conv.* Si extraneus ſit qui dotem promiſit, iſque defectus ſit facultatibus, imputabitur marito cur eum non convenerit. *l. 33. ff. de jur. dot.* See the following Article. Si fundum viro uxor in dotem dederit, iſque inde arbores deciderit, ſi hæ fructus intelliguntur, pro portione anni debent reſtitui. Puto autem: ſi arbores cedua fuerunt, vel gremiales, dici oportet in fructus cedere. Si minùs, quaſi deteriorem fundum fecerit maritus tenebitur. *l. 7. §. 12. ff. ſolut. matrim.*

[c] In his rebus quas præter numeratam pecuniam doti vir habet, dolum malum, & culpam eum præſtare oportere. Servius ait, ea ſententia Publii Mutii eſt. Nam is in Licinnia Gracchi uxore ſtatuit, quod res dotales in ea ſeditione qua Gracchus occiſus erat periſſent, ait, quia Gracchi culpa ea ſeditio facta eſſet, Licinniæ præſtari oportere. *l. 66. ff. ſolut. matrim.*

III.

3. *Diligence againſt the Debtors.*

Altho' the Huſband be obliged to ſue the Debtors who have in their hands any part of his Wife's Portion, and that if he neglects to enter his Action, when it is free for him to do it, he is bound to make good all that ſhall happen to be loſt thro' his Negligence; yet nevertheleſs if the Debtor of the Dowry is the Father, or a Donor; we ought not to require of the Huſband, that he ſhould uſe the ſame diligence againſt them which he ought to uſe againſt a Stranger. But it is reaſonable in this caſe to give ſome grains of allowance, according as the circumſtances may require[d].

[d] Si non petierit maritus, tenebitur hujus culpæ nomine, ſi dos exigi potuerit. *l. 20. §. 2. ff. de pact. dot.* Si extraneus ſit, qui dotem promiſit, iſque defectus ſit facultatibus, imputabitur marito, cur eum non convenerit, maxime ſi ex neceſſitate, non ex voluntate dotem promiſerat. Nam ſi donavit, utcumque parcendum marito qui eum non præcipitavit ad ſolutionem qui donaverat, quemque in id quod facere poſſet, ſi conveniſſet, condemnaverat. Hoc enim Divus Pius reſcripſit, eos qui ex liberalitate conveniuntur, in id quod facere poſſunt condemnandos. Sed ſi vel pater, vel ipſa promiſerunt: Julianus quidem libro ſexto decimo Digeſtorum ſcribit, etiamſi pater promiſit, periculum reſpicere ad maritum: quod ferendum non eſt. Debebit igitur mulieris eſſe periculum. Nec enim quicquam judex propriis auribus audiet mulieretn dicentem, cur patrem qui de ſuo dotem promiſit, non urſerit ad exſolutionem. Multò minus, cur ipſam non convenerit. Rectè itaque Sabinus diſpoſuit, ut diceret quod pater, vel ipſa mulier promiſit, viri periculo non eſſe: quod debitor, id viri eſſe: quod alius, ſcilicet donaturus, ejus periculo, ait, cui adquiritur. Adquiri autem mulieri accipiemus ad quam rei commodum reſpicit. *l. 33. ff. de jur. dot.*

We have thought proper to qualify this Rule in the manner that it is ſet down in this Article. For our Uſage is not in this particular ſo indulgent to the Husband, as this thirty third Law, ff. de jure dot. *ſeems to be. And if on one hand it would be too hard to oblige the Huſband to uſe againſt a Father in Law, or againſt a Donor, the moſt rigid ſeverity for recovering the Debt; ſo on the other hand it would not be juſt that he ſhould be abſolutely excuſed from uſing any manner of diligence at all. So that it is neceſſary to apply ſome Temperament, which may regulate his Conduct according to the circumſtances.* See the twentieth Article of the fourth Section of Partnerſhip.

IV.

4. *If the Husband innovates the Obligation, it is at his own peril.*

If a Huſband change the nature of a Debt pertaining to the Dowry, by innovating the Obligation; this change will be at his own peril, and he will remain charged with the Debt, as if he had received it[e].

[e] Dotem à patre vel à quovis alio promiſſam, ſi vir novandi cauſâ ſtipuletur, corpus ejus eſſe periculum, cùm antè mulieris fuiſſet. *l. 33. ff. de jur. dot.* See the Title of Novations, in order to know what is meant by innovating a Debt; and notice has been already taken of it in the Plan of Matters.

V.

5. If the Husband receives Intereſt from a Debtor of the Dowry.

The Huſband who receives Intereſt from a Debtor of the Dowry, delaying on that account to call in the Principal Sum which he might have demanded, will be anſwerable for the Debt, if the ſaid Debtor becomes inſolvent [f].

[f] Cùm dotem mulieris nomine extraneus promiſit, mulieris periculum eſt: ſed ſi maritus, nomen ſecutus, uſuras exegerit, periculum ejus futurum, reſpondetur. *l.* 71. *ff. de jur. dot.*

VI.

6. How Preſcription may be imputed to the Husband.

If the Lands or Tenements which are part of the Dowry be poſſeſſed by a third perſon, and the Huſband ſuffers the whole time limited for Preſcription to run out, he ſhall be anſwerable for it. Unleſs it be that at the time of the Marriage the Preſcription was very near being accompliſhed, and that there remained ſo little time to run, that the Huſband could not be blamed for not interrupting a Preſcription which was acquired without his knowledge [g].

[g] Si fundum, quem Titius poſſidebat bona fide, longi temporis poſſeſſione poterat ſibi quærere, mulier ut ſuum marito dedit in dotem, eumque petere neglexerit vir, cùm id facere poſſet, rem periculi ſui fecit. *l.* 16. *ff. de fundo dot.* Planè ſi pauciſſimi dies ad perficiendam longi temporis poſſeſſionem ſuperfuerunt, nihil erit quod imputabitur marito. *d. l.*

VII.

7. The caſe of Reſtitution of the Dowry.

The laſt Engagement of the Huſband is to reſtore the Dowry, whenever the caſe happens that it ought to be reſtored. As if the Wife dies without Children before the Huſband; if the Marriage is declared null and void; if they are divorced, or ſeparated from Bed and Board; or if the Wife obtains a Separation of Goods only becauſe of the Huſband's Poverty: if the Dowry was given to the Huſband at the time of Eſpouſals, and the Marriage was not accompliſhed. And when the Huſband dies, his Engagement to reſtore the Dowry paſſes to his Heirs, Executors, or Adminiſtrators [h].

[h] Cùm quæreba*tur* an verbum, ſoluto matrimonio dotem reddi, non tantùm divortium, ſed & mortem contineret, hoc eſt, an de hoc quoque caſu contrahentes ſenſerunt. Et multi putabant, hoc ſenſiſſe, & quibuſcum aliis contra videbatur: ſecundùm hoc motus Imperator pronuntiavit, id actum eo pacto, ut nullo caſu remaneret dos apud maritum. *l.* 240. *ff. de verb. ſign.* Soluto matrimonio ſolvi mulieri dos debet. *l.* 2. *ff. ſol. matr.* Si conſtante matrimonio, propter inopiam mariti, mulier agere volet, unde exactionem dotis initium accipere ponamus? Et conſtat exinde dotis exactionem competere, ex quo evidentiſſimè apparuerit mariti facultates ad dotis exactionem non ſufficere. *l.* 24. *ff. ſol. matr. l.* 29. *C. de jur. dot.* See the fifth Section of the Separation of Goods.

VIII.

8. Acceſſions of the Dowry.

The Reſtitution of the Dowry extends not only to what has been delivered to the Huſband as the Dowry, but likewiſe to all the Acceſſions which may have augmented the Capital of the Dowry, and which ought not to belong to the Huſband. Thus the Augmentations of the nature of thoſe which have been mentioned in the eighth and ninth Articles of the firſt Section are to be reſtored with the Dowry [i].

[i] Quia ipſe fundus eſt in dote, quodcumque propter eum conſecutus fuerit à muliere maritus, quandoque reſtituet mulieri de dote agenti. *l.* 52. *ff. de jur. dot.*

IX.

9. To whom the Dowry ought to be reſtored.

When the caſe of reſtoring the Dowry happens, it ought to be reſtored either to the Wife, if ſhe has ſurvived her Huſband, and be of age to receive it; or to her Heirs, Executors, or Adminiſtrators, or to her Father, if it was he that ſettled it, or to the other perſons to whom the Dowry may appertain [l].

[l] Soluto matrimonio, ſolvi mulieri dos debet. *l.* 2. *ff. ſol. matr.* Hæc, ſi ſui juris mulier eſt. *d. l.* Dos ab eo (patre) profecta reverti ad eum debet. *l.* 10. *eod. l.* 6. *ff. de jure dot. l. un.* §. 13. *C. de rei ux. act. l.* 2. *C. de jure dot.*

X.

10. The Husband's Gains diminiſh the Reſtitution of the Dowry.

If it has been agreed in the Contract of Marriage, or if it be regulated by Cuſtom, that the ſurviving Huſband ſhould retain a part of the Dowry, the Reſtitution will be diminiſhed in ſo much [m].

[m] *See the eleventh Article of the firſt Section.*

XI.

11. Repairs and other Expences leſſen the Dowry.

The Reſtitution of the Dowry is alſo leſſened by the Repairs, and other Charges which the Huſband, or his Heirs, Executors, or Adminiſtrators, have been at in preſerving the Effects of the Dowry, according to the nature of thoſe Diſburſements, and the Rules which follow [n].

[n] *See the following Articles.*

XII.

12. Three ſorts of Expences.

The Expences which the Huſband, or his Heirs, Executors, or Adminiſtrators, may have been at, are of three ſorts. Some are neceſſary, ſuch as thoſe which are laid out in repairing a Building which is ready to fall, and which

ought to be preſerved. Others are uſeful, altho' not neceſſary, ſuch as the planting of an Orchard. And there are ſome which are neither neceſſary nor uſeful, and which ſerve only for pleaſure; ſuch as Paintings, or other Ornaments [o].

[o] Impenſarum quædam ſunt neceſſariæ, quædam utiles, quædam verò voluptariæ. *l.* 1. *ff. de imp. in res dot. fact.* Neceſſariæ hæ dicuntur, quæ habent in ſe neceſſitatem impendendi. *d. l.* 1. §. 1. Si ædificium ruens, quod haberi mulieri utile erat, refecerit. *d. l.* 1. §. 3. Utiles autem impenſæ ſunt, quas maritus utiliter fecit, remque meliorem uxoris fecerit, hoc eſt, dotem: veluti ſi novelletum in fundo factum ſit. *l.* 5. §. *ult. & l.* 6. *eod.* Voluptariæ autem impenſæ ſunt, quas maritus ad voluptatem fecit, & quæ ſpecies exornant. *l.* 7. *eod.*

XIII.

13. *Neceſſary Expences.*

For the neceſſary Expences, the Huſband may retain the Lands or Tenements pertaining to the Dowry, or a part of them, according to their value: and may keep Poſſeſſion of them till he is reimburſed; and this is the reaſon why this ſort of Expences is ſaid to leſſen the Dowry [p]. For it is in effect leſſened by the neceſſity of cutting off from it that which is due to the Huſband, on the account of an Expence, without which the Lands or Tenements might have gone to ruine, or been damaged, or diminiſhed, and which the Huſband was obliged to lay out, that he himſelf might not be made accountable for the Loſs that ſhould happen [q].

[p] Quod dicitur neceſſarias impenſas ipſo jure dotem minuere, non eò pertinet, ut ſi fortè fundus in dote ſit, deſinat aliqua ex parte dotalis eſſe. Sed niſi impenſa reddatur, aut pars fundi, aut totus retineatur. *l.* 56. §. 3. *ff. de jure dot. l.* 1. §. 2. *ff. de imp. l.* 5. *eod.*

[q] Id videtur neceſſariis impenſis contineri, quod ſi à marito omiſſum ſit, judex tanti eum damnabit, quanti mulieris interfuerit, eas impenſas fieri. *l.* 4. *ff. eod.* *See the ſixteenth Article, and the Remark upon it.*

XIV.

14. *The Huſband bears the charges of the Annual, and ordinary Expences.*

The Expences which are laid out daily, and of courſe, either on the preſervation of the Lands and Tenements, ſuch as the leſſer Repairs of a Houſe, or for cultivating the Lands, ſuch as tilling, and ſowing, or gathering in the Fruits, are taken out of the Fruits themſelves, and out of the other Revenues, and are a charge on them. For the Fruits and Revenues are underſtood only to be that which remains of clear Profit, after deduction of the Expences that have been neceſſarily laid out in order to be able to enjoy. So that the Huſband does not recover theſe kind of Expences. But he recovers thoſe which paſs the bounds of what is neceſſary for preſerving the Lands and Tenements in good caſe, and for enjoying them [r].

[r] Nos generaliter definimus multùm intereſſe ad perpetuam utilitatem agri, vel ad eam quæ non ad præſentis temporis pertineat, an verò ad præſentis anni fructum. Si in præſentis, cum fructibus hoc compenſandum. Si verò non fuit ad præſens tantùm apta erogatio, neceſſariis impenſis computandum. *l.* 3. §. 1. *ff. de imp.*

Impendi autem fructuum percipiendorum causâ, Pomponius, ait, quod in arando ferendoque agro impenſum eſt, quodque in tutelam ædificiorum, agrumve curandum, ſcilicet, ſi ex ædificio fructus aliqui percipiebantur. Sed hæ impenſæ non petentur, cùm maritus fructum totum anni retinet, quia ex fructibus priùs impenſis ſatisfaciendum eſt. *l.* 7. §. *ult. ff. ſol. matr.* Et ante omnia quæcumque impenſæ quærendorum fructuum causâ factæ erunt, quamquam eædem etiam colendi causâ fiant, ideoque non ſolum ad percipiendos fructus, ſed etiam ad conſervandam ipſam rem, ſpeciemque ejus neceſſariæ ſint: eas vir ex ſuo facit: nec ullam habet eo nomine ex dote deductionem. *l. ult. ff. de imp.* Quod dicitur impenſas, quæ in res dotales neceſſariò factæ ſunt, dotem diminuere, ita interpretandum eſt, ut ſi quid extra tutelam neceſſariam in res dotales impenſum eſt, id in eâ cauſâ ſit. Nam tueri res dotales vir ſuo ſumptu debet, alioqui tam cibaria dotalibus mancipiis data, & quævis modica ædificiorum dotalium refectio, & agrorum quoque cultura, dotem minuent. Omnia enim hæc in ſpecie neceſſariarum impenſarum ſunt. Sed ipſæ res ita præſtari intelliguntur, ut non tam impendas in eas, quàm deducto eo, minus ex his percepiſſe videaris. *l.* 15. *ff. eod.* Modicas impenſas non debet arbiter curare. *l.* 12. *eod.* Fructus eos eſſe conſtat qui deducta impensâ ſupererunt. *l.* 7. *ff. ſol. matr.*

XV.

15. *The Ground-Charges are taken out of the Fruits.*

The Ground-Charges, ſuch as Quit-Rents, Land-Taxes, and other Dues which are Charges on the Fruits, are taken out of the Fruits [s].

[s] Neque ſtipendium, neque tributum ob dotalem fundum præſtita, exigere vir à muliere poteſt. Onus enim fructuum hæc impendia ſunt. *l.* 13. *ff. de imp. l.* 27. §. 3. *ff. de uſufr.*

XVI.

16. *Uſeful Expences, how they are recovered.*

The Expences which are uſeful, altho' not neceſſary, ought to be repaid to the Huſband, or his Heirs, Executors, or Adminiſtrators. And altho' theſe Expences have been laid out without the Wife's conſent, yet they have their Action for recovering them [t].

[t] Cùm neceſſariæ quidem expenſæ dotis minuant quantitatem, utiles autem non aliter in rei uxoriæ ratione detinebantur, niſi ex voluntate mulieris, non abs re eſt, ſi quidem mulieris voluntas intercederet, mandati actionem à noſtra auctoritate marito contra uxorem indulgeri, quatenus poſſit per hanc quod utiliter impenſum eſt aſſervari. Vel ſi non intercedat mulieris voluntas, utiliter tamen res geſta eſt, negotiorum geſtorum adversùs eam ſufficere actionem. *l. un. §. 5. C. de rei uxor. act.* Ego non tantùm neceſſarias, ſed etiam utiles impenſas præſtandas à muliere exiſtimo. *l. ult. ff. de fund. dot.*

See the thirteenth Article of this Section. It is to be remarked on the ſaid thirteenth Article, and on the preſent, that what has been ſaid in the thirteenth Article touching the Right which the Husband has to detain the neceſſary Expences, and what is ſaid in the preſent Article of

of the Action which the Husband has for recovering the Expences which are only useful, ought to be understood according to our Usage; which is such, that of what nature soever the Expences be, whether useful or necessary, the Husband, who in this quality was in Possession of the Estate pertaining to the Dowry, cannot be dispossessed, nor his Heirs, Executors, or Administrators, against their will, but by Authority of Justice. And this is likewise observed altho' there should be no Reimbursement of Expences due; and this was also the practice under the Roman *Law.* Dotis actione successores mariti super quod ei dotis nomine fuerat datum, convenire debes. Ingrediendi enim possessionem rerum dotalium hæredibus mariti non consentientibus, sine auctoritate competentis judicis nullam habes facultatem. *l.* 9. *C. solut. matr. And this is the Rule for all Possessors, that they cannot be turned out of Possession but by Authority of Justice.* See the fifteenth Article of the sixth Section of Covenants. *But as to what concerns the Reimbursement of the Husband, and the Right he has to detain the Dowry, for the Expences, it depends always on the prudence of the Judge to determine whether the Husband, or his Heirs, Executors, or Administrators, ought to remain in possession till they are reimbursed: And this they are to judge of by the circumstances; such as the quantity of the Expences, the Value of the Lands and Tenements; the Security which the Husband, or his Heirs, Executors, or Administrators may have some other way; the Value of the Fruits; and whether the enjoyment of some part of the Fruits may not suffice for their Reimbursement; the Quality of the Persons, and of their Estates; and other circumstances of the like nature.*

XVII.

17. *How we are to judge of the necessity or usefulness of the Expences.*

Since there may arise difficulties about determining what Expences are necessary, or not, and what are useful, or not, it is to be left to the Prudence of the Judge to decide this matter according to the circumstances. And this depends on divers Views, and on the regard that is to be had to the Quality of the Lands and Tenements, and other Things on which the Expences have been laid out; as if it is to preserve, or to better a House, or to recover a Debt: to the Quality of the Repairs, and other Changes; to the Convenience or Inconvenience that may follow from thence; to the proportion that may be between the Expence and the Improvement; and to other considerations of the like nature. Thus, for Instance, if for the cultivating of a Country Farm, it is necessary to build a Barn to it, or some other Edifice, this may be reckoned a necessary Expence: and if there is in a House a place fit for making a Shop in, this may be reckoned an useful Expence [u].

[u] Quæ impendia secundùm eam distinctionem, ex dote deduci debeant, non tam facile in universum definiri, quam per singula ex genere, & magnitudine impendiorum æstimari possunt. *l.* 15. *in f. ff. de imp. in res dot.* Si novam villam necessariò extruxit, vel veterem totam, sine culpa sua collapsam, restituerit, erit ejus impensæ petitio. *l.* 7. §. *ult. ff. solut. matr.* Si in domo pistrinum, aut tabernam adjecerit. *l.* 6. *ff. de imp. in res dot. f.*

XVIII.

18. *If the Repairs perish by accident.*

If it so fall out that the Repairs perish thro' some accident, the Husband, or his Heirs, Executors, or Administrators will nevertheless recover the charges they were at in making them. Because the Work entitled them to the Recovery of the Expences which they laid out on it; and the Property of the Repairs belonging to the Wife, it is she that bears the Loss of them [x].

[x] Si fulserit insulam ruentem, eaque exusta sit, impensas consequitur. *l.* 4. *ff. de imp.*

XIX.

19. *Expences for pleasure.*

The Expences which are laid out merely for pleasure, without either necessity, or usefulness, are not recovered, even altho' the Wife had engaged the Husband to lay them out. For he ought to blame himself for an Expence which he had a mind to throw away [y].

[y] In voluptariis autem, Aristo scribit, nec si voluntate mulieris factæ sunt, exactionem parere. *l.* 21. *ff. de imp. l. un.* §. 5. *C. de rei uxor. act.*

XX.

20. *Repairs for pleasure.*

If the Repairs made for pleasure are such, that they can be taken away without being destroyed, the Husband, or his Heirs, Executors, or Administrators may take them away, in case of a refusal to reimburse them of the Charges which they have been at in making them. But if they are of such a nature, that they can be of no use when taken away, such as Painting in Fresco, it is not permitted to deface them. For this would be doing harm without reaping any profit [z].

[z] Pro voluptariis impensis, nisi parata sit mulier pati maritum tollentem, exactionem patitur. Nam si vult habere mulier, reddere ea quæ impensa sunt debet marito, aut si non vult pati debet tollentem, si modo recipiant separationem. Cæterùm si non recipiant, relinquendæ sunt. Ita enim permittendum est marito auferre ornatum quem posuit, si futurum est ejus, quod abstulit. *l.* 9. *ff. de imp.* Quod si voluptariæ sint, licet ex voluntate ejus (uxoris) expensæ, deductio operis quod fecit, sine læsione tamen prioris speciei, marito relinquatur. *l. un.* §. 5. *C. de rei ux. act.*

SECT. IV.

Of the Paraphernal Goods.

Which are the Paraphernal Goods.

THE Paraphernal Goods are all those which the Wife does not give to her Husband as part of her Dowry [a]; whether it be that she expresses what

ſhe reſerves to her ſelf, or that ſhe ſpecifies what ſhe is willing only to give as part of her Dowry. For whatever ſhe has over and above, is Paraphernal.

[a] Quæ Græci παράφερνα dicunt. *l.* 9. §. 3. *ff. de jur. dot.* Id eſt, *præter dotem.*

Thus, when the Wife gives to her Huſband in Marriage only all the Eſtate which ſhe has at preſent, or ſome particular Goods, the Remainder which ſhe either has at preſent, or may afterwards have by Inheritance, or otherwiſe, will be Paraphernal. But if ſhe gives in Marriage all her Eſtate preſent, and to come; in that caſe ſhe can never have any Paraphernal Goods.

Diſtinction between the Paraphernal Goods, and thoſe which are part of the Dowry.

The difference between the Dowry, and the Paraphernal Goods, conſiſts in this, that whereas the Revenues of the Dowry belong to the Huſband, the Revenues of the Paraphernal Goods are the Wife's own: and ſhe may diſpoſe of the ſaid Revenues, and of the Principal it ſelf, without the Authority of her Huſband.

Remarks on the nature of Paraphernal Goods.

This Nature of the Paraphernal Goods, which are no part of the Dowry, together with the Liberty given to the Wife to diſpoſe of the Revenues of the ſaid Eſtate, without conſulting her Huſband, or aſking his conſent, ſeems to have ſomething in it contrary to the Principles of their Union. For as the Huſband is the Head of the Wife, and has the charge of the Family, it would ſeem juſt that he ſhould be Maſter of all the Revenues of his Wife's Eſtate; which, as well as thoſe of the Huſband, ought to be imployed for the common uſe of Man and Wife, and of their Family: And this Liberty which the Wife has of enjoying a ſeparate Eſtate independently of her Huſband, is likewiſe an occaſion ſometimes of troubling the Peace and Tranquillity which the Marriage Union requires. And we ſee likewiſe, that in the ſame Law of the *Romans*, which takes away from the Huſband all right over the Paraphernal Eſtate, it is owned to be juſt, that the Wife putting her ſelf under the Conduct of her Huſband, ſhould likewiſe intruſt him with the Management of her Eſtate [b]. However, both the *Roman* Law and our Cuſtoms have received the Uſage of Paraphernal Goods; ſome of them having only regulated that if in the Contract of Marriage, the Wife does not ſpecify what Goods ſhe intends to allot for her Dowry; all the Eſtate which ſhe is ſeized or poſſeſſed of at the time of the Contract, are to be reputed as her Dowry.

[b] Bonum erat mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari. *l.* 8. *C. de pact. conv.*

There are again others, which have ſo favoured the uſe of Paraphernal Goods, and the Liberty of Wives to diſpoſe of them, that altho' the ſame Cuſtoms do not allow the Wife either to alienate, or to mortgage her Dowry, not even with the conſent and approbation of her Huſband; yet they allow her to enjoy, and to diſpoſe of her Paraphernal Goods, not only without the Authority, but even without the Conſent of her Huſband. And this diſpoſition is favourable in the ſaid Cuſtoms, as well as in the Provinces which are more particularly governed according to the Civil Law, where it is obſerved. Becauſe the Community of Goods between the Huſband and Wife not being received in uſe there, ſeeing the Wife has not the profit either of the Revenues of her own Portion, which belong to the Huſband, nor of the Eſtate which he may acquire during the Marriage; they leave her the liberty to augment her own Eſtate by the Profits which ſhe may be able to make of her Paraphernal Goods.

[*It is proper to obſerve here, that the Law of* England *allows of no Paraphernal Goods, beſides the Woman's Apparel. For by the Marriage, without any ſpecial Contract, the Husband acquires an abſolute Right and Property in all the Wife's Chattels Perſonal, in the Wife's poſſeſſion in her own Right. As to the Wife's Chattels Real, ſuch as Leaſes for years, and the like, they are not given to the Husband abſolutely, as all Chattels Perſonal are, by the Inter-marriage; but conditionally, if the Husband happen to ſurvive the Wife; and he hath power to alien them at his pleaſure. But in the mean time the Husband is poſſeſſed of the Chattels Real in her Right. Coke* 1 Inſtit. fol. 300. a. 351. a.]

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1. *Definition of the Paraphernal Goods.*
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5. *The Huſband's care of the Paraphernal Goods delivered to him.*
6. *How theſe Goods are diſtinguiſhed from the Goods of the Dowry.*
7. *What the Wife is poſſeſſed of without an apparent Title, belongs to the Huſband.*

I.

1. *Definition of the Paraphernal Goods.*

THE Paraphernal Goods are all the Goods which a married Woman has, beſides thoſe which have been given with her in Marriage to her Huſband. And theſe Goods are as it were a ſort of *Peculium*, or private Poſſeſſion, which the Wife reſerves to her ſelf over and above her Dowry, which goes to the Huſband [a].

[a] Si res dentur, in ea, quæ Græci παράφερνα dicunt, quæque Galli peculium appellant. *l. 9. §. 3. ff. de jur. dot.* Species extra dotem. *l. 31. §. 1. ff. de donat.* Res quas extra dotem mulier habet, quas Græci παράφερνα dicunt. *l. 8. C. de pact. conv.*

II.

2. *The Wife may diſpoſe of her Paraphernal Goods.*

The Wife may diſpoſe of her Paraphernal Goods, without the Authority and Conſent of her Huſband: and may put them to what uſe ſhe pleaſes, the Huſband having no right to comptrol her, even altho' ſhe had delivered them into his Cuſtody [b].

[b] Hac lege decernimus, ut vir in his rebus, quas extra dotem mulier habet, quas Græci paraphærna dicunt, nullam uxore prohibente habeat communionem: nec aliquam ei neceſſitatem imponat. Quamvis enim bonum erit mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari, attamen, quoniam conditores legum æquitatis convenit eſſe fautores; nullo modo, ut dictum eſt, muliere prohibente, virum in paraphernis ſe volumus immiſcere. *l. 8. C. de pact. conv.* Pecunias ſortis quas exegerit (maritus) ſervare mulieri, vel in cauſas ad quas ipſa voluerit, diſtribuere (ſancimus.) *l. ult. eod.*

III.

3. *In what manner the Wife may enjoy her Paraphernal Goods.*

As the Wife may enjoy, and diſpoſe of her Paraphernal Goods, ſo ſhe may either enjoy them her ſelf, or by other perſons, or leave the Enjoyment of them to her Huſband, for their common uſe, and that of their Family. And if the ſaid Goods conſiſt in Rents, or in Debts, ſhe may either her ſelf, or by other perſons, take up the principal Sums, the Rents, and Intereſt, if any is due, or leave it to her Huſband to recover them, ſhe giving him the neceſſary Powers for doing it [c].

[c] Habeat mulier ipſa facultatem, ſi voluerit, ſive per maritum, ſive per alias perſonas, eaſdem movere actiones, & ſuas pecunias percipere. *l. ult. C. de pact. conv.* Et uſuras quidem eorum circa ſe, & uxorem expendit. *d. l.* Si mulier marito ſuo nomina, id eſt fœneratitias cautiones quæ extra dotem ſunt, dederit, ut loco paraphernorum apud maritum maneant. *d. l. ult.*

IV.

4. *If the Paraphernal Eſtate conſiſts in Moveables.*

If the Paraphernal Eſtate, or a part of it, conſiſts in Rents, Debts, or in Moveable Effects; the Wife may either keep them in her own cuſtody, or put them into the hands of her Huſband, getting him to ſign an Inventory of them, as an acknowledgment of the Receipt of the Goods [d].

[d] Plerumque cuſtodiam eorum maritus repromittit, niſi mulieri commiſſæ ſint. *l. 9. §. 3. in f. ff. de jur. dot.* Mulier res quas ſolet in uſu habere in domo mariti, neque in dotem dat, in libellum ſolet conferre, eumque libellum marito offerre, ut is ſubſcribat, quaſi res acceperit: & velut chirographum ejus uxor retinet, res quæ libello continentur, in domum ejus intuliſſe. *d. §. 3. v. l. ult. C. de pact. conv.*

V.

5. *The Huſband's care of the Paraphernal Goods delivered to him.*

If the Paraphernal Goods are put into the Huſband's cuſtody, he is obliged to take the ſame care of them as of his own Goods, and he will be made accountable for the Faults that are inconſiſtent with this Care [e].

[e] Dum autem apud maritum remanent eædem cautiones, & dolum, & diligentiam maritus circa eas res præſtare debet, qualem & circa ſuas res habere invenitur. Ne ex ejus malignitate, vel deſidia, aliqua mulieri accidat jactura. Quod ſi evenerit, ipſe eadem de proprio refarcire compellatur. *l. ult. in f. C. de pact. conv. l. 9. §. 3. in f. ff. de jur. dot.* See the ſecond Article of the third Section of this Title.

VI.

6. *How theſe Goods are diſtinguiſhed from the Goods of the Dowry.*

The Paraphernal Goods are diſtinguiſhed from the Goods of the Dowry, by the Contract of Marriage which ought to expreſs what goes to the Dowry. And all the Goods which are not comprehended in the Dowry either expreſly, or tacitly, are reckoned to be Paraphernal, even altho' the Wife ſhould deliver them to the Huſband, together with the Goods of her Dowry; unleſs it ſhould appear at the time of the Delivery, that the ſaid Goods were only an Acceſſory with which the Wife intended to augment her Dowry [f].

[f] Dotis autem cauſa data accipere debemus ea quæ in dotem dantur. Cæterum, ſi res dentur in ea quæ Græci παράφερνα dicunt, quæ Galli peculium appellant, videamus an ſtatim efficiuntur mariti? Et putem, ſi ſic dentur ut fiant, effici mariti. *l. 9. §. 2. & 3. ff. de jur. dot.*

VII.

7. *What the Wife is poſſeſſed of without an apparent Title, belongs to the Huſband.*

We ought not to reckon in the number of the Paraphernal Goods, nor of the other Goods of the Wife, thoſe which ſhe may chance to have in her Cuſtody, or which ſhe may pretend to belong to her, unleſs it appear that ſhe has a juſt Title to them; as if ſhe has acquired them by Inheritance, or Gift, or that ſhe was poſſeſſed of them at the time of her Marriage. And all the other Goods which ſhe may chance to have, of which the Title does not appear, and

and it is not known whence ſhe had them, belong to the Huſband. For otherwiſe it muſt be preſumed that the Wife has come by theſe Goods only by cheating her Huſband, or by other unlawful ways[g]. And even the Profits which ſhe may happen to make by her Frugality, her Labour, and Induſtry, belong to the Huſband, as Fruits and Revenues, and as Services or Offices which the Wife owes to the Huſband[h].

[g] Quintus Mucius ait, cum in controverſiam venit unde ad mulierem quid pervenerit, & verius & honeſtius eſt, quod non demonſtratur unde habeat, exiſtimari à viro, aut qui in poteſtate ejus eſſet, ad eam perveniſſe. Evitandi autem turpis quæſtus gratia circa uxorem, hoc videtur Quintus Mutius probaſſe. *l.* 51. *ff. de donat. inter vir. & ux.* Nec eſt ignotum, quod cum probari non poſſit, unde uxor matrimonii tempore honeſtè quæſierit, de mariti bonis eam habuiſſe veteris juris authores meritò crediderint. *l.* 6. *C. eod.*

[h] Qui libertæ nuptiis conſenſit, operarum exactionem amittit. Nam hæc cujus matrimonio conſenſit, in officio mariti eſſe debet. *l.* 48. *ff. de oper. libert.*

SECT. V.

Of the Separation of Goods between the Husband and Wife.

The Connexion between this matter and that of Dowries.

THE Separation of Goods between the Huſband and Wife, is one of the Cauſes of the Reſtitution of the Dowry. And therefore this matter being an Acceſſory to that of Dowries, the Rules concerning it ſhall be explained in this Section.

The Separation of Goods is made in two caſes. The firſt is, when the Wife procures a Separation from her Huſband's Bed, becauſe of his cruel uſage of her; for a Separation from the Huſband's Bed implies a Separation of Goods. And the ſecond is, when the diſorder of the Huſband's Affairs obliges the Wife to take back her own Eſtate.

The Separation from the Huſband's Bed, is a matter which does not come properly within the Deſign of this Book; it being altogether different in our Uſage from that which was the effect of a Divorce under the *Roman* Law. And we ſhall only treat here of the bare Separation of Goods.

[*I muſt here acquaint the Reader, that in* England *we have no ſuch bare Separation of Goods, as is here mentioned by our Author. The Separation in uſe with us, is a Separation from Bed and Board together. And this is granted in the Eccleſiaſtical Courts upon a due proof either of Adultery, or Cruelty, either on the part of the Huſband or Wife. The Divorce, as allowed by the Roman Law, which is a total Diſſolution of the Marriage, is not permitted in* England *without an Act of Parliament.*]

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1. *Definition of the Separation of Goods.*
2. *Cauſe of the Separation of Goods.*
3. *Effect of the Separation.*
4. *The Wife who has obtained a Separation of Goods cannot alienate them.*
5. *She may diſtrain the Goods of the Huſband, and cauſe them to be ſold, for her Dowry.*
6. *She may do the ſame for the Recovery of her Paraphernal Goods which ſhe gave her Huſband.*
7. *As alſo for her Gains.*

I.

1. *Definition of the Separation of Goods.*

THE Separation of Goods between the Huſband and Wife, is the Right which the Wife has to take her Effects out of the Huſband's hands, that ſhe may manage and enjoy them her ſelf, when the ſtate of the Huſband's Affairs expoſes the Wife's Effects to danger[a].

[a] *This Definition follows from the ſubſequent Rules.*

II.

2. *Cauſe of the Separation of Goods.*

Seeing the Wife is ſubject to the Huſband, and that her Dowry, and the other Goods which ſhe may have brought to her Huſband, are left with him on condition that he bear the charges of the Marriage; ſhe cannot demand the Separation of Goods, except when the diſorder of the Huſband's Affairs puts him out of a condition of being able to bear the ſaid charges, and that the Goods which he has of his Wife's are in danger. Thus, the Separation ought to be decreed in a Court of Juſtice, after hearing the Cauſe, and upon ſufficient proof that the bad condition of the Huſband's Affairs, and the ſmallneſs of his Eſtate puts the Goods of the Wife in danger[b].

[b] Si conſtante matrimonio, propter inopiam mariti mulier agere volet, unde exactionem dotis initium accipere ponamus? Et conſtat, exinde dotis exactionem competere, ex quo evidentiſſimè apparuerit, mariti facultates, ad dotis exactionem non ſufficere. *l.* 24. *ff. ſolut. matr. v. l.* 22. §. 8. *eod. l.* 30. *in f. C. de jure dot.*

III.

3. *Effect of the Separation.*

The Separation of Goods being granted to the Wife only becauſe her Goods were in danger, and becauſe the Huſband was not able to bear the charges of the Marriage; the Engagement of the Huſband to manage the Goods of the Wife, and to bear theſe charges, paſſes

paſſes to the Wife by the Separation of Goods. So that ſhe takes upon her again the Adminiſtration of her own Goods, and bears theſe charges, imploying her Revenues for the Maintenance of her Huſband, her ſelf, and their Children [c].

[c] Ubi adhuc matrimonio conſtituto, maritus ad inopiam ſit deductus, & mulier ſibi proſpicere velit. *l.* 29. *C. de jure dot.* Fructibus earum (rerum ſuarum) ad ſuſtentationem tam ſui quàm mariti, filiorumque, ſi quos habet, abutatur. *d. l.*

IV.

4. The Wife who has obtained a Separation of Goods cannot alienate them.

The Separation of Goods gives the Wife only a Right to enjoy her own Goods, and to take care of them; but ſhe cannot alienate them [d], except in ſo far as the Laws, and Cuſtoms of the Country may allow her [e].

[d] Ita tamen, ut eadem mulier nullam habeat licentiam eas res alienandi vivente marito, & matrimonio inter eos conſtituto. *l.* 29. *C. de jur. dot.*

[e] *See the thirteenth and fifteenth Articles of the firſt Section.*

V.

5. She may diſtrain the Goods of the Husband, and cauſe them to be ſold, for her Dowry.

If the Dowry conſiſts in Money, Debts, or other Effects, which are not in being, the Wife may, by virtue of the Separation, diſtrain and cauſe to be expoſed to Sale the Goods of the Huſband, and others that are mortgaged to her, even altho' they be in the hands of a third Poſſeſſor [f].

[f] Ubi adhuc matrimonio conſtituto, maritus ad inopiam ſit deductus, & mulier ſibi proſpicere velit: reſque ſibi ſuppoſitas pro dote, & ante nuptias donatione, rebuſque extra dotem conſtitutis, tenere: non tantùm mariti res ei teneri, & ſuper his ad judicium vocatæ, exceptionis præſidium ad expellendum ab hypotheca ſecundum creditorem præſtamus: ſed etiam ſi ipſa contra detentatores rerum ad maritum ſuum pertinentium, ſuper iiſdem hypothecis aliquam actionem ſecundum legum diſtinctionem, moveat, non obeſſe ei matrimonium ad conſtitutum ſancimus. *l.* 29. *C. de jur. dot.*

VI.

6. She may do the ſame for the Recovery of her Paraphernal Goods which ſhe gave her Husband.

If beſides the Goods of the Dowry, the Wife had put into her Huſband's Cuſtody, her Paraphernal Goods, which are not in being, ſhe may recover them in the ſame manner as the Goods of her Dowry [g].

[g] Rebuſque extra dotem conſtitutis. *d. l.* 29. *C. de jur. dot.*

VII.

7. As alſo for her Gains.

If by the Contract of Marriage there are Gains due to the Wife out of the Huſband's Eſtate, ſhe may recover them in the ſame manner as ſhe recovers her Dowry, whether it be to preſerve her Right of Property in them, if ſhe is not to have the Enjoyment of them till after the Huſband's death, or that ſhe may enter on the actual Enjoyment of them; according as the quality of the ſaid Gains ſhall happen to be regulated, either by the Contract of Marriage, or by the Cuſtoms and Uſage of the Places [h].

[h] Pro dote & ante nuptias donatione. *d. l.* 29. *C. de jur. dot. Nov.* 97. *cap.* 6.

TITLE X.

Of DONATIONS that have their effect in the Life-time of the Donor.

THere are two ſorts of Gifts, or Donations. One which takes effect during the Life of the Donor. And the other ſort is of ſuch Donations as are made in proſpect of death, and which have their effect only after the death of the Donor. *Two ſorts of Donations.*

There are two eſſential differences between theſe two ſorts of Donations. One is, that the Donations which take effect during the Life of the Donor, are Covenants tranſacted between the Donors and the Donees, which makes them irrevocable; whereas Donations made in proſpect of death are Diſpoſitions of the ſame nature with Legacies, and the Inſtitution of an Executor; which depend on the bare will of thoſe who give, and which for that reaſon may be revoked. *Differences between Donations that take effect in the Life-time of the Donor, and thoſe which do not take effect till after his death.*

The other difference between Donations that take effect in the Life-time of the Donor, and thoſe which have their effect only after his death, is a conſequence of the former, and conſiſts in this, that he who gives during his Life-time, diveſts himſelf of that which he gives away, and transfers it to the Donee, who becomes Maſter of it: whereas he who gives only in proſpect of death, loves rather to keep than give away, and remains until his death Proprietor of what he gives, having a Right to deprive the Donee of it, and to diſpoſe of it otherwiſe as he pleaſes. Thus, whereas the Donation that takes effect in the Life-time of the Donor, ſtrips the Donor himſelf; the Donation made in proſpect of death, ſtrips only his Heir or Executor [i].

[i] Sed mortis causâ donatio longè differt ab illa vera & abſoluta donatione, quæ ita proficiſcitur, ut nullo caſu revocetur. Et ibi qui donat, illum potiùs, quàm ſe habere mavult: at is qui mortis causâ donat, ſe cogitat, atque amore vitæ recepiſſe potiùs,

ciùs, quàm dediſſe mavult. Et hoc eſt quare vulgò dicatur, ſe potiùs habere vult, quàm eum cui donat: illum deindè potiùs quàm hæredem ſuum. *l.* 35. §. 2. *ff. de mort. cauſ. donat.*

It is becauſe of this laſt difference between the Donations that take effect in the Donor's life-time, and thoſe which take effect only after his death, that the Cuſtoms which do not permit Teſtamentary Diſpoſitions to the prejudice of the next Heirs, except as to a certain Portion of the Goods, reduce to the ſame Portion Donations made in proſpect of death; and that on the contrary they permit Donations that have their effect in the Donor's life-time to the prejudice of the Heirs, becauſe the Donor not only ſtrips his Heirs, but alſo himſelf of what he gives away. And theſe ſorts of Donations which ſtrip the Donor, have no other bounds than thoſe which have been ſet to them by the ſeveral Cuſtoms of particular Places; whether it be for preſerving to the Children their Filial Portions, or for reſtraining Largeſſes between certain Perſons, or for other cauſes.

It follows from this Nature of Donations that take effect in the Donor's life-time, that they being Covenants irrevocable which ſtrip the Donor of what he gives away, every Donation that has not this character, and which leaves the Donor at liberty to revoke it, is a Donation of no force. That is to ſay, that it is not, properly ſpeaking, a Donation that is to take place in the Life-time of the Donor.

It is on this Principle that the common Rule in this matter does depend, viz. *That to Give, and to Retain, avails nothing.* The meaning of which is, that if the Donor keeps what he gives away, he does not diveſt himſelf, and does not give. Which Maxim has this extent, that it annuls not only the Donations in which the Donors reſerve a liberty of diſpoſing of the Things given, but likewiſe all thoſe Donations in which there happens to be circumſtances denoting that the Donor has not diveſted himſelf, and that the Donee has not been made irrevocably Maſter of the Thing that was given him. Thus a Donation, whereof the Deed or Title remains in the cuſtody of the Donor, the Donee having no duplicate of it, or of which the Minute, or Draught, is not put into the hands of a Publick Notary, in order to draw up the Inſtrument, would be a void Donation; becauſe the Donor would retain the liberty of annulling it.

Donations made in proſpect of death, are one of the matters treated of in the ſecond Part of this Work; and the preſent Title relates only to Donations that have their effect in the life-time of the Donors, becauſe they are Covenants. But to avoid the repeating always the expreſſion at large of Donations that take effect in the Life-time of the Donors, we ſhall uſe only the ſimple word of Donations.

Donations are Liberalities which are Natural in the Order of Society, where the Ties of Parentage and Friendſhip, and the ſeveral Engagements lay different obligations on perſons to do good, either out of Gratitude for Favours received, or out of an Eſteem of Merit, or out of a Motive of aſſiſting thoſe that are in want, or upon other conſiderations.

There are divers ſorts of ways of Giving, and doing of good, as well as of Commerce. And as we make a Commerce of Induſtry, Labour, Services, and alſo of Things, we do the ſame likewiſe of Gratuitous Deeds; but we give the Name of Donation only to that kind of Liberality by which we ſtrip our ſelves of the Things; and not to the Services and good Offices which we render to thoſe whom we are willing to oblige[b].

[b] Labeo ſcribit extra cauſam donationum eſſe talium officiorum mercedes, ut putà ſi tibi adfuero, ſi ſatis pro te dedero: ſi qualibet in re opera vel gratia mea uſus fueris. *l.* 19. §. 1. *ff. de donat.*

Of Donations between Man and Wife.

We ſhall not inſert under this Title any of the Rules of the *Roman* Law which concern Donations between Man and Wife; becauſe this Matter is ſo differently regulated in the Provinces which are governed by the *Roman* Law, and by the Cuſtoms, that it would be to deviate too far from the Deſign of this Work to ſet down here Rules of which there is ſcarcely one that is univerſally received every where. But to ſupply this want, we have thought proper to obſerve here the General Principles which are the Foundation of the different Laws concerning Donations between Man and Wife, to ſhew in the ſaid Principles the Spirit of the different Rules which are obſerved, either in the Provinces that are governed by the *Roman* Law, or in the Cuſtoms: And they are contained in the following Remarks.

The ſtrict Union between Man and Wife being an occaſion to them to exerciſe their Liberality towards one another,

another, according to their Affection, and their Eſtates; the uſe of theſe ſorts of Donations was attended with ſo great Inconveniences, that it was aboliſhed by the *Roman* Law. For it appeared from Experience, that the eaſy Temper either of the Huſband, or of the Wife, impoveriſhed the one to enrich the other: That the application of the Party that was moſt covetous to procure Largeſſes from the other, engaged them in Cares and Views entirely oppoſite to their Duty of educating their Children, or diverted them wholly from any thoughts of it: That the one Party refuſing to comply with the deſires of the other, in giving what was aſked, it was an occaſion of Strife and Contention: and in fine the *Roman* Lawgivers were of opinion, that the Conjugal Love ought to ſubſiſt and to be nouriſhed by a more honourable Motive than that of Self-Intereſt[c].

[c] Moribus apud nos receptum eſt, ne inter virum & uxorem donationes valerent. Hoc autem receptum eſt, ne mutuato amore invicem ſpoliarentur, donationibus non temperantes: ſed profuſâ erga ſe facilitate. Nec eſſet eis ſtudium liberos potiùs educendi. Sextus Cœcilius & illam cauſam adjiciebat, quia ſæpè futurum eſſet ut diſcuterentur matrimonia, ſi non donaret is qui poſſet: atque ea ratione eventurum ut venalitia eſſent matrimonia. Hæc ratio & oratione Imperatoris noſtri Antonini Auguſti electa eſt. Nam ita ait, majores noſtri inter virum & uxorem donationes prohibuerunt, amorem honeſtum ſolis animis æſtimantes: famæ etiam conjunctorum conſulentes: nec concordia pretio conſiliari videretur, néve melior in paupertatem incideret, deterior ditior fieret. *l.* 1. 2. *&* 3. *ff. de donat. int. vir. & ux.*

But ſeeing the principal conſideration which induced the *Roman* Lawgivers to annul Donations between Man and Wife, was to prevent their impoveriſhing one another in their Life-time, and that the Donor might not be deſtitute of all manner of Subſtance after the Diſſolution of the Marriage, whether it were by Death, or Divorce; the Donations which were to take effect only after the death of the Donor not producing the ſame ill conſequences, were permitted between Man and Wife. And they gave likewiſe this effect to Donations, which were intended to take place in the Life-time of the Donor, that if they were not revoked by the Donor in his Life-time, they ſhould be confirmed by his Death, and be as valid as if they had at firſt been made in proſpect of Death.

The diſpoſitions of the Cuſtoms in relation to Donations between Man and Wife, are different, according to the regard which they have had to the Motives upon which theſe Donations were annulled by the *Roman* Law, or according to the other Views of the Spirit and Principles of the ſaid Cuſtoms. Thus ſome of them have allowed Donations between Man and Wife of the Property of Moveables, and of the Immoveables of their own Acquiſition; and likewiſe of a part of the Eſtate which came to them by Inheritance; but they would have theſe Donations to be revocable. Thus the ſame Cuſtoms, and many others have approved of Donations between Man and Wife that take effect in the Life-time of the Donor, and allow them to be irrevocable, provided they be only of an Enjoyment of the Moveables, and Immoveables of the Donor's own Purchaſe, and that they be reciprocal. And the diſpoſition of theſe Cuſtoms is founded on this Principle, that the Liberality being reciprocal, and both the one and the other Party being uncertain of the Event which would entitle the longeſt Liver to the benefit of the Gift, theſe kinds of Donations are not attended with the ſame Inconveniences, as where the Condition of both Parties is not Equal, and that they have nothing in them which may diſturb the Peace and Tranquillity of the State of Matrimony, or which is contrary to the Honour of Marriage.

But other Cuſtoms under other Views, have forbid all Diſpoſitions made by the Wife in favour of her Huſband, even altho' they were made in proſpect of Death; notwithſtanding the ſame Cuſtoms allow the Huſband to give to his Wife all his Eſtate by a Donation that is to take place in his Life-time, reſerving only to the Children their Filial Portions. And theſe Cuſtoms regulate the matter thus, becauſe they make the Wife's condition leſs advantageous in other reſpects, the Community of Goods not being there received: and becauſe they will ſecure the Wife's Eſtate againſt the Diſpoſitions to which the Huſband's Power and Authority over her might engage her.

[*The Law of* England *conſiders the Huſband and Wife as but one Perſon. And therefore by no Conveyance at the Common Law could the Huſband, during the Coverture, limit an Eſtate to his Wife. But a Man may by his Deed covenant with others to ſtand ſeiſed to the Uſe of his Wife, or make a Feoffment, or other Conveyance to the Uſe of his Wife. And now the State is executed to ſuch Uſes by the Statute of* 27 Hen. VIII. *For an Uſe is but a Truſt and Confidence, which by ſuch a mean might be limited by the Huſband to the Wife. But a Man cannot covenant with his Wife to ſtand ſeiſed to her Uſe; becauſe he cannot covenant with her, he and ſhe being but one Perſon in the Law. But he may deviſe by his Teſtament Lands and Tenements to his Wife; becauſe ſuch Deviſe taketh no effect till after the death of the Deviſor, when the Union between them is diſſolved.* Coke 1 Inſtit. fol. 112. a.]

SECT. I.

Of the Nature of Donations that take effect in the Life-time of the Donor.

The CONTENTS.

I.

1. *Definition of Donation.*

A Donation which takes effect during the Life of the Donor, is a Contract made by a reciprocal consent between the Donor, who strips himself of the Thing which he gives away, in order to transfer it *gratis* to the Donee, and the Donee, who accepts and acquires the thing that is given him [a].

[a] Aliæ donationes sunt quæ sine ulla mortis cogitatione fiunt, quas inter vivos appellamus. §. 2. *inst. de donat.* Dat aliquis ea mente, ut statim velit accipientis fieri. *l.* 1. *ff. de donat. v. l.* 22. *in f. eod.* in verbo *contractibus.* Donatio est contractus. *l.* 7. *C. de his quæ vi metusve, c. g. f.*

II.

2. *No Donation without Acceptance.*

There is no Donation without Acceptance. For if the Donee does not accept, the Donor is not divested of the Thing which he gives, and his Right remains still with him [b].

[b] Non potest liberalitas nolenti acquiri. *l.* 19. §. 2. *ff. de donat.* Invito beneficium non datur. *l.* 69. *ff. de reg. jur. l.* 156. §. *ult. eod.* Absenti, sive mittas qui ferat, sive quod ipse habeat, sive habere eum jubeas, donari rectè potest. Sed si nescit eam quæ apud se est, sibi esse donatam, vel missam sibi non acceperit, donatæ rei dominus non fit. *l.* 10. *ff. de don.* Donationis acceptor. *l. ult. C. de revoc. donat.*

III.

3. *If the Donee is incapable of accepting.*

If the Donee is incapable of accepting, as if it be a Child which cannot speak, nor express any desire of having the Thing given, the Acceptance must be made by a person that is capable of accepting for him, such as his Father, his Tutor, or Guardian [c].

[c] Si quis in emancipatum minorem, priusquam fari possit, aut habere rei quæ sibi donatur affectum, fundum crediderit conferendum, omne jus compleat, instrumentis ante præmissis. Quod jus per eum servum, quem idoneum esse constituerit, transigi placuit. Ut per eum infanti acquiratur. *l.* 26. *C. de donat.*

IV.

4. *Who gives what he is bound to give, does not make a Donation.*

A Donation is a Liberality, and he who gives only what he owes, or what he is obliged to give, does not make a Donation, but acquits himself of a Debt, or of some other Engagement. Thus, he who gives in order to fulfil a Condition in a Testament, or of a Donation which burdens him with it, is not a Donor, even altho' it were out of his own Substance that he had been charged to give [d].

[d] Donatio dicta est à dono, quasi dono datum. *l.* 35. §. 1. *ff. de mort. caus. donat.* Donari videtur, quod nullo jure cogente conceditur. *l.* 82. *ff. de reg. jur. l.* 29. *ff. de donat.* Propter nullam aliam causam facit, quàm ut liberalitatem & munificentiam exerceat, hæc propriè donatio appellatur. *l.* 1. *eod.* Quæ liberti impositæ libertatis causâ præstant, ea non donantur, res enim pro his intercessit. *l.* 8. *ff. de don.*

V.

5. *Remuneratory Donations.*

The Donations which are called Remuneratory, and which are made in recompence of Services, are not properly Donations, except when that which is given could not be demanded by the Donee: and the Recompence which the Donee could demand is not in effect a Donation [e].

[e] Aquilius Regulus juvenis ad Nicostratum Rhetorem ita scripsit, *Quoniam & cum patre meo semper fuisti, & me eloquentiæ & diligentiæ tuæ meliorem reddidisti, dono & permitto tibi habitare in illo cœnaculo, eoque uti.* Defuncto Regulo controversiam habitationis patiebatur Nicostratus, & cùm de ea re mecum contulisset, dixi posse defendi, non meram donationem esse, verum officium magistri quadam mercede remuneratum Regulum. Ideoque non videri donationem sequentis temporis irritam esse. *l.* 27. *ff. de donat. v. l.* 34. §. 1. *eod.* Donari videtur, quod nullo jure cogente conceditur. *l.* 82. *ff. de reg. jur.*

VI.

6. *Donations are irrevocable.*

Altho' a Donation be a Liberality, yet it is irrevocable, as other Covenants are [f]; unless it be with the consent of the Donee, or for some one of the

Cauſes which ſhall be explained in the fourth Section.

[f] Quæ ſi fuerint perfectæ, temerè revocari non poſſunt. §. 2. *inſt. de donat.* Ut ſtatim velit accipientis fieri, nec ullo caſu ad ſe reverti. *l.* 1. *ff. de don.* Cùm enim in arbitrio cujuſcumque ſit, hoc facere quod inſtituit, oportet eum vel minimè ad hoc profilire, vel cùm ad hoc venire properaverit, non quibuſdam excogitatis artibus ſuum propoſitum defraudare. *l.* 35. §. *ult. C. de don.*

VII.

7. *What Things may be given.*

We may give all Things that are in Commerce, and which we have power to diſpoſe of, Moveables, Immoveables, Debts, Rights, Actions, and even Goods to come, and in general every Thing that may paſs from one Perſon to another, and be acquired by him. And it is alſo a Donation when the Creditor forgives the Debt to his Debtor [g].

[g] Donari non poteſt, niſi quod ejus fit, cui donatur. *l.* 9. §. *ult. ff. de donat.* Spem futuræ actionis, plenâ intercedente donatoris voluntate, poſſe transferri, non immerito placuit. *l.* 3. *C. eod.* Si quis obligatione liberatus ſit, poteſt videri cœpiſſe. *l.* 115. *ff. de reg. jur.* Si donationis causâ furti actionem tibi remiſſam probetur, ſupervacuam geris ſollicitudinem. *l.* 18. *C. de donat.*

VIII.

8. *Donation of all the Donor's Goods, or of a part of them.*

One may give away either all his Goods, or a part of them [h], provided that the Donation be not undutiful [i]; and that if it is of all one's Goods, there be reſerved either the Uſufruct of the Goods given, or ſome other thing which may ſuffice for the Suſtenance of the Donor. For it would be contrary to Good Manners, for the Donee to ſtrip the Donor of his whole Subſtance, both in Principal, and Revenue [k].

[h] Sed & ſi quis univerſitatis faciat donationem, ſive beſſis, ſive dimidiæ partis ſuæ ſubſtantiæ, ſive tertiæ, ſive quartæ, ſive quantæcumque, vel etiam totius, ſi non de inofficioſis donationibus ratio in hoc reclamaverit, coarctari donatorem, legis noſtræ authoritate tantùm quantùm donavit, præſtare. *l.* 35. §. 4. *C. de donat.*

[i] *Undutiful Donations are thoſe which are taken out of the Legitime or Legal Portions of thoſe perſons to whom ſuch Portions are due by Law; and this is a matter which belongs to the Second Part.*

[k] Divus Pius reſcripſit, eos qui ex liberalitate conveniuntur in id quod facere poſſunt condemnandos. *l.* 28. *ff. de reg. jur. l.* 12. *ff. de don.*

IX.

9. *The Fruits reaped after the Donation do not augment it.*

The Fruits and Revenues which the Donee gathers from the Things given after the Donation, are no part of the Gift, neither do they augment it, but they are Goods belonging to the Donee, in the ſame manner as the Fruits of a Thing which is his own. Thus, in Donations that are ſubject to ſome Reduction, we do not reckon the Fruits that have been reaped after the Donation. Thus, when a Donation comes to be annulled by the exiſtence of ſome Condition, or otherwiſe, the Donee does not reſtore the Fruits and Revenues which he has reaped [m].

[m] Ex rebus donatis fructus perceptus, in rationem donationis non computatur. *l.* 9. §. 1. *ff. de don.* Cùm de modo donationis quæritur, neque partûs nomine, neque fructuum, neque penſionum, neque mercedum ulla donatio facta eſſe videtur. *l.* 11. *eod.*

X.

10. *Donations either pure and ſimple, or conditional.*

Donations are either pure and ſimple, or made upon ſome condition, or with ſome charge. And the Donee is obliged to acquit the Charges, and perform the Conditions which the Donor has enjoined him [n].

[n] Legem quam rebus tuis donando dixiſti, ſive ſtipulatione tibi proſpexiſti, ex ſtipulatu, ſive non, incerto judicio, id eſt, præſcriptis verbis, apud Præſidem Provinciæ debes agere, ut hanc impleri providdas, *l.* 9. *C. de donat.*

XI.

11. *Three ſorts of Conditions.*

The Conditions in Donations, as in other Covenants, are of three ſorts. Some are ſuch, that the validity of the Donation depends on the exiſtence of the Condition: others make void the Donation which had ſubſiſted: and others make only ſome change, without annulling the Donation [o]. Thus, Donations made in favour of Marriage imply the Condition, that they ſhall not have their effect, till the Marriage be accompliſhed [p]. Thus a Donation being made upon condition, that if the Donee dies before the Donor, the Things given ſhall return to the Donor, this Condition annuls a Donation which had ſubſiſted [q]. And this other Condition, that after a certain time, or in a certain caſe, the Donee ſhall be bound to deliver the Things given, or a part of them, to another perſon, neither annuls nor accompliſhes the Donation; but makes the change in it which has been agreed on, and obliges the Donee to deliver the Things to the perſon to whom the Reſtitution ought to be made [r].

[o] *See the fourth Section of Covenants.*

[p] *See the laſt Article of the firſt Section of the Title of Dowries.*

[q] Si rerum tuarum proprietatem dono dediſti, ita ut poſt mortem ejus qui accepit, ad te rediret, donatio valet. Cùm etiam ad tempus certum, vel incertum ea fieri poteſt. Lege ſcilicet, quæ ei impoſita eſt, conſervanda. *l.* 2. *C. de donat. quæ ſub modo.*

[r] Quoties donatio ita conficitur, ut poſt tempus, id quod donatum eſt, alii reſtituatur: veteris juris authori-

authoritate reſcriptum eſt, ſi is in quem liberalitatis compendium conferebatur, ſtipulatus non ſit, placiti fide non impleta, ei qui liberalitatis author fuit, vel hæredibus ejus, condictitiæ actionis perſecutionem competere. Sed cùm poſteà, benigna juris interpretatione, Divi Principes, ei qui ſtipulatus non ſit, utilem actionem juxta donatoris voluntatem competere admiſerint, actio quæ ſorori tuæ, ſi in rebus humanis ageret competebat, tibi accommodabitur. *l.* 3. *C. de donat. quæ ſub modo.*

XII.

12. When the Donation is perfected, it admits of no new burdens.

After the Donation has been accompliſhed, it is no longer in the Power of the Donor to impoſe on the Donee any new Condition or Charge, even altho' he were Father to the Donee[r].

[r] Perfecta donatio conditiones poſteà non capit. Quare ſi pater tuus donatione facta quaſdam poſt aliquantulum temporis feciſſe conditiones videatur, officere hoc nepotibus ejus fratris tui filiis minimè poſſe, non dubium eſt. *l.* 4. *C. de donat. quæ ſub modo.*

XIII.

13. Difference between Motives, and Conditions of Donations.

We are to make a great difference in Donations, between the Motives which the Donors expreſs as the Cauſes of their Liberality, and the Conditions with which they burden them. For whereas the default of a Condition annuls the Conditional Donation; yet it ſubſiſts, altho' the Motives expreſſed in it prove not to be true. Thus if it is ſaid in a Donation, that it is made on account of Services done, or to facilitate to the Donee the making of a Purchaſe which he had a mind to; the Donation will not be annulled, altho' no Services have been rendred, nor the Purchaſe made. For there remains ſtill the abſolute will of the Donor, who may have had other Motives beſides thoſe which he has expreſſed. But if it was ſaid, that the Donation is made only on condition, that what is given be laid out on ſuch a Purchaſe, ſuch as the Buying of an Office, and the Office is not bought; the Donation will have no effect[s].

[s] Titio decem donavi, ea conditione ut inde Stichum ſibi emeret. Quæro, cùm homo antequam emeretur, mortuus ſit, an aliqua actione decem recipiam. Reſpondit, facti magis quàm juris quæſtio eſt. Nam ſi decem Titio in hoc dedi, ut Stichum emeret, aliter non daturus: mortuo Sticho, condictione repetam. Si verò alias quoque donaturus Titio decem, quia interim Stichum emere propoſuerat, dixerim in hoc me dare ut Stichum emeret: cauſa magis donationis, quàm conditio dandæ pecuniæ exiſtimari debebit. Et mortuo Sticho pecunia apud Titium remanebit. *l.* 2. §. *ult. ff. de donat.* Et generaliter hoc in donationibus definiendum eſt, multum intereſſe cauſa donandi fuit, an conditio. Si cauſa fuit ceſſare repetitionem, ſi conditio repetitioni locum fore. *l.* 3. *ff. eod.*

XIV.

14. Reſervation of the Uſufruct.

In all Donations, whether they be Univerſal of all one's Eſtate, or Particular of certain Things, the Donor may reſerve to himſelf the Uſe and Profits of the Things which he gives[t].

[t] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſum fructum ejus retinuerit, &c. *l.* 28. *C. de don. l.* 35. §. 5. *eod.*

XV.

15. Regiſtring of Donations.

Donations ought to be Regiſtred, that every body may know the Engagement, which being unknown might give occaſion to many Frauds[x].

[x] Data jampridem lege ſtatuimus, ut donationes interveniente actorum teſtificatione conficiantur. Quod vel maximè inter neceſſarias conjunctaſque perſonas convenit cuſtodiri. Si quidem clandeſtinis, ac domeſticis fraudibus facilè quidvis pro negotii opportunitate confingi poteſt: vei id quod verè geſtum eſt aboleri. *l.* 27. *C. de donat. l.* 30. *& ſeq. eod. V. l.* 17. §. 1. *ff. quæ in fraud. credit.*

We take notice here only of the General Rule of Regiſtring Donations; and leave out the whole detail of this matter as it is regulated by the Ordinances, and by our Uſage, otherwiſe than it is in the Roman *Law.* See the Ordinance of 1539. Art. 132. and that of *Moulins*, Art. 58.

XVI.

16. All money aforded out of Liberality, or otherwiſe.

We may place in the number of Donations the Expences which one perſon is at for another out of a Motive of Liberality, and without hopes of recovering them: As if one is at the charges of maintaining a near Relation: and what has been given in this manner, cannot be afterwards redemanded. But it is by the circumſtances that we are to judge, whether it was the Intention of the Party to give, or not[y].

[y] Titium, ſi pietatis reſpectu ſororis aluit filiam, actionem hoc nomine contra eam non habere, reſpondi. *l.* 27. §. 1. *ff. de neg. geſt.* Si paterno affectu privignas tuas aluiſti, ſeu mercedes pro his aliquas magiſtris expendiſti, ejus erogationis tibi nulla repetitio eſt. Quòd ſi, ut repeturus ea quæ in ſumptum miſiſti, aliquid erogaſti, negotiorum geſtorum tibi intentanda eſt actio. *l.* 15. *C. de neg. geſt.*

SECT. II.

Of the Engagements of the Donor.

The CONTENTS.

1. *Firſt Engagement of the Donor, Not to Revoke.*
2. *Second Engagement; the Delivery.*
3. *Reſervation of the Uſe and Profits, is in lieu of Delivery.*
4. *Third Engagement, Warranty.*
5. *If the knavery of the Donor occaſions any loſs to the Donee.*
6. *The Donor cannot be conſtrained to*

more than what he is able to give, without being reduced to Want.

7. *Intereſt of the Things given.*

I.

1. *Firſt Engagement of the Donor; Not to Revoke.*

THE firſt Engagement of the Donor is, that he cannot annul the Donation, when he has once given his conſent to it: and he cannot revoke it [a], except for juſt Reaſons; ſuch as if he was forced to make it, if he was incapable of contracting, or if he was in one of the caſes which ſhall be explained in the third Section.

[a] Si donationem ritè feciſti, hanc authoritate reſcripti noſtri reſcindi non oportet. *l.* 5. *C. de revoc. don. l.* 3. *l.* 6. *eod.* See the ſixth Article of the firſt Section.

II.

2. *Second Engagement; the Delivery.*

The ſecond Engagement of the Donor, and which is a conſequence of the firſt, is to perform the Donation, and to deliver the Thing given, and he may be conſtrained to it by the Donee, or by his Heirs, Executors, or Adminiſtrators [b].

[b] Ad exemplum venditionis noſtra conſtitutio (donationes) etiam in ſe habere neceſſitatem traditionis voluit. Ut etiamſi non tradantur, habeant pleniſſimum & perfectum robur, & traditionis neceſſitas incumbat donatori. §. 2. *inſt. de donat. l.* 35. *C. eod.*

III.

3. *Reſervation of the Uſe and Profits is in lieu of Delivery.*

When there is a Reſervation of the Uſe and Profits in a Donation; that ſerves inſtead of a Delivery [c].

[c] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, etiamſi ſtipulatus non fuerit, eam continuò tradidiſſe credatur. Nec quid amplius requiratur quo magis videatur facta traditio. Sed omnimodò idem ſit, in his cauſis uſumfructum retinere quod tradere. *l.* 28. *C. de donat. l.* 35. §. 5. *eod.* See the ſeventh Article of the ſecond Section of the Contract of Sale.

IV.

4. *Third Engagement, Warranty.*

It is likewiſe a third Engagement of the Donor, that if he is obliged for the Warranty of the Things given, he ought to warrant them. But if he has not engaged himſelf for the Warranty, and it happens that he has given what was not his own, believing honeſtly that he was the right Owner of it, he is diſcharged from the Warranty. For it is preſumed that he meant only to exerciſe his Liberality in Things that were his own [d].

[d] Quoniam avus tuus, cùm prædia tibi donaret, de evictione eorum cavit: potes adverſus cohæredes tuos, ex cauſa ſtipulationis, conſiſtere ob evictionem prædiorum, pro portione ſcilicet hæreditaria. Nudo autem pacto interveniente, minimè donatorem hac actione teneri, certum eſt. *l.* 2. *C. de evict.* Si quis mihi rem alienam donaverit—— Et evincatur, nullam mihi actionem contra donatorem competere. *l.* 18. §. *ult. ff. de donat.* See the following Article.

V.

5. *If the knavery of the Donor occaſions any loſs to the Donee.*

If the Donor was guilty of any knaviſh dealing, as if he gave a Thing which he knew was not his own, he would be bound to make good the Loſſes and Damages which the Donee may chance to ſuſtain thro' his Knavery [e].

[e] Labeo ait, ſi quis mihi rem alienam donaverit, inque eum ſumptus magnos fecero, & ſic evincatur, nullam mihi actionem contra donatorem competere, plane de dolo poſſe me adverſus eum habere actionem, ſi dolo fecit. *l.* 18. §. *ult. ff. de donat.*

VI.

6. *The Donor cannot be conſtrained to more than what he is able to give, without being reduced to Want.*

The Donor cannot be obliged to perform what he has promiſed, but in ſo far as he is able, without being reduced to Want. For it would be unjuſt that his Liberality ſhould be an occaſion of Inhumanity to his Donee [f].

[f] Qui ex donatione ſe obligavit, ex reſcripto Divi Pii in quantum facere poteſt convenitur. *l.* 12. *ff. de donat. l.* 28. *ff. de reg. jur.* In condemnatione perſonarum, quæ in id quod facere poſſunt, damnantur, non totum quod habent extorquendum eſt: ſed & ipſarum ratio habenda eſt, ne egeant. *l.* 173. *ff. de reg. jur. V. l.* 49. *ff. de re jud.*

VII.

7. *Intereſt of the Things given.*

The Donor owes no Intereſt for the Thing given, even after the delay, unleſs they are expreſly ſtipulated, or unleſs there has been a Condemnation in a Court of Juſtice. And they will not be due but from the time they have been demanded, and according as the circumſtances may require; as if a Sum of Money has been given for a Marriage Portion [g].

[g] Eum qui donationis cauſa pecuniam, vel quid aliud promiſit, de mora ſolutionis pecuniæ, uſuras non debere, ſummæ æquitatis eſt. *l.* 22. *ff. de donat.* Dotis fructus ad maritum pertinere debere æquitas ſuggerit, cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l.* 7. *ff. de jur. dot.*

SECT. III.

Of the Engagements of the Donee, and of the Revoking of Donations.

The CONTENTS.

1. *Firſt Engagement of the Donee, to acquit the Charges.*
2. *Second Engagement, Gratitude.*
3. *Ingratitude diſſembled by the Donor.*
4. *Revoca-*

4. *Revocation of the Donation, becauſe of Children being afterwards born to the Donor.*

I.

1. *First Engagement of the Donee, to acquit the Charges.*

THE firſt Engagement of the Donee, is to ſatisfy the Charges and Conditions of the Donation, when there are any; and if he fails in it, the Donation may be revoked, according to the circumſtances [a].

[a] Legem quam rebus tuis donando dixiſti—— apud Præſidem Provinciæ debes agere, ut hanc impleri provideat. *l.* 9. *C. de donat.* Vel quaſdam conventiones ſive in ſcriptis donationis impoſitas, ſive ſine ſcriptis habitas, quas donationis acceptor ſpoſpondit, minimè implere voluerit. Ex his enim tantummodò cauſis, ſi fuerint in judicium dilucidis argumentis cognitionaliter approbatæ, etiam donationes in eos factas everti concedimus. *l. ult. C. de revoc. donat.*

II.

2. *Second Engagement Gratitude.*

The ſecond Engagement of the Donee, is Thankfulneſs for the Benefit received: and if he is ungrateful to the Donor, the Donation may be revoked, according as the deed of the Donee may have given occaſion for it. Thus, the Donor may revoke the Donation, not only if the Donee makes any attempt upon his Life, or Honour, but likewiſe if he commits any Violence or Outrage upon his Perſon, or does him any Injury; or if he occaſions him any conſiderable Loſs by unfair practices [b].

[b] Generaliter ſancimus omnes donationes lege confectas, firmas illibataſque manere, ſi non donationis acceptor ingratus circa donatorem inveniatur. Ita ut injurias atroces in eum effundat, vel manus impias inferat, vel jacturæ molem ex inſidiis ſuis ingerat, quæ non levem ſenſum ſubſtantiæ donatoris imponat, vel vitæ periculum aliquod ei intulerit. *l. ult. C. de revoc. don.* Donationes circa filium filiamve, nepotem neptemve, pronepotem proneptemve emancipatos celebratas, pater, vel avus, vel proavus, revocare non poterit: niſi edoctis manifeſtiſſimis cauſis, quibus eam perſonam in quam collata donatio eſt, contra ipſam venire pietatem, & ex cauſis quæ legibus continentur fuiſſe conſtabit ingratam. *l.* 9. *eod.*

Altho' the Cauſes of Ingratitude, which may ſuffice for revoking a Donation, be reſtrained by this laſt Law of the Code de revoc. don. *to theſe which are expreſſed in this Article, yet we put them down only as an Example. For there may be other cauſes which may deſerve that a Donation ſhould be revoked; as for Inſtance, if the Donee ſhould refuſe Alimony to his Donor when he is reduced to great ſtraits.*

III.

3. *Ingratitude diſſembled by the Donor.*

The Right of revoking a Donation becauſe of the Ingratitude of the Donee, does not paſs to the Heir, Executor, or Adminiſtrator of the Donor, if he himſelf having known the Ingratitude did not reſent it [c].

[c] Hoc tamen uſque ad primas perſonas tantummodò ſtare cenſemus: nulla licentia concedenda donatoris ſucceſſoribus hujuſmodi querimoniarum primordium inſtituere. Etenim ſi ipſe qui hoc paſſus eſt, tacuerit, ſilentium ejus maneat ſemper, & non à poſteritate ejus ſuſcitari concedatur, vel adverſus eum qui ingratus eſſe dicitur, vel adverſus ejus ſucceſſores. *l. ult. C. de revoc. donat.* Neque enim fas eſt ullo modo inquietari donationes, quas, is qui donaverat, in diem vitæ ſuæ non retractavit. *l.* 1. *in f. eod.*

IV.

4. *Revocation of the Donation, becauſe of Children being afterwards born to the Donor.*

If after a Donation made by a perſon who had no Children, he happens to have Children born to him, the Donation will be void, upon preſumption that he who gave having no Children, would not have given if he had had any, and that he gave only upon this condition, that if he ſhould happen to have Children, the Donation ſhould be of no force [d].

[d] Si unquam libertis patronus filios non habens, bona omnia, vel partem aliquam facultatum fuerit donatione largitus: & poſtea ſuſceperit libros, totum quidquid largitus fuerat, revertatur in ejuſdem donatoris arbitrio, ac ditione manſurum. *l.* 8. *C. de revoc. don. v. l.* 6. §. 1. *C. de inſt. & ſubſt. l.* 102. *ff. de cond. & dem. l.* 40. §. *ult. ff. de pact.*

Altho' this Law be only in favour of the Patron who had made a Donation to one whom he had ſet free from Slavery, yet we obſerve it indifferently for all perſons. But if the Donation was ſmall, and made by a perſon who had a plentiful Eſtate to a Donee that was in poor circumſtances, and for favourable cauſes, would ſuch a Donation be revoked by the birth of a Child?

If this Child happens to die before the Donor has revoked the Donation, ought it to ſubſiſt, the cauſe of the Revokation having ceaſed by the Child's death? or, is it annulled in ſuch a manner by the Child's birth, that its death cannot make it revive? Theſe words of the Law, revertatur in ejuſdem donatoris arbitrio ac ditione manſurum, *ſeem to ſignify that the Donation is annulled, and that the Donor takes back irrevocably what he had given. Which may be confirmed by the ſixth Law,* §. 1. de inſt. & ſubſt. *where it is ſaid, that if a Father burdens his Son who had no Children with a Subſtitution, the ſaid Subſtitution will vaniſh, whenever the Son comes to have Children,* evaneſcere ſubſtitutionem. *To which we may add, that the Child which is born to the Donor after the Donation, being ſeiſed by its birth of a Right to ſucceed to its Father, this Right annuls the Donation, and which being once annulled, there does not remain to the Donee ſo much as a Right to keep the Donation in ſuſpenſe, under pretext that the Child may come to die before its Father. For it is unlawful to hope for an Event of this nature.* Nec enim fas eſt hujuſmodi caſus expectare. *l.* 34. §. 2. *ff. de contr. empt.*

TITLE XI.

Of USUFRUCT.

Reaſons for treating of Uſufruct in this place.

IN the foregoing Title mention has been made of the Reſervations of Uſufruct which are made in Donations; and the like Reſervations may alſo be made in Marriage Settlements, in Sales, Exchanges, Tranſactions, and other Covenants[a]. We may likewiſe by expreſs Covenants ſettle on any perſon the Uſufruct of a Thing without the Property[b]. So that ſeeing Uſufruct may be ſettled by Contracts, it is a kind of Covenant. And altho' it be likewiſe acquired by Teſtaments, and other Diſpoſitions made in proſpect of death, or even by the Laws, ſuch as the Uſufruct which the Laws, the Ordinances, and the Cuſtoms give to Parents in the Eſtates of their Children, whether it be under the Name of Uſufruct, or Wardſhip; yet we chuſe to place this Matter here, which ſince it can only be in one place, ought to be put in the firſt where there is occaſion to ſpeak of it, as has been remarked in the Plan of Matters.

[a] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, &c. *l.* 28. *C. de donat.*

[b] Et ſine teſtamento ſi quis velit uſumfructum conſtituere, pactionibus & ſtipulationibus id efficere poteſt. *l.* 3. *f. de uſufr.* §. 1. *inſt. eod.* Sive ex teſtamento, ſive ex voluntario contractu uſusfructus conſtitutus eſt. *l.* 4. *C. eod.*

The practice of ſettling the Uſufruct of a Thing without the Property, is Natural in Society, not only becauſe of the indefinite Liberty of all ſorts of Covenants, but alſo becauſe of the uſefulneſs of ſeparating on many occaſions the Right of Property from that of the preſent Enjoyment. And this Separation, which is made naturally by the Commerce of Letting to Hire and to Farm, is likewiſe made very juſtly upon other views; whether it be in Donations, where the Benefactor is willing only to diveſt himſelf of the Property of his Eſtate, reſerving ſtill the preſent Enjoyment: or whether it be in the Commerce of Contracts, as if two perſons making an Exchange, each reſerves to himſelf the preſent Enjoyment of the Land or Tenement which he gives away: or in Teſtaments, as when a Teſtator deviſes the Uſe and Profits of Lands or Tenements, leaving the Property of them to his Executor, or if he deviſes the Property, and leaves the Uſe and Profits either to the Uſufructuary, or to the Executor, or to another Legatee[c]. In all theſe caſes, whether it be that the Uſufruct be ſettled by Covenant, by Teſtament, by a Law, or by Cuſtom; the nature of it is ſtill the ſame, unleſs the Title by which the Uſufruct is ſettled makes ſome diſtinction: and it is this Matter of Uſufruct in general which is the ſubject matter of this Title.

[c] Uſusfructus à proprietate ſeparationem recipit, idque pluribus modis accidit. Ut ecce ſi quis uſumfructum alicui legaverit. Nam hæres nudam habet proprietatem, legatarius verò uſumfructum. Et contrà ſi fundum legaverit deducto uſufructu, legatarius nudam habet proprietatem, hæres verò uſumfructum. Idem alii uſumfructum, alii deducto eo fundum legare poteſt. Sine teſtamento verò ſi quis velit uſumfructum alii conſtituere, pactionibus & ſtipulationibus id efficere debet. §. 1. *inſt. de uſufr.*

We may likewiſe conſider as a kind of Uſufruct, to which ſeveral Rules of this Title may be applied, the Right which the Incumbents of Church Benefices have to enjoy the Revenues belonging to them. And this kind of Uſufruct has this peculiar property belonging to it, that the Eſtates which are ſubject to it do not belong to any particular Owner, but to the Church.

Thoſe who have read this Matter of Uſufruct in the *Roman* Law, may be apt to find fault that we have omitted to ſet down under this Title the Rule which is to be met with in the eighth Law, *ff. de uſufr. & uſu leg.* and in the fifty ſixth Law, *ff. de uſufr.* Which Laws ſay, that if the Uſufruct of a Thing be given to a Town, or other Corporation, it laſts a Hundred years. But beſides that the caſe of ſuch an Uſufruct is ſo very ſingular and odd, that it does not deſerve a Rule[d]; if one were neceſſary, it would not ſeem juſt to make the Proprietor loſe, by an Uſufruct, the Enjoyment of his Eſtate for three or four Generations; and it would be much more reaſonable to limit it to Thirty years. For which opinion we have the authority of another Law. *V. l.* 68. *in f. ff. ad leg. falc.*

[d] *See the twenty firſt Article of the firſt Section of the Rules of Law.*

SECT.

SECT. I.

Of the Nature of Uſufruct, and of the Rights of the Uſufructuary.

The CONTENTS.

I.

1. *Definition of Uſufruct.*

USufruct is a Right to uſe and enjoy a Thing which is not our own, preſerving it whole and entire, without ſpoiling, or diminiſhing it [a].

[a] Uſusfructus eſt jus alienis rebus utendi, fruendi, ſalvâ rerum ſubſtantiâ. *l.* 1. *ff. de uſufr. inſt. eod.* See on theſe laſt words, *without ſpoiling, or diminiſhing it*, that which ſhall be ſaid in the third Section.

II.

2. *Uſufruct of Moveables and Immoveables.*

We may have the Uſufruct not only of Things Immoveable, but alſo of Moveable; ſuch as a Suit of Hangings, a Herd of Cattle, and of other Moveable Things [b], according to the Rules which ſhall be explained in the third Section.

Immoveables.

[b] Conſtitit autem uſusfructus non tantùm in fundo, & ædibus: verùm etiam in ſervis & jumentis, cæteriſque rebus. *l.* 3. §. 1. *ff. de uſufr. l.* 7. *eod.* §. 2. *inſt. eod.* See the third Section.

III.

3. *Uſufruct comprehends all ſorts of Revenues.*

The Uſufruct conſiſts in the full and entire Enjoyment of all the kinds of Fruits, Revenues, Conveniencies, and Uſes which may be reaped from the Thing of which one has the Uſufruct. Such are the Fruits of Trees, the Cuttings of Coppice Wood, the young Trees which may be taken out of a Nurſery without ſpoiling it, all Crops, the Honey of Bees, and in general the Uſufructuary enjoys and uſes every thing without reſerve. And we may likewiſe have the Uſufruct of Moveables and Immoveables, from which we reap no other uſe beſides that of bare Recreation [c].

[c] Omnis fructus rei ad fructuarium pertinet. *l.* 7. *ff. de uſufr.* Quicumque reditus eſt, ad uſufructuarium pertinet. Quæque obventiones ſunt ex ædificiis, ex areis, & cæteris quæcumque ædium ſunt. *d. l.* §. 1. Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *eod. l.* 59. §. 1. *eod.* Seminarii fructum puto ad fructuarium pertinere. Ita tamen ut & vendere ei, & ſeminare liceat. *l.* 9. §. 6. *eod.* Silvam cæduam poſſe fructuarium cædere. *d. l.* §. *ult.* Si apes in eo fundo ſint, earum quoque uſusfructus ad eum pertinent. *d. l.* §. 1. Numiſmatum aureorum, vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt. *l.* 28. *ff. eod.* Statuæ & imaginis fructum poſſe relinqui magis eſt: quia & ipſæ habent aliquam utilitatem, ſi quo loco opportuno ponantur. Licèt prædia quædam talia ſint ut magis in ea impendamus quàm de illis acquiramus, tamen uſusfructus eorum relinqui poteſt. *l.* 41. *eod.*

IV.

4. *The Uſufructuary makes the Fruits which he gathers, his own.*

The Uſufructuary who at the moment that he acquires his Right, and that it begins to take place, finds Fruits hanging on the Trees, or unſeparated from the Ground, which are ripe, may gather them, and they are his own. And if the Uſufruct happens to be extinct, either by the death of the Uſufructuary, or otherwiſe, in the time of Harveſt, the Portion of the Fruits which the Uſufructuary gathered before his death, altho' ſtill remaining on the Eſtate, yet being ſeparated from the Ground, will belong to his Heirs, Executors or Adminiſtrators. And what remains ungathered, will belong to the Proprietor, as alſo the Fruits which fell of themſelves, and to which the Uſufructuary had not put his hand. For ſeeing he has only a Right to enjoy, if

this Right expires before the Enjoyment, he has nothing farther to pretend. So that when the Uſufructuary dies before Harveſt, his Heirs, Executors, or Adminiſtrators, will have no ſhare in the Fruits[d].

[d] Si pendentes fructus jam maturos reliquiſſet teſtator, fructuarius eos feret, ſi die legati cedente adhuc pendentes deprehendiſſet. Nam & ſtantes fructus ad fructuarium pertinent. *l.* 27. *ff. de uſufr.* Si fructuarius meſſem fecit, & deceſſit, ſtipulam, quæ in meſſe jacet, hæredis ejus eſſe Labeo ait. Spicam, quæ terra teneatur, domini fundi eſſe; fructumque pereipi, ſpica aut fœno cæſo, aut uvâ ademptâ, aut excuſsâ oleâ, quamvis nondum tritum frumentum, aut oleum factum, vel vindemia coacta ſit. Sed ut verum eſt quod de olea excuſſa ſcripſit, ita aliter obſervandum de ea olea quæ per ſe deciderit. Julianus ait fructuarii fructus tunc fieri, cùm eos perceperit. *l.* 13. *ff. quib. mod. uſufr. vel uſ. am.* Fructuarius, etiamſi maturis fructibus, nondum tamen perceptis, deceſſerit, hæredi ſuo eos fructus non relinquet. *l.* 8. *in fine. ff. de ann. legat.*

It is to be remarked on this Article, that as an Uſufruct may be acquired by different Titles; ſuch as a Teſtament, a Contract, a Law, as has been taken notice of in the Preamble to this Title; ſo we ought to follow in each kind of Uſufruct, as to what concerns the Rights of the Uſufructuary, whatever has been regulated in that matter by the Title, altho' it be different from the Rule explained in this Article. Thus, the Enjoyment which the Incumbents of Church Benefices have of the Fruits belonging to them, is a kind of Uſufruct, which is regulated in another manner. For ſince the Fruits of the Benefice belong to the Incumbent on account of the Charges and Burdens, the Fruits of the laſt year, reckoning the year to commence, as is the Rule, from the firſt of January, *are ſhared between the Executors or Adminiſtrators of the late Incumbent, and his Succeſſor in the Benefice; in proportion to the time that the late Incumbent lived the laſt year. Thus the Fruits of the Dowry, after the diſſolution of the Marriage, are ſhared differently between the Survivor and the Heirs or Executors of the deceaſed, according to the different Cuſtoms of Places, as has been remarked in the Preamble to the Title of Dowries. Thus the Uſufruct of Fathers, and Wardſhips, are regulated according to the Proviſions made in ſuch caſes by the reſpective Cuſtoms and Uſages of Places.*

V.

5. The Rent of the Leaſe belongs to the Uſufructuary, as the Fruits do.

If the Fruits of Lands, which are ſubject to an Uſufruct, were let to Farm, the Uſufructuary who has actually acquired his Right at the time of the Harveſt, ſhall receive of the Farmer the Rent of the Farm, in the ſame manner as he would have gathered the Fruits, in caſe there had been no Leaſe. And altho' the Uſufruct come to be extinct between Harveſt-time and the Term of Payment, yet the Uſufructuary, or his Heirs, Executors, or Adminiſtrators will receive the whole Rent of the Leaſe, for that Crop[e].

[e] Defuncta fructuarii menſe Decembri, jam omnibus fructibus, qui in his agris naſcuntur, menſe Octobri, per colonos ſublatis, quæſitum eſt utrum penſio hæredi fructuariæ ſolvi deberet: quamvis fructuaria ante Kalendas Martias, quibus penſiones inferri debeant, deceſſerit: an dividi debeat inter hæredem fructuariæ, & rempublicam cui proprietas legata eſt? Reſpondi rempublicam quidem cum colono nullam actionem habere: fructuariæ vero hæredem ſua die, ſecundùm ea quæ proponerentur, integram penſionem percepturum. *l.* 58. *ff. de uſufr.*

VI.

6. The Revenues which are acquired ſucceſſively, are ſhared between the Proprietor, and the Uſufructuary, in proportion to the time.

The Revenues which are acquired ſucceſſively, and from moment to moment, ſuch as the Rents of a Houſe, belong to the Uſufructuary in proportion to the time that his Right laſts. Thus, when an Uſufruct commences from the firſt of *January*, and ceaſes before the end of the year; the Proprietor ſhall have the Rents which accrue after the Uſufruct is extinct, and the Uſufructuary, or his Heirs, Executors, or Adminiſtrators, ſhall have the Rents for the time that the Uſufruct laſted[f].

[f] Si operas ſuas locaverit ſervus fructuarius, & imperfecto tempore locationis uſusfructus interierit: quod ſupereſt, ad proprietarium pertinebit. Sed & ſi ab initio certam ſummam propter operas certas ſtipulatus fuerit, capite deminuto eo, idem dicendum eſt. *l.* 26. *ff. de uſufr.*

VII.

7. In what manner the Uſufructuary may anticipate the Harveſt.

The Uſufructuary may gather, before a perfect Maturity, the Fruits whoſe nature is ſuch, that it is either cuſtomary, or more profitable to gather them before they are fully ripe. Thus we do not wait for the full maturity of Olives, Hay, or of a Copſe. But the Uſufructuary ought to tarry till the time of full Maturity for Harveſt, and for the Vintage[g].

[g] Silvam cæduam etiamſi intempeſtivè cæſa ſit, in fructu eſſe conſtat; ſicut olea immatura lecta: item fœnum immaturum cæſum, in fructu eſt. *l.* 48. §. 1. *ff. de uſufr.* In fructu id eſſe intelligitur, quod ad uſum hominis inductum eſt: neque enim maturitas naturalis hîc ſpectanda eſt: ſed id tempus, quo magis colono dominove eum fructum tollere expedit. Itaque cùm olea immatura plus habeat reditus, quàm ſi matura legatur, non poteſt videri, ſi immatura lecta eſt, in fructu non eſſe. *l. pen. ff. de uſ. & uſufr. leg.*

VIII.

8. Augmentation or Diminution of the Uſufruct, by the change happening to the Eſtate.

The Uſufruct increaſes, or diminiſhes, in proportion to the Augmentation, or Diminution which may happen to the Eſtate that is ſubject to the Uſufruct. And as the Uſufructuary bears the Loſs or Diminution of his Uſufruct, if the Eſtate periſhes, or is damaged by an Inundation, by Fire, or other Accident[h]; ſo likewiſe he reaps the advantage of the changes which make the Eſtate better, or larger. As if the Event of a Law-Suit acquires to the Eſtate a Ser-

vice, or a greater Extent of Ground; or if the Neighbourhood of a River brings to it ſome Addition[l].

[l] *See the fourth, fifth, and ſixth Articles of the ſixth Section.*

[l] Huic vicinus tractatus eſt, qui ſolet in eo quod acceſſit tractari: & placuit alluvionis quoque uſumfructum ad fructuarium pertinere. *l.* 9. §. 4. *ff. de uſufr.*

IX.

9. Changes which the Uſufructuary may make in the Eſtate, for raiſing the revenue.

The Uſufructuary may open a Quarry in the Ground of which he has the Uſufruct. For the Stones which he digs out of it are inſtead of Fruits; and it is the ſame thing with reſpect to the other matters which he ſhall get out of the ſaid Ground. And he may likewiſe pluck up by the roots a Plantation, as of Vines, for inſtance, to make ſome ſuch change in it, provided that the Eſtate be improved, and the Revenue increaſed by it. For the Uſufructuary may make Improvements, but he cannot make any change to the detriment of the Proprietor's Right. But altho' the Revenue were augmented by a change of the condition of the Eſtate, if this Improvement were only for a time, or if this change ſhould occaſion otherwiſe ſome Inconveniences or Expences, which might prove chargeable to the Proprietor, the Uſufructuary would be bound to indemnify him, he having exceeded the bounds of his Right[m]. Thus, it is by the circumſtances that we ought to judge of the changes which the Uſufructuary may, or may not make.

[m] Inde eſt quæſitum an lapidicinas, vel cretifodinas, vel arenifodinas ipſe inſtituere poſſit. Et ego puto etiam ipſum inſtituere poſſe, ſi non agri partem neceſſariam, huic rei occupaturus eſt. Proinde venas quoque lapidicinarum, & hujuſmodi metallorum inquirere poterit—— & cæterorum fodinas, vel quas pater-familiâs inſtituit, exercere poterit, vel ipſe inſtituere, ſi nihil agriculturæ nocebit. Et ſi forte in hoc quod inſtituit plus reditus ſit, quàm in vineis, vel arbuſtis, vel olivetis quæ fuerunt, forſitan etiam hæc dejicere poterit. Si quidem ei permittitur meliorare proprietatem. *l.* 13. §. 5. *ff. de uſufr.* Si tamen quæ inſtituit uſufructuarius, aut cœlum corrumpant agri, aut magnum apparatum ſint deſideraturu opificum forte, vel legulorum, quæ non poteſt ſuſtinere proprietarius, non videbitur viri boni arbitratu frui. *d. l.* 13. §. 6.

X.

10. Trees blown down.

The Trees blown down by the Wind, or by ſome other Accident, belong to the Proprietor of the Ground of which they were a part. So that he is obliged to carry them away at his own charges, that they may no ways incommode. And the Uſufructuary receiving no benefit by them, he is not obliged to plant new ones in their ſtead[n].

[n] Si arbores vento dejectas dominus non tollat, per quod incommodior ſit uſusfructus, vel iter ſuis actionibus uſufructuario cum eo experiendum. *l.* 19. §. 1. *ff. de uſufr.* Arbores vi tempeſtatis, non culpâ fructuarii everſas, ab eo ſubſtitui non placet. *l.* 59. *eod.* See the following Article.

XI.

11. Dead Trees.

The dead Trees belong to the Uſufructuary as a kind of Revenue, but with the charge of planting new ones in their room[o].

[o] In locum demortuarum arborum aliæ ſubſtituendæ ſunt: & priores ad fructuarium pertinent. *l.* 18. *ff. de uſufr.*

XII.

12. Trees blown down may be imployed in Repairs.

If the Places ſubject to an Uſufruct happen to ſtand in need of ſome Repair, to which the Trees that are blown down by ſome accident may be ſerviceable, the Uſufructuary may make uſe of them for that purpoſe[p].

[p] Arboribus evulſis, vel vi ventorum dejectis uſque ad uſum ſuum & villæ poſſe uſufructuarium ferre Labeo ait. *l.* 12. *ff. de uſufr.* Materiam ipſam ſuccidere, quantum ad villæ refectionem, putat poſſe. *d. l.* 12.

XIII.

13. Vine-props.

The Uſufructuary may take Trees out of a Wood, for making Props for the Vines, provided he does not do any damage to the Wood[p].

[p] Ex ſilva cædua pedamenta, & ramos ex arbore uſufructuarium ſumpturum: ex non cædua in vineam ſumpturum: dum ne fundum deteriorem faciat. *l.* 10. *ff. de uſufr.*

XIV.

14. Service acceſſory to the Uſufruct.

If the Uſufructuary of a Piece of Ground cannot have acceſs to it, but thro' another Ground belonging to the perſon who created the Uſufruct; this Paſſage will be due to the Uſufructuary. Thus, if a Teſtator has bequeathed the Uſufruct of a Piece of Ground, to which one cannot enter, but thro' another Ground of his Succeſſion, and this other Ground remains with the Executor, or is deviſed to another Legatee; the Executor or the Legatee holding this Ground of the Teſtator, will be obliged to ſuffer the Service of the Paſſage[q]; and to give it ſuch, as ſhall be found neceſſary for cultivating and enjoying the Ground that is ſubject to the ſaid Uſufruct[r].

[q] Uſusfructus legatus adminiculis eget, ſine quibus uti frui quis non poteſt. Et ideo ſi uſusfructus legetur, neceſſe eſt tamen, ut ſequatur eum aditus. *l.* 1. §. 1. *ff. ſi uſusfr. pet.* Si uſusfructus ſit legatus ad quem aditus non eſt per hæreditarium fundum, ex teſtamento utique agendo fructuarius conſequetur, ut cum aditu ſibi præſterur uſusfructus.

tus. *d. l.* 1. §. 2. In hac ſpecie non aliter concedendum eſſe legatario fundum vindicare, niſi prius jus transeundi uſufructuario præſtet. *l.* 15. §. 1. *ff. de uſu & uſufr. leg.*

[t] Utrùm autem aditus tantùm, & iter, an verò & via debeatur fructuario, legato ei uſufructu Pomponius libro quinto dubitat: & rectè putat, prout uſusfructûs perceptio deſiderat, hoc ei præſtandum. *d. l.* 1. §. 3. *ff. ſi uſuſf. pet.*

XV.

15. *Conveniences which are not neceſſary to the Uſufructuary.*

If in the caſe of an Uſufruct bequeathed, the Uſufructuary wants ſome conveniences which are not abſolutely neceſſary for the Enjoyment, ſuch as that of a Paſſage, he cannot pretend that the Executor ſhould furniſh him ſuch ſorts of conveniences. Thus, he cannot demand that they ſhould give him more convenient Lights for a Chamber, a more eaſy Paſſage, or a Liberty to draw Water out of a Well. For the Uſufruct is limited to the Enjoyment of the Thing, ſuch as it is at the time that the Uſufructuary acquires his Right [r].

[r] Sed an & alias utilitates & ſervitutes ei hæres præſtare debeat, puta luminum, & aquarum, an verò non? Et puto eas ſolas præſtare compellendum, ſine quibus omnino uti non poteſt. Sed ſi cum aliquo incommodo utatur, non eſſe præſtandas. *l.* 1. §. *ult. ff. ſi uſufr. pet.*

XVI.

16. *The Uſufructuary has the Services.*

The Uſufructuary may in his own name ſue for the Right of a Service, if any is due to the Eſtate of which he has the Uſe and Profits, and may ſue the Neighbour who owes it, in the ſame manner as the Proprietor himſelf might do [s].

[s] Si fundo fructuario ſervitus debeatur, Marcellus libro 8. apud Julianum Labeonis & Nervæ ſententiam probat, exiſtimantium ſervitutem quidem eum vindicare non poſſe, verùm uſumfructum vindicaturum. Ac per hoc vicimum, ſi non patiatur eum ire & agere, teneri, ei quaſi non patiatur uti frui. *l.* 1. *ff. ſi uſusfruct. pet.*

XVII.

17. *The Improvements and Repairs which the Uſufructuary may make.*

The Uſufructuary may make in the Eſtate of which he has the Uſufruct, Improvements, and Repairs, uſeful or neceſſary, and even for his bare pleaſure; provided he does not make the Eſtate the worſe, nor change the condition of the places. Thus, he cannot raiſe a Building higher, nor change the Apartments or other Dependencies of a Houſe, nor diſfigure them, augment, or diminiſh them, not even by adding what would be better, or demoliſhing what is uſeleſs. But he may, for Inſtance, make new Lights, paint the Rooms, and imbelliſh the Houſe with Statues and other Ornaments [u].

[u] Neratius libro quarto membranarum ait, non poſſe fructuarium prohiberi quominus reficiat. Quia nec arare prohiberi poteſt, aut colere. Nec ſolum neceſſarias refectiones facturum, ſed etiam voluptatis cauſa, ut tectoria, & pavimenta, & ſimilia. Neque autem ampliare nec uſile detrahere poſſe quamvis melius repoſiturus ſit: quæ ſententia vera eſt. *l.* 7. *in f. & l.* 8. *ff. de uſufr.* Si ædium uſusfructus legatus ſit, Nerva filius, & lumina immittere eum poſſe ait. Sed & colores, & picturas, & marmora poterit, & ſigilla, & ſi quid ad domûs ornatum. Sed neque diætas transformare vel conjungere, aut ſeparare ei permitterur: vel aditus poſticaſve vertere, vel refugia aperire, vel atrium mutare, vel viridaria ad alium modum convertere. Excolere enim quod invenit poteſt, qualitate ædium non immutatâ. Item Nerva eum cui ædium uſusfructus legatus ſit, altius tollere non poſſe, quamvis lumina non obſcurentur, quia tectum magis turbatur. *l.* 13. §. 7. *eod. v.* §. 8. *eod.*

XVIII.

18. *He cannot take away the Improvements, or Repairs which he has made.*

If the Uſufructuary has made Improvements, or Repairs, whether uſeful or neceſſary, or for his pleaſure, he can demoliſh nothing of what he has built, nor take away any thing but what may be preſerved after it is taken away [x].

[x] Sed ſi quid inædificaverit, poſtea eum neque tollere hoc, neque refigere poſſe. Refixa planè poſſe vindicare. *l.* 15. *ff. de uſufr.* See the laſt Article of the third Section of the Title of Dowries.

XIX.

19. *The Uſufructuary may transfer, ſell, and give away his Right.*

The Uſufructuary may either enjoy the Thing of which he has the Uſufruct himſelf, or he may let out his Right to another: he may likewiſe transfer, ſell, or give away his Uſufruct. And the Diſpoſition which he makes of it, is to him inſtead of an Enjoyment of it, and preſerves his Right [y].

[y] Uſufructuarius vel ipſe frui ea re, vel alii fruendam concedere, vel locare, vel vendere poteſt. Nam & qui locat utitur, & qui vendit utitur. Sed & ſi alii precario concedat, vel donet, puto eum uti atque ideo retineri uſumfructum. *l.* 12. §. 2. *ff. de uſufr.* Cui uſusfructus legatus eſt, etiam invito hærede, eum extraneo vendere poteſt. *l.* 67. *eod.*

XX.

20. *He may interrupt the Leaſe.*

The Uſufructuary has the liberty of interrupting the Leaſe which the Proprietor had made, in the ſame manner as the Buyer has [z]; unleſs it be otherwiſe regulated by his Title. For having the Right of enjoying the whole Revenue, and commonly during his Life; he is as it were Maſter; and is not obliged to let the Farmer enjoy a Profit which belongs to him.

[z] Quidquid in fundo naſcitur, vel quidquid inde percipitur, ad fructuarium pertinet: penſiones quoque jam antea locatorum agrorum ſi ipſæ quoque ſpecialiter comprehenſæ ſint. Sed ad exemplum venditionis, niſi fuerint ſpecialiter exceptæ, poteſt uſusfructuarius conductorem repellere. *l.* 59. §. 1. *ff. de uſufr.* See the fourth Article of the third Section of Letting and Hiring.

SECT. II.

Of Uſe, and Habitation.

Difference between Uſe and Uſufruct.

USE is diſtinguiſhed from Uſufruct by this, that where an Uſufruct is a Right to enjoy all the Fruits and Revenues which the Eſtate that is ſubject to it is capable of producing, Uſe conſiſts only in a Right to take out of the Fruits of the Ground, ſuch Portion of them as may be conſumed by Uſe, and which is neceſſary for the perſon who has the Uſe, or which is ſettled by his Title: and the Surplus belongs to the Proprietor of the Eſtate. Thus, thoſe who have the Right of Uſe in a Foreſt, or a Copice, can only take out of them what is neceſſary for their Uſe, or regulated by their Title. And he who has the Uſe of any other Ground, can only take out of it what may be neceſſary to ſupply the occaſions he ſhall have of thoſe kind of Fruits which the ſaid Ground produces: or the Uſe may be even reſtrained to certain kinds of Fruits or Revenues; without extending it to others. Thus we ſee in the *Roman* Law, that he who had only the ſimple Uſe of a Piece of Ground, had no ſhare of the Corn, or Oil that grew in it[a]: And that he who had the Uſe of a Flock of Sheep, was reſtrained only to make uſe of them for dunging his Grounds, and had no ſhare, either in the Wool, or Lambs: and even for the Milk, it is ſaid in ſome places that he could take only a very ſmall portion of it; and in other places it is ſaid, he had no right to any of it[b].

[a] Neque oleo (uſurum) neque frumento. *l.* 12. §. 1. *ff. de uſu & habit.*

[b] Modico lacte uſurum puto. *l.* 12. §. 2. *ff. de uſu & habitat.* Si pecorum vel ovium uſus legatus ſit, neque lacte, neque agnis, neque lana utetur uſuarius, quia ea in fructu ſunt. Plane ad ſtercorandum agrum ſuum pecoribus uti poteſt. §. 4. *inſt. de uſu & habit. d. l.* 12. §. 2.

Of Habitation.

Habitation is in Houſes, what Uſe is in Lands: and whereas he who has the Uſufruct of a Houſe, may enjoy the whole Houſe; he who has only a Right of Habitation, has his Enjoyment of it limited to what part is neceſſary for him, or ſettled by his Title. As to which it is neceſſary to obſerve, that altho' the word *Habitation* appears to be reſtrained in ſome Laws, to the ſenſe explained in this Definition[c]; yet it ſeems in others that Habitation, as alſo the Uſe of a Houſe, implies the Enjoyment of the whole Houſe. So that it is not ſo much by the ſenſe of theſe words *Habitation* and *Uſe*, that we are to extend or limit the Enjoyment of thoſe perſons who have theſe ſorts of Rights, as by the terms of the Title by which it is conveyed, which may help us to judge of the Intention, either of the Teſtator, if this Right is acquired by Teſtament, or of the Parties contracting, if it is by Contract that it is ſettled[d].

[c] *V. l.* 10. *ff. de uſu & habit. d. l.* 1. §. 1. *& l.* 2. *l.* 18. *eod.* See the ninth Article of the ſecond Section, and the ſeventh Article of the fourth Section.

[d] *V. l.* 4. *l.* 22. §. 1. *ff. de uſu & habit. l.* 15. *eod. l.* 13. *C. de uſufr. & habit.*

The CONTENTS.

I.

USE is a Right to take out of the Fruits ſubject to it, ſo much as he who has the Uſe may conſume on his Wants, or ſo much as is given him by his Title[a]. And this is regulated either by the Title it ſelf, if it has expreſſed the Quantity, or by the Prudence of the Judge, according to the Quality of him who has the Uſe, and the Intention of the Perſons who have ſettled this Right, or by the Cuſtoms and Uſage of the Places, if they have made any proviſion therein[b]. 1. *Definition of Uſe.*

[a] Cui uſus relictus eſt, uti poteſt, frui non poteſt. *l.* 2. *ff. de uſu & habit.* Minus juris eſt in uſu quàm in uſufructu. Nam is qui fundi nudum habet uſum, nihil ulterius habere intelligitur, quàm ut oleribus, pomis, floribus, fœno, ſtramentis, & lignis ad uſum quotidianum utatur. §. 1. *inſt. de uſu & habit. l.* 10. §. 4. *l.* 12. §. 1. *ff. eod.* Non uſque ad compendium, ſed ad uſum ſcilicet, non uſque ad abuſum. *l.* 12. §. 1. *eod.*

[b] Uſu legato ſi plus uſus ſit legatarius quàm oportet, officio judicis, qui judicat quemadmodum utatur, continetur ne aliter quàm debet utatur. *l.* 22. §. *ult. ff. eod.* Largius cum uſurario agendum eſt. Pro dignitate ejus. *l.* 12. §. 1. *eod.*

II.

2. When the Uſe implies the Uſufruct.

If the Fruits, out of which he who has the Uſe of them has a right to take whatever is neceſſary for his Occaſions, are ſo inconſiderable on the Ground of which he has the Uſe, that there is preciſely no more than what his Occaſions require, he ſhall have the whole, in the ſame manner as the Uſufructuary [c].

[c] Fundi uſu legato, licebit uſurario & ex penu quod in annum dumtaxat ſufficiat, capere: licet mediocris prædii eo modo fructus conſumantur. Quia, & domo, & ſervo ita uteretur, ut nihil alii fructuum nomine ſupereſſet. *l.* 15. *ff. de uſu & habit.*

III.

3. He who has the Uſe ought not to incommode the Proprietor.

He who has the Uſe of a Piece of Ground, has liberty to go into it to uſe his Right, but without giving any trouble to the Proprietor [d].

[d] In eo fundo hactenus ei morari licet, ut neque domino fundi moleſtus ſit, neque his per quos opera ruſtica fiunt, impedimento. *l.* 11. *ff. de uſu & habit.* §. 1. *inſt. eod.*

IV.

4. The Uſe cannot be transferred to other perſons.

Seeing the Right of Uſe is limited to the perſon of him to whom the Uſe is granted, he can neither ſell, let to hire, nor give away a Right which is perſonal to him, and which paſſing to another perſon might be more chargeable, or more inconvenient to the Proprietor [e]. And if there ſhould be any difficulty to know whether he who has the Uſe may uſe his Right otherwiſe than in perſon, it ought to be adjuſted by the Title, by the Quality of the Perſons, and by the other circumſtances.

[e] Nec ulli alii jus quod habet, aut vendere, aut locare, aut gratis concedere poteſt. *l.* 11. *in f. ff. de uſu & habit.* §. 1. *in fin. inſt. eod.* Quemadmodum enim concedere alii operas poterit, cum ipſe uti debeat. *l.* 12. §. *ult. ff. eod.* See the tenth Article of this Section.

V.

5. How the Uſe acquired to the Husband, or the Wife, is for both.

The Right of Uſe, as alſo that of Habitation, which accrues either to the Huſband, or to the Wife, by a Legacy, or other Diſpoſition made in proſpect of death, is communicated from the one to the other: and they will uſe this Right in common together during the Life of the Perſon to whom it is given [f]. For he who hath bequeathed either an Uſe, or a Habitation, to one of the Parties joined together in Wedlock, hath had no mind to exclude the other from ſharing in it. But if a Right of Uſe of ſome Fruits was bequeathed either to the Huſband, or to the Wife, before they were married, the Marriage happening afterwards would not make the condition of the Proprietor worſe; and the Uſe would be limited to what had been regulated by the Title. And it would be the ſame thing, had the Uſe been acquired by Covenant, either before or after the Marriage. And in all theſe caſes, it is by the circumſtances that we are to judge of the effect which the Title ought to have [g].

[f] Domus uſus relictus eſt, aut marito, aut mulieri. Si marito poteſt illic habitare, non ſolus, verùm familia cum quoque ſua. *l.* 2. §. 1. *ff. de uſu & hab.* Mulieri autem ſi uſus relictus ſit, poſſe eam & cum marito habitare. *l.* 4. §. 1. *eod.* See hereafter the eighth Article.

Cæterarum quoque rerum uſu legato, dicendum eſt uxorem cum viro in promiſcuo uſu eas res habere poſſe. *l.* 9. *eod.* Neque enim tam ſtrictè interpretandæ ſunt voluntates defunctorum. *l.* 12. §. 2. *in f. eod.* Conditionum verba quæ teſtamento præſcribuntur, pro voluntate conſiderantur. *l.* 101. §. 2. *ff. de cond. & demonſtr.*

[g] Semper in ſtipulationibus, & in cæteris contractibus id ſequimur quod factum eſt. *l.* 34. *ff. de reg. jur.* See the eighth Article, with the remark on it.

VI.

6. The Uſe laſts during Life.

The Right of Uſe is not only for one, or more years, but it laſts during the Life of him who has the Uſe, if it is not otherwiſe provided by the Title of the ſaid Right [h].

[h] *See hereafter the eleventh Article of this Section, and the firſt Article of the ſixth Section.*

VII.

7. Definition of Habitation.

Habitation is a Right to dwell in a Houſe, and he who hath this Right, hath as it were an Uſe, or an Uſufruct, according as his Title extends, or limits the Right of Inhabiting [i].

[i] Domus uſus. *l.* 2. §. 1. *ff. de uſu & hab.* See the texts quoted at the end of the Preamble to this Section. *See hereafter the ninth Article.*

VIII.

8. Habitation extends to the whole Family.

The Right of Habitation extends to the whole Family of the perſon who has this Right. For he cannot dwell ſeparately from his Wife, his Children, and his Servants. And it is the ſame thing if this Right belongs to the Wife [l]. And this is underſtood likewiſe of the Habitation which was acquired before the Marriage [m].

[l] Poteſt illic habitare non ſolus, verùm familia cum quoque ſua. *l.* 2. §. 1. *ff. de uſu & habit.* See the fifth Article of this Section.

Mulieri autem ſi uſus relictus ſit, poſſe eam & cum marito habitare, Quintus Mutius primus admiſit, ne ei matrimonio carendum foret, cùm uti vult domo. Nam per contrarium quin uxor cum marito

mario poſſit habitare nec fuit dubitatum. *l.* 4. §. 1. *ff. de uſu & habit.*

[m] Quid ergo ſi viduæ legatus ſit uſus? an nuptiis contractis, poſt conſtitutum uſum, mulier habitare cum marito poſſit? Et eſt verum poſſe eam cum viro, & poſtea nubentem habitare. *l.* 4. *cod.* See the fifth Article.

What is ſaid in this Article, that Habitation extends to the whole Family, ſignifies that he who has this Right may dwell with his whole Family, in the places that are ſubject to his Habitation. But the meaning of this Rule is not, that a Habitation which is limited, for Example, to one Apartment, ſhould extend to another, under pretext that the Family of the perſon who has this Right is ſtraitned for want of room. See the fifth Article.

IX.

9. *To what places Habitation extends.*

Habitation extends, either to the whole Houſe, or only to a part of it, according as it appears to be regulated by the Title. But if the Habitation is given indefinitely, without naming either the whole Houſe, or any part of it, but only either according to the Condition, or the Neceſſities of him who acquires the Right, it will comprehend all neceſſary Conveniencies, even altho' nothing ſhould remain for the Proprietor[n].

[n] Ita uteretur (domo) ut nihil alii fructuum nomine ſupereſſet. *l.* 15. *ff. de uſu & habit.* Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tàm hæredis quàm uſuarii. Videamus tamen, ne, ſi fructum hæres accipiat, ipſe reficere debeat: ſi verò talis ſit res cujus uſus legatus eſt, ut hæres fructum percipere non poſſit, legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet. *l.* 18. *ff. de uſu & habit. We ſee in this Law both the caſes; one, where the Habitation extends to the whole Houſe: and the other, where it is confined to a part of it.* See the ſeventh Article of this Section.

X.

10. *The Right of Habitation may be transferred.*

He who has a Right of Habitation in a Houſe, or in a part of it, may aſſign over and let out his Right to another, without dwelling in the Houſe himſelf[o], unleſs his condition is otherwiſe regulated by his Title[p].

[o] Si quidem habitationem quis reliquerit: ad humaniorem declinare ſententiam nobis viſum eſt: & dare legatario etiam locationis licentiam: quid enim diſtat ſive ipſe legatarius maneat, ſive alii cedat ut mercedem accipiat. *l.* 13. *C. de uſufr.* §. 5. *inſt. de uſu & habit.*

[p] Id ſequimur quod actum eſt. *l.* 34. *ff. de reg. jur.* See the fourth Article of this Section.

XI.

11. *The Right of Habitation is during life.*

The Right of Habitation, as well as that of Uſe, is not limited to a time, but it laſts during the Life of the perſon who has the Right[q].

[q] Utrum autem unius anni ſit habitatio, an uſque ad vitam apud veteres quæſitum eſt. Et Rutilius donec vivat habitationem competere, ait. Quam ſententiam, & Celſus probat libro octavo decimo Digeſtorum. *l.* 10. §. 3. *ff. de uſu & habit.* See the ſixth Article.

SECT. III.

Of the Uſufruct of Things which are conſumed, or impaired, by Uſe.

Uſufruct of Moveables.

THings Moveable are either wholly conſumed, or at leaſt impaired by Uſe. Thus, Grain and Liquors are wholly conſumed when one uſes them: and Cattel, Hangings, Beds, and other Moveables ſuffer ſome diminution by Uſe, and even by the bare effect of Time, altho' they were not uſed: and at laſt theſe Things periſh. But nevertheleſs a kind of Uſufruct has been eſtabliſhed of all Moveable Things, and even of thoſe which periſh by being uſed. This Uſufruct is acquired two ways, either by a particular Title, as if one makes a Gift of the Uſufruct, or bare Uſe, or of a Sute of Hangings and other Moveables; or by a general Title, if they chance to be comprehended in a Totality of Goods, ſuch as a Succeſſion, of which one has the Uſufruct. And it is this kind of Uſufruct of which the Rules ſhall be the ſubject matter of this Section.

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I.

1. *Uſufruct of all ſorts of Things.*

ALtho' it ſeems not to be natural that we ſhould have the Uſufruct of Moveable Things which periſh in the Uſe, ſuch as Corn, and Liquors; yet the Laws have received a kind of Uſufruct of this ſort of Things, as of

all others which we are capable of poſſeſſing[a]. For in effect there is not any one of theſe Things from which we may not draw ſome uſe, and we may eſtabliſh in them a kind of Uſufruct, according to their Nature, by the following Rules.

[a] Senatus cenſuit, ut omnium rerum, quas in cujuſque patrimonio eſſe conſtaret, uſusfructus legari poſſit: quo Senatus conſulto indultum videtur, ut earum rerum quæ uſu tolluntur, vel minuuntur, poſſit uſusfructus legari. *l.* 1. *ff. de uſufr. car. rer. quæ uſu conſ. l.* 3. *eod.* Sed de pecunia recte caveri oportet his à quibus ejus pecuniæ uſusfructus legatus erit. *l.* 2. *eod.* §. 2. *inſt. de uſufr.*

II.

2. Uſufruct of Moveable Effects in a Totality of Goods.

He who has the Univerſal Uſufruct of a Totality of Goods, has alſo the Right to enjoy and uſe all the Moveable Effects according to their Nature; to conſume what is liable to be conſumed in its ordinary uſe; to gather from the Living Creatures the Profits which they yield: to receive the Intereſt of Debts which bear Intereſt: and to make uſe of every thing according to its natural Uſe, either for its Revenue, or for its Conveniency, or for bare Pleaſure[b].

[b] Omnium bonorum uſumfructum poſſe legari. *l.* 29. *ff. de uſufr. l.* 34. §. 2. *eod. V. l.* 1. *C. eod.* Conſtitit uſusfructus non tantùm in fundo, & ædibus, verùm etiam in ſervis, jumentis, cæteriſque rebus. *l.* 3. §. 1. *ff. eod. l.* 7. *eod.* Numiſmatum aureorum vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt. *l.* 28. *eod.* Statuæ, & imaginis uſumfructum poſſe relinqui. *l.* 41. *eod.* Poſt quod omnium rerum uſusfructus legari poterit, an & nominum? Nerva negavit: ſed eſt verius quod Caſſius & Proculus exiſtimant, poſſe legari. *l.* 3. *ff. de uſufr. car. rer. quæ uſu conſ.*

III.

3. In what this Uſufruct conſiſts.

The Uſufruct of Moveable Things which are not conſumed immediately by the uſe of them, conſiſts in the Right of enjoying them, and imploying them as the Proprietor would do, by putting them to the uſe for which they are deſigned, without abuſing them, and taking due care of them. Thus, a Suit of Hangings, of which one has the Uſufruct, may continue hung up, and the other Moveables may likewiſe be employed to their ſeveral uſes: and they ſhall be reſtored to the Proprietor in the condition in which they ſhall happen to be after the Uſufruct is expired, altho' waſted and diminiſhed by the effect of the Uſe, provided the Uſufructuary hath not miſuſed them[c].

[c] Et, ſi veſtimentorum uſusfructus legatus ſit, non ſicut quantitatis uſusfructus legetur: dicendum eſt, ita uti eum debere ne abutatur. *l.* 15. §. 4. *ff. de uſufr.* Proinde & ſi ſcenicæ veſtis uſusfructus legetur, vel aulæi, vel alterius apparatus, alibi quàm in ſcena non uteretur. *d. l.* §. 5. Si veſtis uſusfructus legatus ſit, ſcripſit Pomponius, quamquam hæres ſtipulatus ſit ſimito uſufructu veſtem redii, attamen non obligari promiſſorem, ſi eam ſine dolo malo attritam reddiderit. *l.* 9. §. 3. *ff. de uſuf. quem cau.*

IV.

4. Uſufruct of Living Creatures.

The Uſufructuary, who has Living Creatures in his Uſufruct, may draw from them the Revenues, and Services which the Maſter himſelf would draw. Thus, he may imploy the Oxen in Carriage, and Tillage, the Horſes either to carry and draw, or to till the Ground, or to ride upon, according to the uſes for which they are deſtined; the Sheep to dung the Grounds; and from them he may likewiſe draw the Profit of the Lambs, the Milk, and the Wool[d].

[d] Si boum armenti uſus relinquatur, omnem uſum habebit, & ad arandum, & ad cætera ad quæ boves apti ſunt. *l.* 12. §. 3. *ff. de uſu & habit.* Equitii quoque legato uſu, videndum ne & domare poſſit, & ad vehendum ſub jugo uti: & ſi forte auriga fuit, cui uſus equorum relictus eſt, non puto eum Circenſibus his uſurum, quia quaſi locare eos videtur. Sed ſi teſtator ſciens cum hujus eſſe inſtituti & vitæ reliquit, videtur etiam de hoc uſu ſenſiſſe. *d. l.* 12. §. 4. Si pecoris ei uſus relictus eſt, putà gregis ovilis, ad ſtercorandum uſurum dumtaxat Labeo ait. Sed neque lanâ neque agnis, neque lacte uſurum. *Hæc enim* magis *in fructu eſſe d. l.* §. 2.

V.

5. The Uſufructuary of a Herd of Cattel, ought to ſupply out of the Erwits the places of thoſe which die.

If it is of a Stud of Mares, a Herd of Cattel, or a Flock of Sheep, that one has the Uſufruct, the Uſufructuary will have the Colts, the Calves, the Lambs, the Wool, and all the Services, and other Profits, according to the nature and uſe of theſe Animals[e]; but ſtill on condition that he preſerve entire the Number which he hath received, and that when any of them dies, he fill up their places out of the Fruits. For it is enough for him to enjoy the Profits which he reaps from the Animals, and to have over and above whatever exceeds the number which he is bound to keep intire[f].

[e] *See the preceding Article.*

[f] Planè ſi gregis vel armenti ſit uſusfructus legatus, debebit ex agnatis, gregem ſupplere. Id eſt in locum capitum defunctorum. *l.* 68. §. *ult. ff. de uſufr.* Si deceſſerit fœtus, periculum erit fructuarii, non proprietarii: & neceſſe habebit alios fœtus ſubmittere. *l.* 70. §. 2. *eod.* Eaque pleno grege edita ſint, ad fructuarium pertinere. *d. l.* §. 42.

VI.

6. The Uſufructuary of Animals which do not produce young ones, is not obli-

If it happens that the Uſufruct is of ſuch Animals as cannot produce young ones for ſupplying the places of thoſe that die, ſuch as a Set of Horſes, or Mules, or any one Beaſt alone, the Uſufructuary will not be bound to fill

up

ged to ſupply the places of thoſe that die.

up the place of that which dies[g], if its death happens without his fault.

[g] Sed quod dicitur debere eum ſummittere, toties verum eſt, quoties gregis, vel armenti, vel equitii, id eſt univerſitatis uſusfructus legatus eſt. Cæterum ſingulorum capitum nihil ſupplebit. *l.* 70. §. 3. *ff. de uſufr.*

VII.

7. Uſufruct of Things which are conſumed by uſe.

The Uſufruct of Things which are conſumed in the uſe, carries along with it the Property of them, ſince one cannot uſe them but by conſuming them. But the Uſufructuary is diſtinguiſhed from the Proprietor, in that he is obliged after the Uſufruct is expired, to reſtore, according as his Title obliges him, either an equal Quantity of the ſame Kind with that which he received, or the Value of the Things at the time he received them[h]. For it is of this Value that he has had the Uſufruct.

[h] Si vini, olei, frumenti uſusfructus legatus erit, proprietas ad legatarium transferri debet. Et ab eo cautio deſideranda eſt, ut quandoque is mortuus, aut capite diminutus ſit, ejuſdem qualitatis res reſtituatur. Aut æſtimatis rebus certæ pecuniæ nomine cavendum eſt, quod & commodius eſt. Idem ſcilicet de cæteris quoque rebus, quæ uſu continentur intelligemus. *l.* 7. *ff. de uſufr. ear. rer. quæ uſu conſ.* See the ſecond Article of the fourth Section.

VIII.

8. It is equal, whether one has the Uſe, or Uſufruct of Things which are conſumed in the uſe.

It is the ſame thing whether we have the Uſe, or Uſufruct of Things which are conſumed in uſing, ſuch as Money, Grain, Liquors. For he who has the Uſe of theſe things, enjoys them as much as he who has the Uſufruct of them, ſince he diſpoſes of them as if he were Maſter of them[i].

[i] Quæ in uſufructu pecuniæ diximus, vel cæterarum rerum quæ ſunt in abuſu, eadem & in uſu dicenda ſunt. Nam idem continere uſum pecuniæ, & uſumfructum, & Julianus ſcribit, & Pomponius libro octavo de Stipulationibus. *l.* 5. §. *ult. ff. de uſuf. ear. rer. quæ uſu conſum. l.* 10. §. 1. *eod.*

IX.

9. The bounds and extent of the Uſe of Moveables.

The Uſe of all other Moveable Things hath its limits and its extent according to the Title which eſtabliſhes it; and it is regulated either by the Intention of the Parties contracting, if the Title is a Contract, or by that of the Teſtator, if it is a Teſtament. And we judge of the ſaid Intention either by the terms of the Title, or by the circumſtances, ſuch as that of the Quality of the perſon to whom the Uſe of theſe Things has been given, of the Motive of the Perſon who gave it, of the Uſe which he himſelf made of it, and other circumſtances of the like nature. Regard is alſo to be had to the Cuſtom of the Place, if there be any to which the Title may have relation. And it is by theſe Principles that we ought to judge, if, for Example, an Uſe of Moveables comprehends all Moveable Things without exception, or only ſome of them, and in what manner we are to make the diſtinction: if it extends to all ſorts of Services, and Profits, which one may draw from them, or if it is limited to ſome particular Services, and to ſome Profits[l].

[l] *See the firſt Article, and the fifth Article of the ſecond Section; as alſo the Laws cited on the fourth Article of this Section, and the following Article.*

X.

10. If the Uſufructuary of Moveables can let them out.

He who has the Uſufruct of Moveable Things of which the Uſe conſiſts in letting them out to hire, ſuch as a Boat for carrying Merchandize, a Ship for a Voyage by Sea, may let ſuch Things to hire. But he cannot let out thoſe Things which are not deſtined to be let to Hire. For altho' the Uſufruct gives a full Right to enjoy all the Profit which may be drawn from the Things that are ſubject to it, yet this Right in Moveables ought to have its bounds, becauſe the miſuſe of them may deſtroy or damage them. So that the ways of uſing them ought to be regulated according to the Title, and according to the circumſtances of the Quality of the Perſons, the Nature of the Things, the Uſe which a good and careful Husband ought to make of them, and other the like circumſtances[m].

[m] Et ſi veſtimentorum uſusfructus legatus ſit, non ſicut quantitatis uſusfructus legetur: dicendum eſt, ita uti eum debere, ne abutatur. Nec tamen locaturum, quia vir bonus ita non uteretur. *l.* 15. §. 4. *ff. de uſufr.* Proindè & ſi ſcenicæ veſtis uſusfructus legetur, vel aulæi, vel alterius apparatus, alibi quàm in ſcena non uteretur. Sed an & locare poſſit videndum eſt, & puto locaturum. Et licèt teſtator commodare non locare fuerit ſolitus, tamen ipſum fructuarium locaturum tam ſcenicam quàm funebrem veſtem. *d. l.* §. 5. Si fortè auriga fuit, cui uſus equorum relictus eſt, non puto eum Circenſibus his uſurum, quia quaſi locare eos videtur. Sed ſi teſtator ſciens cum hujus eſſe inſtituti & vitæ reliquit, videtur etiam de hoc uſu ſenſiſſe. *l.* 12. §. 4. *ff. de uſu & habit.* See the foregoing Article.

SECT.

SECT. IV.

Of the Engagements of the Uſufructuary, and of him who has the bare Uſe, to the Proprietor.

The CONTENTS.

1. *The Uſufructuary ought to make an Inventory of the Things ſubject to the Uſufruct.*
2. *He ought to give Security to make reſtitution.*
3. *He ought to take care of the Things ſubject to the Uſufruct.*
4. *He ought to uſe the Things as a good Huſband would do.*
5. *He ought to acquit the Charges.*
6. *He ought to make the Repairs.*
7. *The Engagements of the perſon who has the bare Uſe.*
8. *The relinquiſhing of the Uſufruct, or Uſe, to avoid the Charges.*

I.

1. The Uſufructuary ought to make an Inventory of the Things ſubject to the Uſufruct.

THE firſt Engagement of the Uſufructuary, is to charge himſelf with the Things of which he has the Uſufruct, whether they be Moveables, or Immoveables: and to make an Inventory of them in Writing, in preſence of the perſons intereſted, that it may appear in what Things they conſiſt, and in what condition they are when he receives them: in order to regulate what he is to reſtore after the Uſufruct is expired, and in what condition he ought to give the Things back [a].

[a] Rectè facient & hæres, & legatarius, qualis res ſit, cum frui incipit legatarius, ſi in teſtatum redegerint, ut inde poſſit apparere, an & quatenus rem pejorem legatarius fecerit. *l.* 1. §. 4. *ff. uſuf. quem cav.* For this Uſage ſee the ſeventh Article.

II.

2. He ought to give Security to make reſtitution.

The ſecond Engagement of the Uſufructuary, is to give the neceſſary Security to the Proprietor, for the Reſtitution of the Things of which he has the Uſufruct; whether by his bare promiſe of making Reſtitution, or by giving Surety for his doing it, according as the Title of his Uſufruct may oblige him, or the circumſtances of the Nature of the Things, of the Quality of the Perſons, and others of the like nature may demand. As if it is an Uſufruct of Things which periſh in the Uſe, or which may be eaſily damnified. And the Security for Reſtitution implies likewiſe that of reſtoring the Things in the condition in which they ought to be [b].

[b] Si cujus rei uſusfructus legatus ſit, æquiſſimum prætori viſum eſt, de utroque legatarium cavere, & uſurum ſe boni viri arbitratu, & cùm uſusfructus ad eum pertinere deſinet, reſtituturum quod inde extabit *l.* 1. *ff. uſufr. quem cav.* Si cujus rei uſusfructus legatus erit, dominus poteſt in ea re ſatisdationem deſiderare, ut officio judicis hoc fiat. Nam ſicuti debet fructuarius uti frui, ita & proprietatis dominus ſecurus eſſe debet de proprietate. Hæc autem ad omnem uſumfructum pertinere Julianus libro trigeſimo octavo Digeſtorum probat. *l.* 13. *ff. de uſufr. l.* 8. §. 4. *ff. qui ſatisdare cog.* Uſufructu conſtituto conſequens eſt, ut ſatisdatio boni viri arbitratu præbeatur, ab eo ad quem id commodum pervenit, quod nullam læſionem ex uſu proprietati afferat. Nec intereſt ſive ex teſtamento, ſive ex voluntario contractu uſusfructus conſtitutus eſt. *l.* 4. *C. de uſufr.* Si vini, olei, frumenti uſusfructus legatus erit, proprietas ad legatarium transferri debet: & ab eo cautio deſideranda eſt, ut quandoque eis mortuus, aut capite diminutus ſit, ejuſdem qualitatis res reſtituatur. *l.* 7. *ff. de uſufr. ear. rer. quæ uſu conſ. l.* 1. *C. de uſufr.*

III.

3. He ought to take care of the Things ſubject to the Uſufruct.

The third Engagement which the Uſufructuary is under, is to preſerve the Things of which he has the Uſufruct, and to take the ſame care of them as a good Huſband would do of what belongs to him [c]. Thus he who has the Uſufruct of a Houſe, ought to be watchful againſt Fire. Thus, he who has the Uſufruct of Beaſts, ought to take care that they be well kept, fed, and looked after.

[c] Debet omne, quod diligens pater familiàs in ſua domo facit, & ipſe facere. *l.* 65. *ff. de uſufr.* Uſurum ſe boni viri arbitratu. *l.* 1. *ff. de uſufr. quem cav. l.* 4. *C. eod.*

IV.

4. He ought to uſe the Things as a good Huſband would do.

The fourth Engagement of the Uſufructuary, is to uſe and enjoy the Things of which he has the Uſufruct in the ſame manner as a good Huſband would do, drawing from them ſuch advantages as he can make, without miſuſing, or damnifying them, and without changing even what is deſtined for bare pleaſure, altho' it were to improve the Revenue. Thus he cannot cut down the Trees of an Avenue in order to make a Kitchen Garden, or to ſow Corn in the place [d].

[d] Mancipiorum uſufructu legato, non debet abuti, ſed ſecundùm conditionem eorum uti. *l.* 15. §. 1. *ff. de uſufr.* Et generaliter Labeo ait, in omnibus rebus mobilibus modum eum tenere debere ne ſua feritate, vel ſævitia ea corrumpat. *d. l.* §. 3. Fructuarius cauſam proprietatis deteriorem facere non debet. *l.* 13. §. 4. *ff. eod.* Et aut fundi eſt uſusfructus legatus: & non debet neque arbores frugiferas excidere, neque villam diruere, nec quicquam facere in perniciem proprietatis. Et ſi fortè voluptarium

voluptarium fuit prædium, viridaria vel geſtationes, deambulationes arboribus infructuoſis opacas, atque amœnas habens, non debebit dejicere, ut forte hortos olitorios faciat, vel aliud quid quod ad reditum ſpectat. *d.* §. 4.

V.

5. He ought to acquit the Charges.

The fifth Engagement of the Uſufructuary, is to acquit the Charges of the Things of which he has the Uſufruct, ſuch as the Land-Tax, and other Impoſts and Publick Duties, even thoſe which may chance to be impoſed after the Uſufruct has been acquired, the Quit-Rents, Ground-Rents, and other Charges [e].

[e] Si quid cloacarii nomine debeatur, vel ſi quid ob formam aquæ ductus quæ per agrum tranſiit, pendatur, ad onus fructuarii pertinebit. Sed & ſi quid ad collationem viæ, puto hoc quoque fructuarium ſubiturum. Ergo & quod ob tranſitum exercitus confertur ex fructibus. *l.* 27. §. 3. *ff. de uſufr.* Quæro ſi uſusfructus fundi legatus eſt, & eidem fundo indictiones temporariæ indictæ ſint, quid juris ſit? Paulus reſpondit idem juris eſſe & in his ſpeciebus, quæ poſtea indicuntur, quod in vectigalibus dependendis reſponſum eſt. Ideoque hoc onus ad fructuarium pertinet. *l.* 28. *ff. de uſufr.*

VI.

6. He ought to make the Repairs.

The ſixth Engagement which the Uſufructuary lies under, is to be at the neceſſary Expences for preſerving and keeping in good caſe the Places, and other Things of which he has the Uſufruct. Such as to make the ſmall Repairs of a Houſe, to plant Trees in the room of thoſe which die in the Ground, to manure and improve the Lands, and to make the other leſſer Repairs, and to lay out the Expences which may be neceſſary for the Cultivation and Preſervation of the Places. But he is not bound to be at the charge of the greater Repairs, ſuch as the Rebuilding of a Houſe that is fallen without any neglect of his [f].

[f] Eum, ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt. *l.* 7. *C. de uſuf.* Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum ædes, per arbitrum cogi, Celſus ſcribit: hactenus tamen ut ſarta tecta habeat. Si qua tamen vetuſtate corruiſſent, neutiquam cogi reficere. *l.* 7. §. 2. *ff. de uſufr.* In locum demortuarum arborum aliæ ſubſtituendæ ſunt. *l.* 18. *eod.* Fructus deductis neceſſariis impenſis intelligitur. *l.* 4. §. 1. *ff. de oper. ſerv.*

VII.

7. Engagements of the perſon who has the bare Uſe.

All theſe Engagements of the Uſufructuary are common to him who has the bare Uſe, in proportion to his Right of Uſe. Thus, when his Right gives him the whole Thing, as if he has a Right to inhabit a whole Houſe; he ought to charge himſelf with what is delivered to him, to give the neceſſary Security, take care of the Places, uſe them without miſuſing or damaging them, make the Repairs, and bear the other Charges which the Uſufructuary would be bound to do. But if his Right is limited, as if he has only a part of a Houſe, he is liable to Repairs and other Charges, only in proportion to what he poſſeſſes [g].

[g] Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tam hæredis, quàm uſuarii. Videamus tamen ne, ſi fructum hæres accipiat, ipſe reficere debeat. Si verò talis ſit res cujus uſus legatus eſt, ut hæres fructum percipere non poſſit, legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet. *l.* 18. *ff. de uſu & hab.*

VIII.

8. The relinquiſhing of the Uſufruct, or Uſe, to avoid the Charges.

If the Uſufructuary, or the perſon who has the bare Uſe, chuſes rather to relinquiſh their Right, than to bear the Charges of it, they will be freed from the Charges, except only thoſe which became due in the time of their Enjoyment, and the Waſtes which either they themſelves, or the perſons for whom they are accountable, may have committed. And they will have the ſame liberty of relinquiſhing their Right, even after they have been condemned in a Court of Juſtice to acquit the Charges to which they were liable [h].

[h] Cùm fructuarius paratus eſt uſumfructum derelinquere, non eſt cogendus domum reficere, in quibus caſibus uſufructuario hoc onus incumbit. Sed & poſt acceptum contra eum judicium, parato fructuario derelinquere uſumfructum, dicendum eſt abſolvi eum debere à judice. *l.* 64. *ff. de uſufr.* Sed cùm fructuarius debeat, quod ſuo ſuorumque facto deterius factum ſit, reficere, non eſt abſolvendus, licèt uſumfructum derelinquere paratus ſit. *l.* 65. *eod.*

SECT. V.

Of the Engagements which the Proprietor is under to the Uſufructuary, and to him who has the bare Uſe.

The CONTENTS.

1. *The Proprietor ought to leave the Enjoyment of the Fruits, and the Uſe, free.*
2. *He cannot change the condition of the Places, altho' to the better.*
3. *He ought to remove the Obſtacles, againſt which he is Guarantee.*
4. *He ought to reimburſe what is laid out on Repairs, which he himſelf is bound to make.*
5. *The Uſufructuary enjoys the Things in the condition he finds them.*

I. The

I.

1. *The Proprietor ought to leave the Enjoyment of the Fruits, and the Uſe, free.*

THE Proprietor is bound to deliver to the Uſufructuary, and to him who has the bare Uſe, the Places and other Things ſubject to the Uſufruct, or to the Uſe: or to ſuffer them to take poſſeſſion of them, without putting them to any trouble, or inconvenience. And the perſons who have theſe Rights may ſue the Proprietor, as well as all other Poſſeſſors of the Things ſubject to the ſaid Rights, for a liberty to enjoy them[a].

[a] Utrùm autem adversùs dominum dumtaxat in rem actio uſufructuario competat, an etiam adversùs quemvis poſſeſſorem quæritur? Et Julianus libro ſeptimo Digeſtorum ſcribit, hanc actionem adversùs quemvis poſſeſſorem ei competere. *l.* 5. §. 1. *ff. ſi uſufr. pet.*

II.

2. *He cannot change the condition of the Places, altho' to the better.*

The Proprietor cannot, either before or after the Delivery, make any change in the Places, and other Things ſubject to an Uſufruct, or Uſe, by which the condition of the Uſufructuary, or of him who has the Uſe, is made worſe, altho' it were to make Improvements. Thus, he can neither raiſe a Building higher, nor make a new one, in a Ground where none was before; unleſs it be with the conſent of the Uſufructuary, or him who has the Uſe. Much leſs can he grub up a Wood, pull down an Edifice, impoſe Services on it, or make any other Changes that may be of prejudice to the Uſufructuary, or him who has the Uſe. And if he has done it, he will be liable for the Damages and Loſſes which he ſhall have occaſioned[b].

[b] Neratius: uſuariæ rei ſpeciem, is cujus proprietas eſt, nullo modo commutare poteſt. Paulus: deteriorem enim cauſam uſuarii facere non poteſt. Facit autem deteriorem etiam in meliorem ſtatum commutata. *l. ult. ff. de uſu & habit.* Labeo ſcribit nec ædificium licere domino te invito altiùs tollere, ſicut nec areæ uſufructu legato, poteſt in area ædificium poni. Quam ſententiam puto veram. *l.* 7. §. 1. *in fin. ff. de uſufr.* Si ab hærede, ex teſtamento, fundi uſusfructus petitus ſit, qui arbores dejeciſſet, aut ædificium demolitus eſſet, aut aliquo modo deteriorem uſumfructum feciſſet, aut ſervitutem imponendo, aut vicinorum prædia liberando, ad judicis religionem pertinet, ut inſpiciat qualis ante judicium acceptum fundus fuerit: ut uſufructuario hoc quod intereſt, ab eo ſervetur. *l.* 2. *ff. ſi uſufr. pet. l.* 15. §. *ult. ff. de uſufr.*

III.

3. *He ought to remove the Obſtacles, againſt which he is Guarantee.*

If the Uſufructuary, or the perſon who has the Uſe, cannot have the Enjoyment becauſe of ſome Obſtacle which the Proprietor is bound to remove, he ſhall be bound to get it removed, and to make good the Loſſes and Damages which are ſuſtained by the Non-enjoyment[c]. As if there were an Eviction, or ſome other Trouble, againſt which the Proprietor is bound to Warranty, or if he ſhould refuſe him any neceſſary Service which he is bound to give, as in the caſe of the fourteenth Article of the firſt Section.

[c] *This is a conſequence of the Right of the Uſufructuary.* Uſusfructus legatus adminuculis eget, ſine quibus uti frui quis non poteſt. *l.* 1. §. 1. *ff. ſi uſusfr. pet.* In his autem actionibus quæ de uſufructu aguntur, etiam fructus venire, plus quam manifeſtum eſt. *l.* 5. §. 3. *& §. ult. ff. eod.*

IV.

4. *He ought to reimburſe what is laid out on Repairs, which he himſelf is bound to make.*

If the Uſufructuary has made any neceſſary Repairs beyond thoſe which he is bound to make, the Proprietor ought to reimburſe him of what he has laid out on that account[d].

[d] Eum ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt. Proinde ſi quid ultrà quam impendi debeat erogatum potes docere, ſolemniter reposſces. *l.* 7. *C. de uſufr.*

V.

5. *The Uſufructuary enjoys the things in the condition he finds them.*

The Proprietor is not bound to rebuild, or reſtore to good condition, that which happens to be demoliſhed, or damaged at the time that the Uſufruct is acquired, unleſs he himſelf were the Author of the Damage, or that he were obliged by his Title to put the Things in a good condition. But the Uſufructuary is reſtrained to the Right of enjoying the Thing in the condition in which it is at the Time when he acquires his Right; in the ſame manner as he who acquires the Property of a Thing, ought to have it only ſuch as it was at the time when he acquired it[e].

[e] Non magis hæres reficere debet, quod vetuſtate jam deterius factum reliquiſſet teſtator, quàm ſi proprietatem alicui teſtator legaſſet. *l.* 65. §. 1. *ff. de uſufr.*

SECT. VI.

How Uſufruct, Uſe, and Habitation expire.

The CONTENTS.

1. *Theſe Rights expire by the death of the Uſufructuary, and of him who hath the Uſe.*
2. *And when the time which they ought to laſt, is elapſed.*
3. *Reſtitution of the Uſufruct to a third Uſufructuary.*
4. *If the Thing periſhes.*

5. *Inundation.*
6. *Uſufruct of what remains of the Land or Tenement.*
7. *Difference between an Univerſal Uſufruct, and one that is Particular.*
8. *Changes in the Land, or Tenement.*
9. *The Remainder of the Thing which is deſtroyed belongs to the Proprietor.*

I.

1. *Theſe Rights expire by the death of the Uſufructuary, and of him who hath the Uſe.*

USufruct, Uſe, and Habitation expire by the Natural Death, and by the Civil Death of the perſon who had the Right to them, becauſe this Right is perſonal [a].

[a] Morte amitti uſumfructum, non recipit dubitationem. Cùm jus fruendi morte extinguatur, ſicuti ſi quid aliud quod perſonæ cohæret. *l.* 3. §. *ult. ff. quib. mod. uſufr. amit. l.* 3. *C. de uſufr.* Capitis diminutione quæ vel libertatem, vel civitatem Romanam poſſit adimere. *l.* 16. *in f. C. de uſufr.* Finitur uſusfructus morte uſufructuarii & duabus capitis diminutionibus, maximâ, & media. §. 3. *inſt. de uſuf.*

II.

2. *And when the time which they ought to laſt is elapſed.*

If the Title of the Uſufruct, of the Uſe and Habitation, has limited the Right to it to commence or determine at a certain time, or upon the exiſtence of a certain Condition, the Right will not commence, nor determine, till the condition ſhall happen, or the time be elapſed [b].

[b] Si ſub conditione mihi legatus ſit uſusfructus, medioque tempore ſit penes hæredem: poteſt hæres uſumfructum alii legare. Quæ res facit, ut ſi conditio extiterit, mei legati, uſusfructus ab hærede relictus finiatur. *l.* 16. *ff. quib. mod. uſufr. vel uſ. am. l.* 17. *eod. V. l.* 12. *C. de uſufr.*

III.

3. *Reſtitution of the Uſufruct to a third Uſufructuary.*

If the Uſufructuary is charged to reſtore the Uſufruct to another perſon, his Right to the Uſufruct will determine whenever the time of making the ſaid Reſtitution comes [c].

[c] Si legatum uſumfructum legatarius alii reſtituere rogatus eſt. *l.* 4. *ff. quib. mod. uſufr. vel uſ. am.*

IV.

4. *If the Thing periſhes.*

The Right of Uſufruct is limited to the Thing on which it is aſſigned, and does not affect the other Goods. So that it expires whenever the Land or Tenement, or other Thing which is ſubject to it, happens to periſh before the death of the Uſufructuary, or of the perſon who has the Uſe; as if a Piece of Ground be carried away by an Inundation, or a Houſe be burnt down, or ruined. And in this laſt caſe, the Uſufructuary would not even have the Uſufruct of the Materials, nor of the Place on which the Houſe ſtood. For the Uſufruct was ſpecially ſettled upon a Houſe: and it was reſtrained to what was ſpecified in the Title [d].

[d] Eſt enim uſusfructus jus in corpore, quo ſublato & ipſum tolli neceſſe eſt. *l.* 2. *ff. de uſuf.* Si ædes incendio conſumptæ fuerint, vel etiam terræ motu, vel vitio ſuo corruerint, extingui uſumfructum: & ne areæ quidem uſumfructum deberi. §. 3. *in f. inſt. de uſufr.* Nec cæmentorum. *l.* 5. §. 2. *ff. quib. mod. uſufr. vel. uſ. am.* Si ædes incenſæ fuerint, uſusfructus ſpecialiter ædium legatus, peti non poteſt. *l.* 34. §. *ult. ff. de uſufr.*

V.

5. *Inundation.*

If a Piece of Ground were overflowed, either by the Sea, or by a River, the Uſufruct and the Uſe would not be loſt, except during the continuance of the Inundation: and it would be reſtored, if the Ground, or any part of it, returned to ſuch a condition as one might enjoy it, becauſe the Ground would not have changed its Nature [e].

[e] Si ager, cujus uſusfructus noſter ſit, flumine vel mari inundatus fuerit, amittitur uſusfructus. *l.* 23. *ff. quib. mod. uſufr. vel uſ. am.* Cùm uſumfructum horti haberem, flumen hortum occupavit, deinde ab eo receſſit, jus quoque uſusfructus reſtitutum eſſe, Labeoni videtur, quia id ſolum perpetuò ejuſdem juris manſiſſet. *l.* 24. *eod.* Si cui inſulæ uſusfructus legatus eſt, quamdiu quælibet portio ejus inſulæ remanet, totius ſoli uſumfructum retinet. *l.* 53. *ff. de uſufr.*

VI.

6. *Uſufruct of what remains of the Land or Tenement.*

If it happens that a part of a Houſe periſhes, and that there remains another part of it, the Uſufruct will be preſerved of that part of the Houſe which remains, and of the Place on which ſtood the part of the Houſe which is deſtroyed. For the ſaid Place makes a part of the ſaid Houſe, and is an Acceſſory to the part of it that remains [f].

[f] Si cui inſulæ uſusfructus legatus eſt, quamdiu quælibet portio ejus inſulæ remanet, totius ſoli uſumfructum retinet. *l.* 53. *ff. de uſufr.*

VII.

7. *Difference between an Univerſal Uſufruct, and one that is Particular.*

In the caſes in which the Thing ſubject to an Uſufruct happens to periſh, we ought to obſerve this difference between the Uſufruct of a Totality of Goods, and that of a particular Thing; that whereas the Particular Uſufruct of a Houſe, for Example, is extinct in ſuch a manner whenever the Houſe periſhes, either by a Fall, or by Fire, or other Caſualty, that the Uſufructuary has no manner of Uſufruct in the Place which remains; on the contrary, if his Uſufruct was Univerſal of all the Goods, he ſhall have the Uſufruct of the Place where the Houſe ſtood, and of the Materials

terials which may chance to remain; for they are a part of the Totality of Goods[g]. And it would be the ſame thing in the Uſufruct of a Country-Farm, where the Buildings ſhould happen to go to ruin; for in this caſe the Uſufruct would be preſerved on the Place which ſhould remain, as being an Acceſſory, and making a part of the Whole of the ſaid Farm[h].

[g] Univerſorum bonorum, an ſingularum rerum uſusfructus legetur, hactenus intereſſe puto: quòd, ſi ædes incenſæ fuerint, uſusfructus ſpecialiter ædium legatus peti non poteſt. Bonorum autem uſufructu legato, areæ uſusfructus peti poterit. *l.* 34. §. *ult. ff. de uſufr.* In ſubſtantia bonorum etiam area eſt. *d. l. in fine.*

[h] Fundi uſufructu legato, ſi villa diruta ſit, uſusfructus non extinguetur: quia villa fundi acceſſio eſt, non magis quàm ſi arbores deciderint. Sed & eo quoque ſolo, in quo fuit villa, uti frui potero. *l.* 8. & *l.* 9. *ff. quib. mod. uſusfr. v. uſ. am.*

VIII.

8. *Changes in the Land, or Tenement.*

If there happens any change in the Thing ſubject to an Uſufruct; as if a Pond is dried up, if Arable Land becomes a Marſh, if a Foreſt is converted into Meadow, or Arable Ground; in all theſe and the like caſes, the Uſufruct either ceaſes, or does not ceaſe, according to the Quality of the Title of the Uſufruct, the Intention of thoſe who ſettled it, the time when theſe Changes happen, whether before the Uſufructuary has acquired his Right, or only after, the cauſes of theſe Changes, and the other circumſtances. Thus in an Uſufruct of the Whole Goods, no change extinguiſhes the Uſufruct of what remains; and the Uſufructuary enjoys the Thing in the condition to which it is reduced. Thus in a Particular Uſufruct bequeathed by a Teſtator of ſome Piece of Ground, if he himſelf changes the face of the Places after he has made his Teſtament, and that of a Meadow, for Inſtance, of which he had deviſed the Uſufruct, he makes a Houſe and a Garden; in theſe and the like caſes, where the changes in the Things denote the change of the Will, they annul the Legacy of the Uſufruct, which was limited to Things that are no longer in being. But in an Uſufruct that is acquired by Covenant, the Proprietor is not at liberty to make what changes he pleaſes: And he who ſhould change the nature or condition of the Things, without the conſent of the Uſufructuary, would be bound to indemnify him. And as to the changes which happen by Caſualties, whether before or after the Uſufruct is acquired, it determines, or is preſerved, according to the foregoing Rules, and to what happens to be regulated by the Uſufructuary's Title[i].

[i] Agri vel loci uſusfructus legatus; ſi fuerit inundatus, ut ſtagnum jam ſit, aut palus, proculdubio extinguetur. *l.* 10. §. 2. *ff. quib. mod. uſusfr. vel. uſ. am.* Sed & ſi ſtagni uſusfructus legetur, & exaruerit ſic ut ager ſit factus, mutata re uſusfructus extinguitur. *d. l.* §. 3. Si ſilva cæſa illic ſationes fuerint factæ, ſine dubio uſusfructus extinguitur. *d. l.* §. 4. Si areæ ſit uſusfructus legatus, & in ea ædificium ſit poſitum, rem mutari, & uſumfructum extingui conſtat. Planè ſi proprietarius hoc fecit, ex teſtamento vel dolo tenebitur. *l.* 5. §. *ult. eod.*

IX.

9. *The Remainder of the Thing which is deſtroyed belongs to the Proprietor.*

If the thing ſubject to an Uſufruct chances to periſh, or comes to be changed in ſuch a manner that the Uſufruct ſubſiſts no longer, what remains of the Thing belongs to the Proprietor. Thus, the Materials of a Houſe that is demoliſhed, the Hides of the Beaſts of a Herd of Cattle which ſhould happen to periſh thro' ſome Accident, ought to be delivered to the Proprietor; for the Right of the Uſufructuary was limited to the Enjoyment of what was in being, and it is extinct by this Change[l].

[l] Certiſſimum eſt exuſtis ædibus, nec cæmentorum uſumfructum deberi. *l.* 5. §. 2. *ff. quib mod. uſusfr. vel. uſ. am.* Caro, & corium mortui pecoris in fructu non eſt, quia mortuo eo uſusfructus extinguitur. *l. pen. eod.*

TITLE XII.

Of SERVICES.

The Original of Services, and their Uſe.

THE Order of Civil Society not only ſubjects Mankind one to another, by the Wants which render the reciprocal Uſe of Offices, Services, and Intercourſe between Man and Man neceſſary; but it renders it moreover neceſſary for the Uſe of Things, that there ſhould be the Subjections, Dependencies, and Connexions between one Thing and another, without which there is no putting them in Uſe. Thus, for Things Moveable, there are none of them, or but a very few, that come to our hands in the condition in which they ought to be for our Service, but thro' a Concatenation of the Uſe of many other Things; whether it be for digging them out of the Places from whence they are to be fetched, or for making them fit for Uſe, or for applying them to effectual Service. Thus, for Immoveables, there are none of them

them likewiſe, or but a few, from which one may reap either the Fruits, or the other Revenues, except by the Uſe of divers Things: and even oftentimes by making one Ground or Tenement ſerve for the Uſe of another; as we make, for Inſtance, one Piece of Ground ſerve for giving Paſſage to another, or one Houſe for receiving the Water that falls from another neighbouring Houſe. It is theſe ſorts of Subjections of one Land or Tenement for the uſe of another, which we call Services; but we do not give this Name to the Subjections which render one Moveable Thing neceſſary for the Uſe of another Thing, whether Moveable or Immoveable.

Theſe Services have two Characters, which diſtinguiſh them from all other Uſe that may be made of one Thing for the Uſe of another. The firſt is, that they are perpetual[a]; whereas every one of the other Subjections is of no duration. And the other is, that in theſe Services of Lands and Tenements, the Land or Tenement ſubject to the Service belongs always to another Owner than the perſon who is Maſter of the Land or Tenement to which the Service is due. For we do not give the Name of Service to the Right which the Maſter of a Land or Tenement has to make uſe of it for himſelf[b].

[a] Omnes ſervitutes prædiorum perpetuas cauſas habere debent. *l.* 28. *ff. de ſerv. præd. urb.*

[b] Nemo ipſe ſibi ſervitutem debet. *l.* 10. *ff. com præd.* nulli enim res ſua ſervit. *l.* 26. *ff. de ſervit. præd. urban.*

It is theſe kinds of Services which ſubject the Land or Tenement of one perſon to the Uſe and Service of the Land or Tenement of another, which ſhall be the ſubject matter of this Title; which we have placed among Covenants, becauſe Services are moſt commonly ſettled by Covenant[c], as in a Sale, in an Exchange, in a Tranſaction, in a Partition: and altho' they are ſometimes eſtabliſhed by Teſtament, or by a Decree of a Court of Juſtice, yet it was more proper to bring in in this place a Matter which cannot be inſerted in many places, and which is ranked here according to its Natural Order.

[c] Iiſdem ferè modis conſtituitur, quibus & uſumfructum conſtitui diximus. *l.* 5. *ff. de ſervit.* §. *ult. inſt. de ſervit.* See before, at the beginning of the Title of Uſufruct.

SECT. I.

Of the Nature of Services, of their Kinds, and the manner how they are acquired.

The CONTENTS.

I.

SErvice is a Right which ſubjects a Land or Tenement to ſome Service, for the uſe of another Land or Tenement, which belongs to another Maſter; as for Example, the Right which the Proprietor of an Eſtate has to paſs thro' the Grounds of his Neighbour, to get at his own[a]. 1. *Definition of Service.*

[a] (Servitutes) rerum, ut ſervitutes ruſticorum prædiorum, & urbanorum. *l.* 1. *ff. de ſervit.* Iter eſt jus eundi. *l.* 1. *ff. de ſervit. præd. ruſt.*

2. All

II.

2. *In what Service conſiſts.*

All Services give to the perſons to whom they are due a Right which they would not have naturally; and they diminiſh the Liberty of the Uſe of the Land or Tenement which owes the Service, ſubjecting the Owner of the ſaid Land or Tenement, to what he ought either to ſuffer, or do, or not do, for leaving the uſe of the Service free. Thus he whoſe Land is ſubject to a Right of Paſſage, ought to bear with the inconveniency of the ſaid Paſſage: Thus, he whoſe Wall ought to bear the Building that is raiſed upon it, is bound to repair the ſaid Wall, if there be occaſion: Thus, all thoſe who owe any Service, can do nothing that may trouble the uſe of it [b].

[b] Servitutum non ea natura eſt, ut aliquid faciat quis, veluti viridaria tollat, ut amœniorem proſpectum præſtet, aut in hoc ut in ſuo pingat: ſed ut aliquid patiatur, aut non faciat. *l.* 15. §. 1. *ff. de ſerv.* Etiam de ſervitute quæ oneris ferendi cauſa impoſita erit, actio nobis competit: ut & onera ferat, & ædificia reficiat, ad eum modum, qui ſervitute impoſita comprehenſus eſt. *l.* 6. §. 2. *ff. ſi ſervit. vindic.*

It follows from the Rule explained in this Article, that in all diſputes about Services, one of the Parties endeavours to ſubject the Land or Tenement of the other againſt Natural Liberty; and the other ſtands up for this Liberty; which makes the Cauſe of him who denies the Service to be the moſt favourable, as ſhall be explained in the ninth Article. De ſervitutibus in rem actiones competunt nobis (ad exemplum earum quæ ad uſumfructum pertinent) tam confeſſoria, quàm negatoria: confeſſoria ei qui ſervitutes ſibi competere contendit: negatoria domino qui negat. *l.* 2. *ff. ſi ſerv. vind.* §. 2. *inſt. de act.*

III.

3. *Services are for Lands and Tenements.*

Altho' Services be properly for the behoof of Perſons, yet they are called real, becauſe they are inſeparable from Lands or Tenements. For it is a Land or Tenement that ſerves for another Land or Tenement; and the ſaid Service does not paſs to the Perſon but becauſe of the Land or Tenement. Thus, one cannot have a Service which conſiſts in the Right of going into another Man's Ground, to gather Fruit, or to walk in it, nor for other Uſes which have no relation to that of a Land or Tenement [c]. But ſuch a Right would be of another nature, as for Example, it would be a Letting to hire, if the Right were purchaſed for a Sum of Money.

[c] Servitutes rerum. *l.* 1. *ff. de ſervit.* Ideo autem hæ ſervitutes prædiorum appellantur, quoniam ſine prædiis, conſtitui non poſſunt. Nemo enim poteſt ſervitutem acquirere, vel urbani, vel ruſtici prædii, niſi qui habet prædium. *l.* 1. §. 1. *ff. comm. prad.* §. 3. *inſt. de ſervit.* Ut pomum decerpere liceat, & ut ſpatiari, & ut cenare in alieno poſſimus, ſervitus imponi non poteſt. *l.* 8. *eod.* Neratius libris ex Plautio, ait, nec hauſtum pecoris, nec appulſum, nec cretæ eximendæ, calciſque coquendæ jus poſſe in alieno eſſe, niſi fundum vicinum habeat. *l.* 5. §. 1. *ff. de ſervit. prad. ruſt.* Hauriendi jus non hominis, ſed prædii eſt. *l.* 20. §. *ult. eod.*

IV.

4. *Divers ſorts of Services.*

Services are of ſeveral ſorts, according to the divers kinds of Lands or Tenements, and the different uſes which may be made of one Land or Tenement for the Service of another. Thus for Houſes, and other Buildings, the one is ſubjected for the uſe of the other, either not to be raiſed higher, or to receive the Waters which fall from the other, or to bear ſome part of the Weight of the other Houſe, by fixing a Beam in the Wall, and the like: And for Lands, one is ſubjected for the uſe of the other, either to a Paſſage, or to a Draught of Water, or to other Rights of a different ſort [d].

[d] Non extollendi: Stillicidium avertendi in tectum vel aream vicini: item immittendi tigna in parietem vicini. *l.* 2. *ff. de ſervit. prad. urban.* Iter, actus, via, aquæductus. *l.* 1. *ff. de ſervit. prad. ruſt.* paſſim his titulis.

V.

5. *Two general Kinds of Services.*

All Services are comprehended under two General Kinds; One is, of ſuch as are Natural, and of an abſolute neceſſity, as the diſcharge of the Water of a Spring, which runs into the Ground which is below: The other is, of thoſe which Nature does not make abſolutely neceſſary, but which Men eſtabliſh for a greater conveniency, altho' the Land or Tenement which ſerves be not naturally ſubjected to the other. As if it is agreed that a Houſe cannot be raiſed higher, that it may not hinder the Proſpect of another Houſe; that it ſhall receive the Waters falling from the adjacent Houſe: that the Poſſeſſor of a Piece of Ground may draw Water out of a Spring, or a Rivulet in the neighbouring Ground, either at certain times, ſuch as to water his Grounds; or for a conſtant uſe, ſuch as to convey Water in a Pipe thro' a neighbouring Ground, for the uſe of a Fountain [e].

[e] *This is a conſequence of the nature of Services.* See hereafter the tenth Article of this Section.

VI.

6. *Services of Houſes and Lands.*

All the Kinds of Services are either for the uſe of Houſes and other Buildings; or for the uſe of Lands, ſuch as Meadow Ground, Arable Land, Orchards, Gardens, and others; whether they be ſituated in Town or Country [f].

Servitutes

[f] Servitutes ruſticorum prædiorum, & urbanorum. *l.* 1. *ff. de ſervit.*

In the Roman *Law, all Houſes and Buildings whatſoever, whether in Town or Country, were called* prædia urbana: *and all Lands, whether Meadows, Arable Lands, or Vineyards, have the denomination of* prædia ruſtica. Urbana prædia omnia ædificia accipimus, non ſolùm ea quæ ſunt in oppidis, ſed etſi fortè ſtabula vel alia meritoria in villis, & in vicis vel ſi prætoria voluptati tantùm deſervientia. Quia urbanum prædium non locus facit, ſed materia. *l.* 198. *ff. de verb. ſign.* §. 3. *inſt. de ſervit.*

VII.

7. *Acceſſories to Services.*

The Right of Service comprehends the Acceſſories, without which it cannot be uſed. Thus, the Service of drawing Water out of a Well, or Spring, implies the Service of a Paſſage to get to the Well: Thus, the Service of a Paſſage, implies the Liberty of building, or repairing a Work that is neceſſary for making uſe of the ſaid Paſſage; and if the Work cannot be made in the place allotted for the Paſſage, one may work in the adjacent parts, according as the neceſſity requires; but in Repairing one ought not to make any innovation in the ancient condition of the place [g].

[g] Qui habet hauſtum, iter quoque habere videtur ad hauriendum. *l.* 3. §. 3. *ff. de ſervit. prad. ruſt.* Si iter legatum ſit quia niſi opere facto iri non poſſit, licere fodiendo, ſubſtruendo iter facere Proculus ait. *l.* 10. *ff. de ſervit.* Refectionis gratia accedendi ad ea loca quæ non ſerviant, facultas tributa eſt his quibus ſervitus debetur. Quà tamen accedere eis ſit neceſſe, niſi in ceſſione ſervitutis nominatim præfinitum ſit, qua accederetur. *l.* 11. *ff. comm. prad.* Si propè tuum fundum jus eſt mihi aquam rivo ducere, tacita hæc jura ſequuntur, ut reficere mihi rivum liceat, ut adire quà proximè poſſim ad reficiendum eum ego, fabrique mei, item ut ſpatium relinquat mihi dominus fundi, quò dextra & ſiniſtra ad rivum adeam: & quò terram, limum, lapidem, arenam, calcem jacere poſſim. *d. l.* 11. §. 1. Reficere ſic accipimus ad priſtinam formam iter, & actum reducere. Hoc eſt ne quis dilatet, aut producat, aut deprimat, aut exaggeret: & aliud eſt enim reficere, longè aliud facere. *l.* 3. §. 15. *ff. de itin. actuque priv.*

VIII.

8. *Services are regulated by their Titles.*

The Right and Uſe of a Service is regulated by the Title which eſtabliſhes it: and it hath its Bounds and its Extent according as has been covenanted, if the Title is a Contract; or according to what has been preſcribed by the Teſtament, if the Service has been eſtabliſhed by Teſtament. Thus he to whom a Service is due cannot make its condition heavier, neither can the perſon who owes the Service prejudice the Right of him to whom it is due; but both the one and the other ought to ſtand to the Title, whether it be with reſpect to the quality of the Service, or to the manner in which the one ought to uſe it, and the other to ſuffer it. Thus, for Inſtance, if a Right of paſſage is granted only for one to go on foot, he cannot make uſe of it to go on horſeback; and if the Paſſage is granted only for the day-time, it gives no right to paſs in the night. But if the manner of uſing the Service were uncertain; as if the place neceſſary for a paſſage were not regulated by the Title, it would be ſettled by the Advice of ſkilful perſons [h].

[h] Servitutes ipſo quidem jure, neque ex tempore, neque ad tempus, neque ſub conditione, neque ad certam conditionem (verbi gratia quamdiu volam) conſtitui poſſunt. Sed tamen, ſi hæc adjiciantur, pacti, vel per doli exceptionem, occurretur contra placita ſervitutem vindicanti. *l.* 4. *ff. de ſervit.* Modum adjici ſervitutibus poſſe conſtat: veluti quo genere veliculi agatur, vel non agatur: veluti ut equo dumtaxat, vel ut certum pondus vehatur, vel grex ille tranſducatur, aut carbo portetur. *d. l.* 4. §. 1. *v. l.* 29. *ff. de ſerv. prad. ruſt.* Iter nihil prohibet ſic conſtitui, ut quis interdiu dumtaxat, eat: quod ferè circa prædia urbana etiam neceſſarium eſt. *l.* 14. *ff. comm. prad. v. l.* 14. *ff. ſi ſervit. vind. d. l.* §. 1. Latitudo actus itineriſque ea eſt, quæ demonſtrata eſt. Quod ſi nihil dictum eſt, hoc ab arbitro ſtatuendum eſt. *l.* 13. §. 2. *ff. de ſervit. prad. ruſt. d. l.* §. *ult. l.* 11. §. 1. *ff. de ſerv. prad. urb.*

IX.

9. *Services are interpreted favourably for Liberty.*

Seeing Services derogate from the Liberty that is Natural to every one to make uſe of what is their own, they are reſtrained to what is preciſely neceſſary for the uſe of the Perſons to whom they are due; and one leſſens the Inconveniency of them, as much as is poſſible. Thus, he who has a Right of Paſſage thro' another man's Field, and whoſe Title does not ſpecify the place thro' which he may paſs, has not the liberty of chuſing his Paſſage whereſoever he pleaſes; but it will be aſſigned him thro' the place that is leaſt inconvenient to the Proprietor of the Ground which ſerves; and not, for Example, acroſs a Plantation, or thro' a Building. But if the Title of the Service, or the Poſſeſſion, regulates the Paſſage, altho' it be thro' a place that is very inconvenient for the Proprietor of the Ground which ſerves, yet he muſt ſtand to it [i].

[i] Si via, iter, actus, aquæductus legetur ſimpliciter per fundum, facultas eſt, hæredi per quam partem fundi velit conſtituere ſervitutem. *l.* 26. *ff. de ſervit. prad. ruſt.* Si cui Simplicius via per fundum cujuſpiam cedatur, vel relinquatur: in infinito (videlicet per quamlibet ejus partem) ire agere licebit: civiliter modò. Nam quædam in ſermone tacitè excipiuntur. Non enim per villam ipſam, nec per medias vineas ire agere ſinendus eſt, cùm id æquè commodè per alteram partem facere poſſit, minore ſervientis fundi detrimento. *l.* 9. *ff. de ſerv.* Verùm conſtitit, ut quà primùm viam direxiſſet, ea demum ire agere deberet: nec amplius mutandæ ejus

ejus poteſtatem haberet. *d. l.* 9. Si mihi conceſſeris iter aquæ per fundum tuum, non deſtinata parte, per quam ducerem: totus fundus tuus ſerviet. Sed quæ loca ejus fundi tunc cùm ea fieret ceſſio, ædificiis, arboribus, vineis, vacua fuerint, ea ſola eo nomine ſervient. *l.* 21. & *l.* 22. *ff. de ſervit. pr. ruſt.* See the ſecond Article, and the Remark that is made upon it.

X.

10. *Services that are neceſſary, may be decreed by the Judge.*

Services are eſtabliſhed and acquired, not only by Covenant, or by Teſtament[l], but alſo by Authority of Juſtice, if the Services which are refuſed, be naturally neceſſary. Thus when the Proprietor of a Piece of Ground cannot go to it, without paſſing thro' a neighbouring Ground, the Judge obliges the Proprietor of the ſaid Ground to grant the paſſage thro' the place that is the leaſt inconvenient, allowing him a ſuitable Recompence for his Loſs[m]. For this Neceſſity is in place of a Law; and Natural Equity demands that a Ground ſhould not remain uſeleſs, and that the ſaid Proprietor ought to ſuffer for his Neighbour, what he would wiſh others to ſuffer for him in the like caſe.

[l] Via, iter, actus, ductus aquæ iiſdem ferè modis conſtituitur, quibus & uſumfructum conſtitui diximus. *l.* 5. *ff de ſervit.* See before, the beginning of the Title of Uſufruct.

[m] Præſes etiam compellere debet, juſto pretio iter ei præſtari. Ita tamen ut judex etiam de opportunitate loci proſpiciat, ne vicinus magnum patiatur detrimentum. *l.* 12. *ff. de relig.* See the caſe of this Law in the fourth Article of the thirteenth Section of the Covenant of Sale.

XI.

11. *Services may be acquired by Preſcription.*

The Right of Service may be acquired without a Title, by Preſcription[n].

[n] Si quis diuturno uſu, & longa quaſi poſſeſſione jus aquæ ducendæ nactus ſit, non eſt ei neceſſe docere de jure quo aqua conſtituta eſt, veluti ex legato, vel alio modo. Sed utilem habet actionem, ut oſtendat per annos forte tot uſum ſe, non vi, non clam, non precario poſſediſſe. *l.* 10. *ff. ſi ſervit. vind. l.* 5. §. 3. *ff. de itiner. act. priv.* Si quas actiones adverſus eum qui ædificium contra veterem formam extruxit, ut luminibus tuis officeret, competere tibi exiſtimas more ſolito per judicem exercere non prohiberis. Is qui judex erit, longi temporis conſuetudinem vicem ſervitutis obtinere ſciet: modò ſi is qui pulſatur, nec vi, nec clam, nec precario poſſidet. *l.* 1. *C. de ſervit. l.* 2. *eod.* Traditio plane & patientia ſervitutum inducet officium prætoris. *l.* 2. §. *ult. ff. de ſervit. præd. ruſt.*

There are ſome Cuſtoms, in which the Right of Service cannot be acquired by Preſcription, without a Title; altho' Liberty from Services may be there acquired by Preſcription. See the thirteenth Article of this Section, and the fifth and following Articles of the ſixth Section.

XII.

12. *The manner of the Service may be known by the condition of the places.*

The proof which may be drawn from the ancient condition of the places, is a kind of Title for preſerving, and eſtabliſhing a Service by Preſcription. And it ſerves alſo to regulate the manner and uſe of the Service. Thus, the Entry of a Paſſage, the Bounds of a Way, a Sky-Light in a Houſe, a Water-Pipe clap'd on againſt a Wall, a Roof of a Houſe with a jutting out, and other the like Marks of Services, regulate the uſe of them. And it is not permitted either to him who hath the Service, or to him who ought to ſuffer it, to innovate any thing in the ancient condition of the places[o].

[o] Contra veterem formam. *d. l.* 1. *C. de ſervit.* Qui luminibus vicinorum officere, aliudve quid facere contra commodum eorum vellet, ſciet ſe formam ac ſtatum antiquorum ædificiorum cuſtodire debere. *l.* 11. *ff. de ſervit. præd. urban.*

XIII.

13. *Services are loſt, or diminiſhed, by Preſcription.*

Seeing a Service may be acquired by Preſcription, with much more reaſon may a Freedom from a Service be acquired the ſame way. And if he whoſe Land or Tenement was ſubject to ſome Service has freed himſelf from it, during a time ſufficient for acquiring a Preſcription, the Service ſubſiſts no longer. Thus, he whoſe Houſe was ſubjected to the Service of not being raiſed higher, is not any more ſubject to the ſaid Service, if after having raiſed his Houſe higher, he has poſſeſſed it ſo raiſed, during the time required for Preſcription[p]. And it is the ſame thing, as to the manner of uſing a Service: Thus, he who had a Right to a Draught of Water both by day and night, loſes the Uſe of drawing it in the night-time, if he lets it preſcribe: and if his Service was either at all hours, or only at ſome; he is reſtrained to thoſe to which the Preſcription ſhall have limited him.

[p] Libertatem ſervitutum uſucapi poſſe verius eſt. *l.* 4. §. *ult. ff. de uſurp. & uſuc.* Itaque ſi cùm tibi ſervitutem deberem, ne mihi puto liceret, altiùs ædificare, & per ſtatutum tempus altiùs ædificatum habuero, ſublata erit ſervitus. *d.* §. *ult. l.* 32. §. 1. *ff. de ſervit. præd. urb.* Si is qui nocturnam aquam habet, interdiu per conſtitutum ad amiſſionem tempus uſus fuerit, amiſit nocturnam ſervitutem, qua uſus non eſt. Idem eſt in eo qui certis horis aquæ ductum habens, aliis uſus fuerit, nec ulla parte earum horarum. *l.* 10. §. 1. *ff. quemad. ſervit. amitt.* See the fifth and following Articles of the ſixth Section.

XIV.

14. *Services are annexed to the Lands and Tenements.*

Services being annexed to the Lands and Tenements, and not to Perſons, they cannot paſs from one Perſon to another, unleſs the Land or Tenement paſſes likewiſe. And he who has a Right of Service, cannot transfer it to another, keeping the Land or Tenement to himſelf,

ſelf, nor aſſign over, let out, or lend the Uſe of it. Thus, he who has a Draught of Water cannot ſhare it with others. But if the Land or Tenement for which the Draught of Water was eſtabliſhed, be divided among many Proprietors, as among Co-Heirs, Co-Legatees, Joint-Purchaſers, or otherwiſe; each Share will retain the Uſe of the Service in proportion to its Extent, altho' ſome Shares ſhould ſtand leſs in need of it, or that the Uſe of it were leſs ſerviceable to them than to the others [q].

[q] Ex meo aquæductu Labeo ſcribit, cuilibet poſſe me vicino commodare, Proculus contrà, ut ne in meam partem fundi aliam, quàm ad quam ſervitus acquiſita ſit, uti ea poſſit. Proculi ſententia verior eſt. *l.* 24. *ff. de ſervit. præd. ruſt.*

Per plurium prædia aquam ducis, quoquo modo impoſita ſervitute, niſi pactum vel ſtipulatio etiàm de hoc ſubſecuta eſt, neque eorum cui vis, neque alii vicino poteris hauſtum ex vivo cedere. *l.* 33. §. 1. *ff. de ſervit. præd. ruſt.* See the fifth Article of the fifth Section.

XV.

15. The Property of the place which ſerves, belongs to the Maſter of the Land or Tenement that owes the Service.

The part of the Land or Tenement that is ſubject to a Service, out of which the Service is taken, ſuch as the Way for a Paſſage, belongs to the Maſter of the Land or Tenement which ſerves; and he who receives the Service has no Right of Property in that part of the Land or Tenement that ſerves, but only a Right to uſe it for his Service [r].

[r] Si partem fundi mei certam tibi vendidero: aquæductus jus, etiamſi alterius causâ plerumque ducatur, te quoque ſequetur. Neque ibi aut bonitatis agri, aut uſus ejus aquæ ratio habenda eſt: ita ut eam ſolam partem fundi quæ pretioſiſſima ſit, aut maximè uſum ejus aquæ deſideret, jus ejus ducendæ ſequatur: ſed pro modo agri detenti, aut alienati, fiat ejus aquæ diviſio. *l.* 25. *ff. de ſervit. præd. ruſt.*

Loci corpus non eſt dominii ipſius cui ſervitus debetur, ſed jus eundi habet. *l.* 4. *ff. ſi ſervit. vind.*

XVI.

16. A Service may be for the uſe of two Lands or Tenements.

One and the ſame Service may ſerve for the uſe of two Lands or Tenements. Thus, a Diſcharge of Water may ſerve for two Houſes: Thus, a Paſſage, or an Aqueduct, may ſerve for two or more Lands or Tenements [s].

[s] Qui per certum locum iter, aut actum alicui ceſſiſſet, eum pluribus per eundem locum, vel iter, vel actum cedere poſſe verum eſt. Quemadmodum ſi quis vicino ſuas ædes ſervas feciſſet, nihilominus aliis, quot vellet multis, eas ædes ſervas facere poteſt. *l.* 15. *ff. com. præd.*

XVII.

17. A Service which appears to be uſeleſs.

Altho' a Service may appear to be uſeleſs, ſuch as a Draught of Water to him whoſe Land or Tenement is in no want of it, or who has Water enough in his own Grounds; yet one may retain, or purchaſe ſuch a Service. For beſides that one may poſſeſs Things that are uſeleſs, it may ſo happen that there may be occaſion to uſe them [t].

[t] Ei fundo quem quis vendat ſervitutem imponi etſi non utilis ſit, poſſe exiſtimo. Veluti ſi aquam alicui ducere non expediret, nihilominus conſtitui ea ſervitus poſſit: quædam enim habere poſſumus, quamvis ea nobis utilia non ſunt. *l.* 91. *ff. de ſervit.*

XVIII.

18. Of Lands and Tenements which have ſeveral Owners.

He who has the Property of an Eſtate only in common with others, without any diviſion of the ſeveral Shares, cannot ſubject any part of it to a Service without the conſent of all his Co-Partners: and any one of them may hinder it [u], until that the Eſtate being divided into Shares, every one may impoſe a Service on his own Share, if he thinks fit. And likewiſe he who poſſeſſes in common and undivided a Portion of the Land or Tenement to which the Service is due, cannot by himſelf free the Land or Tenement which owes the Service; but the Service remains for the Portions of the others. For the Services are for every part of the Land or Tenement to which they are due, and every one of the Proprietors has an Intereſt in the Service for his own Portion [x].

[u] Unus ex dominis communium ædium ſervitutem imponere non poteſt. *l.* 2. *ff. de ſervit.* Unus ex ſociis fundi communis permittendo jus eſſe ire agere, nihil agit. *l.* 34. *ff. de ſervit. præd. ruſt.*

[x] Quoniam ſervitutes pro parte retineri placet. *d. l.* 34. *l.* 8. §. 1. *ff. de ſervit.* Quæcumque ſervitus fundo debetur, omnibus ejus partibus debetur. *l.* 23. §. *ult. ff. de ſervit. præd. ruſt.* See the ſeventh Article of the fourth Section.

XIX.

19. Poſſeſſion of Services by Tenants, and other Poſſeſſors.

Services are preſerved againſt Preſcription, not only by the uſe that is made of them by the Proprietors of the Lands or Tenements to which they are due, but likewiſe by the uſe made of them by all other Poſſeſſors, who are in the place of the Maſter; ſuch as Farmers, Tenants, Uſufructuaries, and even thoſe who poſſeſs wrongfully; for they preſerve to the Maſter the Poſſeſſion of his Service [y].

[y] Uſu retinetur ſervitus, cùm ipſe cui debetur, utitur, quive in poſſeſſionem ejus eſt, aut mercenarius, aut hoſpes, aut medicus, quive ad viſitandum dominum venit, vel colonus aut fructuarius. *l.* 20. *ff. quemadmodum ſerv. amitt.* Licet malæ fidæi poſſeſſor ſit, retinebitur ſervitus. *l.* 24. *ff. eod.*

XX.

20. Poſſeſſion of one alone for the

If a Service be due for the uſe of a Land or Tenement belonging in com-

Service common to many.

mon to many perſons, the Poſſeſſion of one of the Partners preſerves the Service for all the reſt; for it is in the Name of all the Partners that he poſſeſſes. But if many perſons have each of them their ſeveral Right of Service in particular, altho' it be in the ſame part of the Land or Tenement which owes the Service, yet every one preſerves only his own Right, and Preſcription may run againſt the others who do not uſe their Right [z].

[z] Si plurium fundo iter aquæ debitum eſſet, per unum eorum omnibus his inter quos is fundus communis fuiſſet, uſurpari potuiſſet. *l.* 16. *ff. quemad. ſerv. amit.* Aquam quæ oriebatur in fundo vicini, plures per eundem rivum jure ducere ſoliti ſunt, ita ut ſuo quiſque die à capite duceret. Primò per eundem rivum eumque communem, deinde ut quiſque inferior erat, ſuo quiſque proprio rivo: & unus ſtatuto tempore quo ſervitus amittitur, non duxit: exiſtimo, eum jus ducendæ aquæ amiſiſſe, nec per cæteros qui duxerunt ejus jus uſurpatum eſſe. Proprium enim cujuſque eorum jus fuit, neque per alium uſurpari poterit. *d. l.* 16.

XXI.

21. The Privilege of one Partner hinders Preſcription againſt the others.

If one of the Proprietors of a Land or Tenement belonging to them in common, and to which a Service is due, has any Quality which hinders Preſcription from running againſt him, as if he is a Minor; the Service is not loſt, altho' all the Proprietors ceaſe to uſe it, becauſe the Minor preſerves it for the whole Land or Tenement [a].

[a] Si communem fundum ego & pupillus haberemus, licèt uterque non uteretur: tamen propter pupillum, & ego viam retineo. *l.* 10. *ff. quemad. ſerv. amitt.*

SECT. II.

Of the Services of Houſes, and other Buildings.

The CONTENTS.

I.

1. Services of Buildings.

THE Services of Houſes, and other Buildings, are of ſeveral ſorts, according to their Wants; ſuch as that of receiving the Water that falls from another Houſe, the Lights of a Houſe, the Proſpect, a Right of fixing a Beam in another's Wall, a Paſſage, and others of the like nature [a]. But there is none of them which is naturally neceſſary, and in ſuch a manner as that he who builds on his own Ground can oblige his Neighbour to ſuffer a Service for the uſe of his Building, if he has neither a Title, nor a Right of Poſſeſſion to juſtify it. For he may and ought to raiſe his Building wholly on his own Ground, keeping the neceſſary diſtance, and not encroaching any ways on his Neighbour's Ground which joins to his [b]. And if any Service is neceſſary to him, and he has it not, he cannot acquire it but by a mutual conſent.

[a] Urbanorum prædiorum jura talia ſunt, altiùs tollendi, & officiendi luminibus vicini, aut non extollendi: item ſtillicidium avertendi in tectum vel aream vicini, aut non avertendi: item immittendi tigna in parietem vicini: & denique projiciendi, protegendive, cæteraque iſtis ſimilia. *l.* 2. *ff. de ſervit. prad. urban.* §. 1. *inſt. de ſervit.*

[b] Imperatores Antoninus & Verus Auguſti reſcripſerunt, in areæ quæ nulli ſervitutem debet, poſſe dominum, vel alium voluntate ejus ædificare, intermiſſo legitimo ſpatio à vicina inſula. *l.* 14. *ff. de ſervit. prad. urb. V. l.* 12. *C. de ædif. priv.* See the eighth and ninth Articles of this Section.

II.

2. Diſcharge of Waters from the Houſes.

The Right of diſcharging the Waters from off the Roof of a Houſe, is a Service which may be differently eſtabliſhed, either in ſuch a manner that the whole Roof may have a Jutting out on another Man's Ground, and ſo let its Waters drop from the Eves there; or that all its Water may be gathered together, and run thro' one Gutter jutting out from the Building, or thro' a Pipe clapt on againſt the Wall [c].

[c] Fluminum & ſtillicidiorum ſervitutem. *l.* 1. *ff. de ſervit. prad. urb.*

III.

3. A Sink, or Drain.

The diſcharge of a Sink or Drain, into a neighbouring Ground, is a Service for the uſe of a Houſe, and one may eſtabliſh others of the like nature according as occaſion requires [d].

[d] Jus cloacæ mittendæ ſervitus eſt. *l.* 7. *ff. de ſervit.* Cloacam habere licere per vicini domum. *l.* 2. *ff. de ſervit. prad. ruſt.* Quominus illi cloacam, quæ ex ædibus ejus in tuas pertinet, qua de agitur, purgare, & reficere liceat, vim fieri vero. *l.* 1. *ff. de cloac. This Service is likewiſe for the uſe of Lands.* V. d. l. 2. ff. de ſervit. præd. ruſt.

IV.

4. *The Lights and Proſpect of a Houſe.*

The Lights of a Houſe are open places for receiving Light into a Chamber, or other Room; and a Proſpect hath, beſides the Light, an open View of the adjacent parts, whether in Town, or Country[e].

[e] Lumen id eſt ut cœlum videretur: & intereſt inter lumen & proſpectum. Nam proſpectus etiam ex inferioribus locis eſt, lumen ex inferiore loco eſſe non poteſt. *l.* 16. *ff. de ſervit. præd. urban.*

V.

5. *The Services for the Lights of a Houſe are of two ſorts.*

The Services for the Lights of a Houſe are of two ſorts. One is of thoſe which give to the Proprietor of a Houſe the Right of opening his own Wall, or a Partition Wall, for receiving Light on the ſide where his Neighbour's Tenement ſtands, with a Right to hinder his Neighbour from raiſing his Building ſo high as to take away the ſaid Light[f]: And the other ſort, is of ſuch Services as give a Right to hinder the Neighbour from opening his own Wall, or a Partition-Wall, that he may have a Window looking into a Court, or other place: or which bound the Liberty of making Lights, to Lights that are without a Proſpect, or ſuch others as happen to be ſettled by the Title[g].

[f] Luminum in ſervitute conſtituta, id acquiſitum videtur, ut vicinus lumina noſtra excipiat. Cum autem ſervitus imponitur ne luminibus officiatur, hoc maximè adepti videmur, ne jus ſit vicino, invitis nobis, altiùs ædificare, atque ita minuere lumina noſtrorum ædificiorum. *l.* 4. *ff. de ſervit. præd. urb.*

[g] Eos qui jus luminis immittendi non habuerunt, aperto pariete communi, nullo jure feneſtras immiſiſſe reſpondi. *l.* 40. *eod.* See the ſecond Article of the firſt Section, with the Remark upon it.

VI.

6. *Services for Proſpects are of two ſorts.*

The Services for a Proſpect are likewiſe of two ſorts. One is of thoſe which give the Right of a free Proſpect, with Power to hinder the adjacent Building from being raiſed ſo as to take away the Proſpect: And the other, is of ſuch Services as give the Proprietor a Right to hinder his Neighbour from having either Proſpect, or Light, on the ſide on which they join, or to oblige him to have it only ſuch as is conformable to his Title[h].

[h] Eſt & hæc ſervitus, ne proſpectui officiatur. *l.* 3. *ff. de ſervit. præd. urban.* Inter ſervitutes ne luminibus officiatur, & ne proſpectui offendatur, aliud, & aliud obſervatur, quod in proſpectu plus quis habet, ne quid ei officiatur ad gratiorem proſpectum & liberum. *l.* 15. *eod.* Non extollendi. *l.* 2. *eod.* (*jus*) altiùs tollendi, & officiendi luminibus. *d. l.* 2. Qui jus luminis immittendi non habuerunt. *l.* 40. *eod.*

VII.

7. *The Right of Reſting on another's Building.*

The Right of Reſting a Building on another's, is a Right to fix in our Neighbour's Wall, a Plank, a Building, or other Thing. And when it is a Partition-Wall, the Joint Proprietors have a right to reſt any thing on it, every one on his own ſide: and the ſame Wall ſerves reciprocally to two Maſters for two Services. But whether the Wall belong to one Maſter alone, or be a Partition-Wall, they ought not to load it otherwiſe than is reaſonable, and according as is regulated by the Service[i].

[i] Jus immittendi tigna in parietem vicini. *l.* 2. *ff. de ſervit. præd. urb.* Etiam de ſervitute quæ oneris ferendi causâ impoſita erit, actio nobis competit, ut & onera ferat. *l.* 6. §. 2. *ff. ſi ſerv. vind. l.* 33. *ff. de ſerv. præd. urb.* Si paries communis, opere abs te facto, in ædes meas ſe inclinaverit: potero tecum agere, jus tibi non eſſe parietem illum ita habere. *l.* 14. §. 1. *ff. ſi ſerv. vind.*

VIII.

8. *One can not treſpaſs on his Neighbour's Ground.*

Altho' a Proprietor may do in his own Ground whatever he pleaſes, yet he cannot make in it any Work which may deprive his Neighbour of the Liberty of enjoying his own, or which may cauſe him any Damage. Thus, the Proprietor of a Piece of Ground, on which there is no Building, cannot raiſe one, whoſe Roof may jut out on his Neighbour's Ground, and there diſcharge its Waters. Thus, one cannot make a Plantation, or a Building, and other Works, but at certain diſtances from the Confines. Thus, one cannot make a Stove, an Oven, or any other Work againſt even a Partition-Wall which may be in hazard of being damaged by it: And as for ſuch ſorts of Works as may do hurt, and which cannot be made but at certain diſtances, or with other precautions, we ought, with regard to them, to obſerve the Rules which Cuſtom and Uſe have eſtabliſhed[l].

[l] Imperatores Antoninus & Verus Auguſti reſcripſerunt, in area quæ nulli ſervitutem debet, poſſe dominum, vel alium voluntate ejus ædificare, intermiſſo legitimo ſpatio à vicina inſula. *l.* 14. *ff. de ſerv. præd. urb.* Domum ſuam reficere unicuique licet, dum non officiavit invito alteri, in quo jus non habet. *l.* 61. *ff. de reg. jur.*

Si fiſtulæ per quas aquam ducas, ædibus meis applicatæ, damnum mihi dent, in factum actio mihi competit. *l.* 18. *ff. de ſervit. præd. urb.* Fiſtulam junctam parieti communi, quæ aut ex caſtello, aut ex cœlo aquam capit, non jure haberi Proculus ait. *l.* 19. *eod.* Rem non permiſſam facit, tubulos ſecundùm communem parietem extruendo. *l.* 13. *eod. v. l.* 8. §. 5. *l.* 17. §. 2. *ff. ſi ſervit. vind.* See the following Article, and the ſecond Article of the firſt

firſt Section of the Title of thoſe who have Lands or Houſes bordering upon one another.

There are Cuſtoms which regulate the manner in which ſuch Works ought to be made, as are mentioned in this Article.

IX.

9. *What one may do in his own Ground, to the prejudice of his Neighbour.*

Altho' one ought not to make any Work by which his Neighbour's Building may be damaged, yet every one has the Liberty of doing in his own Ground whatſoever he pleaſes, even altho' it ſhould occaſion to his Neighbour ſome other ſort of inconvenience. Thus he who is not ſubject to any Service, may raiſe his Houſe as high as he pleaſes, altho' by the ſaid Elevation he ſhould darken the Lights of his Neighbour's Houſe. For this kind of Work alters nothing in the Fabrick of the other Houſe; and he who is the Maſter of the Houſe ought to have placed his Lights ſo as to be out of danger of this Inconvenience, which he had no right to hinder, and which he might have eaſily foreſeen [m].

[m] Cum eo qui tollendo obſcurat vicini ædes, quibus non ſerviat, nulla competit actio. *l. 9. ff. de ſervit. præd. urb. l. 8. l. 9. C. de ſervit. v. l. 26. ff. de damn. inf.* See the ninth and tenth Articles of the third Section of the Title of Damages occaſioned by Faults. See the foregoing Article.

X.

10. *Inconveniencies which the Neighbour ought, or ought not to ſuffer.*

The Works, or other Things, which every one may make, or have in his own Ground, and which ſend into the Apartments of others who dwell in the ſame Houſe, or into the Neighbouring Houſes, a Smoak, or Smells that are offenſive, ſuch as the Works of Tanners, and Diers, and the other different Inconveniencies which one Neighbour may cauſe to another, ought to be born with, if the Service of them is eſtabliſhed [n]: And if there is no Service ſettled, the Inconvenience ſhall either be born with, or hindred, according to the Quality of the Places, and that of the Inconveniency, and according as the Rules of the Civil Policy, or the Uſage of the Places, if there be any ſuch, may have provided in the ſaid Matters.

[n] Ariſto Cerellio Vitali reſpondit, non putare ſe ex taberna caſearia fumum in ſuperiora ædificia jure immitti poſſe, niſi ei rei ſervitus talis admittatur. *l. 8. §. 5. ff. ſi ſervit. vind.* In ſuo enim alii hactenus facere licet, quatenus nihil in alienum immittat: fumi autem, ſicut aquæ eſſe immiſſionem. Poſſe igitur ſuperiorem cum inferiore agere, jus illi non eſſe id ita facere. *d. §.*

SECT. III.

Of the Services of Lands.

The CONTENTS.

1. *Services of Lands.*
2. *Paſſage.*
3. *A Draught of Water.*
4. *Aqueduct.*
5. *Other ſorts of Services.*
6. *Services for the uſe of Cattel.*

I.

1. *Services of Lands.*

THE Services of Lands, ſuch as Meadows, Arable Lands, Vineyards, Gardens, Orchards, and others, are of ſeveral ſorts, according to the ſeveral Wants; ſuch as a Paſſage to go from one Field to another, a Right to draw Water in another Man's Ground, an Aqueduct, or others of the like nature [a].

[a] Servitutes ruſticorum prædiorum ſunt hæ: iter, actus, via aquæductus. *l. 1. ff. de ſervit. præd. ruſt.* In ruſticis computanda ſunt, aquæ hauſtus, pecoris ad aquam appulſus, jus paſcendi, calcis coquendæ, arenæ fodiendæ. *d. l. §. 1. inſt. de ſerv.*

II.

2. *Paſſage.*

The Right of Paſſage is a Service which may be eſtabliſhed different ways according to its Title; either for the Paſſage of a Man on foot only, or for one on Horſeback, or for a Beaſt loaded, or for a Waggon [b].

[b] Iter eſt jus eundi, ambulandi homini, non etiam jumentum agendi; actus eſt jus agendi vel jumentum, vel vehiculum: via eſt jus eundi, & agendi, & ambulandi. *l. 1. ff. de ſervit præd. ruſt.*

III.

3. *A Draught of Water.*

The Draught of Water is a Right to take in a Neighbour's Ground Water out of a Spring or Brook, to carry it into another Ground, either at what time one pleaſes, or by Intervals and at certain Seaſons, or conſtantly without intermiſſion [c].

[c] Quotidiana aqua non illa eſt, quæ quotidiè ducitur, ſed ea qua quis quotidiè poſſit uti, ſi vellet. *l. 1. §. 2. ff. de aqua quot. & eſt.* Ea quoque dicitur quotidiana, cujus ſervitus intermiſſione temporis diviſa eſt. *d. l. §. 3.* Æſtiva ea eſt, qua æſtate ſola uti expedit. *d. §. 3. V. l. 2. §. 2. ff. de ſerv. præd. ruſt.*

IV.

4. *Aqueduct.*

An Aqueduct is a Conveyance of Water from one Ground to another, either in Pipes under ground, or above ground [d].

[d] Aquæductus