vel hyp. tac. contr. *Universa bona eorum qui censentur vice pignorum tributis obligata sunt.*

XXIV.

24. *Privilege of Funeral Charges.* Merchants, Tradesmen, and others to whom any thing is due for Funeral-Charges, have their Action against the Heirs, or Executors, and if there be no Heirs, or Executors, they have it against the Goods of the deceased, as if they had contracted with him; and they have moreover a Privilege, even altho' the Goods of the deceased should not be sufficient to pay his Debts; provided these Charges do not exceed what was reasonable to be laid out on the Funeral, according to the Quality and Estate of the deceased. For the necessity of this Expence makes it necessary to favour with this Privilege, those who furnish it. But if the Funeral Charges exceed these bounds, even altho' the deceased himself had ordered them by his last Will and Testament, the Privilege will be restrained to what shall be judged reasonable and just, according to the circumstances [b].

[b] Impensa funeris semper ex hæreditate deducitur: quæ etiam omne creditum solet præcedere, cum bona solvendo non sint. *l.* 45. *ff. de relig. & sumpt. fun.* Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede. *l.* 1. *eod. v. l.* 17. *ff. de reb. auct. jud. poss.* Sumptus funeris arbitrantur pro facultatibus & dignitate defuncti. *l.* 12. §. 5. *ff. de relig. & sumpt. fun.* Æquum autem accipitur ex dignitate ejus qui funeratus est, ex causa, ex tempore, ex bona fide: ut neque plus imputetur sumptus nomine, quam factum est, neque tantùm quantum factum est, si immodicè factum est. Deberet enim haberi ratio facultatum ejus in quem factum est, & ipsius rei quæ ultra modum sine causa consumitur. Quid ergo si ex voluntate testatoris impensum est? Sciendum est nec voluntatem sequendam si res egrediatur justam sumptus rationem: pro modo autem facultatum sumptum fieri. *l.* 14. §. 6. *ff. de relig. & sump. fun. d. l.* §. 3. & 4.

XXV.

25. *Law Charges.* The Expences of proving the Will, or taking Administration, of making Inventories, of Sales, Orders of Court, and Discussions of Moveables or Immoveables, and all other necessary Law Charges, are preferable to all other Debts [c]. For all the Creditors are concerned in these Expences, they being laid out for their common Interest.

[c] Planè sumptus causa qui necessariè factus est, semper præcedit. Nam deducto eo bonorum calculus subduci solet. *l.* 8. *in f. ff. depos.* Quantitas patrimonii, deducto etiam eo quidquid explicandarum venditionum causa impenditur, æstimatur. *l.* 71. *ff. ad leg. falc. l. ult.* §. 9. *C. de jure delib.* See the thirty second Article.

XXVI.

26. *Preference on the Goods of Publick Depositaries, for Things deposited in their hands.* In a competition among the Creditors of Publick Depositaries, whose Function is to receive the Sums of Money, or other Things, that are to be deposited by order of Court, the persons who are to receive back what has been thus consigned or deposited, are preferred on the proper Goods of these Depositaries, before their private Creditors who have neither Mortgage, nor Privilege. And this Preference is founded upon the Interest which the Publick has in the Safety of those *Depositums*, which people are obliged to consign into their hands [d].

[d] In bonis mensularii vendendis, post privilegia, potiorem eorum causam esse placuit, qui pecunias apud mensam, fidem publicam secuti, deposuerunt. *l.* 24. §. 2. *de reb. auct. jud. poss.* Quod privilegium exercetur non in ea tantum quantitate, quæ in bonis argentarii ex pecunia deposita reperta est, sed in omnibus fraudatoris facultatibus. Idque propter necessarium usum argentariorum, ex utilitate publica receptum est. *l.* 8. *ff. depos.*

Besides the Privilege explained in this Article, the Usage in France *gives to Creditors who are to receive back Monies, or other Things, consigned by Order of a Court of Justice, two other sorts of Security. One is, a Mortgage on the whole Estate of the Depositary who is charged with these sorts of Depositums; and this Mortgage is the Effect of the Authority of Justice, pursuant to what has been said in the fourth Article of the second Section. For as it is the Publick Justice that charges them with these Depositums, so it appropriates their whole Estate for the Security of the Things deposited. So that the Persons to whom the Things deposited are to be restored, will be preferred before the other Creditors of the Depositary who have Mortgages, if the Thing was deposited before their Mortgage was granted. The other Security is, the Appropriation of the Office whose Function it is to receive Depositums of this nature, such as are in* France *the Offices of the Receivers of Monies brought into Court, and those of the Commissaries of the Châtelet, who are Depositaries of Monies, or other Effects, when they proceed to seal up the Effects, and to make Inventaries, and on other occasions of the like nature. For as the Function of receiving these Depositums is proper to these Offices, they are naturally appropriated for the Security of those whom Justice puts under the necessity of depositing in their hands. Thus, this Appropriation of the Office for the Security of these Depositums, gives a Privilege to the Creditors who are to receive them, and makes them preferable to all the Creditors of the said Officer who have Mortgages, even altho' they be prior in time. But this is to be understood only of Offices that are peculiarly destined to this Function. For if the Court had ordered the Monies to be deposited into the hands of another Officer, whose Office was not intended for this Function, the Depositum put into his hands by the Authority of Justice would give indeed a Mortgage upon his Office, but it ought not to give a Preference. For his private Creditors would find themselves deceived by this Preference, which they could not possibly foresee; wherens the Creditors of the Person who by his Office is a Publick Depositary, cannot but know, that his Office is appropriated for indemnifying the Creditors of Things deposited into his hands.* See the three following Articles.

It may be asked, concerning the Mortgage which the Creditors of Sums deposited have on the Immoveables of the Publick Depositary, from what day this Mortgage will have its effect? Whether it will be from the day that the said Receiver enters on his Office, as in the case of Minors, who have a Mortgage in the Estates of their Tutors from the day of their Nomination, for Sums

which

which they are to receive only a long time after, or if it will commence only from the day of depoſiting the Money? If the Mortgage takes place from the day of the Admiſſion of the Publick Depoſitary to his Office, the Creditors of the Monies that were laſt depoſited, will be preferred before the particular Creditors of the Publick Depoſitary who have Mortgages, unleſs their Mortgage be prior to the Admiſſion of the Officer: and if on the contrary the Mortgage takes place only from the day of making the Depoſitum, it would ſeem to follow from thence, that the Creditors of the ſeveral Orders ought to be preferred one before the other on the Immoveables, according to the dates of the Conſignments, altho' they come all in proportionably as to the Price of the Office, without any regard to the dates of their Conſignments, as ſhall be ſhewn in the twenty ninth Article.

We do not pretend to decide theſe Queſtions here, nor to treat of them expreſly, no more than of others which might be ſtarted on this Subject; we make only this tranſitory Remark, to ſhew how much it is to be wiſhed for that this matter were fully ſettled.

XXVII.

27. *Preference as to the* Depoſitum *that is in being.*

If among the Things depoſited, of which mention has been made in the foregoing Article, there be ſome of them in being, thoſe who have depoſited them, or the perſons to whom they ought to return, will recover them preferably to all other Creditors; for it is their own proper Goods[e].

[e] Si tamen nummi extent vendicari eos poſſe puto à depoſitariis, & futurum eum qui vindicat ante privilegia. *l.* 24. §. 2. *ff. de reb. auct. jud. poſſ.*

XXVIII.

28. *He who innovates the Debt, loſes his Privilege.*

If he who was Creditor to a publick Depoſitary, becauſe of Monies depoſited into his hands, ſuch as thoſe are who are to receive back Monies that have been conſigned by Order of Court, or for ſome other Cauſe, has innovated his Debt, and changed the Nature of the *Depoſitum*; as if he has taken a Bond as for Money lent, he will be intitled no longer to any Privilege; and it would be the ſame thing as if he had left his Money in the hands of the Depoſitary, that he might receive Intereſt for it; for he will have thereby changed the Nature of the *Depoſitum*, and converted it into a Contract of Loan[f].

[f] Qui depoſitis nummis uſuras à menſulariis acceperunt, à cæteris creditoribus non ſeparantur. Et meritò, aliud eſt enim credere, aliud deponere. *l.* 24. §. 2. *ff. de reb. auct. jud. poſſ.*

He who takes Intereſt for a Sum of Money which he had depoſited into another's hands, becomes Creditor of it as of Money lent. For the Depoſitum produces no Intereſt, neither can the Depoſitary owe any. So that when he pays Intereſt, it is becauſe he does not keep the Money any longer as a Depoſitum, but converts it to his own proper uſe, with the conſent of the Perſon who ought to receive it. And the receiving of Intereſt, altho' it is not lawful on the part of the Creditor; yet it is always a mark of the intention of the Creditor, and of the Debtor, to change the Depoſitum into a Contract of Loan.

XXIX.

29. *Concurrence of Creditors for ſeveral Depoſitums.*

The three preceding Articles relate to the Competition between Creditors who are to receive Sums of Money, or other Things, depoſited, and the particular Creditors of the Publick Depoſitary. But as to the Creditors of Sums of Money, or other Things, depoſited, if they come in competition with one another for their reſpective *Depoſitums*, the Privilege which they had all of them on the Office of the Receiver, and their Preference before his particular Creditors, being common to them all, they loſe the effect of it among themſelves, and they come all in to ſhare equally in the Price of the Office, in proportion to their reſpective Claims[g]. So that, for Example, all the Creditors of one Order, whoſe Conſignment was prior, coming in competition with Creditors of another Order, whoſe Conſignment was made a long time after the firſt, there would be no Preference given to the firſt, on the Price of the Office that is ſubject to their Privilege; but each Order of Creditors would have a proportionable Share of the Price, according to the Value of the Effects conſigned by every one of them. For it is by virtue of their Privilege, that the Creditors of theſe Orders are intitled to receive the Price of this Office, which was made a part of the Eſtate of this Officer, only upon condition of its being equally appropriated for the Security of all the Sums of Money, or other Things, that ſhould be thereafter depoſited in the hands of the ſaid Officer.

[g] Quæritur, utrum ordo ſpectetur eorum qui depoſuerunt, an verò ſimul omnium depoſitariorum ratio habeatur: & conſtat ſimul admittendos. *l.* 7. §. *ult. ff. depoſ.*

We are to underſtand the Concurrence explained in this Article, only with reſpect to all the Creditors of one Order, conſidered together as having one and the ſame Credit, and to all thoſe of the other Orders, conſidered in the like manner for the Sums that are due to them. But as to the Creditors of each Order among themſelves, there is no Contribution. For every one of them ought to receive in the Order in which he is placed, the Sums which ought to come to him according as he is ranked; ſo that he who is ranked in the firſt place ought to receive his whole Debt, if the Fund be ſufficient, altho' there ſhould not remain enough for the others.

We have ſet down in this Article this Concurrence between Creditors of ſeveral Orders, only as to the Monies ariſing from the Sale of the Office; for it is their common Pledge, appropriated to them by their Privilege: and we have not mentioned the ſame Concurrence on the other Goods of the Officer. Concerning which the Reader may conſult the laſt Remark made on the twenty ſixth Article.

XXX.

30. *Effect of Privileges.*

All Privileges make a particular Appropriation, which gives to the Credi-

tor who is privileged, the Thing for his Pledge, altho' there be neither Covenant, nor Condemnation, which expreſſly mentions this Preference. For it is annexed to the Title of the Credit, by the Nature of the Debt, and altho' no expreſs mention be made of it. And if the Debt were not of it ſelf privileged, it could not be made ſuch by the effect of a Covenant [h].

[h] *This is a Conſequence of all the foregoing Articles,* Toto tit. ff. & Cod. in quib. cauſ. pign. vel hyp. tac. contr.

XXXI.

31. *Difference of Privileges, as to the Appropriation of Goods.*

Among the Privileges of Creditors, there are ſome which affect only one particular Thing, and do not reach to the reſt of the Goods; and others affect all the Goods in general, without diſtinction. Thus, the Privilege which the Proprietor of a Ground has on the Fruits of it, for the Rent of his Farm; that of a Seller for the Price of the Thing ſold; that of the Perſon who has lent Money to buy Lands or Tenements, or to make Improvements on them, do not extend to all the Goods of the Debtor; but are limited to the Things appropriated for the Security of that particular Debt [i]. And theſe Creditors have againſt the Remainder of the Debtor's Eſtate, only a Perſonal Action [k], or a Mortgage, if they have ſtipulated it. But Law Charges, and the Funeral Expences have their Preference upon all the Goods without diſtinction.

[i] *See the foregoing Articles. This is a Conſequence of the nature of a Privilege.*

[k] Sanè perſonali actione debitum apud præſidem petere non prohiberis. *l.* 17. *C. de pign.*

XXXII.

32. *Competition and Preference among Creditors who are privileged.*

Among Creditors who are privileged, ſome of them are preferred before others, according to the Nature of their Privileges, and the Diſpoſition of the Laws, or Cuſtoms [m]. Thus, he who has furniſhed Money to repair a Houſe which was in danger of falling, is preferr'd to the Seller of that Houſe, who demands the Price of the Sale: Thus, he who has let a Barn to a Farmer, will be preferr'd for the Rent of his Leaſe, before the Proprietor to whom the Farmer is indebted for the Rent of the Farm, on which the Fruits which are put into the Barn grew. Thus, the Expences at Law being the Debt of all the Parties, they are preferred to all Privileges whatſoever. Thus thoſe who have Privileges on Moveables, are preferred to the Privilege of the King [n]. Thus Funeral Charges are preferred before the Rent due to the Landlord of the Houſe, on the Moveables of the Tenants [o]. Thus in all the caſes of a concurrence of Privileges, their Preference is regulated by the Diſtinctions which the Nature of the ſaid Privileges makes.

[m] *This is a Conſequence of the Nature of Privileges. See all the Articles of this Section.*

[n] *See the Remark on the twenty third Article.*

[o] Si colonus vel inquilinus ſit is qui mortuus eſt, nec ſit unde funeretur, ex invectis illatis eum funerandum Pomponius ſcribit: & ſi quid ſuperfluum remanſerit, hoc pro debita penſione teneri. *l.* 14. §. 1. *ff. de rel. & ſumpt. fun.*

XXXIII.

33. *A Caſe of Preference among Creditors who have the ſame Privilege.*

If he who ſells a Houſe, occupied by a Tenant, reſerves to himſelf the Rent of the Houſe for a certain time, and it be agreed that the Moveables of the Tenant ſhall ſerve as a Pledge, for the Security of the Rent reſerved to the Seller, as well as for the Rent which ſhall fall afterwards due to the Buyer; the Seller ſhall be paid in the firſt place out of the Moveables, if their Agreement has not regulated it otherwiſe [p].

[p] Inſulam tibi vendidi, & dixi prioris anni penſionem mihi, ſequentium tibi acceſſuram: pignorumque ab inquilino datorum jus utrumque ſecuturum——facti quæſtio eſt. Sed veriſimile eſt id actum, ut primam quamque penſionem pignorum cauſa ſequatur. *l.* 13. *ff. qui potior.*

XXXIV.

34. *Three Orders of Creditors.*

It follows from all the preceding Rules, that among Creditors, there are three Orders. The firſt is, of thoſe that are privileged, who go before all the others, and take place among themſelves, according to the diſtinctions of their Preferences. The ſecond, is of thoſe that have Mortgages, who have their Rank after the privileged Creditors, according to the dates of their Mortgages. And the third, is of Creditors by Bond, and others, who have only Perſonal Actions, who not being diſtinguiſhed either by Privilege, or Mortgage, come in therefore jointly together, and ſhare equally in proportion to their Debts [q].

[q] *This is a Conſequence of all that has been ſaid in this Title.*

SECT.

SECT. VI.

Of Subſtitution to the Mortgage, or to the Privilege of the Creditor.

Explanation of the nature of Subſtitutions, and of their kinds.

ALtho' this Matter of the Subſtitution to the Rights of Creditors, being in it ſelf Simple and Natural, ought to be plain and eaſy; yet the different ways of acquiring the Subſtitution, and the Inconveniences which one may fall into, for want of obſerving in every one of them that which is eſſential to it, cauſe a multiplicity of Combinations which may perplex this Matter, and render it obſcure and difficult. For which reaſon, we have judged it would be uſeful, before we proceed to explain the Rules thereof, to give, in a few words, a general Idea of the Nature of Subſtitution, and of its Kinds, and of what every one of them may have, peculiar and eſſential to it.

Definition of Subſtitution.

The Subſtitution which we treat of here, is nothing elſe but that Change which puts another perſon in the place of the Creditor, and which makes the Right, the Mortgage, the Privilege which a Creditor has, to paſs to the Perſon that is ſubſtituted to him, that is to ſay, who enters into his Right.

The moſt ſimple manner of ſubſtituting, and which makes the Rights of the Creditor to paſs always to him who is ſubſtituted, is the Aſſignment which the Creditor makes of his Rights. Aſſignments are of ſeveral ſorts: Some are general, and of many Rights, ſuch as the Sale of an Inheritance, which tranſmits to him who buys it, all the Rights of the Heir, that he may exerciſe them in the ſame manner as the Heir himſelf might have done: Others are particular, of a certain Thing, ſuch as the Aſſignment of a Bond: Some are gratuitous, as an Aſſignment made by a Donor to a Donee, when the Donation contains Debts due to the Donor, or other Rights: And there are ſome Aſſignments which are made for a valuable conſideration; as if a Debtor aſſigns a Debt that is owing to him for the Payment of his Creditor, or if a Creditor makes over to a third Perſon, for a certain Price, a Debt that is due to him.

All theſe ſorts of Aſſignments have this effect, that the Aſſignee ſucceeds in the place of the Creditor, and that he may exerciſe the Rights which are made over to him in the ſame manner as the Creditor might have done himſelf, before the Aſſignment, and with the benefit of the Mortgage, and Privilege, which the Creditor had.

There is another manner of Subſtitution to the Rights of a Creditor, when his Debtor borrowing Money to pay what he owes him, agrees with the Perſon of whom he borrows, that the Monies ſhall be applied towards the Payment of that Creditor, and that the Perſon who lends the Money ſhall be ſubſtituted in the place of the ſaid Creditor. And this acquires to this new Creditor the Right of the firſt, provided it be mentioned in the Acquittance, that the Payment is made with his Money. For the Debtor who had power to engage himſelf to the firſt Creditor, may alſo engage himſelf, on the ſame conditions, to him who pays off the firſt Creditor: and by putting him in the place of the firſt Creditor, who receives his Monies, he does no wrong to his other Creditors, and changes nothing in their Condition.

The Subſtitution may likewiſe be acquired without the conſent of the Creditor, by an Order of the Judge, and that either with the Debtor's conſent, or ſometimes even without it. Thus, a Tutor who is willing to acquit with his own Money a Debt owing by his Pupil to a Creditor, who refuſes to ſubſtitute him in his room, may procure an Order to be made for ſubſtituting him in the place of the Creditor, upon his acquitting the Debt. And in this caſe, the Authority of Juſtice transfers the Right of the Creditor to the Perſon who pays him, provided he produce the Order of Court for his Subſtitution, and make it appear that the Creditor has been paid with his Monies. For the Judge does to him who pays for another, only the ſame Juſtice that is due to him from the Debtor, and that without prejudice to any other perſon.

There is yet another way of acquiring a Judicial Subſtitution, without the deed of the perſon to whom the Right belongs, and even againſt his will; as if the Debts owing to a Debtor are ſold by Decree of a Court of Juſtice. For the Court gives to the Purchaſer, to whom the Debts are adjudged, the ſame Right which he would have, if the Debtor had ſold it to them: and he will be ſubſtituted likewiſe to the Mortgages and Privileges.

We muſt take notice in the laſt place, of another ſort of Subſtitution, which

is acquired without any Aſſignment from the Creditor, without the conſent of the Debtor, and without an Order of the Judge; but only by the bare effect of the Payment made to the Creditor. Thus, when a Creditor being deſirous to ſecure his Mortgage, and fearing leſt a prior Creditor ſhould increaſe his Debt by Charges, or leſt he ſhould ſeize upon the Lands, or Tenements, mortgaged, pays off that Creditor, he is ſubſtituted in his place, provided it appear by the Acquittance, that the Payment has been made with his Money. For the Law preſumes that he himſelf being a Creditor, he pays only for the Security of his Mortgage; and it ſubſtitutes him in the place of the Creditor whom he pays. And it is the ſame thing as to him who having purchaſed Lands, or Houſes, and fearing leſt he ſhould be troubled in his Poſſeſſion of them, by a Creditor prior to his Purchaſe, pays him off. And both in the one and the other of theſe two caſes, theſe Motives juſtify a Subſtitution which is prejudicial to no perſon whatſoever.

We ſee in all theſe ſorts of Subſtitution, that the Right of the Creditor paſſes from his Perſon to another, who enters into his place, and that this Change can happen only two ways. One, by the will of the Creditor who ſubſtitutes: The other without his will, by the Effect of the Law, which puts in the place of the Creditor, him to whom Equity tranſmits his Right.

The CONTENTS.

I.

1. *The Aſſignment ſubſtitutes to the Mortgage, and to the Privilege.*

He to whom a Creditor makes over a Debt, is ſubſtituted to his Right, and he acquires, together with the Credit, the Mortgages and Privileges which are annexed to it, whether the Aſſignment be made for a valuable conſideration, or *gratis*. For altho' it be true, that the Payment extinguiſhes the Debt, and that it ſeems for that reaſon, that the Creditor cannot tranſmit to another a Right which is extinguiſhed in his perſon, by the payment; yet the Aſſignment which is made at the ſame time, has the ſame effect as if the Creditor had ſold his Right to him who pays him. And as to the effect of the Aſſignment, it is the ſame thing to him who pays for the Debtor, whether it be the perſon who is bound jointly with him for the Debt, or his Surety, or a third Perſon [a].

[a] Emptori nominis etiam pignoris perſecutio præſtari debet: ejus quoque quod poſtea venditor accepit. Nam beneficium venditoris prodeſt emptori. *l. 6. ff. de hared. vel act. vend.* Si à creditore nomen comparaſti, ea pignora, quæ venditor nominis perſequi poſſet, apud præſidem provinciæ vindica. *l. 7. C. de obl. & act. l. 6. eod.* See the fourth Article.

Cùm is qui reum & fidejuſſores habens, ab uno ex fidejuſſoribus acceptâ pecuniâ, præſtat actiones, poterit quidem dici nullas jam eſſe, cùm ſuum perceperit, & perceptione omnes liberati ſunt: ſed non ita eſt; non enim in ſolutum accepit: ſed quodammodo nomen debitoris vendidit. Et ideò habet actiones, quia tenetur ad ipſum, ut præſtet actiones. *l. 36. ff. 6. de fidejuſſ.* Salvas eſſe mandatas actiones: cùm pretium magis mandatarum actionum ſolutum, quam actio quæ fuit perempta videatur. *l. 76. ff. de ſolut.*

II.

2. *Subſtitution without an Aſſignment.*

Thoſe who, without an Aſſignment from the Creditors, procure an Order from the Judge, appointing them, upon their paying of the Creditors, to be ſubſtituted in their place, acquire by the Payment, the Rights of thoſe Creditors, their Mortgages, and their Privileges; and even thoſe of the King, if they purchaſe the Debt that is due to him, and get themſelves to be ſubſtituted in his ſtead [b].

[b] Si in te jus fiſci, cùm reliqua ſolveres debitoris pro quo ſatisfaciebas, tibi competens judex adſcripſit, & tranſtulit: ab his creditoribus, quibus fiſcus potior habetur, res quas eo nomine tenes, non poſſunt inquietari. *l. ult. C. de privil. fiſc.*

III.

3. *In what manner a third perſon may acquire the Right of a Creditor.*

To acquire without the Authority of Juſtice the Right of a Creditor, and his Mortgage, it is ſufficient to have one of theſe two things; either that he who pays

pays the Creditor take an Aſſignment from him, as has been ſaid in the firſt Article, or that he agree with the Debtor, that upon paying the Debt for him he ſhall be ſubſtituted to the Rights of the Creditor, and that in this caſe it be mentioned in the Acquittance, that the Payment was made with his Money. For then, altho' the Creditor ſhould refuſe to ſubſtitute, yet he who pays will acquire his Right, by the Effect of the Payment, and of the Agreement with the Debtor. And it would be the ſame thing, if the Monies lent being put into the hands of the Debtor, with this Agreement, that he who lends the Money ſhould be ſubſtituted to the Rights of the Creditor who is diſcharged with it, the Debtor ſhould afterwards make the Payment himſelf, declaring in the Acquittance, that it is with the Money borrowed of that perſon. But if the Payment is made only upon the bare Acquittance of the Creditor, and not accompanied either with the one or the other of theſe two ways of acquiring the Subſtitution, it will procure to him who pays only a bare Action againſt the Debtor, for recovering from him the Sum paid on his account, even altho' it ſhould be expreſſed in the Acquittance, that the Payment was made with the Monies of this third Perſon. For it might be preſumed that he had acquitted only what he owed [c].

[c] Res obligatas exterus, debito ſoluto liberando, datum petere, non earum dominium adipiſci poteſt. *l.* 21. *C. de pign. & hyp.*

Non omninò ſuccedunt in locum hypothecarii creditoris hi quorum pecunia ad creditorem tranſit. Hoc enim tunc obſervatur, cum is qui pecuniam poſtea dat, ſub hoc pacto credat, *ut idem pignus ei obligetur, & in locum ejus ſuccedat.* Quod cùm in perſona tua factum non ſit (judicatum eſt enim te pignora non accepiſſe) fruſtra putas tibi auxilio opus eſſe conſtitutionis noſtræ ad eam rem pertinentis. *l.* 1. *C. de his qui in prior. cred. loc. ſucc.* Ariſto Neratio Priſco ſcripſit, & ſi ita contractum ſit, *ut antecedens dimitteretur*, non aliter in jus pignoris ſuccedet, niſi convenerit, *ut ſibi eadem res eſſet obligata.* Neque enim in jus primi ſuccedere debet, qui ipſe nihil convenit de pignore. *l.* 3. *ff. quæ res pign.*

See the Remark on the third Article, as to the caſe where the Debtor makes Payment only ſome time after he has borrowed the Monies for paying the Debt.

This manner of acquiring the Right of the Creditor, without his Subſtitution, is juſt and equitable, in order to facilitate the Payment of Debts. And it is but juſt that the Debtors themſelves ſhould have power to put in the place of their Creditors thoſe who pay for them, ſince no body receives any prejudice thereby, and ſince it is the intereſt of the Debtor that he ſhould have power to make his condition eaſier by changing his Creditor. It was upon this Equity that the Edict which was made in the year 1609, after the Reduction of the Rents from Eight to Six per Cent. *was founded; that whereas the Creditors not being willing to receive their Monies refuſed to ſubſtitute, and thoſe who were willing to lend Money, for redeeming the ſaid Rents, were afraid leſt they ſhould not be ſubſtituted to the Rights of the Creditors who refuſed to ſubſtitute. Proviſion was therefore made therein by the ſaid Edict, and the Subſtitution granted purſuant to this Rule.*

IV.

He who pays a Creditor that is privileged, ſucceeds to his Privilege, whether it be by an Aſſignment from the Creditor, who makes over to him ſimply his Right, or by a Subſtitution made by the Judge; as has been ſaid in the ſecond Article: or by an Agreement with the Debtor, as ſhall be explained in the following Article [d].

4. How a third Perſon acquires the Privilege of a Creditor.

[d] Cùm pro patre, in cujus poteſtate non eras, pecuniam fiſco intuleris, & jure privilegio ejus ſucceſſiſti, & ejus locum, cui pecunia numerata eſt, conſecutus es. *l.* 2. *C. de his qui in pr. cred. loc. ſucc.* Si cùm pecuniam pro marito ſolveres, neque jus fiſci in te transferri impetraſti, neque pignoris cauſa domum vel aliud quid ab eo acceperiſti, habes perſonalem factionem. *l.* 3. *C. de priv. fiſc.* Si in te jus fiſci cum reliqua ſolveres debitoris pro quo ſatisfaciebas, tibi competens judex adſcripſit & tranſtulit, ab his creditoribus, quibus fiſcus potior habetur, res quas eo nomine tenes, non poſſunt inquietari. *l. ult. eod.*

V.

One may acquire the Privilege of a Creditor, without Subſtitution, in the ſame manner as the Mortgage, by an Agreement with the Debtor, that he who ſhall pay for him ſhall have the Privilege. And it is no matter whether the Payment be made to the Creditor by him who lends the Money, or by the Debtor with whom the Money has been intruſted, provided that both in the one and the other caſe, it appear by the Acquittance, that the Payment is made with the Money of that Perſon [e], as has been ſaid in relation to the Mortgage in the third Article.

5. How the Privilege is acquired without Subſtitution.

[e] Eorum ratio prior eſt creditorum, quorum pecunia ad creditores privilegiarios pervenit. Pervenîſſe autem quemadmodum accipimus? Utrùm ſi ſtatim profecta eſt ab inferioribus ad privilegiarios, an verò & ſi per debitoris perſonam, hoc eſt, ſi ante ei numerata eſt: quod quidem poteſt benignè dici ſi modò non poſt aliquod intervallum id factum ſit. *l.* 24. §. 3. *ff. de reb. auct. jud. poſſ.* Add the Texts cited on the fourth Article.

Altho' the Money lent for the Payment be not delivered to the Creditor, whether by the Debtor, or by him who lends the Money, till ſome time after their Agreement; yet he who lends the Money ſhall nevertheleſs be ſubſtituted to the Rights of the Creditor. For the Debtor's Bond to him who advanced the Money, will ſerve as a proof that the occaſion of the Loan was to pay off the Creditor: and the Creditor's Acquittance will prove that the Money was put to that uſe. And as to what is ſaid in the Law cited on this Article, that there muſt be no interval of time, that is to be applied to the Uſage of the Roman *Law, according to which Covenants were often made without any Writing; and therefore the diſtance of time might have occaſioned the loſs of the Proof how the Monies had been imployed.*

The Debt which is attached is adjudged to the Creditor who attaches, ſuch as it did belong to the Debtor.

VI.

6. Of a Creditor who pays off a Creditor more ancient than himſelf.

He who being already a Creditor, pays off another Creditor of the ſame Debtor, who is prior to himſelf, ſucceeds to his Mortgage, altho' he have made no ſuch Agreement, nor received any Subſtitution. For his Quality of Creditor makes it to be preſumed, that he pays him who is a more ancient Creditor, with no other view than that he may ſucceed in his place, and thereby ſecure his own Debt. Which diſtinguiſhes his Condition from him who having no ſuch Intereſt, pays for the Debtor without Subſtitution, and of whom it may be ſaid, that perhaps he was under an Obligation to the Debtor to pay for him[f].

[f] Plane cùm tertius creditor primum de ſua pecunia dimiſit, in locum ejus ſubſtituitur in ea quantitate, quam ſuperiori exſolvit. *l.* 16. *ff. qui pot. in pign. V. l.* 11. §. 4. *eod. l.* 12. §. 9. *eod. l.* 17. *eod.*

VII.

7. A Purchaſer ſubſtituted to the Creditors whom he pays off.

The Purchaſer of an Eſtate, imploying the Price of his Purchaſe for the Payment of the Creditors to whom the Eſtate was mortgaged, is ſubſtituted to their Right, to the Value of what he pays them. For by paying them with the Price of their Pledge, in order to ſecure it to himſelf, he preſerves it to himſelf for the Value of what he pays them, againſt other ſubſequent Creditors, altho' they be prior to his Purchaſe[g].

[g] Si potiores creditores pecunia tua dimiſſi ſunt, quibus obligata fuit poſſeſſio quam emiſſe te dicis, ita ut pretium perveniret ad eoſdem priores creditores, in jus eorum ſucceſſiſti: & contra eos, qui inferiores illis fuerunt, juſta defenſione te tueri potes. *l.* 3. *C. de his qui in prio. cred. loc. ſuc.* Eum qui à debitore ſuo prædium obligatum comparavit, eatenùs tuendum, quatenus ad priorem creditorem ex pretio pecunia pervenit. *l.* 17. *ff. qui pot.* See the preceding Article.

VIII.

8. Subſtitution by an Attachment.

The Creditor who by virtue of his Mortgage, or of an order from the Judge, attaches the Rights and Actions which his Debtor has againſt thoſe who are indebted to him, procuring what he has attached to be adjudged to him, is ſubſtituted to the Mortgages and Privileges which his Debtor had for the Debts that are attached[h].

[h] Si prætorium pignus quicunque judices dandum alicui perſpexerint: non ſolum ſuper mobilibus rebus, & immobilibus, & ſe moventibus, ſed etiam ſuper actionibus quæ debitori competunt, præcipimus hoc eis licere decernere. *l.* 1. *C. de prat. pign.*

IX.

9. The Subſtitution is null after Payment.

When the Subſtitution by the Creditor is neceſſary for tranſmitting his Right to the Perſon who pays for the Debtor, it ought to be made at the time of Payment, and of granting the Acquittance. For if the Payment was conſummated without any mention of the Subſtitution, it being made only after Payment, it would be uſeleſs. And the Right of the Creditor being extinguiſhed by the Payment, he could not make over to another what he had not any longer, nor ſubſtitute to a Right which was extinct[i].

[i] Modeſtinus reſpondit, ſi poſt ſolutum ſine ullo pacto omne quod ex cauſa tutelæ debeatur, actiones poſt aliquod intervallum ceſſæ ſint, nihil ea ceſſione actum, cùm nulla actio ſuperfuerit. *l.* 76. *ff. de ſolut.* See the following Article.

X.

10. The validity of the Subſtitution depends on the condition in which the Creditor's Right was at the time of making the Subſtitution.

All Subſtitutions, Aſſignments, and other ways of acquiring the Mortgage, or Privilege of a Creditor, whether by Covenant, or by an Order of the Judge, or otherwiſe, have no manner of effect, if at the time of the Subſtitution, Aſſignment, or other Act, the Right of the Creditor was no more in being, whether it be that it was extinguiſhed by Preſcription, or annulled by a Judgment, or diſcharged by a Payment, or that it had ceaſed to be thro' ſome one of the Cauſes which ſhall be explained in the following Section. Thus, in Queſtions relating to the validity of Subſtitutions, Aſſignments, and other ways of acquiring the Mortgage, or Privilege, of a Creditor, it is neceſſary to examine, if at the time of the Subſtitution, the Right, the Mortgage, or the Privilege, was ſtill ſubſiſting[l].

[l] Si dominus ſolvit pecuniam, pignus quoque perimitur. *l.* 13. §. 2. *ff. de pign.* See the following Section.

SECT.

SECT. VII.

In what manner the Mortgage ends, or is extinguiſhed.

The CONTENTS.

I.

1. *The Mortgage is extinguiſhed by Payment.*

THE Mortgage being only an Acceſſory of the Debt, the Payment which annuls the Debt, extinguiſhes the Mortgage [a]. But it is neceſſary that the Payment ſhould be entire, of all that is due for Principal, Intereſt, and Charges [b].

[a] Si dominus ſolverit pecuniam, pignus quoque perimitur. *l.* 13. §. 2. *ff. de pign. & hyp.* Pignoris cauſa res obligatas, ſoluto debito reſtitui debere pigneratitiæ actionis natura declarat. *l.* 10. *C. de pigner. act.*

[b] Niſi univerſum, quod debetur, offerretur, jure pignus creditor vendere poteſt. *l.* 25. §. 14. *ff. fam. erciſc.* Nam ſi vel modicum de ſorte, vel uſuris in debito perſeveret, diſtractio rei obligatæ non poteſt impediri. *l.* 2. *in f. C. debit. vend. pign. imp. n. p. l.* 6. *C. de diſtr. pign.*

See the fourth Article of the third Section of this Title.

II.

Novation, which extinguiſhes the firſt Obligation, changing it into a new one, extinguiſhes alſo the Mortgage, which was an Acceſſory to it, if it is not reſerved [c].

2. *By a Novation.*

[c] Nova debiti obligatio pignus peremit, ni convenit, ut pignus repetatur. *l.* 11. §. 1. *ff. de pign. act.*

See what Novation is in the Title of Novations.

III.

Whatever annuls the Debt, diſcharges the Mortgage. Thus, when a Debtor, to whoſe Oath the Debt is referred, ſwears that he has paid it, or when he is acquitted by a Judgment, from which there lies no Appeal, the Debt and the Mortgage are annulled. And it is the ſame thing in all the caſes where the Obligation ſubſiſts no more [d].

3. *By the Oath of the Debtor, when the Debt is referred to it, and he ſwears that he owes nothing; or by a Judgment which acquits him.*

[d] Si deferente creditore juravit debitor ſe dare non oportere, pignus liberatur: quia perinde habetur atque ſi judicio abſolutus eſſet. Nam & ſi à judice quamvis per injuriam abſolutus ſit debitor, tamen pignus liberatur. *l.* 13. *ff. quib. mod. pign. vel hyp. ſol.* Idem dicere debemus, vel ſi qua ratione obligatio ejus finita eſt. *l.* 6. *eod.*

IV.

Whatever may be reckoned to be in the place of Payment, extinguiſhes the Mortgage. Thus, for Example, if the Creditor contents himſelf either with a Surety, or with another Debtor, inſtead of the former, or with another Pledge inſtead of the firſt; in all theſe caſes, and others of the like Nature, the Mortgage ceaſes, if it appears to have been the intention of the Parties to diſcharge the Mortgage, and to reſtrain the Creditor to theſe other Sureties, altho' his condition become thereby leſs advantageous [e].

4. *By every thing that is inſtead of Payment.*

[e] Item liberatur pignus ſive ſolutum eſt debitum, ſive eo nomine ſatisfactum eſt, *l.* 6. *ff. quib. mod. pign.* Satisfactum autem accipimus quemadmodum voluit creditor, licet non ſit ſolutum: ſive aliis pignoribus ſibi caveri voluit, ut ab hoc recedat: ſive fidejuſſoribus, ſive reo dato, ſive pretio aliquo, vel nuda conventione, naſcitur pigneratitia actio, & generaliter dicendum erit, quoties recedere voluit creditor à pignore, videri ſatisfactum, ſi ut ipſe voluit, ſibi cavit, licet in hoc deceptus ſit. *l.* 9. §. 3. *ff. de pign. act. l.* 3. *C. de luit. pign.*

V.

If it is by reaſon of the Creditor's refuſing his Payment, that he detains the Pledge, or inſiſts to have it expoſed to Sale, the Debtor may tender the Money in

5. *By conſigning the Debt, in caſe the Creditor*

refuſes to receive Payment.

in Court, and conſign it, in order to his being diſcharged from the Debt, to hinder the Sale, and recover his Pledge, together with the Coſts and Damages which the Creditor may owe him becauſe of his Delay [f].

[f] Si per creditorem ſtetit, quominus ei ſolvatur, rectè agitur pigneratitia. *l.* 20. §. 2. *ff. de pign. act.* Si offerat in judicio pecuniam, debet rem pignoratam, & quod ſua intereſt conſequi. *l.* 9. §. *ult. eod.* Debitoris denuntiatio, qui creditori ſuo ne ſibi rem pignori obligatam diſtrahat, vel his qui ab eo volunt comparare, denuntiat, ita demum efficax eſt, ſi univerſum tam ſortis quam uſurarum offerat debitum creditori, eoque non accipiente, idonea fide probationis, ita ut oportet depoſitum oſtendat. *l.* 2. *C. debit. vend. pign. imp. n. p.* See as to the matter of Conſignment, the Remark on the ſeventh Article of the third Section.

VI.

6. If the Payment which was made does not ſubſiſt, the Mortgage revives.

If the Payment, or that which was to be in lieu of it, had no effect, the Mortgage would revive together with the Credit; as if the Creditor had taken in Payment an Aſſignment to a Debt with Warranty, and that he could not get Payment of it, or Houſes and Lands with the ſame Warranty, which were evicted from him, or that a Minor had given an Acquittance, againſt which he was relieved. For theſe kinds of Payments imply the condition that they ſhall ſubſiſt. But if a Creditor of full Age had contented himſelf with an Aſſignment to a Debt at his own peril, and had given a Diſcharge, the Mortgage and the Credit would remain extinguiſhed, altho' the Creditor ſhould not get Payment of the Debt that was made over to him [g].

[g] Debitum cujus meminiſti, quod per pacti conventionem inutiliter factam remiſiſti, etiam nunc petere non vetaris, & uſitato more pignora vindicare. *l.* 5. *C. de rem. pign.*

VII.

7. The Mortgage is extinct, if the Pledge is put out of Commerce.

If the Lands or Houſes that are mortgaged ceaſe to be in Commerce, as if they are dedicated to the Uſe of a Church, or other Publick Place, the Mortgage ſubſiſts no longer. But the Creditor hath his Action againſt the Price which his Debtor receives for them [h].

[h] *See the twenty ſixth Article of the firſt Section.*

VIII.

8. Or if it happens to periſh.

As the Mortgage upon a Land or Tenement which happens to periſh by an Inundation, or other Accident, ſubſiſts no longer; ſo likewiſe the Mortgage which a Creditor has upon a Right of Uſufruct belonging to his Debtor, will have no longer effect, if the Uſufruct ceaſes, even altho' the Debtor ſhould ſurvive the loſs of his Uſufruct, as if he had it only for a certain time [i].

[i] Sicut re corporali extinctâ, ita & uſufructu extincto, pignus hypothecave perit. *l.* 8. *ff. quib. mod. pign.* See the ſecond Article of the ſixth Section of Uſufruct.

IX.

9. The Preſcription of the Debt extinguiſhes the Mortgage.

If the Debt for which the Mortgage was given, be extinguiſhed by Preſcription, the Mortgage, which was only an Acceſſory of the Debt, is annulled [k].

[k] Item liberatur pignus ſive ſolutum eſt debitum. ——Sed & ſi tempore finitum pignus eſt, idem dicere debemus. *l.* 6. *ff. quib. mod. pign. l.* 12. *ff. de diverſ. temp. præſc. l.* 3. *C. de præſc.* 30. *vel.* 40. *ann.*

By the Roman *Law the Hypothecary Action was extinguiſhed only by a Preſcription of Forty Years againſt the Debtor and his Heirs, and likewiſe againſt a third Poſſeſſor, if the Debtor was ſtill alive. Thus, the Hypothecary Action was of a longer duration than the bare Perſonal Action.* See the end of the Preamble of the fourth Section of Poſſeſſion and Preſcription. *This Preſcription of Forty Years is obſerved in ſome Provinces. But we have conceived the Rule according to the common and natural Uſage, which gives no longer duration to the Hypothecary Action, than to the bare Perſonal Action, for the reaſon explained in the Article.*

X.

10. If the Debtor loſes his Right to the Pledge, the Creditor loſes his Mortgage on it.

If the Debtor who had mortgaged a Land or Tenement, happens to loſe the Right he had to it, as if he is ſtript of it by an Eviction, or by a Power of Redemption, veſted in a former Owner, or in the next of Kin, or by other Cauſes, the Mortgage which he had aſſigned on the ſaid Land or Tenement, does not ſubſiſt any longer; unleſs it was by his own proper deed that he loſt his Right; as if, for Example, when he was able to defend himſelf againſt the ſaid Eviction, or Power of Redemption, he yielded to it; if he neglected to demand the Sale of an Eſtate, ſeized on in the hands of a third Perſon, and which belonged to him; if he did not defend himſelf in a good Cauſe; or if he abandoned any other way his Right. For in all theſe Caſes, the Creditor may exerciſe the Rights of his Debtor, in order to preſerve his own [m].

[m] Si res diſtracta fuerit ſic, *Niſi intra certum diem meliorem conditionem invenifſet*, fueritque tradita, & fortè emptor, antequam melior conditio offerretur: hanc rem pignori dediſſet. Marcellus libro quinto Digeſtorum ait, finiri pignus ſi melior conditio fuerit allata, quamquam ubi ſic res diſtracta eſt, niſi emptori diſplicuiſſet, pignus finiri non putet. *l.* 3. *ff. quib. mod. pign.* Superſedente (debitore) tali auxilio uti, vel præſente vel abſente eo, creditores ejus poſſunt. *l. pen. C. de non. num. pec.*

XI.

11. *Effect of Redhibition of the Thing mortgaged.*

If a Debtor who had bought a Houſe, or Lands, or a Moveable, and had afterwards engaged it to a Creditor, has a mind to diſſolve the Sale by Redhibition, that is, by obliging the Seller to take back the Thing ſold, becauſe of ſome defect in it, his Creditor may hinder him, unleſs the Debtor provides for his Security, either by giving him the Price which the Seller ſhall be obliged to reſtore to him, or by letting him have the Thing ſold, if he is willing to take it at the Price which they ſhall agree on[n].

[n] Si debitor cujus res pignori obligatæ erant, ſervum quem emerat redhibuerit, an deſinat Servianæ locus eſſe? Et magis eſt ne deſinat, niſi ex voluntate creditoris hoc factum eſt. *l. 4. ff. quib. mod. pign.*

See the firſt Article of the eleventh Section of the Contract of Sale.

XII.

12. *The Creditor who conſents to the Alienation of his Pledge, loſes his Mortgage, if he does not expreſly reſerve it.*

The Creditor who conſents to the Sale, Donation, or other Alienation which his Debtor makes of a Houſe, or Lands, that are engaged to him, or who ſuffers it, or ratifies it, has no longer any Mortgage upon the ſaid Houſe, or Lands, unleſs he reſerves it[o]. For he has conſented to an Alienation which could not have been made to his prejudice, if he had not approved of it: and his conſent would deceive the Purchaſer, if he might afterwards make uſe of his Right of Mortgage.

[o] Creditor qui permittit rem venire pignus dimittit. *l.* 158. *ff. de reg. jur.* Si conſenſit venditioni creditor, liberatur hypotheca. *l. 7. ff. quib. mod. pign.* Si in venditione pignoris conſenſerit creditor, vel ut debitor hanc rem permutet, vel donet, vel in dotem det, dicendum erit pignus liberari: niſi ſalva cauſa pignoris ſui conſenſit vel venditioni vel cæteris. *l. 4. §. 1. eod.* Si probaveris te fundum mercatum, poſſeſſionemque ejus tibi traditam, *ſciente & conſentiente* ea quæ ſibi eum à venditore obligatum dicit, exceptione eam removebis: nam obligatio pignoris conſenſu & contrahitur, & diſſolvitur. *l. 2. C. de remiſ. pign.* Sed & ſi non conceſſerat pignus venundari, ſi ratam habuit venditionem, idem erit probandum. *d. l. 4. §. 1. in fine ff. quib. mod. pign.*

Touching this conſent, ſee the fifteenth Article of this Section.

XIII.

13. *If the Creditor conſents that his Pledge be engaged to another.*

If a Creditor conſents that his Pledge be engaged to another, he reſigns to him his Right[p]. But this conſent ought to be ſuch as ſhall be explained in the fifteenth Article.

[p] Paulus reſpondit, Sempronium antiquiorem creditorem conſentientem, cum debitor eandem rem tertio creditori obligaret, jus ſuum pignoris remiſiſſe videri. *l. 12. ff. quib. mod. pign. v. h. ſ.*

XIV.

14. *The Mortgage revives, if the Alienation does not take effect.*

If the Sale, or other Alienation, made by the Debtor, with the conſent of his Creditor, happens to be annulled, or that after the obtaining of this conſent, the Alienation is not accompliſhed; the Creditor, in that caſe, enters again to his Right. For it was only in favour of that Alienation that he renounced his Mortgage. And it would be the ſame thing, if he had conſented that his Debtor ſhould deviſe to a Legatee the Houſes, or Lands, mortgaged to him, and that the Legacy ſhould be found to be null, or the Legatee ſhould renounce it[q].

[q] Bellè quæritur, ſi fortè venditio rei ſpecialiter obligatæ non valeat, an nocere hæc res creditori debeat, quod conſenſit: ut putà, ſi qua ratio juris venditionem impediat, dicendum eſt, pignus valere. *l. 4. §. ult. ff. quib. mod. pign.* Si voluntate creditoris fundus alienatus eſt, inverecundè applicari ſibi eum creditor deſiderat, ſi tamen effectus ſit ſecutus venditionis. Nam ſi non venierit, non eſt ſatis ad repellendum creditorem, quod voluit venire. *l. 8. §. 6. eod.* Venditionis autem appellationem generaliter accipere debemus, ut & ſi legare permiſit, valeat quod conceſſit quod ita intelligemus, ut & ſi legatum repudiatum fuerit, convaleſcat pignus. *d. l. 8. §. 11.* Voluntate creditoris pignus debitor vendidit, & poſtea placuit inter eum & emptorem, ut à venditione diſcederent, jus pignoris ſalvum erit creditori: nam ſicut debitori, ita & creditori priſtinum jus reſtituitur: neque omnimodò creditor priſtinum jus remittit: ſed ita demùm, ſi emptor rem retineat, nec reddat venditori. *l. 10. eod.*

XV.

15. *In what manner we are to underſtand the Creditor's conſent to the Alienation.*

We ought not to take for a conſent of the Creditor to the Alienation of his Pledge, the knowledge which he may have of it, nor the ſilence which he keeps after he knows it; as if he knows that his Debtor is about ſelling a Houſe which is mortgaged to him, and ſays nothing of it. But in order to deprive him of his Right, it is neceſſary that it appear by ſome Act, that he knows what is doing to his prejudice, and that he conſents to it. And a Creditor does not loſe his Mortgage by his conſent, except when it appears evidently that his Intention is to reſign it, or that there be ground to charge him with diſhoneſty, for not having declared his Right, when he was under an Obligation to do it. Thus, for Example, if he who had mortgaged ſpecially a Houſe, or Lands, to a former Creditor for an Annuity, engages it in the ſame manner to a ſecond Creditor, for another Annuity, declaring to him that the ſaid Houſe, or Lands, were not mortgaged to any body elſe, and that the firſt Creditor ſigned the Contract either as a Party, or as a Witneſs; he will have thereby rendred

rendred himſelf an Accomplice to this falſe Declaration, and cannot exerciſe his Mortgage on the ſaid Houſe, or Lands, to the prejudice of this ſecond Creditor. Thus, on the contrary, if a Creditor ſigns, as Witneſs, a Contract of Marriage, or other Deed, by which his Debtor engages all his Eſtate, he ſhall not loſe his Mortgage for not having entred his Proteſtation. Thus he who ſigns, as Witneſs, a Teſtament, in which the Teſtator deviſes Houſes, or Lands, that are mortgaged to the ſaid Witneſs, will not loſe his Mortgage. And in general, we ought to judge of the effect of theſe Approbations by Signature, or otherwiſe, according to the circumſtances of the Quality of the Acts, of that of the Perſons, of the Knowledge which they may have of the wrong which either their Approbation, or their Silence, may do to their own Intereſt, and to that of others, of their Sincerity or Diſingenuity, of the Intention of the Contracters, and other circumſtances of the like Nature[r].

[r] Non videtur autem conſenſiſſe creditor, ſi ſciente eo debitor rem vendiderit, cùm ideo paſſus eſt venire, quod ſciebat utique pignus ſibi durare. Sed ſi ſubſcripſerit fortè in tabulis emptionis, conſenſiſſe videtur, niſi manifeſtè appareat deceptum eſſe. *l.* 8. §. 15. *ff. quib. mod. pign.*

Inveniebatur Mævius inſtrumento cautionis cum republica facto à Seio interfuiſſe, & ſubſcripſiſſe, quo caverat Seius, fundum nulli alii eſſe obligatum. Quæro an actio aliqua in rem Mævio competere poteſt? Modeſtinus reſpondit, pignus cui is de quo quæritur conſenſit, minimè eum retinere poſſe. *l.* 9. §. 1 *ff. quib. mod. pign.*

Lucia Titia inteſtata moriens, à filiis ſuis per fideicommiſſum alieno ſervo domum reliquit. Poſt mortem, filii ejus iidem qui hæredes, cum diviſerunt hæreditatem matris, diviſerunt etiam domum. In qua diviſione dominus ſervi fideicommiſſarii *quaſi teſtis* affuit. Quæro, an fideicommiſſi perſecutionem acquiſitam ſibi per ſervum, eo quod interfuit diviſioni, amiſiſſe videatur? Modeſtinus reſpondit, fideicommiſſum ipſo jure amiſſum non eſſe—— *niſi evidenter apparuerit omittendi fideicommiſſi cauſa hoc eum feciſſe.* *l.* 34. §. 2. ff. de leg. 2. v. l. 8. ff. de reſc. vend.

Caius Seius ob pecuniam mutuam fundum ſuum Lucio Titio pignori dedit. Poſtea pactum inter eos factum eſt, *ut creditor pignus ſuum in compenſationem pecuniæ ſuæ certo tempore poſſideret.*

Verum ante expletum tempus creditor cùm ſuprema ſua ordinaret, teſtamento cavit, *ut alter ex filiis ſuis haberet eum fundum*, & addidit *quem de Lucio Titio emi*, cùm non emiſſet. Hoc teſtamentum inter cæteros ſignavit, & Caius Seius, qui fuit debitor. Quæro, an ex hoc quod ſignavit præjudicium aliquod ſibi fecerit: cùm nullum inſtrumentum venditionis proferatur, ſed ſolum pactum ut creditor certi temporis fructus caperet? Herennius Modeſtinus reſpondit, contractui pignoris non obeſſe, quod debitor teſtamentum creditoris, in quo ſe emiſſe pignus expreſſit, ſignaſſe proponitur. *l.* 39. *ff. de pign. act.*

It is neceſſary to remark on this Article, the difference there may be between a Creditor's ſigning an Inſtrument as a Party, and his ſigning it only as a Witneſs. Whatever he ſigns as a Party, binds him without doubt: But in Deeds which he ſigns as a Witneſs, and where the Signature is put only for a teſtimony to the truth of what is tranſacted between the contracting Parties, one cannot draw a conſequence from the Witneſs's ſigning, that may be of prejudice to him, unleſs he ſhould give occaſion by his ſigning for one of the Parties to be cheated, as in the caſe of the Witneſs who ſigns the Contract in which is inſerted the falſe Declaration explained in the Article. For in that caſe, the Silence of the Witneſs implies a diſingenuity which makes him acceſſory to the Knavery of his Debtor. But if a Witneſs does not contribute any thing on his part to the cheating and overreaching any of the Parties, and if he gives no expreſs conſent which derogates from his Right, neither his preſence, nor his ſigning ought to hurt him; as appears in the Caſe of this Law 39 ff. de pign. act. *quoted on this Article, where he who had mortgaged his Lands to a Creditor does not loſe them for having ſigned, as Witneſs, the Teſtament of the ſaid Creditor, who declares his will to be, that one of his Children ſhould have the ſaid Lands, even altho' the Teſtator had added, that he had purchaſed thoſe Lands of the ſaid Witneſs.*

See the thirty third Article of the firſt Section.

TITLE II.

Of the SEPARATION of the GOODS of the Deceaſed, from thoſe of the Heir, or Executor, among their reſpective Creditors.

The Subject Matter of this Title.

WE have ſeen in the foregoing Title, that one of the uſes of a Mortgage is, to ſecure to the Creditor the Eſtate of the Debtor, into what hands ſoever it paſſes. But when it paſſes only from the Debtor to his Heir, or Executor, the Creditor preſerves his Right, altho' he have no Mortgage, becauſe the Heir, or Executor, ſucceeds to the Eſtate, only on condition that he acquit the Debts. Thus, all the Creditors of the deceaſed are, with regard to his Heir, or Executor, in the ſame condition in which they were, with reſpect to their Debtor; every one of them retaining on the Eſtate of the deceaſed, either their Mortgage, or their Privilege, or their ſimple Credit, ſuch as they had it in the Debtor's life-time. But this change which makes the Eſtate of the Debtor to paſs to his Heir, or Executor, having this effect, that the Creditors of the ſaid Heir or Executor, will likewiſe have their Right on that Eſtate which he acquires by Inheritance, or Succeſſion,

ſion, it happens that when the Heir or Executor has not Eſtate enough of his own to ſatisfy his own Creditors, the Creditors of the deceaſed are in danger of ſeeing the Eſtate of the deceaſed go to the Creditors of the Heir, or Executor; and proviſion is made againſt this, by ſeparating the Eſtate of the deceaſed from that of his Heir, or Executor, for the benefit of their reſpective Creditors.

It is by the uſe of this Separation, that the Creditors of the deceaſed, who fear that the Heir, or Executor, is not ſolvent, hinder the confuſion of the Goods of the deceaſed with thoſe of the Heir, or Executor; that the Goods of their Debtor may be preſerved to them, and may not go to the Creditors of the ſaid Heir, or Executor.

But if the Creditors of the Heir, or Executor, are afraid, on their part, leſt the Heir, or Executor, who is their Debtor, engaging himſelf in an incumbred Inheritance, or Succeſſion, his Goods ſhould go to the Creditors of the deceaſed, to their prejudice, the ſame Equity demands, that they may have power to diſtinguiſh and ſeparate the Eſtate of the Heir, or Executor, from that of the deceaſed. As to which it is neceſſary to obſerve, that altho' the condition of the Creditors of the Heir, or Executor, and that of the Creditors of the deceaſed, ought to be equal, yet the *Roman* Law had ordered it otherwiſe, and did not allow the Separation of Goods to the Creditors of the Heir, or Executor, for this reaſon, that a Debtor being at liberty to bind himſelf, he may make the condition of his Creditors worſe, by entring into new Engagements, to their prejudice[a]. But this nicety has not been received into uſe with us; and it has been thought reaſonable, that the liberty which a Debtor may have to contract new Debts, altho' prejudice may ariſe from thence to his Creditors, ought not to be drawn to ſuch a conſequence. For if it is permitted to this Debtor, to engage himſelf to new Creditors, by accepting a Succeſſion charged with Debts, his Creditors ought not to be debarred from making uſe of the Right which they have on his Goods, to prevent their being ſubjected to the charges of that Succeſſion: and it is fully as equitable to grant them this Separation, as it is to grant it againſt them, to the Creditors of the deceaſed, for the Goods of the Succeſſion.

[a] Ex contrario autem, creditores Titii non impetrabunt ſeparationem. Nam licet alicui adjiciendo ſibi creditorem, creditoris ſui facere deteriorem conditionem. *l.* 1. §. 2. *ff. de ſeparat.*

It is true, that in certain caſes the *Roman* Law did grant the Separation of Goods to the Creditors of the Heir, or Executor; as if he accepted a burdenſome Inheritance, or Succeſſion, in order to defraud his Creditors: and yet even in this caſe it did not grant it eaſily. And this Separation had likewiſe place in ſome other caſes, which it would be needleſs to mention here[b]; but theſe Exceptions were not ſufficient to do juſtice to the Creditors of the Heir, or Executor, and our Uſage allows them this Separation without diſtinction.

[b] *V. l.* 1. §. 5. *& ſeq. ff. de ſeparat.*

This remark concerning our Uſage in this matter, will ſerve as an advertiſement, that we are to extend to the Creditors of the Heir, or Executor, the Rules which ſhall be ſet down in this Title, altho' mention be made only of the Creditors of the deceaſed.

SECT. I.

Of the nature and effects of the Separation.

The CONTENTS.

1. *The caſe of this Separation.*
2. *The Separation is independent on the Mortgage.*
3. *Legatees have the right of Separation.*
4. *Separation for a Debt that is conditional, or of which the term is not yet come.*
5. *If the Heir, or Executor, has already alienated the Goods of the deceaſed, there can be no Separation.*
6. *The Engagement made by the Heir, or Executor, does not hinder the Separation.*
7. *The Separation takes place in a ſecond and third Succeſſion, and beyond that.*
8. *If the Debtor ſucceeds to his Surety, the Separation takes place.*
9. *The Separation does not prejudice the Right againſt the Heir, or Executor.*
10. *Privileges do not hinder the Separation.*

11. *If one of the Heirs, or Executors, be a Creditor, he may demand the Separation.*

I.

1. *The caſe of Separation.*

When the Creditors of a deceaſed Perſon are afraid that the Heir, or Executor, is not ſolvent, they may procure an Order from the Judge, for ſeparating the Effects of the Inheritance, or Succeſſion, from thoſe of the Heir, or Executor, that they may ſecure to themſelves the Goods of the deceaſed their Debtor, againſt the Creditors of his Heir, or Executor [a].

[a] Sciendum eſt ſeparationem ſolere impetrari decreto prætoris: Solet autem ſeparatio permitti creditoribus ex his cauſis, ut putà debitorem quis Seium habuit: hic deceſſit: hæres ei extitit Titius: hic non eſt ſolvendo, patitur bonorum venditionem: creditores Seii dicunt bona Seii ſufficere ſibi, creditores Titii contentos eſſe debere bonis Titii. Et ſic quaſi duorum fieri bonorum venditionem. Fieri enim poteſt, ut Seius quidem ſolvendo fuerit, potueritque ſatis creditoribus ſuis, vel ita ſemel, & ſi non in aſſem, in aliquid tamen ſatisfacere: admiſſis autem commixtiſque creditoribus Titii, minùs ſint conſecuturi, quia ille non eſt ſolvendo: aut minus conſequantur quia plures ſunt. Hic eſt igitur æquiſſimum creditores Seii deſiderantes ſeparationem audiri, impetrareque à prætore, ut ſeparatim quantum cujuſque creditoribus præſtetur. *l.* 1. *ff. de ſeparat.* Eſt juriſdictionis tenor promptiſſimus, indemnitatiſque remedium edicto prætoris creditoribus hæreditariis demonſtratum, ut quoties ſeparationem bonorum poſtulant cauſa cognita, impetrent. *l.* 2. *C. de bon. aut Jud. poſſid.*

Altho' this Rule ſeems to be limited to the Creditors of the deceaſed, yet thoſe of the Heir, or Executor, are in Equity intitled to the ſame Right, as has been obſerved in the Preamble.

II.

2. *The Separation is independent on the Mortgage.*

The right of this Separation is independent on the Mortgage, and Bond Creditors may demand it. For the bare effect of their Debt gives them a Preference on the Eſtate of their Debtor, before the Creditors of his Heir, or Executor, to whom the deceaſed was under no Obligation [b].

[b] *It is not the Mortgage that gives this Right, but the bare quality of Creditor.*

III.

3. *Legatees have the right of Separation.*

The Legatees of the deceaſed have the ſame right to demand this Separation, for they are Creditors to the Succeſſion. But the Creditors of the deceaſed are preferr'd before them, becauſe he could not give Legacies to their prejudice [c].

[c] Quoties hæredis bona ſolvendo non ſunt, non ſolum creditores teſtatoris, ſed etiam eos quibus legatum fuerit, impetrare bonorum poſſeſſionem æquum eſt. Ita ut cùm creditoribus ſolidum acquiſitum fuerit, legatariis vel ſolidum, vel portio quæratur. *l.* 6. *ff. de ſep. l.* 4. §. 1. *eod.*

IV.

4. *Separation for a Debt that is conditional, or of which the term is not yet come.*

A Creditor, or a Legatee, whoſe right depends on a condition, which has not as yet happened, or is ſuperſeded by a term which is not yet come, may notwithſtanding demand the Separation, for their ſecurity [d].

[d] Creditoribus qui ex die, vel ſub conditione debentur, & propter hoc nondum pecuniam petere poſſunt, æquè ſeparatio dabitur, quoniam & ipſis cautione communi conſuletur. *l.* 4. *ff. de ſeparat.*

V.

5. *If the Heir, or Executor has already alienated the Goods of the deceaſed, there can be no Separation.*

If before the Separation was demanded, the Heir, or Executor, had alienated, without any intention of defrauding the Creditors, Goods of the Succeſſion, whether Moveables, or Immoveables, or even the whole Succeſſion, the Creditors of the deceaſed could not demand the Separation of what had been alienated [e]. For the Heir, or Executor, who in that quality was maſter of the Goods, had power to diſpoſe of them. But this alienation, with reſpect to the Immoveables, would be of no prejudice to the Creditors of the deceaſed, who had Mortgages on them: and they might exerciſe their Mortgage, and their Privilege, if they had any, againſt the Poſſeſſors, in the ſame manner as they might have done, if the deceaſed had made the alienation [f].

[e] Ab hærede vendita hæreditate, ſeparatio fruſtrà deſiderabitur: utique ſi nulla fraudis incurrat ſuſpicio. Nam quæ bona fide medio tempore per hæredem geſta ſunt, rata conſervari ſolent. *l.* 2. *ff. de ſeparat.*

Altho' it may ſeem as if this Law related only to the Sale of the Inheritance, or Succeſſion, yet the tenor and motive of it comprehend particular Alienations, and the laſt words of the Law ſhew it plainly enough.

[f] *The Alienations, into what hands ſoever the Lands and Tenements that are mortgaged paſs, do no prejudice to the Mortgage, as has been obſerved in the foregoing Title.*

It follows from this Rule, that with regard to the Immoveables alienated by the Heir, or Executor, the Creditors of the deceaſed, who had no Mortgage on them, have loſt their Right to them, and that there remains to them only the Perſonal Action againſt the Heir, or Executor, and the Right of a Separation of the Goods that may ſtill remain in the hands of the Heir, or Executor. And as to the Moveables alienated by the Heir, or Executor, the Creditors of the deceaſed, even thoſe who have Mortgages, have loſt their Right to them, in the ſame manner as they would have loſt it if the Alienation had been made by the deceaſed; for they had not acquired a Right of Property in them by the death of the deceaſed.

VI.

6. *The Engagements made by the Heir,*

If the Heir, or Executor, had pawned or mortgaged Moveables or Immoveables, belonging to the Inheritance, or Succeſſion,

Executor, &c. not hinder the Separation.

Succeſſion, before the Separation was demanded, the Creditors of the deceaſed will nevertheleſs obtain a Separation of thoſe Goods that are engaged [g]. For the Separation has place as long as the property belongs to the Heir, or Executor, and that Engagement does not diveſt him of it.

[g] Sciendum eſt autem, etiam ſi obligata res eſſe proponatur ab hærede jure pignoris vel hypothecæ, attamen, ſi hæreditaria fuit, jure ſeparationis hypothecario creditori potiorem eſſe eum qui ſeparationem impetraverit. Et ita Severus & Antoninus reſcripſerunt. *l.* 1. §. 3. *ff. de ſeparat.*

VII.

7. The Separation takes place in a ſecond and third Succeſſion, and beyond that.

If the Goods of an Inheritance, or Succeſſion, paſs from the Heir, or Executor, to his Heir, or Executor, and from him again to his Succeſſors, and ſo down to other Heirs, and Executors, ſucceſſively, ſo that the firſt Inheritance, or Succeſſion, and the following ones, are confounded together in the hands of the Heirs and Executors to whom they deſcend, the Creditors of each Inheritance, or Succeſſion, will follow the Goods belonging to the ſame, from one Heir and Executor to the other, and may demand a Separation of them [h].

[h] Secundùm hæc videamus, ſi primus ſecundum hæredem reſcripſerit, ſecundus tertium, & tertii bona veneant: qui creditores poſſint ſeparationem impetrare? & putem ſi quidem primi creditores petant, utique audiendos & adverſus ſecundi & adverſus tertii creditores. Si verò ſecundi creditores petant, adverſus tertii utique eos impetrare poſſe. *l.* 1. §. 8. *ff. de ſeparat.*

VIII.

8. If the Debtor ſucceeds to his Surety, the Separation takes place.

If a Debtor for whom another Perſon was engaged as Surety, happens to ſucceed to him, the Creditor may demand, againſt the Creditors of his Debtor, the Separation of the Goods of the deceaſed, without any oppoſition from the Creditors of the Surety, or thoſe of the Debtor, who ſucceeds to him as Heir, or Executor: for altho' the Obligation of the deceaſed Surety be confounded in the perſon of the Debtor who ſucceeds to him, yet the Creditor does not loſe the Security which he had on the Goods of the Surety, no more than that which he ſtill retains on the Goods of his Debtor [i].

[i] Debitor fidejuſſori hæres extitit, ejuſque bona venierunt: quamvis obligatio fidejuſſionis extincta ſit, nihilominus ſeparatio impetrabitur, petente eo cui fidejuſſor fuerat obligatus: ſive ſolus ſit hæreditarius creditor, ſive plures. Neque enim ratio juris, quæ cauſam fidejuſſionis propter principalem obligationem, quæ major fuit, excluſit, damno debet afficere creditorem, qui ſibi diligenter proſpexerat. Quid ergò ſi bonis fidejuſſoris ſeparatis, ſolidum ex hæreditate ſtipulator conſequi non poſſit? Utrum portio cum cæteris hæredis creditoribus ei quærenda erit, an contentus eſſe debebit bonis quæ ſeparari maluit? Sed cum ſtipulator iſte, non adita fidejuſſoris à reo hæreditate, bonis fidejuſſoris venditis, in reſiduum promiſceri debitoris creditoribus potuerit, ratio non patitur eum in propoſito ſubmoveri. *l.* 3. *ff. de ſeparat.*

What is ſaid in this Article concerning the caſe where the Debtor ſucceeds to the Surety, would take place likewiſe, and that with greater reaſon, in the caſe where the Surety ſucceeds to the Debtor; and the ſame Creditor who can demand Separation of the Goods of the Surety againſt the Creditors of the Debtor who ſucceeds to him, may without doubt demand Separation of the Goods of the Debtor againſt the Creditors of the Surety who ſucceeds as Heir, or Executor, to the Debtor.

IX.

9. The Separation does not prejudice the Right againſt the Heir, or Executor.

The Creditor who having demanded the Separation, has not been able to procure payment out of the Goods of the deceaſed, retains ſtill his Right againſt the Heir, or Executor. But the Creditors of this Heir, or Executor, will be preferred before him [l], if their Credit be prior to his Engagement to the Inheritance, or Succeſſion.

[l] Sed in quolibet alio creditore, qui ſeparationem impetravit, probari commodius eſt, ut ſi ſolidum ex hæreditate ſervari non poſſit, ita demùm aliquid ex bonis hæredis ferat, ſi proprii creditores hæredis fuerint dimiſſi. *l.* 3. §. 2. *ff. de ſeparat.*

X.

10. Privileges do not hinder the Separation.

The Separation may be demanded againſt all Perſons who have Privileges, and even againſt the Exchequer [m].

[m] Sed etiam adverſus fiſcum & municipes impetraretur ſeparatio. *l.* 1 §. 4. *ff. de ſeparat.*

XI.

11. If one of the Heirs, or Executors, be a Creditor, he may demand the Separation.

If among the Co-Heirs, or Co-Executors, there be one of them who is Creditor to the deceaſed, he may demand the Separation, againſt the Creditors of the others, excepting only as to the portion of his Debt, which he himſelf ought to bear [n].

[n] Si uxor tua pro triente patruo ſuo hæres extitit, nec ab eo quicquam exigere prohibita eſt: debitum à cohæredibus petere non prohibetur. Cùm ultra eam portionem qua ſucceſſit, actio non confundatur. Sin autem cohæredes ſolvendo non ſint, ſeparatione poſtulata, nullum ei damnum fieri patiatur. *l.* 7. *C. de bon. auth. jud. poſſ.*

SECT. II.

In what manner the Right of Separation is extinguiſhed, or loſt.

WE ſhall not inſert among the Rules of this Section, that of the *Roman* Law, which did not allow the Separation, after five Years; for this Preſcription is not in uſe with us.

The CONTENTS.

1. *If the confuſion hinders the Separation.*
2. *Novation hinders alſo the Separation.*
3. *Difficulties which are regulated by the prudence of the Judge.*

I.

1. *If the confuſion hinders the Separation.*

IF the Goods of the deceaſed happen to be confounded with thoſe of the Heir, or Executor, ſo as that it is not poſſible to diſtinguiſh, and to ſhew what things are part of the Succeſſion, and what not, the Separation, in this caſe, will not take place; for the confuſion hinders the effect of it. And it ought to be preſumed, that what does not appear to be part of the Succeſſion, belongs to the Heir, or Executor. Otherwiſe the Creditors of this Heir, or Executor, would be obliged to prove the Right which he has to all the things he has in his poſſeſſion; which would neither be juſt, nor poſſible[a].

[a] Præterea ſciendum eſt, poſteaquam bona hæreditaria bonis hæredis mixta ſunt, non poſſe impetrari ſeparationem. Confuſis enim bonis & unitis, ſeparatio impetrari non poterit. Quid ergo ſi prædia extent, vel mancipia, vel pecora, vel aliud quod ſeparari poteſt? Hic utique poterit impetrari ſeparatio. *l.* 1. §. 12. *ff. de ſeparat.*

II.

2. *Novation hinders alſo the Separation.*

If a Creditor of the deceaſed innovates his Debt, and contents himſelf with the obligation of the Heir, or Executor, he cannot demand the Separation of the Goods of the deceaſed. For he is no longer a Creditor to the deceaſed, but to the Heir, or Executor[b].

[b] Illud ſciendum eſt eos demùm creditores poſſe impetrare ſeparationem, qui non novandi animo ab hærede ſtipulati ſunt. Cæterùm, ſi eum hoc animo ſecuti ſunt, amiſerunt ſeparationis commodum. *l.* 1. §. 10. *ff. de ſeparat.*

III.

3. *Difficulties which are regulated by the prudence of the Judge.*

If the Separation being demanded there occur difficulties in it, as if the confuſion of the Goods makes the diſtinction of them uncertain, or that by reaſon of other circumſtances, there ariſes a doubt whether the Separation ought to take place, or not, it will depend on the Judge, to give ſuch order and directions therein, as he ſhall judge to be moſt prudent, according to the condition of the Things[c].

[c] De his autem omnibus admittenda ſeparatio ſit, necne, prætoris erit vel præſidis notio. *l.* 1. §. 14. *ff. de ſeparat.*

TITLE III.

Of the SOLIDITY among two or more DEBTORS, and among two or more CREDITORS.

The Nature of Solidity.

THere are two ways, by which two or more Perſons may be Debtors of one and the ſame Thing. One is, in the caſes where they all of them together owe the whole Debt, but ſo as that each of them owes only a portion of it. And the other, in the caſes where they are all bound for the whole Debt, in ſuch a manner, that any one of them alone may be conſtrained to pay the whole.

This ſecond manner, is what is called Solidity, it giving the Creditor a Right to exact the whole Debt from any one of the Debtors he pleaſes to chuſe. This Right may be acquired two ways; either by the effect of a Covenant, as if ſeveral Perſons borrow a Sum of Money, and oblige themſelves every one for the whole Sum, to the Creditor, who lends only to them all together, and on this condition, of their being bound every one for the whole Sum: or even by the nature of the Debt it ſelf, as if ſeveral Perſons have committed ſome Crime, ſome Offence, or cauſed ſome Damage, thro' a fault that may be imputed to them all. For in this caſe, ſeeing it is the deed of every one of them that has cauſed the Damage, they are all of them obliged in ſuch a manner to repair it, that each of them

in

in particular is bound for the whole. And the being acceſſory to the Crime, or Offence, or the having a ſhare in the Fault, rendring every one of them guilty of it, it makes them conſequently anſwerable for the whole [a].

[a] Si communi conſilio plurium id factum ſit, licere vel cum uno, vel cum ſingulis experiri. Opus enim quod à pluribus pro indiviſo factum eſt, ſingulos in ſolidum obligare. *l.* 15. §. 2. *ff. quod vi aut clam.*

We ſhall ſpeak in this Title, only of the Solidity in Covenants, and the Rules concerning it, which ſhall be here explained, may ſuffice for the other; according as they are capable of being applied to it, and particularly to the Solidity which may ariſe from Faults, which are not accompanied with any Crime or Offence [b], and which are one of the matters that come within the deſign of this Work, the ſame having been treated of in the eighth Title of the ſecond Book.

[b] *See the fifth Article of the firſt Section of Damages occaſioned by Faults,* &c.

This Solidity is to be underſtood only of what concerns the intereſt of the Creditor, and does not hinder the Debt from being divided among the Debtors, according to the portion that each of them ought to bear of it.

As a Debt may be due in the whole by every one of the Debtors to the Creditor, ſo likewiſe there may be another ſort of Solidity, of a Debt due to many Creditors, whether by one Debtor alone, or by many, if the condition of the Debt be ſuch, that as every one of the Debtors who is bound for the whole Debt, may be conſtrained alone to pay the whole, ſo every one of the Creditors among whom the Solidity is, may have alone, and by himſelf, the Right to exact the whole Debt, and to diſcharge the Debtor of it, with reſpect to all the other Creditors.

SECT. I.

Of Solidity among Debtors.

The CONTENTS.

1. *Definition of Solidity.*
2. *There is no Solidity, unleſs it be expreſſed.*
3. *The Solidity does not hinder the diviſion of the Debt among the Debtors.*
4. *In all ſorts of Obligations, the Parties may bind themſelves for the whole.*
5. *The condition of Parties, who are obliged each of them for the whole, may be different.*
6. *Relief of him who pays for the others.*
7. *The Action againſt one of the Debtors, does not make the Solidity to ceaſe.*
8. *The perſonal exception which one of the Debtors may have, does not ſerve for the others.*
9. *The Demand of the Debt from one of the Debtors, hinders Preſcription by the others.*

I.

THE Solidity among Debtors, is the Engagement which obliges every one of them to the Creditor, for the whole Debt [a]. 1. *Definition of Solidity.*

[a] Ubi duo rei facti ſunt, poteſt ab uno eorum ſolidum peti. Hoc eſt enim duorum reorum, ut unuſquiſque eorum in ſolidum ſit obligatus, poſſitque ab alterutro peti. *l.* 3. §. 1. *ff. de duob. reis.* Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ, à quo velit. *l.* 2. *C. eod.* Promittentes ſinguli in ſolidum tenentur. §. 1. *inſt. eod.* See the third Article.

II.

The Obligation of two or more Debtors, who promiſe one and the ſame thing, does not bind every one of them for the whole, unleſs it be particularly ſo expreſſed in the Obligation. And each Debtor will be bound only for his own ſhare of the Debt. And it would be the ſame thing, if two or more Perſons were condemned by a Court of Juſtice, to pay one and the ſame thing, and that the Sentence did not expreſly bear, that each of them ſhould be liable for the whole [c]. For in a doubt, Obligations are to be interpreted in favour of thoſe who are bound [d]. 2. *There is no Solidity, unleſs it be expreſſed.*

[b] Cùm ita cautum inveniretur, *tot aureos recte dari ſtipulatus eſt Julius Carpus: ſpopondimus ego Antonius Achilleus, & Cornelius Dius:* partes viriles deberi. Quia non fuerat adjectum ſingulos in ſolidum ſpopondiſſe, ita ut duo rei promittendi fierent. *l.* 11. *in fin. ff. de duob. reis.* Cùm apparebit emptorem, conductoremve, pluribus vendentem, vel locantem, ſingulorum in ſolidum intuitum perſonam. *l.* 47. *ff. locat.*

[c] Paulus reſpondit, eos qui unâ ſententiâ in unam quantitatem condemnati ſunt, pro portione virili ex cauſa judicati conveniri. *l.* 43. *ff. de re judic.* Si non ſinguli in ſolidum, ſed generaliter tu & collega tuus una & certa quantitate condemnati eſtis, nec additum eſt, ut quod ab alterutro ſervari non poteſt, id alter ſuppleret: effectus ſententiæ pro virilibus portionibus diſcretus eſt. Ideoque parens pro tua portione ſententiæ, ob ceſſationem alterius ex cauſa judicati conveniri non potes. *l.* 1. *C. ſi plures una ſent. cond. ſ.*

[d] See

[d] *See the thirteenth Article of the ſecond Section of Covenants.*

III.

3. The Solidity does not hinder the Diviſion of the Debt among the Debtors.

Altho' it has been agreed that every one of the Debtors ſhould be bound for the whole Debt, yet it is nevertheleſs divided among them: and the Creditor cannot immediately ſue any one of them for the whole Debt. But before he demand from one the portions due by the others, he ought to diſcuſs every one for their own portion: and he may afterwards recover the portions of thoſe who were not able to pay, from the other remaining Debtors. For the Clauſe of Solidity being inſerted in the Obligation, only for the Creditor's greater ſecurity, the Solidity implies the condition, that each Debtor obliges himſelf to pay for the others, only in caſe that ſome of them fail to pay their proportions. Thus, when ſome of the Debtors prove inſolvent, or that becauſe of their abſence the Creditor cannot get payment of their portions of the Debt, the other Debtors anſwer for them, and every one bears his part of the deficiency, in proportion to his own Share[e]. But if the Debtors who are bound each of them for the whole Debt, renounce this benefit, which the Law gives them, and which is called the benefit of Diviſion, every one of them may be conſtrained alone to pay the whole Debt. For every one may renounce what the Law eſtabliſhes in his favour[f]. And he who is forced to pay the whole Debt, will have his Remedy againſt the other Debtors; as ſhall be ſhewn in the ſixth Article.

[e] Si quis alterna fidejuſſione obligatos ſumat aliquos, ſiquidem non adjecerit oportere & unum horum in ſolidum teneri, omnes ex æquo conventionem ſuſtinere. Si verò aliquid etiam tale adjiciatur, ſervari quidem pactum: non tamen mox ab initio unumquemque in ſolidum exigi: ſed interim ſecundùm partem quâ unuſquiſque obligatus eſt. *Nov.* 99. *c.* 1. Si verò minus idonei ſe habere reliqui videantur, ſive omnes, ſive quidam, ſive in partem, ſive in ſolidum, ſive abſentes fortè in illud teneri quod accipere ab aliis non potuit. Sic enim & illis ſervabitur pactionis modus, & nullum ſuſtinebit damnum actor. *Ibid.*

[f] *See the twenty ſeventh Article of the ſecond Section of the Rules of Law.*

It is becauſe of this Right which the Debtors, who are bound each of them for the whole Debt, have to demand the Obligation to be divided, that it is uſual to inſert into Bonds by which the Parties oblige themſelves every one for the whole Debt, a Clauſe whereby it is declared, that the Parties who are bound, renounce this benefit of Diviſion. And this Renunciation has this effect, that altho' all the Debtors be able to pay, yet the Creditor has the liberty to addreſs himſelf to any one of them for the whole Debt, without engaging in the diſcuſſion of every one of them in particular, for their reſpective proportions. This benefit of Diviſion is only for Civil Debts, and not for Crimes.

IV.

4. In all ſorts of Obligations, the parties may bind themſelves for the whole.

The Obligation may be ſuch, as to bind every one of the Parties for the whole Debt, let the cauſe of the Engagement be of what nature ſoever it will. Thus, ſeveral Perſons may oblige themſelves after this manner, in a Loan, in a Sale, in a Contract of Letting and Hiring, in a *Depoſitum*, and in all other ſorts of Engagements. And one may bind himſelf in this manner for a Legacy, for a Guardianſhip, for an Engagement entred into by Order of the Judge, and for all other Cauſes whatſoever.

[g] Eandem rem apud duos pariter depoſui, utriuſque fidem in ſolidum ſecutus, vel eandem rem duobus ſimiliter commodavi, fiunt duo rei promittendi; quia non tantùm verbis ſtipulationis, ſed & cæteris contractibus, veluti emptione, venditione, locatione, conductione, depoſito, commodato, teſtamento. *l.* 9. *ff. de duob. reis.* Duo rei locationis in ſolidum eſſe poſſunt. *l.* 13. §. 9. *ff. locat.* Et ſtipulationum prætoriarum duo rei fieri poſſunt. *l.* 14. *ff. de duob. reis.*

V.

5. The condition of parties who are obliged each of them for the whole, may be different.

Altho' the Solidity renders the condition of the Parties who are bound jointly together equal, in that every one of them is bound for the whole; yet they may be otherwiſe diſtinguiſhed, by differences which render the Obligation more or leſs hard, with reſpect to ſome, than to others. Thus, in the caſe of two Perſons bound ſolidly for the ſame thing, one may give particular Securities which the other does not, as a Pledge, or Surety. Thus, the Obligation of one may be pure and ſimple, whilſt that of the other is conditional; or the term of Payment may be ſhorter for one, than for the other. But theſe differences are no hindrance why the Creditor may not ſue him who owes without a Condition, or whoſe Term is come, without waiting for the Condition or Term of the other[h].

[h] Ex duobus reis promittendi alius in diem, vel ſub conditione obligari poteſt, nec enim impedimento erit dies, aut conditio quominùs ab eo qui purè obligatus eſt, petatur. *l.* 7. *ff. de duob. reis.* §. *ult. inſt. eod.* Duobus autem reis conſtitutis, quin liberum ſit ſtipulatori, vel ab utroque, vel ab altero dumtaxat fidejuſſorem accipere non dubito. *l.* 6. §. 1. *eod. V. l.* 9. §. 1. *eod.*

VI.

6. Relief of him who pays for the others.

If one of the Debtors who are obliged ſolidly together, pays for the others, he ſhall have his Remedy againſt them, for recovering their Proportions, and ſo much as every one of them ought to pay of the Portions of thoſe who

prove inſolvent, but no more. For as the Debt is divided, with reſpect to the Creditor, ſo the Relief of him who pays for the others, is divided alſo, and is limited, with regard to each Debtor, to his Portion, becauſe it is only his Portion that is paid for him[i].

[i] Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ à quo velit. Et ideo ſi probaveris te conventum in ſolidum exolviſſe, Rector provinciæ adjuvare te adverſus eum, cum quo communiter mutuam pecuniam accepiſti, non cunctabitur. *l.* 2. *C. de duob. reis.*

It is in this manner that this Relief ought to have its effect, if the Debtor who pays for the others, has no other Right beſides the indemnity which they owe reciprecally one to another for their portions. For this is the effect of the benefit of Diviſion; and if the Relief were to be always for the whole Debt, each Debtor being ſued in an Action of Relief for the whole, might ſue his fellow Debtors in the ſame manner, which would occaſion a multiplicity of Actions of Relief, full of inconveniencies. But if they have renounced the Benefit of Diviſion with reſpect to the Creditor, and if he who pays for the others takes from the Creditor a Subſtitution to his Rights, the ſaid Debtor ſucceeding in that caſe in the room of the Creditor, he has an Action againſt every one of his fellow Debtors for recovering the whole, excepting the portion of the Debt which he himſelf was bound to pay.

VII.

7. The Action againſt one of the Debtors does not make the Solidity to ceaſe.

If among ſeveral Debtors who are bound every one of them for the whole Debt, the Creditor ſeeks for payment from one of them whom he chuſes, without ſuing the others; he retains nevertheleſs the liberty of bringing his Action afterwards againſt the other Debtors, whether the firſt to whom he addreſs'd himſelf, were ſolvent, or not[l].

[l] Idemque in duobus reis promittendi conſtituimus, ex unius rei electione præjudicium creditori adverſus alium fieri non concedentes. Sed remanere & ipſi creditori actiones integras & perſonales, & hypothecarias, donec per omnia ei ſatisfaciat. *l.* 28. *C. de fidejuſſ.*

VIII.

8. The perſonal Exception which one of the Debtors may have, does not ſerve for the others.

All the Exceptions, which the Parties who are obliged may have againſt the Creditor, and which are not limited to their Perſons, but which have relation to the common Obligation, ſerve for the diſcharge of all the Parties obliged. Thus, for Example, if the Obligation hath been contracted by force, if it is contrary to good manners, if it is null, if it is acquitted; theſe kind of Exceptions which relate to the Obligation, are common to all the Parties who are bound by it. But the perſonal Exceptions which ſome of the Parties obliged may have, ſuch as a Minority, the Interdiction of a Prodigal, or ſome change of Condition, which ſhould make the recovering of the Debt either impoſſible, or difficult, to the Creditor; ſuch as a natural, or civil Death, and the other Obſtacles of the like nature, which might happen on the part of ſome of the Debtors, would not hinder the Effect of the Solidity, with regard to the others[m]. For theſe Exceptions, and theſe Changes, do not extinguiſh the Debt, and each Debtor owes the whole Debt. But if one of the Debtors had a perſonal Exception, which ſhould extinguiſh the Debt, as to his Portion, this Exception would avail the others for that Portion. Thus, for Example, if one of the Debtors ſhould appear to be in his own Right, a Creditor to their common Creditor, his Fellow-Debtors might demand of their common Creditor, a compenſation of the Portion of the Debt which would fall to the ſhare of their Fellow-Debtor, who is Creditor to him. And as to the Overplus of what might ſtill be due from their Creditor, to this their Fellow-Debtor, they could not demand a compenſation of it, unleſs they had otherwiſe the Right of this their Fellow-Debtor[n].

[m] In his qui ejuſdem pecuniæ exactionem habent in ſolidum, vel qui ejuſdem pecuniæ debitores ſunt quatenus alii quoque proſit vel noceat pacti exceptio, quæritur: & in rem pacta omnibus proſunt, quorum obligationem diſſolutam eſſe ejus qui paciſcebatur interfuit. Itaque debitoris conventio fidejuſſoribus proficiet. *l.* 21. *§. ult. ff. de pact.*

Perſonale pactum ad alium non pertinere. *l.* 25. *§. eod. V. tot. Tit. C. de fidejuſſ. min.* Cùm duo eandem pecuniam debent, ſi unus capitis deminutione exemptus eſt obligatione alter non liberetur. Multum enim intereſt, utrum res ipſa ſolvatur, an perſona liberetur; cum perſona liberatur, manente obligatione, alter durat obligatus. Et ideò, ſi aqua & igni interdictum eſt, alicujus fidejuſſor poſteà ab eo datus tenetur. *l. ult. ff. de duob. reis.* See the tenth Article of the firſt Section of Sureties, and the firſt, ſecond, third, fourth, and fifth Articles of the fifth Section of the ſame Title.

[n] Si duo rei promittendi ſocii non ſint, non proderit alteri quod ſtipulator alteri reo pecuniam debet. *l.* 10. *ff. de duob. reis.*

It is in the ſenſe of this Article that we are to underſtand this laſt Text. For it would not be juſt to compel one of the Debtors to pay the portion of him who ſhould have a compenſation to make with the Creditor. Since if this compenſation were not made, and the Debtor who had right to make it ſhould prove inſolvent, thoſe who ſhall have paid for him would be without relief, for having paid what he did not owe, or what he might have juſtly compenſated.

IX.

9. The demand of the Debt from one of the Debtors, hinders Preſcription by the others.

If the Creditor of ſeveral Perſons who are indebted for one and the ſame Thing, brings his Action againſt any one of them, his Demand will preſerve his whole Right, and will hinder Preſcription, with reſpect to the other Debtors[o].

[o] See

[a] *See the ſeventeenth Article of the fifth Section of Poſſeſſion and Preſcription, and the Law which is there quoted, and the fifth Article of the following Section.*

SECT. II.

Of Solidity among Creditors.

The CONTENTS.

1. *Wherein conſiſts this Solidity.*
2. *How it is acquired.*
3. *If one Creditor demands the Debt without the others.*
4. *If he innovates, or makes over the Debt to another.*
5. *The Demand by one is of uſe to the others.*
6. *One of theſe Creditors cannot do any prejudice to the others.*

I.

1. *Wherein conſiſts the Solidity.*

THE Solidity among ſeveral Creditors hath not this effect, that every one of them may appropriate the whole Debt to himſelf, and deprive the others of their Shares; but it conſiſts only in this, that every one of them has a Right to demand and receive the whole, and the Debtor remains quit, with reſpect to them all, by paying the Debt to any one of them [a].

[a] Ex pluribus reis ſtipulandi, ſi unus acceptum fecerit, liberatio contingit in ſolidum. *l.* 13. §. *ult. ff. de acceptil.* Et uni rectè ſolvi. *l.* 31. §. 1. *ff. de novat.* Ex hujuſmodi obligationibus & ſtipulationibus ſolidum ſingulis debetur. §. 1. *inſt. de duob. reis.* Alter debitum accipiendo omnium perimit obligationem. *d.* §.

II.

2. *How it is acquired.*

This Solidity depends on the Title which may give it, and on that which may ſhew, that what is owing to ſeveral Perſons, is due to every one of them in the whole. Thus, when two Perſons lend a Sum of Money, or ſell a Houſe, or Lands, they may treat in ſuch a manner, as that the Payment may be made to any one of the two ſingly; and they will be Creditors each of them for the whole, either of the Money lent, or of the Price of the Sale. But if it were only ſaid, that a Debtor ſhould owe a Sum of Money to two Creditors, without mentioning any thing of the Solidity, in that caſe, each Creditor could demand no more than his own Portion [b].

[b] Cum tabulis eſſet comprehenſum, *illum & illum centum aureos ſtipulatos*, neque adjectum, *ita ut duo rei ſtipulandi eſſent*, virilem partem ſinguli ſtipulati videbantur. *l.* 11. §. 1. *ff. de duobus reis.*

It appears by this Text that theſe words duo rei ſtipulandi *implied the Solidity.*

III.

3. *If one Creditor demands the Debt without the others.*

If in the caſe of two or more Creditors, where each of them has a Right to demand and receive the whole Debt, one of them does demand it; the Payment cannot be made to the other Creditors without him. For he has determined the Debtor not to pay, unleſs he conſents to it: and it may ſo happen, that thoſe who do not put in their Claim, may have loſt their Right [c].

[c] Ex duobus reis ſtipulandi ſi ſemel unus egerit, alteri promiſſor pecuniam offerendo, nihil agit. *l.* 16. *ff. de duob. reis.*

IV.

4. *If he innovates, or makes over the Debt to another.*

When one of the Creditors of one and the ſame Debt, may alone demand the whole Debt, and receive it, he may alſo innovate the Debt, and delegate, or aſſign it over to others; for he might diſcharge the Debt, and even give an Acquittance, without receiving any thing [d]. But this Creditor ought to account to the others for theſe Changes [e].

[d] Si duo rei ſtipulandi ſint, an alter jus novandi habeat, quæritur: & quid juris unuſquiſque ſibi acquiſierit. Ferè autem convenit, & uni rectè ſolvi, & unum judicium petentem, totam rem in litem deducere: item unius acceptilatione perimi utriuſque obligationem. Ex quibus colligitur unumquemque perinde ſibi acquiſiſſe, ac ſi ſolus ſtipulatus eſſet, excepto eo, quod etiam facto ejus cum quo commune jus ſtipulantis eſt, amittere debitorem poteſt. Secundum quæ, ſi unus ab aliquo ſtipuletur, novatione quoque liberare eum ab altero poterit, cùm id ſpecialiter agit: eo magis cum eam ſtipulationem ſimilem eſſe ſolutioni exiſtimemus. Alioquin, quid dicemus, ſi unus delegaverit creditori ſuo communem debitorem, iſque ab eo ſtipulatus fuerit, aut mulier fundum juſſerit doti promittere viro, vel nuptura ipſi, doti eum promiſerit? Debitor ab utroque liberabitur. *l.* 31. §. 1. *ff. de Novat.* See what Novation and Delegation are, in the Titles where they are expreſſly treated of.

[e] *See the ſixth Article.*

V.

5. *The Demand by one is of uſe to the others.*

If where ſeveral Perſons have one and the ſame Right, one of them brings his Action for the Debt, his Demand interrupts the Preſcription againſt the other Creditors [f].

[f] *See the ninth Article of the foregoing Section, and what is cited on it.*

VI.

6. *One of theſe Creditors cannot do any prejudice to the others.*

The uſe which one of the Creditors may make of the Right to demand alone, and receive the whole Debt, cannot hurt the others. And he ought to account

account to them for the manner in which he ſhall have uſed this Right[g].

[g] *This is a conſequence of the nature of this kind of Solidity among Creditors. For they have not left their Debt to the hazard which of them can get payment of it firſt.*

TITLE IV.

Of CAUTIONS, or SURETIES.

Uſe of Cautions and Sureties.

NO body is ignorant of the frequent Uſe of Cautions, or Sureties. Theſe two Names are given to thoſe who oblige themſelves for others whoſe Obligation is not thought ſufficient, whether it be for Money, or for other Cauſes. They are called Cautions, becauſe their Obligation is a Security: They are called Sureties, becauſe it is upon their Faith that thoſe to whom they engage themſelves rely. This is the original Signification of theſe two words.

The Obligation therefore of Cautions, or Sureties, is an Acceſſory to another Obligation. Thus we call the Perſon for whom the Surety binds himſelf, the principal Debtor.

The Uſe of Sureties extends to all manner of Engagements, and comprehends two ſorts of Suretiſhips. One is concerning the Payment of a Sum of Money, or the performance of ſome other Engagement; ſuch as the Undertaking of a Work, a Warranty, and others of the like nature, to aſſure the perſon to whom the Surety engages himſelf, that what is promiſed by the principal Debtor, ſhall be performed. The other ſort of Suretiſhip relates to the validity of the Obligation, in the caſes where it may be liable to be vacated, as if the principal Debtor were a Minor, altho' able to pay, the Engagement of the Surety would be not only to pay the Debt, if the Minor's Obligation were not annulled, but to make good the Obligation, in caſe the Minor ſhould be relieved from it, and to pay for him[a].

[a] *See the ſecond Article of the fifth Section.*

Suretiſhips may be divided into three ſorts. The firſt is of thoſe that are given willingly, and by mutual conſent, for all manner of Engagements, whether they be formed by Covenant, or otherwiſe. Thus, one gives Caution for a Loan, for a Warranty, for the price of a Sale, for the rent of a Leaſe, and for other Obligations, which are contracted by Covenants. Thus Tutors and Guardians ſometimes give Security.

The ſecond ſort is of Suretiſhips enjoined by ſome Law. Thus, by the *Roman* Law, Plaintiffs and Defendants were obliged to give Caution for ſeveral cauſes relating to Judicial Proceedings[b]. Thus, in *France*, by an Edict of the Month of *January* 1557, thoſe to whom any thing falls by Devolution, are obliged to give Caution *to pay what ſhall be adjudged*. And there are other caſes, in which the Ordinances oblige to give Caution, which it would be to no purpoſe to mention here.

[b] *V. Tit. inſt. de ſatiſd. & ff. lib. 2. Tit. 6. 8. 9. 11.*

The third ſort of Suretiſhips, is of thoſe which are ordered by the Judge, whether he does it at the inſtance, or upon an offer of the parties, or *ex officio*. Thus, ſometimes a thing that is in diſpute is adjudged to one of the parties proviſionally, he giving Security to reſtore it, if it be ſo decreed: Thus, Bail is ordered to be given for the Appearance of a Priſoner, who is ſet at liberty on this condition: Thus, in ſettling the rank of payment among Creditors, it is ordered that thoſe who ſhall receive Sums which may be liable to be demanded back, ſhall give Caution to pay them back again to prior Creditors, to whom the ſaid Sums ſhall be found to be due, as in the caſe of a conditional Debt, as has been remarked on the ſeventeenth Article of the third Section of Pawns and Mortgages.

[*As to what the* Roman *Law directed in relation to Caution being given by all Plaintiffs and Defendants, for proſecuting and defending the Suit, and paying what ſhould be adjudged, either for Damages or Expences, this is ſtrictly obſerved in the High Court of Admiralty of* England. *Clarke's* Praxis Curiæ Admiralitatis Angliæ. *Tit.* 11. 13.]

SECT. I.

The nature of the Obligation of Cautions, or Sureties, and the manner in which it is contracted.

The CONTENTS.

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3. *It may be given for a Natural Obligation.*
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11. *The Minor ſaves his Surety harmleſs, if he is not relieved from his Obligation.*
12. *The giving of counſel, and recommending, do not bind one as Surety.*
13. *Qualities of Caution, or Security, taken in a Court of Juſtice.*
14. *Heirs, or Executors, of Sureties.*
15. *When a Surety is once received, he cannot afterwards be rejected.*
16. *The Sureties for perſons that are accountable, are not bound for the penalties to which they may be liable.*

I.

1. *Definition of Sureties.*

SUreties, are thoſe who oblige themſelves for other perſons, and who anſwer in their names for the ſecurity of ſome Engagement, ſuch as a Loan, a Warranty, or any other Obligation [a].

[a] Aut proprio nomine quiſque obligatur, aut alieno. Qui autem alieno nomine obligatur, fidejuſſor vocatur. Et plerumque ab eo quem proprio nomine obligamus alios accipimus qui eadem obligatione teneantur: dum curamus, ut quod in obligationem deduximus, tutius nobis debeatur. *l.* 1. §. 8. *ff. de oblig. & act.* See the following Article.

II.

2. *Caution may be given for all manner of Engagements.*

There is no honeſt and lawful Engagement, to which we may not add the ſecurity of a Caution, to that which the principal Debtor gives himſelf [b], provided that the giving of the ſaid Caution be not contrary to good manners. For there are lawful Engagements, in which it would not be decent to give Security [c].

[b] Omni obligationi fidejuſſor accedere poteſt. *l.* 1. *ff. de fidejuſſ.* Et generaliter omnium obligationum fidejuſſorem accipi poſſe nemini dubium eſt. *l.* 8. §. 6. *eod.* §. 1. *inſt. eod.*

[c] *See the ninth Article.*

III.

3. *It may be given for a Natural Obligation.*

This uſe of Suretiſhips in all manner of Engagements, extends not only to thoſe which are made with the mutual conſent of the parties by Covenants, to thoſe of Tutors and Curators, to thoſe even of Sureties themſelves; (for we may take ſecurity for a Surety;) and in general, to all other ſorts of Engagements, in which the Civil Laws give the Creditor an Action againſt the perſon who is obliged, and which are called, for this reaſon, Civil Obligations [d]: But Caution may alſo be given for that ſort of Obligations, which are called barely Natural, of which we have ſpoken in the ninth Article of the fifth Section of Covenants. For in theſe ſorts of Obligations, there is formed a natural Engagement, which he who becomes Surety for it makes good in his perſon, altho' in the perſon of the principal Debtor it be uſeleſs. Thus, in the Cuſtoms where the Wife who is in the power of her Huſband cannot be bound any manner of way, if the Huſband becomes Surety for the Obligation of his Wife, he ſhall be obliged, altho' the Obligation of the Wife remains always null [e].

[d] Præterea ſciendum, fidejuſſorem adhiberi omni obligationi poſſe, ſive re, ſive verbis, ſive conſenſu. Pro eo etiam qui jure honoratio obligatus eſt, poſſe fidejuſſorem accipi, ſciendum eſt. *l.* 8. §. 1 & 2. *de fidejuſſ.*

A tutore, qui teſtamento datus eſt, ſi fuerit fidejuſſor datus, tenetur. *d. l.* 8. §. 4. *ff. de fidejuſſ.*

Pro fidejuſſore fidejuſſorem accipi nequaquam dubium eſt. *d. l.* 8. §. *ult.*

This Surety of a Surety that is taken in a Court of Juſtice, is termed in France *a Certifier; becauſe he certifies, or undertakes that the firſt Surety is good.*

[e] Fidejuſſor accipi poteſt quoties eſt aliqua obligatio *civilis*, vel *naturalis* cui applicetur. *l.* 16. §. 3. *ff. de fidej.* At nec illud quidem intereſt utrum *civilis*, an *naturalis* ſit obligatio: cui adjicitur fidejuſſor. Adeò quidem, ut pro ſervo quoque obligetur. §. 1. *inſt. eod.*

See the ninth Article of the fifth Section of Covenants.

IV.

4. *Security for a Debt to be contracted.*

We may give Security not only for a preſent Obligation, or for one that has

has been already contracted, but alſo for an Obligation to be contracted; as if he who foreſees a Buſineſs for which he may ſtand in need of Money, gives before-hand the ſecurity of a Surety, to the perſon who is to lend him the Money, the ſaid Surety obliging himſelf before-hand for the Money that is to be lent. And this might happen, if, for Example, he who is to be Surety ſhould have affairs to call him away before the Money is actually paid to the Borrower, or in other caſes, and for other cauſes, as for the Warranty of a Sale, or ſome other Engagement [f].

[f] Stipulatus ſum à reo, nec accepi fidejuſſorem, poſteà volo adjicere fidejuſſorem, ſi adjecero, fidejuſſor obligatur. *l. 6. ff. de fidejuſſ.* Fidejuſſor & præcedere obligationem, & ſequi poteſt. §. 3. *inſt. eod.*

Adhiberi autem fidejuſſor tam futuræ, quam præſenti obligationi poteſt, dummodò ſit aliqua, vel naturalis futura obligatio. *l. 6. §. ult. ff. de fidejuſſ.* Si ita ſtipulatus à Seio fuero, *quantam pecuniam Titio quandoque credidero, dare ſpondes?* Et fidejuſſores accepero: deinde Titio ſæpiùs credidero: nempe Scius in omnes ſummas obligatus eſt, & per hoc fidejuſſores quoque. *l. 55. eod.* Fidejuſſor futuræ quoque actionis accipi poteſt. *l. 50. ff. de pecul.*

V.

5. The Surety can be bound for no more than the Debtor.

Of what nature ſoever the principal Obligation be, the Engagement of the Surety can never be harder than that of the principal Debtor. For his Obligation is only an Acceſſory to the other [g]; and if he ſhould oblige himſelf to any thing more, or to conditions that are more burdenſome, he would be Surety only for what is contained in the principal Obligation. And the Obligation for the overplus will not be reckoned a part of the Suretiſhip, but his own proper Debt, if by the circumſtances the Obligation for the overplus ought to ſubſiſt.

[g] Illud commune eſt in univerſis qui pro aliis obligantur, quod ſi fuerint in duriorem cauſam adhibiti, placuit eos omninò non obligari. *l. 8. §. 7. ff. de fidejuſſ. l. 16. §. 1. & 2. eod.*

Hi qui *acceſſionis loco* promittunt in leviorem cauſam accipi poſſunt, in deteriorem non poſſunt. *l. 34. eod.*

Fidejuſſores ita obligati non ſunt, ut plus debeant quàm debet is pro quo obligantur. Nam eorum obligatio acceſſio eſt principalis obligationis: nec plus in acceſſione poteſt eſſe, quàm in principali re. §. 5. *inſt. eod.*

See the Inſt Text quoted on the following Article.

VI.

6. But he may be bound for leſs.

The Obligation of the Surety may be leſs than that of the principal Debtor. Thus, he may oblige himſelf only for a part of the Debt, or of ſome other Engagement [h]. Thus, he may oblige himſelf only upon ſome condition, altho' the Debt be pure and ſimple [i]. Thus, he may take a longer term than that of the principal Obligation [l], or a place more convenient for payment [m]. And in a word, he may ſoften his condition all the ways they can agree on.

[h] Fidejuſſores & in partem pecuniæ & in partem rei rectè accipi poſſunt. *l. 9. ff. de fidejuſſ.*

At ex diverſo ut minus debeant obligari poſſunt. Itaque ſi reus decem aureos promiſerit, fidejuſſor in quinque rectè obligatur. §. 5. *inſt. eod.*

[i] Item ſi ille pure promiſerit, fidejuſſor ſub conditione promittere poteſt. *d.* §. 5. *l. 6.* §. 1. *ff. eod.*

[l] Non ſolùm autem in quantitate, ſed etiam in tempore minus aut plus intelligitur. Plus eſt enim ſtatim aliquid dare: minus eſt poſt tempus dare. *d.* §. 5.

[m] Qui certo loco dari promiſit, aliquatenus duriori conditioni obligatur. —— Quare ſi reum purè interrogavero, & fidejuſſorem cum adjectione loci accepero, non obligabitur fidejuſſor. *l. 16.* §. 1. *ff. de fidejuſſ.*

VII.

7. Surety without the knowledge of the Debtor.

One may become Surety without an Order from the perſon for whom he binds himſelf, and even without his knowledge [n]. For on the part of the Creditor, it is juſt that he be at liberty to take his Security independently of the will of his Debtor: and as to the Surety himſelf, he may do this good office to his abſent Friend, in the ſame manner as one may take care of the affairs of an abſent perſon [o].

[n] Fidejubere pro alio poteſt quiſque, etiamſi promiſſor ignoret. *l. 30. ff. de fidejuſſ.* Fidejuſſori negotiorum geſtorum eſt actio, ſi pro abſente fidejuſſerit. *l. 20.* §. 1. *ff. mand.*

[o] *See the Title of thoſe who manage the Affairs of others without their knowledge.*

VIII.

8. In Crimes, there is no giving of Security, no more than Warranty.

In the matter of Crimes and Offences, thoſe who commit them by order of other perſons, or who make themſelves Accomplices of them, cannot take Security, nor Warranty, for being ſaved harmleſs from the events which may follow thereupon; nor for aſſuring to themſelves the profits which may ariſe from thence. For the Obligation of ſuch a Surety, and of ſuch a Warranty, would be another Crime. But he who has committed a Crime, or an Offence, may give Security for the Civil Intereſt, and even for the Fines, and other pecuniary Mulcts, which he may have incurred by his Offence. For it is juſt, and for the publick Good, that they ſhould be acquitted [p].

[p] Sed & ſi ex delicto oriatur actio, magis putamus teneri fidejuſſorem. *l. 8. §. 5. ff. de fidejuſſ.* Id quod vulgò dictum eſt, *maleficiorum fidejuſſorem accipi non poſſe*, non ſic intelligi debet, ut in pœnam furti is cui furtum factum eſt, fidejuſſorem accipere non poſſit. Nam pœnas ob maleficia ſolvi magna ratio ſuadet. Sed ita potius, ut qui cum alio cum quo

quo furtum admiſit, in partem quam ex furto ſibi reſtitui deſident, fidejuſſorem obligare non poſſit. Et qui alieno hortatu ad furtum faciendum provectus eſt, ne in furti pœna ab eo qui hortatus eſt, fidejuſſorem accipere poſſit. In quibus caſibus illa ratio impedit fidejuſſorem obligari, quia ſcilicet in nullam rationem adhiberur fidejuſſor: cùm flagitioſæ rei ſocietas coita nullam vim habet. *l.* 70. §. *ult. ff. de fidejuſſ.*

IX.

9. Some honeſt and fair Engagements, in which it is not lawful to take Security.

There are ſome honeſt and lawful Engagements, in which one cannot take Security, becauſe the nature of the Engagement would make the taking of Security to be reckoned an undecent thing. Thus, it would be contrary to good manners for a Partner to give Security to his Co-Partner, that he will not cheat him: or for an Umpire to give Security that he will pronounce Sentence in the matter referred to him, or judge uprightly. Thus, in a caſe of another nature, one ought not to take Security for the reſtitution of a Dowry, neither from the Huſband, nor from other perſons who are to receive it for his uſe; ſuch as his Father, or his Guardian. For the Dowry being an Acceſſory to the Engagement of the Marriage, it would be unworthy of the ſtrict Union of Matrimony, which puts the Wife under the power of the Huſband, with whom ſhe intruſts her perſon, to demand any ſuch Security [q]. And it would be a ſeed of diſcord in Families, which ought to be united by Marriages. But the Father and Mother of the Huſband may oblige themſelves for their Son, to make reſtitution of the Dowry. For the Obligation of their Goods, is the ſame with that of the Son, who is to inherit them. And it is uſual, that he who marries has no other Eſtate beſides what his Parents give him, either at the time of the Marriage, or at their death; which makes their Obligation for the Security of the Dowry to be juſt and reaſonable.

[q] Sive ex jure, ſive ex conſuetudine lex proficiſcitur, ut vir uxori fidejuſſorem, ſervandæ dotis exhibeat, tamen jubemus eam aboleri. *l.* 1. *C. de fidej. vel mand. dot. dend.*

Generali definitione conſtitutionem priſtinam ampliantes ſancimus, nullam eſſe ſatisdationem, vel mandatum pro dote exigendum vel à marito, vel à patre ejus, vel ab omnibus qui dotem ſuſcipiunt. Si enim credendam mulier ſeſe, ſummque dotem patri mariti exiſtimavit, quare fidejuſſor vel alius interceſſor exigitur, ut cauſa perfidiæ in connubio eorum generetur. *l.* 2. *eod.* Seipſam marito committit. *l.* 8. *C. de pact. conv.*

Seeing our Uſage allows an indefinite liberty of inſerting in Contracts of Marriage all ſorts of Covenants, and even ſome which would be unlawful in other Contracts, ſuch as the Inſtitution of an Heir that is irrevocable; it would ſeem that for that reaſon, and in conſideration of the favour of Dowries, the taking of Security for a Dowry ought not to be forbidden, and that the Surety who binds himſelf on that account, ought not to be diſcharged from his Engagement, eſpecially if the Dowry be in danger. But nevertheleſs we have thought proper to inſert here the Rule which was preſcribed in this matter by the Chriſtian Emperors, and which is ſo agreeable to the mutual love and confidence which our Religion enjoins to married perſons.

X.

10. The Surety is not diſcharged by the Reſtitution of the principal Debtor.

Altho' the Obligation of a Surety be only an Acceſſory to that of the principal Debtor, yet he who has bound himſelf Surety for a perſon who may get himſelf relieved from his Obligation, ſuch as a Minor, or a Prodigal who is interdicted, is not diſcharged from his Suretiſhip by the Reſtitution of the principal Debtor: and the Obligation ſubſiſts in his perſon; unleſs the Reſtitution were grounded upon ſome fraud, or other vice which ſhould have the effect to annul the right of the Creditor. But the bare Reſtitution of the principal Debtor, is an event which the Creditor did foreſee and guard againſt, by ſecuring his Debt by the additional Obligation of a Surety, who on his part could not be ignorant of this conſequence of his Engagement [r].

[r] Si ea quæ tibi vendidit poſſeſſionem interpoſito decreto præſidis, *ætatis tantummodò auxilio* juvatur, non eſt dubium, fidejuſſorem ex perſona ſua obnoxium eſſe contractui. Verùm ſi dolo malo apparuerit contractum interpoſitum eſſe: manifeſti juris eſt, utrique perſonæ tam venditoris, quàm fidejuſſoris conſulendum eſſe. *l.* 2. *C. de fidejuſſ. min.* Marcellus ſcribit, ſi quis pro pupillo ſine tutoris authoritate obligato, prodigove vel furioſo fidejuſſerit, magis eſſe ut ei non ſubveniatur. *l.* 25. *ff. de fidejuſſ.* Quòd ſi pro furioſo jure obligato fidejuſſorem accepero, tenetur fidejuſſor. *l.* 70. §. 4. *eod.* Rei autem cohærentes exceptiones, etiam fidejuſſoribus competunt, ut rei judicatæ, doli mali, juriſjurandi, quod metus cauſa factum eſt——Idem dicitur, & ſi pro filiofamilias contra ſenatuſconſultum quis fidejuſſerit, aut pro minore vigintiquinque annis circumſcripto. Quod ſi deceptus ſit in re, tunc nec ipſe ante habet auxilium, quam reſtitutus fuerit, nec fidejuſſori danda eſt exceptio. *l.* 7. *in f. ff. de excep.*

We muſt obſerve from this laſt Law, the difference which the Romans *made between the Surety for Money borrowed by a Son who was under his Father's Juriſdiction, and the Surety of a Minor. The Surety for a Son living under the Paternal Authority was not obliged, no more than the Son himſelf, becauſe of the vice of the Obligation which was prohibited by Law.* l. 9. §. 3. ff. de Senat. Maced. *But the Surety for a Minor was not diſcharged with him, if the Minor was deceived only in the thing, and not thro' any fraud uſed by the Creditor; as for example, if the Minor having borrowed Money, he had not laid it out to any profitable uſe. For in this caſe the Obligation is annulled only becauſe of the Minority, and not on account of any vice in the Obligation.* Ætatis tantummodò auxilio. *d. l.* 2. *Cod. de fidej. min.*

See the firſt, ſecond, third, fourth and fifth Articles of the fifth Section of this Title, and the eighth Article of the firſt Section of the Solidity among two or more, &c. As to the Obligation of a Son ſubject to the Paternal Authority.

Authority, ſee the fourth Section of the Loan of Money and other things to be reſtored in kind.

XI.

The Surety for a Minor has his Action of Relief againſt him to ſave him harmleſs, if the Obligation has been profitable to the Minor. But if it has not been advantagious to him, and he, on that account has been relieved from it, he may likewiſe be relieved from his Obligation to indemnify his Surety [f].

es "if

relieved from his Obligation.

[f] Poſtquàm in integrum ætatis beneficio reſtitutus es, periculum evictionis emptori, cui prædium ex bonis paternis vendidiſti, præſtare non cogeris. Sed ea res fidejuſſores, qui pro te intervenerunt, excuſare non poteſt. Quare mandati judicio, ſi pecuniam ſolverint, aut condemnati fuerint, convenieris: modò ſi eo quoque nomine reſtitutionis auxilio non juvaberis. *l.* 1. *C. de fidej. min.* See the ſecond Article of the fifth Section.

XII.

12. *The giving of counſel and recommending, do not bind one as Surety.*

The Engagement of Sureties conſiſts in this, that they oblige themſelves in their own names, to be anſwerable for the effect of the Obligation for which they become Sureties. But thoſe who without any deſign of engaging themſelves, recommend the perſon who is to be bound, or adviſe the treating with him, do not by that means bind themſelves as Sureties; unleſs there were on their part ſome fraud, or other circumſtances, which ought to make them Guarantees of the event [t].

[t] *See the laſt Article of the firſt Section of Proxies, Mandates,* &c.

XIII.

13. *Qualities of Caution, or Security taken in a Court of Juſtice.*

When a private perſon receives Security, he accepts, or rejects, as he thinks good, thoſe who are offered to him as Sureties, and he ſettles his Security in ſuch manner as he and his Debtor can agree. But when Caution, or Security, is taken in a Court of Juſtice, it is the Office of the Judge to receive or reject it, according as the perſon who offers the Security, and the Surety himſelf, can ſhew that the Security is ſufficient; which depends on three qualities that are to be conſidered in Sureties, according to the Engagements for which they are to be anſwerable; the ſolvency of the Perſons, the facility of ſuing them at Law, and the validity of their Engagement. Thus, the want of an Eſtate, the diguity of the Perſons, and the other qualities which make the ſuing them at Law difficult, and their incapacity of being bound, are cauſes for rejecting the Cautions, or Sureties, that are offered in a Court of Juſtice [u].

[u] Fidejuſſor in judicio ſiſtendi cauſâ locuples videtur dari, non tantùm ex facultatibus, ſed etiam ex conveniendi facilitate. *l.* 2. *ff. qui ſatisd. cog.* Si fidejuſſor non negetur idoneus, ſed dicatur habere fori præſcriptionem, & metuat petitor ne jure fori utatur: videndum quid juris ſit, & Divus Pius (in & Pomponius libro epiſtolarum refert, & Marcellus libro tertio digeſtorum, & Papinianus libro tertio quæſtionum) Cornelio Proculo reſcripſit, meritò petitorem recuſare talem fidejuſſorem. Sed ſi aliàs caveri non poſſit, prædicendum ei, non uſurum eum privilegio ſi conveniatur. *l.* 7. *eod.*

Qui ſatisdare promiſit, ita demùm impleſſe ſtipulationem ſatisdationis videtur, ſi eum dederit acceſſionis loco, qui *obligari poteſt, & conveniri.* l. 3. ff. de fidej.

Altho' ſome of theſe Texts do not relate to all manner of Sureties, yet we may apply them to the Rule explained in this Article.

XIV.

14. *Heirs or Executors of Sureties.*

The Engagements of Sureties paſs to their Heirs [x], or Executors, excepting ſuch as affect the perſon of the Surety, ſuch as Impriſonment, or the like, if the Engagement was ſuch that the Surety was bound to deliver himſelf up priſoner. For he had power to bind his own perſon, but not the perſon of his Heir, or Executor. And as the Heirs, or Executors of Sureties enter into their Engagements, ſo they have likewiſe the ſame benefits which the Laws grant to the Sureties themſelves [y].

[x] Fidejuſſor & ipſe obligatur, & hæredem obligatum relinquit, cùm rei locum obtineat. *l.* 4. §. 1. *ff. de fidejuſſ.* §. 2. *inſt. eod.*

[y] Sicut ipſi fidejuſſori ita hæredibus quoque eorum ſuccurrendum. *l.* 27. §. 3. *eod,*

See what theſe benefits are, Sect. 2. *Art.* 1. *and* 6. *Sect.* 4. *Art.* 1. *See the Remark on the firſt Article of the fourth Section.*

XV.

15. *When a Surety is once received, he cannot afterwards be rejected.*

He who has accepted of a Surety, having once declared his approbation of him, cannot afterwards demand another, even altho' the ſaid Surety ſhould prove inſolvent [z].

[z] Planè ſi non idoneum fidejuſſorem dederit, magis eſt ut ſatisfactum ſit: quia qui admiſit eum fidejubentem, idoneum eſſe comprobavit. *l.* 3. *in f. ff. de fidejuſſ.*

XVI.

16. *The Sureties for perſons that are accountable, are not bound for the Penalties to which they may be liable.*

The Sureties for Officers, and other perſons imployed in the Receipt of the publick Money, are not anſwerable for the Pecuniary Mulcts, to which the ſaid perſons may be liable, on account of their miſdemeanor [a].

[a] Fidejuſſores Magiſtratuum in pœnam vel multam quam non ſpopondiſſent non debere convenire decrevit. *l.* 68. *ff. de fidejuſſ.* Fidejuſſores Magiſtratuum in his quæ ad reipublicæ adminiſtrationem pertinent teneri, non in his quæ ob culpam, vel delictum eis pœnæ nomine irrogentur, tam mihi quàm Divo Severo patri meo placuit. *l. ult. C. de per. eor. qui pro mag. int.*

SECT.

SECT. II.

Of the Engagements of the Surety to the Creditor.

The CONTENTS.

1. *The Surety cannot be ſued till after the diſcuſſion of the principal Debtor.*
2. *Exception as to Judicial Sureties.*
3. *Another Exception, when the Debtor is abſent, and has no viſible Eſtate.*
4. *The diſcuſſion does not extend to Goods alienated by the Debtor.*
5. *The Surety cannot oblige the Creditor to ſue the Debtor.*
6. *In what manner ſeveral Sureties are bound.*
7. *If the Obligation of one of the Sureties is annulled, the others anſwer for his portion.*
8. *What are the Exceptions of the Debtor, that are common to the Surety.*
9. *The Engagement of the Surety follows the Obligation.*

I.

1. The Surety cannot be ſued till after the diſcuſſion of the principal Debtor.

THE Obligation of the Surety being only acceſſory to, and coming in aid of that of the principal Debtor, and for ſatisfying what he ſhall fail to acquit, the ſaid Obligation is as it were conditional, not to have its effect, except in the caſe where the Debtor is not able to pay. Thus, the Surety cannot be ſued, till after the Creditor has uſed all neceſſary diligence for the diſcuſſion of the principal Debtor, and has not been able to recover payment [a].

[a] Qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis quos pro eo obligavit ſuum conſequi. §. *ult. inſt. de replic.*

Si quis igitur crediderit, & fidejuſſorem, aut mandatorem, aut ſponſorem acceperit, is non primùm adverſus mandatorem, aut fidejuſſorem, aut ſponſorem accedat: neque negligens debitoris interceſſoribus moleſtus ſit: ſed veniat primùm ad eum qui aurum accepit, debitumque contraxit, & ſi quidem inde receperit, ab aliis abſtineat. Quid enim ei in extraneis erit à debitore completo? ſi vero non valuerit à debitore recipere aut in partem, aut in totum, ſecundùm quod ab eo non potuerit recipere, ſecundùm hoc ad fidejuſſorem, aut ſponſorem, aut mandatorem veniat: & ab illo quod reliquum eſt ſumat. *Nov.* 4. *c.* 1 In id quod defuiſſet fidejuſſores conveniendos. *l.* 68. §. 1. *in f. ff. de fidejuſſ. V. l.* 13. *in f. l.* 55. *in f. eod. l.* 116. *ff. de verb. oblig.*

Beſides this benefit of Diſcuſſion which is explained in this Article, there are two others which Sureties have. See the ſixth Article of this Section, and the firſt Article of the fourth Section, with the Remark upon it. *This benefit of Diſcuſſion is granted only to thoſe who are bound barely as Sureties; for their Obligation is explained by this quality. But if thoſe who with regard to the principal Debtor are only his Sureties, make themſelves principal Debtors with reſpect to the Creditor, and oblige themſelves, as is uſual, in this quality, equally with the principal Debtor, for the whole Debt, renouncing this benefit of Diſcuſſion, they are no more to be conſidered as Sureties.* See the third Article of the firſt Section of the Solidity among two or more, *&c.* with the Remark on it. See the two following Articles.

II.

2. Exception as to Judicial Sureties.

Thoſe who are Judicial Sureties, may be proſecuted without a previous diſcuſſion of the principal Debtor [b], not only becauſe they oblige themſelves to the Court of Juſtice, the Authority whereof requires it ſhould be ſo; but alſo becauſe of the nature of the Debts in which this Security may be found to be neceſſary. For they are ſuch, that one ought not to allow in them the delay of a diſcuſſion. Thus, for Example, if purſuant to an Order of Juſtice for the payment of Creditors, one of them receives a Sum of Money, on condition that he give Security to reſtore it to other perſons to whom the ſaid Money ought to go, in a certain caſe, as that of the birth of a Child, who is called to a Subſtitution, or other the like caſe; the giving of this Security is ordained only to the end that the ſaid Money may be immediately repaid, if the caſe does happen, and that it be delivered to the perſon who ought to have it, in the ſame manner as if the Money had remained in the hands of the Receiver of all Monies depoſited in Court, which ought to be delivered up without delay. And we ſhall ſee in the other caſes of Judicial Sureties, a like Equity for not admitting in them the benefit of diſcuſſion.

[b] In ſtipulatione judicatum ſolvi, poſt rem judicatam ſtatim dies cedit: ſed exactio in tempus reo principali indultum differtur. *l.* 1. *ff. jud. ſolv. V. inſt. de ſatiſd. & l. ult.* §. 1. *C. de uſur. re jud.*

III.

3. Another Exception, when the Debtor is abſent, and has no viſible Eſtate.

If the principal Debtor is abſent, or has not a viſible Eſtate, ſo that no Action can be brought againſt him, nor he made to pay, the Surety may be ſued; unleſs he obtains a delay from the Court, in order to find out ſome Effects belonging to the Debtor, or to make him pay the Debt; after which delay if the Creditor is not ſatisfied, he may compel the Surety to pay the Debt [c].

[c] Si vero interceſſor, aut mandator, aut qui ſponſioni ſe ſubjecerit, adſit: principalem vero abeſſe contigerit,

contigerit, acerbum eſt, creditorem mittere aliò, cùm poſſit mox interceſſorem, aut mandatorem, aut ſponſorem exigere —— & cauſæ præſidens judex det tempus interceſſori. (Idem eſt dicere ſponſori & mandatori) volenti principalem deducere, quatenus ille priùs ſuſtineat conventionem, & ſic ipſe in ultimum ſubſidium ſervetur. *Nov.* 4. *c.* 1.

IV.

4. The diſcuſſion does not extend to Goods alienated by the Debtor.

The diſcuſſion which the Creditor is obliged to make of the Goods of the Debtor, before he ſues the Surety, does not extend to the Goods on which he has a Mortgage, and which have paſſed from the hands of the Debtor to Purchaſers and third Poſſeſſors; but only to the Goods which the Debtor has actually in his poſſeſſion. And the Creditor cannot ſue the third poſſeſſors, till he has firſt diſcuſſed the Goods of the Debtor, and likewiſe proſecuted his Perſonal Action againſt the Surety. But he cannot exerciſe the Mortgage which he has upon the Eſtate of the Surety, except in the caſe where he cannot recover payment out of what is in the hands of the third Poſſeſſor [d].

[d] Sed neque ad res debitorum, quæ ab aliis detinentur, veniat priùs antequam tranſeat viam ſuper perſonalibus contra mandatores, & fidejuſſores, & ſponſores. Sicque ad res veniens principalis debitoris, ſive ab alio detineantur, & derinentes eas conveniens, ſi neque inde habuerit ſatisfactionem tunc veniat adverſus res fidejuſſorum, & mandatorum & ſponſorum. *Nov.* 4. *c.* 2.

By the Cuſtoms of ſome Provinces in France, *this Diſcuſſion is obſerved; but in other Cuſtoms the third Poſſeſſor may be ſued without this previous Diſcuſſion.* See the ſixth Article of the third Section of Mortgages, and the Remark which is there made upon it.

V.

5. The Surety cannot oblige the Creditor to ſue the Debtor.

Altho' it be the intereſt of the Surety, that the Creditor ſhould recover payment from the Debtor, yet he cannot oblige the Creditor to ſue him for it. For the Creditor may defer the diſcuſſion of the principal Debtor, without loſing the Security which he has taken, by having another perſon bound for the Debt [e]. But if a Minor, whoſe Guardian had given Security for his Adminiſtration, being come of age, and finding his Guardian indebted to him, and at that time able to pay him, ſhould neglect to ſue him, and that in the mean while the Guardian ſhould become inſolvent, his Surety ought not in this caſe to be eaſily condemned to the Minor [f]. For the Engagement of this Surety was only to anſwer for the Guardian's Adminiſtration, and for his being able to pay, after the expiration of the Guardianſhip, whatever he ſhould chance to be indebted to the Minor. Thus, the Surety having ſatisfied his Engagement, ſince the Guardian was ſolvent after the expiration of the Guardianſhip, the negligence of the Minor in not ſuing him after the Account was ſtated, might be imputed to him, according to the circumſtances.

[e] Si fidejuſſor creditori denunciaverit, ut debitorem ad ſolvendam pecuniam compelleret, vel pignus diſtraheret, iſque ceſſaverit: an poſſit cum fidejuſſor doli mali exceptione ſummovere? Reſpondit non poſſe. *l.* 82. *ff. de fidejuſſ.*

See the third Article of the third Section, as to the diligence which the Surety may uſe on his part againſt the Debtor.

[f] Si fidejuſſores in id accepti ſunt *quod à curatore ſervari non poſſit*, & poſt legitimam ætatem tam ab ipſo curatore, quàm ab hæredibus ejus ſolidum ſervari potuit, & ceſſante eo qui pupillus fuit, ſolvendo eſſe deſierit, non temere utilem in fidejuſſores actionem competere. *l.* 41. *ff. de fidejuſſ.*

VI.

6. In what manner ſeveral Sureties are bound.

If ſeveral perſons become Sureties for one and the ſame thing, every one of them is anſwerable for the whole. For every one of them engages for the whole Debt, or other Engagement, and to make up what the principal Debtor ſhall not be able to pay. Thus, their Obligation naturally binds every one of them for the whole Debt, after the diſcuſſion of the principal Debtor. But their Obligation is divided in the ſame manner, and for the ſame reaſon, as that of principal Debtors, who are jointly bound each of them for the whole Debt. Thus, when the Sureties are ſolvent, the Creditor can demand from each of them only his ſhare of the Debt. But the portions of thoſe who are inſolvent are thrown upon the others, and every one bears his part thereof upon the foot of his own portion of the whole Debt [g].

[g] Si plures ſint fidejuſſores, quotquot erunt numero ſinguli in ſolidum tenentur. Itaque liberum eſt creditori à quo velit ſolidum petere. Sed ex epiſtola Divi Hadriani compellitur creditor à ſingulis, qui modo ſolvendo ſunt litis conteſtatæ tempore partes petere. Ideòque ſi quis ex fidejuſſoribus eo tempore ſolvendo non ſit, hoc cæteros onerat. §. 4. *inſt. de fidejuſſ.* Inter fidejuſſores non ipſo jure dividitur obligatio ex epiſtola Divi Hadriani: & ideò ſi quis eorum ante exactam à ſe partem ſine hærede deceſſerit, vel ad inopiam pervenerit, pars ejus ad cæterorum onus reſpicit. *l.* 26. *ff. eod.* Ut autem is qui cum altero fidejuſſit non ſolus conveniatur, ſed dividatur actio inter eos qui ſolvendo ſunt, ante condemnationem ex ordine poſtulari ſolet. *l.* 10. §. 1. *C. eod.* See the firſt Article of the fourth Section.

This Right which Sureties have to divide their Obligations, is called the benefit of Diviſion. *See the third Article of the firſt Section of the Solidity, &c. the firſt Article of this Section, and the firſt Article of the fourth Section, with the Remarks on thoſe Articles, where it appears that thoſe who have this benefit may renounce it.*

VII. If

VII.

7. *If the Obligation of one of the Sureties is annulled, the others anſwer for his portion.*

If of two or more Sureties, one happens to have ſufficient reaſons for vacating his Obligation; as if it was a Minor, or a married Woman who had no power to bind her ſelf, or who is not bound according to form, the other Sureties will be anſwerable for the portion of this Surety who is diſcharged.

[h] Si Titius & Seia pro Mævio fidejuſſerint, ſubducta muliere dabimus in ſolidum adverſus Titium actionem. Cùm ſcire potuerit, aut ignorare non debuerit, mulierem fruſtra intercedere. *l.* 48. *ff. de fidejuſſ.*

VIII.

8. *What are the exceptions of the Debtor that are common to the Surety.*

All the defences which the Debtor has againſt the Creditor, are common to the Sureties. As if the Obligation, or a part of it, happens to be acquitted; if it is preſcribed, if the Debt was referred to the Debtor's Oath, and he had ſworn, either that he never owed any thing, or that he had paid it; or if he has other Exceptions of the like nature. For the Surety is only anſwerable for what ſhall be legally due: And whatever annuls or diminiſhes the Obligation of the Debtor, annuls or diminiſhes the Obligation of the Surety, which is an Acceſſory to the other: Thus, he may make uſe of theſe defences, altho' the principal Debtor ſhould decline to uſe them himſelf [i]. But if the defences of the principal Debtor are only drawn from his own perſon; as if he may obtain relief becauſe he was a Minor when he contracted the Obligation; if he cannot be ſued becauſe he has made over all his Effects to his Creditors, or becauſe they have been confiſcated; theſe ſorts of Exceptions will not avail the Surety: For it was to guard againſt them that the Creditor got the Surety to be bound [l].

[i] Ex perſona rei, & quidem invito reo, exceptio & cætera rei commoda fidejuſſori, cæteriſque acceſſionibus competere poteſt. *l.* 32. *ff. de fidejuſſ. l.* 19. *ff. de exception.*

Defenſiones, ſive exceptiones ad interceſſores extendi, quibus reus principalis, integro manente ſtatu, munitus eſt, conſtat. *l.* 11. *C. de except. ſeu præſc.* §. 4. *inſt. de replicat.* Si reus juravit, fidejuſſor tutus ſit. *l. ult. in f. ff. de jurejur.*

See the firſt and the following Articles of the fifth ection.

[l] Sane quædam exceptiones non ſolent (fidejuſſoribus) accommodari. Ecce enim debitor ſi bonis ſuis ceſſerit, & cum eo creditor experiatur, defenditur per exceptionem, ſi bonis ceſſerit: ſed hæc exceptio fidejuſſoribus non datur. Ideò ſcilicet quia qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis quos pro eo obligavit, ſuum conſequi. *d.* §. 4. *inſt. de replic.* Si Lyſias ademptâ parte bonorum exulare juſſus eſt, non niſi pro parte quam retinuit creditoribus obligatus eſt. Verùm qui pro eo ſuam fidem aſtrinxerunt, jure priſtino conveniri poſſunt. *l.* 1. *C. de fidejuſſ.* See the ſixth Article of the fifth Section.

IX.

9. *The engagement of the Surety follows the Obligation.*

The Engagement of the Surety is not limited to the perſon of the Creditor, to whom he obliges himſelf, but his Obligation is annexed to that of the principal Debtor, and paſſes with it to the perſons who ſhall afterwards have the right to it. And if, for Example, an Heir, or Executor, takes Security from one that is Debtor to the Inheritance, and is obliged afterwards to reſtore the Inheritance to another, either becauſe of a Subſtitution, or becauſe his Inſtitution not ſubſiſting, he ceaſes to be Heir, or Executor; this Surety will remain obliged to him to whom the Inheritance ſhall be reſtored [m].

[m] Hæres à debitore hæreditario fidejuſſorem accepit, deinde hæreditatem ex Trebelliano reſtituit, fidejuſſoris obligationem in ſuo ſtatu manere, ait. Idemque in hac cauſâ ſervandum, quod ſervaretur cùm hæres contra quem emancipatus filius bonorum poſſeſſionem accepit, fidejuſſorem accepit. Ideoque in utraque ſpecie tranſeunt actiones. *l.* 21. *ff. de fidejuſſ.*

This Surety cannot pretend that he became bound only in conſideration of the ſaid Heir or Executor. For beſides that he ought to have expreſſed ſo much, it might be replied to him, that if he had not engaged himſelf, the Creditor might have ſued the Debtor, or taken other Sureties.

SECT. III.

Of the Engagements of the Debtor towards his Surety, and of the Surety towards the Debtor.

The CONTENTS.

1. *The Debtor ought to ſave the Surety harmleſs.*
2. *Indemnity for the conſequences of the Suretiſhip.*
3. *A caſe where the Surety may ſue the Debtor for his indemnity, before he has been called upon by the Creditor.*
4. *If the Surety pays before the Term.*
5. *He may pay after the term, without being called on.*
6. *If he pays imprudently what was not due.*
7. *If the Surety pays, being ignorant of the Exceptions which the Debtor has againſt the Debt.*

8. *If*

8. *If the Surety pays, notwithſtanding he had an Exception for his own perſon.*
9. *If the Surety does not make any defence, when ſued, or neglects to appeal from the Sentence.*
10. *If the Surety does not acquaint the Debtor, that he has paid the Debt for him.*
11. *Surety for a thing depoſited, or for a thing lent.*
12. *If the Creditor gives the Surety a diſcharge of the Debt.*

I.

1. *The Debtor ought to ſave the Surety harmleſs.*

THE principal Debtor is obliged to ſave his Surety harmleſs, either by getting him diſcharged from his Suretiſhip, or by acquitting the Debt. And altho' there ſhould be no expreſs promiſe to indemnify him, yet it is enough that it does appear that the Surety is obliged for the Debtor only in this quality. For it implies the Engagement to ſave him harmleſs [a].

[a] Ait prætor, ſi quis negotia alterius——geſſerit, judicium eo nomine dabo. *l.* 3. *ff. de negot. geſt.* Sed videamus an fidejuſſor hîc habere aliquam actionem poſſit, & verum eſt negotiorum geſtorum eum agere poſſe. *l.* 4. *eod. l.* 20. §. 1. *ff. mand.*

II.

2. *Indemnity for the conſequences of the Suretiſhip.*

If the Creditor, not receiving ſatisfaction from the principal Debtor, brings his Action againſt the Surety, and forces him to pay the Debt, the Surety will recover from the Debtor, both the Principal Sum and Intereſt, which he ſhall have paid to the Creditor, as alſo the Intereſt of the ſaid Principal and Intereſt. For with regard to him, all the Money which he has paid on the Debtor's account, is a Capital of which he ought to be indemnified, in the ſame manner, and with much more reaſon than a Factor, or Agent, who does the buſineſs of an abſent perſon without his knowledge; ſeeing what Monies they advance, they do it of their own accord, and that it is by conſtraint that the Surety makes payment. And if he ſuffers otherwiſe any damage, or is put to any charges; as if the Creditor ſues him, if he attaches his Goods, he will alſo be reimburſed of the Expences which he ſhall have been put to, and of all his damages, and likewiſe of the charges he ſhall be at in ſuing the Debtor for his reimburſement [b].

[b] *This is a conſequence of the preceding Article.* Si quid autem fidejuſſor pro reo ſolverit, ejus recuperandi cauſa habet cum eo mandati judicium. §. 6. *inſt. de fidejuſſ.*

Si fidejuſſor multiplicaverit ſummam, in quam fidejuſſit, ſumptibus ex juſta ratione factis, totam eam præſtabit is pro quo fidejuſſit. *l.* 45. §. 6. *ff. mand.* Sive, cum frumentum deberetur, fidejuſſor africum dedit: ſive quid ex neceſſitate ſolvendi plus impendit, quàm eſt pretium ſolutæ rei—— id mandati judicio conſequeretur. *l.* 50. §. 1. *eod.*

See touching the intereſt of Sums paid by the Surety, the fourth Article of the ſecond Section of Proxies; and the fifth Article of the ſecond Section of thoſe who manage the Affairs of others.

III.

3. *A caſe where the Surety may ſue the Debtor for his indemnity, before he has been called upon by the Creditor.*

If the principal Debtor fails to pay the Creditor at the term, the Surety may ſue him, after the term is expired, to oblige him to acquit the Debt, altho' the Creditor demand nothing. And if the indemnity of the Surety were in hazard, he might ſue the Debtor, even before the term, for his own ſafety. Thus, when the Debtor ſquanders away his Eſtate, or that his Goods are attached, the Surety may put in his claim, and take ſuch other meaſures for his own ſafety, as the circumſtances of the danger ſhall render neceſſary [c].

[c] Non abſimilis illa quæ frequentiſſimè agitari ſolet, fidejuſſor an & priuſquam ſolvat, agere poſſit, ut liberetur. Nec tamen ſemper expectandum eſt, ut ſolvat, aut judicio accepto condemnetur, ſi diu in ſolutione reus ceſſabit, aut certe bona ſua diſſipabit: præſertim ſi domi pecuniam fidejuſſor non habebit, qua numerata creditori, mandati actione conveniat. *l.* 38. §. 1. *ff. mand.*

IV.

4. *If the Surety pays before the term.*

If the Surety pays before the term, he cannot bring his Action for Relief againſt the Debtor, till after the term is elapſed [d]. For he had no power to make the condition of the Debtor worſe, who is not bound to pay till the term comes.

[d] Si fidejuſſor, vel quis alius pro eo ante diem creditori ſolverit, expectare debebit diem quo eum ſolvere oportuit. *l.* 31. *ff. de fidejuſſ.*

V.

5. *He may pay after the term without being called on.*

The Surety may, if he pleaſes, pay after the term. And altho' he has neither been adjudged to pay the Debt, nor ſued by the Creditor, yet he will nevertheleſs have his Action of Relief againſt the Debtor [e]. For the Obligation both of the Debtor and Surety, was to pay at the term. So that he acquits the common Engagement.

[e] Fidejuſſores & mandatores etſi ſine judicio ſolverint, habent actionem mandati. *l.* 10. §. 11. *ff. mand.* See the following Articles.

VI.

6. *If he pays imprudently what was not due.*

Altho' the Surety may pay the Debt without being ſued for it, he ought not however to do any prejudice to the ex-

ceptions which the principal Debtor might have againſt the Creditor. And if, for example, the Surety knowing that the Debtor had either paid, or had ſufficient grounds for annulling the Debt, pays it nevertheleſs, he cannot recover from the Debtor what he ſhall have acquitted in this manner[f].

[f] Si quidem ſciens prætermiſerit exceptionem vel doli, vel non numeratæ pecuniæ, videtur dolo verſari: diſſoluta enim negligentia propè dolum eſt. *l.* 29. *ff. mand.* See the following Article.

VII.

7. If the Surety pays, being ignorant of the exceptions which the Debtor has againſt the Debt.

If the Surety, being ſummoned to pay, acquits the Debt fairly and honeſtly, in order to prevent an Execution, or Attachment of his Goods, and being ignorant either that the Debtor had a compenſation to make, or that he has paid the Debt, or that he had other grounds of defence againſt the Creditor; he will nevertheleſs have his relief againſt the Debtor. For the Debtor ought to blame himſelf, that he did not give notice to the Surety not to pay the Debt[g]. But if the Surety pays raſhly, without being called on, without neceſſity, and without acquainting the Debtor, who might, on his part, not have had time to inform the Surety of the reaſons he had to offer why he ought not to be compelled to pay the Debt; there might be ground, according to the circumſtances, for imputing to the Surety that he had paid it wrongfully.

[g] Si fidejuſſor conventus, cùm ignoraret non fuiſſe debitori numeratam pecuniam, ſolverit ex cauſa fidejuſſionis: an mandati judicio perſequi poſſit id quod ſolverit, quæritur. Et ſi quidem ſciens—— Ubi verò ignoravit, nihil quod ei imputetur. Pari ratione, & ſi aliqua exceptio debitori competebat, pacti forte conventi, vel cujus alterius rei, & ignarus hanc exceptionem non exercebit, dici oportere ei mandati actionem competere. Potuit enim atque debuit reus promittendi certiorare fidejuſſorem ſuum, ne forte ignarus ſolvat indebitum. *l.* 29. *ff mand.* Si cùm debitor ſolviſſet, ignarus fidejuſſor ſolverit, puto eum mandati habere actionem. Ignoſcendum eſt enim ei, ſi non divinavit debitorem ſolviſſe. Debitor enim debuit notum facere fidejuſſori jam ſe ſolviſſe, ne fortè creditor obrepat, & ignorantiam ejus circumveniat, & excutiat ei ſummam in quam fidejuſſit. *d. l.* 29. §. 2.

VIII.

8. If the Surety pays, notwithſtanding he had an exception for his own perſon.

If the Surety had any defence peculiar to himſelf, which was not common to the Debtor; as if he was a Minor, and for that reaſon might get himſelf relieved from his Obligation, or if he had any other Perſonal Exception, and if he pays the Debt voluntarily, without taking advantage of the ſaid Exception, he will nevertheleſs have his Action for relief againſt the Debtor. For by having waved his own Right, he has done no wrong to the Debtor, and he has only acquitted him of what he owed[h].

[h] Fidejuſſor ſi ſolus tempore liberatus, tamen ſolverit creditori, rectè mandati habebit actionem adverſus reum: quamquam enim jam liberatus ſolvit, tamen fidem implevit, & debitorem liberavit. *l.* 29. §. 6. *ff. mand.*

IX.

9. If the Surety does not make any defence, when ſued, or neglects to appeal from the Sentence.

If the Surety, being ſued by the Creditor, does not uſe the means for obtaining a delay which he might make uſe of; as if he does not alledge in his defence ſome Nullities in the proceedings in the Cauſe, which would not be ſufficient to diſcharge the Debtor, and he, after having acquainted the Debtor with the Creditor's Demand, pays the Debt; the Debtor cannot blame him for not having taken the advantage of ſuch defences. But if the Surety being condemned to pay the Debt, whether it be after having defended himſelf, or without making any defence, he does not appeal from the Sentence, or if he does appeal, but does not acquaint the Debtor therewith; and in general, whatever be the conduct of the Surety, and whatever event it may have, it is by the circumſtances of his conduct, and of that of the Debtor, that we muſt diſcern whether the Surety ought to have defended himſelf or not, or to have appealed or not; whether he has defended himſelf well or ill, if he has given timely notice to the Debtor, if he has paid the Debt right or wrongfully, if he has paid more than was due; and by theſe circumſtances, we are to judge whether the Surety ought to recover either barely what was owing by the Debtor, or alſo the charges he has been at, or if he ought to loſe them[i].

[i] Quædam tamen & ſi ſciens omittat fidejuſſor, caret fraude. Ut putà ſi exceptionem procuratoriam omiſit, ſive ſciens, ſive ignarus, de bona fide enim agitur, cui non congruit de apicibus juris diſputare: ſed de hoc tantum debitor fuerit, nec ne. *l.* 29. §. 4. *ff. mand.*

Si hi qui pro te fidejuſſerant, in majorem quantitatem damnati, quàm debiti ratio exigebat, ſcientes & prudentes auxilium appellationis omiſerunt poteris mandati agentibus his æquitate judicis tueri te. Igitur, ſi ignoraverunt, excuſata ignorantia eſt. Si ſcierunt, incumbebat eis neceſſitas provocandi. Cæterum dolo verſati ſunt, ſi non provocaverunt. Quid tamen, ſi paupertas eis non permiſit, excuſata eſt eorum inopia. Sed & ſi teſtato convenerunt debitorem, ut ſi ipſe putaret, appellaret, puto rationem eis conſtare. *l.* 8. §. 8. *eod.*

X. If

X.

10. *If the Surety does not acquaint the Debtor, that he has paid the Debt for him.*

If the Surety having paid the Debt, without acquainting the Debtor, the Debtor pays it a ſecond time; the Surety will have no relief againſt him. For he would be in the fault, for having ſuffered the Debtor to be in danger of paying twice[l].

[l] Hoc idem tractari & in fidejuſſore poteſt, ſi cùm ſolviſſet, non certioraverit reum: ſic deinde reus ſolvit, quod ſolvere eum non oportebat. Et credo ſi cùm poſſet eum certiorare, non fecit, oportere mandati agentem fidejuſſorem repelli. Dolo enim proximum eſt, ſi poſt ſolutionem non denuntiaverit debitori. *l.* 29. §. 3. *ff. mand.*

IX.

11. *Surety for a thing depoſited, or for a thing lent.*

The Engagement of the Surety being only acceſſory to that of the principal Debtor, he is bound only preciſely for that which is owing by the perſon for whom he engages himſelf. Thus, for Example, if one had taken Security from a Depoſitary, or from him who had borrowed a thing for uſe, he who becomes Surety for ſuch an Engagement, would not be obliged to make good the thing depoſited or lent, if it ſhould chance to periſh by an accident; but he would only be bound to anſwer for the fraud and negligence of the principal Debtor; for it was in that only, that the Obligation conſiſted[m].

[m] Et commodati & depoſiti fidejuſſor accipi poteſt, & tenetur. Sed ita demum, ſi aut dolo malo, aut culpa hi fecerunt pro quibus fidejuſſum eſt. *l.* 2. *ff. de fidej. & mand.*

XII.

12. *If the Creditor gives the Surety a diſcharge of the Debt.*

If the Creditor, or another perſon having his right, gives an Acquittance to the Surety, with intention to make him a preſent of the Debt, as a recompence for ſome ſervice, or out of ſome other motive, this Surety may recover the Debt from the Debtor; for this favour was deſigned for the Surety alone, and not intended for the benefit of the Debtor. But if the Creditor had a mind only to diſcharge the Surety, without giving him the Debt, the right of the Creditor will remain intire againſt the Debtor, and the Surety will only be diſcharged of his Suretiſhip. And this will depend on the manner in which the Creditor ſhall have expreſſed himſelf, in order to make his intention known[n].

[n] Si fidejuſſori donationis cauſâ acceptum factum ſit à creditore, puto ſi fidejuſſorem remunerari voluit creditor, habere eum mandati actionem. Multò magis, ſi mortis cauſâ accepto tuliſſet creditor, vel ſi eam liberationem legavit. *l.* 10. §. *ult. ff. mand.* Si vero non remunerandi cauſâ, ſed principaliter donando, fidejuſſori remiſit actionem, mandati eum non acturum. *l.* 12. *eod.*

Si is qui fidejuſſori donare vult creditorem ejus habeat debitorem ſuum, eumque liberaverit, continuo aget fidejuſſor mandati: quatenus nihil interſit, utrùm nummos ſolverit creditori, an eum liberaverit. *l.* 26. §. 3. *eod.*

SECT. IV.

Of the Engagements of Sureties to one another.

The CONTENTS.

1. *In what manner one of the Sureties paying the Debt, may ſue his Fellow-Sureties for their ſhares of it.*
2. *Fellow-Sureties anſwer for one another.*

I.

1. *In what manner one of the Sureties paying the Debt, may ſue his Fellow-Sureties for their ſhares of it.*

IF one of the Sureties pays the Debt, he ſhall have his relief only againſt the Debtor, and not againſt his Fellow-Sureties: For he acquits only his own Engagement: And ſince the payment which he makes, without making uſe of the benefit of Diviſion againſt the other Sureties, extinguiſhes the principal Obligation, that of the Fellow-Sureties, which was only an Acceſſory to it, ſubſiſts no longer. But if in paying the Debt, he gets himſelf to be ſubſtituted to the Creditor, he will have his right for recovering the ſhares of every one of the other Sureties. This ſubſtitution by the Creditor having this effect, that altho' it ſeem that the right of the Creditor be annulled by the payment, yet this right ſubſiſts, ſo as to paſs from the perſon of the Creditor, to him who pays for the others. For it is as it were a Sale, which the Creditor makes to him, of his Rights. And if the Creditor refuſes the Subſtitution, he who pays the Debt may procure an Order for it from the Judge[o].

[o] Cùm alter ex fidejuſſoribus in ſolidum debito ſatisfaciat, actio ei adverſus eum qui una fidejuſſit, non competit. Potuiſti ſanè cum fiſco ſolveres deſiderare, ut jus pignoris quod fiſcus habuit in te transferretur: & ſi hoc ita factum eſt, ceſſis actionibus uti poteris. Quod & in privatis debitis obſervandum eſt. *l.* 11. *C. de fidejuſſ. l.* 39. *ff. eod.* §. 4. *inſt. eod.* Fidejuſſoribus ſuccurri ſolet, ut ſtipulator compellatur ei qui ſolidum ſolvere paratus eſt, vendere cæterorum nomina. *l.* 17. *ff. eod.*

Cùm is qui & reum & fidejuſſores habens ab uno ex fidejuſſoribus accepta pecunia, præſtat actiones, poterit quidem dici nullas jam eſſe cùm ſuum percepérit, & perceptione omnes liberati ſunt. Sed non ita eſt, non enim in ſolutum accepit, ſed quo-

dammodo nomen debitoris vendidit: & ideo habet actiones, quia tenetur ad id ipſum ut præſtet actiones. *l.* 36. *ff. eod. l.* 41. §. 1. *eod.* See the ſixth Article of the ſecond Section.

This Subſtitution of the Surety to the Creditor for recovering the Shares of his Fellow-Sureties, is a third benefit granted to Sureties. So that Sureties have three benefits which leſſen their Engagement, and facilitate their Relief. The firſt is the benefit of Diſcuſſion, *explained in the firſt Article of the ſecond Section. The ſecond is the benefit of* Diviſion, *explained in the ſixth Article of the ſame Section. And the third is this benefit of the* Ceſſion of the Rights of the Creditor, *explained in this Article. The effect of the firſt benefit of Diſcuſſion is, that the Surety cannot be ſued till after the Goods of the principal Debtor have been diſcuſſed. The effect of the ſecond benefit of Diviſion is, that when there are ſeveral Sureties for one and the ſame Debt, each of them can only be ſued for his own ſhare, if the others are able to pay; but if any of them be inſolvent, or their Obligation be found to be null, or be liable to be reſcinded, their Shares will be thrown upon the others, as has been ſaid in the ſixth Article of the ſecond Section. And the effect of the third benefit of the Ceſſion of the Rights of the Creditor, is, that the Surety who pays the Creditor, recovers from every one of the other Sureties their proportions of what he has paid.*

We are to underſtand the uſe of the benefits of Diſcuſſion and Diviſion only in favour of thoſe who have not renounced them. For if they have renounced them, they are, with regard to the Creditor, in the ſame condition as the Debtor. See the third Article of the firſt Section of the Solidity, *&c.*

II.

2. Fellow-Sureties anſwer for one another.

It is an Engagement of Sureties among themſelves, that if there be ſeveral Sureties for one and the ſame Debtor, and there be one of them that is inſolvent, or whoſe Obligation is null, or liable to be reſcinded, every one of the others ought to bear his proportion of the ſhare of the Surety who is inſolvent [b], or whoſe Obligation does not ſubſiſt [c]. For they are all of them Sureties for the whole Debt [d].

[b] Si quis eorum ante exactam à ſe partem ſine hærede deceſſerit, vel ad inopiam pervenerit, pars ejus ad cæterorum onus reſpicit. *l.* 26. *ff. de fidejuſſ.*

[c] Si Titius & Seia pro Mævio fidejuſſerint, ſubducta muliere dabimus in ſolidum adverſus Titium actionem. Cùm ſcire potuerit, aut ignorare non debuerit; mulierem fruſtra intercedere. *l.* 48. *ff. de fidejuſſ.*

[d] *See the ſixth Article of the ſecond Section.*

SECT. V.

How the Engagement of Sureties ends, or is annulled.

The CONTENTS.

1. *There can be no Surety of an Obligation that is unlawful.*
2. *The Exception which the principal Debtor has on account of his own perſon, does not diſcharge the Surety.*
3. *Fraud of the Creditor, with regard to the Surety.*
4. *Circumſtances which may render the Obligation of the Surety null, or valid.*
5. *The Surety is diſcharged, if the Obligation does not ſubſiſt any more.*
6. *Or if it is innovated.*
7. *The Surety in a Leaſe, is not bound, upon the renewal of the Leaſe.*
8. *If the Debtor ſucceeds to the Creditor, or the Creditor to the Debtor.*
9. *If the Creditor, or Debtor, ſucceeds to the Surety, or the Surety to any one of them.*
10. *The Creditor's purſuit of one of the Fellow-Sureties, does not diſcharge the others.*
11. *The Surety for the delivery of a thing that periſhes.*

I.

1. There can be no Surety of an Obligation that is unlawful.

IF in the principal Obligation, there is any eſſential vice which may annul it, as if it has been contracted by force, if it is contrary to Law, or to Good Manners, if it is founded only on a fraud, or on ſome error which may ſuffice to annul it; in all theſe caſes the Obligation of the Surety is likewiſe annulled [a]. For no one can take Surety for validating Engagements that are vicious in themſelves.

[a] Rei cohærentes exceptiones etiam fidejuſſoribus competunt —— Ut doli mali —— Quod metus cauſâ factum eſt. *l.* 7. §. 1. *ff. de excep.*

Fidejuſſor obligari non poteſt ei apud quem reus promittendi obligatus non eſt. *l.* 16. *ff. de fidejuſſ.*

See an example of a Surety for an Engagement contrary to Good Manners. Nov. 51. in Præfat. V. l. 46. & l. 56. ff. de fidejuſſ.

II.

2. The exception which the principal Debtor has on account of his own perſon, does not diſcharge the Surety.

If the principal Obligation was annulled only becauſe of ſome perſonal Exception which the principal Debtor had, as if it was a Minor, who, in conſideration of his being under Age, got himſelf relieved from an Engagement by which he ſuffered ſome prejudice, and that there had been no fraud on the Creditor's part; the Reſtitution of the Minor would have indeed this effect, that it would annul his Obligation to the Creditor, and his Engagement to ſave harmleſs his Surety, if he deſired to be relieved from it. But the ſaid Reſtitution of the Minor would not in the leaſt invalidate the Surety's Obligation to the Creditor [b]. For it was only to make good the Obligation of the Minor,

in caſe he ſhould be relieved from it on account of his Age, that the Creditor took the additional Security of a Surety.

[b] Poſtquam in integrum ætatis beneficio reſtitutus es, periculum evictionis emptori, cui præſidium ex bonis paternis vendidiſti, præſtare non cogeris. Sed ea res fidejuſſores qui pro te intervenerunt excuſare non poteſt. Quare mandati judicio, ſi pecuniam ſolverint, aut condemnati fuerint, convenieris; modò ſi eo quoque nomine reſtitutionis auxilio non juvaberis. *l.* 1. *C. de fidejuſſ. min.*

See the two following Articles, and the tenth and eleventh Articles of the firſt Section.

III.

3. Fraud of the Creditor with regard to the Surety.

If beſides the perſonal Exception which might be a ſufficient ground for annulling the Obligation of the principal Debtor, without invalidating that of the Surety, there was any fraud on the part of the Creditor, whether in the buſineſs which was the ſubject matter of the Obligation, or in the manner of engaging the Surety; the Obligation of this Surety would be annulled. Thus, for Example, if one who is willing to lend Money to a Minor upon Security, gives to the perſon who is to become Surety for the Minor, falſe proofs of his being of Age, the Obligation of the Surety will be annulled [c].

[c] Si ea quæ tibi vendidit poſſeſſiones interpoſito decreto præſidis ætatis tantummodo auxilio juvatur, non eſt dubium fidejuſſorem ex perſona ſua obnoxium eſſe contractui. Verùm ſi dolo malo apparuerit contractum interpoſitum eſſe manifeſti juris eſt, utrique perſonæ tam venditricis, quàm fidejuſſoris conſulendum eſſe. *l.* 2. *C. de fidejuſſ. min.*

IV.

4. Circumſtances which may render the Obligation of the Surety null, or valid.

In all the caſes where the principal Obligation is liable to be annulled, it is by the circumſtances that we are to judge whether the Obligation of the Surety will ſubſiſt or not. Thus the Surety of a Minor remains bound, in the caſe of the eleventh Article of the firſt Section. And on the contrary, he is diſcharged in the caſe of the third Article of this Section. Thus, when the Obligation has for its cauſe ſome Commerce, or ſome Diſpoſition, prohibited by a Law, as if he who has a mind to give ſomething to a perſon to whom it is prohibited, by ſome Law, or Cuſtom, to give any thing, makes a fictitious Contract for the benefit of the ſaid perſon, or of a third perſon who lends his name for that purpoſe, and that he adds to the ſaid Contract the ſecurity of a Surety, the Obligation of the Surety will be without effect, as well as that of the principal Debtor. Thus in general, to judge of the validity, or invalidity of the Engagement of the Surety, it is neceſſary to conſider the quality of the principal Obligation, whether it be lawful or unlawful; the ſincerity or diſingenuity of the Parties; the motive which has induced the Creditor to take an additional Security, as if it was becauſe the Obligation was unlawful, or only to ſupply the inſolvency, or incapacity of the principal Debtor, as if it was a Minor, who becauſe of his Minority, could not validly oblige himſelf, altho' the Obligation were not unlawful in its own nature: if he who is bound as Surety for another, has voluntarily offered himſelf, and engaged the Creditor to accept of him, or if he has been engaged by any unfair dealing, on the part of the Creditor: And it is by theſe circumſtances, and others of the like nature, that we are to judge of the effect which the Obligation of the Surety ought to have [d].

[d] Interceſſionis quoque exceptio, item quod libertatis onerandæ cauſa petitur, etiam fidejuſſori competit. Idem dicitur & ſi pro filiofamilias contra ſenatuſconſultum quis fidejuſſerit, aut pro minore viginti quinque annis circumſcripto. *l.* 7. §. 1. *ff. de except. præſc. & præjud.*

Cùm lex venditionibus occurrere voluerit, fidejuſſor quoque liberatur: eò magis quòd per ejuſmodi actionem ad reum pervenitur. *l.* 46. *ff. de fidejuſſ.*

Marcellus ſcribit, ſi quis pro pupillo ſine tutoris auctoritate obligato, prodigove, vel furioſo fidejuſſerit, magis eſſe ut ei non ſubveniatur. *l.* 25. *eod.*

Si à furioſo ſtipulatus fueris, non poſſe te fidejuſſorem accipere certum eſt. Quia non ſolùm ipſa ſtipulatio nulla interceſſit, ſed ne negotium quidem ullum geſtum intelligitur. Quòd ſi pro furioſo jure obligato fidejuſſorem accepero, tenetur fidejuſſor. *l.* 7. §. 4. *eod.*

In cauſæ cognitione verſabitur, utrùm ſoli ei ſuccurrendum ſit, an etiam aliis qui pro eo obligati ſunt, ut putà fidejuſſoribus. Itaque ſi cùm ſcientem minorem, & ei fidem non haberem, tu fidejuſſoris pro eo, non eſt æquum fidejuſſori in necem meam ſubveniri: ſed potiùs ipſi deneganda erit mandati actio. In ſumma perpendendum erit prætori, cui potiùs ſubveniat utrùm creditori, an fidejuſſori. Nam minor captus neutri tenebitur, faciliùs in mandatore dicendum erit non debere ei ſubvenire. Hic enim velut affirmator fuit, & ſuaſor ut cum minore contraheretur. *l.* 13. *ff. de min.*

V.

5. The Surety is diſcharged, if the Obligation does not ſubſiſt any more.

If the Debtor annuls his Obligation, either by payment, or by ſome other way that diſcharges him, as if the matter being referred to his Oath, he ſwears that he has paid the Debt, or that he did not owe any thing, if he is diſcharged by a Sentence, by a Tranſaction, or other Covenant with the Creditor; in all theſe caſes, the Engagement of the Surety is annulled. For he was obliged

obliged only to pay what ſhould be due [c].

[c] Non eſt ambigui juris electo reo, & ſolvente fidejuſſorem liberari. *l.* 2. *C. de fidejuſſ. tut. vel cur.*

Rei autem cohærentes exceptiones, etiam fidejuſſoribus competunt, ut rei judicatæ, doli mali, jurisjurandi. *l.* 7. §. 1. *ff. de except.*

Igitur & ſi reus pactus ſit in rem, omnino competit exceptio fidejuſſori. *d.* §. 1. Non poſſunt conveniri fidejuſſores, liberato reo tranſactione. *l.* 68. §. 2. *ff. de fidejuſſ.*

See the eighth Article of the ſecond Section.

VI.

6. Or if it is innovated.

If the Debt is innovated between the Creditor and the Debtor, without the Surety's obliging himſelf anew, his Obligation does not ſubſiſt any longer. Thus he who was Creditor for the Price of a Sale, and who had a Surety bound for it, having given an Acquittance thereof, and having taken from the Buyer alone his Bond, as for Money lent, cannot after that demand any thing of the Surety. For altho' what he had promiſed to pay be not acquitted, and that the Debtor remains obliged for a Debt, to which the Sale had given riſe, and for which the ſaid Surety had engaged himſelf; yet the Creditor having extinguiſhed the firſt Obligation, that of the Surety, which was only an Acceſſory to the other, is alſo extinct [f].

[f] Ubicumque reus ita liberatur à creditore, ut natura debitum maneat, teneri fidejuſſorem reſpondit, cùm verò genere novationis tranſeat obligatio, fidejuſſorem aut jure aut exceptione liberandum. *l.* 60. *ff de fidejuſſ.*

Novatione legitimè perfecta, debiti in alium tranſlati, prioris contractûs fidejuſſores, vel mandatores liberatos eſſe non ambigitur. Si modò in ſequenti ſe non obligaverunt. *l.* 4. *C. eod.*

VII.

7. The Surety in a Leaſe is not bound upon the renewal of the Leaſe.

If a former Obligation being expired, the Debtor has renewed it by a ſecond; he who was Surety for the firſt Obligation, will not be ſo for the ſecond, unleſs he obliges himſelf anew. Thus, he who renews with his Farmer a Leaſe that is expired, either by granting him a new Leaſe, or by a tacit continuance of the former, will not have him engaged a Surety who was bound for the firſt Leaſe, unleſs he obliges himſelf anew. For it is another Obligation [g].

[g] Qui impleto tempore conductionis remanſit in conductione, non ſolum reconduxiſſe videbitur, ſed etiam pignora videntur durare obligata. Sed hoc ita verum eſt, ſi non alius pro eo in priore conductione res obligaverat. Hujus enim novus conſenſus erit neceſſarius. Eadem cauſa erit & ſi reipublicæ prædia locata fuerint. *l.* 13. §. 11. *ff. locat. l.* 7. *C. eod.*

VIII.

8. If the Debtor ſucceeds to the Creditor, or the Creditor to the Debtor.

If the Creditor becomes Heir, or Executor to the Debtor, or the Debtor to the Creditor, the confuſion which is made in the perſon of the ſaid Heir, or Executor, of the qualities of Creditor and Debtor, makes that the Obligation does not ſubſiſt any more: and this confuſion annuls likewiſe the Obligation of the Surety. For he cannot owe to the Heir, or Executor, a Debt againſt which the Heir, or Executor himſelf is bound to indemnify him. And there is no longer either Debt or Debtor [h].

[h] A Titio, qui mihi ex teſtamento ſub conditione decem debuit, fidejuſſorem accepi, & ei hæres extiti: deinde conditio legati extitit. Quæro, an fidejuſſor mihi teneatur? Reſpondi, ſi ei à quo tibi erat ſub conditione legatum, cùm ab eo fidejuſſorem accepiſſes, hæres extiteris, non poteris habere fidejuſſorem obligatum: quia nec reus eſt pro quo debeat, ſed nec res ulla quæ poſſit deberi. *l.* 38. §. 1. *ff. de fidejuſſ.* Quòd ſi ſtipulator reum hæredem inſtituerit, omnimodo obligationem fidejuſſoris peremit, ſive civilis, ſive tantùm naturalis in reum fuiſſet: quoniam quidem nemo poteſt apud eumdem pro ipſo obligatus eſſe. *l.* 21. §. 3. *eod. V. l.* 71. *eod.*

IX.

9. If the Creditor or Debtor ſucceeds to the Surety, or the Surety to any one of them.

If it happens that the Debtor or Creditor be Heir, or Executor to the Surety, or that the Surety ſucceed in that quality to one or other of them, in all theſe caſes there ariſe different confuſions of the qualities of Debtor, Creditor, and Surety, every one of which annuls the Engagement of the Surety. For if he ſucceeds to the Debtor, he himſelf becomes principal Debtor, and conſequently ceaſes to be Surety. And if he ſucceeds to the Creditor, he is no longer bound, ſeeing he cannot be bound to himſelf. But if it is the Creditor that ſucceeds to the Surety, he will not be bound to himſelf, but will retain only his right againſt the Debtor. And laſtly, if it is the Debtor that ſucceeds to the Surety, there remains no longer any Suretiſhip, but only a principal Obligation in the perſon of the Debtor. And he could not even plead the Exceptions which the Surety may have had to alledge in his own perſon; as if he was, for Example, a Minor [i].

[i] Cùm reus promittendi fidejuſſori ſuo hæres extitit, obligatio fidejuſſoria perimitur. Quid ergo eſt: tanquam à reo debitum petatur. Et ſi exceptione fidejuſſori competente uſus fuerit, in factum replicatio dari debebit, aut doli mali proderit. *l.* 14. *ff. de fidejuſſ.*

Quòd ſi creditor fidejuſſori hæres fuerit, vel fidejuſſor creditori, puto convenire confuſione obligationis non liberari eum. *l.* 71. *in f. prin. ff. eod.*

Generaliter Julianus ait, eum qui hæres extitit ei pro quo intervenerat, liberari ex cauſa acceſſionis, & ſolummodò quaſi hæredem rei teneri. Denique ſcripſit, ſi fidejuſſor hæres extiterit ei pro quo fidejuſſit,

juſſit, quaſi reum eſſe obligatum, ex cauſa fidejuſſionis liberari. *l. 5. ff. de fidejuſſ.*

X.

The Sureties of the ſame Debt do not diſcharge the others.

Since the Engagement of the Fellow-Sureties does not ceaſe to ſubſiſt, although the Creditor ſues one of them, before he brings his Action againſt the others; therefore when there are ſeveral Sureties for one and the ſame Debt, the Suit which the Creditor commences againſt one of them, does not hinder him from bringing his Action afterwards againſt the others[l].

[l] Generaliter ſancimus, quemadmodum in mandatoribus ſtatutum eſt ut conteſtatione contra unum ex his facta alter non liberetur, ita & in fidejuſſoribus obſervari, &c. *l. 28. C. de fidejuſſ.*

XI.

11. The Surety for the delivery of a thing that periſhes.

Altho' the Obligation of him who is bound to give or reſtore a thing, be annulled, if the thing periſhes by an accident; and that the Surety, if there was any, be no longer obliged: yet nevertheleſs, if the thing does not periſh till after the Debtor has been in fault for not delivering it; as if a Seller does not deliver what he has ſold, or if one does not reſtore what he has hired, or borrowed, his Obligation continues to ſubſiſt, and makes that of the Surety to ſubſiſt likewiſe[m]. For he ought to anſwer for the deed of the perſon for whom he engaged himſelf.

[m] Cum facto ſuo reus principalis obligationem perpetuat, etiam fidejuſſoris durat obligatio: veluti ſi moram fecit in Sticho ſolvendo, & is deceſſit. *l. 58. §. 1. ff. de fidejuſſ.* See the ninth Article of the third Section of Covenants, and the third Article of the ſeventh Section of the Contract of Sale.

TITLE V.

Of INTEREST, COSTS and DAMAGES, and RESTITUTION of FRUITS.

Of the ſeveral ſorts of Damages, and of their cauſes.

IT is a natural conſequence of all the kinds of particular Engagements, and of the general Engagement to do wrong to no body, that they who cauſe any Damage, whether it be by contravening ſome Engagement, or failing in the performance of it, are obliged to repair the Damage which they have done.

All the ſorts of Damages, whatever cauſe they may proceed from, may be reduced to two kinds. One is, of the viſible Damages cauſed by thoſe who occaſion the loſs or deſtruction of ſome thing, or who damnify it; as he does who having borrowed a Horſe, loſes him, or lames him: or he who turns his Cattle a grazing into the Field of another perſon who does not owe him that Service. The other kind, is of the Damages cauſed by thoſe who without deſtroying or damaging any thing, give occaſion to ſome loſs of another nature. As if he who owes a Sum of Money does not pay it at the term, if he who ſells fails to deliver the thing ſold, if he who undertakes a Work does not perform it.

We may diſtinguiſh Damages by another view, according to the intention of thoſe who cauſe them. Some are the effects of a bad deſign, as of a Crime, of an Offence, of a Cheat: And others happen without any bad deſign in the perſon who is accountable for them; but barely either out of negligence, or thro' ſome fault, or even thro' an inability to perform ſome Engagement.

Of what nature ſoever the damage be, and from what cauſe ſoever it may proceed, he who is anſwerable for it ought to repair it, by an amends proportionable either to his fault, or to his offence, or other cauſe on his part, and to the loſs which has happened thereby, according to the Rules which ſhall be explained in this Title.

Before we enter on the explanation of theſe Rules, it is neceſſary to make here ſome reflexions on the Principles on which they depend, the knowledge whereof may make the uſe of theſe Rules more eaſy and more profitable in the ſeveral caſes where it is neceſſary to apply them.

Difference between Intereſt, and Coſts and Damages.

All the ſorts of Reparations of Damage, are reduced to two kinds: One which is called barely Intereſt; and the other Coſts and Damages. Intereſt is the reparation, or ſatisfaction which he who owes a Sum of Money is bound to make to his Creditor, for the damage which he does him by not paying him the Money he owes him. As if he who has borrowed a Sum of Money, does not pay it at the term: if a Purchaſer does not pay the price of the Sale: if a Tenant does not pay the Rent of the Houſe which he hires, or a Farmer the Rent of his Farm. All the other

other reparations of Damage, of what nature ſoever the Damage be, are called Coſts and Damages; as if a Tenant neglects to make the repairs which he is bound to by his Leaſe, and the Houſe be thereby damaged: if a Partner neglects to take care of a thing belonging to all the Partners in common, with which he is intruſted, and the ſame periſhes: if a Tutor fails to gather in the Debts that are owing to his Minor, and they be loſt: if a Seller does not warrant the Purchaſer againſt an Eviction. The ſame name of Coſts and Damages, is given likewiſe to the Reparations which are due from thoſe who have cauſed any Damage by a Crime, or an Offence. And in Crimes, the ſatisfaction for the Damage is called the Civil Intereſt, which is the ſame thing with Coſts and Damages; but this word of Civil Intereſt is made uſe of, to diſtinguiſh this reparation of the Damage from the other Penalties which are inflicted for Crimes.

There is this difference by the Law, and by our Uſage, between the Damages which ariſe from the bare default of paying a ſum of Money that is due, and the Damages which have other cauſes, that all the Damages which thoſe may ſuffer who are not paid a ſum of Money at the term of payment, are all uniform, and fixed by the Law to a certain portion of the Sum that is due, for the ſpace of a year, and proportionably for a longer or ſhorter time. Thus we have ſeen the Intereſt of Money at the rate of between eight and nine *per Cent.* that is, the twelfth part of the principal Sum; then between ſix and ſeven *per Cent.* then reduced lower, to between five and ſix; and at preſent it is fixed at five *per Cent.* But the other ſorts of Damages are indefinite, and are extended or limited differently, by the prudence of the Judge, to more or leſs, according to the nature of the fact, and the circumſtances. Thus, whoever owes Money, whether on the ſcore of Loan, or for other cauſes, owes for all manner of damage, if he does not pay it, only the Intereſt that is ſettled by Law. But a Tenant who fails to make the Repairs which his Leaſe obliges him to; an Undertaker who fails to perform the Work which he has undertaken to do; or who does it ill; a Seller who does not deliver the thing which he has ſold; or who having delivered it, does not warrant it againſt an Eviction; owe indefinitely the damages which may enſue upon their not performing their Engagement; and they are regulated differently according to the diverſity of the loſſes which happen, the quality of the facts which occaſion them, and the other circumſtances.

Why the Intereſt of Money is fixed, and Coſts and Damages undetermined.

This difference between the Intereſt ſettled by Law for ſums of Money owing, and thoſe Reparations of Damage, of which the eſtimation is undetermined, hath its foundation in the differences which are between the failing to pay a ſum of Money that is owing, and the other various cauſes which give occaſion to ſome damage.

We may remark as the firſt and moſt ſenſible of theſe differences, that among all the cauſes which may give occaſion to a reparation of Damages, there is none ſo frequent as the default of paying a ſum of Money that is due; and that there is likewiſe none from whence there ariſes ſo great a variety of damages to be repaired; ſo that if every Creditor had a right to have the damage eſtimated which he may ſuffer for want of the Money that was due to him, each demand of payment would be attended with an infinite number of diſcuſſions of the different damages which the Creditors might alledge they had ſuſtained. One would pretend, that for want of payment, his Goods had been ſeized, and ſold, and he by that means ruined; another would alledge that his Houſe had fallen down for want of Money to repair it: a Merchant would pretend a conſiderable loſs in his Trade: and according as the different wants and conjunctures ſhould diverſify the events, every one would diſtinguiſh himſelf by the circumſtances of his Loſs, and of his Damage.

Had there therefore been no other cauſe for fixing by a Law an uniform Reparation for all the ſorts of Damages which may ariſe from the non-payment of Sums of Money, beſides the conſideration of retrenching this infinite multitude of different Liquidations and Law-ſuits which would follow thereupon, we could not well be without ſuch a Regulation. But another difference which diſtinguiſhes the Engagement of Debtors of Sums of Money, from all other ſorts of Engagements, is a Natural Cauſe, which makes this Regulation to be as equitable in it ſelf, as it is uſeful to the Publick.

This difference conſiſts in this, that the Damages which proceed from other cauſes than the non-payment of Money, ariſe from ſome Engagement which diſtinguiſhes and points out the nature

of the Damage which one may be accountable for, if he fails to perform his Engagement; which is not to be met with in the Engagement of thoſe who owe Sums of Money. Thus, for example, when a Tenant obliges himſelf to the ſmall Repairs of a Houſe which he rents, his Engagement points out to him preciſely, that he obliges himſelf to thoſe Repairs, in order to preſerve the Houſe in the good condition in which it is at the time it is let to him, and that conſequently if he fails to make the ſaid Repairs, he will be liable for the Damage that ſhall enſue thereupon, and be obliged to reſtore the Houſe in the ſame condition in which it was at the time when he hired it. Thus, when an Undertaker of a Building obliges himſelf to make it ſuch as it ought to be according to his bargain, his Engagement tells him the quality which the Work he undertakes ought to be of; that he is to anſwer for the defects of the materials, if by his Contract he is bound to furniſh them, and for the faults of his Conduct and Workmanſhip. Thus, he who is engaged in a Guardianſhip, cannot be ignorant that his Engagement obliges him to an exact and faithful Adminiſtration, and that if he neglects either to call in the Debts, to cultivate the Lands, or to repair the Houſes, he will be accountable for the conſequences of his negligence. And it is the ſame thing in all the other ſorts of Engagements, excepting that to pay the Money one owes. Thus in theſe Engagements, the deed of the perſon who is bound to repair the damage, is a cauſe which determines preciſely the quality of the reparation which he may be liable to make. But the Engagement of thoſe who owe Sums of Money, has no relation to any kind of particular and determined Damage that is to happen, if they do not pay; and does not mark whether it will be the ruin of a Building, or a Bankrupcy, or any other particular Damage, of a thouſand that may happen. But the quality of this Damage will depend on the particular circumſtances in which the Creditor who is not paid at the term ſhall find himſelf. And as the wants are diverſified according to the differences of the Events and Conjunctures in which thoſe perſons happen to be, who are diſappointed of what is due to them; ſo the Damages which happen to them from thence, are alſo of natures altogether different; and they are unforeſeen, as well as the wants from whence they may proceed.

This infinite variety of Damages which may enſue, upon the non-payment of a Sum of Money, is an effect of the nature of Money; which of it ſelf having no particular and determined uſe, as all other ſorts of things have; but having this general uſe of making the Price of all Things that may be valued, it is to every perſon inſtead of thoſe things which he ſtands in need of. Thus, the uſe of Money being different according to the divers ways of imploying it, and according to the particular occaſions which one may have for it, the damages which may happen to thoſe who are not paid by their Debtors, are different likewiſe, according to the diverſity of the uſes to which they intended to put the Money that was due to them.

It follows from this difference between the Engagement of thoſe who are indebted in Sums of Money, and all other ſorts of Engagements; that as in all other Engagements, the perſons who are obliged may diſtinguiſh by the nature of their Obligation, what the damage will be for which they will be accountable, in caſe they do not perform their Engagement, and that this knowledge makes them foreſee preciſely what they oblige themſelves to, and what the damages which they ſhall cauſe may amount to; one finds in every one of the ſaid Engagements, a juſt foundation whereby to diſtinguiſh the reparation that may be due, and to aſcertain the ſame. But as the bare quality of the Engagement of thoſe who owe Money does not diſtinguiſh their condition, and does not point out to them preciſely what may be the damage that may enſue, upon their failing to make payment, and that beſides they are all obliged only to one and the ſame thing, which is, to pay a Sum of Money; their Engagement is not a Principle by which we can diſtinguiſh the Reparations to which they may be liable, nor does it oblige them differently to the reſpective damages which the Creditors may ſuffer, according to the diverſity of the Events. But theſe Events are, with reſpect to the Debtors, as Accidents, which they could not foreſee, and which their Obligation did not comprehend.

It follows from this difference between the Engagement of perſons who are indebted for ſums of Money, and all the other ſorts of Engagements, that in one and the ſame Contract, of the nature of thoſe which are binding on both ſides, it may happen, and does often

often ſo fall out, that altho' the Engagement of the Contracters be reciprocal, that is, that each of them on his part be bound to the other; yet their Engagements are neither alike in their nature, nor equal in their eſtimation, but are of different natures; and the ſame Contract limits the Engagement of one of the Contracters to the bare Intereſt of a Sum of Money, if it is not paid at the term of payment, whilſt the Engagement of the other party is indefinite, and may be extended to damages of a far greater value. Thus in a Contract of Sale, the Obligation of the Seller informs him, that he is obliged to deliver the thing ſold, and to warrant it with the qualities which it ought to have; which lets him know, that if the thing ſold is not delivered, if it has not thoſe qualities which it ought to have, if it is evicted from the Purchaſer, he muſt anſwer for the damages which ſhall enſue thereupon, according to the Rules explained in the ſecond, tenth, and eleventh Sections of the Contract of Sale. But the ſame Contract of Sale doth not form any ſuch Engagement on the part of the Buyer. For it does not point out to him what damage the Seller may ſuſtain for want of his Money, whether he ſhall ſuffer any at all, or whether, on the contrary, it may not endanger the loſs of his Trade and Commerce; whether ſuch a diſappointment may not occaſion his Goods to be ſeized and ſold; or what other damage the Seller may ſuſtain thereby. Thus, whereas with regard to the Seller, the Events which ſubject him to damages having been foreſeen, he cannot ſay, when they happen to the Buyer, that they are Accidents which he could not foreſee, and for which he ought not to be anſwerable; whereas the Buyer, on the contrary, may ſay, in reſpect of the different loſſes which may happen to the Seller, that not any one of them has been foreſeen, and that therefore thoſe which happen are, with regard to him, Accidents which his Obligation did not point out to him: and he may alledge, that if the Seller had propoſed, that in caſe ſuch Accidents ſhould happen, the Buyer ſhould be anſwerable for them, he would not have bought upon thoſe terms, nor expoſed himſelf to the danger of ſuch conſequences, in caſe of failure to pay the price of the thing ſold.

It is eaſy to perceive the ſame difference of Engagements, in one and the ſame Contract, in Leaſes of Lands and Houſes, and in other ſorts of Engagements, even thoſe that are entred into without Covenant. But we muſt not draw this conſequence from the difference we ſee between the Engagement of one party, and that of the other, that thoſe who owe only Money are not liable to damages, if they fail in their payment, under pretext that their Engagement does not preciſely point out to them what will be the damage that will enſue upon their non-payment. For it being certain that they do wrong to their Creditors by not paying them, it is juſt that they ſhould make them amends; and in order to ſettle this reparation of damages, it was neceſſary to have a fixed Rule, that might be common to all Debtors in Sums of Money, and that ſhould be founded on other principles than thoſe which regulate the damages of all other kinds. And there could not have been made a more equitable Regulation in this matter, than what has been found out, by fixing the reparation of damages which the Debtor of a Sum of Money is liable to, in caſe he fails to pay it at the term, to a certain portion of the Sum due; for this reparation is founded on two Principles which are perfectly juſt and equitable. One is, that all Debtors for Sums of Money being under the ſame Engagement, and owing only one thing of the ſame kind, they are obliged only to the ſame reparation of damages. And the other is, that it being neceſſary to fix this reparation of damages upon one and the ſame foot, it could not be made more juſt and more certain, than by fixing it at the value of the common profits that may be made of Money by a lawful Commerce. And this is what has been done by comparing Money, which makes the price of all things, to thoſe things which produce naturally ſome profit, and by regulating the profit of a Sum of Money, according to the profit that is made of a Thing of like value. And ſeeing the moſt ordinary, and moſt natural profits, are thoſe which Lands yield, the reparation of damages which ought to be made to Creditors in Sums of Money, who are not paid at the term of payment, is eſtimated at the rate of the uſual Produce or Revenue of a piece of Land of the ſame value with the Sum that is due. Thus, for example, if the common value of the Revenue of Lands is a *French Sol*, or Penny, in the Livre, the reparation of damages

which will be due from a Debtor who owes the Sum of a Thouſand Livres which he does not pay, will be of fifty Livres a year, which is the Revenue that is commonly reaped every year from a Piece of Ground that may be worth a Thouſand Livres. And it is upon the ſame foot that Annuities are regulated, where he who purchaſes an Annuity out of the Eſtate of his Debtor, does nothing elſe but purchaſe a yearly Revenue in Money, which may be of the ſame value with the ordinary Revenue that may be made of a Piece of Ground which might be purchaſed for the Money he lays out on the Annuity. But ſince the value of the Revenue of Lands is ſubject to changes, and that the ſame riſes, or falls, according to the ſcarcity, or plenty of Money, and for other cauſes which render it neceſſary to make different Eſtimations, according to the changes which the times may produce, the Laws regulate differently the Standard of the Intereſt of Money, and that of Annuities, according as thoſe changes may require. Thus we have ſeen in *France*, as has been already obſerved, Annuities, and Intereſt of Money, reduced from ten, to between eight and nine *per Cent.* and lowered, by degrees, to five in the Hundred, which is the preſent Standard.

Exceptions to the Rule which fixes the Intereſt of Money.

All theſe conſiderations, which juſtify the Rule by which the Intereſt of Sums of Money is fixed at a certain portion of the Principal, are to be underſtood only of the caſes where the Debtors cannot be charged with any blame, that may deſerve a Reparation of another kind. And this Rule does not juſtify the Debtors, who being able to pay, are unwilling to do it, and much leſs does it juſtify thoſe, who, rather than pay their Debts, hoard up their Money, and let poor Families ſtarve, for want of their own. This ſort of Iniquity is of another kind than the bare delay of Debtors, who have not wherewithal to pay their Debts at the time appointed: and this hardſhip would deſerve puniſhments of a ſeverer kind, than a bare reparation proportioned to the damages which it may occaſion. It was for this reaſon that the Ordinance of *Orleans* in *France* required the Judges to condemn thoſe who ſhould be found in arrears for Wages due to Labourers and Workmen, to pay the double of what they owed[a]. And altho' this Ordinance be not obſerved, and that ſuch unjuſt Debtors go unpuniſhed, yet we thought fit to inſert this Remark, to ſhew that this Impunity is not agreeable to the Spirit of the Law, and that there are occaſions in which the crying Injuſtice of thoſe Debtors might be puniſhed, agreeably to the Intention of the Law.

[a] *Article 60. of the Ordinance of Orleans.*

We muſt alſo except from this Rule which fixes the Intereſt of Sums of Money that are owing, Bankers who do not punctually anſwer Bills of Exchange. For this kind of Obligation hath particular Characters which diſtinguiſh it; as to which the Reader muſt conſult what has been ſaid thereof, in the fourth Section of the Title of Perſons who drive any publick Trade, *&c.* where we ſee that the engagement in Bills of Exchange is not only to pay a Sum, but implies the circumſtance of remitting the Money from one place to another; which renders the party who fails in the performance of his engagement liable to other damages beſides the bare delay of paying what he owes. And this matter is regulated by the Ordinance of 1673, in the Title of Bills of Exchange; and in that of the Intereſt of Change and Rechange[b].

[b] *V. tit. ff. de eo quod certo loco.*

Neither muſt we comprehend under this Rule, the Engagement of Debtors to their Sureties. For it is not Money that Debtors owe to their Sureties; but they are bound to ſave them harmleſs from the damages which they may ſuſtain on the part of the Creditor, if he is not paid; as if he diſtrains their Goods. Thus, the indemnity which the Debtor owes to his Surety, obliges him to make good the damages which he may have ſuffered by a Seizure of his Goods, at the inſtance of the Creditor.

Other Remarks concerning Damages.

After having made this diſtinction between the Intereſt of Money, and Damages, it is neceſſary to obſerve, as to Damages, that it is by two views that we may judge whether there be any at all due, and that we ought to regulate them. For we ought firſt of all to conſider the quality of the fact from whence the damage proceeded, as if it is a Crime, an Offence, a Cheat: Or if it is barely ſome fault, ſome neglect, or an involuntary non-performance of an Engagement. For according to theſe differences, the Reparation of Damages may be greater or leſſer, as we ſhall ſee hereafter. And we ought alſo to conſider the Events which have enſued upon the ſaid fact, and whether they be ſuch as ought

ought to be imputed to him who is Author of the fact, or whether there be other cauſes mixed with it, ſo that all thoſe conſequences ought not to be imputed to him.

As to what concerns the quality of the fact of the perſon from whom a reparation of damages is demanded, the queſtion is only to know, if there be on his part any deſign to hurt, or any knavery, or if there be no ſuch thing. And ſeeing it is an eaſy matter to know it, either by the fact it ſelf, or by the circumſtances, without any help of Rules, it is ſufficient to remark barely here, that it is by this firſt view, that we ought to examine the queſtions concerning Damages.

As to the events which may enſue upon the fact of him who is charged with the Damage, there may ariſe difficulties about them, which may very well deſerve Rules for deciding them. For it is to be obſerved, that it often happens, that there ariſes from one only fact a chain of conſequences and events, which cauſe divers damages, whether it be that thoſe events have been the immediate conſequences of the ſaid fact, ſo as that it may be averred that it was the real and only cauſe of them; or that they may be aſcribed to other cauſes which have no dependance on the ſaid fact, but to which that fact had barely given occaſion, or that they happen to be joined with the ſaid fact by ſome accidents. And according to theſe differences of Events, there may be a difference in the Damages, ſo that ſome of them may be juſtly imputed to the Author of the fact, and it may not be reaſonable to charge him with others.

We ſhall be able to judge of theſe ſeveral ſorts of Events, and of the regard which ought to be had to them in Queſtions relating to Damages, by the two following Examples. And we ſhall ſee likewiſe at the ſame time, the divers effects which the fact of the perſon who is anſwerable for the damage ought to have in theſe Queſtions, according to the quality of the fact, and the motive thereof.

We may ſuppoſe for the firſt Caſe, that a Merchant having hired a Shop for a Fair, in a Town which was not the place of his uſual reſidence, and that having carried thither his Merchandize, it happens that he who had let him the Shop is himſelf turned out of the poſſeſſion thereof, either by an Eviction, or by a Power of Redemption, or by a Seizure of his Eſtate, and that the Shop is let to others, by the authorit Court of Juſtice, ſo that the perſc let it to the Merchant is not perform his Contract, and that fore the Merchant finds himſelf neceſſity of hiring another Shop the former, but at a much deare Or that not being able to get another Shop, he loſes his Market, and for want of the aſſiſtance which he expected from the Sale of his Goods, to pay a preſſing Debt, he becomes Bankrupt. We ſee in this caſe many damages which may follow from theſe different Events, which it is neceſſary to diſtinguiſh, in order to diſcern between thoſe which are in ſuch a manner a conſequence of the non-performance of the covenants of the Leaſe, that they ought to be imputed to him who was bound to give the Shop; and the Events which may proceed from ſome other cauſe, jointly with that of the non-performance of the Leaſe, and for which it may not be reaſonable to make the Leſſor of the Shop accountable.

We ſee in the firſt of theſe Events, where the Merchant has hired another Shop, that all the damage conſiſts in his having hired it at a dearer rate; and that the ſaid damage having for its only cauſe the non-performance of the firſt Leaſe, he ought to be indemnified as to what it has coſt him more to get this other Shop. But in the ſecond caſe, where the Merchant could not get another Shop, we ſee that he ſuſtains three different ſorts of damages; that of the charges of tranſporting his Merchandize thither and back again, that of the loſs of the profit which he would have made by the ſale of his Goods, and that of the Bankrupcy.

The loſs of the charges for the Carriage of the Goods, is a neceſſary conſequence of the non-performance of the Contract for letting the Shop; and ſeeing this loſs proceeds from no other cauſe, one may impute it to him who let the Shop.

The loſs of the profit which might have been made by the ſale of the Goods, is alſo a conſequence of this non-performance of the Leaſe of the Shop; but this loſs is not of the ſame nature with that of the charges of the Carriage. For whereas the loſs by the Carriage of the Goods may be eaſily eſtimated, and is an effect which hath for its certain and preciſe cauſe the non-performance of the Leaſe; the loſs of this profit which might have been made by the ſale of the Goods, cannot be ſo eaſily known:

for this knowledge depends on nd uncertain events. It is well that the profit which this Mer- aight make at the Fair, did not barely on his having a Shop or in it; but it might happen, ei- cauſe of the great quantity of Goods of the ſame kind with his, or becauſe of the ſcarcity of Money, and the ſmall number of Buyers, or through other cauſes, that there would be but little profit to be made, or perhaps none at all: and it might happen likewiſe that becauſe of the ſcarcity of thoſe Goods, the plenty of Money, and the great number of Buyers, the profit would have been great. So that it cannot be known exactly what this loſs may have amounted to. But even altho' it could be known exactly what quantity of Goods this Merchant might have been able to ſell, and what gain he might have made, judging of his profit by that which other dealers in the ſame Commodity had made; yet it would not be reaſonable to charge all that loſs on him who ought to have furniſhed the Shop. For beſides that this Merchant having ſtill the Goods in his poſſeſſion, might yet make profit by them, and perhaps more than he would have done at the Fair, for which the Shop was hired, no body knew any thing at that time of the events which might make the profit either greater or leſſer, or which might occaſion, perhaps, that there would be no profit at all, or that there would be loſs, inſtead of gain. So that they did not reckon that the penalty for the non-performance of the Leaſe ſhould amount to the value of the greateſt gain that this Merchant could hope for from a good market. But becauſe he who has failed to deliver the Shop ought to ſuffer ſome puniſhment for his not performing his Bargain; it is juſt to award under all theſe views ſome reparation of damages, and to regulate the ſame according to the circumſtances.

As to the third Damage, which is that of the Bankrupcy, this unforeſeen event having for its particular cauſe, the condition in which the affairs of the ſaid Merchant were at that time, it is an accident with regard to him who had promiſed the Shop, and which conſequently ought not to be laid to his charge.

We may ſuppoſe, for a ſecond Caſe, that a Merchant having agreed with the Maſter of a Manufacture, for a certain quantity of Goods, to be delivered to him on a certain day, that they might be imbarked on board a Fleet appointed to ſail at that time, and that the Merchant having paid beforehand the price of the ſaid Goods, or a part thereof, and being come with Carriages to receive them, they are not delivered to him. We ſee alſo in this caſe ſeveral damages, the charges of the Carriages, the loſs of the profit which this Merchant might hope to have made by the ſale of thoſe Goods in the place whither he purpoſed to ſend them, and that of the gain which he might have been able to make upon other Goods which he would have bought up in the ſame place, and likewiſe the Intereſt of the Money which he had advanced. The charges of the Carriages are due to him without any manner of difficulty, as well as the Intereſt of the Money which he advanced. The profit which he might hope to make upon the Goods which he intended to buy up with the Produce of his outward bound Cargo, is too remote from the deed of the perſon who has failed to deliver the Goods for the Imbarkation, and ought not to be imputed to him. And as for the profit which might have been made by thoſe Goods, if they had been imbarked, we muſt conſider, on one hand, that for want of having had thoſe Goods delivered to him, the Merchant is deprived of the hopes of the gain which he might have expected, and that he who was bound to deliver them, having failed in the performance of his engagement to do it, ought to bear the puniſhment of his non-performance of his promiſe, by making ſome reparation of the damage. And on the other hand likewiſe, we ought to conſider that this gain was not certain, that the Ship might periſh by Shipwrack, or fall into the hands of Pirates or Enemies; and that other accidents might have prevented the making any profit at all. So that in this uncertainty of events, it would not be juſt that the reparation of damages ſhould be equal to the gain which one might hope for from a ſucceſs altogether favourable. But it ought to depend on the prudence of the Judge, to ſettle and to moderate ſome reparation of damages, according to the circumſtances, and the particular Uſages obſerved in ſuch caſes, if there be any.

We ſee by theſe Examples, and it is eaſy to remark in others[c], of what conſequence it is to diſtinguiſh the events, in order to know wherein the reparation of damages ought to conſiſt. And it remains that we ſhould conſider the

the divers effects which the different qualities of the facts from whence they proceed may have in Queſtions relating to Damages. Thus, for Example, in the firſt Caſe of the non-performance of the Leaſe of the Shop promiſed to the Merchant, if we ſuppoſe that, inſtead of an Eviction, or a Seizure, which may have hindred the execution of the Leaſe, it had happened that the Shop was burnt by a fire communicated from the neighbouring Houſe, or that on the very day of the Fair the ſaid Shop had been ſet apart for ſome publick Office, by the Authority of Juſtice, and that the Proprietor had not time nor opportunity to give notice to the Merchant of the ſaid changes; ſeeing the ſaid changes would be accidents which had happened without any fault on his part, he would not be liable to any reparation of damages, by the general Rule that no body is to anſwer for Accidents, except there be ſome fault on their part[d]. But if we ſuppoſe that he who let the Shop to this Merchant, did afterwards let it to another, and put him into poſſeſſion of it, that he might have a greater Rent for it; this Knavery will ſubject the Owner of the Shop to a much greater reparation of damages, than if the non-performance of the Leaſe had been occaſioned only by a Seizure, or Eviction of the Shop. For whereas in the caſe of an Eviction, or Seizure, we ought to moderate the reparation that is to be made to the Merchant, for his loſs in being diſappointed of the Sale of his Goods, according to the Remarks which have been made; his knaviſh dealing cuts off all pretenſions to any mitigation of the damages: and the Sentence which condemns the Party in damages, ought to have the utmoſt extent that the Rigour of the Law can give it, becauſe the knavery implies a will and intention to do all the hurt that is poſſible.

[c] *See the ſeventeenth and eighteenth Articles of the ſecond Section of the Contract of Sale, the eighth Article of the third Section of Letting and Hiring, the twelfth, thirteenth, and fourteenth Articles of the fourth Section of Partnerſhip, and the ſixth Article of the ſecond Section of Proxies.*

[d] *See the ninth Article of the third Section of Covenants.*

We may conclude from all theſe Remarks, that in all the caſes where the queſtion is to know if any Damages are due, and in what they conſiſt, it is neceſſary to conſider the quality of the fact which has occaſioned the damage, the ſhare which the perſon who is charged with the damage may have had in the fact, his intention, whether the ſaid fact happened by accident, what have been the conſequences of it, either immediate, or more remote, and which may have proceeded from other cauſes. And it is by all theſe views, and by a conſideration of the particular circumſtances of every caſe, that the Judges ought, according to their prudence, to decide queſtions of this nature. As to which it is likewiſe neceſſary to obſerve, that there are caſes in which the conſequence of the non-performance of an Engagement may be ſuch, that altho' there were no bad intention on the part of him who has failed to perform his Engagement, yet he might deſerve not only to be condemned in a conſiderable Sum of Money, for Reparation of Damages, but alſo to be puniſhed otherwiſe. As in the caſe of thoſe who undertake to furniſh Arms, Proviſions, Forrage, or other things for an Army, and who fail in the performance of their Contracts. For in Contracts of this importance, wherein the Publick and State is concerned, imprudences and other faults, let them be never ſo ſmall, are of ſuch conſequence, that they deſerve to be puniſhed with great ſeverity, and are ſuch as may be ranked in the number of Crimes, according to the circumſtances.

We may add to all theſe Remaks, a diſtinction which it is neceſſary to make between two ſorts of caſes where damages happen that are to be eſtimated. One is, of the caſes where the damage is preſent, and where the reparation may be known, and regulated by a view of the events which have actually happened. And the other is, of the caſes where the damage is not preſent, but to come, and depends on future and uncertain events, altho' it be neceſſary to regulate the reparation for the damages, before they happen. We may ſee in one and the ſame kind of Contract, an example of each of theſe two ſorts.

If the Leaſe of a Farmer, which was only for one year, be interrupted juſt before Harveſt, by a change of the Proprietor, as if the Land was evicted from him who had leaſed it out, or if he ſold it, he ought to make good to the Farmer the preſent loſs which he ſuffers by not being allowed to gather the Crop that is on the Ground; and it is no hard matter to adjuſt this reparation of damages, becauſe it appears wherein the loſs does conſiſt. But if the Leaſe was for ſeveral years, and the ſame be interrupted

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views of the Events which this Farmer might have reaſon to hope for, or fear, according to the quality of the Fruits or Revenues which his Farm yielded. It was poſſible that there might happen Hails, Froſts, Barrenneſs, a fall in the price of Proviſions, and other cauſes of Loſſes: and it might likewiſe ſo fall out, that there might be plentiful Crops, that the price of Proviſions might likewiſe riſe, that there might be favourable opportunities for the Sale of them, and other cauſes of Profit: and, in a word, it might happen that the ſaid Farmer would neither have been a gainer, nor a loſer. But becauſe Farmers uſually make their bargains ſo as to be gainers, and that it is even the intention of the Proprietors, that their Farmers ſhould reap ſome profit; the uncertainty of theſe Events is no reaſon why a reparation of damages ſhould not be due to this Farmer. And all that Human Reaſon can do in a caſe where it is neceſſary to decree a reparation of damages to be made, and impoſſible to know what the Damage may amount to, is to take a Medium of the Profits which Farmers of ſuch Lands may commonly make, adding thereto the conſiderations which the particular circumſtances may deſerve, as if the Farmer had enjoyed his Farm for the greateſt part of the time of his Leaſe with a great deal of profit, or a great deal of loſs; for in the firſt caſe, the Reparation of Damages ought to be leſs, and greater in the ſecond: if the ſaid Farmer found any where elſe an opportunity of taking much ſuch another Farm; or if no ſuch opportunity offered: if he had many years of his Leaſe to come; for in this caſe one ought not to allow for each year the ſame Reparation of Damages, as if there remained only one or two years of his Leaſe to run; becauſe the Farmer might provide himſelf of another Farm in ſo long a time, and he might have many more caſualties to fear. And we ought alſo to conſider the cauſe of the interruption of the Leaſe; if it is an Eviction that was not foreſeen, a voluntary Sale, or an Accident: For according to the cauſe, either there is no Reparation due at all, as if the Land was carried away by a Flood; or it might be leſſer, or greater, according as the Proprietor had more or leſs ſhare in it.

It is by all theſe views, and others of the like nature, that we may regulate the Reparations of Damages of this kind. Which may be reduced to the Remark already made, that the Reparations of Damages ought to be regulated by a view of the cauſe of the damage, and of the events which are the conſequences of it.

Hitherto we have ſaid nothing of the vulgar diſtinction in the matter of Damages, between thoſe which are due for a Damage, or Loſs that one ſuffers by a diminution of his preſent Goods, which he is actually poſſeſſed of, and thoſe which are due on the account of a Gain that ceaſes. For it will be eaſier to diſtinguiſh theſe two ſorts of Damages, after the other diſtinctions that have been remarked. Thus, for example, in the caſe of the Merchant to whom the Shop had been let, we ſee that the loſs of the charges of tranſporting his Goods is of the firſt ſort, and the loſs of the profit which he might have made by the Sale of them is of the ſecond; as well as that of the Farmer, whoſe Leaſe is interrupted. And as to the difference that may be between theſe two ſorts of Damages, in what regards the application of the ſeveral Reflections abovementioned, both to the one ſort and the other, it is eaſie to diſtinguiſh them aright. And one will be able to judge both by theſe Reflections, and by the Rules which ſhall be explained in this Title, of the uſe that is to be made of them in the ſeveral caſes of Damages of all kinds.

The Reparations of Damages are regulated either by the Judge, or by ſkilful Perſons.

We muſt obſerve in the laſt place on the ſubject of the Eſtimate that is to be made of Damages, that in conſequence of the Remarks already made, this Eſtimate may be ſettled in two manners, either by the Judge himſelf, or by ſkilful Perſons, and this depends on the quality of the Damages that are to be eſtimated. For if they are ſuch as the Judge may regulate himſelf, there is no occaſion to call for the aſſiſtance of ſkilful Perſons: who are not to be employed except in the caſes where this Eſtimate depends on ſome Art or Profeſſion, or on ſome facts which it would not be ſuitable to the Function or Dignity of the Judge to enquire into. We ſhall explain theſe ſorts of Damages by two Examples.

If he who has purchaſed an Eſtate is evicted thereof, and demands for his Damages only the Fines of Alienation which

which he had paid to the Lord of the Mannor, and the charges he had been at for drawing and engroſſing the Writings, and taking poſſeſſion of the Eſtate; the Judge may by himſelf regulate theſe Damages, for he may eaſily ſee in what they conſiſt. But if it is the Damages due by an Architect for a faulty Building which are to be regulated, this ſaid Eſtimate, which depends on the quality either of the Materials, or of the Work, demands the Judgment of perſons ſkilled in thoſe matters.

But if the caſe be ſuch, that the Eſtimate of the Damages depends barely on Reflections to be made on the quality of the Fact which has occaſioned the Damage, and on the Events which have been the conſequences or effects thereof, in order to diſtinguiſh between what ought to come under the Reparation, and what not, and that there be nothing beſides which requires the judgment of ſkilful Perſons; ſeeing theſe ſorts of Reflections are equally conſiſtent with the Dignity and Function of the Judge, he may take cognizance of them, and may regulate by his own Prudence the Damages of this kind. Thus, the Ordinances of *France* require, that the Judges themſelves ſhould regulate the Damages cauſed by falſe Impriſonments, unjuſt Seizures of Goods and Executions [e], becauſe the liquidating of theſe ſorts of Damages depends on the conſideration of the quality, and circumſtances of the facts which occaſion them. Thus, for example, if a Creditor cauſes his Debtor to be thrown into Jail, when he has no right to uſe the ſaid conſtraint, whether it be that his Debt does not give him that power, or that the Age of his Debtor, or ſome other cauſe, does make the ſaid impriſonment to be unjuſt, and that the ſaid Debtor be a Day-Labourer, or other perſon who by his Labour maintains his Family, which for want of this aſſiſtance ſuffered likewiſe other loſſes; it will depend on the Prudence of the Judge to regulate a Reparation both for the loſs of the day's work of this Priſoner, and for the other Damages, according as the injuſtice of the ſaid Creditor may deſerve upon conſideration of the circumſtances.

[e] *Ordinance of* Blois, *Article* 145.

We have judged it neceſſary to make here all theſe Remarks on the nature and Principles of this matter of Intereſt, and Damages, in order to explain the difficulties which the Laws themſelves acknowledge to be therein; ſince we ſee a Law of the Emperor *Juſtinian*, in which, to prevent theſe difficulties, and the infinite number of queſtions that ariſe from thence, he reduced all the Caſes where there happens any Damages to two kinds. The one is, of thoſe Caſes where the queſtion is about a certain quantity, or which have their nature fixed and regulated, ſuch as Sales and Leaſes, and under this kind he comprehended all Contracts. The other kind is of all the other Caſes whatſoever without diſtinction, whatever might be the cauſe of the Damage.

As for the Caſes of the firſt kind, which have their nature fixed, and where the queſtion is concerning a certain quantity, he eſtabliſhed it for a Rule, that the Damages ſhould not exceed the double of the ſaid quantity: And as to all the other Caſes where there ſhould happen any Damages, he ordered that they ſhould be regulated by the prudence of the Judge, according to the Eſtimate of the real Damage that was ſuſtained [f].

[f] Cùm pro eo quod intereſt dubitationes antiquæ in infinitum productæ ſint: melius nobis viſum eſt hujuſmodi prolixitatem, prout poſſibile eſt, in anguſtum coarctare. Sancimus itaque in omnibus caſibus qui certam habent quantitatem, vel naturam, veluti in venditionibus & locationibus, & omnibus contractibus, hoc quod intereſt, dupli quantitatem minimè excedere. In aliis autem caſibus qui incerti eſſe videntur, judices qui cauſas dirimendas ſuſcipiunt, per ſuam ſubtilitatem requirere, ut hoc quod revera inducitur damnum, hoc reddatur, & non ex quibuſdam machinationibus, & immodicis perverſionibus in circuitus inextricabiles redigatur: ne dum in infinitum computatio reducitur, pro ſua impoſſibilitate cadat: cùm ſciamus eſſe naturæ congruum, eas tantummodo pœnas exigi quæ vel competenti moderamine proferuntur, vel à legibus certo fine concluſæ ſtatuuntur. Et hoc non ſolùm in damno, ſed etiam in lucro noſtra amplectitur conſtitutio: quia & ex eo veteres id quod intereſt ſtatuerunt. Et ſit omnibus, ſecundùm quòd dictum eſt finis antiquæ prolixitatis, hujus conſtitutionis recitatio. *l. un. C. de Sent. quæ pro eo quod int. prof.*

Seeing this Regulation which limits the Damages to the double in all Contracts, and in the caſes where the queſtion is about a certain quantity, and which have their nature fixed and regulated, is a manner of deciding which does not unravel nor reſolve the difficulties, and which often would not do juſtice to thoſe who ſuffer damage, it is therefore not in uſe with us. For beſides that it does not diſtinguiſh between the Facts in which there is Knavery, and thoſe in which there is none, there is no more reaſon for leſſening or retrenching

retrenching any thing of the lawful Reparation of Damages in the Caſes where the queſtion is about a certain quantity, and in Contracts, than there is in the other Caſes of different natures. Thus, for Example, if a Tenant of a Houſe who pays only one hundred Crowns for the Rent of it, had ſo far neglected to make the Repairs which he was bound to make, that he had cauſed a damage exceeding one thouſand Livres, or if the Houſe had been burnt by his fault, it would not be juſt that he ſhould be quit for his Rent, nay, not for the double, nor even for the triple of it.

It is to be obſerved, as to this Rule of *Juſtinian*, which limited thus the Damages to the double in all thoſe caſes which have been mentioned, that it ſeems to have been made in imitation of another Rule, which ordered that the Intereſt of Money lent ſhould never exceed the value of the Principal[g]. And whereas this Rule concerning the Intereſt of Money, took place at firſt only in the caſes where the Intereſt actually owing amounted to the value of the Principal Sum; *Juſtinian* extended it to all the caſes where the Intereſt paid at different times, exceeded the principal Sum that was due[h].

[g] *L.* 27. §. 1. *C. de uſur. Nov.* 121. 138. 160.

[h] Uſuræ per tempora ſolutæ non proficiunt reo ad dupli computationem. Tunc enim ultra ſortis ſummam uſuræ non exiguntur, quoties tempore ſolutionis ſumma uſurarum excedit eam computationem. *l.* 10. *C. de uſur.* Cùm igitur leges noſtræ nihil ultra duplum ſolvi velint: & nos in hoc tantum differentiam habemus cum prioribus, quod illæ quidem debita conſtituant uſque ad duplum, ſi nulla particularis facta fuiſſet ſolutio: Nos verò recipiamus ut particulares etiam ſolutiones debita diſſolvant, ſi uſque ad duplum pertingant. *d. Nov.* 121. *c.* 1.

This Rule relating to the Intereſt of Money, may have been made out of hatred to uſurious and extravagant Intereſt, which, altho' tolerated in the *Roman* Law, was not very favourable; but it is not in uſe with us in *France*, except in ſome places. For ſeeing no Intereſt is adjudged to the Creditor, unleſs the ſame be demanded, and that it be juſtly due during the whole time of the delay, it would not be juſt to make him loſe it. Thus, for Example, if a Merchant, or other Creditor, having occaſion for his Money, and not being able to recover payment, after he has obtained Judgment for his Debt, finds himſelf obliged to ſeize upon the Effects of his Debtor, or to appear for his intereſt in a Seizure already made by other Creditors, and that the Debtor prolongs the Suit relating to the ſaid Seizure for many years, by Appeal, or other ways; it would be contrary to Equity, that after twenty years of delay, he ſhould be deprived of the lawful Reparation of Damages that would be due to him.

Expences.

There is alſo another ſort of Damages, which is that of Expences due from the perſon who is caſt in a Law-Suit; and that conſiſts in the reimburſement of the Charges, which the perſon who gains the Suit has been at in carrying it on. But beſides this Reparation of Damages, which the Ordinances oblige the Judges to decree to all thoſe who gain their Law-Suits[i], there was in the *Roman* Law other Coſts and Damages againſt thoſe whoſe Demands, or Defences were found to be nothing but Injuſtice and Cavil[l]: and the *Romans* likewiſe made uſe of this precaution, to oblige the Plaintiff, and Defendant, and their Advocates, to make Oath, at the very beginning of the Suit, that it was not out of malice, or for the ſake of cavilling, that they carried on the Suit, but that they looked upon their Cauſe to be juſt and well grounded[m]. This Oath is not in uſe with us in *France*, and it was only a ſure occaſion of Perjury. But the Condemnation of thoſe in Coſts who proſecute or defend ill-grounded Law-Suits, has been found ſo juſt, that *Francis* the Firſt revived it, having ordained, that in all Matters Civil and Criminal, the Coſts occaſioned by the temerity of him who is caſt in the Law-Suit, ſhould be given againſt him, if they are demanded; and that they ſhould be taxed and moderated by the ſame Judge who decides the Law-Suit[n]. But altho' this Ordinance be not at preſent put in execution, and that we ſee very ſeldom ſuch Condemnations, yet the Equity of this Rule is not aboliſhed, neither can it be; and the Judges are at liberty to obſerve it on all occaſions where the Spirit of theſe Laws may require it.

See the Ordinance of Charles IV. *in* 1324. *of* Charles VIII. *in* 1493. *Article* 50. *the Ordinance of* 1667. *Tit.* 31. *Art.* 1.

[l] Improbus litigator & damnum, & impenſas litis inferre adverſario ſuo cogatur. §. 1. *in f. inſt. de pœn. tem. litig.*

[m] *Toto Tit. C. de Jurejur. propt. cal. dando.*

[n] *See the Ordinance of* 1539. *Art.* 88. *&* 89.

We ſhall not treat, under this Title, of the matter of Expences, becauſe it is a part of the Order obſerved in Judicial Proceedings. And as to the Coſts and Damages which may be due from thoſe

thoſe who proſecute or defend unjuſt Law-Suits, theſe ſorts of Coſts and Damages have no other particular Rules, than thoſe of the other kinds. And it is ſufficient to take notice here of this Rule, which ſhall have its rank in this Title in its proper place.

Reſtitution of Fruits. There remains ſtill another matter to be conſidered under this Title; which is that of the Reſtitution of Fruits. We have added this matter to that of Intereſt, and of Coſts and Damages, becauſe the Reſtitution of Fruits is a kind of Reparation of Damages, which is due from him who has unjuſtly enjoyed a Land, the enjoyment whereof belonged to another perſon; and becauſe Fruits are the Revenue of Lands, as Intereſt is that of Money, or rather becauſe the Intereſt of Money has been invented after the Example of the Fruits of the Ground, and becauſe Intereſt of Money is inſtead of thoſe Fruits, as has been already obſerved.

SECT. I.

Of Intereſt.

AFter the Remarks that have been made in the Preamble to this Title, on the differences between Damages and Intereſt, it is not neceſſary to explain here what is the ſubject matter of this Section, and of that which follows. Since it appears clearly enough that the ſubject matter of the preſent Section, is the Reparation of Damages which is due from Debtors who owe Sums of Money, and who fail in the payment thereof; and that the matter of the other Section comprehends all the other kinds of Reparation of Damages.

The CONTENTS.

I.

BY Intereſt is meant the Reparation of Damages which the Law directs to be made to Creditors in Sums of Money, by Debtors who fail to pay what they owe[a]. 1. *Definition of Intereſt.*

[a] In bonæ fidei contractibus uſuræ ex mora debentur. *l.* 32. §. 2. *ff. de uſur.* Propter moram ſolventium infliguntur. *l.* 17. §. 3. *in fin. eod.*

The word Uſury, *which we read in theſe texts, has the ſame ſignification in the* Roman *Law, as the word* Intereſt *has with us; with this difference, that we take the word Uſury always in evil part, becauſe we give this name only to unlawful Intereſt; ſuch as Intereſt for Money lent, as has been explained in the Preamble of the Title of the Loan of Money, and that in the* Roman *Law, which allowed the taking of Intereſt for Money lent, and by which it was lawful to covenant for Intereſt upon a ſimple Bond, or Promiſſory Note for Money lent, the word Uſury was not taken in a bad ſenſe, but ſignifies the Intereſt which the Laws allow to be taken for Money lent.*

We ſhall not take up time here to explain the Principles of the Roman *Law, touching the difference between the Contracts which the* Romans *called* bonæ fidei, *of which mention is made in the firſt text cited on this Article, and thoſe which they termed* ſtricti juris. *For as to what concerns this diſtinction in general, it is ſufficient to obſerve what has been ſaid thereof in the twenty ſecond Article of the third Section of Covenants: And as to the relation which that diſtinction may have to the matter of Intereſt for Sums of Money lent, the principles thereof ſhall be explained in this Section.*

See the following Article.

II.

The Intereſt which Debtors in Sums of Money owe for default of payment, is fixed by the Law, at a certain proportion of ſo much in the Pound, every year, and for more or leſs time in proportion[b]. And this Intereſt is computed on this foot from the moment that the Debt becomes due, till it is acquitted. 2. *In what it conſiſts.*

[b] Uſurarum modus ex more regionis ubi contractum eſt, conſtituitur. *l.* 1. *ff. de uſur.* Quæ in regione frequentantur. *l.* 37. *ff. eod.*

This Regulation of the Intereſt of Money, as well as that of Annuities, depends on the Edicts which fix it differently

differently according to the different times, as has been obſerved in the Preamble to this Title.

III.

3. When it becomes due.

Debtors incur the penalty of Intereſt by their delay to pay what they owe[c], according as the ſaid delay may be imputed to them, and may have that effect. Which depends on the nature of the Credits, and on the circumſtances[d]. For in ſome Debts the bare default of paying at the term of payment makes the Intereſt to run for the benefit of the Creditor, altho' he do not demand it: and in other Debts, this Intereſt is not due except from the time that a Demand has been made of the Debt, in a Court of Juſtice, altho' there was a term fixed for payment, and that it was expired. We ſhall be able to judge of this diſtinction by the Rules which follow.

[c] Uſuræ non propter lucrum petentium, ſed propter moram ſolventium infliguntur. *l.* 17. §. 3. *in fin. ff. de uſur.*

[d] Mora fieri intelligitur non ex re, ſed ex perſona. Id eſt ſi interpellatus oportuno loco non ſolverit. Quod apud Judicem examinabitur. *l.* 23. *ff. de uſur.* An mora facta intelligitur, neque conſtitutione ulla, neque juris auctorum quæſtione decidi poſſe: cùm ſit magis facti, quàm juris. *d. l.* 32.

See the Remark upon the fifth Article.

IV.

4. The Purchaſer of Lands owes the Intereſt of the Price.

The Purchaſer of a Land, or Tenement, who has got poſſeſſion thereof, owes the Intereſt of the Price, if he does not pay it at the term of payment, altho' it be not demanded of him, or if he does not conſign it, in caſe the Seller refuſes to receive it. And with much more reaſon would the Intereſt be due, if there was no term fixed for payment of the price, or if it was agreed that the Buyer ſhould pay ready Money, at the time that the Lands ſhould be delivered to him, and that he had failed to make payment[e]. For this Intereſt is due for the Fruits of the Ground. And although the Purchaſer reaps leſs profit from the Lands, than the Intereſt of the Price amounts to, or that even by ſome accident the Land yields him no Revenue at all, he will nevertheleſs be liable to pay the ſaid Intereſt for the Right of Enjoyment: and the Accidents which deprive him of the enjoyment affect him as Proprietor, and do not diſcharge him of the Intereſt, which ought not to ceaſe, nor to be diminiſhed by reaſon of the ſaid loſs, as it would not be augmented, were the Fruits of never ſo great value. But this Rule hath its uſe only in the caſes where the Contract of Sale has not otherwiſe regulated what relates to the Intereſt of the Price. For if the Contracters have explained their minds touching this matter, their agreement will be inſtead of a Law.

[e] Uſuras emptor, cui poſſeſſio rei tradita eſt, ſi pretium venditori non obtulerit, quamvis pecuniam obſignatam in depoſiti cauſam habuerit, æquitatis ratione præſtare cogitur. *l.* 2. *C. de uſur.*

Poſt traditam poſſeſſionem defuncto venditore, cui ſucceſſor incertus fuit, medii quoque temporis uſuræ pretii, quod in cauſa depoſiti non fuit, præſtabuntur. *l.* 18. §. 1. *ff. de uſur.*

Veniunt autem in hoc judicium infrà ſcripta, imprimis pretium quanti ea res venit: item uſuræ pretii poſt diem traditionis. Nam cùm re emptor fruatur, æquiſſimum eſt eum uſuras pretii pendere *l.* 13. §. 20. *ff. de act. empt. & vend. l.* 2. *C. eod.* See the fifth Article of the third Section of Covenants.

As to the conſigning of the Price, ſee the eighth Article of the ſecond Section of Payments.

V.

5. Intereſt after a demand of the Debt.

If that which is due proceeds from a Cauſe which in its own nature produces no Revenue, the Intereſt thereof will be due only after the Debt has been demanded in a Court of Juſtice: and in this caſe it is only this legal Demand that makes the delay of payment to be imputed to the Debtor[f]. Thus, a Debtor who owes a Sum of Money which he has borrowed, failing to pay it at the time appointed, does not owe Intereſt for it: and the Intereſt will not run but from the time that it has been demanded in a Court of Juſtice. Thus he who has been condemned either in Coſts[g], or in Damages[h], will not owe Intereſt for the ſaid Sum, till after that the ſaid Coſts and Damages have been liquidated, and the Creditor has demanded in a Court of Juſtice, the Intereſt of the Sum at which they have been taxed. For in all theſe caſes, the Debt not producing Intereſt in its own nature, the Debtor does not begin to owe any until the Creditor ſets forth by his Demand the damage which he ſuffers: and the Debtor, on his part, owes then the ſaid Intereſt, as a puniſhment for his delay of payment.

[f] Lite conteſtatâ uſuræ currunt. *l.* 35. *ff. de uſur.*

The Intereſt, according to our Uſage, runs not only from the time of Conteſtation of Suit, as is ſaid in this Law, but from the time of the Demand made by the Service of the Citation. As to which it is neceſſary to obſerve, that by Conteſtation of Suit is meant that which paſſes before the Judge between the Plaintiff, who explains his Demand, and the Defendant who conteſts it. Lis autem conteſtata videtur, cùm judex per narrationem negotii cauſam audire cœperit. *l. un. C. de lit. conteſt.* Poſt narrationem negotii propoſitam, & contradictionem objectam. *l.* 14. §. 1. *C. de jud.*

After which the Judge makes his first Order, or Assignation, in the Cause.

This Contestation of Suit was necessary in the Roman *Law, to make the Defendant guilty of delay. For oft times he was ignorant what the person who summoned him had a mind to demand of him.* Deducunt hominem invitum ad judicem datum, & nihil scientem compellunt facere litis contestationem. *Nov.* 53. *cap.* 3. *But by our Usage, pursuant to the Ordinances which are confirmed by that of* 1667, *Title* 2. *Art.* 1. *the Plaintiff being obliged to explain his Cause of Action in his Citation, it is just that the Defendant should be deemed refractory after he is served with the Citation, and that he, knowing from the tenour of the Citation what is demanded of him, and not complying therewith, should bear the punishment of his backwardness to acquit what he justly owes.*

By the Ordinance of Orleans, *Art.* 60. *the Interest for Sums of Money due upon Promissory Notes, or Bonds, ought to be decreed from the day of the Service of the Citation.*

[g] *The Interest of Costs given to the Party who gains the Cause, is due after a legal demand thereof; and that with much greater Reason than the Interest of Money advanced by one Co-Partner for another, or by those who take care of the Affairs of others without their knowledge, or by those who have any thing in common with others.* See the eleventh Article of the fourth Section of Partnership, the fifth Article of the second Section of those who manage the Affairs of others, &c. and the fourth Article of the second Section of those who chance to have any thing in common together.

[h] *We have inserted in this Article for one of the Examples of the cases where Interest is not due till after Demand thereof, that of Damages; which is to be understood of that sort of Damages which shall be treated of in the second Section, and not of Interest, which is the subject of this Section, and which cannot produce Interest, as shall be shewn in the ninth Article of this Section; whereas Damages may produce Interest, for the reason which shall be explained in the Remarks on the tenth Article.*

VI.

6. *A case where one may stipulate Interest, when it would not otherwise be due by the nature of the Debt.*

There are cases in which one may stipulate Interest for Sums of Money which of their own nature would yield none, and where the agreement makes the Interest to be lawful according to the circumstances which give occasion thereto. Thus in a Sale of Moveables which would not produce any Revenue, the Seller may stipulate Interest for the Price, till it be paid; for that Interest makes a part of the Price. Thus, in a Transaction, where the pretensions of the Parties are regulated at a certain Sum of Money which one party is to give to the other, it may be covenanted that Interest shall be paid for the Money, and that even from the day of the Transaction, altho' there be a term fixed for payment thereof. For this Interest is made a condition of the Transaction, either to compensate what he who stipulates the Interest may remit in another respect, or for other causes. And such a stipulation may be considered as having the effect of a Condemnation, by the Sentence or Decree of a Court of Justice. For Transactions have the same authority as the Decrees of a Court [i].

[i] Non minorem authoritatem [illegible] quàm rerum judicatarum esse, recta [illegible] *l.* 20. *C. de transact.*

VII.

7. *Interest of Marriage Portions.*

The Dowry given with a Woman in Marriage, ought of its own nature to produce Interest, without a Sentence of Condemnation; for it is given to the Husband, to help him to bear the charges of the Marriage [k]. This however is not to be understood of the Debtor whose Bond shall be assigned over to the Husband in payment of his Wife's Portion, for this Cession will not change the nature of the Debtor's Obligation; but it must be understood of the person himself who makes the Settlement, such as a Father, or a Mother, who endows their Daughter. But if the Marriage Settlement were conceived in such terms as to make one judge, that the intention of the Contracters was, that the interest of the Sum promised should not be due till after a certain time, it would be necessary to keep to that which appears to be their intention; whether the Dowry were promised by the Father, or Mother, or by other persons.

[k] Si aliæ res præter immobiles, vel aurum fuerint in dotem datæ, sive in argento, sive in muliebribus ornamentis, sive in veste, sive in aliis quibuscumque, si quidem æstimatæ fuerint, simili modo post biennium & earum usuras ex tertia parte centesimæ currere. *l. ult. §.* 2. *C. de jur. dot.* See the second Article of the first Section of Dowries.

We have not put down in this Article the delay of two years, which is regulated by this Law for Interests of this kind, seeing our Usage does not regulate it in this manner. But according to the circumstances, the Judge may grant a reasonable delay for the delivery of such kinds of things, and direct Interest to be paid for them, if it appear reasonable.

We have not set down here any Rule for the Interest which the Husband owes, who does not restore the Dowry he had with his Wife in Moveables after the dissolution of the Marriage, when there are no Children. For the Rule of the Roman *Law, which allowed a year to the Husband without obliging him to pay Interest, is not in use with us.* V. l. un. §. 7. versic. sin autem Cod. de rei ux. act. *As to the Dowry consisting in Lands and Tenements, see the end of the Preamble to the Title of Dowries.*

VIII.

8. *Interest due from those who turn to their own profit the Monies belonging to other persons.*

Those who retain in their hands Monies belonging to other persons, and who divert them, and turn them to their own profit, without the consent of those persons, are bound to pay Interest, altho' it be not demanded. For it is an injustice which they do to those whose Money they keep: and this Interest is due as a satisfaction for the loss which they may occasion, and as a just

iſhment for their knaviſh dealing. ıs when a Partner happens to have his hands Monies belonging to the tnerſhip, which he has converted to own uſe, and laid out upon his own icular concerns, he ought to pay ereſt for the ſame, according to the Rule which has been explained in the Title of Partnerſhip [m]. Thus a Creditor who is overpaid his Debt, either by the ſale of a Pledge, or by the enjoyment of the Fruits of the Thing which he had in pawn, or otherwiſe, owes to his Debtor Intereſt for what he has received over and above his Debt, if he has converted the ſame to his own proper uſe [n].

[m] Socium, qui in eo quod ex ſocietate lucri faceret reddendo moram adhibuit, cùm eâ pecuniâ ipſe uſus ſit, uſuras quoque eum præſtare debere, Labeo ait. *l.* 60. *ff. pro ſocio.*

Socius, ſi ideò condemnandus erit, quod pecuniam communem invaſerit, vel in ſuos uſus converterit, omnimodò etiam mora non interveniente, præſtabuntur uſuræ. *l.* 1. §. 1. *ff. de uſur.* See the fifth Article of the fourth Section of Partnerſhip.

[n] Si creditor pluris fundum pignoratum vendiderit, ſi id fœneret, uſuram ejus pecuniæ præſtare debet ei qui dederit pignus. Sed etſi ipſe uſus ſit eâ pecuniâ, uſuram præſtari oportet. *l.* 6. §. 1. *ff. de pign. act.* See the fourth Article of the fourth Section of Pawns and Mortgages.

IX.

9. *The Debtor never owes Intereſt of Intereſt.*

Whatever delay there may be on the part of the Debtor, to pay the Intereſt, and whatever may be the cauſe of it, he is never bound to pay ſecond Intereſt for the Intereſt which he owes: and the Creditor cannot accumulate the Arrears of Intereſt with the principal Sum, in order to make the whole a Capital, which may produce Intereſt; but the ſame will be reduced to the amount of the Principal Sum which is capable of producing Intereſt [o].

[o] Ut nullo modo uſuræ uſurarum a debitoribus exigantur & veteribus quidem legibus conſtitutum fuerat, ſed non perfectiſſimè cautum. Si enim uſuras in ſortem redigere fuerat conceſſum, & totius ſummæ uſuras ſtipulari: quæ differentia erat debitoribus à quibus reverâ uſurarum uſuræ exigebantur? Hoc certè erat non rebus, ſed verbis tantummodò legem ponere. Quapropter hoc aperti ſſima lege definimus, nullomodo licere cuiquam uſuras præteriti temporis vel futuri in ſortem redigere, & earum iterùm uſuras, ſtipulari. Sed etſi hoc fuerit ſubſecutum, uſuras quidem ſemper uſuras manere, & nullum uſurarum aliarum incrementum ſentire: ſorti autem antiquæ tantummodò incrementum uſurarum accedere. *l.* 28. *C. de uſur.*

X.

10. *But he may owe Intereſt for other Revenues.*

We muſt take care in applying the preceding Rule, not to confound with the Intereſt of Money the Revenues of another nature, ſuch as the Rent of a Farm, of a Houſe, and others of the like kind. For theſe ſorts of Revenues differ from the Intereſt of Money; becauſe the Intereſt of Money is not a natural Revenue [p], and is only, on the part of the Debtor, a puniſhment which the Law inflicts on him for his delay of payment; and on the part of the Creditor, it is a compenſation for the loſs which he ſuffers by lying out of his Money; whereas the Price of the Fruits of the Ground, and of the Rents of a Houſe, is a natural Revenue, which on the part of the Debtor is the value of an Enjoyment which he has reaped the benefit of; and on the part of the Creditor, is a real Good, which in his hands makes a Capital, as his other Goods do. So that the Debtor of the Rent of a Farm, or of a Houſe, owes juſtly Intereſt for the ſame, from the time that it has been demanded [q].

[p] Uſura non natura pervenit. *l.* 62. *ff. de rei vind.* Uſura pecuniæ quam percipimus in fructu non eſt, quia non ex ipſo corpore, ſed ex alia cauſa eſt, id eſt, nova obligatione *l.* 121. *ff. de verb. ſign.*

[q] Ex locato qui convenitur, niſi convenerit, *ut tardiùs pecuniæ illatæ uſuras deberet*, non niſi ex mora uſuras præſtare debet. *l.* 17. §. 4. *ff. de uſur.* Si in omnem cauſam conductionis etiam fidejuſſor ſe obligavit, eum quoque exemplo coloni tardiùs illatarum per moram coloni penſionum præſtare debere uſuras. *l.* 54. *ff. locat.*

Annuities are of another nature than the Rents of a Houſe, or of a Farm; for Annuities are not the Fruits of Houſes or Lands, and have for their Principal only a Sum of Money which was the price of the purchaſe of the Annuity. So that the Arrears of Annuities can never produce Intereſt, nor be accumulated with the Principal, in order to make a Capital for which the Debtor may be obliged to pay new Intereſt.

It is to be remarked on this Rule, that as we ought not to confound the Fruits of Lands and Houſes with the Intereſt of Money, of which we cannot make a Capital for producing new Intereſt, ſo neither ought we to confound with the Intereſt of Money, the Damages which are the ſubject matter of the following Section. For one may obtain a Sentence for the Intereſt of Sums of Money ariſing from Damages; as if a Seller has been condemned in Damages on account of an Eviction, or an Undertaker on the ſcore of a Building that is faulty, or other perſons, for cauſes of another nature. In all theſe caſes the Damages having been adjudged and liquidated, if the perſon to whom they are due does not receive payment of them, he may demand Intereſt for the ſame in a Court of Juſtice. For theſe Damages are a Capital, which is in the place of a real Subſtance, of which he to whom they are due has been deprived. See the fifth Article.

We ought to place in the ſame rank the Coſts adjudged by a Sentence, or Decree of a Court: and the party to whom they are due may demand Intereſt for them after they have been liquidated, if they are not paid at the time. For it is a Capital, which is in lieu of the Charges which have been laid out upon the Law-Suit. See the ſame fifth Article.

XI.

11. *How we are to underſtand the prohibi-*

The prohibition of taking Intereſt of Intereſt, relates only to the Creditor who would take Intereſt for the Intereſt that

tion of taking Intereſt of Intereſt.

that is ſtill owing by his Debtor; for the ſaid Intereſt can never be reckoned to him as a Principal Sum. But if a third perſon pays for a Debtor Intereſt to his Creditor, the ſame, with regard to this third perſon, is a Principal Sum, which he lends to the ſaid Debtor: and if he ſhould not receive payment of it at the term, he might demand in a Court of Juſtice, both the ſaid Principal, and the Intereſt thereof[r].

[r] Nullo modo uſuræ uſurarum *à debitoribus* exigantur. *l.* 28. *Cod. de uſur.*
The Rule is only for the Creditor with reſpect to his Debtor; à debitoribus.

XII.

12. A caſe where he who pays Intereſt for another, cannot demand Intereſt for that Sum.

We muſt except from the preceding Rule the Creditor, who to ſecure his own Mortgage, acquits the Principal Sum and Intereſt owing by his Debtor to a Creditor who is prior to himſelf. For this ſecond Creditor cannot pretend from his Debtor, Intereſt for the Sum which he has paid to the firſt Creditor on the ſcore of Intereſt that was due to him; becauſe he paid the ſame as taking care of his own concerns, and not of the concerns of his Debtor; and ſeeing he paid for the Debtor only with this view of ſecuring his own, he could not make the Debtor's condition worſe[s].

[s] Uſurarum quas creditori primo ſolvit (ſecundus creditor) uſuras non conſequitur: non enim negotium alterius geſſit, ſed magis ſuum, *l.* 12. §. 6. *ff. qui pot.*
See the ſixth Article of the ſixth Section of Mortgages.

XIII.

13. A caſe where Intereſt of Intereſt is due.

The Rule which prohibits the taking Intereſt of Intereſt, does not hinder a Minor from exacting lawfully from his Tutor or Guardian, not only Intereſt for the Sums ariſing from the Intereſt which the Minor's Debtors have paid to the Guardian, but alſo Intereſt of the Intereſt of Sums of Money which the ſaid Guardian may owe upon his own account to his Pupil. For all the ſaid Intereſts in the hands of Tutors and Guardians are Capitals, which their Office obliges them to lay out for the benefit of their Pupils. And if they have failed to do it, either thro' negligence, becauſe they have laid out the Money upon their own particular concerns, they are bound to pay Intereſt for it; that the ſame may be to the Minors inſtead of the Profit which they would have reaped from Lands, or Houſes, or Annuities, if their Money had been laid out in the purchaſe of ſuch things[t].

[t] *See the twenty third, twenty fourth, and twenty fifth Articles of the third Section of Tutors; with the Remarks upon them.*

XIV.

14. Four Cauſes from whence Intereſt ariſes.

It follows from all the Rules which have been explained in this Section, that we may reduce to four ſorts of Cauſes, all thoſe which may give occaſion for paying Intereſt of Sums of Money. For the ſame may be due, either by the effect of an Agreement; as if it has been ſtipulated in a Tranſaction: Or by the nature of the Obligation, as the Intereſt of a Portion given with a Woman in Marriage, and that of the Price of Houſes or Lands that are ſold: Or by a Law, as that which Tutors and Guardians are bound to pay to their Pupils, for the Monies which they have neglected to lay out for their behoof: Or as a puniſhment of the Debtor who defers payment, after the Creditor has made his demand in a Court of Juſtice, both of his Principal, and of the Intereſt due for default of payment[u].

[u] *This Article is a conſequence of all the other Articles of this Section.*

XV.

15. Divers views by which we may judge whether Intereſt be due or not.

We have reduced here to theſe few articles, the Rules concerning this matter of Intereſt of Money; for beſides that in every Engagement we have marked under their proper Titles thoſe in which Intereſt is due, it ſufficeth that we have remarked in general the ſeveral Rules which comprehend the principles on which the Deciſions of caſes of this nature depend, and that we have pointed out the uſe of them in ſome Examples. To all which we ſhall add, that in order to diſcern aright between the caſes where Intereſt is due, and thoſe where it is not due, it is neceſſary to conſider in every one what the Debt is, as if it is a Loan, a Sale, or other Contract, or what other kind of Engagement, and of what nature it is; the quality of the thing that is due, as if it is a Suit of Hangings, Silver Plate, or other things which yield no revenue except to ſuch as let them out to hire; or if they are things from which the Creditor might have drawn ſome profit, either from the thing it ſelf, or by ſelling it; that we may judge whether Intereſt be due for the value of the Thing, or whether any thing is due for Damages: the circum-

es of the delay of payment: thoſe
ne fair or unfair dealing of the Debt-
and the other circumſtances which
help us to make a right judgment
ther there be ground to condemn
Debtor to pay Intereſt, or to diſ-
rge him from it[x].

[x] Videamus, an in omnibus rebus petitis, in fructus quoque condemnatur poſſeſſor. Quid enim, ſi argentum, aut veſtimentum, aliamve ſimilem rem: quid præterea, ſi uſumfructum, aut nudam proprietatem, cùm alienus uſusfructus ſit, petierit? Neque enim nudæ proprietatis, quod ad proprietatis nomen attinet, fructus ullus intelligi poteſt: neque uſusfructus rursùs fructus eleganter computabitur. Quid igitur, ſi nuda proprietas petita ſit? ex quo perdiderit fructuarius uſumfructum, æſtimabuntur in petitione fructus. Item, ſi uſusfructus petitus ſit, Proculus ait, in fructus perceptos condemnari. Præterea Gallus Ælius putat, ſi veſtimenta, aut ſcyphus petita ſint, in fructu hæc numeranda eſſe, quòd locata ea re, mercedis nomine capi potuerit. *l.* 19. *ff. de uſur.*

Cùm multa oriri poſſint, quæ pro bono ſunt æſtimanda. Ideoque hujuſmodi varietas viri boni arbitrio dirimenda eſt. *l.* 13. §. 1. *ff. de ann. legat.*

Altho' this laſt Text concerns another ſubject, yet it may be applied to this.

As to the Engagements in which Intereſt is due, ſee the Articles which follow.

Art. 4. *Sect.* 3. *of Covenants.*
Art. 5. *Sect.* 3. *of the Contract of Sale.*
Art. 3. *Sect.* 3. *of the Loan of Money.*
Art. 5. *and* 11. *Sect.* 4. *of Partnerſhip.*
Art. 4. *Sect.* 2. *of Proxies.*
Art. 23, 24, 25. *Section* 3. *of Tutors.*
Art. 5. *Sect.* 5. *of the ſame Title.*
Art. 5. *Sect.* 3. *of Curators.*
Art. 8. *Sect.* 1. *of thoſe who manage the Affairs of others,* &c.
Art. 5. *Sect.* 2. *of the ſame Title.*
Art. 4. *Sect.* 2. *of thoſe who chance to have any thing,* &c.
Art. 1. *Sect.* 3. *of thoſe who receive what is not due to them.*
Art. 1. *Sect.* 2. *of that which is done to defraud Creditors.*
Art. 2. *Sect.* 3. *of Cautions, or Sureties.*

SECT. II.

Of Damages.

The CONTENTS.

I.

BY Damages, is meant here, the reparation, or ſatisfaction, which is due from thoſe who are anſwerable for ſome damage[a]. 1. *Definition of Damages.*

[a] Ut damneris mihi quanti intereſt mea. *l.* 5. §. 1. *ff. de præſcript. verb.* Quanti ea res erit. *l.* 29. §. 2. *ff. de adil. edict.* Quanti res eſt, id eſt, quanti adverſarii interfuit, *l.* 68. *ff. de rei vindic.*

II.

All the Rules concerning the matter of Damages, reſpect either the Queſtion, whether any be due? or in what they do conſiſt? The queſtion whether any Damages be due, is always a queſtion of Law, which depends on knowing if the perſon to whom they are imputed ought to be anſwerable for them. Thus, for Example, the queſtion which ariſes upon the Caſe explained in the ſeventh Article of the fourth Section of the Title of Damages occaſiond by Faults, in relation to the perſon who cuts the Ropes of a Ship, in order to diſengage his own Veſſel, which a blaſt of Wind had thrown upon the other, is a queſtion of Law; in which it is neceſſary to judge whether this damage ought to be imputed to him, or whether thoſe who ſuffered it ought to bear it as an accident[b]. 2. *Two ſorts of queſtions in the matter of Damages. The firſt, whether any are due.*

[b] *All Queſtions are either concerning matter of Fact, or Law,* de facto an de jure. *l. ult. ff. de jurej. We call thoſe Queſtions of Fact, where the matter is to know the truth of a Fact: if an Event has happened, or not; if the perſon whoſe Inheritance is controverted has made*

made a Teſtament, or if he has made none: if he who complains of Damage has really ſuſtained ſome Loſs, or if he has ſuſtained none.

We call thoſe Queſtions of Law, wherein the matter is to know how we ought to judge, and where it is neceſſary to reaſon upon Principles and Rules, in order to form the Deciſion.

As to the difference between Queſtions of Law, and thoſe of Fact, ſee the firſt Section of the Vices of Covenants.

III.

3. The ſecond queſtion is in what they do conſiſt. Example of this Queſtion.

This firſt queſtion, whether any Damages be due, being decided, then follows the ſecond queſtion, which is to know, in what they do conſiſt? that is, to diſcern in the whole extent of the Damage which has happened, what part thereof ought to be imputed to him who is obliged to indemnify, and what ought not to be imputed to him. For it often happens, as has been mentioned in the Preamble to this Title, that one bare Fact gives occaſion to ſeveral Damages, part whereof is not imputed to him who is ſaid to have been the cauſe of them. Thus, for example, if he who had ſold Corn, and promiſed to the Buyer to deliver it on a certain day, in a certain place, does not keep his word, and that the ſaid Buyer either be obliged to buy other Corn at a dearer rate, or finding none other to buy, he loſes the Sale thereof in another place, where he might have hoped to have made profit by it; or that for want of the ſaid Corn, which he deſigned for the ſubſiſtence of a great many Workmen, he by that diſappointment ſuffers the loſs of their days labour, and the interruption of a Work that is uſeful or neceſſary to him; theſe Events will give riſe to the Queſtion, whether this Seller ſhall be anſwerable either for all theſe conſequences, or a part of them; and what ſhall be the damage that he will be obliged to make good. And this queſtion, which is to fix and aſcertain what is the preciſe Damage that is to be repaired, is a ſecond queſtion of Law, of which we ſhall ſee another Example in the following Article[c].

[c] Cum per venditorem ſteterit quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit, *quæ modo circa ipſam rem conſiſtit.* Neque enim ſi potuit, ex vino putà negotiari, & lucrum facere, id æſtimandum eſt, non magis quàm ſi triticum emerit, & ob eam rem quòd non ſit traditum, familia ejus fame laboraverit; nam pretium tritici, non cervorum fame necatorum conſequitur. Nec major fit obligatio quòd tardiùs agitur: quamvis creſcat ſi vinum hodie pluris ſit. Meritò, quia ſive datum eſſet, haberet emptor; ſive non, quoniam ſaltem hodie dandum eſt, quod jam oportuit. *l.* 21. §. 3. *ff. de act. empt. & vend.*

We have not put down in this Article the Example mentioned in the Law that is here cited, becauſe it is in the eighteenth Article of the ſecond Section of the Contract of Sale.

IV.

4. Another example of the ſame Queſtion.

If the Proprietor of a Vineyard, or other perſon who had right to the Fruits thereof, having hired Carriages for gathering the Grapes thereof on a certain day, he who undertook to furniſh them fails in his promiſe, and the Owner of the Vineyard is obliged to hire other Carriages at a dearer price; or that finding none to hire, he is forced to defer his Vintage, and it happens that a ſhower of Hail comes and deſtroys all the Grapes; with the Produce of which the Owner had propoſed to pay off a Creditor, who being diſappointed of his payment, ſeizes on the Owners Goods, and expoſes them to Sale, the perſon who undertook to furniſh the Carriages, will without doubt be obliged, in the firſt caſe, to make good the Overplus, that the Owner of the Vineyard was forced to give for other Carriages. But in the ſecond caſe, of the loſs of the Vintage, and of the Seizure of the Owner's Goods by a Creditor, this will be a queſtion of Law, to know what this Event will oblige the Carrier to. And one clearly ſees that the Seizure and Sale of the Goods is a conſequence too remote from the deed of this Carrier, and that it proceeds likewiſe from another Cauſe, to wit, the diſorder in which the affairs of the Owner of the Vineyard were; for which reaſon this laſt loſs ought not to be imputed to him[d]. For his condition ought not to be worſe for having failed in his promiſe to a perſon who was under ſuch ſtraits and difficulties, than it would have been if he had diſappointed a perſon whoſe affairs were in a better ſtate. But as to the loſs of the Fruits, is the Carrier bound to make good the whole, or a part thereof, or nothing at all? Will it be ſaid, that this is an Event altogether unforeſeen, which ought not to be imputed to him[e]; or that it was natural to foreſee it, and that his non-performance of his Engagement deſerves ſome puniſhment; if not a Condemnation to make good the whole loſs of the Vintage, yet at leaſt a part of it? This queſtion ought to depend on the circumſtances, and it is neceſſary to conſider if the diſappointment of the Carriages was occaſioned by ſome accident that happened to the Carrier, or if he had preferred a greater gain in another place; or if ſome other cauſe had hindred him from performing his Engage-

Engagement, if it was poſſible to hire other Carriages: and according to theſe circumſtances, and others of the like nature, the Judge will determine whether he ought to make ſome reparation of this damage, or none at all; and it would be juſt to acquit him of all damages, if he had been hindred from performing his Engagement, by an Accident which had happened without any fault of his.

[d] *This is a conſequence of the foregoing Article, and of the Remarks which have been made in the Preamble to this Title.*

[e] Ea quæ rarò accidunt non temerè in agendis negotiis computantur. *l. 64. ff. de reg. jur.*

V.

5. The third Queſtion, about the Eſtimate of Damages.

When the Queſtions of Law have been decided, and it is determined that Damages are due, and wherein they do conſiſt, there remains a third Queſtion, to know what they are to be eſtimated at; which is to be looked upon only as a Queſtion of Fact[f]. Thus, for Example, if he who had ſold Corn which he promiſed to deliver on a certain day, in a certain place, having failed in his promiſe, it be adjudged by the circumſtances, that no other Damages are due, except on account that the ſaid Buyer was obliged to buy other Corn in the ſame place at a dearer rate; there is nothing neceſſary for eſtimating this Damage, but to enquire how much dearer he has bought the other Corn[g]. Which is only a matter of Fact.

[f] Quatenùs cujus interſit in facto, non in jure conſiſtit. *l. 24. ff. de reg. jur.*

[g] Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum, tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die, quo dari debuit. Idemque juris in loco eſſe, ut æſtimatio ſumatur ejus loci quo dari debuit. *l. ult. ff. de cond. trit.*

Quotics in diem, vel ſub conditione oleum quis ſtipulatur, ejus æſtimationem eo tempore ſpectari oportet, quo dies obligationis venit. Tunc enim ab eo peti poteſt. *l. 59. ff. de verb. oblig.*

VI.

6. Two ſorts of Damages which ought to be diſtinguiſhed.

It appears from the Rules explained in the third and fourth Articles, that the Damages and Loſſes of which reparation may be demanded, are of two ſorts. One is of the Loſſes which are in ſuch a manner a conſequence of the deed of the perſon from whom reparation is demanded, that it is evident they ought to be imputed to him, as proceeding from no other cauſe. And the other ſort is of thoſe Loſſes which are only remote conſequences of the ſaid deed, and which proceed from other cauſes[h]. Thus in the caſe of the preceding Article, the Loſs is of this firſt kind[i]. Thus, for another Example of the ſame kind, if an Architect, either out of Ignorance, or thro' a defect in the Materials which he was obliged to furniſh, makes a Building faulty, the damages of the Owner of the Building conſiſting either in the charges of rebuilding what is neceſſary to be rebuilt, or in the Eſtimate which ſkilful perſons ſhall make of the defects of the Work, if it is to remain in the condition it is in; theſe damages are ſuch as have no other cauſe beſides the fault of the Architect, and therefore they ought to be imputed to him[k]. Thus, for the ſecond ſort of Loſſes, we ſee in the caſe of the fourth Article, that the Seizure of the Goods of the perſon whoſe Vintage was deſtroyed by a ſhower of Hail, is, 'tis true, a conſequence of the diſappointment of the Carriages which he had agreed for, but a conſequence ſo remote from that fact, and ſo viſibly owing to another cauſe, that it ought not to be imputed to the perſon who was to have furniſhed the Carriages[m].

[h] *See the Preamble to this Title.*

[i] Cùm per venditorem ſteterit, quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit, quæ modò *circa ipſam rem conſiſtit.* l. 21. §. 3. ff. de act. empt. & vend. Cauſa omnis reſtituenda. *l. 31. ff. de reb. cred.*

See the ſeventeenth Article of the ſecond Section of the Contract of Sale.

[k] Poterit ex locato cum eo agi qui vitioſum opus fecerit. *l. 51. §. 1. ff. locat.*

[m] *See the eighteenth Article of the ſecond Section of the Contract of Sale, and the Preamble to this Title.*

VII.

7. Damages either for a Loſs ſuſtained, or for having failed to make a Profit.

It is neceſſary likewiſe to diſtinguiſh Damages under another view, into two other kinds. One is of thoſe which conſiſt in an effective loſs, and a diminution that one ſuffers of his preſent Eſtate. And the other kind, is of thoſe which deprive one of ſome profit to be made. Thus, the Landlord of a Houſe, which is damaged, by the neglect of the Tenant to make the repairs which he was obliged to make, ſuffers a loſs and diminution of his preſent Subſtance. Thus, a Farmer, whoſe Leaſe is interrupted, is deprived of the profit which he might have made, had he been permitted to enjoy the Farm. In the damages of the firſt kind, the Eſtimate that is to be made thereof, being in relation to a loſs that has actually happened, it is eaſy to ſee wherein the ſaid loſs conſiſts, and to regulate the reparation that may be due for it, when it is

the whole loſs that is to be made good. But in the Damages of the ſecond kind, where an Eſtimate is to be made of the loſs of a profit to come, and which depends on uncertain Events which might render it greater or leſſer, and which might alſo occaſion that there would be no profit at all, or that there would be only loſs; it is not poſſible to make an exact Eſtimate of ſuch a Loſs, and to regulate ſuch a Reparation of Damages as may do exact juſtice both to the Farmer, and to the perſon who is bound to make good his damage. But as for theſe ſorts of Reparations of Damages, it is neceſſary to adjuſt them according to the principles which have been explained in this Title, and from whence we have drawn what ſhall be ſaid relating thereto in the twelfth Article.

[o] Colonus ſi ei frui non liceat, totius quinquennii nomine ſtatim recte aget. *l.* 24. §. 4. *ff. locati.* Et quantum per ſingulos annos compendii facturus erat, conſequetur. *d. l.* Si colonus tuus fundo frui a te, aut ab eo prohibetur quem tu prohibere ne id faciat poſſis, tantum ei præſtabis, quanti ejus interfuit frui. In quo etiam lucrum ejus continebitur. *l.* 33. *in fin. ff. locati.* See the ſixth Article of the ſixth Section, and the fourth Article of the third Section of Letting and Hiring.

It is to be remarked on this Article, that in the Reparation of Damages to be made to this Farmer, we ought to diſtinguiſh between that which relates to the Eſtimate of the profit which he might have hoped to make, if his Leaſe had not been interrupted, and another ſort of Damage which he might ſuffer at the preſent; as if his having taken the Farm had obliged him to buy Cattle, or other things neceſſary, or to ſettle there, or put him to other charges of the like nature; the loſs of which would be a Damage of the firſt kind, which might be eſtimated at its juſt value, and ſeparately from the loſs which the Farmer ſuſtains by not enjoying the Farm.

VIII.

8. *Difference in Damages, according as the perſon who owes them has acted fairly, or unfairly.*

In all the caſes where Damages are due, it is neceſſary to conſider the quality of the Fact which has occaſioned them, and to diſtinguiſh between the Facts in which there is no fraud, or knaviſh dealing, and thoſe in which there is. For according to this difference, the Damages may be either greater or leſſer, although all the other circumſtances ſhould chance to be equal. Thus, for example, if the Purchaſer of a Houſe, or Lands, is turned out of poſſeſſion by an Eviction, after he has made not only neceſſary Repairs, and Improvements, which have augmented the Revenue, but alſo been at ſome charges for Imbelliſhments; theſe uſeleſs and ſuperfluous Expences will not be comprehended in the Damages for the Eviction, if the Seller has acted honeſtly and fairly, having had reaſon to look upon himſelf as the true Owner of the Houſe or Lands which he ſold. For the Warranty only extended to ſuch conſequences for Expences which the Seller could foreſee, and which he laid out only for his pleaſure. But if the Seller knew well enough that he was not the right Owner of the Houſe or Lands which he ſold, and ſo ſold knaviſhly a Thing belonging to another perſon, this circumſtance of his knaviſh dealing would give a larger extent to the Warranty, and he would be bound to refund the ſuperfluous Expences, which the Purchaſer would not have laid out, if he had known any thing of the Seller's unfair dealing with him. Thus, for another Example, if a Thing that was ſold happens to have ſome defect in it, which occaſions ſome damage, as if it was Cattle infected with ſome contagious diſtemper, which cauſed not only the death of the Cattle that were bought, but alſo of thoſe which the Buyer had before; the Seller who knew nothing of this diſtemper, would be anſwerable only for the loſs of the Cattle which he had ſold; his Engagement not extending to this conſequence of the loſs of the other Cattle. But if the Seller knew of the diſtemper, he would be likewiſe liable to make good the loſs of the other Cattle which the Buyer had before, becauſe he ought to have warned him of the infection that was among the Cattle which he ſold him, and it is his knavery that has given occaſion to this other loſs which the Buyer ſuſtains by the death of his other Cattle. Thus, in general, Damages have a larger extent againſt thoſe whoſe knavery makes them anſwerable for them, than againſt thoſe who have acted honeſtly and fairly. For altho' that a Seller, for Example, who knaviſhly ſells what he knows to be another's, may be ignorant, as well as one who believes what he ſells to be his own, whether the Purchaſer will lay out any ſuperfluous Expences on the Thing that is ſold, yet he cannot but know, that his Knavery implies a will to do all the evil which may enſue upon the ſaid Sale. Thus, whereas the Eviction is, in regard to a Seller who has dealt fairly and honeſtly, an Accident which he could not foreſee: the ſaid Eviction, and the loſſes which follow upon it are, with reſpect to a Seller who has acted unfairly and knaviſhly, a natural conſequence of his Knavery, for which he ought to be accountable[o].

[o] De

[o] De ſumptibus verò quos in erudiendum hominem emptor fecit, videndum eſt. Nam empti judicium ad eam quoque ſpeciem ſufficere exiſtimo: non enim pretium continet tantùm, ſed omne quod intereſt emptoris ſervum non evinci. Planè, ſi in tantum pretium excediſſe proponas, ut non ſit cogitatum à venditore de tanta ſumma, veluti ſi ponas agitatorem poſteà factum vel pantomimum, evictum eſſe eum qui minimo venit pretio, iniquum videtur in magnam quantitatem obligari venditorem. *l.* 43. *in f. ff. de act. empt. & vend.* In omnibus tamen his caſibus, ſi ſciens quis alienum vendiderit omnimodò teneri debet. *l.* 45. §. 1. *in f. eod.* See the eighteenth Article of the tenth Section of the Contract of Sale.

Julianus libro quinto decimo inter eum qui ſciens quid, aut ignorans vendidit differentiam facit in condemnatione ex empto. Ait enim, qui pecus morboſum, aut tignum vitioſum vendidit, ſi quidem ignorans fecit, id tantùm ex empto actione præſtaturum quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem: ſi verò ſciens reticuit, & emptorem decepit, omnia detrimenta quæ ex ea emptione emptor traxerit, præſtaturum ei. Sive igitur ædes vitio tigni corruerunt, ædium æſtimationem: ſive pecora contagione morboſi pecoris perierunt, quod interfuit idoneè veniſſe, erit præſtandum. *l.* 13. *ff. eod. V. d. l.* §. 1.

One may be able to judge by the Examples mentioned in this Article of the uſe of this Rule, for diſtinguiſhing in all ſorts of Caſes between the Damages which are due from thoſe who have given occaſion to them by any fraud or knavery, and thoſe which may be due even when there is no unfair dealing. See an Example of another nature in the nineteenth Law, §. 1. ff. locat. *where it is ſaid, that if a Paſture-Ground being farmed out, the Cattle who depaſture therein die by eating of venomous Herbs, the Owner of the Ground knowing nothing of this bad quality which it had, will not be accountable for the loſs of the Cattle; but he will be bound only to diſcharge the Farmer of his Rent: but if the Owner of the Ground knew of this bad quality, he will be obliged to make good the loſs of the Cattle which periſhed by feeding therein.*

Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod intereſt, nec ignorantia ejus erit excuſata. Et ita Caſſius ſcripſit. Aliter atque ſi ſaltum paſcuum locaſti: in quo herba mala naſcebatur: hic enim, ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt præſtabitur, ſi ſciſti: ſi ignoraſti, penſionem non petes. Et ità Servio, Labeoni, Sabino placuit. *l.* 19. §. 1. *ff. locat.*

See the ſixth and ſeventh Articles of the eleventh Section of the Contract of Sale, the eighth Article of the third Section, and the firſt and ſecond Articles of the eighth Section of Letting and Hiring.

It is obſervable, that in the Roman *Law they made this difference, as to Damages which might be due from thoſe who did not reſtore a Thing which they were bound to reſtore or deliver up, that if there was no knavery in the caſe, the Condemnation in Damages went no higher than the value of the effective Damage which the perſon ſuffered who had intereſt therein. But if the party was guilty of any fraud or Contumacy; that is, if it was a wilful delay, the party who was injured thereby was allowed to give in upon Oath an Eſtimate of the Loſs or Damage which he ſuſtained, and it was left to the diſcretion of the Judge to limit the Oath to a certain Sum, and even to mitigate the Condemnation after Oath had been made.* Interdùm quod interſit agentis ſolùm æſtimatur, veluti cùm culpa non reſtituentis, vel non exhibentis punitur: cùm verò dolus, aut contumacia non reſtituentis, vel non exhibentis, quanti in litem juraverit actor. *l.* 2. §. 1. *ff. de in lit. jur.* Sed judex poteſt præfinire certam ſummam, uſque ad quam juretur. *l.* 5. §. 1. *eod.* Item etſi juratum fuerit, licet judici vel abſolvere, vel minoris condemnare. *d. l.* §. 2. *V. tit. C. de in lit. jur.*

IX.

When there is neither any deſign to hurt, nor any knavery in the Fact which has cauſed the damage, it is neceſſary to enquire, in the next place, if the Damage has happened thro' any negligence, or any fault, or if there is nothing that can be imputed to the perſon who is pretended to be anſwerable for it. Thus, for Example, if he who has hired a Horſe, rides him in a dark night, in a ſtony way, full of bad ſteps, and the Horſe lames himſelf, or if, for want of care, he is ſtolen, theſe ſorts of faults may be imputed to the perſon who hired him. But if without his fault the Horſe is lamed, or if he is carried off by Robbers, at noon-day, in a highway, the Owner of the Horſe will bear the loſs. For theſe Loſſes are accidents which fall upon the Owner [p].

9. *Of the regard which ought to be had to the quality of the Fact which has cauſed the Damage.*

[p] In judicio tam locati quàm conducti dolum & cuſtodiam, non etiam caſum cui reſiſti non poteſt, venire conſtat. *l.* 28. *C. de locato.*

X.

Altho' there be no fault on the part of the perſon from whom a Reparation of Damages is demanded, yet this is not always enough to diſcharge him of it. For there are caſes in which Damages are due, altho' they have not been occaſioned by any fault; but are due by the bare effect of an Engagement. Thus, he who had ſold honeſtly a Thing which he believed to be his own, is obliged to put a ſtop to the demand of the perſon who pretends to be Owner of it, and if he does not do it, he will be liable for the damages of the Eviction, altho' there be on his part no unfair dealing, nor any other kind of fault. Thus, he who fails to deliver what he has ſold, is accountable for the damages which are occaſioned by his failing to deliver it. And theſe Damages are bare conſequences of the Engagements which the Seller is under [q].

10. *Damages may be due, even altho' they have not been occaſioned by any faults.*

[q] Evicta re, ex empto actio non ad pretium duntaxat recipiendum, ſed ad id quod intereſt, competit. *l.* 70. *ff. de evict. l.* 60. *eod.* See the tenth Section of the Contract of Sale.

Si res vendita non tradatur, in id quod intereſt agitur. Hoc eſt, quod rem habere intereſt emptoris. *l.* 1. *ff. de act. empt. & vend.*

Cauſa omnis reſtituenda. *l.* 31. *ff. de rebus cred.*

See the ſixteenth and ſeventeenth Articles of the ſecond Section of the Contract of Sale, and the fourth Article of the third Section of Covenants.

XI.

It hath been remarked in the ſixth Article, that we ought not to impute

11. *Conſequences which ap-*

pear remote, and yet enter into the Eſtimate of Damages.

to the perſon whoſe fact hath cauſed ſome damage, the conſequences that are remote, and which may proceed from other cauſes which ſome conjuncture hath joined with the ſaid fact; and that theſe ſorts of conſequences do not enter into the Eſtimate of Damages. But we muſt not reckon in the number of thoſe remote conſequences, the different loſſes which may be occaſioned by the ſame fact, if the ſaid loſſes have that fact for their only cauſe. Thus, for inſtance, if an Architect having undertaken to build a Houſe, and to perfect it by ſuch a time, for a Tenant who had hired it, does not finiſh it by the time appointed, or makes it ſo faulty, that a part of it falls to the ground, either by a defect in the foundation, or by ſome other cauſe for which the Architect is anſwerable; this event will cauſe three ſorts of Loſſes, that of the Expence for rebuilding the Houſe, the loſs of the Rent which the Landlord ought to have had, and that of the Damages which the Landlord will be liable for to the Tenant, for diſappointing him of his Houſe. And altho' this ſecond and third loſs be conſequences that appear remote from the deed of the Undertaker, yet ſeeing they have no other cauſe, and that his Contract implied the Obligation to put the Houſe in a condition to be inhabited; theſe loſſes may be imputed to him. And if this caſe had happened by the fault of an Architect who was able to make good all theſe loſſes, he would be bound to do it. But becauſe Undertakers have not always the means to make ſuch ample Reparations of Damages, and that Humanity obliges us on ſome occaſions to moderate the Rigour which a ſtrict Juſtice might demand, a temperament may be applied in eſtimating theſe ſorts of Damages, by conſidering that theſe are Events which happen to the moſt ſkilful and moſt careful perſons. Thus it depends always on the prudence of the Judge, and of the perſons imployed to make thoſe Eſtimates, to regulate them according to the circumſtances [r].

[r] Multa oriri poſſunt quæ pro bono ſunt æſtimanda. Ideoque hujuſmodi varietas viri boni arbitrio dirimenda eſt. *l.* 13. §. 1. *ff. de aqu. leg.*

Altho' this Law relates to another ſubject, yet the Principles on which it depends may be applied here.

Bonus judex varie ex perſonis, cauſiſque conſtituet. *l.* 38. *ff. de evict.*

XII.

12. Damages for loſſes, The ſame Equity which makes us often moderate the Damages of preſent Loſſes, by the motives [illegible] preceding Article, doe[s] [illegible] lige us to mitigate the [illegible] the loſſes are not pre[illegible] the Eſtimate thereof, [illegible] ture events which cannot be known, cannot be regulated on any certain foot. Thus, in the caſe of the Farmer mentioned in the ſeventh Article, it is neceſſary to adjuſt his Damages by ſeveral views: And to conſider what is the cauſe which turns him out of poſſeſſion, as if the perſon who let him the Farm is turned out of poſſeſſion by a Recovery at Law, or if he has ſold it without obliging the Purchaſer to ſtand to the Leaſe: what have been the profits, or loſſes, which this Farmer hath already had: the number of years which his Leaſe had ſtill to run; the quality of the Fruits of his Farm; according as they were more or leſs obnoxious to the injuries of the weather, and to other loſſes; the uncertainty of the value of Proviſions; that of the Opportunities which the Farmer might have had, or not have had, during the time of his Leaſe, to ſell the ſaid Fruits; the uſual profits made by other Farmers of the like Revenues in the ſame places: and by all theſe views, and others of the like nature, we may balance both the profits which this Farmer might hope to make, and the loſſes which he had to fear; and may regulate by theſe conſiderations, ſuch a Reparation of Damages as may be agreeable to Equity [r].

[r] Colonus, ſi ei frui non liceat totius quinquennii nomine ſtatim recte aget. *l.* 24. §. 4. *ff. locat.* Et quantum per ſingulos annos compendii facturus erat, conſequetur. *d. l.*

See the ſeventh Article.

XIII.

13. The Prudence of the Judge in eſtimating Damages.

It follows from all the preceding Rules, that as the queſtions relating to Damages ariſe always from Facts which vary according to the circumſtances, it is by the Prudence of the Judge that they are to be decided, he joining to the light which the Principles of Law and Equity may give him, a prudent diſcernment of the circumſtances, and of the regard that ought to be had to them: whether it be for leſſening the Damages that are to be adjudged, by cutting off pretenſions for diſtant loſſes, and upon other conſiderations, if there be ground for it, as in the caſes where no bad deſign, nor any fault, can be imputed to the perſon who is bound to make good the damage: or for increaſing the Damages which are to be given in conſide-

conſideration of the intention to hurt, if there was any. Thus, for Example of the leſſening of the Damages, in the caſe where a Seller, who has ſold a Thing which he verily believed to be his own, is bound to warrant the Thing ſold againſt an Eviction, the Reparation of Damages will not be extended to the ſuperfluous Expences which the Purchaſer may have laid out barely for his own pleaſure: and much leſs will there be any regard had to the particular conſiderations which might render the ſaid Purchaſe more precious in the eye of the Purchaſer, whether it were becauſe it had been an ancient Patrimonial Eſtate belonging to his Family, or that he took delight therein becauſe he had been brought up in it. For the price of things is not regulated by affection, which may make them more valuable to ſome than to others; but only on the foot of what they may be worth to all perſons indifferently[t]. Thus, on the contrary, in the caſe where one had, by ſome treſpaſs, occaſioned the loſs of a thing which was of neceſſary uſe for the matching of others, which, for the want of that which periſhed, became uſeleſs, as it may happen on ſeveral occaſions; the perſon who had cauſed this damage would be accountable, not only for the value of the thing loſt, but alſo for the damage which the ſaid loſs had occaſioned beſides, by the want of the uſe of the other things[u]. For this damage which might have been conſidered as an Accident, if the loſs of the thing had happened only thro' ſome imprudence, might be imputed to him who had cauſed it, with an intention to do harm.

[t] Pretia rerum non ex affectu, nec utilitate ſingulorum, ſed communiter funguntur. *l.* 63. *ff. ad leg. Falcid.*

Non affectiones æſtimandas, ſed quanti omnibus valeret. *l.* 33. *ff. ad leg. Aquil.*

Si dicat patronus rem quidem juſto pretio veniſſe, verumtamen hoc intereſſe ſua, non eſſe venundatum, inque hoc eſſe fraudem, quòd venierit poſſeſſio in quam habebat patronus affectionem, vel opportunitatis, vel vicinitatis, vel cœli, vel quòd illic educatus ſit, vel parentes ſepulti, an debeat audiri volens revocare? Sed nullo pacto erit audiendus. Fraus enim in damno accipitur pecuniario. *l.* 1. §. 15. *ff. ſi quid in fraud. patr. factum ſit.*

What is ſaid in this Law touching the fraud committed againſt the Rights of a Patron, may be applied to the caſe of an Eviction.

[u] Sed utrùm corpus ejus ſolum æſtimamus, quanti fuerit, cùm occideretur: an potiùs, quanti interfuit noſtra, non eſſe occiſum? Et hoc jure utimur, ut ejus quod intereſt, fiat æſtimatio. *l.* 21. §. 2. *ff. ad leg. Aquil.* Item cauſæ corpori cohærentes æſtimantur, ſi quis ex comœdiis, aut ſymphoniacis, aut gemellis, aut quadrigis, aut ex pari mularum unum, vel unam occiderit. Non ſolùm enim perempti corporis æſtimatio facienda eſt: ſed & ejus ratio haberi debet, quo cætera corpora deprætiata ſunt. *l.* 22. §. 1. *eod.*

XIV.

14. *Damages againſt litigious perſons.*

Among all the cauſes from whence Damages may ariſe, there is none more frequent than the injuſtice of thoſe perſons, who by proſecuting or defending unjuſt Law-Suits, cauſe to their adverſe parties not only charges, which are almoſt never made up by the Coſts of Suit which they are condemned in, but likewiſe other damages of which thoſe Law-Suits are the only cauſe; ſuch as the loſs of time, eſpecially in thoſe who live by their Labour, and many other conſequences of the injuſtice and cavilling humour of litigious perſons. Which makes it very juſt and reaſonable, that ſuch perſons ſhould be condemned in Damages, whenever the vexation is ſuch as may deſerve it. And altho' this Rule be ſo rarely obſerved, that it looks as if it were quite aboliſhed; yet ſeeing it is founded upon Equity, that it is agreeable to the Law of Nature, and that it has been revived by the Ordinances, it would be proper for the Judges to put it in execution, whenever the injuſtice, the cavilling and vexatious humour of the parties may deſerve it[x].

[x] Improbus litigator & damnum, & impenſas litis inferre adverſario ſuo cogatur. §. 1. *in f. inſt. de pœna tem. litig. V. tit. C. de jurej. propt. cal. dand.*

In all matters Real, Perſonal, and Poſſeſſory, Civil and Criminal, there ſhall be Judgment for Damages ariſing from the Suit, and from the calumny and temerity of the perſon who loſes the Cauſe, which ſhall be taxed and moderated by the ſame Sentence or Judgment at a certain Sum, provided always that the ſaid Damages have been demanded by the Party who has gained the Cauſe, and of which the Parties may give in a Summary Account in the Proceedings of the Cauſe. Ordinance of *Francis* I. in *Auguſt* 1539. Art. 88.

Thoſe perſons who do not underſtand Latin, *muſt be here informed, that the word* Calumny *in the above-mentioned Ordinance, as well as in the* Roman *Law, ſignifies the vexation and cavilling of thoſe who knowingly and wilfully proſecute or defend unjuſt Law-Suits.*

[In England *we have ſeveral Acts of Parliament which direct the Judges to give Coſts, in order to diſcourage litigious perſons from vexing their neighbours. As by* Stat. 23 H. VIII. cap. 15. *which directs, that if the Plaintiff be Nonſuit, or overthrown by lawful Trial in any Action, Bill, or Plaint, the Defendant ſhall in ſuch caſe have his Coſts, to be aſſeſſed by the Judge or Judges of the Court, and to be recovered as the Plaintiff might have recovered his in caſe Judgment had been given for him. Likewiſe by* Stat. 4 Jac. I. cap. 3. *it is enacted, that if the Demandant or Plaintiff be Nonſuit, or overthrown by lawful Trial, in any Action whatſoever, the Tenant or Defendant ſhall have Coſts.*

By Stat. 1 Gul. & Mar. Seſſ. 1. cap. 21. *it is ordained, that upon diſmiſſion of a Bill in Chancery, the Plaintiff ſhall pay full Coſts, to be taxed by a Maſter. And by* Stat. 8 & 9 W. III. cap. 11. *it is enacted, that in all Actions of Treſpaſs, where it ſhall appear at the Trial, and be certified by the Judge on the back of the Record, that the Treſpaſs was wilful and malicious, the*

the Plaintiff ſhall recover not only his Damages, but his full Coſts of Suit.]

XV.

15. Stipulation of a certain Sum in lieu of all Damages.

The difficulties in ſettling the value of the Damages which may enſue upon the non-performance of an Engagement, oblige ſometimes thoſe who contract together to agree on a certain Sum, which he who fails to perform what he has promiſed on his part, ſhall be bound to pay to the other, to be to him inſtead of a Reparation of Damages. But ſeeing theſe ſorts of Stipulations are not ſo much a juſt Eſtimate of the Damage, as a precaution for engaging the Contracter to a more exact fidelity, thro' fear of incurring the penalty of paying the Sum agreed on, it depends on the prudence of the Judge to moderate the ſaid Sum, if it exceeds the real damage. For he who has ſuffered the damage cannot reaſonably pretend to more than what may be lawfully due to him. And this Stipulation hath its juſt effect by a reaſonable Satisfaction for the loſs that is to be repaired. But if the Agreement is conceived in ſuch terms as ſhew that it was the intention of the Parties to limit the Reparation of Damages to a certain Sum in favour of the perſon who might be liable thereto, and to prevent his being obliged to any thing beyond that Sum, altho' the Damage ſhould chance to be greater; in this caſe the Damage could not be eſtimated at more than the Sum agreed on. For the perſons who have contracted in this manner, had power to mitigate the Reparation of Damages that might be due[y].

[y] In ejuſmodi ſtipulationibus quæ quanti res eſt promiſſionem habent, commodiùs eſt certam ſummam comprehendere: quoniam plerumque difficilis probatio eſt quanti cujuſque interſit: & ad exiguam ſummam deducitur. *l. ult. ff de ſtip. prætor. §. ult. inſt. de verb. oblig.* See the eighteenth Article of the fourth Section of Covenants in general.

XVI.

16. All Damages are eſtimated in Money.

All Damages, of what nature ſoever they may be, are reduced to Sums of Money which thoſe perſons owe who are obliged to make any Reparation, whether it be for having failed to perform their Engagements, or for other cauſes. For Money is in place of all things that are capable of being eſtimated[z].

[z] Quia non facit quod promiſit, in pecuniam numeratam condemnatur: ſicut evenit in omnibus faciendi obligationibus. *l. 13. in f. ff. de re judic.*

XVII.

17. Loſſes which he who is the cauſe of them is not obliged to make good.

We muſt not reckon indifferently in the number of the caſes where Damages may be due, all the Events where one perſon may cauſe by his deed ſome loſs to another. For it often happens, that one is the cauſe of loſs without being bound to make it good. And when the facts which have been the occaſion of the loſs have been lawful, and that the loſs has been only a privation of ſome conveniency, and a conſequence of the fact of a perſon who did nothing but uſe his own Right, he will not be bound to repair it. Thus, for example, he who digging in his own Grounds, finds there a Spring which he turns to his own uſe, will not be bound to make good the loſs which his neighbour will ſuffer by being deprived of the ſaid Spring, which will by this means ceaſe to riſe any more in his Ground, unleſs the ſaid change had been made with no other view but to do harm. Thus, he who not being ſubject to a Service, raiſes his Building higher, and by that means takes away the Light, or Proſpect, from his Neighbour's Houſe, cannot be hindred from doing it. But if the change made by a perſon in his own Ground deſtroys, or damages a thing belonging to his Neighbour, as if one digging in his own Ground, weakens thereby the foundations of his Neighbour's Wall, and puts it in danger of falling, he will be anſwerable for it; for the facts which hurt in this manner ceaſe to be lawful; and one cannot dig in his own Ground near the confines of his Neighbour, nor make other Works, unleſs he obſerves the diſtances, and uſes the other precautions preſcribed by the Uſage and Cuſtom of the places[a].

[a] Proculus ait, cùm quis jure quid in ſuo faceret, quamvis promiſiſſet damni infecti vicino, non tamen eum teneri ea ſtipulatione. Veluti ſi juxta mea ædificia habeas ædificia, eáque jure tuo altius tollas: aut ſi in vicino tuo agro, cuniculo vel foſſa aquam meam avoces. Quamvis enim & hic aquam mihi abducas, & illic luminibus officias, tamen ex ea ſtipulatione actionem non mihi competere: ſcilicet quia non debeat videri is damnum facere, qui eo veluti lucro, quo adhuc utebatur, prohibetur: multúmque intereſſe utrum damnum quis faciat, an lucro quod adhuc faciebat uti prohibeatur. Mihi videtur vera Proculi ſententia. *l. 26. ff. de damno inf.* Denique Marcellus ſcribit, cum eo qui in ſuo fodiens, vicini fontem avertit, nihil poſſe agi: nec de dolo actionem. Et ſanè non debet habere, ſi non animo vicino nocendi, ſed ſuum agrum meliorem faciendi id fecit. *l. 1. §. 12. ff. de aqua & aq. pluv. arc.* Si tam altè fodiam in meo, ut paries tuus ſtare non poſſit, damni infecti ſtipulatio committitur. *l. 24. §. 12. ff. de damn. inf.* See the eighth and ninth Articles of the ſecond Section of

* Services;

Services; and the ninth and tenth Articles of the third Section of Damages occaſioned by Faults.

XVIII.

General remark touching the Intereſt of Money, the ſeveral views by which we may judge if any Intereſt be due, or not [b]; ſo we ought alſo to diſcern in Queſtions that ariſe about Damages, whether any be due, or not. And this depends on the quality of the Fact which may have given occaſion to the Damage; if it is an accident, a ſlight fault, an imprudence, a crime, an involuntary non-performance of an Engagement, or ſome other cauſe. And then Enquiry is made, in the next place, what the Damages may conſiſt in; giving them either the extent, or bounds, which Equity may demand, according to the different cauſes of the Damages, the diverſity of the Events, and the circumſtances, obſerving therein the Rules which have been explained [c].

General remarks relating to Damages.

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

[c] *This is a conſequence of the preceding Articles.* Hoc quod revera inducitur damnum, & non ex quibuſdam machinationibus, & immodicis perverſionibus in circuitus inextricabiles redigatur. *l. un. C. de ſent. quæ pro eo quod int. prof.*

SECT. III.

Of the Reſtitution of Fruits.

The CONTENTS.

1. *The Reſtitution of Fruits is a Reparation of Damages.*
2. *The extent of this Reſtitution.*
3. *The word* Fruits *is underſtood of all ſorts of Revenues.*
4. *The unjuſt Poſſeſſor is bound to reſtore all the Fruits which he has enjoyed.*
5. *The Poſſeſſor who verily believed himſelf to be the right Owner, does not reſtore the Fruits which he has enjoyed during this belief.*
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9. *A caſe where the Poſſeſſor, who believes himſelf to be the true Owner, reſtores the Fruits.*
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11. *We muſt deduct from the value of the Fruits to be reſtored, the Expences laid out upon them.*
12. *The Fruits belong to the Maſter of the Ground, and not to him who ſows it.*
13. *The unjuſt Poſſeſſor is bound to make Reſtitution of the Fruits which have been gathered from the Ground.*
14. *The Heir or Executor of an unjuſt Poſſeſſor ſucceeds to his Engagement.*
15. *Eſtimate of Fruits and other Revenues.*
16. *Reſtitution of the Revenues of Moveable Things.*
17. *There is no Intereſt due for the Fruits, till after a Demand.*

I.

THE Reſtitution of Fruits is a kind of Reparation of Damages, which is due from him who hath unjuſtly enjoyed the Revenue of another. For this Reſtitution repairs the loſs of the perſon who ought to have enjoyed the Revenue [a].

1. *The Reſtitution of Fruits is a Reparation of Damages.*

[a] *As Intereſt is the Reparation of Damages which is due from Debtors who owe Sums of Money, and are behind hand in payment; ſo the Reſtitution of Fruits is a Reparation of Damages due from thoſe who have unjuſtly enjoyed the Revenues belonging to other perſons.*

II.

This word Reſtitution of Fruits, comprehends not only the obligation to reſtore thoſe which are in being; but altho' the enjoyment has been for ſeveral years, and that the Fruits of thoſe years be conſumed; yet ſeeing it is the value of the ſaid Fruits which ought to be reſtored, and that their value is inſtead of the Fruits themſelves, the Reſtitution of the Fruits is to be underſtood both of ſuch Fruits as are ſtill extant, and alſo of thoſe which are conſumed [b].

2. *The extent of this Reſtitution.*

[b] *This is a conſequence of the foregoing Article.*

III.

We muſt not in this place limit the word *Fruits*, to the ordinary ſenſe of the Fruits which the Earth produces; but this word ſignifies here, all the different ſorts of Revenues, of what nature ſoever they may be. And they may be diſtinguiſhed into two kinds; one is of thoſe which the Earth produces, whether it be of it ſelf, and without being cultivated, ſuch as Hay, the Fruits of Trees, Coppice Wood, the Minerals dug out of Mines, the Stones of Quarries,

3. *The word* Fruits *is underſtood of all ſorts of Revenues.*

ries, and others of the like nature: or by culture, ſuch as Corn, and other Grain[c]. The other kind is of Revenues which are not the Fruits of the Earth, nor things which it produces either of it ſelf, or by culture, but which are reaped by induſtry and care, either from ſome Tenement, or Animals, or from ſome Right eſtabliſhed by Law. Thus one gathers Rent from a Houſe, or other Building[d]: Thus one draws from a Ferry-Boat, or a Ship, a Revenue for the carriage of Perſons and Goods[e]: Thus Mills and Pigeon Houſes have their Revenues: And the ſeveral ſorts of Animals which are for our uſe, have alſo their Revenues[f]: Thus one has Rights of Fiſhing and Hunting, Tolls, and divers other Rights of ſeveral natures. And all theſe different Revenues of theſe two kinds, which come in yearly, or daily, are ſo many ſorts of Goods, the enjoyment whereof may be the ſubject matter of the Reſtitution ſpoken of here.

[c] Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *ff. de uſufr. l.* 59. §. 1. *eod.*

[d] Prædiorum urbanorum penſiones pro fructibus accipiuntur. *l.* 36. *ff. de uſufr.*

[e] Item vecturæ navium. *l.* 29. *in f. ff. de hared. pet. l.* 62. *ff. de rei vind.*

[f] In pecudum fructu etiam fœtus eſt, ſicut lac, & pilus, & lana. Itaque agni & hœdi & vituli ſtatim pleno jure ſunt bonæ fidei poſſeſſoris. *l.* 28. *ff. de uſur.*

IV.

4. The unjuſt Poſſeſſor is bound to reſtore all the Fruits which he has enjoyed.

All thoſe who enjoy a Revenue which they know they have no right to, are bound to reſtore to the perſon whom they have deprived of it, the value of all that they have reaped from it, altho' they have not been diſturbed in their enjoyment, by any demand. For they were ſenſible of the injuſtice which they were doing to the perſon who had a right to enjoy[g].

[g] Certum eſt malæ fidei poſſeſſores, omnes fructus ſolere cum ipſa re præſtare. *l.* 22. *C. de rei vind. l.* 17. *eod. l.* 3. *C. de condict. ex leg.*

V.

5. The Poſſeſſor who verily believed himſelf to be the right Owner, does not reſtore the Fruits which he has enjoyed during this belief.

Thoſe who are honeſtly in poſſeſſion of an Eſtate, which they believe to be their own, when it is not, are not bound to any Reſtitution of what they have enjoyed, during the time that they were fully perſuaded of their right and title to the ſaid Eſtate. For the integrity of a Poſſeſſor hath this effect, that he may look upon himſelf as Maſter of the thing which he poſſeſſes; and this upright perſuaſion of his, which he has reaſon to take for truth, ought to put him in the ſame condition as if he were really Maſter[h]. Thus, the loſs which the right Owner ſuſtains, by not enjoying, is, in regard to him, an accident which he cannot impute to this Poſſeſſor.

[h] Bonæ fidei poſſeſſor in percipiendis fructibus id juris habet, quod dominis prædiorum tributum eſt. *l.* 25. §. 1. *de uſur.*

Bonæ fidei emptor non dubiè percipiendo fructus, etiam ex aliena re, ſuos interim facit: non tantùm eos qui diligentia & opera ejus provenerunt, ſed omnes. Quia quòd ad fructus attinet, loco domini penè eſt. *l.* 48. *ff. de acq. rer. dom.*

Bona fides tantumdem poſſidenti præſtat, quantùm veritas, quoties lex impedimento non eſt. *l.* 136. *ff. de reg. jur.* See the fifth Article of the third Section of Poſſeſſion. See concerning the caſes where the upright Poſſeſſor reſtores the Fruits which have been reaped before the demand, the ninth and tenth Articles of this Section.

We call him an upright Poſſeſſor, who has juſt cauſe to believe himſelf to be Maſter of the Thing, as if he has purchaſed an Eſtate which he thought did belong to the perſon of whom he bought it, if it has deſcended to him by Inheritance, if it has been given him, or if he has acquired it by ſome other juſt Title, being ignorant of the right of the true Owner.

VI.

6. The upright Poſſeſſor reſtores the Fruits, after a legal Demand.

The integrity of the Poſſeſſor, which gives him the right to enjoy the Eſtate, ceaſes at the ſame time that his poſſeſſion is called in queſtion, by a demand made by the right Owner. For having once known the right of the true Owner of the Eſtate, he cannot any longer deprive him of the enjoyment thereof. And altho' he may pretend that the Demand is ill founded, and may think that his defences againſt it are juſt; yet if afterwards he is condemned to reſtore the Eſtate, his upright perſuaſion of his own Right and Title, when he defended himſelf, will be of no avail to him; and he will be obliged to make Reſtitution of the Fruits, from the time of the Demand[i]. For this belief of his own Right, let it be never ſo upright and ſincere, cannot have the effect of hurting the true Owner, who has known his Right, and demanded his Eſtate, or of counter-balancing the Authority of a Thing that is adjudged.

[i] Litigator victus, qui poſt conventionem rei incumbit alienæ, non in ſola rei redhibitione teneatur, nec tantùm fructuum præſtationem eorum quos ipſe percepit, agnoſcat: ſed etiam eos quos percipere potuiſſet, non quos eum redigiſſe conſtat, exolvat, ex eo tempore ex quo re in judicium deducta, ſcientiam malæ fidei poſſeſſionis accepit. *l.* 2. *C. de fructib. & lit. exp.* Ut omne habeat petitor, quod habiturus foret, ſi eo tempore quò judicium accipiebatur, reſtitutus illi homo fuiſſet. *l.* 20. *ff. de rei vind.* See the thirteenth Article.

7. If

VII.

7. *The Fruits that are cut down belong to the upright Poſſeſſor, altho' they be ſtill lying on the Ground.*

If a Poſſeſſor, who is verily perſuaded of his own right, is ſummoned juſt before Harveſt time by the Maſter of the Ground, to deliver up the poſſeſſion, and to reſtore the Fruits, and that in the event of the Law-Suit he is condemned, he will be obliged to reſtore the Fruits of that Crop. For ſeeing they were not cut down at the time of the demand, they made a part of the Ground, and the demand interrupted the right which the Poſſeſſor had to enjoy them. But if the Fruits were ſeparated from the Ground before the demand, altho' they were not yet carried away, but lay ſtill in the Field, they will belong to this Poſſeſſor[l]. For he having gathered and ſeparated them from the Ground, they belonged to him: and one cannot afterwards take away his property in them, nor hinder him to carry off what is his own.

[l] Bonæ fidei poſſeſſoris (fructus) fiunt mox cùm à ſolo ſeparati ſint. *l. 13. ff. quib. mod. uſusfruct. vel uſ. amit.*

Etiam priuſquam percipiat, ſtatim ubi à ſolo ſeparati ſunt, bonæ fidei emptoris fiunt. *l. 48. ff. de acq. rer. dom.*

Perceptionem fructus accipere debemus, non ſi perfectè collecti, ſed etiam cœpit ita percipi, ut terra continere ſe fructus deſierint. Veluti ſi olivæ, uvæ lectæ, nondum autem vinum, oleum ab aliquo factum ſit. Statim enim ipſe accepiſſe fructum exiſtimandus eſt. *l. 78. in fin. ff. de rei vind.*

VIII.

8. *Of Revenues which come in ſucceſſively.*

If the Revenues of a Tenement which is poſſeſſed by one who ſincerely believes himſelf to be the true Owner thereof, come in ſucceſſively, and day after day, as the Rents of a Houſe, the Revenue of a Mill, of a Ferry-Boat, of a Toll, and others of the like nature, and the ſaid Tenement be recovered by Law, from the Poſſeſſor; he ſhall have whatever fell due before the demand, and muſt reſtore the reſt[m].

[m] *See the ſixth Article of the firſt Section of Uſufruct.*

IX.

9. *A caſe where the Poſſeſſor who believes himſelf to be the true Owner, reſtores the Fruits.*

There are caſes where the Poſſeſſor who takes himſelf to be the right Owner, is obliged to make reſtitution of the Fruits which he has enjoyed. Thus, for inſtance, if two Brothers being Co-heirs to their Father, one of them being abſent, the other has enjoyed all the Goods and Effects of the Inheritance, believing that his Brother was already dead, he will be obliged to reſtore to him when he returns, all his ſhare of the Inheritance, with the Fruits which it has yielded. And it is the ſame thing, with reſpect to all other Co-heirs, whether they ſucceed by Teſtament, or without Teſtament, when one of them has enjoyed the portion belonging to the other[n]. For the Title of Heir gives him only right to his own portion; and the portion of his Co-heir is increaſed by the Fruits which proceed from it. Thus the integrity of the Heir who enjoys all the Goods of the Succeſſion, implies the condition, that in caſe it ſhall be found that he has a Co-heir, he will do him juſtice as to his portion. And this diſtinguiſhes the condition of this Heir, from that of another Poſſeſſor who takes himſelf to be the true Owner, and who has no reaſon to think that any body beſides himſelf has a right in what he poſſeſſes.

[n] Non eſt ambiguum, cùm familiæ erciſcundæ titulus inter bonæ fidei judicia numeretur, portionem hæreditatis, ſi qua ad te pertinet, incremento fructuum augeri. *l. 9. C. famul. erciſc.*

Cohæredibus diviſionem inter ſe facientibus juri abſentis & ignorantis minimè derogari, ac pro diviſo portionem eam quæ initio ipſius fuit in omnibus communibus rebus, eum retinere certiſſimum eſt. Unde portionem tuam cum reditibus arbitrio familiæ erciſcundæ percipere potes: ex facta inter cohæredes diviſione nullum præjudicium timens. *l. 17. C. eod. l. 44. ff. eod.*

Fructus omnes augent hæreditatem, ſive ante aditam, ſive poſt aditam hæreditatem acceſſerint. *l. 20. §. 3. in f. ff. de hæred. petit.* Fructibus augetur hæreditas, cum ab eo poſſidetur à quo peti poteſt. *l. 2. C. de petit. hæred.*

If the perſon who ſucceeded alone to an Inheritance, which was not then claimed by any other Heirs, having enjoyed it, for ſeveral years, there ſtarted up another Heir, in the ſame degree with him, but whoſe Relation was till then unknown: and if the Heir who had enjoyed the whole Inheritance during this long time, was not able to reſtore the Fruits of the Portion belonging to his Co-Heir without being ruined, or very much incommoded thereby, it would be equitable to moderate the ſaid Reſtitution by ſome temperament according to the circumſtances.

X.

10. *Another caſe of the like nature.*

If one Co-Partner has enjoyed alone a Houſe, or Lands belonging in common to the whole Partnerſhip, altho' he thought that he had the ſole right to it, and altho' his enjoyment thereof was honeſt, and with an upright intention, yet he will nevertheleſs be obliged to make reſtitution of the Fruits for the ſhares of his Co-Partners[o]. Thus, for Example, if in the caſe of an univerſal Partnerſhip of all Goods without diſtinction, one of the Partners, to whom a Relation or Friend had deviſed by Will, or given by Deed of Gift, an Eſtate, had enjoyed the ſame apart by himſelf, believing, thro' an Error in Law, that his Co-Partners had no ſhare therein,

therein, he will be bound notwithſtanding his upright intention, to reſtore to them their portions of the Fruits of that Eſtate [p], becauſe their Partnerſhip making the ſaid Eſtate common to them all, the right of that Partner was reſtrained to his own portion: and his upright intention, which had for its foundation only an Error in Law, did not give him a title to enjoy the portions of the other Partners [q].

[o] In ſocietatibus fructus communicandi ſunt. *l.* 32. §. 2. *ff. de uſur.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes, quos fructus ex his rebus ceperis, me conſecuturum, Proculus ait. *l.* 38. §. 1. *ff. pro ſocio.*

[p] *See the fourth Article of the third Section, and the firſt Article of the fourth Section of Partnerſhip. See in the fourteenth Article of this Section, another Caſe where a Poſſeſſor who believes himſelf to be the right Owner reſtores the Fruits. See the third Article of the third Section of thoſe who receive what is not their due, and the Remark on the ſaid Article.*

[q] *See the ſixteenth Article of the firſt Section of the Vices of Covenants.*

XI.

11. *We muſt deduct from the Value of the Fruits to be reſtored, the Expences laid out upon them.*

The Reſtitution of the Fruits does not extend to their full value, but we muſt deduct from the value the Expences that were neceſſary for the enjoyment thereof: Such are the Expences for tilling the Ground, for the Seed, and thoſe which are neceſſary for gathering in the Fruits, and preſerving them. And this deduction is allowed even to Poſſeſſors who knew what they enjoyed not to be their own [r]; for theſe Expences being neceſſary, they diminiſh the effective value of the Revenues, which conſiſts only in what remains after all charges are deducted.

[r] Hoc fructuum nomine continetur, quod juſtis ſumptibus deductis ſupereſt. *l.* 1. *C. de fruct. & lit. exp.* Fructus eos eſſe conſtat, qui deducta impenſa ſupererunt. *l.* 7. *ff. ſolut. matr.* Fructus intelliguntur deductis impenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt. Quod non ſolùm in bonæ fidei poſſeſſoribus naturalis ratio expoſtulat, verùm etiam in prædonibus. *l.* 36. §. *ult. ff. de hared. pet.*

This deduction of the Expences that are neceſſary for enjoying the Fruits, is grounded on the ſame Equity as the Reſtitution that is due to a Poſſeſſor of all uſeful and neceſſary Expences, which have been laid out for improving the Thing which he had in his poſſeſſion, or for preſerving it: and which is allowed even to unjuſt Poſſeſſors, when they are turned out of their Poſſeſſion. Benignius eſt in hujus quoque perſona (prædonis) haberi rationem impenſarum (neceſſariarum & utilium;) non enim debet petitor ex aliena jactura lucrum facere. *l.* 38. *ff. de hared. pet.*

See the ſixteenth Article of the tenth Section of the Contract of Sale, and the fourth Section of thoſe who receive what is not their due.

XII.

12. *The Fruits be-*

Altho' in many ſorts of Revenues, the induſtry of the perſon who has enjoyed them may hav[illegible] ſhare therein, yet t[illegible] who is Maſter of the [illegible] produced them: and [illegible] ſuch Fruits is not t[illegible] becauſe the induſtry o[illegible] has been inſtrumental in producing them. For the culture, the ſeed, and all the induſtry that is neceſſary for reaping Fruits, or other Revenues, do preſuppoſe the Ground which is to produce them. Thus, it is to the Right of Property which one has to the Ground, that the Right of Enjoyment is annexed; and the Revenue which may be drawn from the Ground belongs to him who is Maſter of it, deducting from the value of the Revenue the Expences neceſſary for enjoying it [s].

[s] Omnis fructus non jure ſeminis, ſed jure ſoli percipitur. *l.* 25. *ff. de uſur.*

In percipiendis fructibus magis corporis jus ex quo percipiuntur, quàm ſeminis ex quo oriuntur, aſpicitur. Et ideò nemo unquam dubitavit, quin ſi in meo fundo frumentum tuum ſeverim, ſegetem & quod ex meſſibus collectum fuerit, meum fieret. *d. l.* 25. §. 1.

XIII.

13. *The unjuſt Poſſeſſor is bound to make Reſtitution of the Fruits which might have been gathered from the Ground.*

The Poſſeſſor who knows what he poſſeſſes not to be his own, is not only bound to make reſtitution of the Fruits which he has reaped; but if by his abſence, or thro' negligence, and for the want of cultivating, he has not reaped any Fruits from the Ground which he was in poſſeſſion of, or if he has reaped only a part of what the Ground might have yielded if it had been cultivated; he will be accountable for the Fruits which a good Huſband might have reaped. For the Maſter of the Ground might have enjoyed it in this manner. But with regard to a fair Poſſeſſor, who takes himſelf to be the right Owner, and who is notwithſtanding obliged to reſtore the Fruits, the Reſtitution may be regulated differently, according to the circumſtances. Thus, a fair Poſſeſſor, who believed himſelf to be the right Owner, having been ſued by the Maſter of the Thing which he is in poſſeſſion of, may afterwards be compared to an unjuſt Poſſeſſor, and condemned to the ſame Reſtitution with him, if after the demand made by the right Owner, he has neglected the enjoyment thereof, or if he has diminiſhed the Revenue, by not making the neceſſary Repairs; and he will be anſwerable for it, as having done it in fraud of the Reſtitution which he had reaſon to be afraid of. But he who is obliged to make Reſtitution of Fruits which he had honeſtly and fairly

fairly reaped before any demand was made, as in the caſes mentioned in the ninth and tenth Articles, might be excuſed, if for want of Repairs, or by reaſon of any other neglect, he had not drawn from a Ground, which he thought he might neglect with impunity, believing it to be his own, that profit which another perſon might have made of it with greater care [u].

[t] Fructus non modò percepti, ſed & qui percipi honeſtè potuerunt, æſtimandi ſunt. *l.* 33. *ff. de rei vindic.* See the ſixth Article of the third Section of Poſſeſſion.

See the Texts cited on the ſixth Article.

[u] *Altho' the Text quoted on this Article makes no diſtinction between Poſſeſſors who believe themſelves to be the right Owners of what they poſſeſs, and thoſe who know that they poſſeſs what is another's, yet it ſeems to be juſt to diſtinguiſh them in the manner they are diſtinguiſhed in this Article.*

XIV.

14. *The Heir or Executor of an unjuſt Poſſeſſor ſucceeds to his Engagement.*

The Heirs or Executors of unjuſt Poſſeſſors, are bound to the ſame Reſtitution as they are to whom they ſucceed, for they come in their place. And as they have the Goods and Rights belonging to the ſaid perſons, ſo they bear likewiſe their burdens: and they enter into the ſame Engagements which they were under; and altho' they may happen to be altogether ignorant of any unfair or diſingenuous dealing, yet their integrity will not hinder the effect of the unjuſt poſſeſſion of thoſe whom they repreſent [x].

[x] Hæredis quoque ſuccedentis in vitium, par habenda fortuna eſt. *l.* 2. *in f. C. de fructi. lit. & exp.*

XV.

15. *Eſtimate of Fruits and other Revenues year by year.*

In the Reſtitution of Revenues, the value whereof may riſe or fall from one year to another, whether they conſiſt in Money, as the Rents of a Houſe, the Farm of a Mill, of a Toll, and others of the like nature; or whether they be the Fruits of the Ground, or Rent paid in Corn, and other kinds; the Arrears thereof are eſtimated on the foot of what the Houſe or Lands may have produced, and of the value of the Kinds, according as the differences of the times may alter their price: or this liquidation is made according to the Leaſes, if there be any that are not liable to ſuſpicion.

[y] Quanti fuiſſet eo die quo dari debuit. *l. ult. ff. de condict. tritic.* See the ſeventeenth Article of the ſecond Section of the Contract of Sale.

In France, *this Eſtimate is made in the manner as is preſcribed by the Ordinances, of which theſe are the words:*

In Cauſes or Actions, Real and Perſonal, which are commenced for Lands and Things Immoveable, if there is Reſtitution of Fruits decreed, they ſhall be adjudged not only from the time of Conteſtation of Suit, but alſo from the time that the Party who is caſt has been in delay, and has had knowledge of his unjuſt poſſeſſion before the Conteſtation of Suit; nevertheleſs, according to the common way of making ſuch Eſtimates, which ſhall be ſettled according to the Extract taken out of the Regiſters of the ordinary Juriſdictions. Ordinance of 1539. Art. 94. *In all our ordinary Courts of Judicature, whether general or particular, report ſhall be made every week of the Value and common Eſtimate of all kinds of great Fruits, ſuch as Corn, Wine, Hay, and others of the like kind,* &c. Art. 102 and 103. *And by the Extract taken out of the Regiſters of the ſaid Courts, and no otherwiſe, ſhall be proved for the future the Value and Eſtimate of the ſaid Fruits, as well in Execution of Decrees or Sentences, as in other matters, in which Appraiſements are neceſſary.* Art. 104. *If there is a Sentence, or Decree for Reſtitution of Fruits, thoſe of the laſt year ſhall be delivered in kind: And as to thoſe of the preceding years, in liquidating them regard ſhall be had to the four Seaſons, and the common price of every year, unleſs it ſhall have been otherwiſe directed by the Judge, or agreed on between the Parties.* Ordinance of 1667 Tit. 30. Art. 1. See the other Articles of the ſaid thirtieth Title.

XVI.

16. *Reſtitution of the Revenues of Moveable Things.*

Altho' the Reſtitution of Fruits be commonly underſtood only of the Revenues of Immoveable Things, yet ſeeing there are Moveable Things which produce Revenues, we may apply to them the ſame Rules, according as they are applicable thereto: as for Example, to the Revenues which ariſe from Animals, and to the profit which may be made of Things which are let to Hire by thoſe who make a trade of it, ſuch as an Upholſterer who lets out a Suit of Hangings [z].

[z] Si veſtimenta, aut ſcyphus petita ſint, in fructu hæc numeranda eſſe, quòd locata ea re, mercedis nomine capi potuerit. *l.* 19. *ff. de uſur.*

XVII.

17. *There is no Intereſt due for the Fruits, till after a Demand.*

Whatever number of years the enjoyment, for which Reſtitution is to be made, may have laſted, altho' the Poſſeſſor may have known that what he poſſeſſed was not his own, yet there is due only the bare Eſtimate of that enjoyment, without any intereſt for the Value of the Fruits of each year. But if a legal Demand has been made of the ſaid Intereſt, the ſame will be due from the time of the Demand. For the Value of the ſaid Fruits, which are a real Subſtance, is in lieu of a Capital [a].

[a] Neque eorum fructuum qui poſt litem conteſtatam, officio judicis, reſtituendi ſunt, uſuras præſtari oportere: neque eorum qui priùs percepti, quaſi malæ fidei poſſeſſori condicuntur. *l.* 15. *ff. de uſur.* Fructuum poſt hæreditatem petitam perceptorum uſuræ non præſtantur. Diverſa ratio eſt eorum qui ante actionem hæreditatis illatam percepti, hæreditatem auxerunt. *l.* 51. §. 1. *ff. de hæred. petit.* Paulus reſpondit, ſi in omnem cauſam, conductionis etiam fidejuſſor ſe obligavit, eum quoque, exemplo coloni, tardiùs illatarum per moram coloni penſionum præſtare debere uſuras. *l.* 54. *ff. locat.*

TITLE VI.

Of PROOFS *and* PRESUMPTIONS, *and of an* OATH.

What is a Proof.

WE call that a Proof which convinces the Mind of a Truth: and as there are Truths of diverſe ſorts, ſo likewiſe there are different kinds of Proofs. There are Truths which are independent on the deed of Man, and on all ſorts of Events, which are immutable and always the ſame. Thus, without meddling with the Divine Truths of Religion, which are above all certainty, becauſe of the Authority of God who reveals them to us, and who makes us to feel and to love them, and alſo by reaſon of other different Proofs of an infinite force, which it is not our buſineſs to treat of here. We have in Sciences the knowledge of a great number of Truths which are certain and unchangeable; but there are others which are called Truths of Fact, that is, of what has been done, of what has happened; as, for Example, that one has committed a Robbery or a Murder, that a Teſtament is forged, that in a Fire, a thing which was ſaved out of it was depoſited in the hands of a neighbour, who denies the Depoſit, that a Poſſeſſor of a Houſe or Lands has enjoyed it for the ſpace of ten, twenty, or thirty years, and an infinite number of other Facts of ſeveral natures.

What Truth is.

There is this which is common to all the different ſorts of Truths, that *Truth is nothing elſe but that which is in reality:* and to know a Truth, is barely to know if a Thing is, or is not, if it is ſuch as is ſaid, or if it is different. But the Proofs which lead us to the knowledge of the Truth in matters of Fact, are very different from thoſe which eſtabliſh the Truths that are taught in Sciences. For in Sciences, all the Truths which may be known in them have their nature fixed and immoveable, and are always the ſame neceſſarily, without any dependance on the deed of Man, or on any ſort of change. Thus, the Proofs of theſe Truths are drawn from their own nature; and they are known either by their ſelf-evidence, if they are firſt Principles, and Truths which a in themſelves: or if they dep other Truths, their Proofs conſi connexion that links them toget which makes them to be kno one by the other, according as they are neceſſary conſequences one of another. But in Facts which might happen, or not happen, as depending on Cauſes whereof the Effects are uncertain, it is not by Principles which are certain and unchangeable, on which depended that which has happened, that we can know it: but we muſt have recourſe to Proofs of another kind; and it is by other ways that we muſt diſcover this ſort of Truths. Thus, for Example, if a man has been killed on the high way, being alone in the night time; the truth of the cauſe of this Murder, and the queſtion to know who it is that has killed this man, will not depend on Principles that are certain, and of which the Evidence will lead us to the preciſe knowledge of the Author of this Crime, with a certainty like to that which Demonſtrations in Sciences do produce. And it may likewiſe ſo fall out that it may be impoſſible to know it. But if it is diſcovered, it will be only by Proofs that may be drawn from circumſtances which ſhall happen to be linked together with this Crime, and which will depend on Events that have happened by accident, ſuch as the caſual rencounter of ſome Witneſſes, and ſuch ſigns and tokens as there may happen to be, conjectures, and preſumptions. And even altho' there ſhould chance to be two Witneſſes, beyond all manner of Exception, who ſhould ſay that they had ſeen the Murderer, whom they knew, actually ſtabbing the ſaid man, yet the certainty of ſuch a Proof is of another kind than that of the Truth of a Propoſition clearly proved in a Science, and has not the character of a Demonſtration; becauſe it is not impoſſible that two Witneſſes may be deceived, or even that they may have a mind to deceive. But the force of this Proof conſiſts in this, that it is preſumed from their good ſenſe, that they are not deceived themſelves, and from their probity, that they do not intend to deceive others. So that this Proof ſeems in effect to be grounded only on Preſumptions. However, theſe Preſumptions of Truth, which ariſe from the teſtimony of two Witneſſes are ſuch, that the Laws both of God and Man have appointed them to be held as a ſure Proof, when the Depoſitions agree with

Different ſorts of Proofs.

ne another, and when the Wit- are perſons againſt whom there Exception. And altho' it be at this kind of Proof has not the er of the certainty of a Demon- n, becauſe it is of quite another kind; yet nevertheleſs it has another ſort of certainty which perſuades fully, when the fidelity of the Witneſſes is well known; becauſe this Proof hath its foundation in the certainty of a Truth which is a ſure Principle, and which is drawn from the very Nature of Man, and from the Cauſes which govern his Actions. According to this Principle, it is certain that two perſons who have Reaſon, and who are not byaſſed by ſome impreſſion of Hatred, Revenge, Intereſt, or ſome other Paſſion, can never agree to bear falſe witneſs together in a Court of Juſtice, and that upon Oath. And we may conclude certainly from the natural Principles of our Actions, that Witneſſes who ſwear that they will ſay nothing but the Truth, do really tell it, if nothing changes in them the Natural Order. And altho' it be true, that the Judges cannot always be ſure that the Witneſſes are ſincere, and that they give their Evidence without intereſt, and without paſſion, and that there are often even falſe Witneſſes; yet it would be unjuſt, as well as abſurd, to give credit to no Witneſs at all, becauſe we cannot be certain of all Witneſſes that they do not lie. And it is a ſufficient juſtification of the Rule, which declares the teſtimony of two Witneſſes to be a ſufficient Proof, that it be true in general, that it is the Natural Order for Men to tell the truth which they know, when they cannot do otherwiſe without involving themſelves in the guilt of Perjury: and in particular, if in the Evidence that is given there appear no reaſon which may make us doubt of the fidelity of thoſe who are produced as Witneſſes; for by that one judges, that it is the Truth which they have declared.

This ſame Principle of the conſequences that may be drawn from the Natural Cauſes which govern our Actions, furniſhes us likewiſe with other different proofs of Facts, by the connexion that is between the ſaid Cauſes and their Effects. Thus *Solomon* founded his Judgment between the two Women, upon the diſcovery which he made of the true Mother, by the commotion and trouble which he foreſaw the Maternal Affection would produce in her, at the ſight of the danger to which he feigned to expoſe the Child.

It may be remarked on the nature of the Proofs of Facts in this Example, and that of Proofs by two Witneſſes, and we ſhall find it the ſame likewiſe in all the other kinds of Proofs of Facts, that although they be different from thoſe which we may have of a Truth in a Science, yet there is ſtill this common to all kinds of Proofs in general, that their force conſiſts in the certain conſequence which we may draw from ſome Truth that is known, to conclude from thence the Truth of which we ſearch the proof; whether it be that we draw a conſequence from a Cauſe to its Effect, or from an Effect to its Cauſe, or from the connexion of one Thing with another.

We have made here theſe Remarks, to ſhew by theſe Principles of Proofs, that in all the Queſtions where the matter is to know if a Fact is proved, or if it is not, it is neceſſary to judge thereof by the certainty of the Foundation on which the Proof is built, and by the connexion which the Fact that is to be proved may have with that Foundation. And as it happens very often, either that the Foundation is not very ſure, or that the Fact in queſtion is not neceſſarily linked with it, we find then, inſtead of Proofs, only Conjectures, which are not ſufficient to eſtabliſh a certain proof of the Truth. Thus, for Example, if ſome days after a quarrel happening between two perſons, one of them is found killed, and that there is againſt the other no manner of proof beſides the bare circumſtance of that quarrel, we cannot from thence conclude with certainty, that it was that perſon who committed the murder. For beſides that Enmities and Quarrels are but ſeldom carried to ſuch extremities, this Murder may have had many other cauſes. So that as there is no neceſſary connexion between this death and that quarrel, this circumſtance alone will not be ſufficient to ground a Sentence of Condemnation upon, and it can only form a Conjecture.

Two ſorts of Preſumptions.

It may be gathered from theſe Remarks, that there are two ſorts of Preſumptions: Some of which are drawn by a neceſſary conſequence from a Principle that is certain; and when theſe ſorts of Preſumptions are ſo ſtrong, that one may gather from them the certainty of the Fact that is to be proved, without leaving any room for doubt, we give

give them the name of Proofs, becauſe they have the ſame effect, and do eſtabliſh the truth of the Fact which was in diſpute. The other Preſumptions are all thoſe which form only Conjectures, without certainty; whether it be that they are drawn only from an uncertain Foundation, or that the conſequence which is drawn from a certain Truth is not very ſure.

It is becauſe of the difference between theſe two ſorts of Preſumptions, that the Laws have appointed ſome of them to have the force of Proofs, and have not left the Judges at liberty to conſider them only as bare Conjectures, becauſe in effect theſe ſorts of Preſumptions are ſuch, that one ſees in them a neceſſary connexion between the truth of the Fact that is to be proved, and the certainty of the Facts from whence it follows. Thus, for inſtance, in *France* it is enacted, by an Edict of *Henry* II. that if a Woman has concealed her being with Child, and is brought to bed privately, without any witneſs, and it be found that the Child never was chriſtened, nor had any publick Burying, ſhe ſhall be reputed to have murdered her Child, and be puniſhed with death[a]. And there are other ſorts of Preſumptions which the Law directs to be held as certain Proofs; ſo that we ought to take good heed not to diſtinguiſh the ſenſe of the word *Preſumptions* from that of *Proofs*, in ſuch a manner as never to take Preſumptions to be Proofs, ſeeing there are ſuch Preſumptions as are ſufficient to eſtabliſh the Proof of a Fact. But whereas the word *Proof* is taken for a full conviction, the word *Preſumption* is extended to all the conſequences which may be drawn from the ſeveral arguments that may ſerve to prove a Fact, whether it be that thoſe conſequences amount to the Evidence which may make a full Proof, or that they leave ſome doubt.

[a] *See the Edict of* Henry II. *of the year 1556, touching Women who have concealed their big bellies.* V. l. 34. nd leg. Jul. de adult.

We have thought it neceſſary to make here theſe Reflexions upon the nature of Proofs and Preſumptions, in order to eſtabliſh the Principles of the Rules concerning this matter, and to diſcover the natural cauſes of that which may eſtabliſh the certainty of the truth of matters of Fact. For it is by theſe Principles that we are enabled to judge of the ſtrength or weakneſs of the arguments which the parties bring to prove a Fact. There remains only that we ſhould diſtinguiſh the different manners in which Facts are proved, and they may be reduced to five Kinds; *viz.* Writing, Witneſſes, Preſumptions, Confeſſion of the Parties, and an Oath. Theſe five Kinds ſhall be the ſubject matter of ſo many Sections. And becauſe there are Rules common to all the ſorts of Proofs, we ſhall explain in the firſt Section thoſe Rules which are common to them all.

We ſhall not ſet down among theſe Rules, ſuch as regard only the Proceedings obſerved in Courts of Juſtice in the matter of Proofs; ſuch as the formalities neceſſary to be obſerved for the proof of private Writings; in examining and interrogating Witneſſes, in ſwearing them, taking down in writing their Depoſitions, and receiving the Objections that may be made againſt the Witneſſes, by thoſe againſt whom they are produced: the form of interrogating the Parties upon Facts, of taking the Oath of the Party, when the Adverſary is willing to have the matter in diſpute decided by it; and the other different Proceedings, whether it be in Civil or Criminal Matters. For all theſe things relate to the Order of Judicial Proceedings, and therefore do not belong to this place, and are regulated by the Ordinances, for the moſt part otherwiſe than they were by the *Roman* Law. And here we ſhall explain only the eſſential Rules which relate to the Nature and Uſe of the ſeveral ſorts of Proofs and Preſumptions.

SECT. I.

Of Proofs in general.

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11. *In proofs it is neceſſary to examine,* 1st. *If they are according to form.*
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I.

1. *Definition of Proofs.*

BY Judicial Proofs, is meant the ways which the Law has preſcribed for diſcovering, and for eſtabliſhing with certainty the truth of a matter of Fact that is conteſted [a].

[a] Ut quod actum eſt facilius probari poſſit. *l.* 4. *ff. de fid. inſtr.* Ad fidem rei geſtæ faciendam. *l.* 11. *ff. de teſtib.*

II.

2. *Proofs are of two ſorts.*

There are two ſorts of Proofs; thoſe which the Law appoints to be held as certain, and thoſe whereof the effect is left to the diſcretion of the Judge. Thus the Law will have the uniform Depoſitions of Witneſſes that are unexceptionable, and who are in the number required by Law, to be received as a certain proof of a Crime, or other Fact. Thus the Law eſtabliſhes it for a ſure proof of an Agreement, if the Contract is ſigned by the parties, or if they have not been able, or could not write, if it is ſigned either by a Notary and two Witneſſes, or by two Notaries without any Witneſs, according to the different Uſages of the places. But when there is nothing elſe but preſumptions, tokens, conjectures, imperfect evidence, or other ſorts of Proofs which the Law has not directed to be held for certain, it leaves it to the diſcretion of the Judge, to diſcern what may be received as Proofs, and what ought not to have that effect [b].

[b] *See the fifth Article of the fourth Section.*

III.

3. *Facts which have no need of proof.*

The uſe of Proofs does not concern Facts that are naturally certain, and whereof the Truth is always preſumed, if the contrary is not proved. But it reſpects only Facts which are uncertain, and of which the truth is not preſumed unleſs it be proved. Thus, for Example, he who demands a Succeſſion, or a Legacy, by virtue of a Teſtament, has no occaſion to prove that the Teſtator was in his right Senſes when he made the Teſtament, in order to eſtabliſh from thence the validity of the Teſtament. For it is naturally preſumed, that every one has the uſe of his Reaſon. But the Heir of blood, or next of kin, who in order to annul the ſaid Teſtament, alledges the inſanity of the Teſtator, ought to prove that Fact. Thus he who demands to be relieved from an Obligation becauſe of his Minority, ought to prove his Age [c]. Thus he who pretends to be Proprietor of a Houſe or Lands which are in the poſſeſſion of another perſon, ought to make proof of it [d].

[c] Cùm te minorem viginti quinque annis eſſe proponas; adire præſidem provinciæ debes, & de ea ætate probare. *l.* 9. *C. de probat.*

[d] Poſſeſſiones, quas ad te pertinere dicis, more judiciorum proſequere. Non enim poſſeſſori incumbit neceſſitas probandi eas ad ſe pertinere, cùm te in probatione ceſſante, dominium apud eum remaneat. *l.* 2. *C. de probat.*

See the ſeventh Article of the fourth Section.

IV.

4. *He who advances a Fact, ought to prove it.*

It follows from the preceding Rule, that in all the caſes of a Fact that is conteſted, if it is ſuch that it be neceſſary to make proof of it, it lies always on the perſon who advances it, to prove it. Thus all thoſe who make any demands that are founded upon ſome matter of fact, ought to prove the truth of the fact, if it is conteſted. Thus, he who demands a Legacy bequeathed by a Codicil, ought to prove the Codicil to be true. This is the reaſon why it is commonly ſaid, that it is incumbent on the Plaintiff to prove his fact [e].

[e] Semper neceſſitas probandi incumbit illi qui agit. *l.* 21. *ff. de probat.*

Ei incumbit probatio qui dicit, non qui negat. *l.* 2. *eod.*

Actore non probante, qui convenitur, etſi nihil ipſe præſtat, obtinebit. *l.* 4. *in f. C. de edendo.*

See the ſeventh Article of the fourth Section.

V.

5. *The Defendant ought to prove the facts on which he grounds his defence.*

As the Plaintiffs are obliged to prove the facts on which they ground their demands, ſo likewiſe if the Defendants on their part alledge facts which they make uſe of as a foundation of their defences, they ought to prove them. Thus, a Debtor who confeſſing the debt, alledges for his defence that he has paid it, ought to make proof of the payment. And altho' he be Defendant in the Suit, yet he is conſidered in regard of this fact as Plaintiff [f].

[f] In exceptionibus dicendum eſt, reum partibus actoris fungi oportere. Ipſumque exceptionem, velut intentionem implere: ut putà ſi pacti conventi exceptione utatur, docere debet pactum conventum factum eſſe. *l.* 19. *ff. de probat.*

Nam reus in exceptione actor eſt. *l.* 1. *ff. de except. præſc. & præjud.* Ut creditor qui pecuniam petit numeratam, implere cogitur, ita rurſum debitor qui ſolutam affirmat, ejus rei probationem præſtare debet. *l.* 1. *C. de probat.*

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6. Each party may on his part prove the contrary of the facts alledged by the adverſe party.

Altho' the perſon againſt whom one alledges a fact which it is neceſſary to prove, be not obliged on his part to prove the contrary [g]; yet he may nevertheleſs, if he pleaſes, the better to eſtabliſh his Right, prove the truth of the oppoſite fact [h].

[g] Fruſtrà veremini ne ab eo qui lite pulſatur, probatio exigatur. *l.* 8. *C. de probat.*

[h] Si quis fiducia ingenuitatis ſuæ ultrò in ſe ſuſcipiat probationes—— non ab re eſſe opinor, morem ei geri probandi ſe ingenuum. *l.* 14. *ff. de probat.*

VII.

7. The Parties have mutual liberty to alledge facts, and to prove them.

It is equally free both for the Plaintiff and Defendant, to alledge the facts which may ſerve as a foundation to build their Right upon. And each of them is admitted, both to prove the facts which he himſelf alledges, and alſo to prove the contrary of the facts alledged by his adverſary [i].

[i] *This is a conſequence of the preceding Articles.* See the following Article.

VIII.

8. Provided the facts have relation to the affair in hand.

The liberty of alledging and proving of facts, does not extend to all ſorts of facts indifferently; but the Judge ought to receive the proof only of thoſe that are called pertinent, or relevant; that is, from which one may draw the conſequences which may ſerve to eſtabliſh the Right of the perſon who alledges the ſaid facts: and he ought on the contrary to reject thoſe facts of which the proof, if they were true, would be uſeleſs. Thus, for inſtance, he who ſhould pretend to evict a Houſe or Land from the perſon who had purchaſed it, believing himſelf to be Proprietor thereof, becauſe he had lent the Money for the purchaſe, would demand to no purpoſe to be admitted to prove this fact; and this proof would be of no manner of uſe to his pretention, ſeeing the property of the Houſe or Land does not belong to him who advanced the Money to the purchaſer [l].

[l] Jure competenti prædiorum, quæ in queſtionem veniunt, dominium ad te oſtende pertinere. Nam res vindicantem ab emptore, ſuos numeratos nummos aſſeverantem erga probationem laborare non convenit: ſiquidem hujuſmodi licet probetur factum, tamen intentioni nullum præbet adminiculum. *l.* 21. *C. de probat.* See the fourth Article of the fifth Section.

IX.

9. A thing adjudged holds the place of Truth.

Things that are adjudged hold the place of Truth with regard to thoſe between whom they are adjudged, if they have not appealed, or if there lies no Appeal from the Sentence. Thus, for Example, if in the caſe of two Brothers claiming each of them their ſhare in their Father's Inheritance, one of them has been by Sentence declared to be a Profeſſed Monk, this fact will be held for true, and well proved: and he will be incapable of having a ſhare in the Inheritance [m]. But the facts which have been formerly adjudged between other perſons than thoſe who conteſt them at preſent, are undecided with reſpect to theſe, and muſt be proved; for they might have reaſons to offer, which had not been urged by the others [n].

[m] Res judicata pro veritate accipitur. *l.* 207. *ff. de reg. jur.*

[n] Sæpe conſtitutum eſt res inter alios judicatas, aliis non præjudicare. *l.* 63. *ff. de re jud. tot. tit. C. quib. res jud. non noc. & tit. C. inter al. act. vel jud. al. n. noc.*

X.

10. The effect of the Proofs depends on the prudence of the Judge.

In all the kinds of Proofs, whether by Witneſſes, or by Writing, or by other ways, the queſtion whether a Fact is proved, or is not, depends always on the prudence of the Judge, who ought to diſcern whether the Depoſitions of the Witneſſes, or the other ſorts of Proofs, be ſufficient, or not [o]. And this implies two ſorts of diſcuſſion, which ſhall be explained in the two following Articles.

[o] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. *l.* 3. §. 2. *ff. de teſtib.* Hoc ergò ſolum tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem, cognitionem ſtatim alligari debere, ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parum probatum tibi opinaris. *d.* §. *in fine.*

XI.

11. In proofs it is neceſſary to examine, 1°. If they are according to form.

The firſt enquiry that a Judge ought to make, in order to know what ought to be the effect of a Proof, and what regard ought to be had to it, is concerning the Formalities thereof; that is, if the Proof be according to the Order preſcribed by Law. Thus in the caſes where Proofs by Witneſſes may be received, it is neceſſary to enquire if they are in the number which the Law demands, if they have given their teſtimony by word of mouth, if there be no cauſe which may render their Evidence ſuſpected, if they have been ſummoned, if they have been ſworn; and, in a word, if their Depoſitions have been accompanied with all the Formalities which the Law requires [p]. Thus when it is by a Writing that one pretends to prove a Fact, it is neceſſary to examine if it be an Original, or a Copy:

Copy: if it is an Act made in preſence of a Publick Notary, and of which the date is certain; or if it is only a private Writing, ſigned only by the Parties, and to which they may have put what date they pleaſed: and if the Act has the Formalities required to make it Authentick, and if it be ſuch as ought to be received for a Proof [q].

[p] Si teſtes omnes ejuſdem honeſtatis, & exiſtimationis ſint. *l.* 21. §. 3. *ff. de teſtib. v. l.* 3. *cod.* Divus Hadrianus Junio Rufino Proconſuli Macedoniæ reſcripſit, teſtibus ſe, non teſtimoniis crediturum. *l.* 3. §. 3. *ff. de teſtib.* See the third Section.

[q] Non ex indice & exemplo alicujus ſcripturæ, ſed ex authentico. *l.* 2. *ff. de fide inſtr.* See the ſecond Section.

XII.

2dly. *If they are concluding.*

The ſecond examination of the Proofs, conſiſts in diſcerning that which reſults from them for eſtabliſhing the truth of the Facts which were to be proved, whether it be by Witneſſes, or by Writing, or otherwiſe. Thus, as for the Depoſitions of Witneſſes, the Judge examines if the Facts to which they depoſe are the ſame which ought to have been proved, or if they are other Facts from which one may be able to draw certain conſequences of the truth of the Facts in diſpute: If the Depoſitions agree one with the other, or in caſe they differ, whether the difference can be reconciled ſo as to make a Proof, or whether it leaves the thing uncertain: If the multitude of Witneſſes leaves no manner of doubt: If among ſeveral Witneſſes who depoſe differently, the probity and authority of ſome of them gives more weight to their teſtimony: If there is no variation in a Depoſition: If the facts are notoriouſly evident, and confirmed by publick fame, in the caſes where theſe circumſtances may be conſidered: If ſome of the Witneſſes be ſuſpected of partiality, by reaſon of favour or hatred to one of the parties. Thus in Proofs by Writing, and in all the other kinds of Proofs, it depends on the prudence of the Judge to diſcern that which may ſuffice for eſtabliſhing the truth of a Fact, and that which leaves it doubtful: to conſider the relation and connexion which the Facts reſulting from the Proofs may have with thoſe which are to be proved: to examine if the Proofs are concluding, or if they are only conjectures, ſigns, and preſumptions, and what regard ought to be had to them: and in a word, to judge of the effect of the Proofs by all the different views which one may have from the knowledge of the Rules, and from the Reflections on the facts and circumſtances [r].

[r] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. Sicut non ſemper, ita ſæpè, ſine publicis monumentis cujuſque rei veritas deprehenditur, aliàs numerus teſtium, aliàs dignitas & autoritas, aliàs veluti conſentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergò ſolum tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem, cognitionem ſtatim alligari debere, ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parum probatum tibi opinaris. *l.* 3. §. 2. *ff. de teſtib.*

In teſtimoniis dignitas, fides, mores, gravitas examinanda eſt, & ideo teſtes qui adverſus fidem ſuam teſtationis vacillant, audiendi non ſunt. *l.* 2. *ff. de teſtib.* Si teſtes omnes ejuſdem honeſtatis & exiſtimationis ſint, negotii qualitas, ac judicis motus cum his concurrit, ſequenda ſunt omnia teſtimonia. Si verò ex his quidam eorum aliud dixerint, licet impari numero, credendum eſt. Sed quod naturæ negotii convenit, & quod inimicitiæ, aut gratiæ ſuſpicione caret. Confirmabitque judex motum animi ſui, ex argumentis & teſtimoniis, & quæ rei aptiora, & vero proximiora eſſe compererit. Non enim ad multitudinem reſpici oportet, ſed ad ſinceram teſtimoniorum fidem, & teſtimonia quibus potiùs lux veritatis aſſiſtit. *l.* 21. §. 3. *ff. de teſtib.*

Indicia certa, quæ jure non reſpuuntur, non minorem probationis, quàm inſtrumenta, continent fidem. *l.* 19. *C. de rei vindic.*

SECT. II.

Of Proofs by Writing.

THE force of Proofs by Writing conſiſts in this, that men have agreed to preſerve by Writing the remembrance of things that have been tranſacted, and to perpetuate the memory of them to poſterity, whether it be that they may ſerve as Rules to the parties themſelves, or as a perpetual proof of what is written. Thus Covenants are put down in writing, in order to preſerve the memory of what the contracting parties have bound themſelves to, and to make to themſelves thereby a fixed and unchangeable Law, as to what has been agreed on. Thus Teſtaments are written, that a remembrance may be kept of what has been ordered by the Teſtator, who had a right to diſpoſe of his Goods, and that it may ſerve as a Rule to his Executor, and to the perſons to whom he has left Legacies. Thus it is thought fit to write Sentences and Decrees of Courts, Edicts, Ordinances, and every thing which is to ſerve as a Title, or a Law. Thus it is cuſtomary to write down in publick Regiſters, Marriages, Chriſtenings,

and other Acts which ought to be recorded; and other the like Regiſters are kept as a publick and perpetual Repoſitory of the truth of the Acts which are there recorded.

The written Contract therefore is a proof of the Engagements of thoſe who have contracted, and the written Teſtament is a proof of the will of him who has made it. And theſe Proofs are in the place of Truths to the perſons whom they concern. Thus, a written Contract ſerves as a proof againſt the Contracters, againſt their Heirs, and againſt all thoſe who repreſent them, and who ſucceed to their Engagements. Thus, a Teſtament proves the truth of the diſpoſitions made by the Teſtator, and obliges the Executors and Legatees to execute them.

It is eaſy to comprehend how neceſſary the uſe of Writing has been, for preſerving the memory of Agreements, of Teſtaments, and of other Acts of all kinds; and that there can be no better proof of them, ſeeing the Writing preſerves without change or alteration, whatever is ſet down therein, and expreſſes the intention of the perſons by their own proper teſtimony and Evidence. But ſeeing all perſons cannot write, it has been thought fit, for the conveniency of thoſe who cannot write, to eſtabliſh publick Officers, who are called Notaries Publick, and whoſe Function is ſuch, that the Acts ſigned either by two Notaries, without any witneſs, or by one Notary and Witneſſes, according to the different uſages of places, make a legal proof of the truth of that which is written between the perſons who cannot either write or read. And as to perſons who can write, their Sign Manual, without the preſence of a Notary, makes likewiſe a proof of the truth of that which is written: but with this difference between Acts written without the preſence of Notaries, which are called private Writings, and thoſe which are ſigned by Notaries; that theſe are received as a proof in Courts of Juſtice, and prove two facts. One is, that the Act has been ſped between the perſons who are named in it, at the time, and in the place there ſpecified: And the other is, that the intentions of the Parties concerned are there explained. And the authority of this Proof is founded on the publick Function of Notaries, who are eſtabliſhed for this very purpoſe, to render the Acts which they ſign, authentick. But private Writings do not even prove by whom they are written, and it is neceſſary to verify them; that is, to prove by whom they are ſigned.

The great facility there is of writing Covenants, and the infinite number of inconveniences that attend the admiſſion of the proof of unwritten Covenants, in the manner that it was received by the *Roman* Law, have been the motives which induced the Kings of *France* to make the Ordinances, whereby it is prohibited to receive other proofs than writing for Covenants, where the Sum exceeds One Hundred Livres, as has been remarked in another place[a]. And it is for the ſame reaſon that the Ordinances have directed that there ſhould be kept publick Regiſters of Chriſtenings, Marriages, Deaths and Burials, Ordinations, Admiſſions into any Religious Order, to the end that people may eaſily come at the certain proof of theſe ſorts of Facts[b]. Which does not hinder but that in caſe the ſaid Regiſters ſhould happen to be loſt or deſtroyed, one may be allowed to make uſe of the other kinds of proofs[c].

[a] *See the Remark on the twelfth Article of the firſt Section of Covenants in general. It is neceſſary to obſerve, with reſpect to this Prohibition by the Ordinances of* France *againſt receiving the proof of Covenants by Witneſſes, that it does not extend to things depoſited in a caſe of neceſſity, nor to the other caſes explained in the third and fourth Articles of the twentieth Title of the Ordinance of the month of* April 1667.

[b] *Ordinance of* 1539. *Art.* 50. *and* 51. *Of* Blois, *Art.* 181. *Of* Moulins, *Art.* 55. *Declaration in* July 1566. *Art.* 11. *Ordinance of* 1667. *Tit.* 20. *Art.* 7. 8. *and* 15.

[c] *Ordinance of* 1667. *Tit.* 20. *Art.* 14. Ætas probatur aut ex nativitatis ſcriptura, aut aliis demonſtrationibus legitimis. *l.* 2. §. 1. *ff. de excuſ.*

[*It has been already obſerved, in relation to the Uſage obſerved in* England *in the matter of unwritten Contracts, that by Statute* 29 Car. II. cap. 3. §. 17. *it is enacted, That no Contract for the Sale of any Goods, Wares and Merchandizes, for the price of Ten Pounds Sterling, or upwards, ſhall be allowed to be good, except the Buyer ſhall accept part of the Goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the Bargain, or in part of payment, or that ſome Note, or Memorandum in writing, of the ſaid Bargain be made and ſigned by the parties to be charged by ſuch a Contract, or their Agents thereunto lawfully authorized.*]

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6. *Written Acts are not received as proof, unleſs they be in due form.*

7. *The*

7. *The witneſſes to a written Act will not be received to prove the contrary.*
8. *Written Acts prove only againſt thoſe who are parties to them.*
9. *No man can by himſelf make a Title to himſelf.*
10. *It is by the Original Acts that we ought to examine the proofs.*
11. *Caſes where the Copies of Deeds, and other Proofs, may ſerve, when the Originals cannot be had.*
12. *When mention is made of one Deed in another.*
13. *Deeds that contradict one another.*
14. *Counter-Letters.*
15. *Counter-Letters cannot prejudice third perſons.*

I.

1. *What are written Proofs.*

PRoofs by Writing are thoſe which are drawn from ſome written Act, ſuch as a Contract, a Teſtament, or other Writing, which contains the truth of the fact in queſtion [a].

[a] Quibus cauſa inſtrui poteſt. *l.* 1. *ff. de fide inſtr.*

II.

2. *Uſe of theſe Proofs.*

People put down in writing, Contracts, Teſtaments, and other Acts, in order to preſerve the proof of what has been done, by the teſtimony of the perſons themſelves who expreſs therein their intentions [b].

[b] Fiunt ſcripturæ, ut quod actum eſt, per eas facilius probari poſſit. *l.* 4. *ff. de fide inſt. l.* 4. *ff. de pignor.*

Written Acts are of ſeveral ſorts, and they may be reduced to four kinds: Private Writings, Acts made in the preſence of Publick Notaries, thoſe which are made in Courts of Juſtice, ſuch as the naming of a Tutor, or Guardian, and thoſe which are made before other publick perſons, as Matrimony in the preſence of a Clergyman, the Promotion to Holy Orders, and other Acts of which publick Regiſters are kept.

III.

3. *Written Proofs are the ſtrongeſt.*

Seeing the force and validity of Proofs by Writing conſiſts in this, that they are a teſtimony which the perſons who are parties to the ſaid Acts give againſt themſelves, and a teſtimony which is unchangeable; there can be no better proof of what has paſt between them, than what they themſelves have expreſſed of the matter [c].

[c] Generaliter ſancimus, ut ſi quid ſcriptis cautum fuerit pro quibuſcunque pecuniis ex antecedente cauſa deſcendentibus, eamque cauſam ſpecialiter promiſſor edixerit: non jam ei licentia ſit cauſæ probationem ſtipulatorem exigere: cùm ſuis confeſſionibus acquieſcere debeat. *l.* 13. *C. de non. num. pecu.*

IV.

4. *No Proofs are received againſt Writing.*

This ſtrength of written Proofs, is the reaſon why we do not receive contrary proofs by Witneſſes [d]. Thus, he who would call in queſtion a Teſtament that is made according to form, pretending to prove by witneſſes, either that the Teſtator had altered his will, or that his intention was otherwiſe, would not be admitted to make ſuch a proof; nor he who ſhould offer to prove by witneſſes, that he had not received a Sum of Money for which he had given an Acquittance.

[d] Contra ſcriptum teſtimonium, non ſcriptum teſtimonium non fertur. *l.* 1. *C. de teſtib.*

Cenſus & monumenta publica potiora teſtibus eſſe, ſenatus cenſuit. *l.* 10. *ff. de probat.* See the thirteenth Article of this Section, and the Remarks at the end of the Preamble to this Section.

V.

5. *Unleſs it be pretended that the Writing is forged.*

We muſt not extend the Rule explained in the preceding Article, to the caſes where the truth of an Act is called in queſtion; as if it be pretended that it is forged, or that it has been made through the impreſſion of fear and violence, which render it null. For the proof which is drawn from a written Act, hath for its foundation the fidelity of the teſtimony which the Writing gives of the truth of what it contains, and when this fidelity is called in queſtion, the Writing loſeth its force. Thus, he who pretends to prove that his hand has been counterfeited in a Writing that appears to be ſigned by him, ought to be received to prove this fact [e]. Thus, he who pretends that an Obligation has been extorted from him by force and violence, may make proof of it [f]. And it would be the ſame thing in all the caſes where the written Act ſhould be oppoſed on the head of ſome vice which might annul it, as on the account of ſome fraud, or ſome error which might have this effect [g]. Or if it were an Act counterfeited in order to colour ſome fraud, ſuch as a Diſpoſition made to a third perſon, whoſe name is made uſe of for tranſmitting ſome Liberality to another perſon, who by Law is incapable of receiving it directly in his own name, or for acquiring to the ſaid perſon a Thing whereof the Commerce was prohibited to him [h].

[e] Quid ſit falſum quæritur & videtur id eſſe, ſi quis alienum chirographum imitetur. *l.* 23. *ff. ad leg. Corn. de falſ.*

[f] Si quis vi compulſus aliquid fecit, per hoc edictum reſtituitur. *l.* 3. *ff. quod metus cauſa.*

[g] *See the Title of the Vices of Covenants.*

[h] Acta ſimulata velut non ipſe, ſed ejus uxor comparaverit, veritatis ſubſtantiam mutare non poſſunt. Quæſtio itaque, facti per judicem, vel præſidem provinciæ examinabitur. *l.* 2. *C. plus val. quod agitur.* Nec per interpoſitam perſonam aliquid eorum ſine periculo poſſit perpetrari. *l. ult.* §. 3. *C. de contr. jud. V. l.* 46. *ff. de contr. empt. V. l.* 10. *ff. de his q. ut ind. l.* 1. *l.* 3. *l.* 40. *ff. de jure fiſci.* See the nineteenth and twentieth Articles of the firſt Section of the Rules of Law, the Preamble to the eighth Section of the Contract of Sale, and the firſt Article of the ſame Section.

VI.

6. Written Acts are not received as proof, unleſs they be in due form.

Written Acts have not the force of Proofs, except they have all the formalities which the Law preſcribes. For theſe formalities are neceſſary precautions for qualifying them to ſerve as Proofs, and are marks by which the Law points out to us what written Acts it receives as Proofs, and what it rejects. Thus, for Example, in the Provinces where it is neceſſary to have ſeven Witneſſes to a Teſtament, it would be to no purpoſe to produce a Teſtament which had only ſix Witneſſes, altho' they were perſons of never ſo great integrity[i]. For beſides that it is neceſſary to obſerve the preſcription of the Law, the practice of authorizing a Teſtament, barely in conſideration of the probity of the witneſſes, would be opening a door to a thouſand inconveniences. Thus, for another Example, a Contract which the parties intended to execute in the preſence of a Publick Notary, and Witneſſes, would be without effect, if it were not ſigned, both by the Parties themſelves, and by the Witneſſes who could write their names, and by the Notary. Thus, a private Writing which is only written, but not ſigned by the party, would make no proof[k].

[i] Septem teſtibus adhibitis. §. 3. *inſt. de teſtamentis ordin.*

[k] Non aliter vires habere ſancimus (contractus quos in ſcriptis fieri placuit) niſi inſtrumenta in mundum recepta, ſubſcriptionibuſque partium confirmata, &, ſi per tabellionem conſcribantur, etiam ab ipſo completa, & poſtremò à partibus abſoluta ſint. *l.* 17. *C. de fide inſtr.* See the fifteenth Article of the firſt Section of Covenants.

VII.

7. The Witneſſes to a written Act will not be received to prove the contrary.

When the written Acts are according to form, not only are contrary proofs not received, but even not ſo much as a hearing is granted to one of the Parties who ſhould deſire to have the Witneſſes to an Act examined Judicially, in order to make ſome change in the Act, or to explain it. For beſides the danger of ſome infidelity on the part of the Witneſſes, the Act having been committed to writing, only with deſign that it might remain unchangeable, its force conſiſts in remaining always the ſame as it was made at firſt[m].

[m] Contra ſcriptum teſtimonium, non ſcriptum teſtimonium non fertur. *l.* 1. *C. de teſtib.* See the fourth and fifth Articles.

VIII.

The authority of Proofs which are drawn from written Acts, hath its effect againſt the Perſons whoſe conſent is therein expreſt, as being Parties thereto, and againſt their Succeſſors, and thoſe who have their Rights, or who repreſent them; and theſe Acts ſerve as a Rule and a Proof againſt the ſaid Perſons[n]. But they can be of no prejudice to third perſons, whoſe intereſt may be thereby injured[o]. And if it were ſaid, for Example, in a Teſtament, that a Land or Tenement deviſed by the Teſtator did belong to him, this declaration would be of no manner of prejudice to the perſon who ſhould pretend to be Owner of the ſaid Land or Tenement.

Thoſe are parti to them.

[n] Cum ſuis confeſſionibus acquieſcere debeat. *l.* 13. *C. de non num. pecu.* See the third Article.

[o] Non debet alii nocere quod inter alios actum eſt. *l.* 10. *ff. de jurej.* See the following Article.

IX.

9. No man can by himſelf make a Title to himſelf.

No body can acquire to himſelf a Right, nor make himſelf Creditor to another, by Acts which he himſelf may make at his pleaſure. Thus, for inſtance, a Judge will not pronounce Sentence, upon the bare Authority of a Journal or Day-book of any perſon, which mentions a Sum of Money to be owing to him by another, that the ſaid Sum is due, if there be no other proof of it, with what exactneſs ſoever the Book may be kept, and how great ſoever may be the integrity of the perſon who wrote it[p].

[p] Rationes defuncti, quæ in bonis ejus inveniuntur, ad probationem ſibi debitæ quantitatis ſolas ſufficere non poſſe, ſæpè reſcriptum eſt. Ejuſdem juris eſt, & ſi in ultima voluntate defunctus, certam pecuniæ quantitatem, aut etiam res certas ſibi deberi, ſignificaverit. *l.* 6. *C. de probat.*

Exemplo perniciosum eſt ut ei ſcripturæ credatur, qua unuſquiſque ſibi adnotatione propriâ debitorem conſtituit. Unde neque fiſcum, neque alium quemlibet in ſuis ſubnotationibus debiti probationem præbere poſſe oportet. *l.* 7. *C. eod. Nov.* 48. *c.* 1. §. 1. *l.* 5. *C. de conv. fiſc. debit.*

X.

10. It is by the Original Acts that we ought to examine the proofs.

The truth of written Acts is made out by the Acts themſelves; that is, by a ſight of the Originals. And if the perſon againſt whom a Copy only is produced, demands a ſight of the Original,

ginal, it cannot be refuſed him, whatever quality the perſon may be of who makes uſe only of a Copy [q].

[q] Quicumque à fiſco convenitur, non ex indice & exemplo alicujus ſcripturæ, ſed ex authentico conveniendus eſt. *l. 2. ff. de fide inſtr.*

The ingroſſed Copies of Contracts, Teſtaments, and other Acts, of which the Minutes, which are the true Originals, have been depoſited in the hands of Publick Notaries, are in the place of Originals, and are not called Copies; for they are ſigned by the Notaries themſelves. But if there were any Acciſation of Forgery, or if it were neceſſary to amend ſome error in the ingroſſed Copy, it would be neceſſary in that caſe that the Minute it ſelf ſhould be produced.

XI.

11. *Caſes where the Copies of Deeds, and other Proofs, may ſerve, when the Originals cannot be had.*

If the Original Deed or Inſtrument is loſt, as if it has periſhed by fire, or other accident, one may in that caſe prove the contents of the Deed, either by Copies thereof duly collated, or by other proofs, if there be any ſuch, which the Judge in his diſcretion may think fit to be received [r]. Thus, for Example, mention being made of a Bond, in the Inventory of the Goods of a perſon deceaſed, the Guardian of the Heir who is under Age might make uſe of the ſaid Inventory, to prove the truth of the ſaid Bond, if it ſhould happen to be loſt thro' ſome accident [s]. Thus, when a Creditor receives from his Debtor payment of a Rent, if he takes from him a Copy of the Acquittance which he gives him, and if the ſaid Copy, which is called a Duplicate of the Acquittance, be ſigned by his Debtor, it may ſerve as a proof of his Title to the Rent, if the Title chances to be loſt. For it is the Debtor himſelf who acknowledges the truth of the Creditor's Title, by this Act which he ſigns [t].

[r] Sicut iniquum eſt inſtrumentis vi ignis conſumptis debitores quantitatum debitarum retinere ſolutionem: ita non ſtatim caſum conquerentibus facilè credendum eſt. Intelligere itaque debetis, non exiſtentibus inſtrumentis, vel aliis argumentis, probare debere fidem precibus veſtris adeſſe. *l. 5. C. de fide inſtrum.*

Si aliis evidentibus probationibus veritas oſtendi poteſt. *l. 7. C. eod.*

Emancipatione factâ, etſi actorum tenor non exiſtat, ſi tamen aliis indubiis probationibus, vel ex perſonis, vel ex inſtrumentorum incorruptâ fide, factam eſſe emancipationem probari poſſit, actorum interitu veritas convelli non ſolet. *l. 11. C. eod.*

[s] Chirographis debitorum incendio exuſtis, cùm ex inventario tutores convenire eos poſſent ad ſolvendam pecuniam, &c. *l. 57. ff. de adm. & per tut.*

[t] Si voluerit is qui apocham conſcripſit, vel exemplar cum ſubſcriptione ejus qui apocham ſuſcepit ab eo accipere, vel antapocham ſuſcipere, omnis ei licentia hoc facere concedatur, neceſſitate imponenda apochæ ſuſceptori antapocham reddere. *l. 19. C. de fide inſtr.*

XII.

12. *When mention is made of one Deed in another.*

It is not ground enough for demanding a Debt, or claiming any other Right, that the Title thereof be ſet forth in ſome other Deed which makes mention of it. For this bare mention of it makes no proof, if the Title it ſelf does not appear; unleſs the perſon againſt whom one would make uſe of ſuch a declaration, had been a party to the Deed which contains the ſaid declaration; or that becauſe of other conſiderations it ſhould appear to be equitable, and conformable to the intention of the Law, that ſuch a declaration ſhould be received as a proof; as in the caſe of the preceding Article [u].

[u] Et hoc inſuper jubemus, ut ſi quis in aliquo documento alterius faciat mentionem documenti, nullam ex hac memoria fieri exactionem: niſi aliud documentum, cujus memoria in ſecundo facta eſt proferatur: aut alia ſecundùm leges probatio exhibeatur, quia & quantitas, cujus memoria facta eſt, pro veritate debetur. Hoc enim etiam in veteribus legibus invenitur. *Nov. 119. c. 3. V. l. 37. §. 5. ff. de legat. 3. l. ult. ff. de probat.*

XIII.

13. *Deeds that contradict one another.*

If one and the ſame perſon makes uſe of two written Deeds, or Titles, whereof the one contradicts the other, they deſtroy one another mutually, by the oppoſite conſequences which will be drawn equally from the one and the other [x].

[x] Scripturæ diverſæ fidem ſibi invicem derogantes, ab una eademque parte prolatæ, nihil firmitatis habere poterunt. *l. 14. C. de fid. inſtr.* See the following Article.

XIV.

14. *Counter-Letters.*

We muſt not comprehend under the Rule explained in the preceding Article, the Acts of which there are Counter-Letters that are contrary thereto, or which make ſome change therein. For the Counter-Letters are Acts which thoſe who treat together ſeparate from their Contracts, when they have no mind to comprehend in them what they reſerve to explain apart in theſe Counter-Letters. So that the contrariety between a Contract and a Counter-Letter does not deſtroy the former, but only reſtrains it, and makes therein ſuch other changes and alterations, as the parties had a mind to make. Thus, for Example, if in a Contract of Sale, the Seller obliges himſelf to Warranty againſt all manner of Evictions, and the Buyer declares in a Counter-Letter that he conſents that the Seller ſhall be bound only

only to warrant againſt his own proper act and deed, the contrariety of theſe two Covenants will not have the effect to annul either the one or the other. For one ſees that the intention of the Parties is, that the Contract ſhould ſubſiſt with the condition regulated by the Counter-Letter. Thus, he who obliging himſelf for a Sum of Money, takes a declaration from the Creditor whereby he conſents that the Obligation ſhall have its effect only for half the Sum, will owe no more than what ſhall have been agreed on by this laſt Writing. And altho' the Counter-Letters be of the ſame date with the Acts which are explained therein, and which are changed thereby, yet they are conſidered as a ſecond will, which revokes the former, or derogates from it[y].

[y] Si cum viginti deberes pepigerim ne decem petam, efficeretur per exceptionem mihi opponendam, ut tantùm reliqua decem exigere debeam. *l.* 27. §. 5. *ff. de pact.* See the following Article.

XV.

15. Counter-Letters cannot prejudice third perſons.

The Rule explained in the foregoing Article is not to be underſtood indifferently of all ſorts of Counter-Letters, but it is reſtrained to ſuch as may have their effect among the contracting Parties, without prejudice to the intereſt of any other third perſon. And Counter-Letters, and all ſecret Acts which derogate from Contracts, or which make any change in them, have no manner of effect, with regard to third perſons, whoſe intereſt may be prejudiced thereby[z]. Thus, for Example, if a Father, in marrying his Son, had given him, as a Marriage-Settlement, either a Sum of Money, or an Eſtate in Land, or an Office, taking from him a Counter-Letter, declaring that the Gift ſhould be valid only for a leſſer Sum, or that the Son ſhould give back out of the Land, or out of the Office, a Sum of Money, ſuch as they had agreed upon among themſelves; this Counter-Letter would have no effect with regard to the Wife, and the Children that ſhould be born of the ſaid Marriage, nor with regard to other third perſons, who might be any ways intereſted therein, ſuch as the Creditors of this Son. For this Agreement would be an infidelity contrary to Good Manners, and would deſtroy the fidelity and ſincerity that is due not only to the Wife and her Parents, who would not have conſented to the Marriage on the conditions of this Counter-Letter, but to all the perſons whom this fraud may any way concern. And it is for the Publick Intereſt, to reſtrain the bad uſe which private perſons may make of the facility they have in their Families, to collude together in order to deceive others by ſuch like clandeſtine Acts[a].

[z] Non debet alii nocere quod inter alios actum eſt. *l.* 10. *ff. de jurej.* Non debet alteri per alterum iniqua conditio inferri. *l.* 74. *ff. de reg. jur.*

Acta ſimulata, velut non ipſe, ſed ejus uxor comparaverit, veritatis ſubſtantiam mutare non poſſunt. Quæſtio itaque facti per judicem vel præſidem provinciæ examinabitur. *l.* 2. *C. plus val. quod ag. quam quod ſim. conc.*

Si quis geſtum à ſe, alium egiſſe ſcribi fecerit, plus actum quam ſcriptum valet. *l.* 4. *eod.*

[a] Si quidem clandeſtinis ac domeſticis fraudibus facilè quidvis pro negotii opportunitate confingi poteſt, vel id quod verè geſtum eſt aboleri. *l.* 27. *C. de donation.*

Altho' theſe words be taken out of a Law which has no relation to Counter-Letters, yet they may be applied to them.

SECT. III.

Of Proofs by Witneſſes.

The ſubject-matter of this Section.

WE do not ſpeak here of the proof which Witneſſes make in Contracts, in Teſtaments, and in the other Acts where the Law requires the preſence of ſome Witneſſes to confirm the truth of what is there tranſacted; for this kind of Proof is comprehended in the Proofs by Writing, of which we have treated in the foregoing Section. And in this Section we mean to ſpeak only of the Proof that is made by the Depoſitions of Witneſſes who are Judicially examined, that the Judge may learn from their mouths, the truth of Facts for which no written proofs can be produced, or where the proofs which may be alledged, are not ſufficient. Thus, for Example, if a fair and honeſt Poſſeſſor of an Eſtate, who knows of no better right to it than his own, and yet has no Title to produce, but has poſſeſſed it during the time neceſſary for Preſcription, is diſturbed in his poſſeſſion, and has no Writings to prove it, or has only wherewithal to prove his poſſeſſion for part of the time which he has enjoyed it; as if he has Leaſes of ſome years, or ſome Acquittances for Quit-Rents which he has paid as Poſſeſſor, he may produce Witneſſes to declare what they know of the ſaid poſſeſſion, and of its duration: and his adverſe party may likewiſe on his part prove the contrary. Thus one proves by Witneſſes all the other Facts which

it may be juſt and neceſſary to prove, ſuch as Accuſations in Crimes, and Facts conteſted in Civil Matters, except ſuch as the Law does not allow to be proved by Witneſſes, as has been remarked at the end of the Preamble to the foregoing Section.

There is this difference between the Proof by Witneſſes, which is the ſubject matter of this Section, and the Proofs which Witneſſes make in written Deeds; that in the ſaid Deeds the Witneſſes are perſons which one has the liberty to chuſe to be preſent at them, and they ought to be in the number regulated by Law, and of the quality which it preſcribes; whereas in the Proofs which are to be treated of in this Section, the Witneſſes are perſons who happen by chance to have knowledge of the Facts which one would prove, without having been choſen and called upon to ſee what paſſes, and to remember it. And this is the reaſon why in Informations in Criminal Proſecutions, and in Trials concerning Civil Matters, the Judges admit the Depoſitions of Witneſſes who would not be allowed of as proper Witneſſes to Deeds. Thus, for Example, Women, who cannot be Witneſſes in a Teſtament, or in a Contract, are admitted to give Evidence in Criminal Proſecutions, and Trials in Civil Cauſes.

Examination of Witneſſes ad futuram rei memoriam abolished in France.

We ſhall put down nothing in the Articles of this Section, touching that kind of Proof by Witneſſes which was called Examination of Witneſſes *ad futuram rei memoriam*, which was in uſe under the *Roman* Law, and which was likewiſe obſerved in *France*, before the Ordinance of 1667, which aboliſhed the uſe thereof [a]. But this Remark is made here, only to give the Reader an Idea of that ſort of Examination of Witneſſes which ſerved to preſerve their Evidence to poſterity, and to inform him that the ſame is aboliſhed in *France*.

[a] *Ordinance of* 1667. *Tit.* 13.

This Examination of Witneſſes, in order to preſerve their teſtimony to futurity, was uſed in the caſes where any one foreſeeing that he might have occaſion for a proof by Witneſſes, and fearing leſt they ſhould die, or that other changes ſhould happen which might deprive him of his Proof, before his Law-Suit were ſo far advanced as that he might be admitted to make his Proof, or that the Judge could examine his Witneſſes, he demanded leave of the Judge to have them examined before the time, that their Evidence might be thereby perpetuated to futurity [b]. But this precaution, which is attended with many inconveniences, has been judged uſeleſs likewiſe for other reaſons. For thoſe who may be in haſte to make their Proofs, may take their meaſures accordingly; may make their Demands, and alledge their Facts, in order to have the proof of them decreed, if it be neceſſary, without having recourſe to an Uſage that is inconvenient and full of uncertainty.

[b] Si deletum chirographum mihi eſſe dicam, in quo ſub conditione mihi pecunia debita fuerit, & interim teſtibus quoque id probare poſſim, qui teſtes poſſunt non eſſe eo tempore quo conditio extiterit. *l.* 40. *ff. ad leg. Aquil.*

Finge eſſe teſtes quoſdam qui dilata controverſia aut mutabunt conſilium, aut decedent, aut propter temporis intervallum non eandem fidem habebunt. *l.* 3. §. 5. *ff. de Carbon. Ed.*

The general Inqueſt about Cuſtoms, aboliſhed in France.

It may not be amiſs to obſerve here by the by, that the ſame Ordinance of 1667 hath alſo aboliſhed in *France* another kind of Examination of Witneſſes, which was called *Enquête par Turbes* [c], or a General Inqueſt, and which was uſed in Queſtions relating to the Interpretation of ſome Cuſtom. The uſage of theſe Inqueſts was founded on this, that the particular diſpoſitions of Cuſtoms were conſidered as Facts [d]. So that they received proof by Witneſſes of the uſage and interpretation of ſome article of a Cuſtom. They called theſe Inqueſts, *par Turbes*, becauſe ten Witneſſes were only reckoned as one: and theſe Witneſſes were choſen from among the Officers of the Places, and the Advocates, who were the likelieſt perſons to know what was the Uſage and Practice as to the Diſpoſitions of their Cuſtoms. But theſe Inqueſts were attended with an infinite number of inconveniences, as may eaſily be perceived; and the Superior Judges have better ways to find out the ſenſe and meaning of Cuſtoms, and to interpret that which may require an explanation.

[c] *Ordinance of* 1667. *Title* 13.

[d] *See the eleventh Chapter of the Treatiſe of Laws, Numb.* 20. *towards the end.*

[*This Uſage of the* Roman *Law, in relation to the Examination of Witneſſes* in perpetuam rei memoriam, *is obſerved in the Court of Chancery in* England. *And the method is, firſt to exhibit a Bill, and ſhew a Title to the Thing, and that the Witneſſes to prove it are old, and not like to live long, whereby the Party is in danger to loſe it; and then to pray a Commiſſion into the Country to examine them, and a* Subpœna *to the Parties intereſſed, to ſhew cauſe, if they can, to the contrary. But the Depoſitions are not to be made uſe of, or given in Evidence, againſt any other but the Defendants, who were warned to defend it, or thoſe who claim under them.* Praxis Almæ Curiæ Cancellariæ, *p.* 37.]

The

The CONTENTS.

I.

1. *Witneſſes, and their Evidences.*

Witneſſes are perſons who are ſummoned to appear in Judgment, in order to declare what they know of the truth of the Facts conteſted between the Parties. And the declaration which they make of the matter, is their Evidence[a].

[a] Ad fidem rei geſtæ faciendam. *l.* 11. *ff. de teſtib.*

II.

2. *Uſe of Witneſſes in all matters.*

The uſe of Evidences is infinite, according to the infinite number of events which may render the proof of a Fact neceſſary, whether it be in Civil Matters, or in Criminal[b].

[b] Teſtimoniorum uſus frequens, ac neceſſarius eſt. *l.* 1. *ff. de teſtib.* Adhiberi quoque teſtes poſſunt non ſolùm in criminalibus cauſis, ſed etiam in pecuniariis litibus, ſicuti res poſtulat. *d. l.* §. 1.

III.

3. *Who may be a Witneſs.*

All perſons of both Sexes may be Witneſſes, if there be no exception againſt them regulated by ſome Law[c]. Thus, for Example, Children and Madmen cannot be admitted as Witneſſes, nor perſons whoſe Reputation has received ſome blemiſh, either by a Sentence of Condemnation in a Court of Juſtice, unleſs they be reſtored again to their good Name, or by the Infamy of their Profeſſion; nor thoſe whom other Cauſes may render incapable of giving Evidence[d], as ſhall be ſhewn in the ſequel of this Section.

[c] Mulier teſtimonium dicere in teſtamento quidem non poterit: aliàs autem poſſe teſtem eſſe mulierem, argumento eſt Lex Julia de adulteris quæ adulterii damnatam teſtem produci, vel dicere teſtimonium vetat. *l.* 20. §. 6. *ff. qui teſt. fac. poſſ. l.* 18. *ff. de teſtib.*

[d] Hi quibus non interdicitur teſtimonium. *l.* 1. §. 1. *ff. de teſtib.* Quidam propter lubricum conſilii ſui, alii verò propter notam & infamiam vitæ ſuæ admittendi non ſunt ad teſtimonii fidem. *l.* 3. §. 5. *in f. ff. de teſtib.* Quive impuberes erunt: quique judicio publico damnatus erit: qui eorum in integrum reſtitutus non erit: quive in vinculis, cuſtodiave publica erit: quæve palam quæſtum faciet, feceritve. *d.* §. 5. Qui judicio publico reus erit. *l.* 20. *eod.*

IV.

4. *Two qualities in Witneſſes.*

The proofs which are drawn from Evidences, depend chiefly on two qualities that are neceſſary in the Witneſſes. Probity[e], which engages them to ſay nothing but the truth; and a ſteddineſs in relating the circumſtances of the Fact, which may ſhew the Witneſſes to have been careful and exact in obſerving and retaining them[f]. And it is for want of one or the other of theſe qualities that Evidences are ſuſpected, and rejected. And this depends on the Rules which follow.

[e] Fides, mores. *l.* 2. *ff. de teſtib.* Eos teſtes ad veritatem jurandam adhiberi oportet, qui omni gratiæ, & potentatui fidem religioni judiciariæ debitam poſſint præponere. *l.* 5. *C. de teſtib.*

[f] Quorum fides non vacillat. *l.* 1. *ff. de teſtib.*

V.

5. *Witneſſes who are ſuſpected.*

Whatever proves the want of probity in a Witneſs, is ſufficient to make his Evidence to be rejected. Thus, we do not receive the evidence of a Perſon condemned by a Court of Juſtice for Calumny, or Forgery, or for having born falſe witneſs, or for writing a Defamatory Libel, or for other Crimes[g]. For theſe Condemnations caſt a blemiſh on the Honour of the perſon, and make him

him forfeit the reputation of Probity. And it would be the ſame thing, and that with much more reaſon, if it were proved that the Witneſs had received Money to give his Evidence[h].

[g] Quæſitum ſcio, an in publicis judiciis calumniæ damnari teſtimonium judicio publico perhibere poſſunt? Sed neque lege Remmia prohibentur, & Julia lex de vi, & repetundarum, & peculatus, eos homines teſtimonium dicere non vetuerunt: verumtamen, quod legibus omiſſum eſt, non omittetur religione judicantium. *l.* 13. *ff. de teſtib.*

Lege Juliâ de vi cavetur ne hac lege in reum teſtimonium dicere liceret, qui judicio publico damnatus erit. *l.* 3. §. 5. *eod.*

Repetundarum damnatus nec ad teſtamentum, nec ad teſtimonium adhiberi poteſt. *l.* 15. *eod.*

Ob carmen famoſum damnatus, inteſtabilis fit. *l.* 21. *eod.*

[h] Qui ob teſtimonium dicendum, vel non dicendum, pecuniam accepiſſe judicatus, vel convictus erit. *l.* 3. §. 5. *eod.*

VI.

6. Witneſſes who are intereſted.

If the Witneſs has any intereſt in the Fact concerning which he is deſired to give evidence, he will be rejected[i]. For one cannot be ſure that he will make a declaration contrary to his own intereſt.

[i] Nullus idoneus teſtis in re ſua intelligitur. *l.* 10. *ff. de teſtib.* Omnibus in re propria dicendi teſtimonii facultatem jura ſubmoverunt. *l.* 10. *C. eod.*

VII.

7. Witneſſes engaged in the ſame intereſt with the Party.

The ſame reaſon which ſerves for rejecting the teſtimony of perſons intereſted in the Facts that are to be proved, makes the teſtimony likewiſe of the Father in the Cauſe of the Son to be rejected, as alſo that of the Son in the Cauſe of the Father. For the intereſt of the one touches the other, as his own proper intereſt. And altho' the Father ſhould offer to give evidence againſt his Son, or the Son againſt his Father, they would not be admitted to do it. For this affectation and forwardneſs would render them ſuſpected of having an intention either to favour, or to hurt[k].

[k] Teſtis idoneus pater filio, aut filius patri non eſt. *l.* 9. *ff. de teſtib.* Parentes & liberi invicem adverſus ſe, nec volentes ad teſtimonium admittendi ſunt. *l.* 6. *C de teſtib.*

VIII.

8. Witneſſes who are Relations, or Allies.

As we reject the teſtimony of perſons who are intereſted in the Facts which are to be proved, or who take part in the intereſt of thoſe whom the ſaid Facts concern, ſo neither do we receive the evidence of thoſe who are related by Conſanguinity, or by Affinity, to the perſons intereſted in the ſaid Facts. And if there ſhould be any enmity between thoſe perſons and the Witneſſes who are their Relations or Allies, ſuch Witneſſes ought to be rejected with greater reaſon. And they may on their part refuſe to give their Evidence, eſpecially in Criminal Proſecutions. We may reckon in the number of Allies, with reſpect to the uſe of this Rule, thoſe who are only ſo by Spouſals, the Marriage not being as yet accompliſhed[m]. And we muſt underſtand Conſanguinity and Affinity in the extent of the degrees regulated by Law[n].

[m] Lege Julia judiciorum publicorum cavetur, ne invito denuntietur ut teſtimonium litis dicat adverſus ſocerum, generum, vitricum, privignum, ſobrinum, ſobrinam, ſobrino natum, coſve qui priore gradu ſunt. *l.* 4. *ff. de teſtib.*

In legibus quibus excipitur ne gener, aut ſocer invitus teſtimonium dicere cogeretur, generi appellatione ſponſum quoque filiæ contineri placet: item ſoceri, ſponſæ patrem. *l.* 5. *eod.*

[n] *In* France, *by the Ordinance of* 1667, *Tit.* 22. *Art.* 11. *the Teſtimony of Relations, and Allies of the Parties, even down to the Children of ſecond Couſins inclusively, is rejected in Civil Matters, whether it be for, or againſt them.*

IX.

9. Witneſſes who are Friends.

The ties made by ſtrict Friendſhips, or engagements of Familiarity, may likewiſe render ſuſpect the teſtimony of a Friend in the Cauſe of his Friend[o]. And this depends on the prudence of the Judge, according to the quality of the tie of Friendſhip, and that of the facts and circumſtances.

[o] An amicus ei ſit pro quo teſtimonium dat. *l.* 3. *ff. de teſtib.*

Amicos appellare debemus, non levi notitiâ conjunctos: ſed, quibus fuerint jura cum patrefamilias honeſtis familiaritatis quæſita rationibus. *l.* 223. §. 1. *ff. de verb. ſign.*

X.

10. Witneſſes who are Enemies.

The Enmities that are between Witneſſes and the perſons againſt whom they depoſe, are juſt cauſes for doubting of the fidelity of their teſtimony. For we ought to miſtruſt that their paſſion may lead them to make a declaration prejudicial to the intereſt of their Enemy. And unleſs their Evidence were accompanied with ſome other proof, it would be ſuſpicious. So that we ought to judge by the circumſtances of the quality of the perſons, of the cauſes and conſequences of the Enmity, and of what reſults from the other proofs, what regard ought to be had to the fact of Enmity[p].

[p] An inimicus ei ſit adverſus quem teſtimonium fert. *l.* 3. *ff. de teſtib.*

Facilè meutiuntur inimici. Causâ cognitâ habenda fides, aut non habenda. *l.* 1. §. 24. & 25. *ff. de quæſt. V. Nov.* 90. *c.* 7. *l.* 17. *C. de teſt.*

XI.

11. *Witneſſes who are Domeſticks, and depend on the party.*

The perſons who have a dependance on the party who would make uſe of their teſtimony, ſuch as Menial Servants, being ſuſpected to favour the intereſt of their Maſter, and to declare only what he deſires, their Evidence ought to be rejected [q].

[q] Idonei non videntur eſſe teſtes, quibus imperari poteſt ut teſtes fiant. *l. 6. ff. de teſtib.*

Teſtes eos quos accuſator de domo produxerit, interrogari non placuit. *l. 24. eod.*

Etiam jure civili domeſtici teſtimonii fides improbatur. *l. 3. C. eod.*

XII.

12. *Witneſſes who waver in their depoſitions.*

It is not enough to eſtabliſh an Evidence beyond all exception, that the probity of the Witneſs be not called in queſtion; it is moreover neceſſary, that his declaration be ſteddy and firm. For if he varies in his account, depoſing circumſtances and facts that are different, or even contrary; or if he waver in his depoſition, and be himſelf in doubt of the fact which he relates; this uncertainty, and theſe variations rendring his Evidence uncertain, they will cauſe it to be rejected [r].

[r] Ab his præcipuè exigendus (teſtimoniorum uſus) quorum fides non vacillat. *l. 1. ff. de teſtib.*

Teſtes qui adverſus fidem ſuam teſtationis vacillant, audiendi non ſunt. *l. 2. ff. de teſtib.*

XIII.

13. *There muſt be two Witneſſes to make a proof.*

In all the caſes where Proof by Witneſſes may be received, it is neceſſary that there be two of them at leaſt; and that number may ſuffice, except in caſes where the Law demands a greater. But one ſingle Witneſs, of what quality ſoever he may be, makes no proof [s].

[s] Ubi numerus teſtium non adjicitur, etiam duo ſufficient. Pluralis enim elocutio duorum numero contenta eſt. *l. 12. ff. de teſtib.*

Simili modo ſanximus, ut unius teſtimonium nemo Judicum, in quacunque cauſa facilè patiatur admitti. Et nunc manifeſtè ſancimus, ut unius omnimodò teſtis reſponſio non audiatur, etiamſi præclaræ Curiæ honore fulgeat. *l. 9. §. 1. C. de teſtib.*

XIV.

14. *One may produce many Witneſſes.*

Altho' two Witneſſes be ſufficient to prove a Fact, yet ſeeing this proof conſiſts in the conformity of their Depoſitions, and that it often happens that the declarations of two Witneſſes do not agree in all points, or that ſome eſſential circumſtances are known only to one of the Witneſſes, the other being ignorant of them, and that likewiſe it may ſo fall out that there may be ſome juſt objection againſt one of the Witneſſes, or even againſt them both; for theſe reaſons a greater number of Witneſſes may be examined, and even ſeveral out of one and the ſame Houſe, ſuch as the Father and Children, that the Evidence of the one may make up what is defective in the teſtimony of the others, and that all of them together may make up an entire proof of the truth. But the liberty of producing many Witneſſes ought to be reſtrained by the prudence of the Judge, if the Law has ſet no bounds to it.

[t] Quamquàm quibuſdam legibus ampliſſimus numerus teſtium definitus ſit, tamen ex conſtitutionibus Principum hæc licentia ad ſufficientem numerum teſtium coarctatur, ut judices moderentur: & eum ſolum numerum teſtium quem neceſſarium eſſe putaverint, evocari patiantur: ne ex re nata poteſtate ad vexandos homines ſuperflua multitudo teſtium protrahatur. *l. 1. §. 2. ff. de teſtib.*

Pater & filius qui in poteſtate ejus eſt, item duo fratres qui in ejuſdem patris poteſtate ſunt, teſtes utrique in eodem teſtamento, vel eodem negotio fieri poſſunt. Quoniam nihil nocet ex una domo plures teſtes alieno negotio adhiberi. *l. 17. eod.*

By the Ordinances of France, *it is prohibited to examine more than ten Witneſſes to each Fact in Civil Matters. Ordinance of* 1446. *Art.* 32. *of* 1498. *Art.* 13. *of* 1535. *Chap.* 7. *Art.* 4. *Ordinance of* 1667. *Title* 22. *Art.* 21.

XV.

15. *Several views by which we are to judge of proofs by Witneſſes.*

It is neceſſary to add to all theſe Rules, in relation to Proofs by Witneſſes, that we ought to conſider their condition, their manners, their eſtate, their conduct, their integrity, their reputation: If their honour has received any blemiſh by a Condemnation in a Court of Judicature: If they are in a condition to tell the truth without regard to the perſons intereſted, or if it is to be feared that they are under ſome engagement, or have ſome inclination to favour one of the parties, as if they are friends, or enemies to one or other of them: If their poverty, or wants, expoſe them to the temptation of giving ſuch teſtimony as may be agreeable to one of the Parties, according as they have any thing to fear or hope for from him; If their teſtimony appears to be ſincere, without affectation: If the depoſitions are conformable to one another, and not concerted: If the number of the Witneſſes, the conformity of their Depoſitions, common Fame, and the probability of the circumſtances, confirm their Evidence: If their variations, their diſagreement, their contradictions, render them ſuſpected: If the conſequence of the Facts be ſuch as may require a more exact conſideration of what may render the Witneſſes ſuſpected, as in Criminal

Proſe-

Proſecutions; or if the Facts be ſo ſlight that it is not neceſſary to be ſo exact in the Enquiry, as if the matter were only a bare Action of Slander or Defamation, in a quarrel between perſons of a mean condition. Thus the right judgment that is to be made of the regard which ought to be had to the Depoſitions of Witneſſes under all theſe views depends on the Rules which have been explained, and on the prudence of the Judges, to make a right application of them, according to the quality of the Facts, and the circumſtances[u].

[u] In teſtimoniis dignitas, fides, mores, gravitas examinanda eſt. *l.* 2. *ff. de teſtib.*

Teſtium fides diligenter examinanda eſt. Ideòque in perſona eorum exploranda erunt imprimis conditio cujuſque: utrum quis decurio, an plebeius ſit: & an honeſtæ & inculpatæ vitæ, an vero notatus quis, & reprehenſibilis: an locuples, vel egens ſit, ut lucri causâ quid facilè admittat: vel an inimicus ei ſit adversùs quem teſtimonium fert: vel amicus ei ſit, pro quo teſtimonium dat. Nam ſi careat ſuſpicione teſtimonium, vel propter perſonam à qua fertur, quod honeſta ſit, vel propter causam, quod neque lucri, neque gratiæ, neque inimicitiæ cauſa ſit, admittendus eſt. Ideòque Divus Hadrianus Vivio Varo legato provinciæ Ciliciæ reſcripſit, eum qui judicat magis poſſe ſcire, quanta fides habenda ſit teſtibus. Verba epiſtolæ hæc ſunt. Tu magis ſcire potes quanta fides habenda ſit teſtibus: qui, & cujus dignitatis & cujus æſtimationis ſint: & qui ſimpliciter viſi ſint dicere, utrùm unum eundemque meditatum ſermonem attulerint, an ad ea quæ interrogaveras, ex tempore veriſimilia reſponderint. Ejuſdem quoque principis extat reſcriptum ad Valerium Verum, de excutienda fide teſtium, in hæc verba: Quæ argumenta, ad quem modum probandæ cuique rei ſufficiant; nullo certo modo ſatis definiri poteſt. Sicut non ſemper, ita ſæpè ſine publicis monumentis cujuſque rei veritas deprehenditur. Aliàs numerus teſtium, aliàs dignitas & auctoritas, aliàs veluti conſentiens fama confirmat rei, de qua quæritur fides. Hoc ergò ſolùm tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem cognitionem ſtatim alligari debere: ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parùm probatum tibi opinaris. *l.* 3. *d. l.* §. 1. *&* 2. *ff. de teſtib.* Si teſtes omnes ejuſdem honeſtatis, & exiſtimationis ſint, negotii qualitas, ac judicis motus cum his concurrit: ſequenda ſunt omnia teſtimonia. Si verò ex his quidam (eorum) aliud dixerint, licet impari numero, credendum eſt. Sed quod naturæ negotii convenit, & quod inimicitiæ, aut gratiæ ſuſpicione caret: confirmabitque judex motum animi ſui ex argumentis, & teſtimoniis, & quæ rei aptiora, & vero proximiora eſſe compererit. Non enim ad multitudinem reſpici oportet: ſed ad ſinceram teſtimoniorum fidem, & teſtimonia quibus potiùs lux veritatis aſſiſtit. *l.* 21. §. 3. *ff. de teſtib.*

XVI.

16. *Witneſſes againſt whom there lies no exception, may be miſtaken.*

It is not ground enough to be aſſured of the truth of the Depoſitions of Witneſſes, that their integrity is well known; and therefore ſeeing it may happen that the moſt intelligent and moſt ſincere perſons may have been deceived by others, or they themſelves miſtaken, either in the knowledge of the perſons, or in ſome circumſtances, or even in the Facts; it is always prudent for the Judge to conſider well the Depoſitions of all the Witneſſes, even of thoſe who are moſt to be credited, and to ſee whether they agree with the other clear and certain proofs that may be had of the truth of the Facts, and circumſtances. And in order to give to the Evidence its juſt effect, it is neceſſary to gather the truth out of all that appears to be certain in all the proofs together[x].

[x] Ad (judicantium) officium pertinet ejus quoque teſtimonii fidem, quod integræ frontis homo dixerit, perpendere. *l.* 13. *in f. ff. de teſtib.*

XVII.

17. *Witneſſes may be compelled to give evidence.*

The perſons who are ſummoned to give evidence, are obliged to come and declare what they know of the matter. For the conſequence of diſcovering the truth of Facts neceſſary for the Adminiſtration of Juſtice, is what the Publick has an intereſt in. So that the Judge may compel thoſe who refuſe to come and give their evidence, whether it be in Civil Matters, or in Criminal[y].

[y] Non eſt dubitandum quin evocandi ſint (teſtes) quos neceſſarios in ipſa cognitione deprehenderit qui judicat. *l.* 3. *in f. ff. de teſtib.*

Conſtitutio jubet non ſolùm in criminalibus judiciis, ſed etiam in pecuniariis, unumquemque cogi teſtimonium perhibere de his quæ novit. *l.* 16. *C. de teſtib.*

If the Witneſs does not appear on the Summons with which he is ſerved, the Judge condemns him in a Fine, for which his Goods may be attached and ſold, and even his Perſon may be impriſoned, in caſe he does not obey the Summons. See the eighth Article of the twenty ſecond Title of the Ordinance of 1667.

XVIII.

18. *The Witneſſes ought to be examined by the Judge.*

It is not enough to give to the declaration of a Witneſs the effect which it ought to have in Juſtice, that the Witneſs himſelf writes, or cauſes another to write his Evidence, and that he gives it or ſends it to the Judge; but it is neceſſary that he appear before the Judge, and that the Judge himſelf interrogate him, and put down his declaration in writing[z].

[z] Divus Hadrianus Junio Rufino Proconſuli Macedoniæ reſcripſit, *teſtibus ſe, non teſtimoniis creditu-rum.* Verba epiſtolæ ad hanc partem pertinentia, hæc ſunt. Quod crimina objecerit apud me Alexander Apro, & quia non probat, nec teſtes producebat, ſed teſtimoniis uti volebat, quibus apud me locus non eſt: nam ipſos interrogare ſoleo: quem remiſi ad provinciæ præſidem, ut is de fide teſtium quæreret, & niſi impleſſet quod intenderat, relegaretur. *l.* 3. §. 3. *ff. de teſtib.*

Gabinio quoque Maximo idem princeps in hæc verba reſcripſit, alia eſt auctoritas præſentium teſtium, alia teſtimoniorum quæ recituri ſolent. *d. l.* 3. §. 4.

XIX.

19. *And ought to be firſt ſworn.*

Seeing it is to the Judge, and even to Juſtice it ſelf, that the Witneſs gives his evidence, his declaration ought to be preceded by an Oath, that he will ſpeak the truth; that the reſpect which he owes to Religion may engage him to give his teſtimony with all the fidelity, and all the exactneſs that Juſtice and Truth may require. And if he has no knowledge of the Facts about which he is interrogated, he muſt even ſwear, that thoſe Facts are unknown to him [a].

[a] Jurisjurandi religione teſtes, priuſquàm perhibeant teſtimonium, jamdudum arctari præcepimus. *l. 9. C. de teſtib.*

Cum Sacramenti præſtatione. *l. 16. eod.*

Vel jurare ſe nihil compertum habere. *d. l. 16.*

See the ninth Article of the twenty ſecond Title of the Ordinance of 1667.

XX.

20. *Excuſes of Witneſſes, which are called Eſſoins.*

If the Witneſſes have excuſes which hinder them from coming to give their evidence, they may be diſcharged from coming. Thus thoſe perſons whom ſickneſs, or abſence, or any lawful impediment diſables from appearing before the Judge, their appearance is diſpenſed with [b]. But if their Depoſitions be neceſſary, the Judge may go himſelf, and examine them in perſon, or may give Commiſſion for that purpoſe to another, according as the quality of the Fact may require, and the Laws and Uſage allow of it.

[b] Inviti teſtimonium dicere non coguntur ſenes, valetudinarii, vel milites, vel qui cum Magiſtratu Reipublicæ cauſa abſunt, vel quibus venire non licet. *l. 8. ff. de teſtib.*

Lege à dicendo teſtimonio excuſantur. *l. 1. §. 1. ff. eod.* See the following Article.

XXI.

21. *Witneſſes who are excuſed by reaſon of their Dignity.*

There are ſome perſons whom their Dignity exempts from appearing before the Judge to give Evidence; but in the caſes where the teſtimony of ſuch perſons may be neceſſary, the Judge muſt give proper directions therein, according to the different Uſages of Places, or application muſt be made to the Prince, if the quality of the Fact, and that of the Witneſs may deſerve it [c].

[c] Exceptis tamen perſonis quæ legibus prohibentur ad teſtimonium cogi, & etiam illuſtribus, & his qui ſupra illuſtres ſunt, niſi ſacra forma interveniat. *l. 16. C. de teſtib.* Illud quoque incunctabile eſt, ut, ſi res exigat, non tantùm privati, ſed etiam magiſtratus, ſi in præſenti ſunt, teſtimonium dicant. *l. 21. §. 1. ff. de teſtib.*

Item ſenatus cenſuit prætorem, teſtimonium dare debere in judicio adulterii cauſâ. *d. §. 1. in fine.* Ad perſonas egregias, eoſque qui valetudine impediuntur, domum mitti oportet ad jurandum. *l. 15. ff. de jurejur.* See the preceding Article.

XXII.

22. *Letters of Requeſt for the examination of a Witneſs who lives out of the Juriſdiction of the Court.*

If it happen in a Civil Cauſe, that a Witneſs has his abode without the Juriſdiction of the Judge who ought to take his Depoſition, and that by reaſon of the too great diſtance, or of the indiſpoſition of the Witneſs, or for other cauſes, he cannot be examined but on the place where he lives; the Judge who has cognizance of the Cauſe may, if it is neceſſary, requeſt the Judge of the place where the Witneſs reſides to examine the ſaid Witneſs, and may give him a Commiſſion for that effect. But in Criminal Proſecutions, the Witneſſes can be examined only by the Judge who takes Cognizance of the Crime [d].

[d] Et quoniam ſcimus dudùm factam legem, ut ſi quis hic litem exerceat, oporteat autem in provinciæ parte aliqua approbari, &c. *Nov. 90. c. 5. l. 18. C. de fide inſtr.* Hæc omnia in pecuniariis quæſtionibus intelligentes: in criminalibus enim in quibus de magnis eſt periculum, omnibus modis apud judices præſentari teſtes, & quæ ſunt eis cognita docere. *d. Nov. c. 5. in f.*

The Judge who takes Cognizance of the Cauſe, requeſts the Judge of the place where the Witneſs lives, to take his Depoſition, and gives him a power to do it by a Commiſſion for that end. V. Nov. 134. c. 5.

Beſides the conſequence that is taken notice of in the laſt Text, when the matter relates to the proof of a Crime, the neceſſity of confronting the Witneſs with the Criminal, is another juſt motive why the Witneſs ought to be examined by the Judge before whom the Trial is had.

XXIII.

23. *The Advocate of the Party cannot be a Witneſs.*

Whoever have been imployed as Advocates in a Cauſe, cannot be Witneſſes in it. For their teſtimony would be either ſuſpected, if it were in favour of the perſon whoſe Cauſe they had defended, or both uncivil and ſuſpected, if it were againſt their Client. And it is the ſame thing as to Proctors and Attorneys, and other perſons who ſhould happen to be under the ſame engagements [e].

[e] Mandatis cavetur, ut præſides attendant, ne patroni in cauſa cui patrocinium præſtiterunt, teſtimonium dicant. Quod & in executoribus negotiorum obſervandum eſt. *l. ult. ff. de teſtib.*

XXIV.

24. *The expences of the Witneſſes paid by the Party who ſummons them.*

The Expences which the Witneſſes are at for their Journey, and for their attendance to give their teſtimony, are repaid them by the Party at whoſe inſtance they have been cited; and that by vertue of an Order of the Judge, and according as he ſhall tax them [f].

[f] Talis debet eſſe cautio judicantis, ut venturis (teſtibus) ad judicium, per accuſatorem, vel ab his per

per quos fuerint poſtulati, ſumptus competentes dari præcipiat. *l.* 11. *C. de teſtib.* 16. *in f. eod.*

XXV.

25. *A falſe Witneſs is puniſhed.*

If it happens that a Witneſs can be convicted of having given falſe evidence, or of being guilty of ſome other miſdemeanor, as if he has divulged the tenor of his Depoſition to the Party accuſed, he may be puniſhed for it according to the quality of the fact, and the circumſtances g.

g Qui falsò vel variè teſtimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur. *l.* 16. *ff. de teſtib.*

SECT. IV.

Of Preſumptions.

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I.

1. *Definition of Preſumptions.*

PReſumptions are conſequences drawn from a fact that is known, to ſerve for the diſcovery of the truth of a fact that is uncertain, and which one ſeeks to prove. Thus, for Example, in a Civil Concern, if there is a conteſt between the Poſſeſſor of a Land or Tenement, and another who pretends to be Proprietor thereof, it is a Preſumption that the ſaid Land or Tenement belongs to the Poſſeſſor: and he will be maintained in it, if the other does not prove his right; for it is uſual and natural that no body takes poſſeſſion of a Thing without having a Right to it, and that the Proprietor does not patiently ſuffer himſelf to be turned out of his poſſeſſion a. Thus in a Criminal Affair, if a Man has been killed, and it is not known by whom, and if it be diſcovered that he had a little while before a quarrel with another perſon, who had threatened to kill him, one draws from this known fact of the quarrel and threatning, a Preſumption that he who had thus threatned him, may have been the Author of the Murder.

a Poſſeſſiones quas ad te pertinere dicis more judiciorum perſequere. Non enim poſſeſſori incumbit neceſſitas probandi, eas ad ſe pertinere. Cum te in probatione ceſſante, dominium apud eum remaneat. *l.* 2. *C. de probat.* In pari cauſa poſſeſſor potior haberi debet. *l.* 128. *ff. de reg. jur.* Cogi poſſeſſorem, ab eo qui expetit, titulum ſuæ poſſeſſionis dicere, incivile eſt. *l.* 11. *C. de petit. hared. l. ult. C. de rei vindic.* See concerning the Preſumption in favour of the Poſſeſſor, that which is ſaid of it in the Preamble to the fourth Section of Poſſeſſion. See the fourth Article of this Section, and the thirteenth Article of the firſt Section of Poſſeſſion.

II.

2. *Preſumptions ſtrong, or weak.*

Preſumptions are of two kinds, ſome of them are ſo ſtrong, that they amount to a certainty, and are held as Proofs, even in Criminal Matters b. And others are only Conjectures which leave ſome doubt.

b Indicia certa, quæ jure non reſpuuntur, non minorem probationis, quàm inſtrumenta continent fidem. *l.* 19. *C. de rei vindic.* Sciant cuncti accuſatores eam ſe rem deferre in publicam notionem debere, quæ munita ſit idoneis teſtibus, vel inſtructa apertiſſimis documentis, vel indiciis ad probationem indubitatis, & luce clarioribus expedita. *l. ult. C. de probat.* See at the end of the Preamble to this Title, the remark touching the Edict of *Henry* the Second of *France*, concerning Women who have concealed their being with child.

III.

3. *The foundation of Preſumptions.*

The certainty, or uncertainty of Preſumptions, and the effect which they may have to ſerve as Proofs, depends on the certainty, or uncertainty of the Facts from which the Preſumptions are gathered, and on the juſtneſs of the conſequences which are drawn from thoſe Facts, to prove the Facts which are in diſpute. And this depends on the connexion that may be between the known Facts, and thoſe which are to be proved. Thus one draws conſequences from Cauſes to their Effects,