THE PANDECTS.

THE PANDECTS;

A TREATISE

ON

THE ROMAN LAW,

AND

UPON ITS CONNECTION WITH MODERN LEGISLATION.

BY

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TRANSLATED FROM THE DUTCH,

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TO

MOUNTSTUART E. GRANT DUFF, Esq., M. P.,

UNDER-SECRETARY OF STATE FOR INDIA,

IN TOKEN OF

RESPECT FOR HIS CHARACTER AND TALENT,

AND IN RECOGNITION OF HIS

DISCRIMINATING CRITICISM OF THE LAW, THE LITERATURE, AND THE POLITICAL AND SOCIAL CONDITION OF EUROPE,

THIS TRANSLATION IS RESPECTFULLY DEDICATED,

BY

THE AUTHOR, AND THE TRANSLATOR.

PUBLISHERS' PREFACE.

For the B. L. Examination of the Madras University for 1891, Goudsmit's Pandects was prescribed in supercession of Lindley's Introduction to Jurisprudence; but as the former was then nearly out of print, and there was no immediate intention to re-issue it, the present Publishers took early steps for arranging for a *reprint* with a view to meet the requirements of candidates for this examination. While they were still in negotiation, the Syndicate, finding that Goudsmit was not in the market, reverted to Lindley as the Text-book. However, now that the book is available, the Publishers trust that their desire to meet the wants of the University, though at a heavy cost and risk to themselves, will not be frustrated, and that this work will be again included, by the Faculty of Law, in the curriculum as the Text-book for General Jurisprudence for future examinations.

H. & CO.

MADRAS,
15th April 1891.

TRANSLATOR'S PREFACE.

Numerous as are the works recently written upon the seemingly inexhaustible theme of ROMAN LAW, in few of them has it been treated so broadly, or so comprehensively, as in the one submitted to English and American readers, in the present translation; and scarcely any author furnishes evidence of having given to the subject a study at once so minute and so extensive, as that of which the fruits are here collected.

PROFESSOR GOUDSMIT has been, for many years, Professor of Jurisprudence in the ancient University of Leyden. His name has long been regarded, throughout the Continent of Europe, as of supreme authority, in all that concerns the history, the theory, the ancient practice, and the modern application of Roman Law. — His erudition in this department is amazing. Reference to his book will shew that he seems to be familiar with everything that has ever been written concerning it, in either ancient or modern times; and he has gathered from these various and innumerable sources, a mass of authority, and of carefully digested knowledge, which is not only of great value to the student, but presents, in a condensed and available form, the results of all past study and research, and an exposition of what is now known and accepted, as to that slowly and elaborately constructed monument of the wisdom and

justice of successive ages, the majestic remains of which constitute for us that "Roman Law" from which the grandest and most essential doctrines of modern law are derived, and the original grandeur and richness of which are strikingly manifested by the magnificence and extent of the fragments which still survive the ravages of time, and form, in large part, the basis of all existing systems of justice and of law.

It may be added, that this work, although of special value to the student, is well calculated, also, to interest the general reader;—its style being singularly agreeable and perspicuous, in spite of the inevitable technicality and complication of some of the subjects of which it treats.

The writer of this preface speaks thus boldly of the great merit of this book, because it is the work of another. Great care and labour have been bestowed upon the translation, not only to ensure accuracy, but, in order to reproduce, as precisely as possible, the mode of thought and forms of expression of the author, and thus render the copy worthy of the original*.

THE TRANSLATOR.

TEMPLE, LONDON,
April, 1873.

* There is an admirable French translation of this work, by Monsieur JULES VUYLSTEKE, of Ghent, — a Belgian advocate of talent and repute, — of the valuable assistance to be derived from which I have gladly availed myself, during the progress of my own labours; and I am happy to here acknowledge my obligations to its able and learned author.

THE TRANSLATOR.

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PROFESSOR GOUDSMIT to Mr. DE FRACY GOULD.

(EXTRACT.)

"At the conclusion of your translation, I wish to declare my sense of the admirable manner in which you have performed a task requiring no ordinary amount of industry, ability, and learning."

* * *

"I may add, that not only have you shown much general knowledge of Roman Law, but you have succeeded in expressing my exact meaning, with singular clearness, even in passages of the greatest complication and difficulty."

(signed) J. E. GOUDSMIT.

Professor etc. at the University of Leyden.

§ 2. INTERESTING NATURE OF THE STUDY OF ROMAN LAW.

If the Roman Law still continues to be the starting-point of the Study of Legal Science, it owes this prominence chiefly to the influence which it has always exercised, and the authority which it has never ceased to wield.

In fact it has ruled for many centuries in most of the countries of Europe; and its power has not been derived from any express legislative sanction, but rather from the custom adopted by jurists of making it the basis of their counsels and of their decisions; — a custom which, in its turn, had its source in the strong conviction which they felt of the superiority of this to their national laws, both in form and in substance [1]).

To this cause must be added the characteristic tendency of the 15th century to renew with the classic civilization of antiquity relations long interrupted, and to rescue its incomparable monuments from the oblivion into which they had been plunged ever since the middle ages. — Finally, the prevailing sentiment, which recognized in the "Holy-Roman Empire," — of which the German Emperors wore the crown, — the continuation of the ancient Empire of the Caesars, must, in itself, have contributed to cause the collections of Roman laws to be recognized and obeyed, as laws of the German Empire.

But, independently of these external causes, that which has given and still gives to the Roman Law its penetrating predominant influence, is its inherent excellence, and especially the distinguishing quality of not being the product of any narrow, national, and exclusively Roman spirit, but rather the expression of a sound conception of human relations in their most extended sense [2]); — while to this universality of character in the Law

1) Windscheid, Lehrbuch des Pandektenrechts, T. I. § 2. "The Roman was so far superior to the national laws, both in form and substance, that it was not regarded as *a* law, distinct from others, but as THE law *par excellence*."

2) This idea is finely expressed by Keller, in his Pandects, T. I, p. 27. "The Roman

itself, the Roman jurisconsults added a power of analysis, carried to a degree of perfection never since attained.

§ 3. THE CORPUS JURIS.

The ancient Editions, down to Gothofredus, comprise only certain portions of the *Corpus Juris;* or where all are included, it is not as forming a whole, but as parts distinct from each other. The arrangement adopted in the glossaried editions, which succeed each other regularly until the 16th century, is as follows: Part I, Digestum Vetus, I—XXIV, II. Part II, Infortiatum, XXIV, II—XXXVIII. Part III, Digestum Novum, XXXVIII—L. Part. IV, Codex (the first nine books). Part V, Volumen, or Volumen parvum, containing the last three books of the Code, the Novellae and the Institutes [1]).

After the 16th century the Editions appear sometimes with, sometimes without the Glossary. After the commencement of the 17th century there are only Editions without. Among these last, that of Dionysius Gothofredus [2]), occupies the foremost place,

Law has given us a practical book, where life is taken in the act; where are exhibited legal truths recognized more or less absolutely among all nations; in one word, a Body of Law common to all humanity; a written Code of Reason, or of practical psychology; and this is the prominent characteristic which has won for it, through successive generations, its great and enduring influence upon legislation, and upon the theory and practice of Law, from the moment when mankind had once more learned to appreciate the achievements of civilization." As to the universal, or cosmopolitan character of the Roman Law, see Ihering's interesting essay: "Der Gedanke der Universalität und Nationalität," which forms an introduction to the second edition of his "Geist des Römischen Rechts": "How insignificant," says he, "from this point of view, must the national (local) laws have appeared; containing only positive statutes; laborious endeavours to solve, within the narrow limits of a small country, problems of which the Roman Law had already given the solution, in an incomparable manner, and to the entire world! The different forms of local legislation appeared thenceforth simply as barriers in the path of science."

1) See, as to this arrangement, Savigny, Gesch. des Röm. Rechts im Mittelalter, III. pp. 422, 442.

2) "It would be difficult to exaggerate the utility of this work, especially for stu-

forming in fact the groundwork of those (often reprinted and copied) of Simon van Leeuwen and of Freyesleben; and, even in our days, this edition is of unquestionable value, by reason of its collation of passages relating to each other. Among more recent editions, must be cited: *First*, that of Gebauer and Spangenberg, 2 vols. 4°. Göttingen 1776—1797; the chief merit of which is its reproduction, in all its purity, of the Florentine text of the Pandects [1]). *Second*, that of Beck, 1825—1836. *Third*, that of the Brothers Kriegel, Leipsic, 1833; in which the text of the Institutes and the Pandects is the work of the Kriegels: that of the Code [2]), (which is the more carefully executed) the work of Hermann, and the Novellae the work of Osenbruggen. *Fourth*, the Edition of Schrader, undertaken on, perhaps, too grand a scale, and which has not gone beyond the Institutes. *Fifth*, the Edition of the Pandects, commenced very recently, in accordance with the theories of Mommsen, with his coöperation and under his direction, (Berlin, 1866). Up to the present time, only one Part has been published.

dents, for the interpretation of the text. Even for those more advanced this edition is often valuable." Windscheid, I c. § 4, note 4.

1) This refers to the text of the manuscript found originally at Pisa, but subsequently removed to Florence, where it is guarded in the Laurentian Library with a sort of religious respect. Formerly it was rather generally believed, that this MS. was the archetype of all the others; but this belief has been combatted by Savigny, l. c., pp. 455—460, and Vol. VII, pp. 82—87; and by Mommsen, Jahrb. des Gem. Rechts, Vol. V, pp. 416—427. The latter admits the ancient belief only commencing from the *tres partes* (35. 2. L. 82); upon the ground that after the 33rd Book there are no additions to the Florentine manuscript. By this also he explains the signification of the word *infortiatum*. (V, p. 429). To the Florentine text (*litera Pisana*), is opposed the Vulgate; that is the text which the Glossarists have drawn about as much from the Florentine as from other old MSS. Thanks to the influence of this school, this eclectic text has obtained general currency. It is usual to designate as "the third text" (lectio Haloandrina) that which Gregorius Haloander has given in his edition of 1529, and which is taken in part from the Florentine MS., and in part from the MSS. of the Vulgate; but which, also, is in many parts founded upon mere conjecture.

2) Vangerow, Lehrbuch der Pandekten, Seventh edition, Vol. I, p. 2. Windscheid, l. c. note 7.

SECTION

Study of the Roman Law by the Glossarists and their successors.

§ 4. THE GLOSSARISTS.

At the commencement of the twelfth century [1]), the town of Bologna became the seat of a flourishing school, to which the nature of its labours has caused to be given the name of the "School of the Glossarists" [2]). Their system was distinctively explanatory; but they did not restrict themselves to explaining and dissecting, one by one, the fragments collected in the *Corpus Juris;* they systematically and continuously indicated (and this is their chief merit), the connection and the analogy between different passages concerning the same subjects, and thus

1) In the earlier days of the middle ages the Roman Law continued, it is true, to be applied in most of the states of Europe, but with little success: the dead letter alone was obeyed, without any knowledge of its spirit. See Sav., Gesch. des Röm. R., Vols. III—VII, Second edition. 1834, 1850, 1851.

2) Sav., Vol. III. l. c. p. 84, thus describes the causes of the formation and the repute of this school: "The first and principal cause existed in the requirements of the Lombard cities, in the midst of which the school arose. Those cities had accumulated great riches; their population was numerous and extremely active. The activity which gave life and movement to their commerce and their industry, demanded a well developed civil legislation; the laws of the German countries were not up to the level of the situation, and the vague notions of Roman law, with which people had, until then, contented themselves, were no longer sufficient. But the sources of that Law, which had been always preserved, could supply the deficiency which had begun to be felt; and it was necessary only to use them wisely and scientifically, in order to obtain a system of laws perfectly suited to existing requirements."

opened the way to a more exact and thorough acquaintance with the sources whence they were derived; — the only solid foundation upon which positive Science can rest. The chief fault attributed to this school is that of not having had sufficient literary culture [1]) to enable its professors to form an adequate idea of the historical development of Law. In their eyes, the Roman Law was not the gradual and progressive work of centuries; — they beheld only the imperial compilation, handed down (so to speak) from the heavens.

The principal Glossarists were: Irnerius, who was the founder of the school, at the beginning of the twelfth century; Bulgarus, Martinus, Jacobus, Hugo (known as "the four Doctors"), in the middle of the same century; Rogerius, their contemporary, but younger than they; Placentinus, founder of the school of Law at Montpellier, † in 1192; (*) his contemporary Johannes Bassianus; Pillius † after 1207; Azo † after 1220 [2]); and Hugolinus, † after 1233 [3]).

1) See the Preface of Heineccius, Synt. Antiq. Ed. Haubold, p. 20. Windscheid, l. c. p. 18. Even of the celebrated Azo, it is stated: "non fuit bonus loicus, nescivit in artibus, non fuit extremus in artibus, licet in scientia nostra fuerit summus." Sav. l. c. IV, p. 252, and V, p. 6; who nevertheless says, justly, l. c. p. 215: "The Glossarists were wanting in a multitude of resources and acquirements; nevertheless, every impartial mind must admit that they were able to attain a degree of relative merit and perfection, which still render their works valuable to us; and this gives them certainly a valid title to our admiration." I hope to shew, in the course of this book, that the study of the Glossarists has been too much neglected, even by the more recent Romanists, and that more than one discovery has been vaunted as new, of which their works contain at least the germ.

2) So great was the influence of his writings, that almost all those of his predecessors fell into oblivion, and that in more than one locality it was necessary to possess the Summa Azonis, in order to be admitted to a court of Law. "Chi non ha Azzo, non vada a Palazzo." Sav. l. c. p. 11, n. 33.

3) As to the Glossarists *in general*, see Sav. l. c. *Vols. 4 and 5, to page 198.*

(*) **Nota Bene.** Throughout this work, the cross (†) placed after the name of an author and before the mention of the year, indicates that he d i e d in the year mentioned.

TRANSLATOR.

§ 5. THE PERIOD AFTER THE GLOSSARISTS, STYLED THE PERIOD OF THE COMMENTATORS.

At the close of the thirteenth century, legal science experienced a rapid decline. The abuse of dialectics, a vain formalism touching only the surface of things, an insupportable prolixity, and finally the total absence of taste and of discrimination; such were the chief faults of the authors of this epoch. That which establishes a marked superiority of the Glossarists over their successors, is that they had made the very sources of the Law the object of their studies, while after them the jurisconsults dealt only with the Glossaries. Dazzled by the authority of the first writers, their successors neglected to make for themselves new researches; and consequently all originality and all freshness were wanting to their works [1]).

The most celebrated Commentators are: Odofredus, † 1265; Cipus, † 1334; Alberic de Rosciate, † after 1354; Bartolus, † 1357; Baldus, † 1400; and Jason, † 1519 [2]).

§ 6. THE FRENCH SCHOOL.

The sixteenth century was remarkable for the revival of classical study and a passionate love of antiquity. Jurisprudence could not escape the operation of this general sentiment. As to its substance, the student turned, as if to refresh himself, to the very sources of Law; and the historical system, until then too much neglected, became dominant; while as to its form, legal works

1) Sav. VI, p. 14 et s. Windscheid. l. c. note 3. Heineccius, Hist. Jur. § 422. "Sunt sane in his aeque ac in glossis, quae admireris. Sed plura etiam inepte et stolide, qualia proficisci oportuit a viris in illa caligine educatis, omnique literarum, historiae, ac philosophiae lumine destitutis."

Sav. V, pp. 323—345. VI, 71—98, 126—137, 157—184, 208—248, 397—418.

began to be written with much more taste and elegance than before. Finally, new sources were discovered, and explored with indefatigable zeal to throw light upon the more ancient. France was the seat of this renovation.

The chiefs of this school are: Jacq. Cujas (Cujacius), † 1590 [1]); Hugo Doneau (Donellus), † 1591 [2]); François Duarein (Duarenus), † 1559; Antoine de Conte (Contius), † 1577 [3]); Barnabé Brisson (Brissonius) † 1591 [4]), Denys Godefroi (Gothofredus), † 1622 [5]), and his son Jacques, † 1652 [6]), whose merit exceeds, by far, that of his father.

1) His complete works were published Cura Fabroti. Paris, 1658. X. f., Naples, 1722 sq. XI. f., Naples, 1757. XI. f. Venice and Modena, 1758 sq. XI. f. In spite of his great acquirement, he is not favorably judged by Hugo, Lehrb. der Gesch. des Röm. R. seit Justinian, § 243. Latterly his life has been written by Berriat-Saint-Prix. Savigny, Vermischte Schriften, Vol. IV, p. 173, speaks of this biography in terms of high praise. See, also, Hugo, Civ. Mag. Vol. III, nº. 11, 12, 17, 22.

2) His excellent work, entitled "Commentarii Juris Civ.," was published after his death, by his pupil Scipio Gentilis. It is but recently that the eminent qualities of this book have been appreciated; although, previously, more than one, (Noodt, for example), had made no scruple of borrowing from him many pages literatim, without acknowledgment. A good edition of the Commentarii is that of Koenig and Bucher, Nüremberg, 1822— 1833, 16 vols., in 8vo. As to his life and works see "Doneau, sa vie et ses oeuvres, par M. Eyssel; Dijon 1860." Also Sav. Syst. VI. § 221. m.

3) As to Contius, see Hugo, l. c. § 221.

4) Known chiefly by his Dictionary de Verborum significatione, of which Heineccius published a revised edition; and by his work "De formulis et solennibus populi Romani." Hugo says truly, that whoever desires seriously to study Roman Law cannot dispense with these two books.

5) Celebrated for his numerous editions of the Corpus Juris; although the text which he gives leaves much to be desired; and the original notes, added by himself, have scarcely any value, except as to the connection between different passages. Hugo, l. c. § 273.

6) "He is perhaps the most meritorious of all those who have written upon the History of the Roman Law." Hugo, § 274. His most celebrated work is his Commentary upon the Theodosian Code. The best edition is that of Ritter, 6 vols. in folio, Leipsic, 1736.

§ 7. THE GERMANS AND THE DUTCH, IN THE 16th, 17th AND 18th CENTURIES.

The tendencies of the French humanist school exercised but little influence in Germany. An effort certainly was made, in order to meet the immediate requirements of practice, to treat and to apply the Roman Law as if it were indigenous; but very little attention was paid to it, for the purpose either of penetrating its spirit and developing its hidden principles, or of distinguishing the historical from the practical materials which it contains [1]).

Among the German jurisconsults, let us cite: Joachim Mynsinger, † 1588, pupil of Ulrich Zasius; Andrew Gaill, † 1587; Mathew Wesenbeck, † 1586 [2]); Hermanus Vultejus, † 1634 [3]); Christopper Besold, † 1638 [4]); Ren. Bachovius von Echt, † 1635; Mathias Berlich, † 1638; Benedict Carpzovius, † 1666 [5]); David Mevius, † 1670 [6]); Wolfg. Ad. Lauterbach, † 1678 [7]); G. A Struve,

1) An exception must be made in favor of Ulrich Zasius, 1461—1535. See Stinzing: Ueber Zasius. Ein Beitrag zur Gesch. der Rechtswissenschaft, im Zeitalter der Reformation. For the rest, I adopt what is said by Puchta, Pand. § 9 *a*, of the Germans, to whom he opposes, with eulogy, the Hollanders: "Knowingly or unconsciously, they are subject, more or less directly, to the influence of the commentators at the end of the middle ages, and they are absolutely ignorant of the writings of the school of the sixteenth century, and notably of the new historical method applied to the interpretation of the Roman Law in its latest period; or, at best, they profit but superficially by those writings. The practical necessity was felt, of adapting the Roman Law to modern legislation; but there were wanting both the perspicacity and the force required to find the practical application elsewhere than in the theoretical corruptions of that Law."

2) Born at Antwerp. We have his Comment. in Pand. Jur. Civ. et Cod. Justin. olim dicta paratitla, published in 1565. Hugo, l. c. § 270.

3) Hugo, l. c. § 282.

4) Hugo, § 285, praises his originality.

5) He has written extensively upon Criminal Law, Ecclesiastical Law, and Procedure. Hugo, § 291.

6) He has written (int. al.) "Decisiones," which have acquired a reputation and are esteemed for their conciseness. Hugo, § 292.

7) This author is best known by his Collegium theoretico-practicum Pand., Tubingen, 1690—1711. Hugo, § 300.

† 1692 [1]); Samuel Stryk, † 1701 [2]); J. H. von Berger, † 1732 [3]); Just. Henning Böhmer, † 1749 [4]); Samuel v. Cocceji, † 1756 [5]); J. G. Heineccius, † 1741 [6]); Augustin von Leyser, † 1752 [7]); D. G. Strube, † 1775 [8]); G. L. Böhmer, † 1797 [9]); J. A. Hellfeld, † 1782 [10]); J. A. Bach, † 1758 [11]); L. J. Höpfner, † 1796 [12]); C. Ch. Hofacker, † 1793 [13]); Phil. Fr. Weis, † 1808, (the Instructor of Savigny) and Chr. Fr. Glück, † 1831 [14]).

The Dutch school, in concurrence with the French, has done more than the German, toward making known the sources and the history of Law [15]). Our celebrated countrymen (the Dutch)

1) We have of him, among other works, a Jurisprudentia Romano-Germanica forensis, 1670, which was in use in Germany as a classic work, until the end of the last century. Hugo, § 300.

2) His numerous writings have been collected with those of his son, in 10 vols. in folio. Hugo, § 385.

3) Author of an Oeconomia Juris ad usum hodiernum accomodata, 1712.

4) His treatise on the Pandects continued to be extensively used, in Germany, until the present century, although its principal merit was its publication and explanation of C. J. Canonici, 1747.

5) See Hugo, l. c. § 409, and Civ. Mag. IV, p. 34.

6) The most celebrated professor in Germany of Roman Law. Gibbon, Chap. 44 of his Decline and Fall of the Rom. Emp., places him "at the head of his guides." His works were published at Geneva, 1744, in 8 vols. quarto.

7) His Meditationes ad Pandectas, Vols. I—XI, Leips. 1772, Vols. XII and XIII cura Hoepfneri, Giessen, 1774—1780, display rather his great erudition, than any profound study of his subject. Hugo, § 402.

8) Author of "Rechtliche Bedenken," Hanover, 1761. Republished with notes by Spangenberg, Hanov. 1827.

9) Celebrated by his writings upon Ecclesiastical and Feudal Law, 1762—1765.

10) Author of a Jurisprud. forens. secundum Pandect. ordin. proposita; Jena, 1764 Edit. noviss. cura Oeltze. Jena, 1806.

11) Known especially by his Hist. Jurisp. Rom.; a work less esteemed now than formerly. Hugo, Lehrb. Ed. XI, p. 35.

12) His paraphrase of the Institutes of Heineccius was frequently republished; but was severely criticized by Hugo, in the Civ. Mag. T. I, p. 70 et s.

13) He was a very successful teacher, and published the Princ. Jur. Civ. Rom. Germ., of which a second edition appeared at Tubingen in 1800—1803.

14) Known by his Ausführliche Erläuterung der Pandekten, nach Hellfeld, T. 1—34, Erlangen, 1790—1830; work continued by Mühlenbruch, T. 35—43, 1832—1843; and by Fein, T. 44 and 45, 1851 and 1853.

15) Like Puchta (see note 1, p. 9). Keller, Pand. p. XXXI, does homage to the

have however performed their task more in the character of archaeologists than of jurists; and therefore, although I am far from sharing in the opinion of Ihering [1]), who accuses them of having, by their historico-juridical researches, suppressed, rather than aroused, the veritable spirit of legal study, I must, nevertheless, admit, that it is not without cause that they are accused of having expended a vast amount of scholarship to little purpose, and of having failed either to sound the depths of Roman Law, or to invariably apply its principles, with success, to the ordinary relations of life.

Among the Dutch writers, we may cite: Viglius Zuichem ab Ayta, † 1577 [2]); Arnold Vinnius, † 1657 [3]); Ulrich Huber, † 1694 [4]); John Voet, † 1714 [5]); Ger. Noodt, † 1725 [6]); Ant. Schulting,

Dutch in contradistinction to the Germans: "In harmony with their era, cultivated and progressive minds were strongly attracted by the veritable, antique Roman genius; while men of routine, and narrower minds, with scarcely an idea of the treasures on which they gazed, could not penetrate beyond the mere dead-letter of the Justinian Law. This latter tendency was, (especially in the seventeenth century) in marked opposition to the contemporary Dutch school, — known as "the school of the Elegant Jurists," — and no less so, to the excellent French school."

1) Jahrb. für die Dogmat. T. I, p. 22 etc. Windscheid, § 8.

2) Celebrated less for his writings, than for his political career and his edition of Theophilus, which was first published by him. The MS. of this ancient author was obtained at Padua, by Bembo, to whom Viglius had been recommended by Erasmus. Vide, Preface to Carolum. Imper. V, Excursus V, placed at the end of the edition of Reitz, T. II, p. 1126 etc.

3) Besides his Selectae Juris Quaestiones, Lib. II, Leyden 1653, 8vo., and some less important works, he wrote a Commentary upon the Institutes, which has substantial merit, but is somewhat too prolix.

4) He wrote: Praelectiones Juris civ. secundum Institutiones et Digesta, Fourth edit., Frankfort 1749; and Eunomia Romana s. Censura censurae Juris Justinianei, cura Z. Huber, Amsterd. 1724.

5) Known by his Commentarius ad Pand., in quo praeter Romani Juris principia ac controversias illustriores, jus etiam hodiernum et praecipuae fori quaestiones excutiuntur. A good edition of this book is the Second, in 2 Vols. in folio. The Hague, 1707. Jan van der Linden published at Utrecht, in 1793, a supplement to this work, Traj. ad Rhenum.

6) Besides other less important works, he wrote a Commentary on the first twenty-seven books of the Pandects, (Opp. omnia in duos tomos distributa, Leyden 1724, Fourth edit.), an interesting work, especially by reason of the "restitutio edicti." In 1842 Mr.

† 1734 [1]); John Ortw. Westenberg, † 1737 [2]); Corn. van Bijnkershoek, † 1743 [3]).

§ 8. INFLUENCE OF MODERN PHILOSOPHY, OR PERIOD OF THE LAW STYLED "NATURAL."

The new German philosophy tended to release itself from the restraints, which had too long checked the progressive advance of modern nations. The positive basis of Law being of foreign origin, it must be proscribed and banished. For a well organized state (it was said), all this historic baggage is but useless ballast; the subjective spirit is able to deduce from ideas founded on *pure reason* (die reine Vernunft), the eternal, immutable, and universal Law; and this is the one result which every legislator should struggle to attain. It was sought, thus, to create a collection of precepts, which should furnish the judge with infallible rules for all possible cases, and relieve him from those historical and theoretical doubts, which disturbed his convictions and troubled his judgment.

This philosophical school, no doubt, awakened among the people, the consciousness of their own strength, and developed the sentiment of nationality. By constantly reiterating, with energetic persistence, that it was high time to purge the Law from those antiquated dogmas which the spirit of routine sought obstinately

Huguenin also published, at Heerenveen, his Scholae in Digestorum, libros 28—50. He was learned and acute; but his assertions are often rash, and his conjectures reckless.

1) A pupil of Noodt. His Jurisprudentia vetus ante Justinianea, 1717, in 4to., is justly celebrated. Hugo, l. c. § 362, says of this work, "It has been found worthy to be reprinted in Germany and in Spain."

2) His manual of the Pandects, entitled "Principia Juris, secundum ordinem Digestorum Pandectarum in usum Auditorum," has been reprinted in our times.

3) Among his works, should be mentioned "Libri octo, obs. Jur. Rom.," the "Opuscula varii argumenti," and a volume entitled "Opera minora."

to preserve, it contributed greatly to the development of more extended ideas and to a systematic conception of Law [1]).

Its grand defect was its exclusiveness. Its followers could not see that it was no less impossible than useless, to raise up, as by enchantment, an entirely new system of law ; they were unable to perceive that the present is attached to the past by indissoluble ties, and that the experience of successive centuries is not "useless ballast" to be cast into the sea, but, on the contrary, an indispensable pilot, whose guidance must be followed. In a word, they did not see, that it could not be desirable to obliterate the accumulated learning of ages, but far rather to condense and simplify the entangled mass, and subject the traditional system of laws to a renovation which should reproduce its ancient substance in a modern form [2]).

§ 9. THE HISTORIC SCHOOL.

This philosophic school, and the exaggeration in which it indulged, provoked, toward the close of the last, and more especially at the commencement of the present century, a salutary reaction. To the "Historic school," belongs the honour of having re-connected the broken chain which linked the past to the present, and replaced the History of Law upon its pedestal.

Its labours were crowned with an immense success, and produced results, which neither the French school of the sixteenth

1) Windscheid, § 8.

2) Note here the very just language of Kierulff, Theorie des Gem. civ. Rechts, Introduction, p. 21. "The present epoch feels neither the necessity nor the desire, of seeing invented and constructed a new system of law, unknown until now. What is desired, is, that the abundance of laws which we already possess should be reduced to uniformity and rendered clear and simple. But this end can never be attained by rejecting, (as dictated by the doctrine of "Natural Law") all existing materials, in order to put in their place others, extracted from the "*me*" absolute ! Such simplicity would be but poverty and misery !"

century, nor (afterward) the Dutch jurisconsults, had been able to attain; a fact to be explained as much by the more accurate notions which the modern school had formed as to the origin of Law in general, as by its having learned to draw from the ancient fountains of legal science a knowledge of the consequences of progressive development, and thus obtained the key to more than one apparently arbitrary arrangement, and an explanation of the systematic connection, which links to each other the seemingly fragmentary portions of what is, in truth, one mighty whole.

The historic school has, however, and not without cause, been accused of an excessive predilection for that which *was*, while losing sight of that which *ought to be*. Seduced from the high-road of rigid dogmatism into the by-ways of the system of "historic elegance," its professors forgot that for the science of Law, — the social science *par excellence*, — history is a means, but cannot be an end. They did not adequately realise, that it was less important to dissect, in its minutest fibres, that which formerly *had been* law in Rome, than to determine what law *ought* to be and to become, in order to harmonize with the modifications, which the ideas, the condition, and the organisation of society have undergone since that ancient law was framed [1]). But, on the other hand, it cannot be denied, that the critical and elaborate study of the Roman law can alone enable us to discern how much of that law is local and temporary, and how much universal and durable. It contains, in fact, some provisions, res-

Kierulff, Introduction, p. 19. "This historic tendency places itself quite as much outside of the practical territory of modern requirements, as does the theory of Natural Law. It lays hold of the absolute substance of the Roman Law; but this substance is, in great part, inert matter, bound by no living tie to the laws of the present time. The historic school desires the perfection of existing juridic institutions, and desires that this process should be effected organically, from within; but even as the "natural law" pursued a vague ideal, without substance or definite purpose, the historic school also shews us only vaguely and in the remote distance, the moment when the modern initiative could come into operation. This school desires, in fact, that the German nation, which, after all, has for some centuries shewn sufficient aptitude and patience in acquiring instruction, should begin the process afresh, by seeking among the treasures imported from abroad the means of finally becoming, in its turn, productive in the domain of Law!"

pecting conditions of things originated and developed on the Roman soil, and inseparably connected with Roman institutions. Those provisions are accidental, local, purely Roman, and, consequently, dead for us; while, on the contrary, those which are founded upon the social necessities of all ages and of every country, are, by their very nature, destined to retain their vital force.

The Historic school has greatly aided in effecting this separation; or, rather, it gave the original impulse in this direction. This is a merit which no one can deny to it [1]), and a merit sufficient for its glory, even though it be also true, that in reacting against an exclusive system the agitators went beyond their goal, and fell into an opposite extreme; or sometimes lost themselves in microscopic studies, which, satisfying neither the feelings nor the intellect, in their turn provoked an opposition from the school, called anti-historic, or philosophic [2]).

The founder of the historic school was Hugo, † 1844 [3]); its chief and its glory was Fred. Charl. de Savigny, 1861 [4]); in

It is in this that consists, to my mind, the principal, and truly inestimable merit of the System of Savigny.

2) The contest of the historic and anti-historic schools was especially active between Thibaut and Savigny. It had reference, however, not only to difference of method, but to the question whether the development of positive law, in view of the future, should be effected by science only, or by legislation. Thibaut, in his work über die Nothwendigkeit, eines allgemeinen bürgerlichen Gesetzbuches für Deutschland, 1814, says that after having thrown off the French yoke, Germany should, by the promulgation of a common code, have rejected every foreign source of law. Savigny, on the contrary, (über den Beruf unserer Zeit für Rechtswissenschaft und Gesetzgebung, 1824, 1828), considered that the times were far from ripe for any such change; and he found the justification of his opinion, in the Codes of Prussia, Austria and France. Subsequently, Thibaut modified his views of the historic school, in an article entitled, über die sogenannte Historische und nicht Historische Schule (Arch. für civ. Prax., T. 21, p. 391). The more recent introduction of a common legislation for all Germany, in reference to commercial law and bills of exchange, has left not the smallest doubt of the possibility and the utility of a national legislation.

3) See, in reference to Hugo, Savigny, Zeitschr. für gesch. Rechtsw., T. 9, 13. His treatise on the History of the Roman Law to the time of Justinian, (a valuable work although not agreeable in style) has reached eleven editions. The last appeared at Berlin, in 1832.

4) Already in 1803, at the age of 24, he had published his treatise of the Possession

addition we find among its disciples G. F. Puchta, † 1846 [1]); J. F. L. Göschen, † 1837 [2]); Arn. Heise, † 1851 [3]); J. C. Hasse, † 1830 [4]); Ed. Schrader, † 1860 [5]); C. F. Mühlenbruch, † 1843 [6]); Eg. von Löhr, † 1851 [7]); Dan. Unterholzner, † 1838 [8]); C. A. O. Klenze, † 1839 [9]); and Fredk. Louis Keller, † 1860 [10]).

which at once established his fame. The last edition of this work is that of Rudorff, Vienna, 1865. It contains, by way of appendix, a review of everything that has appeared on the same subject since the sixth edition (1837). His principal works are his Gesch. des Röm. R. im Mittelalter, and his System des heutigen Röm. R. Berlin, 1840—1849, in eight vols.; the continuation of which, Das Obligationenrecht, Berlin, 1851—1853, was, unfortunately, never completed. Compare also, as to Savigny, Ihering, Jahrb. für Dogm. V, 7; Rudorff, Zeitschr. für Rechtsgesch., T. II, p. 2—68. The latter exclaims, with regret, "We shall never again see his equal!"

1) His principal works are, his Pandects and his Lectures upon Modern Roman Law, several times republished, subsequently to the fourth edition by Rudorff, and his Course on the Institutes; also attaining several editions. Ihering (Jahrb. für Dogm. T. I, p. 26) says: "To the aptitudes and acquirements of the historian he joined a juridical talent, properly so called, of unusual penetration; and no one has done so much, as he by his Pandects, to spread a similar system among the public. It is to him that the system of progress founded by Savigny is indebted for having become public property; the assured possession of German jurisprudence.

2) The first editor of the Institutes of Gaius, Berlin, 1820.

3) Known by the system which bears his name. He published a work entitled Grundriss eines Syst. des. Gem. Civ. Rechts. 9th edition, Heidelb. 1823.

4) Author of the celebrated monography, "Die Culpa des Röm. Rechts." Second edit. Bethmann-Hollweg, 1836.

5) The edition of the Corpus Juris, undertaken by this author has been already mentioned.

6) His Doctrina Pandectarum, III vols., Halle 1823—1824; third edit., Halle 1830—1831, has also been published in Germany, in III vols.; Halle 1835—1837. For a time it had a wide circulation, but has now given place to better manuals.

7) Editor, jointly with Grolman, of the Magazin für Rechtswissenschaft und Gesetzgebung.

8) Principal works: Quellenmässige Zusammenstellung der Lehre des R. R. von den Schuldverhältnissen, 2 vols., 1840; and Verjährungslehre, the second edition of which was edited by Schirmer, Leipzick, 1858.

9) He contributed, for a time, to the Zeitschr. für Gesch. Rechtsw., edited by Savigny.

10) His work über Lit. Cont. (Zurich 1827), is justly regarded as a masterpiece. See (int. al.) what is said of it by Savigny, in his Syst. VI, § 283. His Pandects, published after his death, by Friedberg, contain views of great excellence and originality; but are defective in system and arrangement.

SECTION III.

§ 10. OF THE ARRANGEMENT ADOPTED IN THE EXPOSITION OF THE PANDECTS.

Since the time of the Glossarists, it has continued to be customary to pursue the explanatory method according to the arrangement of the Pandects. Already, however, in the 16th century, Francis Connanus had initiated a better method [1]), and Hugh Donneau, in the admirable preface to his Commentaries, had condemned the former arrangement as illogical and absurd, and had adopted another in its stead [2]).

In the 16th and 17th centuries it became the custom, while following the arrangement of the titles of the Pandects, to act with more freedom and more system, in interpreting the different fragments of each title [3]). Others followed, each in his own fashion, the division and the plan of the Institutes, which many others [4]) rejected, and which, in truth, are incomplete and ill adapted to

1) Bartholomew Fajus, in his preface to the works of Connanus, says: "Accuravere Graeculi illi ad perpetui Edicti imitationem, totum titulorum ordinem, reliqua cuique titulo subjecta capita et responsa, deformi ceu membrorum transpositione, non tam corpus quam monstrum e pluribus compositorum operum fragmentis effingentes, ultro etiam confudere."

2) Sav. (Besitz, p. 12, Ed. Rudorff) says of this system: "In fact, this exposition of "Possession" is, like the entire work, one of the writings at once the most known and the least known of all those which have been published in reference to the Civil Law. Every one cites it, and every one admires isolated extracts from it but the comprehensive exposition, which constitutes the real merit of the work, is generally ignored."

3) See the works cited by Vangerow, I, § 9. Arndts, Lehrb. der Pandekten, Ed. § 17

4) Puchta, Kleine civ. Schrift., p. 221, et s.

their purpose [1]). At present the system generally adopted is that of Hugo, reproduced by Heise, in his Grundriss eines Syst. des gem. civ. Rechts; and which is, substantially, as follows: "Man cannot supply his necessities but by subjecting nature to his control. The force of things opposes, however, the completeness of this subjection; and it is limited to things which are finite, and which can be employed in satisfying human requirements. Those portions of nature which are thus subjected to the power of Man, are called "*Things.*" The relation in which Man finds himself towards the thing which he controls, is, at first, a relation *de facto*, or *natural* relations; but in proportion as third parties become obliged to respect the power which he has assumed over things, and to forbear to interfere with that power, the relation or position, which, at first, was only *de facto*, enters the domain of *Right*, and creates for itself a relation of right, or of obligation, which, according to its scope, creates certain rules. The aggregate

Puchta himself, — starting from the doctrine which he prescribes, that for the natural sequence of juridical rules the principle of Right should be adopted as a guide, — has invented a new system, which presents the following classification: I. Rights of man as to his proper person, or rights of personality. II. Rights as to things. III. Rights as to actions (obligations). IV. Rights as to other persons (marriage, paternal authority etc.). V. Rights, as to persons, which have merged in us (hereditary rights). See Kleine Civ. Schrift. p. 239 et s. This system has been opposed, with justice, by Sintenis, Zeits, für civ. R. u. Proc. Vol. XIX, p. 42; by Sav. Syst. 1, p. 337; by Unger, Syst. des Oesterrich. allgem. Priv. Rechts, Leipsic, 1863, 2nd ed. I, §. 24; and by Windscheid, § 13, note 2. In fact, and to begin with, the rights which belong to us differ according to the variety of the relations of right in which we are placed; but it would be false to say, conversely, that the relations of right are determined by our rights. Again, as Savigny remarks, *the right of personality* does not form a distinct class of rights, but forms the essential quality, the basis, of rights of every kind. As to a right over the personality of a deceased person, it is an absurdity; and besides, that which distinguishes and characterizes hereditary right, is not the subject of a similar right, but the question of settling a patrimony which has *no* subject (possessor). Finally, in the moral system, there belongs to the family a distinct place; so that it is not possible to treat the juridical rules which affect it otherwise than as a natural unit. Brinz, Krit. Blätter, No. 3, p. 4, makes, also, in reference to Puchta's system, this ingenious observation: "He believed that he had evolved from the depths of the mind a new creation, when, in fact, he had produced only a caricature of this harmless idea: from the right to the thing."

of these rules forms what are called "*Rights* concerning *things*" [1]

But, on the one hand, the number of Things which are necessary for us is limited, and on the other, it is impossible for even the most energetic effort to produce or procure them all, without the help of others; and hence the necessity, which men find, of mutually interchanging their services and their forces. In other terms, individuals are compelled to form connections with other individuals; whence it follows that the one has to perform some act to the advantage of the other, and that thus the will of the latter is able to govern, as to a certain act, the will of the former. Relations of this kind are called "*Obligations,*" and the aggregate of the rules which govern them "*the Rights of Obligations.*" It is upon these two kinds of Rights, — the Rights concerning Things and the Rights concerning Obligations, — that the individual Proprietorship, — the *Patrimony,* — is founded; and the statutes which regulate it are included in the general title of *Patrimonal Rights,* (Rights of Property), — or *Jus Rerum.*

But man is not isolated, he is a member of an organic whole. As such, he needs to complete himself by the aid of other men, with whom he contracts permanent relations. Of this nature is marriage; a union ordained by nature, whence are derived new relations, and as a result of which reciprocal ties are formed and maintained, between the persons thus united among themselves by a mutual affiliation. Hence, we have marriage, consanguinity, and paternal authority with its artificial extension, — guardianship. The relations in which man finds himself thus placed, as an individual, but, at the same time, as a member of an organic whole, are those of the family, and the rules which govern them are called *Family* or *Domestic Rights.* These rights are distinguished from Patrimonial Rights, by the fact that they are generally restricted to the control of the formation and dissolution of domestic ties; and as the substance and the scope of those ties belong especially to the domain of morality, they seldom give occasion for the employment of constraint. Besides, the family ties, or relations, cause

1) Savigny, Syst. I, p. 368. Unger, I, p. 214.

numerous modifications of the rights of property; they have upon them an influence so important that they give to "the Family" a certain judicial character; and there is consequently sufficient warrant for speaking of special rights of property, or *Patrimonial Family Rights* [1]).

By his death man ceases to be the subject of rights, or capable of being the master of a patrimony. Now, the patrimony cannot exist without an owner, and would disappear and be annihilated, if there were not found some means (by a species of fiction) of causing the patrimonial individuality of the deceased proprietor to survive himself, in order that the patrimony may remain intact, and not be checked in its operation or in its development. The judicial institutions that produce this result, and with which many others combine in reference to inherited property, constitute what are called "*the Rights of Inheritance;*" which, extending, in a certain sense, the limits of the life of man, add, so to speak, the topmost stone, which crowns the edifice [2]) of the Institution of Law [3]); — Law being *Organized Right*.

1) Sav., Syst. I, 380. Unger, I, 380. Savigny says truly (l. c. p. 350): "It cannot be denied, that the fidelity and devotedness of husband and wife, and the obedience and respect of children, are the very essence of the institution of marriage and of paternal authority; but these elements, despite their importance, are placed under the protection of Morality, and not of Law; as it is, likewise, to public morality that we must leave the duty of commanding the father of a family to use his marital and paternal authority with dignity and humanity." It is for this reason that I cannot approve the jurisprudence of the Dutch tribunals, in according to the Husband the right (by the use of actual force) of compelling his Wife to re-enter the conjugal abode. This jurisprudence is founded upon the fact that the Law has been unwilling to ordain a duty without ensuring its fulfilment; as if it were in the power of the Legislator to regulate and control, absolutely ALL the conjugal duties, without distinction! *)

*) If the learned author were aware of the frequency, in England, of suits for "*the restitution of conjugal rights*", he would, perhaps modify his views as to the (legal!) *impossibility* of legislative control over the performance of "ALL the conjugal duties, without distinction!" *The Translator.*

2) This phrase has been worn so threadbare, in its political use, (either grave or satirical), on the other side of the Channel, that I would gladly have avoided it; but the metaphor which it embodies is too happily applied, to be abandoned here, because it has been abused elsewhere. *The Translator.*

3) Sav., Syst. I, 385, Unger, I, 218.

But, irrespectively of the rules applicable to each particular subject, there are certain points which are common to all the relations of Right, or, at least, to most of them, and which we encounter always and everywhere; although, sometimes, with modifications more or less important. Thus, legal relations being formed between certain persons and for the advantage of certain persons, the legal capacity of the latter and their capability to act ought to be established at the outset. Thus, again, *Things* form the basis of Patrimonial (or Proprietary) Right, in its comprehensive sense; so that it is impossible to dispense with a preliminary definition of the legal notion which we must form of "*Things*" and of the difference between their diverse kinds, as well as of the influence which they exercise in the domain of Right. Moreover, as to each relation of Right, the questions arise: How did it originate? How has it been developed? What is its result? Finally, the protection and the maintenance of Rights, in case of violation or of disturbance, and the modifications which those Rights themselves may consequently undergo, are, also, matters which belong, in common, to the general relation of Rights to each other.

To avoid constant repetitions, and especially to render more conspicuous, by comparison, the similar character of the rules which govern the subjects just enumerated; in order, moreover, to display them in a more precise manner and to shew their connection with each other; the classification is preceded by a summary, which treats, I, Of Persons, or the subjects of Rights; II, Of Things; III, Of the origin and the purpose of Rights; and IV, Of the exercise of Rights and the means of enforcing them.

SECTION IV.

§ 11. SOME RULES, CONCERNING THE CRITICISM OF THE TEXT, AND THE EXPLANATION, OR INTERPRETATION, OF THE PANDECTS.

To interpret, in its extended signification, is to explain the sense and the bearing of the text interpreted. There is, First, the *scientific* interpretation [1]), or that which is obtained exclusively by scientific means, without the aid of any extrinsic authority; and Secondly, the *authentic* interpretation, which is given, when the legislative authority, by its own decree or prescription, explains another decree which it had previously rendered. This second mode is not, however, an interpretation, properly so called, but rather a new enactment; with this derogation from general principles, that it has a retroactive (*ex post facto*) operation [2]), in so far as the present legislator enacts that an anterior law

The Germans style it "*doctrinal*," as distinguished from the legal, or authentic interpretation.

2) Nov. 19. Praef. i. f. "cum omnibus manifestum sit, oportere ea quae adjecta sunt, per interpretationem, in illis valere, in quibus interpretatis legibus sit locus." Nov. 143. i. f. "quam interpretationem non in futuris tantummodo casibus, verum in praeteritis etiam valere sancimus, tamquam si nostra lex ab initio cum interpretatione tali a nobis promulgata fuisset." Kierulff, p. 72, note. Sav., Syst. VIII, 511. Bremer, in the Jahrb. of Becker, II, 241 et s. Windscheid, § 20. Sav. l. c., does not see in this any derogation from the principle of the non-rectro-activity of laws; inasmuch as the judge, bound by the will of the Legislator, in reality applies only the law interpreted, and *not* the law interpretative; but this is to ignore the fact that "retro-activity" consists, here, precisely in the circumstance that the judge, who, before, was free as to his appreciation of an obscure or equivocal law, is now bound by the interpretative enactment, even as to his judgment of acts performed before its promulgation. The authentic (or legal) interpretation is also regarded by the Prussian Law as forming an

ought always to have been construed in a certain manner and not otherwise. We shall, therefore, have to consider only the scientific interpretation; and as I do not propose to offer, here, a general hermeneutic of Law, I shall restrict myself to the indication of certain points, which it is desirable to note for the better explanation of the principal parts composing the Justinian collection [1]).

But, first of all, it is indispensable to be assured of the authen-

exception to the principle of non-retro-activity *). (Pr. Lands-Recht, Introduction, § 15.) "Nevertheless, where the Legislator thinks it necessary to give an interpretation of an anterior law, and this interpretation has been published in due form, it must be applied to all cases not previously decided." Thus, also, in the proposed Dutch Stat. of 1820, art. 31: "when, however, an ulterior law has no other object than to explain and interpret one which is anterior, it is in accordance with the provisions of the interpretative law, that even the cases arising before its promulgation must be judged, if the litigation which concerns them has not yet been concluded by a definitive judgment or by a compromise"; and the like in the Austrian Code, Introd. § 8. French jurisprudence has also sanctioned this principle, although the provision relative thereto, proposed in the draft of the Code, is not embodied in the actual publication. See Dalloz, v. Laws, chap. IV, art. I, N°. 188.

1) Several authors have written on this subject: for instance, C. W. Eckhardt, Hermeneutica Juris, Leipsic, 1750; Zachariae, Versuch einer allgemeinen Hermeneutik des Rechts; Meissen, 1808; W. F. Clossius, Hermen. des Röm. R. im Grundrisse, Lips., 1831; Lang., Beiträge zur Hermen. des Röm. R., Stuttgart, 1857. See, also, Thibaut, Theorie der logischen Ausleg. des Röm. R., 2nd edit., Altona, 1806. The opinion generally entertained, at present, is not very favorable to the hermeneutic. See Puchta, Vorles, I, p. 38: "From the combination of rules respecting the criticism and the interpretation of texts, there has been formed a distinct doctrine, — the juridical hermeneutic, — which is, ordinarily, but a dry, sterile, and very superficial explanation, not reaching the depths of the subject. For every person gifted with common sense, the whole science of law consists of hermeneutics." Kierulff, p. 35: "The superficial rules which are usually grouped under the name of hermeneutics do not enable any one to obtain positive results. Every jurist, and above all a jurist of genius, should be a Master of legal theories; but their application *in concreto*, coupled with actual example, can alone furnish a sure and useful guide. When the judicial vocation, matured by study and practice, has become a practical reality, it is no longer reflection which guides it at the moment of production, and mere abstract rule is without influence upon the creative action." Windscheid, § 20, i. f.: "It is less a science to be taught than an art which must be learned."

*) "Retro-active," — retro-activity, etc." — although more than doubtful English, seem to be received into the current legal vocabulary, *ex necessitate rei*, in substitution of the cumbrous phrase "having a retrospective operation" and its corollaries.

The Translator.

ticity of the text to be interpreted. Criticism, which tends to the attainment of this end, is either that which is termed inferior, (diplomatic criticism), or that which is styled superior, (conjectural criticism). The first consists of the careful comparison of divers manuscripts and various editions, and the consideration of their respective authority. The latter does not rely exclusively upon these external authorities, but devotes itself to the correction of erroneous readings, while also taking note of necessities and probabilities, in connection with the contents of the texts.

Now, in reference to the criticism of texts, it is necessary to pay attention to the following observations:

I. In the manuscripts, the signs of punctuation are either absolutely wanting, or are very rarely found; and often the editors have placed or displaced them in the most arbitrary manner. Examples: *a*) in L. 22 pr. D. quando dies leg. (36. 2) the text of the ordinary editions gives, *si annorum quatuordecim factus erit, an ita. cum priore scriptura,*" which should be corrected thus: *an itia: cum* [1]). *b*) In L. 11, § 6 and § 7. D. quod vi aut clam. (43. 24), the § 6 should finish with *furiosus,* and the § 7 commence with the words: *sed ad noxam an* [2]). c) In the L. 6. D. de her. petit. (5. 3) it should read: *vel quaerendum an debeatur, et si testamentum falsum esse dicatur. Ei tamen qui,* etc. [3]). *d*) L. 33. § 1 D. de reb. auct. jud. possid. (42. 5) should be corrected thus: *Defendere debitorem sicut antequam bona ejus possiderentur, licet, ita post bonorum quoque possessionem. Verum sive ipse sui* etc. [4]).

II. Syllables of similar sound (consonant) are sometimes omitted. For example: facere cusaverit, for face*re re*cusaverit. L. 24

1) In the annotated editions of Lyons, 1562: "An cum quatuordecim annorum factus erit nam ut." Kriegel's edition also perpetuates the error.

2) Goldschmidt, Jahrb. des Gem. Deutsch. Rechts, V, p. 132.

3) See Francke. Exeg. dogm. Comment. über den Pandtitel de Her. petit. Göttingen 1864, p. 107.

4) Keller, Semestr. I, 112, says of this fragment: "Verborum structura et sententiarum conjunctione inconcinnum, contortum et suspiciosum." Cugac. Opp. VIII, p. 676, proposes to interpolate here an entire line.

D. de min. (4. 4). In L. 1. § 6 D. de superf. (43. 18) we must, undoubtedly, admit the reading of Huschke [1]), *pignori quoque insuper, superficiem dari.* In the § 96 Fragm. Vat. Die nuptiarum *vir virgini* obtulit munus (Mommsen). In L. 36. § 3 D. de her. pet. (5. 3), we should read: nec adjectum essest *etsi* res interierit [2]).

III. Sometimes letters or syllables are transposed. For example, L. 52. § 2 D. de leg. III (32) we read *partes hodie,* which should be *rhapsodiae.* In Ulpian VI. 15, we should read *quae triennio* instead of *quadriennio;* and in the Coll. Mos. et Rom. leg. 16. 3, 5, we should read *quibus bonorum possessio nisi,* instead of *possessionis* [3]).

IV. The *sigla* (abbreviations) which have insinuated themselves into the Corpus Juris despite the prohibition of Justinian [4]), are sometimes erroneously explained and sometimes completely overlooked. For example: In L. 1. pr. D. de O. I. (1. 2) we read: *Facturus legum vetustarum interpretationem necessario* PRIUS *ab urbis initiis repetendum; but we should read* P. R. IUS; *Populi Romani jus* [5]). In L. 8 pr. D. qui et a quib manum (40. 9) "*f. c.*" has been rendered "fideicommissorum causa," while, in fact, this abbreviation signifies *fraudandorum creditorum, πρὸς παραγραφὴν τῶν δανειστῶν* [6]). In Ulpian VI, 6, *habet* R. U. *actionem,* R. U. has been rendered *revera* instead of *rei uxoriae.* In L. 3 pr. D. de pollicit, (50. 12) it has been overlooked that *eo* is a siglum, or abbreviation, and that consequently we must read *extra ordinem.* In L. 9. § 4 D. ad leg. Aquil. (9. 2) the copyist has erroneously assumed that *GUMIL* signified *cum allii,* whereas the § 4. I. de leg. Aquil., and the whole sequence of the law, prove that Ulpian had written *cum milites* [7]).

1) Zeitschr. für Civ. R. und Proc. XX, p. 196.

2) See my observations in the collection. Themis, Rechtskund. Tijdschr.'s Gravenhage, Gebr. Belinfante, 2n collection, V, p. 236, and Eckhardt, l. c. 60 and 61.

3) Vangerow, I, § 23, note No. 4 c.

4) § 8, Const. Omnem reip. nostrae sanctionem.

5) Mommsen, Jahrb. des Gem. Deutschen Rechts, III, p. 9.

6) Cujac, Observ., 4, 31.
See my observations, Themis, 1861, p. 488.

V. For the criticism of the text, the Basilica, and better still, what are called the Ancient Scholies, are of incalculable utility; a utility which even in our day is not sufficiently appreciated. Among these Scholies (*Scholia*) we must concede the higher authority to the extracts of the Index of Dorotheus; because we there find a literal translation (*κατὰ πόδα*), by one of the compilers; that is to say, by a man who has had before his eyes those writings of the jurisconsults which served for the compilation of the Pandects. The same is true of the commentary written by the Antecessor Stephanus, under the title or Ὁ Ἰνδιξ, or Τὸ Πλατος[1]).

Examples: The Basilica (50. 1. 53) prove that the obscure text of the L. 54 pr. D. de Acq. rer. dom. (41. 1) should be thus amended: Homo liber hereditatem nobis acquirere non potest, qui bonâ fide nobis servit; acquiret tamen sibi, si sponte sua sciens conditionem suam adierit. In L. 56. § 1 D. de furt. (47. 2), in the phrase *in simplum videtur quaestio sublata,* we must, instead of *sublata,* which makes the sentence incomprehensible, put *translata*: *δοκεῖ εἰς τὸ ἁπλοῦν ἡ τῆς κλοπῆς ζήτησις κατενηνέχθαι*[2]). In L. 26. § 3 D. de injur. (47. 10) we should read: sed hoc *non utcunque,* sed tunc locum habere potest. Schol. Bas. (60. 21. 25.) *ἀλλὰ ταῦτα οὐχ ὡςδήποτε χώραν ἔχει, ἀλλ' ὅτε χάριν ὕβρεως ταῦτα ποιεῖ.* In the L. 6. § 3 D. de Stat. lib. (40. 7) it should be, non solum autem si *venierit,* haec conditio ad eum transit qui emit (*οὐ μόνον δὲ ἐὰν π ρ α θ ῇ, μεταβαίνει πρὸς τὸν ἀγοραστὴν ἡ αἵρεσις ἀλλὰ καί*[3]). In L. 7 D. de leg. Corn. de fals. (48. 10), it should not be, cum ne quidem *omnino,* but, certainly, cum ne quidem *hominibus* jure Civili neque jure Praetorio, neque extra ordinem computantur. Schol. Basil. *οὔτε κατὰ τὸ πολιτικὸν οὔτε κατὰ τὸν πραίτωρα οὔτε μὴν ἔξτρα οἱ οἰκέται*[4]).

See the remarkable work of L. Heimbach, Ueber den Nutzen der, Besiliken und der sogenannten alten Scholien für die Kritik des Digesten-textes, in the Zeitschrift für Rechtsgesch., II, p. 318 et s.

2) See my observations, Themis 1860, p. 453.

3) Heimb., l. c., 351.
The same, l. c., p. 362.

As to the *interpretation* of the collection of Justinian, it is chiefly necessary to observe the following points.

I. The Pandects, destined, like the Code, to serve as a legal compilation, ought, properly, to contain only those enactments which were still in force, in the time of Justinian. It is, therefore, not surprising, that the compilers should have been authorized to make, in the passages which they extracted from the ancient writings or laws, such modifications, alterations, or additions, as they might think necessary to the end which they sought. It is to this circumstance that we owe many fragments, which in the Corpus Juris are very different from the original text. The passages thus altered are known by the name of *Emblemata Triboniani* [1]). Examples: L. 47. § 1 D. de neg. gest. (3. 5); L. 3. § 1 D. de usufr. accresc. (7. 2), si duo fundi domini proprietatem *tradiderint*, compared with the Fragments Vat. § 80, proprietatem *mancipaverint;* L. 12. § 3. D. de usufr. (7. 1), stipuletur aliquid vel *per traditionem accipiat*, comp. Fragm. Vat. § 89, stipuletur aliquid vel *mancipio accipiat;* L. 49. § 1 D. sol. matr. (24. 3). Fundus aestimatus in dotem datus — ex causa *pignoris* ablatus est, comp. Fragm. Vat. § 94, ex causa *fiduciae* ablatus est.

II. On the other hand, the writings which remain to us from the times before Justinian prove, that, urged by the desire not to suppress more than was absolutely necessary, the compilers have reproduced only portions of certain passages, while omitting the rest; whence it follows that we do not find in these passages the logical sequence which existed in the original text. Compare, for example, the §§ 6 and 7 I. de Atil. tut. (1. 20) with Gaius, I. § 189; the §§ 1 and 2 I. de fidej. (3. 21) with Gaius III. §§ 119 and 120 [2]).

1) L. 1. § 7; L. 2. § 10. C. de jur. enucl. (1. 17.). "Ut si quid in veteribus non bene positum libris inveniatur, vel aliquid superfluum vel minus perfectum est, repleatur — ut hoc videatur esse verum et quasi ab initio scriptum, quod a vobis electum et ibi positum fuerit."

2) These comparisons prove that there is much less of the *emblemata*, than was formerly imagined, and that, regarded from the *practical* point of view which they adopted,

III. With this is connected what is called the double interpretation (*duplex interpretatio*), which occurs where it becomes necessary, in the Justinian compilation, to give to certain words a signification entirely different from that which the author of the passage had originally intended. There are, indeed, instances in which, in cases of this nature, the compilers, instead of changing the words, have, from an excess of scrupulousness, felt bound to preserve them, even at the sacrifice of perspicuity. Examples: L. 63. D. de usufr. (7. 1); L. 39 D. de Serv. praed. urb. (8. 2); L. 11 § 1 D. de publ. in rem. act. (6. 2).

IV. In order to thoroughly understand the bearing of many passages of the Pandects, it is necessary to pay attention to the name of the Jurisconsult and the title of the work whence the fragment is extracted, as well as to the particular subjects to which that work refers. In fact, we know that the compilers have frequently placed extracts in places where they are quite inappropriate; thus giving them an apparent meaning entirely at variance from that which their author had in view [1]). This is especially the case with the *Regulae Juris*, in the last Title of the Pandects; which, unless taken in connection with the fragments from which they are extracted, frequently seem to have an operation much more general than they have in reality [2]). Examples: L. 6 D. de transact. (2. 15) compared with L. 1. § 1 D. Testam.

Tribonian and his fellow-labourers have shewn rather too much than too little respect for the writings of the ancients.

In reference to the recent discoveries in the ante-Justinian field, and their help in the acquirement of a more precise knowledge of the Roman Law, See Edw. Schrader: "Wass gewinnt die Röm. Rechtsgesch. durch Gaius Institutionen?" — an article inserted in the Heidelberg Jahrb. der Lit., and published separately at Heidelberg in 1823; G. Bruns, quid conferant Vat. Fragm. ad melius cognoscendum jus Romanum, Tubingen, 1842, 8vo and Comment. Ost. J. W. Tromp, ad Quaestionem Juridicam in Acad. Lugd. Bat., anno 1835 propositam Annales Acad. Lugd. Bat. 1836.

1) Such laws are styled *leges fugitivae*.

2) Bernardus Henricus Reinoldus, Oratio de legum inscriptionibus (Duisburgi, 1712), p. 188: "Cunctae regulae, ut solenne carmen: in schola, in foro omnibus in ore sunt, numquam spectantibus, unde habeant originem, nec animos advertentibus ad quas, species pertineant."

quemadm. aper. (29. 3) [1]); L. 40 D. de R. I. (50. 17), compared with L. 6 D. de verb. obl. (45. 1) [2]), and with L. 19. 20 D. de aq. pluv. arc. (39. 3); L. 75 D. de R. I., compared with L. 8 D. de coll. bon. (37. 6) [3]); L. 112 D. de R. I., compared with L. 42 § 3 D. de proc. (3. 3); and L. 195 D. de R. I. compared with L. 68 D. de her. instit. (28. 5) [4]).

V. The Pandects contain, also, fragments which contradict each other, or which are irreconcilable with passages of the Code or of the Institutes (antinomiae) [5]); although Justinian was so far misled by faith in the perfection of his work, as to affirm the contrary. When we encounter such *antinomiae,* it is necessary to observe, with an extreme minuteness, — which, according to the suggestion of the Emperor need not exclude even subtlety [6]), — whether these passages do not offer some delicate shade of meaning, which reconciles their apparent contradiction; or, again, if one of the passages should not be considered as completed by the other, so that the apparent general application of the one is, in reality, localized and restricted by the other. This mode of harmonising apparent discrepancies, is styled the *systematic method* [7]).

Examples: L. 51 pr. D. de proc. (3. 3) compared with L. 1, 2 C. de fidej. min. (2. 24); L. 7. § 1 D. de except. (44. 1);

1) Vide *Labittus,* Usus Indicis Pandectarum, placed at the end of the Jurispr. restituta of Abraham Wieling, Amsterd. 1727, and Risch, die Lehre vom Vergleiche (Erlangen, 1856), pp. 108—130.

2) Vide, Gothofred. Comment. in tit. de R. I. L. 40, cited. Sav., Syst. 3. § 112.

3) Cujac. ad lib. III Quaest. Papin. ad. h. l.

4) Sav., Syst. 3, § 118 u.

5) There can be, here, no question of the novellae, the object of which was, in fact, to change the legislation.

6) L. 2. § 15, L. 3. § 15 C. de vet. jur. enucl. (1. 17): "Contrarium autem aliquid in hoc codice positum nullum sibi locum vindicabit, nec invenitur: si quis *subtili animo* diversitatis rationes excutiet: sed est aliquid novum inventum vel occulte positum, quod dissonantiae querelam dissolvit, et aliam naturam inducit discordiae fines effugientem."—"Contrariam autem aliis legibus legem ex his quae in hoc volumine positae sunt, non facile quis repererit, si modo ad omnes contrarietatis fines animum intendere festinet, sed inest aliquid diversum; quod adsumtum alterius generis forte hanc et illam legis positionem apparere faciat."

7) Vide Sav. Syst. I, § 44. Arndts, § 13.

L. 95. § 3 D. de solut. (46. 3) ; L. 3 § 4, and L. 13 pr. D. de min. (4. 4) [1]); and L. 3 and 4, § 2 D. pro suo (41. 10), compared with L. 27 D. de usurp. (41. 3); L. 11 D. pro emt. (41. 4); L. 5. § 1 D. pro suo, and § 11, I. de usuc. (2. 6) [2]).

It sometimes happens, nevertheless, that *one* of the contradictory passages evidently contains a provision, which must be considered as the latest result of the progressive developement of Law; while the *other* has been reproduced by mistake, or perhaps for historic accuracy, in order either to explain the present legislation by reference to the ancient law [3]), or to ensure the application of the latter to legal propositions previously stated. Nov. 89, ch. 7. This method of reconciling contradictions, — which should be employed with the utmost circumspection, — is styled *the historic method* [4]):

Examples: L. 34 pr. D. mand. (17. 1), compared with L. 15 D. de R. C. (12. 1), and L. 11 D. cod.; L. 38 § 1 D. de solut. (46. 3), compared with L. 3 §§ 12 and 13 D. de don. i. v. e. u. (24. 1) [5]).

1) Vangerow, Pand. § 183, note. Keller, § 104, N^{0}. 2. Sav. Syst. VII, § 335.

2) Sav. Syst. I, § 43.

3) The compilers were unwilling to exclude, absolutely, all historic materials. This is proved, — at least in respect to the Institutes, — which, themselves were intended to contain only the law actually in force, (§ 3 Prooem: ut nihil inutile, nihil perperam positum sed quod in ipsis rerum obtinet argumentis accipiant), by § 5 eod., § 1 de testam. (2. 10) (sed ut nihil antiquitatis penitus ignoretur), § 1 de fideicomm. lib. (2. 23), the pr. and §§ 1 and 2 de succ. lib. (3. 8). As to the Pandects, the same thing results, from (among others) L. 2 ad Sct. Vellej. (16. 2), and L. 1 D. de test. mil. (29. 1).

4) Sav. l. c., p. 276 et s. Arndts, l. c.

5) Sav. Syst. IV, p. 592 and T. I, § 45. Vide Carl Salkowski, Zur Lehre von der Novation. (Leips. 1866), p. 55 et s.

SECTION V.

§ 12. WORKS RELATING TO THE PANDECTS.

Vide: Vangerow, Lehrbuch der Pandekten, I, § 7—10.
Keller, Pand. Introd. p. 33—49.,
Windscheid, Lehrbuch des Pandekten-Rechts, § 12.
Arndts, Lehrbuch der Pandekten, § 16—22.

BOOK FIRST.

GENERAL.

OF RIGHTS IN GENERAL.

CHAPTER I.

Rights.

§ 13. RIGHTS IN GENERAL.

That which is called "Right" is the universal conviction which leads all the members of the same community to recognise and to adopt one uniform rule as the guide of their actions [2]).

This conviction manifests itself either by Law or by Custom.

1) It is the especial merit of the Historical School, to have disseminated just ideas as to the origin of Law. Vide Savigny, Vom Beruf. § 2; Puchta, Vorlesungen, § 10: "The members of one and the same nation are united among themselves by a common tendency of mind. (national character, or nationality). Certain views and certain convictions, or at least certain aptitudes for acquiring them, and certain predispositions, are innate with them, for the sole reason that they are members of the same nation. Among these are certain legal opinions or convictions."

2) Keller, Pand. § 1: "Legal notions commence by being instinctively observed, in the relations of life, and act upon those relations as a natural force; exactly as is the case in regard to language and manners. But, afterward, organized Human Society draws them within the sphere of its conscience and of its freedom of action, and, by its creative power, gives them a positive form and a determinate efficacity."

§ 14. OF LAW.

By "law," is meant a declaration of the public authority, in reference to that which it wills shall be obeyed, and be applied as a governing rule. The exposition of the diverse forms in which the will of the Legislator manifested itself, at different epochs of the Roman Government, belongs to the History of Law.

§ 15. CUSTOMARY LAW. (COMMON LAW).

Customary law, is the popular conviction as to what *ought* to be the law or governing rule of action, as this conviction is manifested by a constant and uniform application [1]).

[1] L. 32, § 1, D. de Leg. (1. 3) Inveterata consuetudo pro lege non immerito custoditur (et hoc est jus, quod dicitur moribus constitutum). Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod judicio populi receptae sunt: merito et ea quae sine ullo scripto populus probavit, tenebunt omnes; nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur. L. 35. D. eod. "Sed et ea quae longa consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio, non minus, quam ea quæ scripta sunt jura, servantur." L. 36, L. 40. D. eod. § 1. I. de jur. nat. gent. et civ. (1. 2). Nov. 89, cap. XV. Formerly, legislation was regarded as the only source of law, and every other mode of formation of law as an infringement of the public authority, without the express sanction of which, custom must be utterly powerless. "Customary-law" was consequently understood to mean such rules as had their origin in an uninterrupted usage, and their justification in the will of the state. To this erroneous notion must be attributed the care taken by modern legislators to check a development which, in their eyes, was completely irregular. (Vide the Civil Code Autr. § 10, in conformity with art. 3 of the Netherlands' law, containing general provisions respecting the legislation of the kingdom; and the General Code of Prussia, — Publikations Patent, § I, § 6 and 7).

The historic school was the first to thoroughly analyse the essence of customary-law, and explain satisfactorily its character and meaning. Vide, particularly, Hugo, (Civ. magaz. IV, 89 and v.) in an interesting and intelligent essay entitled "Die Gesetze sind nicht die einzige Quelle der Juristischen Wahrheiten". ["Laws (codes), are not the only source of juridical truth".] Puchta, das Gewohnheits-Recht, 1832, 1837.

According to the Roman system, the following conditions are requisite for the existence of customary-law.

First: It is requisite that the custom should be founded upon a consciousness of the necessity for a law. (opinione necessitatis.) If there is merely a purely accidental repetition of acts, — not founded upon a conviction that they ought to be thus, and ought not to be otherwise, — then there is custom, but no customary-law. [1]).

Second: It is requisite that the custom shall have existed for a certain length of time. (Longa, inveterata, diuturna, antiquitus probata et servata tenaciter consuetudo, longaevus usus. L. 32. § 1. L. 35, D. de legg. (1. 3.) L. 2. 3. C. quae sit long. cons. (8. 53). But it is impossible to declare, in this respect, a fixed rule, capable of determining, precisely, either the exact time, or the exact number of repetitions required; and it is to the judge, that must be left the duty of deciding both these points [2]).

Sav. Syst. I, § § 7, 12, 18, 25, 28. — The theory was nevertheless, carried to an extreme in the other direction, when it was assumed that custom was merely a means of recognising the Law: whereas it is rather the form in which the law makes itself known. In fact, as legislation cannot become law except by publication, neither can the popular conviction become so, except by being manifested in the relations of life. Kierulff, Theorie, p. 9, note. Unger, Syst. des österr, allg. Priv. R. I, § 5. Windscheid, Paud. § 15, note 2 (Suffragio populus voluntatem suam declaret, an *rebus ipsis et factis*).

Professor Opzoomer, at page 15 of his commentary upon the laws of the Netherlands, containing a general summary of the legislation of the kingdom, assuming, as a principle that the legal conscience of the People finds expression in the utterances of the Legislator, does not admit that any other voice has a right to be heard; — but it may be answered, that there will always elapse a long time before the convictions of the people become known to the legislator, and that the latter is not always a free agent; and that, consequently, if customary-law be not recognised, the popular legal convictions may remain far too long, without finding authentic utterance. Opzoomer, indeed, has felt this difficulty and suggested a remedy. But even supposing that this remedy were as easy of application as he imagines it to be, it is still true that it has not yet been admitted into the Pharmacopaea Belgica. Nevertheless, Opzoomer approves of the law which henceforward has, pitilessly, deprived custom of existence!

1) Kierulff, l. c., p. 9. Unger, l. c., p. 39.

2) Formerly it was the usage to apply, by analogy, the rules of prescription (limitation of time); — consuetudo legitime, canonice praescripta. Kierulff, p. 11. — Puchta, Vorles, § 12. — Windscheid, § 16, note l. The provision of art. 7 of the Project.

Third: It is requisite that the custom shall have been exercised in a uniform manner, and not have been contradicted or neutralised by any contrary usage; [1] — unless, indeed, the latter shall have been purely accidental. (Tenaciter, jugiter observata. L. 3. C. quae sit long. cons. L. 3. C. de priv. schol. (12. 30).

Fourth: It is requisite that the conviction upon which the custom is founded be not the result of a mere error, which, with proper attention, would have been promptly detected. L. 39 D. de legg. "Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet." [2].

The custom by which customary-law is manifested (or established), may emanate directly from the people themselves, when the uniformity of their acts shews that they govern their relations of right, (legal relations), always in the same manner; or this custom may display itself either in judicial decisions, or in the opinions of jurisconsults; inasmuch as these may be considered the true representatives of the legal sentiment of the nation, as being the living organs of its legal conscience.

The law thus created by jurists is not the result of scientific research, but rather one of the various forms of customary-law [3].

Custom may be proved, in part, by individual observation, — each person being able to establish the continuous practice of certain similar acts; — and in part by credible testimony of its actual existence [4].

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of 1820 was just: "The appreciation of the presence of these two conditions is entrusted to the judge, who must decide according to the nature of the different cases."

1) L. 34. D. de R. I. (50. 17). Si neque regionis mos appareat, quia varius fuit.

2) Sav. I, 174. Windscheid, § 16, note 3. The explanation which Kierulff (p. 12) gives of this text, seems to me forced. As to the condition required by canon Law, ut consuetudo sit *rationabilis*, see Sav. I, 176; Kierulff, p. 13, and Windscheid, note 5.

3) This is termed "Jurists-law" in the restricted acceptation of the phrase. Upon jurists'-law in general, see Puchta, Vorl., I, 42, and in the contrary sense, von Scheurl, Beiträge I, 121. The latter remarks, justly, that science, as such, is not a source of law worthy to be placed in the same line as customary-law (or right).

4) L. 34. D. de legg. "Cum de consuetudine civitatis vel provinciae confidere quis videtur, primum quidem illud explorandum arbitror, an etiam contradicto aliquando judicio consuetudo firmata sit." Among the proofs which tend to establish the existence of custom, must be included the "*Weisthümer*," — i. e. the decisions of the ancients of a locality as to its usages, — and the "*Turbes*," or legal adages and current proverbs.

The rules of procedure, relative to the necessity and the manner of alleging and proving, judicially, the *facts* upon which it is intended to rely, are distinct from the proof of custom no less than of law; — thus the judge cannot recognise a fact which has not been duly stated or proved, before him, by one or other of the parties, — but he is bound, on the contrary, to pay attention to customary law, and to apply it *ex officio*, even though the parties may neglect to invoke it. [1])

The force of customary-right is fully equal to that of written law. L. 32. § 1. D. de legg. (1. 3). It may perfect, modify, or indeed abrogate the existing law; [2]) even though that law should, in advance, have declared null and non-obligatory any custom to the contrary which might be adopted. [3]) In fact the written law cannot prevent a right from establishing itself as such; and consequently any provision which invalidates, by anticipation, a future custom, is as inoperative as one which should, in the same manner, prohibit a future enactment.

§ 16. ABSOLUTE, OR IMPERATIVE LAW:—COMPLEMENTARY, OR REGULATORY LAW. (ABSOLUTES, GEBIETENDES RECHT:— VERMITTELNDES, ERGÄNZENDES RECHT; AD JUS, — AD VOLUNTATEM PERTINENS. L. 12. § 1. D. DE PACT. DOT. (23. 4.)).

By imperative law are meant the rules, which, founded upon public

1) Sav. I, 188. Windscheid, § 17. Vangerow, I, § 17. Kierulff, l. c., p., 14, says, very justly, "custom, as such, is a fact, but it is not so with customary-law. The latter is not strictly a fact, but only finds in the fact its expression, or manifestation."

2) This rule is contradicted, only in appearance, by L. 2 C. quae sit longa cons.: Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque *adeo sui* valitura momento, ut aut rationem vincat aut legem. This law only expresses the difference between custom as a fact, and customary-law as an expression of the general will. See Puchta, Vorles, I. 451; and other less plausible explanations in Sav. Syst. II, appendix I. Vangerow I, § 16, Kierulff, l. c.

3) Windscheid, § 18.

order, — the pecuniary or administrative interests of the State,— or good morals, — leave no room for the exercise of individual will. They are enforced, whether individuals desire it or not. Jus publicum, privatorum pactis mutari non potest. L. 38. D. de pact. (2. 14). Pacto jus publicum infringi non potest. L. 20. pr. de relig. (11. 7). Quoties pactum a jure communi remotum est, servari non oportet. L. 7. § 16. D. de pact. L. 42. D. eod. L. 12. § 1. D. de pact. dot. (23. 4).[1]) Complementary, or regulatory law, on the contrary, leaves an ample field for exercise of individual will, and operates only when the parties interested have neglected to determine their respective legal rights to their full extent.

1) Ex. ne dolus praestetur, ut tutores aneclogisti sint, ne divertere liceat, ne quis Falcidia utatur. L. 23. D. de R. J. L. 5. § 7. D. de adm. tut. (26. 7). L. 15. § 1. D. ad. leg, Falc. (35. 2). L. 5, 6, 14, 15, 16, D. de pact. dot. (23. 4). L. 13. § I. D. de Pollicit. (50. 12). "Conditiones donationibus adpositas, quae in Rempublicam sunt, ita demum ratas esse, si utilitatis publicae interest: quod si damnosae sint, observari non debere: et ideo non observandum, quod defunctus, certa summa legata, vetuit vectigal exerceri: esse enim tolerabilia, quae vetus consuetudo comprobat." See art. 187, 195, 470, 1112, 1200, 1223, 1556, 1557, Netherlands' Civil Code; and art. 14, of the Läw containing general provisions.

CHAPTER II.

The idea of rights, and their divisions.

§ 17. WHAT CONSTITUTES A RIGHT.

A Right in its subjective sense, is the power [1]) given, by

1) From the fact that a right is a power, it follows that no conception of it can be formed except as attached to a person. Windscheid, Pand. § 49, note 2, and other authors whom he cites, reject, in the vacant inheritance, the fictitious personality. Among other reasons, they rest upon the fact that the law possesses the absolute power of prolonging the existence of an assemblage of patrimonial rights, without any positive necessity for the presence of a subject to govern that assemblage. But Kuntze objects, very justly, (die Obligation, § 95), that, even in the domain of pure reason, arbitrary-absolutism cannot reign, and that even the jurisconsult and the legislator must respect the laws of logic. If it be, still, asked, why the rights and the obligations which were attached to a determinate subject cannot continue to exist in their collective unity, after the disappearance of this subject, (person,) [Windscheid, Actio des Röm. Civil-Rechts, § 234], I answer that if we admit this possibility, for the sole reason that the patrimony has once had a subject, this is, in reality, equivalent to a recognition of the fiction of a continued personality. Finally, Windscheid, starting from the principle, that *a determinate subject* is not essential to the existence of a right, deduces thence the conclusion that there is no necessity for a subject at all! But, Unger (Krit. Ueberschau, VI, 160), wittily asks him what would be said to the following specimen of reasoning :—"Inasmuch as it is indifferent by what actor this part may be played, there is no need of any actor whatever for this part." Windscheid is, also, sharply attacked by Ihering, Jahrb. f. d. Dogmat., I, 28, note 9. Our assumption that an *existing* right cannot be imagined except as attached to a subject or possessor, is not contradicted by the circumstance that it is sometimes uncertain, and not to be known until subsequently, upon which person, among several, a right will devolve. L. 70, § 1. D. de usufr. (7. 1): "pondere, eorum dominium, ut si summittantur, sint proprietarii, si non summitantur, fructuarii. Quae peculiari nomine servi captivorum possident, in suspenso sunt." L. 22. § 3. D. de capt. (49. 15).

right in the objective sense to the will of a person [1]), relatively to a certain object. To such a right there corresponds, if not a positive obligation on the part of another specified individual, at least a negative obligation [2]) on the part of every one, not to disturb the possessor of the right in the exercise of the power conferred upon him by its possession. (by the objective right.)

1) Fitting, (die Natur der Correalobligation, p. 28, note 31), protests against this definition. He asserts that it can be applied only to real rights, and to those derived from the *potestas*, and not in any way to family-rights; because the wife, for example, has no power over her husband, nor children over their parents. I do not perceive the grounds of this objection. When the law recognises certain rights on the part of children as towards their parents, and of the wife as towards her husband, is not this a power created and admitted by the law, in favour of the one or of the other? In regard to obligations, Fitting observes, that only that which is objective and durable can be the object of power and of submission, and that it cannot apply to that which is fugitive and changeable; as for example an action by a man. But, it must be observed that the question is not as to the empire of physical force, but in reference to a power of a special nature, of which the effect, — assured by legal prescriptions, — is to regulate and limit, in different ways and according to the difference of its objects, the subjective will of others. This remark suffices, also, to answer this other objection of Fitting, that the idea of power implies, necessarily, that the creditor should be able directly to force the debtor to fulfil his obligation. He objects, still further, that no constraint or power can be conceived in regard to natural obligations; but this is inexact, inasmuch as natural obligation, according to the Roman Law, has, undeniably, several effects; and a right does not the less exist, because political or legislative reasons cause its exercise to be limited. — A debtor, for example, who becomes a creditor by the operation of a natural obligation, has THE RIGHT to enforce his claim by way of compensation: Is not this is a power which is accorded him by *objective right?* The definition given by Fitting himself; — "We term right, in the subjective sense, every power recognised by right in the objective sense," — signifies, merely, that a right *is* a right. Vide, Sav. Syst. I, 7; Kuntze, l. c., § 2 et s.; Windscheid, § 37, note 1; Arndts, § 21, note l. (3.)

2) A right, to which corresponds the negative obligation of every one to respect it, is called an absolute right; that to which corresponds the obligation of a specified person, to do or to forbear from doing some act, is a relative right. See Unger, § 59. Arndts, § 21, note 2.

§ 18. DISTINCTION OF RIGHTS, ACCORDING TO THE OBJECT UPON WHICH THE WILL MAY ACT.

The will of a person directs his power, *First:* directly upon a physical object in nature, exterior to himself. When this is the case, one is said to have a right over the thing. (*jus in re*). Among rights of this kind, the foremost place belongs to property; which, by its nature, submits something completely to our power. There are also other rights, of lesser extent, by operation of which we exercise our power upon something of which another is proprietor; without, however, controlling it in every respect or from every side. (*jura in re aliena*). Or, *Second:* the direction of the will consists in exacting that some particular person shall perform, or shall forbear to perform, some particular act; and so that to this performance or this forbearance shall attach an interest appreciable in money. Rights of this kind are termed *debts* or *obligations.*

These two categories of rights are comprised in the generic name of *patrimonial rights,* or *rights of property;* and both have this in common, that they are capable of inheritance; by which must be understood the entrance of a person upon the general rights and obligations of another person, whose natural existence has ceased. (Hereditary right.) To patrimonial rights, properly so called, are opposed family ties, which being founded upon the permanent and personal relations of man to man, and consequently of a moral rather than a legal nature, [1]) are nevertheless recognise as obligations

1) Windscheid, § 41. "The family relation is not exclusively, nor even principally, a question of legal right. It derives its rules directly from the moral law. It imposes duties without conferring rights, and those duties involve the maintenance rather of a certain sentiment than of a specific line of external conduct. The law finds the family thus governed, and seeks, as far as possible, to procure an external sanction for the moral rules which, in the family, manifest themselves spontaneously. So far as it thus commands one to submit his own will to that of another, it may be said to confer a right upon the latter. But such a right is, still, very different from all others. It is derived from a duty. Duty is the mainspring, — the right is only a consequence. No other right presents this peculiarity; — none is born of duty; — all, on the contrary, exist before duty, and call it into being.

or relations of right, and are regulated by legal prescriptions; and this, especially, (among other reasons) because of the important and characteristic influence which they exercise upon the patrimony.

It is upon this diversity of rights and of relations, that is founded the system of private rights generally adopted at the present day; and which presents the four following principal divisions.

I. Rights as to things. (Real rights.)
II. Right of obligations.
III. Family Rights.
IV. Hereditary Rights.

§ 19. OF RIGHTS GENERALLY, IN THEIR RELATION TO OBJECTIVE RIGHT.

Most rights are founded upon a general rule or prescription, which determines, in advance, the conditions to which the particular rights and capacities to be conferred are subjected. But it may also happen, that, by, or on behalf of the public authority, rights are conferred, (or, sometimes, obligations or penalties imposed), which are not founded upon any general legal rule, but are granted rather for some special reason; —ordinarily as matter of favour. Such rights are termed "privileges," [1]) in the restricted sense of the word.

Care must be taken not to confound these with privileges in the extended acceptation of the term; — that is to say rights which, strictly speaking, owe their origin to a general rule or prescription, but a prescription which, being founded upon special

L. I. § 2. D. de const. Princ. (1. 4). Plane ex his quaedam sunt personales, nec ad exemplum trahuntur. Nam quod princeps alicui ob merita indulsit, vel si quam poenam irrogavit, vel si cui sine exemplo subvenit: personam non egreditur. L. 17. § 5. D. ad mun. (50. 1). L. 38. pr. D. Ex quibus causis maj. (4. 6). Gellius, *Noct. Att.* (X. 20). "Non sunt generalia jussa neque de universis civibus, sed de singulis concepta, quôcirca potius privilegia vocari debent, quia veteres priva dixerunt, quae nos singula diximus."

motives of utility [1]) or necessity, creates, for certain categories of persons, of things, or of circumstances, a law derogatory to the common right, and applicable only to those persons or those things which belong to these exceptional categories. These departures from general rule were termed, (in contradistinction to the jus commune) *Jus singulare* or *proprium ;* and the subjective rights which sprung from them were called *Jura singularia.*

Privileges were divided into Privilegia personae, rei et causae, according to their applicability to certain persons, things, or circumstances. L. 1. § 43. D. de aqua (43 20). Et datur (jus aquae ducendae) interdum praediis, interdum personae ; quod praediis datur extincta persona non extinguitur : quod datur personis cum personis amittitur. Ideoque neque ad alium dominum praediorum neque ad heredem vel qualemcunque successorem transit. L. 196. D. de R. I. Privilegia quaedam causae sunt, quaedam personae ; et ideo quaedam ad heredem transmittuntur, quae causae sunt : quae personae sunt, ad heredem non transmittuntur. L. 68. D. eod. In omnibus causis id observatur ; ut ubi personae conditio locum facit beneficio, ibi deficiente ea, beneficium quoque deficiat, ubi vero genus actionis id desiderat, ibi ad quemvis persecutio ejus devenerit, non deficiat ratio auxilii.

The peculiarity of the jus singulare is not that it was created only for certain persons, certain classes, or certain circumstances, but in its departure from general principles, and from juridical logic or theory. (ratio juris). Sav. Syst. I, 61. Thibaut, Vers. II, 271. L. 16. D. de Legg. "Jus singulare est quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est." Wächter, Handb. des im Königr. Wurtemb, gelt. Priv. Rechts. II. 15. Kierulff, l. c., p. 47. "The jus singulare is an infraction of the logic of the Law, inasmuch as it infringes the provisions of law as to some particular matter, to which, logically, they should be applied." Hence the L. 14. D. de legg. (1. 3). Quod contra rationem juris receptum est, non est producendum ad consequentias. See, as to this passage, Keller, § 7. Windscheid, § 29, note 3.

CHAPTER III.

OF PERSONS, OR SUBJECTS OF RIGHTS.

SECTION I.

Of persons in general.

§ 20. OF PERSONALITY.

In its strict and technical application [1]), the word *person* designates every being capable of having rights [2]), — and the term *personality* (personam habere), is applied to the capacity of asserting the will, within the limits fixed by objective right.

By nature, every man is capable of having rights, [3]) and man, only, has this capability; — but positive law sometimes refuses to concede personality to certain men, and, again, accords it, frequently, to other than human beïngs [4]).

1) In a more extended sense the word *Persona* is used as the synonyme of *Homo*. Thus in the Summa de jura personarum divisio, in Gaius I, § 9. L. 215. D. de V. S. (50. 16). L. 22. D. de R. J. (50. 17). In *personam servilem* nulla cadit obligatio. — See, on the contrary, a passage of Theophilus, ad § 2, I. Quib. mod. toll. obl. (3. 29); passage of which Windscheid, § 49, note 3, has lost sight: "*Ἀπροσωπος παρα τοῖς ὁ δούλος*," where the sense cannot be the same as in the other two passages: *τοῦ οἰκείου χαρακτηρίζεται δεσπότου.*

2) Kierulff, § 6: "Consequently, is subject juridical, the being who, according to Law, has the capacity to will; that is to have rights."

3) Quod ad jus naturale attinet, omnes homines aequales sunt. L. 32. D. de R. I. (50. 17).

4) Brinz, Lehrb. d. P. § 15, uses the following original-expressions: "Wir haben keine unpersönliche menschen mehr, dagegeu persönliche Nicht-menschen oder nicht-

As this extension of personality is never granted but for legal purposes, the persons thus created, who exist only by law, — and, it may be added, by reason, and in view, of rights to be exercised,) — are styled legal, or juridical persons. [1]) Moralische, [2]) fingirte, mystische Personen, — être moral; — zedelijk lichaam; [3]) zedelijk persoon.

Human persons, on the contrary, are called *natural* or *physical.*

menschliche Personen." (We have no more unpersonal human beings; but personally non-human, or non-humanly personal).

1) Windscheid, § 49, note 3, criticises this expression, "because", says he, "man also borrows from law alone his juridical capacity." But here is the difference: The juridical person owes to the Law his origin and his existence, while the natural, or physical person is indebted to it for nothing but the recognition of his existence. Kuntze. Kritische Heidelb. Zeits. V, 361, says, justly; "Natural persons carry their own proper powers within themselves; — their legal capacity is but one of the aspects of their being, and is at the service of the totality as a human creature." For the rest, his distinction between what he calls civilistische-central, and civilistische kollektiv-Persönlichkeiten, (distinction which Windscheid, also, seems to adopt), confounds two different species of corporations: the one of private, the other of public law. Sav. (Syst. II. § 85) had already anticipated this confusion. The Romans have no recognised expression for what we term juridical persons. They say "Personae vice fungitur"; they use *singularis persona* in distinction from *populus, curia, collegium, corpus.* L. 22. D. de fidej. (46. 11). L. 9. § 1. D. quod met. caus. (4. 2).

2) Austrian Code, (Allg. B. G.) in marg. §§ 26 and 529. Also Prussian Code. (Pr. L. R.) Part. II, Tit. VI, §§ 13 and 81.

3) This designation, employed also in the Netherlands' Code, is properly rejected by Savigny, II, 241.

SECTION II.

Of natural persons.

§ 21. THE COMMENCEMENT OF NATURAL PERSONALITY: CONDITIONS REQUIRED.

A natural person was assumed to exist, from the moment when an infant issued from the womb of his mother, living and in human form.[1]) The law did not ask how he came into the world, [2]) nor even whether he was capable of living. (viable). [3]) *).

1) L. 1. § 1. D. de insp. ventre (25. 4). Partus antequam edatur, mulieris portio vel viscerum est. L. 9. S. I. D. ad Leg. Falc. (35. 2). Partus nondum editus, homo non recte fuisse dicitur.

2) L. 141. D. de V. S, "Etiam ea mulier, cum moreretur, creditur filium habere, quae exciso utero edere possit." L. 12. pr. de lib. et posth. her. (28. 2). On the other hand, it is required, "ut vivus ad orbem totus processerit ad nullum declinans monstrum vel prodigium. L. 3. C. de posth. (6. 29).

3) L. 12. D. de stat. hom. (1. 5). L. 3, § 11. D. de suis et leg. her. (38. 16). Paulus 4, 9. §§ 1 and 5. Among modern authors, Puchta, (Pand. § 14, and in Schneiders' Jahrb. 1840, p. 680). maintains that viability is an essential condition. But this is an error. The fragments which he cites, concern only paternity and the jus liberorum. The L. 2 and 3 C. de posth. hered. (6. 29), require only that the child be vivus perfecte natus licet illico postquam in terra cecidit vel in manibus obstetricis decessit. The L. 2. C. laud. refers to the case of a child who comes into the world before his time and lifeless; and it is to this case that the dictum of the jurisconsult Paulus applies: "Abortus vel abactus venter, partum officere non videtur," 4. 9. § 6. Sav. Syst. II, 386, et s. Vangerow, I, § 32. In the legislation of Austria, Prussia, of the Netherlands, as also in the Dutch project of 1820, art. 76, the viability of the child is not required. Sav. l. c., p. 413. Unger, I, § 25. Voorduin, I, 269—271, II, 9. To the contrary, Vide Code Nap., art. 314, 725, 906.

*) Note by the Translator. The rule of English law is the same. It is sufficient that the child is born alive, even though he die on the instant. Thus, where a

Before his birth, therefore, a child was not a subject of rights; but if, eventually, he was born alive, he was regarded (in so far as this fiction might be advantageous to him), [1]) as having existed from the moment of conception; [2]) — and, in fact, various measures were prescribed by law for the protection of his eventual interests [3]).

§ 22. THE END OF NATURAL PERSONALITY.

The legal capacity, and consequently the personality, of natural persons was ended by death. The death of a person, when it was to be made the foundation of a right, had to be proved, like any other fact. (Nov. 117. Cap. XI.) It was originally only by custom, — since confirmed, in various instances, by modern legislation, — that a presumption of death was introduced, in the case where a person had remained absent during a certain period of time, without any news being received of either his life or his death. That which is occasionally found in the Roman Law, [4])

Husband claims, by "the courtesy of England", an estate for life in the lands of his deceased Wife, it is sufficient that the Wife has brought forth a child actually living at the moment of birth; although it lived but an instant, or was even incapable of living longer.

1) L. 231. D. de V. S. "Quod dicimus eum, qui nasci speratur, pro superstite esse, tum verum est, quum de ipsius jure quaeritur: aliis autem non prodest, nisi natus." L. 7. D. de Stat. hom. (1. 5). L. 48, § 5. D. de Furt. (47. 2). Applications of this rule occur in L. 26. D. de Stat, hom.; in the Title of the Dig. de Ventr. in poss. (37. 9); In L. 20. D. de tut. et cur. dat. (26. 5); and in L. 2. § 6. D. de excus. (27. 1).

2) It is not accurate to say: "The child of which a woman is pregnant, is reputed already born"; for it would thence result that, from the bare fact of being conceived, he could at once acquire; on the condition, that subsequently, should he come dead into the world, he would lose again that which he had previously acquired. This is by no means so. [Vide L. 7. pr. D. de reb. dub. (34. 5); L. 129. D. de V. S. „ Qui mortui nascuntur, neque nati neque procreati videntur; quia numquam liberi appellari potuerunt".] This idea is better expressed in L. 3. D. Si pars her. pet. (5. 4). Antiqui libero ventri ita prospexerunt, ut in tempora nascendi omnia ei jura integra reservarent. Windscheid, § 52, note 5. Opzoomer, upon art. 5, of the Netherlands' Civil Code. This author refers, very justly, to the provisions of the Prussian Law. Pr. L. R., Part. I, Tit. I, § 12.

3) Vide art. 403, Netherl. Civ. Code.

L. 56. D. de usufr. (7. 1). L. 8. D. de usu et usufr. (32. 2). L. 23. pr. et § 1.

respecting the age of one hundred years, cannot be regarded as forming a general and legal presumption.

The moment of death, or the pre-decease of the one of two persons, had also to be proved, in cases where the existence of a right depended upon one or other of those circumstances. In the absence of proof, one person was not presumed to have survived another.[1]) On the other hand, proof of death was not required, when it sufficed for the solution of a question, that one person had not survived another [2]), — or where the declared intention of him who had desired to confer a right upon another, was opposed to such proof. [3])

The general rule respecting proof of pre-decease admitted but one exception; — which was when parents and children met their death by accident, and from the same accident. — In that case, — (except as to the heritable rights of the patron or lord), children under the age of puberty were presumed to have died before, and those above that age to have died after their parent. This presumption, was rigorously restricted to this one and sole case, and admitted of no extension [4]). L. 9. § 4; L. 9. § 2. D. de rebus

C. de SS. Eccles. (1. 2.). Vangerow, § 33, obs, 1. As to the origin and development of customary-law concerning absent persons, see Bruns, Jahrb. des Gem. Deutsch Rechts. I., 30; who shows why legal presumptions were less necessary among the Romans, than since the formation of a theory of proof, based upon fixed principles, and limiting the power of the Judge. See also Windscheid, § 53, note 1.

1) L. 34. D. ad Sct. Trebell (36. 1). L. 9. § 3. L. 16. § 1. L. 18. pr. D. de reb. dub. (34. 5). "In quibus casibus si pariter decesserint, nec appareat, quis ante spiritum emisit, non videtur alter alteri supervixisse."

2) L. 32. § 14. D. de don. i. v. et ux. (24. 1). Ait enim Oratio, si prior vita decesserit, qui donatum accepit: non videtur autem vita prior decessisse, qui donatum accepit, cum simul decesserint. L. 8. D. de reb. dub. L. 26. D. de m. c. d. (39. 5).

3) In L. 9. pr. D. de reb. dub. (On the text of this law, see Arndts, § 27, note 2.) the jurisconsult founds his argument upon the intention of the testator, who desired, in any case, to devolve both estates upon the person having the gift over. In the same way, in L. 9. § 3. D. eod.: where it was intended to leave the dower to the wife only in case it should accrue to her advantage after dissolution of the marriage; and again, in L. 17, § 7 D. ad Sct. Trebel; as to which see Kierulff, I, 91.

4) Some have sought to extend this presumption to other persons and other cases; but this is an error. In fact, in the first place, there is question here of a *jus singulare;*

dab.; L. 23. L. 22. D. eod. "Cum pubere filio mater naufragio periit: cum explorari non possit, uter prior extinctus sit, humnius est credere, filium diutus vixisse." L. 26 pr. D. de pact. dot. (23. 4).

and moreover, there is not, in case of natural death, a parity of motives for departing from the general rule. Vangerow, § 33. obs. 1; Windscheid, § 53. 4. The Prussian, L. R., I. § 39, rejects the presumption, and requires, in every case, proof of the prior decease. Likewise the Austrian Code. (A. B. G. § 25). The Code Napoleon, on the contrary, (art. 720, 721 and 722), contains a system of presumptions, no less arbitrary than incomplete, and which the Netherlands' legislation has done well not to reproduce. Vide art. 878 Code of the Netherlands; which is nevertheless, superfluous on the one hand, and far from precise on the other.

SECTION III.

Qualities and attributes which affect, in a general manner, the legal status of natural persons.

§ 23. OF THE STATUS, AND OF THE CAPITIS DIMINUTIO BY WHICH IT MIGHT BE MODIFIED.

Although all men, — with the exception of slaves, whose legal status we have not now to consider, — are capable of having rights, the extent of this capacity is, nevertheless, far from being the same for all. We have first to consider the *status* of the Romans, and the *capitis diminutio* by which it might be modified. [1])

By *status*, when they use the word in the acceptation of a personal attribute, the Roman jurisconsults mean the place and the position which a man occupies relatively to other men. [2]) From this point of view, we find the following distinctions: I. Free men and slaves (liberi, servi). II. Citizens and strangers. (Cives, peregrini). III. Independent persons and persons subject to the control of others. (Sui juris, alieni juris). pr. J. de jur. pers. (1. 3). L. 1. pr. D. de his qui sui vel alieni juris sunt. (1. 6).

In like manner there were three kinds, of the capitis diminutio: I. The grand, (*maxima*), which consisted of the loss of liberty: II. The lesser or intermediate, (*minor* vel *media*), which involved the loss of citizenship; (civitas): III. The least (*minima*), which destroyed the ties of agnation [3]). L. 11. D. de căp. min.

1) As to the notion to be formed of this, See Sav. II, 443. Von Scheurl, Beitr.,
2) Savigny, l. c., p. 454.
Vangerow, I, § 34. Arndts, § 28, note 4.

(4. 5) : "Capitis diminutionis tria genera sunt : — Maxima, Media, Minima. Tria enim sunt quae habemus : libertatem, civitatem, familiam. Igitur, cum omnia haec amittimus, hoc est libertatem, et civitatem et familiam, maximam esse capitis diminutionem : cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis diminutionem : cum et libertas, et civitas retinetur, familia tantum mutatur, minimam esse capitis diminutionem constat." § 1 — 3. J. de cap. dim. (1. 16).

The capitis diminutio affected : I. Him who was adopted by one of his relatives in the ascending line. (plena adoptio). L. 10. C. de adopt. (8. 48). II. Him who from being sui juris, became alieni juris, by reason of legitimation or arrogation (legitimatio, arrogatio). § 3. I. de cap. min. L. 2. § 2. D. eod. III. Children who passed from one family into another, conjointly with the person legitimated or arrogated. L. 3. pr. D. eod. [1]) IV. Him who became paterfamilias by emancipation [2]) L. 3. § 1. D. eod.

Anciently this cap. dim. minima had important legal consequences ; [3]) the chief of which was the destruction of all family-rights and all the capabilities attached to agnation. [4]) But after

"Liberos, qui adrogatum parentem sequuntur, placet minui caput, cum in aliena potestate sint et cum familiam mutaverint." Undoubtedly, this text should be read ; "cum in aliena potestate sint, et *cum eo* familiam mutaverint." They suffered a cap. dim. because, being in the power of another, they entered, necessarily, (with their father) the new family. Basil. 46. 2. 2. *Ἐναλάσσουσι γὰρ τὴν φαμιλίαν ἄλλου γινόμεναι ὑπεξούσιοι σὺν τῷ πατρί*

2) But not if he became paterfamilias by the death of his father, or in some other way. L. 195. § 2. D. de V. S. Nam etsi patrefamilias mortuo, singuli singulas familias habent, tamen omnes qui sub unius potestate fuerunt, recte ejusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt. Nov. 81. Cap. 2.

3) Personality was, to a certain extent, different, accordingly as an individual belonged to this or that family. As von Scheurl says (Beitr. I, 235). Every cap. dim. is "An entire loss of personality, as regarded by private-law." This explains, among many other phenomena, the extinction of regular personal servitudes, (Paul. III. VI. C.) changed by Justinian in L. 16. C. de usufr. (3. 33) ; and also the extinction of creditors' claims by the cap. dim. min. of the debtor, to which the pretorian law had been opposed by means of the restitutio in integrum. L. 2. § 1. D. de cap. min. (4. 5). Gai. 4. 38.

4) Also, among others, of the legitimate guardianship of agnates (legitima agnatorum tutela). L. 1. pr. D. de cap. min. "Tutelas etiam non amittit capitis minutio, exceptis

the assimilation of agnates and cognates, by Novel. 118, it operated only in those cases where, as in adoption, the right of cognation was a consequence of the agnation. L. 1. § 4. D. unde cognati. (38. 8).

§ 24. OF CIVIL HONOUR. (EXISTIMATIO).

By "honour" is meant the possession of personality, entire and intact; and in so far as the enjoyment of civil rights is dependent thereupon, it is not improperly, named "*civil honour*" [1]). It was lost, by the deprivation of liberty inflicted as a punishment [2]). It was diminished, when a person, by reason of his conduct or his profession, was placed beneath others in respect of some of his rights; whether this inferior position was caused by a legal prescription which attached *diminution of honour* to a certain action or to a certain mode of life *(infamia)*, or was the result of public opinion, when it branded with shame certain acts or modes of conduct [3]). (*levis nota, turpitudo*). Modern writers express this distinction by the terms: infamia *juris*, and infamia *facti* [4]); but

lis, quae in jure alieno positis personis *non* deferuntur." As to this fragment, see Huschke, Rhein. museum, VII, 68.

1) L. 5. § 1. D. de extraord. cogn. (50. 13). "Existimatio est dignitatis illaesae status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut minuitur, aut consumitur."

2) L. 5. § 3. D. laud. "Consumitur vero, quoties magna cap. diminutio intervenerit, id est: cum libertas adimitur veluti cum aqua et igni interdicitur, quae in persona deportatorum venit, vel cum plebeius in opus metalli, vel in metallum datur."

3) L. 5 § 2. D. eod. L. 13. C. ex quibus causis inf. (2. 12). Ea quae pater testamento suo filios increpans scripsit, infames quidem filios jure non faciunt, sed apud bonos et graves opinionem ejus, qui patri displicuit, onerant. L. 2. D. de obseq. parent. (37. 15). Licet enim verbis Edicti non habeantur infames ita condemnati, re tamen ipsa et opinione hominum non effugiunt infamiae notam, L. 27. C. de inoff. test. (3. 28).

4) It is with good reason that Sav. (II. § 78.) and Kierulff, (l. c. p. 108), criticise those who have placed the infamia facti beside the infamia juris, as a distinct legal situation. Indeed the infamia facti, being neither limited nor defined by the law, is impracticable abstraction in the domain of law. Keller. § 23, calls it "The loss

the infamia facti, except for the effect which it had upon the querela inofficiosi of brothers and sisters, had no other consequence, by the Roman Law, (as indeed scarcely anywhere else), than to render the persons thus noted unfit to occupy posts of dignity, or discharge public functions, and to diminish the credence accorded to their testimony, before the tribunals [1]).

As to the *infamia juris*, it was either, the immediate and legal consequence of an act committed or a profession exercised, (infamy styled *immediata*), or the consequence of a judicial condemnation [2]), which declared the individual guilty of infamous conduct, or of an infamous action. (*Infamia juris mediata*). The greater part of the cases which inflicted it were enumerated in the edict of the Praetor, which was subsequently completed by the Imperial Constitutions [3]).

Under the Justinian legislation, its only effect, in the domain of private-law, was to prevent the infamous person from appearing before the tribunals as the agent of another [4]); and even this restriction went no farther than the judge might think necessary for the maintenance of his proper dignity; for it did not give the adverse party the right to make it available in order to plead the nullity of the procuration [5]).

of consideration, consequent upon certain modes of living or acting, but of which the Law regulates neither the conditions nor the effects."

1) L. 2. C. de dignit. (12. 1). L. 17. § 1. D. de test tut. (26. 2). L. 3. § 4 D. de lib exhib. (43. 30). L. 3. pr. D. de test. (22. 5). Compare also, art. 437 and 1945 Netherlands Civil Code.

2) In certain cases, the compromise made in order to escape a conviction was considered equivalent to the conviction itself. Qui furti. vi bonorum raptorum, injuriarum, de dolo malo damnatus pactusve erit, quoniam intelligitur confiteri crimen qui paciscitur. L. 1. pr. et L. 5. D. de his qui not. inf. (3. 2).

3) Vide, the cases enumerated in Arndts, § 31, note 1.

4) L. 1. § 8. D. de post. (3. 1). Fragm. Vat. § 322—324. Paulus, I. 2. 1. Anciently, the consequence was that no debt could be assigned to the person declared infamous, because the transfer was required to be made in the form of a procuratio in rem suam, Paulus, I. 2. 3. It was also forbidden to him to assume to represent the public interest, by bringing one of the actions termed *populares*. L. 4 D. de popul. act. (47. 23), "Popularis actio integrae personae permittitur; hoc est cui per edictum postulare licet."

5) § 11. I. de Exc. (4 13). Eas vero exceptiones quae olim procuratoribus propter

In general, infamy continued until death [1]), unless the Praetor the Emperor, or the Senate, caused it to cease, by complete restitution. L. 1. §§ 9 and 10, D. de postul. (3. 1). The remission of the punishment did not remove the infamy [2]), but a curious peculiarity was, that in case a person had suffered a punishment more severe than that which the law awarded (excepting a pecuniary punishment), by way of compensation, the brand of infamy did *not* attach to it, although a legal consequence of the act committed [3]).

§ 25. OF RELIGION. (RELIGIO).

After the introduction of Christianity, the principle was gradually developed, in the Roman Law, that the difference of religious belief must cause a difference in the legal capacity of persons differing in faith. Hence very rigorous enactments against Pagans (*Pagani*); against Christians whose doctrine had been condemned by a Council (*Haeretici*); and finally, against all who had passed from the orthodox church to one or other of the condemned heresies. (*Apostatae*). These laws, independently of other penalties which they pronounced, generally deprived those who did not adhere to the orthodox church, of the right to bequeath or inherit, and sometimes also of all right to acquire or possess anything at all, in any manner whatsoever. L. 4. C. de haeret. (1. 5) [4]).

infamiam vel dantis vel ipsius procuratoris opponebantur, cum in judiciis frequentari nullo modo perspeximus, conquiescere sancimus, ne dum de iis altercatur, ipsius negotii disceptatio proteletur. Sav. II, 218. Arndts, § 31. Windscheid, § 56, n. 5.

1) L. 43. § 4. D. de R. N. (23. 2). L. 6. C. ex quib. caus. inf. (2. 12).

2) Indulgentia, quos liberat, notat, nec infamiam criminis tollit, sed poenae gratiam facit. L. 3. C. de gener. abol. (9. 43).

3) L. 13, § 7. D. de his qui not. inf. (3. 2). Poena gravior ultra legem imposita, existimationem conservat — dicendum erit, — duriori sententia cum eo transactum de existimatione ejus: idcirooque non esse infamem.

4) As to the Manicheans and the Donatists: "Ac primum quidem volumus esse publicum crimen: quia quod in religionem divinam committitur, in omnium fertur injuriam. — In mortem quoque inquisitio extendatur. Nam si in criminibus majestatis licet

§ 26. OF SEX. (SEXUS).

The Law recognised but two sexes: the masculine and the feminine [1]). In the domain of private law, their capacity [2]) was, in most respects, the same. There were, however, certain differences, which caused Papinian to say: "In multis juris articulis deterior est conditio feminarum, quam masculorum." L. 9. D. de stat. hom.

memoriam accussare defuncti non immerito et hic debet subire tale judicium." L. 19. pr. L. 21. L. 22. C. eod. — As to the Pagans; L. 7. 2 and L. 10. C. de pagan. (1. XI). "Sic autem edoctos prorsus abjecto priori errore, salubre baptisma accipere, aut haec contemnentes scire, se neque ullius rei in imperio nostro fore participes; neque patrimonii mobilis vel immobilis possidendi licentiam habituros, sed omnibus rebus ablatis in inopiâ relinquendos et praeterea competentibus poenis subjiciendos."

As to the Jews, marriage between them and the Christians was forbidden, and subjected to the punishment of adultery; but in other respects their legal capacity was not restricted. L. 6, 8, 15. C. de Jud. (1. 9).

Ever since the Reformation, we find, in nearly every country, exclusions and restrictions, differing in different countries and according to the religious sect which has at different times wielded the controlling power. Vide Sav. II. § 84. Unger, I. § 30. Arndts, § 34, note 3. — In France, the laws of 24th Dec. 1789 *raised* non-Catholic Frenchmen to the rank of *citizens;* and by the law of 27th Sept. 1791 the Jews were nationalised. In Germany, the act of confederation of 1815 guaranteed, (and it was a great advance!) to all who belonged to any one of the three great divisions of the Christian church, complete equality of civil and political rights. As to the Jews, the German States have proceeded but reluctantly, and not without many hesitations and fluctuations, toward the abolition of the restrictions which affect that people. In view of these hesitations, the Netherlands may point, with honest pride, to the art. 166 of their fundamental law. [That article is to the following effect: "Those who profess divers religions, all possess the same civil and political rights, and are all equally eligible for dignities, employments and professions." **The Translator.**]

1) L. 10. D. de stat. hom. Quaeritur, hermaphroditum cui comparamus? et magis puto ejus sexus aestimandum, qui in eo praevalet. L. 15. § I. D. de test. (22. 5). L. 6. § 2. D. de lib. et posth. (28. 2).

2) This equality did not exist outside of the private law. L. 2 D. de R. I. (50. 17). Foeminae ab omnibus officiis civilibus vel publicis remotae sunt; et ideo nec judices esse possunt, nec magistratum gerere, nec postulare, nec pro alio intervenire, nec procuratores existere. L. 18. D. de tut. (26. 1). L. I. § 5. D. de post. (3. 1). L. 18. C. de proc. (2. 13). "Alienam suscipere defensionem virile est officium, et ultra sexum muliebrem esse constat." L. 8. D. de accus. (48. 2). L. 18. D. de jur. fisci (49. 14). L. 6. D. de popul. act. (47. 23).

(1. 5). Thus, for example, women did not possess paternal authority, and consequently could not exercise the power of adoption, § 10. I. de adopt. (1. 11); nor could they serve as witnesses to a testament, L. 20. § 6. D. qui test. fac. poss. (28. 1); they were forbidden, also, to exercise the calling of a banker, L. 12. D. de ed. (2. 13) [1]). On the other hand, there were many legal provisions, made with a view to assist the weakness of their intelligence. Thus, every act was void, by which a woman bound herself for another [2]): and there were, moreover, numerous guarantees, tending to prevent her dowry from being arbitrarily alienated or dissipated [3]); and thus, finally, women were numbered among those who might sometimes plead, by way of excuse, their ignorance of the law [4]).

1) Foeminae remotae videntur ab officio argentarii: cum ea opera virilis sit Compare also, L. 6. D. de fid. instrum. (22. 4).

2) L. I. § 1. D. ad Sct. Vellej. (16. 1). "Nam sicut moribus civilia officia ademta sunt foeminis, et pleraque ipso jure non valent: ita multo magis adimendum eis fuit id officium, in quo non sola opera nudumque ministerium earum versaretur, sed etiam periculum rei familiaris."

3) L. 14. D. de pact. dot. (23. 4). Consider the Lex Julia de fundo dotali; the tacit hypothecation with its attendant privileges; and numerous other guarantees.

4) Originally this favour accorded to women was general; but a constitution of the Emperor Leo restricted it to certain special cases, expressly defined by anterior Laws. L. 13. C. de jur. et. fact. ign. (1. 18). Sav. Syst. III. 434. They might, also, be excused, if, by error, they had been guilty of an infringement of Law purely positive (delicta juris civilis); ex. gr. in case of incest non juris gentium. L. 38. § 2. D. de adult. (48. 5). "Quare mulier tunc demum eam poenam, quam mares, sustinebit, cum incestum jure gentium prohibitum admiserit: nam si sola juris nostri observatio interveniet, mulier ab incesti crimine erit excusata." L. 4. pr. D. ad Sctum. Turpill. (48. 16). L. 15. § 5. D. ad. Leg. Corn. de fals. (48. 10).

Modern legislation in general places the man and the woman on the same level as to legal capacity. [Vide Pr. L. R. I. I. § 24; upon the Austrian Code, vide Unger I. § 36; upon the French Code, to which the Dutch is conformed, Zachariä, Handbuch des französ. civ. R. § 81.] But, almost every where, the woman is laid under certain disabilities; as, for example, exclusion from guardianship or curatorship; (Pr. L. R. I. 18. § 143; Austrian Code, § § 192, 281; Code Nap. art. 442; Neth. Code art. 436. 3.); and the prohibition to serve as witness to authentic instruments, (Neth. Code, art. 30, 131, 991; Code Nap. art. 37, 980; Aust. Code, § 591; Pr. L. R. I. Tit.

§ 27. OF AGE. (AETAS).

Difference of age affects, chiefly, the capacity of action, or the exercise of rights. The two most important periods are "puberty" (*pubertas*), and "majority" *major* or *legitima aetas*). The former commenced (with the Romans) at the age of fourteen, or of twelve, (for males and females respectively), and the latter at the age of twenty-five (pr. I. quib. mod. tut. fin. (1. 22). L. 3. C. quando tut. esse desin. (5. 60)). However, men at twenty and women at eighteen might, by dispensation, (*venia aetatis*), be invested with the rights of majority [1]). Tit. C. de his qui veniam aetatis impetraverunt (2. 45).

Persons under the age of puberty were divided into two classes: infants (*Infantes*), and those who had passed the period of infancy. (*Infantia majores*). Infants were those who had not reached the full age of seven years. Persons not arrived at puberty but past the period of infancy, required the *assistance* of their guardians for all acts which put their patrimony in danger †); while, on the contrary, those who were still infants were not assisted, but *represented* by their guardians (*gerere, auctoritatem praestare*) [2]). As to the division into two classes, of those who

As regards married women, marital authority is everywhere energetically sustained *) (Code Nap. art. 215; Neth. Code, art. 163 et. s.; Aust. Code, § 1034; Pr. L. R. II. Tit. 1. § § 184, 189, 195, 196.)

*) **Note, by the Translator**: it is necessary for the sake of precision, to point out, that the author's remarks as to restrictions upon the powers of women and as to the maintenance of marital authority, do not refer to the state of the Law in England, and still less to American Law on the same subjects!

1) The prohibition against alienating or encumbering certain property, without a decree of the Praetor, continued to be applied to them. L. 3. C. 1.

†) **Note, by the Translator**: It will be observed, that here, and indeed throughout the work, the learned Author uses the words *patrimony*, *patrimonial*, etc., in their extended and primitive sense; i. e. as referring, not merely to the paternal estate, but to private or individual *property* of every kind.

2) L. 1. § 2. D. de adm. et per. tut. (26. 7). L. 14. D. pe Spons. (23. 1). L. 18. § 4. C. de jur. del. (6. 30).

had passed the period of infancy but had not attained puberty: *pubertati proximi* and *infantiae proximi*, the law had not fixed precise limits; and this distinction was applied only in reference to offences [1]). In the domain of private law they were assimilated *benignâ juris interpretatione* [2]).

Other periods of life, occasionally mentioned in Roman Law, do not concern capacity in general, but only certain legal consequences dependent thereon [3]).

§ 28. OF HEALTH. (VALETUDO).

The condition, also, of the body or of the mind affected the capacity of action. Thus, besides the fact, that, in this way, certain legal relations were modified [4]), persons whose bodily organs were defective or paralysed, required to be provided with representatives or curators [5]). But it was more especially the total or partial derangement of the faculties of the *mind*, which exercised a great influence upon the capacity of action. Such maladies caused either

1) Pupillum qui proximus pubertati sit, capacem esse furandi et injuriae faciendae. L. 13. § I. D. de dol. (4. 3).

2) In proximis infantiae propter utilitatem eorum benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. § 10. I. de inut. stip. (3. 20). Sav. III. 38; Keller, I, § 27. The Austrian Code distinguishes, also: *infants*, that is to say those under seven years; those not having attained *puberty*, or being under fourteen; and *minors*, or those under twenty-four years. Vide § § 21, 310, 865, 1308. Unger. I. § 37. It is the same with the Prussian Code. Pr. L. R. Part. I. Tit. I. § § 25, 26. The French and Netherlands Codes, recognise, as a legal condition, but a single kind of minority; that of persons under 21 or 23 years. Art. 388, Code Nap.; art. 385, Netherl. Code.

3) Ex gr.: The age of sixty years, required for having the right of adoption; that of seventeen to be able pro aliis postulare; that of twenty for emancipating slaves; the dispensation from giving evidence before the tribunals, and from performing public functions, after the age of seventy. L. 15. § 2. L. 40. § 1. D. de adopt. (1. 7). L. 8 D. de test. (22. 5). L. 2. § 1 D. de vac. (50. 5). § 13. I. de Excus. (1. 25).

4) § 7. I. cited.

5) Sed et mente captis, et surdis, et mutis, et qui perpetuo morbo laborant (qui rebus suis superesse non possunt) curatores dandi sunt. § 4. I. de Curat. (1. 25).

complete inability to act [1]), or (at least) the necessity for the help of another; and in consequence although the legal capacity of the person so affected, remained intact [2]), the exercise of his rights, except during lucid intervals [3]), was left to him, only within certain limits. The prodigal might also be deprived of the administration of his property [4]); but his legal situation was not, in general, the same as that of a person of unsound mind [5]); resembling, rather, that of the *impubes pubertati proximus* [6]); the prodigal being capable of acting and of acquiring, but unable, directly or indirectly to diminish his patrimony (estate). [7]).

1) *Mentis non compos, furiosus, mente captus.* § 8. I. de inut. stip. (3. 20). L. 25. C. de nupt. (5. 4). Tit. dig. de cur. fur. (27. 10). Care must be taken not to confound with these the persons styled *fatui* and *stulti*; who, although not incapable of acting, were sometimes provided with curators. L. 2. D. de postul. (3. 1). L. 19. § 1. L. 20 and L. 21. D. de reb. auct. jud. poss. (42. 5). Sav. III. § 112. As to the rest, the Romans made no distinction between different kinds of deranged persons. In like manner, no distinction is made between them, in reference to the consequences of their acts, in the Austrian, French and Dutch Codes. Vide Sav. 1. c., p. 84. Unger I. § 38. On the contrary, the Prussian law (Pr. L. R. Part. I. Tit. I. § 29), assimilates madmen and deranged persons to infants, in reference to rights which depend upon age, and idiots to those under the age of puberty. But according to Koch (ad h. l.) this distinction is ill-judged, and inconvenient in practice.

2) L. 12. D. de R. C. (12. 1). Ex quibus causis ignorantibus nobis actiones acquiruntur, ex hisdem etiam furioso acquiri. L. 46. D. de O. et A. (44. 7). L. 8. D. de his qui sui vel al. (1. 6).

3) L. 6. C. de cur. fur. (5. 70). L. 9. C. qui test, fac. poss. (6. 22). L. 2. C. de contr. emt. (4. 38). Intermissionis tempore furiosos, — venditiones et alios quosvis contractus facere posse, non ambigitur.

4) Gai. I. 53. Paul. III. 4*a*. § 7. Ulpian XII, §§ 2 and 3. I. de cur. (1. 23).

5) As to L. 40. D. de R. I. (50. 17), "Furiosi vel ejus cui bonis interdictum est nulla voluntas est," which seems in contradiction with what we say, see Sav. l. c. p. 88. Keller, § 30. Unger, § 38.

6) L. 6. D. de V. O. (45. 1). L. 10. pr. D. de cur. fur. (27. 10). L. 19. § 1 D. de R. C. (12. 1). L. 29. D. de cond. ind. (12. 6). L. 3. D. de Nov. (46. 2). L. 5. § 1 D. de acq. vel. omitt. her (29. 2).

7) L. 10 pr. D. de cur. fur. (27. 10). "Eos quibus per praetorem bonis interdictum est, nihil transferre posse ad aliquem, *quasi* (this is the true reading, as is proved by the Schol. Basil.: *Λοκεῖ γὰρ σχεδόν μηδὲ ἐν οὐσίᾳ ἔχειν τὰ πράγματα*) in bonis non habeant, cum eis diminutio sit interdicta." Neither could he make a Will, nor be a witness to the Will of another. L. 18 pr. D. qui test. fac. poss. (28. 1). § 2. I. quiperm. fac. test. (2. 12). § 6. I. de test. ord. (2. 10). The prodigal is treated

§ 29. OF CONSANGUINITY, AND OF AFFINITY OR ALLIANCE. (COGNATIO, AFFINITAS).

Relationship or consanguinity (*cognatio*) is the tie existing between persons who are descended mediately or immediately the one from the other, or from a common ancestor [1]). Affinity, or alliance (*affinitas*), is the tie formed, by marriage, between one of the married pair and the relatives of the other [2]); but there is no affinity between the relatives of the one and the relatives of the other.

Distinctions existed between :—

I. Relationship produced by marriage, or independently of marriage.

II. Natural Relationship, and the artificial Relationship which is created by adoption. (Civilis — quae etiam legitima dicitur sine jure naturali cognatio consistit per adoptionem). L. 4. § 2 D. de grad. et adf. (38. 10).

III. Relationship in the ascending, descending, or collateral line. (Linea superior, adscendens, — inferior, descendens, — linea transversa, obliqua. Tit. I. de grad. cogn. 3, 6. D. Tit. de grad.

in much the same manner in the Austrian Code, § 865. The Prussian Law (Pr. L. R. Part. I. Tit. I. § 31) and the Netherl. Code, art. 506, (see, however, art. 500) distinctly assimilate the prodigal to the minor. The Code Nap. adopts a different system. Art. 513, et s.

1) L. I. § 1 D. unde cogn. (38. 8). Cognati appellati sunt quasi ex uno nati, aut ut Labeo ait: quasi commune nascendi initium habuerint.

2) L. 4 § 3 D. de grad. (38. 10) "Affines sunt viri et uxoris cognati; dicti ab eo, quod duae cognationes, quae diversae inter se sunt, per nuptias copulantur, et altera ad alterius cognationis finem accedit; namque conjungendae affinitatis causa fit ex nuptiis." According to this definition, the married pair are not *affines*; which is easily explained, because marriage is not merely the means of establishing a reciprocal alliance between the husband and wife, but creates, rather an intimate union between them, — making them one, in every relation of life. This definition, by Modestin, is in conformity with those of modern legislation in general. Pr. L. R. Part. I. Tit. I. § 43. Aust. Code, § 40. Netherl. Code, art. 350. Proj. Néerl. 1820, art. 575. Neth. Code of Proced. Civ. art. 56. In a more general sense, however, the Roman Law regarded the married pair as *affines*. Fragm. Vat. § 262. § 218. L. 38. § 1 D. de usur. (22. 1). L. 8 D. de cond. c. d. c. n. s. (12. 4). L. 5. pr. D. de inj. (47. 10).

l, Arch. für civ. Prax. T. 22, p. 237 et s. Keller, § 33, p. 59.

et adf. Nov. 118, praef.). Hence, ascendants, descendants and collaterals (adscendentes, descendentes, ex latere venientes, or ex latere cognati). Among these last, the nearest, especially brothers and sisters, were divided into *german*, viz. those who descended from the same father and mother; and *consanguinei* and *uterini*, viz. those who descended from the father or the mother only. (Germani, consanguinei, uterini) [1]).

IV. Simple Relationship, and complex Relationship. The latter occurred among persons who were related to each other by more than one affiliation. Resulting from divers causes, it had especially to be considered in questions of inheritance.

Examples of Complex relationship.

1. When two relatives intermarry.
2. A., (a woman) married first to B., by whom she has had C^a., afterwards marries D^a., by whom she has D^b.

   E., mother of D^a., afterwards marries C^a., by whom she has C^b.

   C^a. and D^b. being born of the same mother, are consequently uterine-brothers, and therefore C^b. is the nephew of D^b. and D^b. is uncle of C^b.

   And, on the other hand, D^a. and C^b. being brothers, born of the same mother, E, it follows that D^b. is the nephew of C^b., and C^b. uncle to D^b. L. 38. § 14 D. de grad. et adf. (38. 10).
3. B., first married to G., by whom she has had E. G., is married again to S. K., and gives birth to M. K.

   D., previously married to N. K., by whom she has had the above-named S. K., is remarried to E. G., by whom she has J. G.

   S. K. is the brother of J. G., on the mother's side. M. K. is thus the nephew of J. G., and J. G. is the uncle of M. K.; and M. K. being the uterine brother of E. G., J. G. is the nephew of M. K., and M. K. is the uncle of J. G.
4. A. marries B., and afterwards her sister, C. By B. he has

As to what is called respectus parentelae, in marriage, See § 5. I. de nupt. (1. 10).

E. (boy) and F. (girl); by C., G. (boy) and H. (girl). — E. and F., on the one hand, and G. and H. on the other, are brothers and sisters on the father's side, and cousins on the mother's side.

5. Two brothers marry two sisters. Their children are cousins to each other, on both the father's and the mother's side.
6. When a kinsman in the ascending line adopts one of his descendants [1]).

V. Finally, a distinction was drawn between natural relationship *(cognatio naturalis, cognatio κατ' ἐξοχην)* and civil relationship *(cognatio civilis, agnatio)*. The first had its origin in community of blood, the other in the family tie formed by paternal authority. In the latter period of the Justinian Law, however, this distinction was of but secondary interest [2]).

Degrees of consanguinity were calculated by the number of generations [3]). Affinity, not being founded upon the union which results from birth, had not, properly speaking, any degrees [4]); but the Husband was allied to the relatives of his Wife in the same degree as the Wife was related to them by blood; and the Wife occupied the same position towards her Husband's relatives [5]). The legal consequences of consanguinity affected, especially, family-rights and the rights of inheritance; but also, to some extent, the law of obligations and the rules of procedure [6]). The consequences of affinity were visible more particu-

1) Vide Keller, § 33. Kierulff, § 7, p. 119.

2) In case of adoption. See L. 8 C. de cod. (6. 36). Nov. 118.

3) L. 10. § 10 D. de grad. cogn. § 7. I. de grad. cogn. (3. 6). Semper generata persona gradum adjicit.

4) Gradus affinitatis nulli sunt. L. 4. § 5 D. eod.

5) Ictus cognatorum gradus et *adfinium* nosse debet. L. 10. pr. D. eod. Fragm. Vat. § 216, 217. Sell, l. c. p. 249. Schilling, Lehrb. der Inst. II. § 43. Aust. Code § 41: "A person is *allied* to one of the married pair, in the same line and in the same degree as that person is *related* (by blood) to the other." Also, Cod. Nap, art. 162. Neth. Civ. Code. art. 351.

6) Ex gr. the in jus vocatio, actiones famosae, and beneficium competentiae. (In Dutch law, for partition of costs between parties. Art. 56, Code of Civ. Proced).

larly in certain prohibitions as to marriage, and to some extent in procedure [1]).

The capitis diminutio, maxima or media, put an end to the effects of consanguinity [2]) as well as to those of affinity; the latter moreover, were terminated by a dissolution of the marriage which caused them; except that the prohibition of marriages between persons formerly allied continued to subsist [3]).

Relationship was proved, if founded upon birth, by proof of affiliation. For this, was substituted, in the case of children conceived during marriage, a presumption of law, according to which the husband of their mother was their father: "Pater is est quem nuptiae demonstrant. L. 5. D. de in jus voc. (2. 4); but proof to the contrary was not rejected [4]). As to the period of conception, the calculation was, that there must have elapsed 181 days after the consummation of the marriage, and not more than 10 months (300 days) from its dissolution [5]). Children born otherwise than of a legal union [6]) were regarded as having neither Father nor paternal relatives. On the other hand, they were in reference to their mother and her relatives, on the same footing as if they had been legitimate [7]). L. 4. § 2 D. de grad. L. 4.

1) § 6. I. de nupt. (1. 10). L. 4. D. de test (22. 5). Mos. et Rom. leg. Coll. 9. 3. § 2. Neth. Civ. Code art. 1946, 1950.

2) § 6. I. de cap. min. (1. 16).

3) L. 4. § 11. D. de grad. L. 12. § 3. D. de R. N. (23. 2). L. 3. § 1. D. de post. (3. 1). Fragm. vat. § 303. See, on the other hand, art. 352 Neth. Civ. Code.

4) To combat this presumption, the mere adultery of the wife does not suffice. L. 11. § 9. D. ad l. Juliam de adult. (48. 5); nor even her proper declaration that the child is not by her husband. L. 29 § 1. D. de prob. (22. 3). See also, L. 6. D. de his. qui sui vel al. (1. 6).

5) L. 12. D. de Stat. hom. L. 3. § 11. 12. D. de suis et legit. (38. 16). Sav. Syst. IV. § 181. h. [Lord Coke considered forty weeks, (280 days) as the *ultimum tempus gestationis* according to English Law; (Coke Litt., 244 a); but the modern usage, in England and America, is rather to judge each case specially, than to fix any precise general limit, as to time. **The Translator.**]

6) Concubinage — a legal union — had, in respect of private-law, many analogies with marriage. L. 3. § 1. D. de conc. (25. 7).

According to the Austrian Code, § 754, natural children are allowed to inherit *intestat* from their mother, on the same footing as legitimate children and

§ 3, 5. D. de in jus voc. § 7. I. de Scto. Tertull. (3. 8); and § 3. I. de Scto. Orphit. (3. 4). L. 2. L. 4. L. 8. D. und. cogn. (38. 8) [1]

§ 30. OF DOMICILE. (DOMICILIUM).

By domicile, in the legal sense, was understood the place which a person had chosen as the centre of his civil relations [2]). The

concurrently with them. Likewise by Prussian Law. (Pr. L. R. Part. II. Tit. II, § 656.) It is otherwise in the French and Netherlands Codes. (Code Nap., art. 757. Neth. Code, art. 910). [**Note by Translator**: Most readers will be familiar with the English law on this subject. An illegitimate child is *filius nullius*, — the child of nobody, — as to all questiores of inheritance; he cannot inherit from his mother, nor she from him; but in many of the American States, (notably Vermont, Connecticut, New-York, Ohio, Virginia, Kentucky, Indiana, Illinois, Tennessee, North Carolina, Alabama and Georgia), in default of lawful issue of the mother, her illegitimate child may inherit her real or personal estate, and she and her relatives inherit from him. In Louisiana, the illegitimate child succeeds even to the estate of the Father, if the latter has acknowledged him and dies without legitimate heirs. In the other States, the rule of the English common law prevails].

1) But this rule (it is almost universally considered) did not extend to children born ex complexibus aut *nefariis* aut *incestis*, aut damnatis; who had no right even to aliments! L. 6. C. de inc. nupt. (5. 5); and Nov. 89, cap. 15. Puchta, (Pand. § 41), says of this provision that it is sanctioned by the moral sense; but Keller on the contrary (§ 33, note 4), very justly terms it vicious and unjust, because it is a senseless compromise between two totally opposite principles; viz., on the one part, a recognition of the *fait accompli* as affecting innocent parties, and on the other the absolute annulation of that which is the result of a violation of Law. (notably, by killing the child, and thus causing the illegal procreation to be as if it had never existed.) The articles 762 Code Nap. and 914 Neth. Code, and more especially the Austrian Code, (Unger, T. VI, § 31), are more indulgent towards them.

2) L. 7. C. de incol. (10. 39). "Et in eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde non sit discessurus si nihil avocet, unde cum profectus est, peregrinari videtur, quo si rediit peregrinari jam destitit." L. 27. § 1. D. ad munic. (50. 1). "Si quis negotia sua non in colonia, sed in municipio semper agit, in illo emit, vendit, contrahit, eo in foro, balineo, spectaculis utitur, ibi festos dies celebrat, omnibus denique municipii commodis, nullis coloniarum fruitur, ibi magis habere domicilium, quam ubi colendi causa diversatur."

domicile was either voluntary or legal. The voluntary domicile was that which a person had chosen for himself, by actually inhabiting a certain place, with the intention of fixing there his abode and the site of his estate, or patrimony. The fact of residence, without the intention of fixing his abode there, was insufficient; and it was the same as to the intention without the act [1]). He who had fixed his place of abode in several localities, had several domiciles [2]). Or a person might have no domicile whatever [3]). As for the establishment of the domicile, so for changing it; — both the intention and the act were necessary [4]).

1) The intention, without the fact, was insufficient. "Domicilium re et facto transfertur, non nuda contestatione." L. 20. D. ad munic. The act was not sufficient without the intention. L. 3. C. de incol. "Est verum eos, qui in territorio alicujus civitatis commorantur, vel ut incolas ad subeunda munera, vel ad capiendos honores non adstringi." It follows, that a temporary residence in a place, for the purposes of study, did not fix the domicile, either of the student or of the Father who visited him frequently; nor did the possession of a house in a certain locality suffice to create a domicile. L. 2 and L. 4. C. eod. The question whether the intention to establish a domicile in a certain place really exists, — or whether the residence has not rather, an accidental character — is one which it is hardly possible to decide *in abstracto*, and which depends, in each case, upon its special circumstances. It is necessary, as is said by Kierulff, p. 123, to take into consideration, concurrently, the situation, the condition, the profession and the occupations of the individual. A slight difference in any one of these particulars may, in law, produce an entirely different decision. Compare art. 105. Code Nap. with art. 376. Neth. Code.

2) The Roman jurisconsults were not unanimous on this point. Labeo taught the negative, Celsus doubted. Paulus and Ulpian held for the affirmative. L. 5. L. 6. § 2. L. 27. § 2 D. ad mun. Kierulff, p. 126, presents the question in an original point of view. He considers that a person who is established in several places, has one sole domicile, *in all those places together*, as distinguished from every other place on Earth. But Kierulff forgets that this is not a question of mere theory, but, on the contrary the eminently practical question of ascertaining where a person is bound to pay taxes and to perform public functions.

3) L. 27. § 2 D. l. c. Difficile est, sine domicilio esse quemquam, puto autem et hoc procedere posse, si quis domicilio relicto naviget, vel iter faciat, quaerens, quo se conferat atque ubi constituat. Nam hunc puto sine domicilio esse. The Prussian law (Pr. L. R., Introduction § 27), also recognises the plurality of domicile. On the contrary, the French and Dutch Codes assume that it is impossible to have more than one domicile, or to have none. Vide art. 103, Code Nap., and Marcadé in reference to this art., and also, art. 74, Neth. Code.

4) L. 20. L. 27. § 2 D. cit.

The legal domicile was that which was designated for certain persons, by the law, independently of their desire. (*Domicilium necessarium*). Thus, I. The domicile of the Wife was that of her husband. Becoming a Widow, she retained that domicile so long as she did not contract another marriage [1]). II. The domicile of legitimate children, so long as they had not themselves, chosen another, was that of their father: the domicile of natural children was that of their mother [2]). III. That of soldiers was the place where they served [3]). IV. That of those who were banished, the place of their banishment [4]). V. That of freedmen, the domicile of their former masters [5]).

The consequences of the domicile, in the domain of private law [6]), were first, that a Defendant must, if the Plaintiff so required, make his appearance before the tribunals, in the place of his domicile; "Actor rei forum sequi debet;" Fragm. Vat. § 325, 326. L. 2. C. de Jurisd. (3. 13). L. 3. C. ubi in rem, (3. 19) [7]); and secondly that every person was subject to the territorial law of the place where he was domiciled [8]). Under modern law, there is no longer question either of the forum or of the lex originis; but, in general, it is the forum and the lex domicilii of the defendant which determine at once the competence of the Court, and the law by which it is to be guided [9]).

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1) L. 65. D. de jud. (5. 1). L. 5. D. de R. N. (23. 2), domicilium matrimonii. L. 22, § 1. L. 38. § 3. D. ad mun. L. 9. C. de incol. (10. 39).

2) L. 3. L. 4. D. L. 6. § 1. L. 17 § 11. D. Tit. cit. Sav. Syst. T. VIII, p. 62. Keller, § 32.

3) L. 23. § 1. D. eod.

4) L. 22. § 3 D. eod. Soldiers and banished persons might, however, retain their original domicile, if they there possessed real property, or if their families resided there. L. 23. § 1. L. 27. § 3. D. eod.

5) L. 6. § 3. L. 22 pr. D. eod., in which, instead of "*Filii libertorum libertarumque, liberti paterni et* patroni manumissoris," should be read: "Filii libertorum libertorumque liberti, paterni et patroni manumissoris. Sav. Verm. Schriften, III, p. 245, et s.

6) As to the effect of the domicile in reference to municipal offices (munera et honores) in the cities of the Roman Empire, See Sav., l. c. p. 69—71. Keller, l. c. p. 54.

7) Ordinarily, however, the Plaintiff preferred the forum domicilii. Sav., l. c. p. 54.

8) But it appears that in case of conflict between various laws, the preference belonged to that of the locality where the person had the rights of citizenship. Sav., t. c. p. 87.

9) Sav., l. c. p. 95. Keller, § 32. int. Art. 59. Code de Proc. Civ. Code Proc. Neth., art. 126.

SECTION IV.

Of legal persons.

§ 31. DESCRIPTION AND DIVISION OF LEGAL (OR JURIDICAL) PERSONS.

A legal person is a being, capable of having rights of property, who derives his existence from the law alone. (A fiction of law) [1]).

Kierulff, p. 129. Sav. II. p. 289. "A legal person is a subject capable of having patrimonial rights, but created artificially". Some authors seek to make a distinction, between *legal persons*, and *fictitious subjects of rights*; — ex. gr., between corporations and vacant inheritances; and they base this distinction upon the theory, that the attribution of personality to any being is never a fiction, — fictions being incapable of existence except in the region of facts, — while personality is *not* a fact, but an effect produced, or an attribute conferred, by the Law. — Kuntze, Die Obligation, p. 377. But this doctrine has been victoriously refuted; — and in fact personality, in itself, is the faculty possessed by a being to assert his will; therefore the law, in so far as it considers and treats *man* as a person, does not bestow upon him a personality (that is to say a power of exercising volition,) which he did not before possess, but simply recognises and confirms the personality already existing. On the contrary, when the law grants legal capacity to a being *who has, in reality, neither thought nor volition*, it is then only *by a fiction* that it supplies a condition naturally indispensable; and this fiction consists of the admission that this being thinks and wills, although really incapable of so doing. Vide Unger, Kritische Ueberschau, VI, p. 157, et s.; Böcking, Röm. Privat. R. § 24. — Latterly, not only the name, but also the idea and the essence of legal personality have been attacked, and it has been sought to substitute therefor another invention, under the name of "*Zweckvermögen.*" (Power for a purpose). See, in opposition to this doctrine Windscheid, § 49, note 2. Arndts, § 41, note 3. — Another question is this: — What is the bearing of personification? (upon what does it operate?) What is properly the subject (possessor) of Rights in the juridical person? According to Savigny, Puchta, von Scheurl, Windscheid and others, the result or purpose which the legal person is designed to effect, constitutes

The purpose for which such "persons" are generally created is as follows. Certain associations of men, — designed to subserve, not the momentary and fleeting interests of a few, but the permanent interests of great numbers, — obtain, by the creation of a "legal person", a creature independent of the duration of the life of one or of several individuals, as well as of their volition and their powers. [1]) But, as associations of men can thus have permanent objects, so may an individual man propose to himself a certain purpose, which he desires to see realised, and, more especially, wishes perpetuated after his death. But if the law

in itself the "person" to whom the rights in question attach. But to this doctrine is peremptorily opposed the consideration, that, since the person is created with a view to the purpose, that purpose, can never be, *itself* the person; and it is with truth that Unger remarks, (l. c. p. 159), that a result is always something objective; something to pursue, to attain; — and that it is not possible to consider the result as being, at the same time, subject and object, since a result does not pursue or attain *itself*.

Others teach that personification acts always upon the *basis* of the legal person; and that thus, in corporations it is the collective body of members, and in endowments the property bestowed, which is invested with personality. But Demelius, (Jahrb. für die Dogmatik, IV, 119), very pertinently asks, "Why, in one case the personality is attributed to the property, and in the other to the assemblage of individuals?" — And, indeed, for the judicial analysis of the idea which we are considering, it is unimportant whether the property serves as a material means of action for an aggregation of individuals, or whether it is destined for benevolent purposes. If, in the corporation, the members derive advantage from the property possessed, in like manner the property of endowments (foundations) produces advantages for those whom it is designed to benefit. For the rest, and for myself, I consider these discussions as purely idle and speculative, and I concur, in this respect, with the very sensible language of Kierulff, (p. 131, note): "In this direction unanimity cannot be attained, inasmuch as each one of these constituent elements has just as much and just as little right as any other one of them, to claim the honours of personality. The truth is, in fine, that all these physical objects have the conditions requisite to constitute a Juridical Person; but that this Person itself has only a legal and intellectual existence, corresponding to nothing material. There are, for example, in a corporation a number of physical persons; — but this circumstance is only a matter of fact and by no means constitutes the legal basis of the idea. That which forms the corporation legally, is, to the exclusion of every thing else, the intellectual *unit*; — the *individual* who has, nevertheless, no material existence.

1) Keller, § 34.

did not come to his aid, in this case, the means which he desires to devote to the objects which he has in view, would remain exposed to the dangers and the fluctuations which so often assail the property of individuals; and he would be forced (in order to realise his intentions) to leave his property to his successors, charged with certain duties and obligations, (*sub modo*), and to confide to them its administration; — which would expose it to all the risks incurred by their own private fortunes.

It is in order to remedy these inconveniences, that the law has sought, by the creation of an independent subject, (raised in some sort above the temporary and the variable) to devote, in perpetuity, to the destined purpose, the property intended for its realisation; — to guard it against untoward chances, against the risk of unfaithful administration, and, in short, against all uses not in conformity with the intentions of the donor. Finally, it was important to take care that a property, which, by the disappearance of its subject, might be scattered and deteriorated, should be, by the law, provided with a temporary possessor or representative, who, for a time, could keep the inheritance together, as one whole (or unit) of rights and obligations, in order to be able, subsequently, to convey it, in its entirety, to the heir or successor who should present himself.

From the definition which we have given of the legal person, it results that his domain is limited exclusively to rights of property [1]) and that it is impossible to attach thereto any relations of right which assume, as an indispensable condition, the effective existence of a man. — When, therefore, legal persons are under consideration, there cannot, be any question of family-rights, properly so called [2]); — such for instance, as marriage, affinity,

1) Sav. l. c. Arndts, § 41, note 1. — Windscheid, § 57. The Netherlands Civil Code, therefore, (art. 1691), speaks in an inexact and too general way, in saying that moral persons are, *like private persons* capable of performing *civil acts*. Art. 877 of the Project of 1820 was more correct.

2) The power over the slave, and the patronage over the freedman, being proprietary rights, may also appertain to legal persons.

or paternal authority. As, however, the legal person does not owe to the law merely the recognition of his capacity, but that capacity itself, — which is created by the law alone, — it is in conformity with the nature of things, that the power which thus creates legal capacity should also determine its extent and its limits; — and consequently it is not permitted to extend, *a priori*, to legal persons the application of all the rules which concern natural persons. The legal person is a person, only on such conditions, and in so far, as the legal fiction wills and permits. [1])

The Roman law recognised four kinds of legal persons: [2])

I. Associations of persons, under the names of universitates, collegia, corpora. (corporations).

II. Foundations, or endowments. (Piae Causae).

III. The public Treasury.

IV. Vacant inheritances.

We shall treat of the latter, under the head of hereditary right.

1) Kierulff, l. c. p. 129. Thus there were municipalities among the Romans, long before the right of succession was accorded to them; and even under the laws of Justinian this was a privilege for the collegia.

2) That which Kuntze calls "the mania of personification" has been carried so far, as to raise to the rank of legal persons lands encumbered by servitudes, or for the benefit of which servitudes existed. This error has been caused by expressions like the following: "Fundo servitus acquiritur, fundus jus aquae amisisset, sententia praedio datur." This absurdity is, very properly, rejected by most modern authors, who connect with such expressions as the foregoing, others, such as *Pecori debetur appulsus*, in L. 1. § 18. D. de aq. quot. et aest. (43. 20). These expressions signify, simply, that the owner of the land has a right to the servitude by right of the land which he possesses; and, indeed, he is and must continue to be, alone, the subject of the right. Nor can we forbear to censure those who treat as a legal person the succession of the administrators or titularies of a function; and, no less, those who consider as such the *collegia* in the service of the commonwealth; ex. gr. the tribunals, because the majority of these *collegia* are deficient in that which constitutes the essence of the legal person, the capacity of having proprietary rights. — Vide Kierulff, p. 130. Sav. II. 379. Puchta, Vorles. I. § 27. Vangerow, I. § 53. Kuntze, Heidelb. Crit. Zeits., I. 549, et s.

A. § 32. OF THE DIVERS KINDS OF UNIVERSITATES. (CORPORATIONS).

The Roman law mentions as corporations, or Universitates:

I. The urban communes, and certain of their integral parts. (Civitas, municipium, municipes, colonia, respublica civitatis, commune, communitas, curiae or decuriones [1]), vici [2]), fora, conciliabula, castella [3])). Eventually, the Provinces were also recognised as legal persons [4]).

II. Religious corporations, such as those of the Priests. (Anciently, that of the vestal virgins). Collegia templi. L. 38. § 6. D. de leg. III. (32).

III. Associations of functionaries; among which those of the Scribes occupied an important place, by reason both of their number and of their influence. Destined originally to the divers branches of the public service, the Scribes were also employed by private individuals in their personal affairs. — We find them variously designated; as Scribae, Librarii, Fiscales, Censuales, Decuriati and Decuriales [5]).

IV. Associations or fraternities (confreries) of artisans; — such as those of the Smiths, the Bakers and the Mariners. L. 1. pr. D. quod cujusque univ. nom. (3. 4). "Item collegia Romae certa sunt, quorum corpus — confirmatum est, veluti pistorum et quorumdam aliorum, et navicularioram qui et in provinciis sunt."

1) L. 7. § 2. D. quod cuiusque univ. (3. 4).

2) L. 73. § 1. D. de leg. I. (30). "Vicis legata perinde licere capere atque civitatibus, rescripto Imperatoris nostri significatur."

3) Mentioned in L. Rubria, Cap. 21. and in Cap. 5 of L. Julia municip. Quicumque in municipiis, coloniis, oppidis, praefecturis, foris, conciliabulis. Paulus, 4. 6. 2. Testamenta in municipiis, coloniis, oppidis, praefecturis, vicis, castellis, conciliabulis facta. Sav. § 87. Arndts, § 42, note 1 and 2.

4) Cod. Theod. L. 12. Tit. 12. de leg. et decr.

5) L. 3 § 4. D. de bon. poss. (37. 5). A municipibus et societatibus et decuriis et corporibus bon. possessio agnosci potest. L. 22. D. de fidej. (46. 1). Hereditas personae vice fungitur, sicut municipium, et decuria, et societas. L. 25. § 1. D. de acq. vel omitt. her. (29. 2). Cod. Just. XI. 13.

L. 5. § 12. D. de jure immun. (50. 6). Quibusdam collegiis vel corporibus quibus jus coeundi lege permissum est, immunitas tribuitur: scil. iis collegiis vel corporibus in quibus artificii sui causa unusquisque adsumitur, ut fabrorum corpus est, et si qua eandem rationem originis habent, id est, idcirco instituta sunt, ut necessariam operam publicis utilitatibus exhiberent.

V. Associations, formed for the purpose of friendly assemblage. (Sodalitates, Sodalitia, Collegia sodalitia, Clubs.) L. 1. pr. D. de de coll. et corp. (47. 22). These associations, which, originally, were partly friendly, partly religious, became in times of commotion the active centres of political factions, and were, for this reason, abolished by laws and by senatus-consultes; — and finally, with the exception of the collegia Tenuiorum, none could be formed without the authorisation of the government [1]).

VI. Finally, we discover, under the form of legal persons, associations formed for purposes of gain. These associations, despite their corporate character, retained the denomination of *societates*, and preserved, as to their effects, many features of resemblance to the societates properly so called [2]). Of this number were the societates vectigalium publicorum, aurifodinarum, argentifodinarum, et salinarum. L. 1. pr. D. quod cujusque Univ. (3. 4).

The generic name, common to all the associations abovementioned [3]), was *Universitas;* in contradistinction to which the natural person was styled *singularis persona.* L. 9. § 1. D. quod met. causa. (4. 2).

L. 1. § 2. L. 3. § 2. D. de colleg. Sav. l. c., p. 255.

L. 1. pr. D. Neque *Societatem*, neque *Collegium*, neque hujusmodi corpus passim omnibus habere conceditur, paucis admodum in causis concessa sunt hujusmodi corpora. To distinguish these corporate societies from those which existed merely by mutual agreement, the latter were termed *privatae*. L. 59. pr. D. pro. socio (17. 2). Sav. l. c., p. 255.

3) The word *corporatio* is found in Nov. Severi II. (Corp. jur. ante-just., II. 339).

§ 33. NATURE AND ESSENCE OF THE UNIVERSITATES.

By "universitas" was meant a juridical or legal person, formed by an assemblage of natural persons associated for one sole and identical purpose [1]).

Inasmuch as the universitas is legally a person, it follows that from the moment of its formation, the subject of rights and of obligations is the invisible unit thus created, and by no means the members of the universitas, either individually or collectively [2]).

Consequently, it is possible for a member of the universitas to exercise over property belonging to the latter positive rights, — ex. gr. a predial servitude, — without any violation of the principle *res propria nemini servit;* and there is nothing to prevent, as between the Universitas and its members, the existence of reciprocal obligations, or the making of contracts, or even the prosecution of suits [3]). As to the rights and obligations of the members towards each other, we can conceive them of all sorts, shades and varieties; nor is the essence of the corporation affected by the fact, that the enjoyment of its property is shared among its members, as was the case with the Roman societates vectigalium publicorum [4]); or even that the property of the corporation is,

[1]) Kierulff, p. 129.

[2]) Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent. L. 7. § 1. D. quod cuiusque univ. nom. L. 6. § 1. D. de div. rerum (1.8). L. 10. § 4. D. de in jus voc. (2. 4). Qui manumittitur a corpore aliquo, vel collegio, vel civitate, singulos in jus vocabit; nam non est illorum libertus. L. 1. § 7. D. de quaest. (48. 18). Servum municipum posse in caput eorum torqueri, saepissime rescriptum est: quia non sit illorum servus, sed rei publicae. Consequently, it is utterly incorrect to speak of *common-property* of an artificial person, as is done in art. 582, Neth. Civ. Code. — Art. 962 of the Project of 1820 was much more accurate: "By property of a community are meant all things, generally, which belong to a community recognised by the State as a moral (artificial) person".

[3]) L. 9. D. quod cujus univ. "Si tibi cum municipibus hereditas communis erit: familiae erciscundae iudicium inter vos redditur." L. 1. § 15. D. ad Sctum Trebell. (36. 1). "Si autem collegium vel corpus sit, quod rogatum est restituere, decreto eorum, qui sunt in collegio vel corpore, in singulis, inspecta eorum persona, restitutionem valere: nec enim ipse sibi videtur quis horum restituere."

L. 59. pr. L. 63, § 8. D. pro Soc. (17. 2). L. 9. § 4. D. de Public. (39. 4).

in case of dissolution, to be divided among the members, as in the case of modern societies or companies, whose property is represented by shares, but which are likewise legal persons [1]). The only essential condition was, that there should be a legal subject, distinct from the members taken individually; — which "subject," constituting the centre of the property of the corpo-

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1) Schmid, Ueber die s. g. Genossenschaften, Arch. für civ. Prax. T. 36. p. 166. Arndts, § 42, note 3, says, with truth. "The Roman notion of the *Universitas*, is therefore broad enough to include the numerous societies (companies) or associations of our times, all of which have more or less analogy with those Roman Societies, as, for instance, Commercial Companies and Companies constituted by Shares, Artistic Societies, Reading Societies etc." Unger, l. c., p. 186, says, likewise, "Share-Companies are the *Societates publicae* of modern times. Corporate Companies having for their object the realisation of profits, are *legal persons*. It matters little, that, by the terms of the Statutes of most of these Companies, the capital of the corporation is declared to be the common property of the shareholders, in such manner that each has a quote-part proportionate to the nominal value of his shares; (art. 216, German Comm. Code); for this declaration only expresses the knowledge possessed by the shareholders, that when the intermediary, — the fictitious subject, — shall have ceased to exist, it is to themselves, that the property must at last, and in its final distribution, appertain. But it is not the less true, that, so long as the company exists, the capital belongs to this fictitious subject, and that *during* this time the shareholders are simply its creditors; as is indeed, signified in the French, by the name of "*action*" which they give to the shares, and which designates the right (*actio*) which the members possess, to demand their quota of the profits." This same principle forms the basis of art. 529, Code Nap. and of art. 567, n°. 4, (very badly drawn!) of the Neth. Code. These provisions are explained by the fact, that, *during the existence of the company*, the shareholder, is simply a creditor of the company, and not a proprietor of its assets. "The law", says Marcadé, referring to art. 529, Code Nap., n°. 378, "considering the company as an artificial person, a being of the mind, distinct from the individual associates, regards this being, alone, as proprietor of the *real* property in its possession, and considers each shareholder as having the right to demand from the company a dividend in *money*, a right *ad pecuniam*; a mere money claim." Heretofore, the legal personality of joint-stock companies has been energetically contested. An enumeration of the many works which relate to this question may be found in the Treatise upon the Commercial Law of the Netherlands (*Het Nederl. Handelsrecht*) of my learned colleague, Mr. J. de Wal, p. 79 et s. But this personality has been acknowledged by modern legislation in general. See § 8. of the Prussian Law of 9 Nov. 1843, as to joint-stock companies; and art. 213. of the German Com. Code. This latter says; "A joint stock company has, as such, its rights and its obligations. It may acquire ownership, or other rights over real property, and may appear in judicature, either as Plaintiff or Defendant."

ration, as long as it existed, was recognised and treated as owner of all that belonged to it, and could present itself as creditor and as debtor in all the relations of the corporation with third parties. But, putting aside those societies called corporative [1]), there are, between the corporation and the private association or copartnership important differences, as to their objects, their powers, their productions, their administration and their end. In the copartnership the social object is made subordinate to the private interests of the partners; — interests, generally, of a pecuniary character; — and it is for this reason that the copartnership is, itself, temporary, variable, and perishable [2]). In the corporation, on the contrary, the chief place belongs to the social purpose, which is, ordinarily, also a moral purpose of a permanent nature [3]), and independent of the existence of those who may be its members at any particular time. It is for this, again, that in the copartnership, the partner does not absolutely and for ever abandon the property which he contributes to the common stock, in order to transfer it to a new subject of rights, distinct from the copartners themselves; he reserves to himself, on the contrary, a proportionate share in that which was previously his own exclusive property, and, in like manner, he acquires, reciprocally, a joint proprietorship in that which was previously the exclusive property of his partners. But in the corporation it is otherwise. — Each member surrenders that which he contributes; — he alienates it completely, for the benefit of another person who becomes the owner of this property, which, thenceforward, is as

1) Windscheid, § 58. "We are, in this case, in presence of corporations endowed with special qualities, but the notion of the corporation (a legal person) is not altered."

2) L. 70. D. pro soc. "Nulla societatis in aeternum coitio est."

3) The *causa perpetua* is not however of the *essence*, but only of the *nature* of the corporation. See Pfeifer, Die Lehre von den juristischen Personen, p. 27. It is otherwise in the Prussian Law. (Pr. L. R. Part. II, 6. § 25). The Netherl. Project of 1820, art. 873, required also a determinate and *permanent* object. Our present legislation (Dutch) presupposes associations formed for a term of less than 30 years. Art. 5. of the law of 22 April, 1855.

distinct from the property of the individual member as is the property of any third person whomsoever; — and it hence results, that in case of authorised withdrawal from the copartnership, the ex member can demand his share; whereas he who quits the corporation has no share to demand, nor any claim whatever to allege against the property of the artificial person. Again, in the copartnership, as the property contributed by the several partners is not lost to them, so their individual will is not absorbed in that of the collective whole; — and the legitimate, if not the sole, mode of action is, and must remain, the joint consent of the partners. (L. 28. D. comm. div. (10. 8). "In re communi neminem dominorum, jure facere quiquam invito altero posse. Unde manifestum est, prohibendi jus esse; in re enim pari potiorem causam esse prohibentis.") In the corporation, on the contrary, the will of the unit, — (the body corporate) — which manifests itself in an artificial manner, is the sole governing power. In the partnership, personal advantage is the motive and the object, and the profits realised revert exclusively to the members; while, in the corporation the property is made subservient to the objects of the association, and it is the association itself, and not the individual members, who profit by the advantages obtained [1]). Finally, in the copartnership, the individual and his private interests are placed in the foremost rank; — his existence, his will, his cöoperation, his property, are all indispensable elements of the association into which he has entered; — whence it results that, this association is ended by the withdrawal or death of one of its members. — In the corporation, on the contrary, it is the object of the corporation itself which is predominant; and for this reason the corporation is independent of the existence of any part, or even of the whole, of those who are its members at any given time. Even though all be changed, the corporate unit

1) "As to individuals, they are entitled to enjoy only the satisfaction which they derive from seeing the success of the common object, and the purely moral advantage which it cónfers upon them." Keller, § 41.

survives. "In decurionibus vel aliis universitatibus nihil refert utrum omnes idem maneant, an pars maneat vel omnes immutati sint. Sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri: cum jus omnium in unum reciderit, et stet nomen universitatis." L. 7. § 2. D. quod cujusque univ. (3. 4).

§ 34. EXTENT OF THE LEGAL CAPACITY OF THE UNIVERSITATES.

Independently of the special rights and privileges which might be granted to certain corporations, or to their members [1]), corporations (generally) had all the capacities which were necessary to the realisation of the objects of their foundation. Thus, they might acquire I. Property [2]): II. Real servitudes: III. Usufructs; — the duration of which, for them was, however, fixed at one hundred years [3]), — unless, indeed, the corporation were sooner dissolved. The right of Use, on the contrary, consisting of a present and personal enjoyment, proportioned to the necessities of a

1) For example, the privileges of the public treasury; the right of succession to property left by deceased members, dispensation from certain charges or functions. Sav., l. c. p. 281.

2) "Universitatis sunt, non singulorum veluti quae in civitatibus sunt theatra et stadia et similia, et si qua alia sunt communia civitatum. Ideoque nec servus communis civitatis, singulorum pro parte intelligitur sed universitatis. Et ideo tam contra civem quam pro eo posse servum civitatis torqueri Divi fratres rescripserunt. Ideo et libertus civitatis non habet necesse veniam Edicti petere, si vocet in jus aliquem ex civibus." L. 6. § 1. D. de r. d. (1. 8).

3) L. 56. D. de usufr. (7. 1). "An ususfructus nomine actio municipibus dari debeat, quaesitum est. Periculum enim esse videbatur, ne perpetuus fieret quia neque morte, nec facile cap. dim. periturus esset? — Et placuit centum annis tuendos esse municipes; quia is finis vitae longaevi hominis est." L. 8. D. de usu et usufr. (33. 2). L. 21. D. quib. mod. usufr. amitt. (7. 4). — By French and Dutch Law, usufructs last for 30 years. Arts. 619 Code Nap., and 857 Neth. Code. The Prussian law makes an incomprehensible distinction between usufructs created by covenant and those constituted by will. — See § 179. Part. I. Tit. 21., and § 423. Tit. 12, and Koch's comments upon these passages. The Austrian Code makes the usufruct last as long the legal person. Vid. 5. 529.

man, cannot be imagined in the case of a corporation [1]). IV. Possession, — although doubts seem to have existed on this point [2]), — might be acquired and exercised for them, not only by slaves but by representatives who were free. L. 1. § 22. D. de acq. vel. amitt. poss. (41. 2) [3]). L. 7. § 3. D. ad exhib. (10. 4). V. They could bind themselves towards others and others toward them [4]). VI. They could sue and be sued [5]); and judgments could be executed against them, in the same way as against individuals. L. 7. pr. L. 8. D. quod cujusque univ. VII. The right of succession (inheritance) *ab intestat*, as it was, except as to the patron, founded upon relationship, did not apply to corporations. There were, however, certain corporations, to which was granted the right to succeed, in priority to the Public Treasury, to the property of their own deceased members. Tit. C. de hered. decur. (6. 61). VIII. The right to inherit by testament was, at first, denied to Towns, with the exception of *bona liberti* [6]). It was conceded to them only A. D. 469. by the emperor Leo. L. 12. C. de hered. instit (6. 24). Other corporations, in order to be

1) Sav. II, 290.

2) Sav. II, 291.

3) "Municipes per se nihil possidere possunt, quia universi (al. uni) consentire non possunt"; i. e. even when all the members assembled come to a decision, it is, nevertheless, not the corporation, — the ideal person, — which adopts this decision. (Sav. II, 291. Possession, 7th. Edition, p. 317; and the observations of Rudorff, Appendix, nº. 94.) "Sed hoc jure utimur, ut et possidere et usucapere municipes possint, idque iis per servum et per liberam personam acquiratur."

4) L. 11. § 1. D. de usur. (22. 1). L. 5. § 7. 9. D. de pec. const. (13. 5). L. 9. D. quod cujusque univ. nom. By the *mutuum* the *civitas* is bound only so far as the loan is really to its advantage. L. 27. D. de r. c. (12. 1). The Glossarists extend the same provision to all corporations, and Sav. II. 294, also recognises this extension. But it is combatted, very justly, by Pfeifer, l. c. p. 103.

5) Other acts, tending to preserve and assure their rights, come within their competence. L. 10. D. eod. In the suits which they maintained, they were represented either by an agent specially authorised for each cause, (*actor*) or by a general representative (*syndicus*) who appeared for them on all occasions. L. 1. § 1. D. h. t. Sav. II. 296.

6) Ulp. 22. 5. "Nec municipia, nec municipes heredes institui possunt: quoniam incertum corpus est, et neque cernere universi, neque pro herede gerere possunt, ut heredes fiant." L. Un. § 1. D. de lib. univ. (38. 3). Sav. l. c. p. 301. b.

able to inherit, must have obtained that right as a privilege [1]). A constitution of Nerva [2]) permits bequests to towns; and since Marcus Antoninus the same power has been extended to villages and to legalised associations. L. 117. L. 122. pr. D. de leg. I. L. 20. D. de reb. dub. (34. 5). Gai. II., 195. The validity of a trust left to a town was recognised by the Senatus-consultum Apronianum [3]).

L. 8. C. eod "Collegium, si nullo speciali privilegio subnixum sit, hereditatem capere non posse, dubium non est." According to modern law, corporations are, generally, capable of inheriting; although in divers countries acquisitions in mort-main have been restricted and subjected to certain conditions. See, as to Austrian Law, § 26. — Unger, T. VI. § 5. Prussian Code, Part. II. Tit. VI. § 83. Koch, as to this Section. — Art. 910 Code Nap. and art. 947. Neth. Civ. Code. — Sav. II. 299 indicates the natural reason why the right of inheritance, as distinguished from other rights, was not sooner accorded to legal persons. "Inheritance," says he, "as a mode of acquisition, is, — except in the case of next of kin, — a thing so fortuitous and accidental, that we cannot regard it as indispensable to the rapidity and liberty of the circulation of property; and the absence of the rules which have regulated this form of acquisition would produce no void in the social organisation." These remarks are well worthy of the attention of Statesmen and Legislators!

2) Ulp. 24, 28. "Civitatibus omnibus, quae sub imperio populi Romani sunt, legari potest; idque a divo Nerva introductum, postea a Senatu auctore Hadriano, diligentius constitutum est."

3) Ulp. 22, 5. L. 26, 27. pr. D. ad Sct. Treb. (36. 1). The question whether a corporation, *as such*, can be guilty of a misdemeanour, has generally, since Savigny, been answered in the negative, because penal enactments are applicable only to beings really capable of thinking, feeling, and exercising the power of volition; while the representation by an agent, or artificial organ, has no necessity for existence but in the domain of private-law; that is to say, where it is indispensable to the existence and power of action of the legal person. L. 15. § 1. D. de dol. (4. 3). "Quid enim municipes dolo facere possunt? Sed si quid ad eos pervenit ex dolo eorum, qui res eorum administrant, puto dandam. De dolo autem decurionum in ipsos decuriones dabitur de dolo actio." L. 4. D. de vi (43. 16). The apparent contradiction between these passages and the L. 9. § 1. D. quod met. causa has been explained, in the simplest manner, by Schliemann, die Lehre vom Zwange, p. 34 et s. — See; also, on this point, Kierulff, p. 135, note. Sav. II, 310; Vangerow, § 55; Keller, § 37; Windscheid, § 59, notes 7 and 8.

§ 35. ORGANISATION AND REPRESENTATION OF THE UNIVERSITATES. (CORPORATIONS).

Legal (artificial) persons, — and consequently corporations, — are deficient in the natural power of volition [1]). They are, therefore, incapable of directly performing any act whatsoever, and have need of some agent who can represent them, and whose will and whose resolutions may be regarded as those of the corporation itself [2]). The Roman law did not regulate this representation of the universitas with precision, except as to the urban communes [3]); but these served as models for other corporations, even to the minutest details [4]). Moreover, every authorised association had the faculty of making statutes which should be obligatory upon its members [5]), provided that that they were contrary neither to the laws of the state nor to public order; also the power of choosing directors (managers), with powers more or less extended, for representing the corporation. If not otherwise provided by its constitution, the members of the corporation, taken collectively, were to be considered as its natural representatives; — and then

1) L. 1. § ult. D. de poss. (41. 2). L. 1. § 1. D. de lib. univ. (38. 3). "Consentire non possunt."

2) L. 97. D. de cond. et dem. (35. 1). L. 14. D. ad munic. (50. 1). "Municipes intelligentur scire, quod sciant hi, quibus summa reip. commissa est."

3) The commune was represented by the *ordo decurionum*. This collegium could not deliberate unless at least two-thirds of its members were present, and the decisions were taken by majority of voices. L. 3. 4. D. quod cuiusque univ. L. 2. 3. D. de decr. ab ord. fac. (50. 9). L. 46. C. de dec. (10. 31), "Cum duae partes ordinis in urbe positae, totius curiae instar exhibeant." Mommsen, die Stadtrechte von Salpensa, p. 412.

4) L. 1. § 1. D. quod cujusque univ. "Quibus autem permissum est, corpus habere collegii, societatis sive cujusque alterius eorum nomine, proprium est, *ad exemplum rei publicae*, habere res communes, arcam communem, et actorem sive syndicum, per quem tamquam in rep. quod communiter agi fierique oporteat, agatur, fiat." Mommsen, de colleg. et sodalit. Rom. § 17. "Collegium instituitur ad exemplum municipii, qua in re tota eorum natura conclusa est. Cernitur ea imitatio in minimis etiam."

5) "Sodales sunt, qui ejusdem collegii sunt. His — potestatem facit Lex, pactionem. quam velint sibi ferre; dum ne quid ex publica lege corrumpant." L. 4. D. de colleg. et corp. (47. 22).

the question arises whether unanimity was requisite for the resolutions to be adopted, or at least, for certain of them; and, in that case, for which. The opinion which considers that it was always the majority of votes that governed, appears to me the most plausible [1]).

§ 36. FOUNDATION AND EXTINCTION OF CORPORATIONS.

There was a corporation, when several persons [2]) were associated for a common and lawful purpose, [3]) with the intention of creating a legal (artificial) person, distinct from the members regarded individually, and when this artificial person had been recognised by the State; — whether such recognition were the result of a general law, or of a special authorisation in each case [4]).

In favour of this opinion, reference is made to L. 160 § 1. D. de R. J; — but this law, as well as L. 19. D. ad municip., affords but a feeble argument; for both appear to refer to corporations having a public character. (See Pfeifer, l. c. p. 92). This opinion, however, seems most conformable to the practical character of the Romans, and is also, supported by analogy. Sav. l. c. p. 330; Arndts, § 43.— Windscheid, § 59, distinguishes between measures of simple administration and other resolutions; but this distinction, although founded upon a rational basis, finds no support in the jus costitutum. Nor does the art. 1694 of the Neth. code civil forbid *all* the members of the corporation from acting in its name. Diephuis (P. 7.u⁰. 1021), observes, certainly, that the members are not the corporation itself, and no one will dispute this axiom; but it does not thence follow that all the members collectively cannot represent it. The discussions upon this point, reported by Voorduin, (V. p. 317), prove, indeed, that there was no intention, by reason of the want of a representative committee, of depriving corporations of the exercise of their legal powers, and thus destroying their life, while allowing them to live. See art. 883 of proposed Neth. law, 1820.

2) Was the number of three persons, at least, necessary? This seems doubtful. The L. 85. D. de V. S. was, perhaps, intended only to fix the number of members necessary to render an association illicit Pfeifer, l. c. p. 28. Windscheid, § 60 note 3, Arndts, § 44, obs. 2. — In the Neth. Code this condition is no longer exacted, although it was so in the project of 1820.

3) L. 2. D. de coll. et corp. (47. 22).

4) It is a question still constantly discussed, — whether, according to Roman Law, lawful associations required a special authorisation, in order to enjoy the privileges of

In regard to the extinction of corporations, certain distinctions must be made. — Those which were established by public authority came to an end according to the rules laid down by the ordinances which governed their composition and their entire organisation. Those which had been founded by the action of private persons, expired when any one of the conditions essential to their existence ceased to be fulfilled. Thus, they expired: — I. When the State had granted them a legal personality for a certain time only, and that time had elapsed. II. When, for any motive, the legal personality, which the association held only from the State, was withdrawn from it by the State [1]). III. By the death [2]) or the withdrawal of all its mem-

legal persons (corporations). The affirmative is sustained by Kierulff, p. 132; Sav. II, 275; Pfeifer, l. c., p. 36, and Sintenis, I, § 15. — The negative by Unger, l. c., p. 148—156; Demelius, Jahrb. für Dogm. p. 182; Windscheid, § 60, note 1; and Arndts, § 44, obs. 4. — I concur with the latter. Indeed, in the L. 1. pr. D. quod cuiusque univ., it is said that the formation of associations was forbidden by legislative provisions of various kinds, and that it was permitted in a very limited number of instances, by pure exception; but if the association came within the category of those lawful societies (*quibus est permissum corpus habere*), there was then no question of ulterior authorisation; — proprium est — habere res communes, etc. Thus the L. 3. § 1 D. de coll. says, (47. 22) "nisi ex Scti auctoritate corpus coiërit, — contra Sctum collegium celebrat;" — whence it resulted, that the association, once tolerated, became, by that very fact, *collegium* or *corpus*. Finally the L. 20. D. de reb. dub. (34. 15), is decisive. "Nulla dubitatio est, si corpori cui *licet* coïre, legatum sit debeatur." The Prussian law, II, 6, § 25, requires the recognition by the State. The same is true of the Neth. law of 22 April, 1855. (S. B. N° 32). The Austrian law, on the contrary, does not require it. Unger, I, 339.

1) Kierulff, l. c. p. 141: "The Universitas, a being of mere privilege, depends upon the will of the Government, and there can be only political, and not juridical motives for its suppression." By art. 10 of the above-cited Netherl. law of 1855, the quality of legal personality can be withdrawn only by a judicial sentence and for violation of the Statutes. The Prussian Law (II. Tit. 6, § 189), and practice are less liberal. See Koch, in reference to this Section.

2) Sav. § 89; Windscheid, § 61, note 3; Arndts, § 45, obs. 1. In a contrary sense, Kierulff, p. 143; Sintenis, § 15, note 29; Pfeifer, § 40; Unger, I, 345. Puchta, Vorles. § 28, stands upon the ground, that the idea of the corporation includes not only present, but future members; but this is a *petitio principii*, because the very question is, whether, all the members having disappeared, a corporation still remains. It is as if one were to reason thus: "In as much as more sheep may hereafter be born, the flock (*grex*) continues to exist even after the death of all the sheep of which it is composed." Besides, the words *magis admittitur*, in the L. 7. § 2 D. quod cujusque univ. prove that

bers. — If there remained but a single member, the artificial person should, in strictness, cease to exist, because there was no longer an association; but it was thought that it would be contrary to equity to deprive this sole member of the advantages belonging to his membership of a body in favour of which he might have made sacrifices, by active coöperation or pecuniary support, and which, moreover might recruit itself with new members, and thus acquire fresh strength and fresh resources. L. 7. § 2. D. quod cujusque univ. nom. IV. By virtue of a resolution of the members of the association [1]), in cases where the latter had not a

it was at the very most, that the corporation was allowed to exist, when there remained but one member; and in fact, the founders, in choosing, for attainment of their object, the process of association, had shewn that, in their view, it was only in this way that their object could be attained. The Glossarists sustain our opinion (ad h. l.): "Item quid si nullus omnino remansit? Resp. Io. Solutum esse Collegium. In this sense, also, are § 177, P. II, Tit. 6, of the Pruss. L. R., and art. 890 of the proposed Neth. Law of 1820. Is it the same with the present law of the Netherlands? I doubt it. Art. 1699 would seem to say yes; but art. 1700 and the Parliamentary debates (Voorduin, V, p. 315) testify in the negative. The reasoning of Diephuis (T. VII, n^{0}. 1046), is not conclusive, and his explanation of the word *voorwerp* is scarcely plausible.

1) This point is also controverted. Our opinion is that of Kierulff, p. 144; of the authors cited by Pfeifer, l. c. § 41; and of Unger, Krit. Ueberschau, VI, 177. On the contrary, the approbation of the public authority is exacted by Sav. II, 279; Puchta, Vorles., § 28; Pfeifer, l. c.; Arndts, § 45; Windscheid, § 61; and Keller, § 39. Unger justly observes, that the corporation is but a form, chosen by private persons, in view of their private interests; and that it would be placing the creature above the creator, the instrument above its master, to attribute to such associations an existence independent of the will of their members. Puchta compares the legal (artificial) person to a natural one; and as the latter can destroy his own life, but is unable to divest himself of his personality by a mere act of his will, he concludes that it should be the same with the legal person; but he loses sight of the fact, that the interests of the State require that every individual should have, and should retain his personality, but not at all, that every association should be and remain a legal person. From the fact that the authorisation of the State alone could give existence to the corporation, it does not follow that the corporation can be annihilated only by the same power; for the State, by the authorisation which it gives, confers a favour, but does not impose a necessity. It is evident that care must be taken of the interests and rights of third parties who have relations with the artificial person. The opinion which we maintain must also, and for the same reasons, be held true of the Netherlands' legislation, and this even in spite of the law of 22nd April, 1855, which requires the recognition of the Government for the establishment of every association. See also, Diephuis,

public character. In the contrary case, its existence would be independent of the will of its members. — If at the time of its foundation the dissolution had not been provided for, the majority could decide upon it.

The Roman Law is silent as to the fate of the property which had formed the estate of the corporation [1]). Many authors, however, maintain that it should revert to the State, in the character of property without an owner [2]). But certain distinctions must be made.

Either, First, the corporation had been instituted by public authority, — in which case it is but just, that the State should appropriate property which had already a public destination ; — or, Second, the association was a private institution, — and in that case there was occasion to discriminate anew among a great number of diverse hypotheses. — Thus, if at the time of the formation of the statutes of the association, there had been provisions for the disposal of the property in case of dissolution, such provisions were to be observed, like all other *pactiones quas sibi ferre volebant*. If the corporation, at the time of pronouncing its own dissolution, or even after the adoption of this decision but before its execution, had made rules as to the destination or the distribution of the property, that which had been agreed, was, in that case, to serve as a law to the members : and if, finally, the association was dissolved without any previous decision as to the destiny of the associate-property, it was necessary to follow the presumed intentions of the former members, and distribute the estate among them, either in equal parts, or in proportion to the enjoyment which each previously had, or the amounts

l. c. n^0. 1043. The art. 887 of the Project of 1820, is ambiguous. The Prussian law requires the sanction of the State. Part II, Tit. 6, § 180.

1) The L. 3 D. de coll. et corp. (47. 22), refers to illicit associations which have never possessed the quality of legal persons. On the other hand, the L. 5 C. de pag. (1. 11), contained a penal provision, (which since then is not capable of further extension), against those who should bestow property for heathenish purposes. Schmid, l. c., p. 182.

2) Puchta, Weiskes R. Lex. III, p. 74 ; Vorles. II, 512 ; Arndts, § 45 ; Windscheid, § 62.

respectively contributed. This last mode of partition was required to be adopted, especially, in what were called corporative societies (companies), which existed solely for purposes of gain [1]).

B. § 37. OF ENDOWMENTS (PIAE CAUSAE) [2]).

When a person desires to devote property to a charitable object, or to any other lawful purpose, which is not merely temporary, this end can be attained by giving or bequeathing this property to a person (natural or artificial), charged to employ it according to the desire of the donor or testator. But this does not form a foundation (or an endowment) in the legal sense. That takes place, only when the bestowal of the property coincides with the creation of an independent subject as a legal person [3]).

As, for example, joint-stock companies. Unger, l. c. p. 179, in reference to these companies, speaks of the rule relative to heredes sui: non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. L. 11. D. de lib. et posth. her. (28. 2). Arndts, § 45, obs. 6. Kierulff, p. 145. I cannot, however, approve the reasoning of this latter author. He supposes that after the formation of an association, but before its recognition by the State, there exists among its members a Society, which is only suspended when it becomes a Corporation, and which, after the dissolution of the latter, returns to its primitive condition of Society. (Partnership.) This supposition seems to me forced. In truth, so long as the recognition of the legal person has not taken place, there can no more be an association than there is the moral unit. This is a consequence of the intention of the parties, who have not proposed to enter indifferently into no matter what kind of association. Besides, there is no need of any such specious reasoning. The partisans of the right of the State argue solely from the analogy which exists between this case and that of a vacant inheritance; but is it not evident, that when it is sought to find a subject for the property of a late corporation, the ex-members have a right much nearer, and pretentions much more just, than the Treasury can have, which has always remained a stranger to the objects and the operations of the corporation? The system which I maintain as to Roman Law, has been sanctioned by Dutch legislation, in art. 1702 Code Civil, and art. 11 of the law as to the right of association.

2) *Piae causae*, according to Roman Law, indicated a charitable object. L. 19 C. de SS. Ecclesiis (1. 2), donationes super piis causis factae. Afterwards, this expression was employed as synonymous with *pia corpora*, to designate the charitable establishments themselves.

3) This definition excludes, therefore, the case of alms destined to be distributed to

The possibility of such a creation has been contested, and it has been alleged, that all the provisions *ad pias causas* contained in the Roman Law, had no other subject than the Church in general, or some parish in particular. But this is evidently to confound the administration of charitable establishments with their mere existence. In truth, the Constitutions invoked in support of this doctrine do confirm the existence of intimate relations between the *piae causae* and the Church; the latter exercising over the former an active and incessant watchfulness; but the possibility of the proper personality of the pious foundations is so far from being excluded by those Constitutions, that on the contrary they tacitly presuppose it [1]). However, that which is true of the *piae causae* cannot be extended to endowments having other destinations. These last, unless recognised by the State, had no legal personality, and did not participate in the privileges with which the *piae causae* were favoured by the Christian Emperors [2]).

the poor, for once only; or that of a disposition *sub modo*, with which the inheritors (ex gr.) are charged. Kierulff, p. 148; Sav. II, 269; Roth, Ueber Stiftungen (Jahrb. für die Dogm. I, p. 202).

1) L. 19, 22, 23 C. de Eccles. (1. 2). L. 35, 46 C. de Episc. (1. 3). In all these laws the Holy Church, (*Sancta Ecclesia*), is mentioned with, but apart from, other foundations; which proves that the latter, although intimately connected with the Church, were not an integral part of it. Kierulff, p. 148; Sav. II, 271; Puchta, Pand. § 27, note k; Vangerow, I, § 60.

2) It is precisely because of the intimate ties which united the charitable establishments to the Church, and the supervision which she exercised over them, that there is no analogy between the *piae causae* and other foundations. All legal (artificial) personality being a fiction, it can be conferred only by public authority, unless there be, as in the case of corporations, a general rule by which it is recognized. The contrary opinion is taught by Puchta (Richters Krit. Jahrb. 1840, p. 705), and also by Windscheid, § 60, note 2. The latter considers that the personality of foundations rests upon an idea which, in daily life, is scarcely less widely received than that of the personality of the physical man; but it must be observed, that, if it requires a high degree of mental development to seize, simply and purely, the notion of legal personality in general, the same is required *à fortiori*, in order to conceive a subject of rights which has no personal substratum; and it is, indeed, not without cause that the Roman jurisconsults have thought it necessary constantly to put the reader on his guard against the danger of confounding the visible members with the invisible unit endowed with personality. Vangerow, l. c.; Roth, l. c., p. 207. I consider that neither does the Netherlands law

A foundation *ad pias causas* could be established: I. By Testament, when a person bequeathed to an establishment which was to Exist only in consequence of this bequest itself [1]). L. 24, L. 28, L. 49, C. de episc. et cl. (1. 3). L. 13 C. de SS. Eccl. (1. 2). Nov. 131, cap. X, XI, XV. — II. by the promise of a gift, the execution of which promise, in case the promissor should fail to fulfil it, was assured by the intervention of the Bishop [2]). L. 15 C. de SS. Eccles. (1. 2).

The foundation *ad pias causas* ceased to exist: I. By the expiration of the time for which it had been established, or when the determinate object for which it was created had been attained; or, finally, by the accomplishment of a determining condition subsequent, when the founder had willed that the foundation should exist only till a certain event should have happened. — II. By the impossibility of realising the intentions of the founder. (By reason, for example, of a prohibition by the Government.) In both of these cases, the Church was charged to employ the property destined to the foundation, for purposes which should be the nearest possible, to the primitive intentions of the donor [3]).

permit the establishment of a foundation otherwise than by law. Endowments, in fact, come neither within the terms of that Title of the Civil code which treats of "corporations," nor within those of the law as to associations.

1) Is it the same as to foundations other than the *piae causae?* This is the well-known question discussed on the occasion of the Städelsche Kunstinstitut at Frankfort. See, on this subject, the authors cited by Arndts, § 46, obs. 4, and Unger, P. VI, § 14, note 8.

2) In the case of foundations other than *piae causae*, the compulsary execution of the promise would be difficult; because, at the moment when it was made, there was no one in existence who could accept it. Pfeifer, l. c., p. 134, thinks that the State, at the very moment when it recognises the institution, and until managers or administrators are appointed for it, intervenes as its manager or agent, and accepts the gift in that character. This view is contested by Roth, l. c., p. 209, who says, with reason, that the consent of the State gives the *right* to execute the promise, but does not impose the *obligation* so to do.

3) Pfeifer, l. c., p. 151; Roth, l. c., p. 219. An analogous provision is to be found in art. 9 of the Neth. Law, of 28th June, 1854 (S. B. N° 100), as to the administration of Charitable Establishments. I share, moreover, the opinion of Windscheid, § 62, that a foundation does not lapse, because, at a certain moment, there is a total absence of re-

Endowments (foundations) were administered and represented according to rules framed by the founders; subject however to the supervision of the Bishops, who could remove negligent or unfaithful administrators, and supply their places by others. L. 46 § 3. C. de Episc. et cl. "Ipsi vero non administrent quidem, sed administrationem illorum inspiciant aut observent, et recte quidem habentem laudent; in quibusdam autem aliquid praetergredientem corrigant."

C. § 38. OF THE PUBLIC TREASURY [1]).

The Treasury, as a legal person, was the State, in so far, as in its relations to rights of property, it came, — as a subject of rights and of obligations, — in contact with private persons. As all rights emanate from the State, it was natural not only that the legal capacity of the Treasury should not be contested or restricted, like that of other artificial persons, but that it should, on the contrary, be extended beyond the limits fixed for the latter, whenever such extension might seem necessary to facilitate, for the State, the accomplishment of its duties [2]).

It must not, however, be forgotten, that the Treasury constituted but one sole and distinct legal person, and not so many persons as there were divisions or bureaux (*stationes*) corresponding to the divers branches of the public service. Nevertheless, this separation into various departments, — established in the interest of good order in management and of accuracy in accounts, —

sources. The contrary opinion, maintained by Roth, among others, l. c. p. 219, is founded upon a theory which regards the property as the *substratum* of the foundation.

1) Pfeifer, l. c., § 5, regards the Treasury, (and perhaps not inaccurately), as the most ancient of artificial persons.

2) Sav. II, § 101; Keller, § 36. It was this position, — privileged and derogatory to common right, — which caused Modestin to say (L. 10. D. de jure fisci (49. 14)): "Non puto delinquere eum, qui in dubiis quaestionibus contra fiscum facile responderit (in dubio contra fiscum)." See Arndts, § 47, obs. 1; and especially the interesting note 2 in Keller, § 36.

exercised, sometimes, an influence, even in the domain of private law. L. 1 C. de comp. (4. 31): "Et Senatus censuit, et saepe rescriptum est, compensationi in causa fiscali, ita demum locum esse, si eadem statio quid debeat quae petit. Atque hoc juris propter confusionem diversorum officiorum tenaciter servandum est." See also, L. 2. § 4 D. de adm. rer. ad civ. pert. (50. 8). On the contrary, the L. 2 C. de solut. (8. 43) says: "Liberari fidejussores, quoties Fiscus tam debitori, quam creditori (licet diversis stationibus) succedit, jus certum est."

CHAPTER IV.

OF THINGS, OR OBJECTS OF RIGHTS.

SECTION I.

Of things in general.

§ 39. THE LEGAL CONCEPTION OF A "THING."

By Thing (*res*) in the more general legal acceptation [1]), was understood all which could form the object of a right of property. "Rei appellatione et causae et jura continentur." L. 23 D. de V. S. (50. 16). In this sense alone [2]), things were divided into corporeal and incorporeal; the latter, according to Roman Law, comprising all rights of property, with the exception of ownership which was identified with its object [3]).

In its restricted acceptation, the word *Thing* designates every

1) In the extended and vulgar sense, the word *thing* signifies, generally, every object of our thoughts and our reflections.

2) Puchta, Vorles. § 35. Unger, I, p. 356. Keller, § 42. It is not in a general manner that the Roman Law divides things into corporeal and incorporeal, but only in so far as they constitute the elements of which property is composed.

3) L. 222. D. de V. S. L. 18. § 1. D. de her. pet. (5. 3). L. Un. § 7. C. de rei ux. act. (5. 13). Wächter (Wurtemb. Privat-R., II, p. 209) justly observes, that this identification, very far from resting upon a confusion of ideas, is a very natural conception. Indeed if we enquire, of a person ignorant of the science of law, of what his fortune is composed, he will begin by enumerating his property real and personal, and will speak of his other rights only in the second place; and no one, in fact, would think, in making an inventory, of devoting a special heading to "*rights of ownership.*"

corporeal object susceptible of being subjected to the power of man. This legal notion of a "thing" is, however, somewhat modified in the following case: — a certain number of corporeal objects, ordinarily of the same kind and united by a common destination, are considered and treated, [1]) in certain legal relations, as forming but a single unit; one whole; and the signification, the legal bearing [2]), of this idea is, that the collective unit con-

1) From the fact that the totality, or assemblage of things, is, here only a unit *purely ideal*, it follows that this case is distinct from that where things present, externally, a material unity, obvious to the senses. Indeed the latter is governed by different rules. L. 30. pr. D. de usurp. et usuc. (41. 3). "Tria autem genera sunt corporum. — Alterum, quod ex contingentibus, hoc est: pluribus inter se cohaerentibus constat, quod *Συνημμένον* id est: connexum vocatur; ut aedificium, navis, armarium. — Tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subjecta, veluti populus, legio, grex."

2) Besides which, I share the opinion of those who think that the Roman Law regarded as capable of being objects of rights, only those individual things, the assemblage of which composes the fictitious unit, and not that assemblage itself. Indeed, if a real right be only a natural domination, more or less restricted, such a right cannot be conceived of things purely fictitious. Windscheid, (§ 137, note 4), concedes that the expression *res incorporalis* applied to an assemblage of things considered as a unit, is nowhere to be found. — He also concedes, that all the legal consequences indicated in the *corpus juris* are easily to be explained, without any necessity for admitting the existence of a right having for its object this assemblage, — to which was given the name of *Universitas facti*. Still, he allows himself to be drawn into a belief contrary to ours, by the L. 1. § 3, and L. 3. pr. D. R. V. (6. 1). "Sed enim gregem, sufficiet ipsum nostrum esse licet singula corpora non sint." To this, Dernburg (Pfandr., I. § 59), has justly objected that the *vindicatio gregis* was permitted, only to save the plaintiff from the danger which he would have incurred, if, among the three or four hundred sheep which he might have claimed separately, there had been found a single one, as to which he could not prove his ownership. But, to say that, by means of the *vindicatio gregis*, the plaintiff could really cause to be adjudged to him sheep which were not his own, would be a pretension contrary to all analogy. (L. 23. § 5. D. de R. V. eod). See also Exner, Die Lehre vom Rechts. Erwerb durch Tradition pag. 230—232 (Wien. 1867). In the interpretation of L. L. 2 and 3, D. eod, sufficient attention has not been paid, — (and even Dernburg has omitted to remark this point), — to the sense and the bearing of the expressions *vindicare*, and *in restitutionem non venire*, which are there opposed to each other. Indeed, if we remember the ancient procedure *per formulas*, in connection with the *actio in rem arbitraria*, we shall readily observe, that — the *intentio* of the claimant being stated thus: "Si paret gregem de quo agitur A. A. esse," — he had no need, in order to sustain his claim before the arbitrator, to establish his ownership of each separate animal, but that it sufficed for him to prove his ownership of the flock.

tinues to subsist, despite the change or the loss of the objects of which it was, originally, composed. (*Universitas facti sive hominis*). § 18, I. de leg. (2. 20). L. 22 D. de leg. I. [1]). L. 34 pr. D. de pign. (20. 1). L. 30. § 2 D. de usurp. et usuc. (41. 3) [2]). L. 76 D. de jud. (5. 1). In contradistinction to these *Universitates facti*, the name of *Universitas juris* was given to an assemblage of things corporeal and incorporeal, the property of, or belonging to, a single person, in order to shew that it was in virtue of an objective right that such an assemblage was regarded as a unit [3]); and a double consequence was involved in this distinction: I. That the *Universitas juris* gave room for an action *in rem universalis*; and II. That it was subject to the application of the rule "*res succedit in locum pretii*" [4]), or (the same idea, in other words): "*surrogatum sapit naturam ejus in cujus locum surrogatur.*" But more recent labours have brought to light the groundlessness, no less than the sterility of this theory, which may now be regarded as abandoned [5]).

But when, after the *pronuntiatio*, it became a question of actual restitution (*restitutio*), the defendant was required to deliver only those animals of which the plaintiff proved himself the owner. (See Keller, § 45, note 2. and Brinz, § 50.) Finally, that which argues still further against the doctrine of Windscheid, is, that if the Roman Law had regarded the flock itself as the object of ownership, it is impossible to conceive why, in the L. 2, (cited), the defendant was required to deliver to the plaintiff, who had demanded, precisely, the restitution of *the flock*, only the strange sheep, and not, also, his (the defendant's) own. — It would have been logical, in fact, to apply to this case, exactly as to that where the *singula capita* belonged to a third party, the rule: "Sufficit gregem ipsum nostrum esse, licet singula capita nostra non sint."

1) "Si grege legato, aliqua pecora vivo testatore mortua essent, in eorumque locum aliqua essent substituta: eundem gregem videri, et si diminutum ex eo grege pecus esset, et vel unus bos superesset, eum vindicari posse, quamvis grex desiisset esse."

2) "Etsi ea natura ejus est, ut adjectiõnibus corporum maneat, non item tamen universi gregis ulla est usucapio, sed singulorum animalium sicuti possessio, ita et usucapio."

3) L. 20. § 10. D. de her. pet. (5. 3). In hereditate et in peculio castrensi vel alia universitate. L. 1. § 4. D. de dot. praeleg. (33. 4). The expression *Universitas facti et juris* may be found in the Glossary of the L. 1. § 3. D. de R. V. ad v. sed posse gregem vindicari "quia universitas est facti non juris in his: nam in universitate juris aliud est."

4) This was deduced from L. 22. D. de her. pet. (5. 3).

5) Mühlenbruch, was the first to refute this theory, in a conclusive manner, in his

"*Programma observatt.* jur. Rom. Spec." I. (1818). He was followed by Hasse, "*Archiv. für Civ. Prax.*" V, pp. 1—68. — Mühlenbruch reverts subsequently to the same subject in the *Arch. für Civ. Prax.* XVII, p. 321 et sup. — See also, Vangerow, I, § 71, i. f. and Unger, I. § 57. Art. 903 of the Project of 1820 was still under the influence of this erroneous theory.

Observation. Most of the legislative attempts to give a definition of the word "*Things*" have been attended with very imperfect success. Thus, for example, the Austrian Code, § 285, says: "All which is distinct from the person, and which serves for the use of man, is called, in legal acceptation, a *thing*." The idea of a "thing", defined in a manner so general, certainly includes the whole; and as it is upon this definition that are founded (in § 309) the notions both of *possession* and of *ownership*, we attain to this absurdity; — that the scholar (ex. gr.) has legal possession of the learning which he has acquired! See Sav. Vom Beruf, p. 99. Unger, I, 354. The Prussian law (Part. I, Tit. II. § 1—3), gives two different definitions of the word *Thing*, the one broad, the other restricted; so that, at every step, the reader is forced to ask himself in which sense the word is employed. The French Code has wisely abstained from giving any definition, and some other more recent Codes (completed or projected) have followed this prudent example. In the Neth. Code, the provision of art. 555, which calls *things* "the property and the rights which can form the object of ownership," is no less inexact than the foregoing; for, either the word "ownership" must be taken, here, in an acceptation much more extended than its natural and proper signification, or the article is in contradiction with other provisions of the Code: — as, for example, art. 564, n^0. 8, and 567, n^0. 3. — "Possession" also creates difficulties; ex. gr.: "can obligations form an object of possession? If yes, can they all do so? It is evident that this is the occasion, — or never, — to say: "*Omnis definitio periculosa!*"

SECTION II.

Of the different kinds of things, from a legal point of view.

§ 40. THINGS REAL AND PERSONAL (RES IMMOBILES, MOBILES).

That was called real (or immovable) property, which could not be displaced or removed without deterioration. Thus landed property (*fundus* [1]), *praedium, solum, res soli, res solo cohaerens*) was real, and every thing which was attached or which adhered thereto, whether naturally or artificially, in a way to make one with it; as, for example, trees, plants, fruits [2]), standing corn, and minerals; as also buildings attached [3]) to the soil by their foundations [4]). Those things were, on the contrary, personal,

1) L. 211. D. de V. S. (50. 16). "Fundi appellatione omne aedificium et omnis ager continetur. Sed in usu urbana aedificia, aedes, rustica villae dicuntur."

2) L. 40. D. de act. emti. (19. 1). "Arborum quae in fundo continentur, non est seperatum corpus a fundo." L. 44. D. de R. V. (6. 1). "Fructus pendentes pars fundi videntur."

3) Things which were elevated above the soil, while adhering to it either organically or by mechanical means, were called *superficies*. L. 13. D. de S. P. R. (8. 3). L. 50. D. ad L. Aq. (9. 2). L. 44. § 1. D. de O. et A. (44. 7). Brisson. de V. S. i. v. It may be observed that trees, plants, fruits, etc., when regarded with reference to their future destination, after they shall have been detached from the soil, should be considered as personalty. — Thus, for example, a sale of trees, or of standing corn, is regarded as a sale of personal property. See Wächter. II, 221. Unger, I, 383. It was so held by the High Court of the Netherlands, 14th April 1851. (Weekblad van het Recht, n°. 1320), and decided in the same sense by the Government, for the application of art. 194 of the communal law. See Mr. van Emden, Recht-spraak, I, 306.

4) Barns, sheds and huts, which could be taken down and removed were personalty.

(movable) [1]), which could be removed, or displaced, without affecting their substance, whether the displacement might be effected by their own proper force (*res sese moventes*) or by the effect of a force external to them.

Lands were divided into *praedia rustica* and *urbana* [2]). By *praedium rusticum* was meant all land devoted to culture, whatever its situation; by *praedium urbanum* all buildings with the soil to which they were attached, and all land not cultivated. L. 198 D. de V. S. "Urbana praedia, omnia aedificia accipimus, non solum ea quae sunt in oppidis, sed et si forte stabula sunt, vel alia meritoria in villis et in vicis; vel si praetoria voluptati tantum deservientia; quia urbanum praedium non locus facit, sed materia. Proinde hortos quoque, si qui sunt in aedificiis constituti, dicendum sit urbanorum appellatione contineri." § 1. I. de serv. (2. 3). L. 1. D. Comm. praed. (8. 4). L. 4. § 1 D. in quibus caus. pign. vel hypot. (20. 2). Where it was a question of lands both built upon and not built upon, the character which was dominant determined their legal quality. "Plane," thus continues the L. 198, already cited, "si plurimum forte in reditu sunt, vinearii forte vel etiam olitorii, magis haec non sunt urbana." L. 91. § 5 D. de leg. III. (32).

The possibility of removal is a quality that belongs only to things which occupy a certain portion of space; whence it follows that the division of property into real and personal, (immovable

L. 60. D. de A. R. D. (41. 1). L. 18. pr. D. de A. E. et V. (19. 1). "Granaria quae ex tabulis fieri solent, ita aedium sunt, si stipites eorum in terra defossi sunt, quodsi supra terram sunt, rutis et caesis cedunt."

1) The expression *res moventes* or *moventia* is found as the synonyme of *res mobiles* or *mobilia*, in L. 93. D. de V. S. "Moventium item mobilium appellatione idem significamus, *nisi* tamen apparet (this should be read thus, according to the Basilicae εἰ μὴ) defunctum animalia duntaxat, quia se ipsa moverent, moventia vocasse." In other passages *moventia* and *res mobiles* are opposed to each other. Schilling, Instit. II, § 59. Apart from slaves, the designation of *moventia* was applied only to animals, which are divided into *fera*, *mansueta*, and *mansuefacta*. § 12, L. de rer. div. (2. 1). Gaius, II, § 15.

2) This division is still important in our law, in reference to leases. Compare Sections III and IV of Title 7, Book III, Netherlands Civil Code.

and movable), concerns only things corporeal. Thus the Romans [1] distinguished things real and personal from *jura* and *actiones*; things incorporeal [2]).

§ 41. OF THINGS FOR WHICH OTHERS OF A LIKE NATURE MAY BE SUBSTITUTED, AND THE CONTRARY [3]). (RES FUNGIBILES ET NON FUNGIBILES).

In their legal relations, things present themselves sometimes as individually determinate; that is, as distinguished from all other things of the same nature by certain characteristic properties (*species, certum corpus*); sometimes they are determined only by their kind (*genus, incertum corpus*). L. 54 pr. D. de V. O. (45. 1). "Cum species stipulamur, necesse est inter dominos, et inter heredes ita dividi stipulationem, ut partes corporum cuique debebuntur. Quoties autem genera stipulamur, numero fit inter eos divisio" [4]). But, there are also things, respecting which commercial

1) L. 7. § 4. D. de pec. (15. 1). "In peculio res esse possunt omnes, et mobiles et soli — hoc amplius et nomina debitorum." L. 15. § 2. D. de R. J. (42. 1). "Quod si nec, quae soli sunt, sufficiant, vel nulla sint soli pignora, tunc etiam pervenietur ad jura." L. 2. C. de quadr. praescr. (7. 37). L. 1. § 7. D. ad leg. Falc. (35. 2). For certain legal purposes, things incorporeal were assimilated to things real or personal. Thus, in L. un. C. de usuc. transf. (7. 31): "Res quae immobiles sunt, vel esse*intelliguntur*; which the Glossary comments: "Ut mancipia rustica et servitutes rerum vel personarum."

2) By German law, all property was very early divided into real and personal, and the modern legislation of many countries classes things incorporeal in one or the other of these categories. Compare, for example, the Austrian Code, § 298, and the Prussian Law, Part. I. Tit. 2. § 7 — 10, with arts. 526, 529 Cod. Nap., and arts. 564 and 567 Netherl. Code; — and compare, also, these articles themselves with arts. 924, 925, of the Project of 1820. — See also, Unger, I, 394; Keller § 43, note 2; and Windscheid, § 139, note 5.

3) **Note by the Translator.** We have, in English, no *one word* capable of rendering the meaning of this phrase, as is done by the Latin *fungibilis* and *non fungibilis*. For brevity, I use the word "interchangeable," although it scarcely expresses the entire idea.

L. 5. pr. D. de R. V. (6. 1); L. 30. pr. L. 34, § 3, 4; L. 51. D. de leg. I.

usage takes note only of quality and quantity (*pondere, mensura, numero conseptum*); so that by reason of their common nature, one is considered as the exact equivalent of the other [1]). Consequently, when such things are in question, the species and the individual are regarded as interchangeable [2]). This does not however prevent parties, on particular occasions, from treating interchangeable articles as not interchangeable, and *vice virsâ.* These terms have, in fact, but a purely relative value.

Nor must we confound with things interchangeable in their nature, those which, indeed, are distinguished only by their kind, but between which a choice is necessary: the same kind containing, perhaps, objects of quality and value extremely diverse; so that here the individual and the species are by no means indifferently interchangeable [3]). L. 30. § 5 D. ad leg. Falc. (35. 2); L. 52. D. mand. (17. 1).

The division of things into interchangeable and non-interchangeable (*fungibiles* and *non fungibiles*), is applicable only in matters (30); L. 1. § 7. D. ad leg. Falc. (35. 2). "Sive in corpore constet, certo incertove, sive pondere, numero, measura valeat."

1) L. 2 § I. D. de R. C. (12. 1). "Mutui datio consistit in his rebus, quae pondere, numero, mensura consistunt: quoniam earum datione possumus in creditum ire, quia in genere suo functionem recipiunt per solutionem magis quam specie." It is this passage which gave rise to the use of the word *fungibiles*, not used by the Romans. (Fongible, art. 1291, Cod. Nap.). The expression *vertretbare Sache* is criticised by Savigny, but wrongly so. See Unger, I, 407, note 4. The Romans say also: "*res quae* communi speci continentur." (L. 29. D. de Sol. (46. 3); — that is to say things which, although distinguished from each other by certain signs, are treated in commerce only by their kind.

2) Thus, for example, in case of deposit, of loan, or of bequest. L. 24. D. dep. (16. 3). L. 3. § 6. L. 4. D. comm. (13. 6). L. 30. § 6. L. 34. § 4. D. de leg. I. (Pecunia quae in arcâ est, vinum quod in apothecis). L. 37 D. de V. O. (45. 1), embodies an important consequence of these principles.

3) The German writers call these things *Gattungssachen.* (See Kierulff, p. 316; Arndts, § 51; Unger I, p. 404). Windscheid, I, § 1, confounds the two ideas. Wächter, II, p. 231, note 12, considers that where there is a choice to be made between different things, that is a case of interchangeability; an application of the rule: *res in genere suo functionem recipiunt;* but this opinion is incorrect, for the reason that, in this case, the fact that the things may be replaced, one by the other, is not an effect of their nature, but of the circumstance that a choice is rendered necessary by vagueness or uncertainty in the wishes, or in the expressions of the parties interested.

of contract. As to ownership or other real rights, they can never have for their object a kind, or a quantity, as such, but only specific things [1]). L. 6 D. de R. V. (6. 1).

§ 42. THINGS CONSUMABLE AND NON-CONSUMABLE. (RES QUAE USU CONSUMUNTUR.)

By things consumable (res quae usu consumuntur, quae in abusu consistunt. L. 5. § 1. L. 7. D. D. de usufr. earum rerum quae usu (7. 5)), were meant those which, from their nature, disappear or undergo a notable diminution when once used ; such as wine, oil, provisions, a ball-dress, etc. This natural quality of things consumable had the legal effect of subjecting them (except by agreement, or testamentary disposition to the contrary), to the same conditions as things interchangeable ; which has sometimes caused the two definitions to be confounded [2]).

Coined money was also regarded as a consumable article ; because, being destined solely to be expended, it is impossible to make use of it without, at the same time, causing it to be lost to him who possesses it. "Ipso usu assidua permutatione quodammodo extinguitur." § 2. I. de usufr. (2. 4) [3]).

There are yet other things which are destroyed neither wholly nor partially, by the first use which is made of them, but which

1) Wächter, l. c., p. 232. Unger, p. 406. Puchta, Vorles., § 36.

2) Every consumable article is at the same time interchangeable ; (fungibile, — susceptible of substitution) ; but the converse is not true. — Metals, stones, and nails are interchangeable, but are not consumable. Nearly all modern legislators have confounded these two qualities. Vide, Aust. Code, § 300. Pruss. L. R. Part I. Tit. 2. § 120 ; Code Nap. Arts. 1874, 1892 ; Neth. civ. Code, Arts. 1779, 1791, compared with art. 561. These latter provisions, construed literally, would ordain that a rare fruit (for example) could not be the object of a loan for use ; and that, on the other hand, an ingot of gold could not be the object of a loan for consumption !

3) Hence the expression *pecunia consumitur* ; — money consumes itself, — annihilates itself, for him who spends it. Unger, I. 401. note 2.

in proportion as they are used, are gradually deteriorated, so as to be no longer capable of completely serving their original purpose [1]). They may be described as things which *waste*, or *wear-out*.

§ 43. THINGS DIVISIBLE AND INDIVISIBLE [2]) (RES DIVIDUAE ET INDIVIDUAE).

In a natural sense, all things are divisible [3]), although the division may spoil them, or deprive them of nearly all their value. But when a thing belongs to several persons in common, who desire to define their respective claims thereto and obtain a distribution among themselves of their respective shares therein, it becomes necessary to consider the fact, that in commerce things are estimated only according to the use that can be made of them and the current value which they may have; and that, consequently, their mere natural divisibility cannot form the sole ground for deciding whether they ought, or not, to be regarded as divisible. Thus the Roman Law regarded as divisible only those things which were susceptible, without destruction of their substance, and without perceptible diminution of their value, of being divided into portions analogous in quality to the thing it-

1) The heading of Tit. V. Book VII. Dig. also mentions this kind of things: — "Res quae usu consumuntur vel minuuntur." L. 15. 4. D. de usufr. (7. 1). The distinctive characteristic of things consumable is, therefore, that it is impossible to make use of them, even once, without either destroying, or notably diminishing their substance. Unger, § 42. note 2.

2) This distinction is mentioned neither in the Code Nap. nor in the Neth. Code; although it is, legally, of quite as much importance as (for example) that between things consumable and non-consumable. See Arts. 1332. 1333, and 1758. Nether code. — The project of 1820, art. 927, gave a definition of it, — which, however, was not quite accurate. See also the Prussian Law, Part. I. Tit. 2. § 41.

3) In this sense, a statue, a horse, and a table are divisible.

self [1]), and differing from it only in quantity [2]). (L. 26. § 2 D. de leg. I. (30. 1). "Sin autem vel *naturaliter* indivisae sunt, vel *sine damno* divisio earum fieri non potest, aestimatio ab herede omnimodo praestanda est." L. 35. § 3 D. de R. V. (6. 1); L. 1, 3. C. comm. div. (3. 37); L. 34. § 2 C. de don. (8. 54); § 5. I. de off. jud. (4. 17)). All other things were legally indivisible.

As to the application of this principle, it must be said, that real property is generally divisible [3]), because, forming a constituent part of the surface of the globe, it takes its boundaries and its limits only from the, always variable, will of man [4]). (L. 6. § 1. D. comm. praed. (8. 4). "Plane si divisit fundum regionibus

1) Thus a watch, or a machine, is indivisible: and thus, also, posts, windows, doors and building-materials are not, in matter of divisibility, regarded as parts of the house to which they belong; because such objects, when separated from the thing to which they were attached, are not similar things of lesser volume, but things altogether different. — "These are not", says Windscheid, § 140, note 1. "properly speaking, parts (Theile), but rather elements (Bestandtheile) of the thing." These observations serve to explain the L. 36. D. de evict. (21. 2). and the L. 13. § 2. D. de acceptil (46. 4).

2) The analogy between the part and the whole, is generally expressed by the names given to the two. Thus a piece of bread is always bread; but a spring, a wheel, or a dial of a watch, is no longer a watch. See Wächter, archiv. für civ. Prax. T. 27. p. 172; Würtemburg priv. Recht, II. 173. Unger I. 411. and Sav. Oblig. I. 307.

3) It may also happen that the parcelling or division of a landed estate may very much depreciate its value. Sav. l. c., p. 305.

4) L. 60. D. de V. S. (50. 16). "Ceterum adeo opinio nostra et constitutio locum a fundo separat, ut et modicus locus possit fundus dici, si fundi animo eum habuimus. Non enim magnitudo locum a fundo separat, sed nostra affectio, et quaelibet portio fundi poterit fundus dici, si jam hoc constituerimus, nec non et fundus locus constitui potest; nam si eum alii adjunxerimus fundo, locus fundi efficitur." — It follows, that after the partition of a landed property, it is inaccurate to speak of parts of that property, inasmuch as each parcel forms of itself a whole; — which caused Quintus Mucius to say: "*Partis appellatione rem pro indiviso significari: nam quod pro diviso nostrum sit, id non partem sed totum esse.*" (L. 25. § 1. D. eod.) Thus, there is, in appearance community, but in reality only neighbourhood, juxtaposition. Nevertheless, if we consider that, even after the partition, there continues to exist a certain apparent connection, we understand how the separate parts may still be regarded as portions of a whole which no longer exists; and that one may thus speak of a communio pro divisio. Servius, non ineleganter partis appellatione utrumque significari. See also L. 5. § 16. D. de reb. eorum qui sub tut. (27. 9). and Unger, I. p. 413.

et sic partem tradidit pro diviso, potest alterutri servitutem imponere, quia non est pars fundi sed fundus; quod et in aedibus potest dici, si dominus, pariete medio aedificato, unam domum in duas diviserit (ut plerique faciunt), nam et hic pro duabus domibus accipi debet.") On the contrary, personal property is ordinarily indivisible; because, there, the *form* is dominant, so that any separation or division changes its substance, or at least considerably diminishes its value; but thence it naturally results that when it is a question of things of which the form is unimportant, and of which the substance alone is taken into account, — as for example a bar of metal, — there is no reason why they should not be divisible [1]).

There may also be question of the parts of a thing, in another sense. It is when a thing is divided among several persons, not in parts materially separated from each other, but in parts purely ideal, according to the proportionate share which belongs to each person. In this case, as there is no natural or physical division, there exists among the joint-owners an undivided community of proprietorship, which among the Romans was termed *communio pro indiviso*, while the parts were called *partes indivisae*. (L. 5.

1) Some authors think, that according to Roman Law, the indivisibility of personal property (movables) was absolute.

They found this opinion upon the L. 8. D. de R. V. " si ex aequis partibus fundum mihi tecum communem tu et Lucius Titius possideatis, non ab utrisque quadrantem petere me debere, sed a Titio qui non sit dominus, totum semissem. Aliter atque si certis regionibus possideatis eum fundum, nam tunc sine dubio et a te et a Titio partes fundi petere me debere. Quoties enim certa loca possidebuntur, necessario in his aliquam partem meam esse; et ideo te quoque a Titio quadrantem petere debere. Quae distinctio neque in re mobili neque in hereditatis petitione locum habet, numquam enim pro diviso possideri potest."

It is easy to see that Pomponius had in view, here, only that kind of division which still leaves to the divided parts the appearance of a whole (as in the case of land), so that it is still possible to speak of possessio or dominium pro diviso; and it is precisely this sort of division which he declares inapplicable to personal property, — ("Divisa", — says. Doneau, (Comm. jur. civ., 20. 4. § 24)" jam res esse desinit, quae prius fuerat"), — and not that which destroys neither the value nor the substance of the thing. Wächter, Arch. l. c., p. 158. Sintenis, Civ. R. I. § 41. note 83. Heimbach, R. L. T. 9. note 203. Unger, l. c., p. 412.

D. de stip. serv. (45. 3). "Servus communis sic omnium est, non quasi singulorum totus sed pro partibus utique indivisis, ut *intellectu* magis partes habeant quam *corpore*." L. 66. § 2 D. de leg. II (31). "Plures in uno fundo dominium *juris intellectu*, non divisione *corporis* obtinent." L. 5. § 15 D. Commod. (13. 6). "Nec quemquam partis corporis dominum esse, sed totius corporis pro indiviso pro parte dominium habere.") In this case, therefore, that which was really divided, was not the thing itself, but the right to it; but, inasmuch as the right was identified with its object, the thing was said, or assumed, to be divided. L. 54. pr. D. de V. O. (45. 1). L. 29. D. de sol. (46. 3). L. 19. § 2 D. de cond. ind. (12. 6) [1]).

When a thing was thus, ideally, or non-materially divided, the right of each of its joint owners pervaded it throughout [2]), and it was impossible to touch any one part of it without at the same time touching every other; and hence it followed, that, although each of the joint owners was free to dispose of his ideal share [3]), he was nevertheless bound and restricted, in his dealings with the common property itself, by the will of his co-owners. This was expressed by the rule: "in re communi neminem dominorum jure facere quidquam invito altero posse, — in re enim pari potiorem esse causam prohibentis." L. 28. D. Comm. div. (10. 3). L. 27. § 1 D. de S. P. U. (8. 2).

If it be asked, what things are mentally divisible, the answer is, that *all* are so, without distinction or exception, no matter whether they are susceptible or not of physical division, nor even whether the latter be prohibited by the law, or by some special provision or arrangement. L. 14. § 2, 3 D. comm. div. (10. 3).

Wächter. l. c. p. 163. Unger, l. c. p. 416. The latter observes, very justly, that it is usual at the present day, to say, "The half of this house belongs to me." — See also, Arndts, § 53, note 5, in refutation of Windscheid, § 140. note 4.

2) L. 8. D. de R. V., "Quoties enim certa loca possidebuntur, necessario in his aliquam partem meam esse."

3) L. 14. § 3. D. comm. div.

L. 16. § 1 D. pro socio. (17. 2). L. 41. § 1 D. de leg. I. (30). L. 2 C. de aed. priv. (8. 10) [1]).

Finally, as to things incorporeal, or rights, some were divisible and others indivisible [2]); but before entering upon the discussion of this question, it will be necessary to consider what was included in those rights themselves.

[1]) Wächter, l. c., p. 182.

[2]) Arndts, § 53. note 6.

SECTION LII.

Of things in their relation to each other.

§ 44. PRINCIPAL, OR PRIMARY THINGS, AND DEPENDENCIES, OR THINGS ACCESSORY. PRINCIPAL THINGS; — AND APPURTENANCES, OR THINGS AUXILIARY [1]).

Considered in its relations to another thing, a thing is styled "principal" when it is directly, and in itself, the object of a right, as distinguished from one which is so only indirectly (mediately) and in consequence of its connection with the former. This relation may be established in two different manners [2]). I. A thing may

1) The Germans say *Pertinenzen.* — In the middle ages, we find aisiae, aisia, aisiamentum (Aise, aisance).

2) This distinction was disregarded by the ancient school and has likewise been so by modern legislation; although the Roman jurisconsults, — whose language, however, was not always very accurate, (ex gr. L. 24. § 24. D. de leg. I), — had styled the dependencies *pars*, and the auxiliaries *quasi pars rei* L. 44. D. de R. V. (6. 1), L. 13. § 31. D. de act. emt. (19. 1). It may be remarked, that the Netherlands' Project, 1820 had also noted this difference, and had expressed it in a tolerably accurate manner, in defining, (Arts. 931, 939), things auxiliary: — "those which, without immediately constituting integral parts of a principal thing, contribute, nevertheless, to the realisation of its purpose;" — and things accessory or — dependencies: — "those which are so closely united to the principal thing, that they exist only by it and with it." See, also Wächter, Wurtemb. Priv. Recht. II. 250; Unger, I. 428. et s. — Keller, § 46. — The importance of this distinction, in view of its legal consequences, is shewn (int. al.) by L. 7. § 1. D. pro. emt. (41. 4). as compared with L. 16. pr. D. de Pign. (20. 1). As to Netherlands' law, compare Art. 1211. with 1011, and Diephuis, T. V. n^{0}. 913. The Prussian law notes the distinction,

become an integral part of another, by blending itself therewith, and forming with it but one sole and identical whole, in such a manner as completely to lose its own individuality: (accessio cedit principali): — Or, II., A thing, from the mere fact that it is made to serve as aid and auxiliary to another, shares, in many respects, the destiny and the legal conditions and relations of that other, [1]) without, however, being inseparably united thereto, or absolutely identified therewith. The difference between these two kinds of relation may be expressed by the denomination of dependencies, or things accessory, for the first, and of appurtenances, or things auxiliary, for the second [2]).

Among dependencies, or accessories, may be classed all which derives, or springs, organically from any object; — as trees, plants, fruits; — or which, from without, is attached thereto, in a permanent manner; — as accretions, alluvions, buildings erected upon land, an arm added to a statue, and the like: — in short, every addition by which the accessory (the thing added), becomes united to the principal, in one single whole, so as to form, and be able to form, in law, but one and the same body. L. 44. § 1. D. de O. et A. (44 7). "Sic et in tradendo, si quis dixerit se solum sine superficie tradere, nihil proficit, quominus et superficies transeat, quae natura solo cohaeret." L. 26. D. de usucap. (41. 3). "Numquam superficies sine solo capi longo tempore potest." L. 29. § 2. D. de pign. (20. 1). "Jus soli superficiem secutam videri ideoque cum jure pignoris."

and treats the question of the Pertinenzen (appurtenances) in its minutest details. Part I. Tit. 2. § 42—109; and Koch, in reference to these sections.

1) For example, in case of alienation, of mortgage, or of devise by will. L. 91. § 5. D. de leg. III. — L. 52. § 3. D. de act. emt. (19. 1). Windscheid, (I. § 143. note 1), thus characterises the two relations of a thing towards another: "A thing which forms a constituent part of another thing, is by that very fact deprived of individual existence; a thing which is the appurtenance of another thing is deprived only of individual signification."

2) These terms avoid the confusion mentioned in note 2 on the preceding page. — The term auxiliary designates an object intended to act in aid of another; the term dependency expresses complete subordination or actual fusion.

In order that a thing should be considered as, in its nature [1]), an auxiliary or appurtenance, it is necessary. I. That it should be naturally adapted to serve the principal thing and augment its utility, and not merely to satisfy the personal wants of the immediate possessor [2]). II. That this adaptation should be of a permanent character [3]). III. That it should be efficiently realised. A merely temporary cessation of connection between the principal and the auxiliary does not, however, deprive the latter of its character of appurtenance [4]).

To real or immovable property, might attach, as auxiliary, other property of the same nature, as well as articles of movable or personal property [5]). Personal effects, on the contrary could have

1) These are no auxiliary things to which that quality is attributed by the law itself. Unger. I. 448; Windscheid, § 143. note 2.

2) L. 13. § 31. D. de act. emt. (19. 1) "Aedibus distractis vel legatis, ea esse aedium solemus dicere quae quasi pars aedium vel propter aedes habentur ut puta puteal" L. 17. § 2. D. eod. "In sterculino — distinctio Trebatii probanda est: ut si quidem stercorandi agri causa comparatum sit, emtorem sequatur; si vendendi venditorem, nisi si aliud actum est." L. 91. § 5. D. de Leg. III. "Si hortum domus causa comparavit, ut amoeniorem domum ac salubriorem possideret, aditumque in eum per domum habuit et aedium hortus additamentum fuit, domus legato continebitur."

3) L. 17. § 7. D. eod. "Labeo generaliter scribit, *ea quae perpetui usus causa in aedificiis sunt, aedificii esse; quae vero ad praesens, non esse aedificii*, ut puta fistulae temporis quidem causa positae, non sunt aedium, verumtamen si perpetuo fuerint positae, aedium esse." L. 26. D. de instrum. leg. (33. 7).

4) L. 17. § 10 et 11. D. de A. E. et V. "Quae parata sunt ut imponantur non sunt aedificii. Pali qui vineae causa parati sunt antequam collocentur fundi non sunt. Sed qui exemti sunt hac mente ut collocentur, fundi sunt." L. 242. § 4. D. de V. S. — See Wächter, l. c., p. 251. Kierulff, I. p. 331. Unger, I. p. 454. Windscheid, I. § 143. and art. 563. n^{0}. 4 Cod. Civ.Nêerl.

5) Articles of personal property, being appurtenances of real property, were however not regarded by the Roman law as themselves real, in all respects. They could be separately possessed and acquired by prescription, according to the rules regulating personal property. See Wachter. l. c. p. 248. Sintenis, l. c., note 58.

It is otherwise in the Austrian code. § 293. and Code Nap. Art. 517. "In fact," says Marcadé, in reference to art. 525, "from the moment when it is understood that a thing is real property, it is unimportant to know whether it is so by nature, or only by destination. All real property is governed by the same rules, and the only distinction of any practical importance is that between things real and things personal." — The

only personal effects as auxiliaries [1]). For example, among things auxiliary to landed property, were reckoned articles placed thereon with a view to its chief purpose, — which is cultivation [2]), — as well as supplies of straw and of manure not destined to be sold [3]). On the contrary, cattle and implements of husbandry were not auxiliaries [4]), because they were not considered as subserving the primary purpose, but rather as acquired by the possessor for the exercise of his profession. On the same principle, the following were considered as appurtenances of a house: — a garden purchased by the owner of the house as an embellishment and to render his sojourn more agreeable [5]), — drains for water, — covers of wells, — keys, and locks or padlocks not attached (serae) [6]). — On the contrary, all that belongs to the

same view is sustained in the Neth. Code, Arts. 562, 563. (Diephuis, III. § 53). According to these provisions, the same rule would apply, for example, as to prescription, to a forge and to the tools (not attached) lying upon it. (art. 563, no. 1). In fact, the art. 2014, is not applicable to articles real by destination. It will be seen what absurdities might result from a confusion between things which form an integral part of the principal object and those which are only auxiliaries.

1) That which is temporary and movable cannot govern that which is permanent and fixed; neither can rights be regarded as appurtenances. Wächter, l. c., p. 258. Sintenis, I. § 41. note. 1.

2) L. 24. § 2. D. de leg. I. "Si quis post testamentum factum fundo Titiano legato partem aliquam adjecerit, quam fundi Titiani destinaret, id quod adjectum est exigi a legatario potest." L. 20. § 7. D. de instrum. leg. (33. 7).

3) L. 17. § 2. D. de act. emt. (19. 1).

4) Instrumentum fundi. L. 14. D. de suppellect. leg. (33. 10). L. 2. § 1. L. 8. L. 12. pr. § 13. L. 26. § 1. D. de instr. vel. instr. leg. (33. 7). According to French law, Art. 524, Code Nap., cattle and implements of husbandry are real (*immeubles*) by destination. Likewise in the Austrian Code, § 296, and in the Prussian law, part I, Tit. II. § 52. — The Dutch law, which rules otherwise, is less consistent with itself. (Asser, § 328).

5) L. 91. § 5. D. de leg. I. (30).

6) L. 17. pr. D. de act. emt. L. 12 § 24. D. de instr. leg. — "Serae et claves, magis domus portio, quam domus instrumentem sunt." L. 14. D. de supell. leg. (33. 10). L. 12. § 16. D. de instr. leg. — "Instrumentum domus id esse, quod tempestatis arcendae aut incendii causa paratur; non quod voluptatis causa. Instrumenti ea esse quae ad tutelam domus pertinent, ornamenti quae ad voluptatem, sicut tabulas pictas."

trade or profession of him who inhabits the house was excluded, as well as all which was there merely for his personal convenience: — as, for example, cattle in a stable, fish in a pond, pictures, curtains, and, generally, every thing which, although fitted and arranged, originally, for one particular house, was not necessarily or exclusively destined for that house alone, but might serve for any other house; as, for example, ladders, brooms, pails, fire-pumps, and other objects which the Romans included in the denomination of *instrumentum domus*.

It will be seen, from what precedes, that in order to judge whether a thing was or was not an appurtenance of another, it was necessary, simply, to observe its destination as established in fact. Whence it follows, that the distinctive mark of its quality was not to be found in the mere circumstance that an object was inherent in the soil or nailed to the building. In fact, a movable (personal) object did not become an appurtenance of a reality simply by being attached thereto [1]); nor, on the other hand, was the material union essential to constitute it such [2]). L. 17. pr. D. de act. emt. (19. 1). "Aedium multa esse quae aedibus affixa non sunt, ignorari non oportet; ut puta seras, claves, claustra. Multa etiam defossa esse, neque tamen fundi aut villae haberi; ut puta vasa vinaria, torcularia; quoniam haec instrumenti magis sunt, etiamsi aedificio cohaerent." § 7. D. eod. L. 245. pr. de V. S. (50. 16). "Statuae affixae basibus structilibus, aut tabulae relegatae catenis, aut erga parietem adfixae, aut si similiter cohaerent lychni, non sunt aedium; ornatus enim

1) Puchta, Vorles., § 37 Kierulff, I. p. 334. Wächter, l. c., p. 255.

2) The Austrian law, § 297, treats as realty all that is attached to the soil, or rivetted, nailed, or attached by masonry to the building, (Unger, I. 459); and the Dutch law, (art. 562), includes in the same category, apart from their destination, every thing which is attached to the soil or fastened to the building; — which would, in fact, (in its general terms) include carpets nailed to the floor, a bookcase nailed against the wall, or a lamp suspended from the ceiling! The project of 1820, art. 915, was preferable, inasmuch as it treated as belonging to the realty, only "that which is attached to the soil, or is fixed to the building *and belongs to it*."

aedium causa parantur, non quo aedes perficiantur." L. 38. § 2. D. de act. emt. (XIX. 1). L. 66. § 2. D. de contrah. emt. (18. 1). "Quintus Mucius scribit: qui scripsit ruta caesa, quaeque aedium fundive non sunt, bis idem scriptum; nam ruta caesa ea sunt, quae neque aedium neque fundi sunt."

Finally, things personal (movable) were auxiliaries of other things of the same character, when they were destined to subserve the purposes of the principal object: — as for example, the keys of a chest, the frame of a picture, the sheath of a sword, or the bottle containing liquor [1]).

§ 45. OF FRUITS. (FRUCTUS).

In the natural acceptation of the word, *fruits* are the natural products which a thing furnishes by its own proper force. [2]) Usura pecuniae quam percipimus, in fructu non est, quia non ex ipso corpore sed ex alia causa est, id est nova obligatione. L. 121. D. de V. S. (50. 16). But, in law this definition of the word has been, on the one hand restricted and on the other extended: — restricted in so far as to include only things the production of which comes within the natural design of the principal thing [3]);

1) L. 52. § 9. L. 100. § 3. D. de leg. III. L. 4. pr. de penu leg. (33. 9). "Nam quod liquidae materiae sit, quia per se esse non potest, rapit secum in accessionis locum id, sine quo esse non potest."

2) Treasure found upon an estate, is not a product, nor, consequently, a fruit thereof. L. 7. § 12. D. sol. matr. (24. 3.) and art. 824. Neth. Code.

3) The partus ancillae was not of the number of fruits "quia non temere ejus rei causa ancillae comparantur ut pariant." L. 27. pr. D. de H. P. (5. 3). L. 68. pr. D. de usufr. (7. 1); and see, for the application of this rule in matters of dowry, L. 10. § 2. and 3. D. de jur. dot. (23. 3). On the contrary, the increase of animals was considered as fruit. The same thing might, therefore, according to its purpose or destination, be, or not be, fruit L. 26. D. de usuris. (22. 1). "Venationem fructus fundi negavit esse, nisi fructus fundi ex venatione constet." Fruit trees in a nursery-garden, although natural products, were not fruits any more than trees blown down by the wind; but on the other hand, the trees of a forest, felled periodically, are fruits. L. 7. § 12.

extended in so far as to include, also, products (especially in the mineral kingdom), which in their nature are rather constituent parts, than fruits of a thing, — but which have been considered as fruits, because the principal thing derives its value from them, and because the power of continually supplying them, permits them to be enjoyed without being exhausted, and without annihilation of their substance [1]). L. 7. § 13. D. sol. matr. (24. 3). L. 9. § 2 et 3. D. de usufr. (7. 1). L. 77. D. de V. S. "Frugem pro reditu appellari, non solum quod frumentis aut leguminibus, verum et quod ex vino, silvis caeduis, cretifodinis, lapidicinis capitur" [2]).

Natural fruits were divided: Into fruits strictly natural, (*mere naturales*), and industrial fruits, (industriales), according as they are the spontaneous growth of nature, or as their production requires the aid of human labour [3]). II. Into fruits hanging to branches or clinging to roots, — fruits separated, — fruits gathered. (Pendentes, separati, percepti, apprehensi). L. 25. § 1. D. de usuris. (22. 1). L. 13. D. quib. mat. usufr. am. (7. 4). L. 78. D. de R. V. (6. 1). Those were called *pendentes* or *stantes* which were still united to their principal, and were in law, considered

D. sol. matr. "Si arbores caeduae fuerunt vel cremiales, dici oportet, in fructu cedere, si minus, quasi deteriorem fundum fecerit maritus tenebitur; sed etsi vi tempestatis ceciderunt, dici oportet, pretium earum restituendum mulieri, nec in fructum cedere, non magis, quam si thesaurus fuerit inventus; in fructum enim non computabitur." Puchta, § 37. Voy. Cod. Nétherl., art. 813, 814, 815.

1) Wächter, l. c. p. 263. This author gives the following, very accurate, definition of natural fruits in a legal sense: "Every organic product of a thing and all physical product extracted from it; provided that the process of obtaining or appropriating them does not, according to common usage and to their destination, exceed the limits of "working" properly so called, — which excludes all diminution or deterioration of the principal thing.

2) Vide Arts. 598. Code Nap., and 822, 823. Neth. Code.

3) This distinction, which by Roman law concerned only the bona fide possessor, (L. 45. de usuris, (22. 1); L. 48. D. de A. R. D. (41. 2), and which has no practical interest for us, has, nevertheless, been reproduced in the Netherlands legislation, in imitation of the French Code. Arts 556, 630, 634, and 809. Nether. Code; and Marcadé on Art. 583. Code Nap. For the German law, see Unger. I. p. 464.

as forming a part of it. [1]) If the union had ceased, the fruits were termed *separati,* when the separation had been caused by chance or by natural causes; — *percepti,* when it was caused by the act of man and with the intention of assuming possession of them [2]).

Fruits still present, were termed *extantes;* — consumed, alienated, or so mixed with others as to be no longer identifiable, they were called *consumti.* Finally, under certain aspects of law, fruits were spoken of, which might have been gathered but by negligence were not so, as fruits neglected. (Fructus percipiendi) [3]).

This negligence gave a claim for damages, which were calculated upon this or that basis [4]).

The idea of fruit in general also received from the law [5]) another important extension. In fact, it was made to include every advantage appreciable in money, which any thing procured, or produced, periodically, and upon which one could count with an approach to certainty, as may be done in the case of natural fruits. For example: the labor of slaves, rents, interest of money, and arrears of rents. [6])

1) L. 44. D. de R. V. (6. 1). "Fructus pendentes pars fundi esse videntur." This is why the proprietor of the principal thing is also proprietor of its fruits, as well after their separation as during their union.

2) The difference, as to legal consequences, consists of the fact that the bona fide possessor and the lessee acquire fruits, as independent objects, by all separation; whereas the usufructuary acquires them only by gathering § 36. I. de rerum div. (2. 1.); L. 12. § 5. D. de usufr. (7. 1); L. 25. § 1. D. de usuris (22. 1).

3) The German authors call them, ziehbare or versäumte Früchte (Unplucked, or neglected fruits). See § 2. I. de off. jud. (4. 17). L. 25. § 4. D. de her. pet. (5. 3). L. 33. D. pr. de R. V. L. 62. § 1. D. eod. "Generaliter cum de fructibus aestimandis quaeritur, constat animadverti debere, non an malae fidei possessor fruitus sit, sed an petitor frui potuisset, si ei possidere licuisset." L. 1. § 1. C. de her pet. (3. 31).

4) There is a dispute among modern authors, in reference to this basis. Unger, I. p. 466. note 27.

5) In fact, in its widest acceptation, this word is found as the equivalent of any enjoyment, or pecuniary advantage. L. 49. D. de usuris: "Fructus rei est, vel pignori dare licere." Unger, l. c., p. 468, note 34.

6) L. 34. de usuris. "Usurae vicem fructuum obtinent, et merito non debent a fructibus separari." L. 29. D. de her. pet. "Mercedes plane a colonis acceptae loco sun

These were termed *civil* fruits [1]), in contradistinction to those which were called *natural*. The division into fruits gathered, and fruits neglected, applies to them also [2]).

Moreover, when there was a question of the restitution of fruits, he who was called upon to make that restitution was entitled to deduct the cost of improvements, and any other expenses which he had incurred for the production or preservation of those fruits. L. 1. C. de fruct. (7 51). " Hoc fructuum nomine continetur, quod justis sumtibus deductis superest." L. 36. § 5. D. de her. pet. (5. 3.). " Fructus intelliguntur, deductis impensis, quae quaerendorum, cogendorum, conservandorumque eorum gratia fiunt. Quod non solum in bonae fidei possessoribus naturalis ratio expostulat, verum etiam in praedonibus."

fructuum : operae quoque servorum in eadem erunt causa qua sunt pensiones. — Item vecturae navium et jumentorum."

1) L. 62. pr. de R. V. "Etsi maxime vectura sicut usura non natura pervenit, sed jure percipitur." Art. 934 of the project of 1820 : " To natural fruits are assimilated civil fruits ; i. e. those which, by virtue of civil institutions, are attached to the ownership of a thing, whether by contract, or by law.

2) L. 39. § 1. D. de leg. 1. (30). L. 5. C. de R. V. (3. 32). L. 7. § 7. D de adm. et per. tut. (26. 7.)

SECTION IV.

§ 46. OF THINGS, CONSIDERED AS OBJECTS OF PRIVATE COMMERCE.

Generally speaking, every thing was an object of commerce ;— that is, it might become the object of a real right or of an obligation. There were, however, exceptions, derived either from the particular nature of certain things or from the law. ("Res quas vel natura, vel gentium jus, vel mores civitatis commercio exuerunt." L. 34. § 1. D. de contr. emt. (18. 1). Thence the division into res in commercio and extra commercium [1]) L. 6. pr. D. eod. L. 39. § 10. D. de leg. I. (30).

Among things excluded from commerce, by reason of their nature [2]), were those which, because they are beyond reach, or because their extent is too vast, or because their substance is fluid, or in almost perpetual motion, can in no way be subjected to the power of man, or else constantly escape from it. Such are air [3]), running

It is important not to confound with the res extra commercium those styled *extra patrimonium ;* i. e. those which being, by accident, the property of no one, belong to the first possessor ; — as for example, wild animals, and things abandoned by the owner. Pr. I. de R. D. (1. 2). L. 5. D. de V. S. (50. 16).

2) § 1. I. l. "Et quidem *naturali jure* communia sunt omnium haec, — aër, aqua profluens, et mare, et per hoc litora maris. See also, § 5. eod.

3) The air was an object of rights, in the sense that no one might erect any building or construction whatever, projecting over the property of another, without permission of the proprietor. L. 22. § 4. D. quod vi aut clam, (43. 24). L. 29. § 1. D. ad leg. Aq. (9. 2). The Glossary, ad L. 1. D. de S. P. U. (8. 2), formulates this rule thus : "Cujus est solum, eius debet esse usque ad coelum." The Austrian code, § 297, includes among *real properties* "houses and other constructions, with the column of air which rises above them in a direct line!" See also, art. 44. Neth. Project, 1820.

water [1]), the sea and its shores [2]). From the very nature of such things, results the necessary consequence, that they can never be completely the object of private ownership; — that they can form the object of such a right only so far, and so long, as it is possible for man to retain them under his domination or control. Except as to the portions which individuals may thus have brought under subjection, they must be regarded as common to all the world [3]). *Res omnium communes.* § 1. I. de R. D. (2. 1).

The following were excluded from commerce by the law. — *First:* Things called *res divini juris;* [4]) (Gaj. II. 2. § 7. I. de R. D. (2. 1)); which include: — the *res sacrae,* the *res religiosae,* and the *res sanctae.* — Things "sacred," — as distinguished from things "profane", — were those which had been solemnly consecrated, and were devoted, exclusively, to divine worship. (Gaj. II. 4. "Quae *diis* superis," Justinianus, § 8. I. de R. D., "quae *Deo* consecratae sunt." L. 6. § 3. D. eod.) Unavailable for ordinary commerce, such things were held to be susceptible neither of possession nor of ownership, and could be neither alienated nor mortgaged, except in case of extreme need, L. 9. D. de R. D. (I. 8). L. 30. § 1. D. de acq. vel. omitt. poss. (41. 2). L. 9. D.

1) Water when drawn, became private property (also in a reservoir). Brooks were also susceptible to ownership.

2) The shores of the sea are no longer, as with the Romans, *res communes,* (L. 14. pr. D. de A. R. D. 41. 1); but rather *res publicae.* Kierulff, p. 812. Windscheid, I. § 146, note 2. Code Nap. art. 538, and Neth. Code, art. 577. Roman Law, moreover, was far from depriving the State of all power over the shores of the sea, although it recognised a temporary ownership of the soil in those who had built upon it. L. 6. pr. D. de R. D. (1. 1); L. 14. D. de A. R. D. (41. 1.); L. 50. D. eod. "Quamvis quod in litore publico, vel in mari exstruxerimus, nostrum fiat, tamen decretum Praetoris adbendum est, ut id facere liceat." — Which caused Celsus to say (L. 3. pr. D. ne quid in loc. publ. 43. 8); "Litora in quae populus Romanus imperium habet, populi Romani esse arbitror." The Glossary says, as to this text: "quoad jurisdictionem."

3) Withdrawn from all private domination, they were also called *res nullius.* L. 51. D. de contr. emt. (18. 1). See Wächter, l. c., p. 280; obs. 2. Unger, II. p. 365.

4) The designation "*res nullius*" was also, sometimes extended to this category of things. L. 6 § 2. D. de R. D. (1. 8). See, about this matter, a treatise of Wappaeus, Zür Lehre von dem Rechtsverkehr entzogenen Sachen. Göttingen 1867.

de usurp. (41. 3). L. 21. C. de SS. Eccl. (1. 2). Nov. 120. cap. 10) [1]). — *res religiosae* were the places where a dead person, — or the *head* of a dead person [2]) had been interred [3]), by one having the right so to do [4]). These, like things sacred, were insusceptible of possession or ownership; — but the right to inter a dead body in a certain place was recognised as a private right [5]). The *res sanctae*, (inviolable) were those which were protected by heavy penalties, against all dilapidation; such as the walls, ramparts and gates of towns. (L. 8. pr. L. 9. § 3 et § 4. D. de R. D. L. 2. D. ne quid in loco sacr. (43. 8)). Originally they were consecrated, as *res sacrae*. They belonged however, in the character of "res publico usui destinatae", to the municipia or civitates "*quodammodo* divini juris et nullius (privati) in bonis sunt." § 10. I. de R. D. [6]).

II. Those things were, also, by law excluded from commerce,

The *res sacrae* were distinct from the *res ecclesiasticae*. The latter, although like-wise church property, were not directly devoted to divine worship; and might therefore, by the observation of certain formalities, be alienated or mortgaged. L. 14. and 17. C. de SS. Eccl. — Schilling, Lehrb. für Instit. II. § 52. — According to modern law, things of this kind are, ordinarily, the property of the church. Wächter, l. c., p. 283.

2) If different parts of the body were interred in different places, it was only the place where the *head* was buried which became *religiosus*: "ubi quod est principale conditum est, id est caput, cujus imago sit unde cognoscimur." L. 44. pr. de Rel. (11. 7). If the remains of a person were removed by order of the authorities, the ground where they had been interred lost its religious character. Also in case the place of sepulture was occupied by an enemy. L. 36, et L. 44, § 1. eod.

3) The rule did not, therefore, extend to funeral monuments. (*cenotaphium*). L. 6. § 1. D. eod.

4) Gaj. II. 4. L. 6. § 4 et L. 7. D. de R. D. L. 3. § 6. D. de Rel. (11. 7). L. 2. C. eod. (3. 44).

5) L. 14. C. de leg. (6. 37). "Monumenta quidem legari non posse manifestum est. Jus autem mortuum inferendi legare nemo prohibetur." At the present day, cemeteries are no longer *res nullius*, but the property of the church, the parish, or a public company. Can any one claim the ownership of a corpse? See, as to this, Wächter, l. c., p. 285, and Unger, 1. 368, note 28. [The author, speaking only from a continental point of view, is probably unaware of the instances on record, in England, in which a Creditor has taken in execution, (*per capias ad satisfaciendum*), the dead body of his Debtor. **The Translator.**]

Voy. Schrader, ad h. l.

which were devoted to the use and benefit of all the inhabitants or to the public service [1]). Of this number were [2]) : — Rivers which were never dry; Ports; — Streets; — public squares; public roads [3]), and public edifices. Ordinarily these things belonged to the State or to the communes [4]), but they might, also, belong to individuals; — for that which caused them to be excluded from commerce, was simply the public use and utility to which they were devoted. L. 5. pr. D. de R. D. "Riparum usus publicus est jure gentium, sicut ipsius fluminis. — Sed proprietas illorum est, quorum praediis haerent; quae de causa arbores quoque in his natae eorumdem sunt."

It must, however, be observed, that those things which were directly destined to the general use or benefit, were distinguished from the possessions of the State, or of the communes, of which only the revenues were employed to meet the public expenditure

"Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi Romani." L. 9. D. de usurp. (41. 3). § 5. I. de emt. vend. (3. 24). § 2. I. de Inut. stip. (3. 20). These things were usually public (*publicae*) in the proper sense of the word. By an incorrect use of it, those things were sometimes, also, called *publicae* which belonged to the communes; sometimes even the *res communes.* "Bona civitatis abusive publica dicta sunt, sola enim ea publica sunt, quae populi Romani sunt." L. 10. D. de R. D. L. 15. D. de V. S. (50. 16).

[2]) L. 4. § 1. D. de R. D. "Flumina pene omnia publica sunt." The word *Pene*, which is not found in the § 2. I. eod. (See Schrader, ad h. l.), is explained by the L. 1. § 2 et 3. D. de flum. (43. 12). "Fluminum quaedam sunt perennia, quaedam torrentia. Perenne est, quod semper fluat, *ἀέννaος*" Torrens *ὁ χειμάῤῥους* id est: hieme fluens. — Fluminum quaedam publica sunt, quaedam non. Publicum flumen esse, Cassius definit, quod perenne sit." § 4. "Hoc interdictum ad flumina publica pertinet; si autem flumen privatum sit, cessabit interdictum, nihil enim differt a ceteris locis privatum." Vide art. 577 C. Neerl., art. 538 Code Nap., Pruss. Law P. II. Tit. 15. § 38 and 39. Austr. Cod. § 407.

[3]) L. 2. D. de via publ. (43. 11). "Viam publicam populus non utendo amitterre non potest." As to various kinds of roads, see L. 2. § 22. D. ne quid in loc. publ. (43. 8).

[4]) It will be observed from the difference between the *res sacrae* and the *res religiosae*, that the *res publicae* are excluded from commerce only in a relative manner, and in the sense that private persons cannot subject them to their exclusive control. See Kierulff, l. c., p. 311. Puchta, Vorles, I. p. 79.

but which were in no way withdrawn from commerce, although their administration or alienation was subject to special rules. L. 72. § 1. D. de contr. emt. (18. 1). "Lege venditionis illa facta, si quid sacri, aut religiosi, aut publici est, ejus nihil venit, si res non in usu publico, sed in patrimonio fisci erit, venditio ejus valebit." L. 6. pr. D. eod. "Publica, quae non in pecunia populi, sed in publico usu habeantur, ut est Campus Martius" [1]).

Finally, motives of public interest caused the imposition of restrictions, or of prohibition, as to the alienation of certain things, and even as to any dealings with them [2]).

1) The difference between those things which are *in usu publico* and those which are *in pecunia populi*, is expressed in the Austrian Code, § 287, by the words *öffentliche* or *allgemeine Güter*, (Public or universal property), and *Staatsvermögen*, (Property of the State). The same difference is, also partially noted in Arts 538, 539, Cod. Nap. The Netherlands legislator, — as if all property belonging to the State stood in precisely the same position, — does not content himself with naming them all in one line, but unites them more closely by the word *insgelijks* — i. e.: likewise or similarly. (Code Neth., Arts. 576, 577). The Project of 1820 was, here again, greatly superior. In art. 951 it says: "Private persons can acquire no rights against the State as to things evidently devoted to public utility, and which are, consequently, *common to the entire country and inalienable.*" See also, as to property of communes, arts. 229, 230, of the Neth. Communal law.

2) L. 4. § 1. D. Fam. ercisc. (10. 2). Thus, for example, it was forbidden, under heavy penalties, to sell arms to *the barbarians* who visited Rome; and it was also forbidden, in a general way, to sell *purple*. Tit. C. quae res venire non possunt; and Tit. C. quae res exportari non debent (4, 40 and 41).

CHAPTER V.

OF THE CREATION AND THE EXTINCTION OF RIGHTS.

SECTION I.

Of the creation and the extinction of rights in general.

§ 47. OF THE ORIGINAL ACQUISITION AND THE LOSS OF RIGHTS; THE TRANSMISSION OF RIGHTS; — THE TRANSFORMATION OF RIGHTS.

A right was created, or was lost, when, relatively to a person, a state of facts occurred, to which the creation or the loss of a right was attached, as a consequence, by positive right. The acquisition of a right by a specified person could be effected: I. In a direct manner, and independently of the rights of any other person [1]); — and in such case it is called original, or direct: (acquisitio originaria); or II. A right which was previously attached to a specified subject, passed to another, in virtue of legal

This mode of acquiring a right could, also, itself, be effected in two different ways. Either the right arose for the first time, as in case of occupation of a thing which had never belonged to any one; — or a right belonging formerly to another, but which had lapsed or been lost, was revived, independently of the person previously entitled, and apart from all connection with him; — as, for example, in case of acquisition by prescription, (lapse of time) or by delegation. L. 12. D. de Nov. (46. 2); Wächter, II. 612. Puchta, Vorles, § 47.

relations created either by the will of individuals, or by the law ; [1]) and in this case the acquisition is termed " derived". (acquisitio derivata). This transfer of a right from one subject to another, might be by general or special title ; and its effect was to instal (as to this right) the new possessor in the place and stead of him from whom he derived it ; and the relation thus created between the new possessor and the person previously entitled was called " succession". (successio) [2]). This succession was not, however, permitted indiscriminately, as to all kinds of rights. It could not, for instance, take place, where there was question of family rights, properly so called [3]) ; nor, generally, whenever the substitution of one person for another would entirely change the nature of the right, or modify its essential elements [4]).

Succession, where it was legally possible, might take place with special reference to one or to several specified rights : succedere in rem [5]), in singulas res in singularum rerum dominium. L. 37. D. de acq. vel omitt. her. (29. 2). L. 3. § 1. D. de exc. rei vend. (21. 3. L. 8. D. de jure-jur. (12. 2). L. 1. § 13. D. quod leg. (43. 3) : in locum successisse accipimus, sive per universita-

1) In the absence of any legal relations effecting the transfer, there would be, — as Unger well expresses it, (l. c., § 74) — two persons who follow each other, but do not *succeed* one to the other. Thus, the occupation of a *res derelicta* and the usucaption are not successions ; — while the converse is true as to acquisition by purchase, by gift, or by bequest.

2) The new possessor was called *successor ;* he to whom he succeeded *auctor*, — as being the immediate cause, — the " author", — of the devolution of the right upon another. L. 7. D. si serv. vind. (8. 5). " Neque se neque successores suos prohibituros altius tollere." L. 175. § 1. D. de R. J. " non debeo melioris conditionis esse quam auctor meus a quo jus in me transit."

3) The Roman Law recognised succession as to certain family relations which had acquired, in some sort, the character of rights of property ; — as, for instance the *manus*, and paternal authority. Sav. Syst. III. pag. 12.

4) Such was the case, for example, as to the usufruct and the use : — two rights which, consequently, could neither be transmitted nor ceded. Gai. II. 30. § 3. I. de usufr. (2. 4). We shall see, hereafter, to what extent obligations are susceptible of succession as individual rights. Unger II. 19. obs. 14 and 15.

5) As to this terminology, see Sav, l. c., p. 18 et s. Windscheid. § 65, note 2.

tem, sive in rem sit successum") ; — or it might include all the rights of a certain individual, mentally regarded as a single whole : (collective unit) : — successio in universum jus, in omne jus, in universa bona, successio per universitatem (L. 37. D. 1.) "Heres in omne jus, non tantum singularum rerum dominium succedit."

These two kinds of succession had this in common, — that the successor took the place of his predecessor ; — but they differed in other respects. Thus the succession by universal title transferred immediately to the new possessor, the whole, the aggregation, of the rights of property of his predecessor ; but transferred to him only mediately and indirectly the invidual objects of which that whole was composed. (*per* universitatem succedere, *per* universitatem acquirere). The acquisition of the latter was, therefore, only the enforced and instantaneous consequence of the succession to the totality ; and hence it resulted, that it was possible to succeed *per universitatem,* to rights which, taken separately, were insusceptible of being transferred. (L. 62. D. de acq. rer. dom. (41. 1). "Quaedam quae non possunt sola alienari per universitatem transeunt ; ut fundus dotalis ad heredem ; et res cujus aliquis commercium non habet. Nam etsi legari ei non possit, tamen heres institutus dominus ejus efficitur." L. 1. § 1. D. de fund. dot. (23. 5). " Sed et per universitatem transit praedium — veluti ad heredem mariti cum suo tamen jure ut alienari non possit.") The peculiar feature of the universal succession, was the immediate transmission of the claims which formed a part of the collective whole [1]).

The Justinian law [2]) mentions, as *modi quibus per univer-*

1) L. 37. D. 1. "Cum et ea, quae in nominibus sint, ad heredem transeant." The antithesis is in L. 3. pr. D. pro soc. (17. 2) "ea vero quae in nominibus erunt, manent in suo statu, sed actiones invicem praestare debent." See Hasse, Archiv für Civ. Pr. V. p. 21 et s. ; Sav. l. c., p. 15.

2) Anciently, there were several other modes of acquiring *per universitatem* the entire property of a person still living. Thus the *coemtionator* and the *bonorum emtor* acquired the entire property ; and it was the same with the succession to a person, who, previously free, became a slave by force of a judicial sentence. Gaius III. 82. "Ecce cum paterfamilias se in adoptionem dedit, mulierve in manum convenit, omnes

sitatem acquiritur, only the hereditas, the bonorum possessio, the arrogatio and the addictio bonorum libertatum conservandarum causa [1]): and this enumeration was specific, and was not susceptible of extension to other cases, even though expressly so desired by the parties. Thus, neither they who acquire an entire estate by gift, or as a dowry, nor yet the socius omnium bonorum, could be said to succeed *per universitatem*. L. 3. D. pro soc. (17. 2). L. 72. D. de jur. dot. (23. 3) [2]).

Succession by substitution of persons did not cause any modification in the nature or the essence of the objective right which formed the matter of the succession. The successor remained,

eorum res incorporales et corporales, quaeque eis debitae sunt, patri adoptivo coëmtionatorique acquiruntur." Gaj. I. 160. III. 78. § 1. I. de success. subl. (3. 13). Observe, that in case of acquisition by means of the *manus* and of the *potestas*, other rules were applied as to the succession to debts than in the case of inheritance. "This kind of universal succession," says von Scheurl, (Beiträge, p. 246), "does not constitute an hereditary succession to the person and the goods of the individual arrogated, or the woman married, — who, in fact, are not dead; but is, simply, a *universal acquisition of their property, through them*. Arndts, § 56. Obs. 3. — It may be said that every acquisition per universitatem is not a succession *in* universitatem.

1) According to modern law, there remains but one sole mode of universal acquisition; — i. e. hereditary succession. (inheritance). In art. 880 of Netherl. Code, (the phraseology of which leaves great room for improvement), the legislator, as if it were a question of an acquisitio *per* universitatem, has omitted to speak of the succession to the obligations of the deceased, although the art. 724, of the code Nap. from which ours (the Dutch) is taken, had not been guilty of similar forgetfulness, any more than the project of 1820 art. 1557, which says: "By hereditary succession is meant succession to all the possessions of a person deceased, and to all his rights and *obligations*, except in so far as they were purely personal."

2) Schilling, Inst. III. 948. Unger, II. 23. "The application of universal succession," says Savigny, (Syst. III. p. 17), "is, in some sort, *juris publici*; and thus, as Hasse justly observes, under a legislation which did not admit the acquisition of property by the effect of obligations merely, it was natural that all things and all rights should be separately transferred; — a general rule, departed from only in the single case where the anterior subject (owner) of the property having disappeared, a special transfer of each article could not be required without serious obstruction to the transmissibility of property." As to this Hasse says: "The Romans made it a principle of their Law not to carry a fiction beyond the limits of strict necessity, and they thus rendered fiction itself natural; — which, should, most certainly, be the aim of the great masters of every art."

therefore, subject to all the charges and restrictions attached to the right which was transmitted to him, and could not, in this respect, claim more than his predecessor had possessed [1]). But this did not prevent the acquisition of the private right of some one in whose person that right had never existed in a separate and independent form [2]).

Apart from their creation and their extinction, rights might, in consequence of their nature, undergo transformations by the augmentation or diminution of their extent, or might be modified by disturbance or infringement [3]).

§ 48. OF LEGAL FACTS.

Those facts were termed "legal facts" the effect of which was to create, to modify, or to extinguish rights [4]). The result desired by him who performed the act, did not, however, always follow directly or immediately. This result, or at least its precise character [5]), often depended upon a future still uncertain; so that, during a greater or less lapse of time the situation remained in doubt, and

1) L. 54. D. de R. J. "Nemo plus juris in alium transferre potest quam ipse haberet." L. 175 § 1. L. 177. D. eod. "Qui in jus dominiumve alterius succedit, jure ejus uti debet." L. 143 eod. "Quod ipsis qui contraxerunt, obstat, et successoribus eorum obstabit." L. 20, § 1. D. de acq. rer. dom. (41. 1). L. 7. § 1. D. de exc. (44. 1). L. 3. § 1. D. de exc. rei vend. (21. 3). L. 28. D. de exc. rei jud. (44. 2).

2) L. 63. D. de usufr. (7. 1). "Quod nostrum non est, transferemus ad alios, veluti is qui fundum habet, quamquam usumfructum non habeat, tamen usumfructum cedere potest." As the right, in this case, was not apparent, and was not fixed in a positive manner before its acquisition by another, the German authors give to this form of acquisition the name of *constitutive*, in contradistinction to that which they term *translative*. Wächter, II. p. 612. Unger, l. c., p. 5. Arndts, § 56.

3) Sav. l. c., p. 5. Windscheid, I. § 64. Arndts, l. c.

4) Sav. Syst. III. p. 3, calls them "juristische Thatsachen." Unger, II. p. 3: "rechtserzeugende Thatsachen."

5) We find an example in Gaius, II. § 146. "Idque ex accidentibus apparet, tamquam sub conditione facta cujusque venditione *an* locatione."

so to speak, pendent [1]), (depending); but this did not prevent the germ of a future right from being planted [2]) and a certain effect thus produced, although perhaps not that which was intended [3]).

Moreover, these facts did not exercise their influence regularly, except as to the future. It was only by exception, that any retrospective force was conceded to legal results; and when it was so, it involved an assumption that the fact from which the result ensued had taken place earlier than it, in reality, had done [4]). — Nay, more, the Roman law contains many rules founded on a fiction [5]), in virtue of which that which

1) L. 12. § 5. D. de usufr. (7. 1). "Cum — in pendenti est dominium — dicendum est condictionem pendere, magisque in pendenti esse dominium." L. 25. § I. D. eod. L. 20. D. de don. int. vir. et ux. (24. 1) "in pendenti esse causam obligationis." L. 86. § 2. D. de leg. I. (30. 1). "Servi status in suspenso est." § 5. I. quibus mod. jus patr. pot. solv. (1. 12). "Pendet jus liberorum propter jus postliminii."

2) § 4. I. de V. O. (13. 15). "Ex conditionali stipulatione tantum spes est debitum iri eamque ipsam spem in heredem transmittimus."

3) Windscheid, § 67, obs. 1.

4) "Omnia fere jura heredum perinde habentur, ac si continuo sub tempus mortis heredes exstitissent." L. 193. D. de R. J. L. 54. D. de acq. vel omitt. her. (29. 2). L. 43. § 2. D. de A. R. D. (41. 1). L. 7. pr. C. ad Sct. Mac. (4. 28). "Cum nostra novella lege generaliter omnis ratihabitio prorsus retrotrahatur et confirmet ea, quae ab initio subsecuta sunt."

5) Much has been written of late years, respecting the fictions of law among the Romans. See, particularly, Demelius, "Die Rechtsfiction in ihrer geschichtlichen und dogmatischen Bedeutung, 1858." (Legal fiction in its historical and dogmatical signification). But no one has better explained its precise nature than Ihering, in his Geist des Röm. Recht. Vol. III. p. 286. — He calls it "*a falsehood technically necessary*," — (eine technische Nothlüge), and continues thus: — "It sounds well, to say that fictions are expedients, are crutches, to which science ought not to have recourse. Nothing is more true, from the moment when science can dispense with such aids; but otherwise, it is better that she should walk, even with "crutches", than tumble over for want of them, or be afraid to move! It was not then an accident, but a happy instinct, which led science, in her infancy, to have recourse to these crutches; — and here again the example of English law, (which has made the most extensive use of this expedient), may convince us that fictions are not a creation exclusively Roman, but that they constitute a resource, of which sheer necessity causes the employment, at a certain period of the intellectual development of a people. Order with fiction, is better than disorder without it." If we, in Holland, would but move a little more in the region of legal fictions, we should have not so much reason to deplore our legislative immobility!

had never happened was assumed to have actually occurred [1]).

The multiplicity and the infinite variety of the legal relations with which legal facts are connected, cause the latter to present such diversity, that it is scarcely possible to treat them collectively, but is necessary to study them separately, in their connection with the rights which they affect. Among these facts, an important place belongs to acts and to the lapse of time; and these two matters require special consideration..

It is necessary also, in the first place, to distinguish between positive and negative facts; — according as it may be requisite, for the acquisition or the loss of right, that something should or should not happen. In the second place, it is necessary, also, to distinguish between the voluntary acts or voluntary omissions [2]) of the person who has to acquire or to lose a right, and circumstances merely accidental, — including the acts of third parties.

Finally, voluntary acts, in their turn, are of two kinds. Their immediate purpose either, first, is to create or to extinguish a right: — in which case the act, provided that it be at the same time a necessary condition of this legal result, is called a legal act [3]); — or secondly, the act is not immediately directed towards legal consequences which may even not be desired; — or, again, those consequences have not their sole cause in the will of him who has performed the act [4]).

1) Gaius, III. 26; IV. 34—39. L. 18. L. 22. pr. D. de capt. (49. 15).

2) "Impune puto admittendum, quod per furorem alicujus accidit: quomodo si casu aliquo, sine facto personae id accidisset." L. 61. D. de adm. et per. tut. (26. 7). "Hence it follows," says Puchta, (Pand. § 49.) "that every omission (and even every action) is not an *act*; — as otherwise he who sleeps would act. An act of omission, is an omission founded upon a resolution previously formed."

3) Savigny and others call them also "willenserklärungen", (declarations of will or intention); — but this designation is not quite accurate, inasmuch as illegal acts may also constitute declarations of intention.

4) As, for example, in case of prescription (by lapse of time) and in regard to misdemeanours. See Wächter, l. c., § 83.

SECTION II.

Of acts, considered with reference to the creation and extinction of rights.

§ 49. OF THE CAPACITY TO ACT. [1])

The first condition required for the free performance of an act, is to be endowed with the faculty of desiring (willing) to accomplish that act in such a way that it shall produce the effect which is its natural consequence. The total absence of *will*, caused to be considered as incapable to "act": —

I. Legal (artificial) persons, who, to meet their necessities, required the assistance of Representatives who could act for them. (L. 1. § 22. D. de acq. vel. am. poss. (41. 2). L. 1. § 1. D. de lib. univ. (38. 3). "Sed an omnino bonorum possessionem petere possint, dubitatur. Movet enim quod consentire non possunt." [2]) L. 97. D. de cond. et dem. (35. 1). Ulpian. (22. 5).

II. Infants under seven years of age [3]) (infantes). L. 1. § 12, 13. D. de O. et A. (44. 7). § 10. I. de inut. Stip. (3. 20). "Infans et qui infantiae proximus est, non multum a furioso distant, quia hujusmodi aetatis pupilli nullum habent intellectum." L. 5. § 2. D. ad. l. Aq. (9. 2)).

The capacity to *act* is not the same thing as legal capacity, — that is to say the capacity of having rights. He who is incapable of having rights is also incapable to act; — but the converse is not true. Sav. Syst. II. § 60; III. § 106.

2) Vide supra, § 34, note 5. (p. 000).

3) As to the period termed *infantia* in modern legislation, vide supra, § 27. p. 57 note 2.

III. Lunatics (furiosi, dementes.) L. 40. D. de R. J. L. 1. § 3. D. de poss. (41. 2). "Furiosus, et pupillus sine tutoris auctoritate non potest incipere possidere, quia affectionem tenendi non habent, licet maxime corpe suo rem contingant: sicut si quis dormienti aliquid in manu ponat"; except during lucid intervals [1]). (induciae, lucida intervalla). L. 6. C. de cur. fur. (5. 70). L. 9. C. qui test. fac. poss. (6. 22). L. 2. C. de contr. emt. (4. 38). Temporary madness, occasioned by illness or by any other cause [2]), excluded, so long as it lasted, the exercise of the will, and with it, consequently, the power to act, L. 17. D. qui test. fac. poss. (28. 1).

Certain other persons were not absolutely incapable of acting, but their capacity was more or less restricted. Thus: —

I. Minors above the age of seven years (*infantia majores*) could, without the assistance of their tutors, ameliorate their condition, but never deteriorate it [3]). L. 9. D. pr. de auct. tut. (26. 8). pr. I. eod. "Placuit, meliorem quidem conditionem licere eis facere, etiam sine tutoris auctoritate; deteriorem vero non aliter, quam cum tutoris auctoritate."

II. To these minors, were assimilated prodigals deprived of the

1) During which, however, the curatorship continued. "Curatoris creationem non esse finiendam, — sed per intervalla quae perfectissima sunt, nihil curatorem agere." L. 6. c. l. — The Austrian Code, § 567, admits the validity of a testament made during a lucid interval; but not so the Prussian law, part I. tit. 12. § 2; (See Koch, ad h. l.); nor the French nor the Netherlands code. Arts. 489. 503. Cod. Nap. — 487. 500. Netherl. Code.

2) Somnambulism must be included in this category, and even drunkenness, when it reaches such a point that the man is unconscious of what he does. — See Austrian Code, § 566, and the Prussian Law, Part I. Tit. IV. § 28. The Neth. Code does not expressly mention drunkenness as a cause of incapacity to act; but it seems to render void, (at least in the matter of testaments and agreements), all acts performed under its influence and under the conditions above mentioned. (Arts. 942, and 1356, code Neth.) — Anger, alone, is not a ground of nullity, but it becomes so, when it reaches the degree of mental aberration. L. 48. D. de R. J. "Quidquid calore iracundiae fit vel dicitur, non prius ratum est, quam si perseveranter apparuit judicium animi fuisse." Windscheid, § 71, note 5. See Prussian law, l. c., § 29.

3) Nevertheless, when they approached puberty, they became responsible and punishable for offences which they committed. § 18. I. de obl. ex. del. (4. 1).

administration of their property. L. 6. D. de V. O. (45. 1). Is cui bonis interdictum est stipulando sibi acquirit, tradere vero non potest vel promittendo obligari." L. 10, pr. D. de cur. fur. (27. 10) [1]).

III. Persons under the age of twenty-five years, (*minores*) were capable of acting, when they had no curator [2]); and, as a general rule [3]), a curator could not be placed over them against their will. "Invriti adolescentes curatores non accipiunt" § 2. I. de curat. (2. 23). But if the minor had a curator, he could not alienate his property without the consent or approval of the latter; he could but contract obligations [4]).

1) L. 9. § 7. D. de R. C. (12. 1). "Sed etsi ei numeravero, cui postea bonis interdictum est, mox ab eo stipuler, puto pupillo eum comparandum, quoniam et stipulando sibi acquirit." L. 3. D. de Nov. (46. 2). L. 5. § 1. D. de acq. vel omitt. her. (29. 2). The power of testamentary disposition was withdrawn from the prodigal. L. 18. pr. D. qui test. fac. poss. (28. 1). By the Austrian and the Prussian law he can exercise it only in favour of his legal heirs. (Pr. Law. part. I, Tit. 12. § 27 et s.; Cod. Autr. § 568). The Netherlands law, for reasons which scarcely bear examination, leave the prodigal entire latitude in this respect. Art. 500, Neth. Code, and Asser, p. 212.

2) L. 3. c. de int. rest. min. (2. 22). The minor was protected against all prejudice, by the restitution *in integrum*. "Si vero sine curatore constitutus contractum fecisti: implorare in integrum restitutionem, si necdum tempora praefinita excesserint, causa cognita non prohiberis."

3) The intervention of a curator was necessary to him: — to receive an account of tutorship; to accept a payment; to appear in the tribunals; and for arrogation. L. 7. C. qui pet. tut. (5. 30). L. 7. § 2. D. de min. (4. 4). L. 11. C. qui dare tut. (5. 34).

4) This is still and always, a disputed point. See Sav., Verm. Schriften, II. p 384 et s. Vangerow, I. § 291. obs. 2. Keller, § 449. Windscheid. § 71. note 8. Brinz, Pand. I. p. 43. It seems to me that the L. 101. D. de V. O. is conclusive: "Puberes sine curatoribus suis possunt ex stipulatu obligari." The glossarists interpret this text as if it were applicable only to the single case where the minor has no curator. Puchta supposes that the minor was simply allowed to dispense with the *assistance*, but not with the approbation of his curator. Both interpretations seem to me inadmissible. The first, because the words *sine curatoribus suis* imply that there are curators; — the second, because it is forcing the sense of the word *sine* (in "sine curatoribus") to translate it by "*out of the presence*." My opinion is, moreover, confirmed by L. 43. D. de O. et A." Obligari potest paterfamilias suae potestatis, pubes, compos mentis Pupillus sine tutoris auctoritote non obligatur. Jure Civile. Servus autem ex contracti. bus non obligatur." The jurisconsult enumerates three categories of persons: — First,

IV. In some respects, the capacity of women [1]) to act was restricted: — for example for the *intercessio*. L. 2. § 1. D. ad Sctum. Vellej. (16. 1).

§ 50. OF THE EFFECTIVE (OR REAL) EXERCISE OF THE WILL.

In addition to the capacity of acting, another condition was requisite for the free performance of an act; — which was, that he who acted should really have willed that which he professed to desire. Otherwise there would exist an apparent volition, but not a real (effective) exercise of the will; — at least not when the want of accord between the true volition and the expression of supposed volition had been within the knowledge of him who was in contact with the author of the act. — What is termed "mental reservation" (reservatio mentalis) had no effect in a matter of rights [2]).

The disaccord between the will and the declaration might exist in two different ways: — with, or without the knowledge of

those who can bind themselves *without the concurrence of any one*; second, those who can do so only *with the concurrence of another*; and finally those who cannot do so even *with* such concurrence. The argument that Puchta founds upon the prohibition which forbids a minor to alienate his property, is not conclusive, because the prohibition to alienate does not necessarily imply a prohibition to contract obligations. The minor who contracted rash obligations was protected by the *extraordinarium Praetoris auxilium*, to which he would not fail to have recourse; particularly in presence of menacing creditors, who would keep him on the alert. Finally, it must not be forgotten, that the *cura minorum* was always voluntary; — and that it would not have been an encouragement to minors to demand a curator, to at once prevent him who did so from contracting any kind of engagement. [The distinctions between the English law and the law here cited, as to the restrictions upon, and the protection extended to minors, in regard to the alienation of property and the contraction of obligations, — (excepting, always, as to the constantly disputed question of "debts for necessaries"), — are too well known, to require to be here treated in detail. **The Translator.**]

1) Vide supra, § 26.

2) Sav. Syst. III. § 134. Keller, § 58. Windscheid, I. § 75. note 1.

the author of the declaration. The disaccord was within his knowledge, when it was evident that what ordinarily constitutes an indication of the will, had been done by him with a different intention. Thus, words in themselves suited to express a real and serious intention, might be employed only in jest [1]), — or by way of illustration, — or in a symbolical sense [2]); or threats might have induced a person to affix his signature to an instrument of which he knew nothing. — But it was especially thus, when the contracting parties had in view something else than would be inferred from the apparent sense of their declarations; (simulatio); — whether they had not intended to perform any legal act whatever [3]), — or had intended to perform a different act from the one expressed [4]), — or had intended to perform it for the benefit of other persons than those named [5]). — In the first case, the declaration was entirely without effect; — to the two others was applied the general principle, that the true will of parties must be respected, without reference to the simulated declaration, — unless indeed that which they intended was prohibited by law; — for, in this latter case that which they had declared to be their intention was of no effect because they had not really intended it, while that which they had really intended remained also without effect as being contrary to law [6]).

1) L. 24. D. de test. mil. (29. 1.) L. 3, § 2. D. de O. et A. (44. 7.) "Verborum quo que obligatio constat, si inter contrahentes id agatur: nec enim si per *jocum* puta, veldemonstrandi intellectus causa ego tibi dixero: spondes; et tu responderis; spondeo, nascitur obligatio." But the "joke" could not, under pain of damages, be practised at the expense of a third party who had no reason to suspect its existence. Ihering, Jahrb. für Dogm. T. IV. p. 74. Prussian Law, part. 1. Tit. 4. § 56.

2) Gaius, II. 103. II. 252. IV. 93. 94.

3) L. 55. D. de contr. emt. (18. 1) "Nuda et imaginaria venditio pro non facta est, ideo nec alienatio illius rei intelligitur. D. 30. D. de R. N. (23. 2). L. 3. C. de rep. (5. 17).

4) L. 36. D. de contr. emt. L. 46. D. loc. (19. 2). L. 5. § 2. D. pro soc. (17. 2). L. 5. § 5. D. de don. i. v. et ux. (24. 1).

5) L. 2. 4. C. plus valere. quod agitur, quam quod simulate concipitur. (4. 22). L. 16. C. de don. i. v. et ux. (5. 16).

6) L. 1, 2, 3. C. plus valere. L. 46. loc. "Si quis conduxerit nummo uno, conductio nulla est, quia et hoc donationis instar inducit." L. 5. § 5. D. de don. i. v. et ux.

If the person who declared his will did not know that his declaration was at variance with his intention, that declaration — the result of an error, — was null, not because there was error, but because there was absence of intention [1]) ; — whence it follows that in such case it was unimportant whether the error was of law or of fact ; — excusable or not excusable — [2]).

Again, it happened, that volition really existed, but that it had been produced by such circumstances that the law was bound to prevent its natural effects. These circumstances were, constraint, error, ignorance, and fraud.

" Venditionem donationis causa inter virum et uxorem factam, nullius esse momenti: si modo, cum animum maritus vendendi non haberet, idcirco venditionem commentus sit, ut donaret."

1) Savigny, (Syst. III. app. 8 n0. 3). Styles such an error " an error improperly so called", because the nullity, in this case is not the result of the error, as such. Windscheid § 76. note 1, criticises this expression, on the ground that an error improperly so called is not an error ; and that a real error cannot be so styled simply because it differs from other errors in its legal effects.

2) L. 25. § 6. D. de her. pet. (5. 3). " Scire ad se non pertinere, utrum is tantummodo videtur, qui factum scit : an et is qui in jure erravit ; — Et non puto hunc esse praedonem, qui dolo caret, quamvis in jure erret." L. 79. D. de leg. II. L. 36. § 1. L. 37. D. de usurp. (41. 3). This difference, pointed out by Savigny, had been overlooked by previous writers. At present, the generality of authors concur with him. See Wächter, II. p. 743 ; Unger, II. § 89. note 6. Windscheid. l. c. ; Vangerow. I. § 83. obs 3.

The Prussian law, Part. I. Tit. IV. § 78, declares the nullity of the declaration, if there be error exclusive of volition, even though the error be inexcusable. See Koch, ad h. 1. The Austrian Code, § 875. sanctions a false theory in the matter of agreements ; to wit that they retain their force, when the person, who is bound, is the author of his own error, or when it has been occasioned by a third person, who is a stranger to the contract. (Unger l. c.) The French law seems to enjoin, in all cases of error in agreements, that they should be annulled by the judge ; (Code Nap. Art. 1117.) but it seems from Pothier, Traité des oblig. nos. 17 and 21, that this article should not be applied to error exclusive of consent. See Marcadé, (upon the art. 1117), — whose opinion should, I think, be adopted in the Dutch Law, — and Opzoomer, in reference to art. 1358, N0. 1. Neth. Code.

§ 51. OF CONSTRAINT. (VIS METUSVE) [1]).

When fear, produced by unjust threats, induced a person to make a declaration of his will, that circumstance did not alter the fact that the act thus performed was an emanation of his will [2]) and as such should take effect. — In fact, it matters

The word *geweld* (violence) employed in art. 1359 et s., Neth. Code, is too broad, for it includes violence purely physical, (vis absoluta), by means of which a person is forced to perform an act, in the performance of which he is but a passive instrument in the hand of another. The project of 1820, said : *geweld of bedreiging, geweld of vrees* : (violence or menace, — violence or fear).

2) L. 21. § 5. D. l. " Si metu coactus adii hereditatem, puto heredem me effici, quia, quamvis si liberum esset noluissem, tamen coactus volui." L. 21. § 4. eod. L. 22. D. de R. N. (23. 2). " Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur, maluisse hoc videtur." — The art 2277 of the Neth. Project of 1820 stated this principle in very judicious terms : " There is no agreement without concurrence (mutuality) of volition ; but this is considered to be completely established by the (joint) declaration of volition." In some special cases, however, — as of testaments. dowry, and manumission, — the Romans seem to have recognised the nullity of the act. L. 21. § 3. D. h. t. L. 9. pr. L. 17. pr. D. qui et a quib. manum. (40. 9). Dositheus, § 9. Schliemann (die Lehre vom Zwange, 1861), thinks that the Roman jurisconsults were not all agreed upon this point, but that we should pronounce in favour of the nullity for intrinsic reasons, because from the moment that it is doubtful whether the declaration is in accordance with the intention, (will), we can infer nothing from the one to the other. This opinion, however, is not well founded ; for volition which has manifested itself in a regular manner can cause no doubt as to its veritable existence, and is independent of the motive which has induced its exercise. — Fear does not, in fact, exclude volition, but rather constitutes its determining motive ; and it is justly that Windscheid says. (§ 80, note 2) " The declaration is more than a means of proving the existence of volition ; — it is not merely a sign from which its existence may be inferred, but the actual showing forth of that volition ; — the will itself in its external manifestation. If it be asserted that this manifestation is only a falsehood, a semblance, it is for him who repudiates the act to prove the non-existence of the intention (volition) ; it is not sufficient simply to throw a doubt upon it." See also Arndts, § 61, and the authors whom he cites. According to Prussian law, Part. I. Tit. IV. §§ 31, 32, 33, constraint annuls the act. See Koch, ad h. l. and it is the same in the Austrian Code, §§ 55, 565, 870, 877, — but only as towards the author of the constraint. Unger § 80. — The Code Nap. and the Neth. Code see in violence a ground of nullity, but the act must be annulled or declared null by the Judge. Arts. 1111, and 1117. Code Nap. — Arts 1359 and 1485. Neth. Code. — See Diephuis, VI. N°. 517. 1070.

little, what may have been the secret motive of him who performed the act, provided that his will was manifested, externally, in a clear and natural manner. But, as the object of the Law is to ensure the peaceable development of individual liberty, it would be irrational, and entirely contrary to this purpose, not to intervene to relieve him, who, by no fault of his own, has been subjected to the action of an influence hostile to his liberty and operating prejudicially as to his property. To obviate this evil, various legal remedies were granted against unjust constraint; and these remedies, which vary according to the different nature of the acts, tended, in some cases, to cause the act to be considered as non-existent; but, more usually, they simply prevented it from producing its entire effect, or at least deprived it of some of its consequences; (actio quod metus, exceptio metus, in integrum restitutio); and this reparation of an injury suffered, was granted, not merely, (as in case of fraud), against him who had caused it, but also against whoever was, even accidentally, in a position to be able to restore matters to their primitive condition. L. 1. D. quod metus causa (4. 2.) "Quod metus causa gestum erit, ratum non habebo." L. 9. § 8. L. 10. pr. L. 14. § 3. D. eod. "In hac actione non quaeritur, utrum is qui convenitur an alius metum fecit; sufficit enim hoc docere, metum sibi illatum vel vim; et ex hac re eum qui convenitur, etsi crimine caret, lucrum tamen sensisse." L. 4. § 33. D. de dol. mal. exc. (44. 3). Metus causa exceptio in rem scripta est, *si in ea re nihil metus causa factum est,* ut non inspiciamus an is qui agit, metus causa fecit aliquid, sed an omnino metus causa factum est in hac re a quocumque, non tantum ab eo qui agit."

In order that constraint should produce the effects above indicated, it was requisite:

I. That the fear which had induced the act, should have been well-founded, taking into account the physical condition [6]) of the person against whom the menace was directed. "Metum non vani

1) The law does not protect either cowardice or feebleness of character. Schliemann, l. c. p. 27.

hominis, sed qui merito et in hominem constantissimum cadit." [1]) L. 6. D. L. 9. pr. D. eod. L. 184. D. de R. J. "Vani timoris justa excusatio non est."

II. That the fear should have been produced by menaces against the life, the physical person, or the liberty, — (not against the fortune merely [2]), — of the person menaced; — or (also) against the tranquillity or the honour of himself or his children. L. 4. L. 8. § 3. L. 5. L. 7. pr. D. h. t. L. 3. D. ex quibus caus. maj. (4. 6). L. 13. C. de transact. (2. 4). L. 4. C. de his quae vi (2. 20). L. 7. 8. 9. 10. C. eod.

III. That the menace should have been unjust; — although the injury which formed the object of the menace might, some times, be just [3]). Moreover, it was requisite that the author of the menace should have threatened an injury which he meant actually to inflict, and not have threatened merely to abstain from doing something which he was not legally bound to do. L. 9. § 1. D. h. t. "Si quo magis te de vi hostium, vel latronum, vel populi tuerer, vel liberarem, aliquid a te accepero, vel te obligavero, non debere me hoc Edicto teneri, nisi ipse hanc tibi vim summisi. Ceterum, si alienus sum a vi, teneri me non debere, ego enim operae potius meae mercedem accepisse videor."

In the absence of one or more of these conditions, other legal remedies protected those who were victims of fear; — but the operation of these remedies was generally less extensive [4]). See the Title of the digest. de calumn. (3. 6); L. 2. 4. § 2. D. de cond. ob turpem caus. (12. 5).

"In this passage, the superlative should not be interpreted too literally." Windscheid l. c., note 6.

2) By French and Dutch law it suffices that property is exposed to a considerable and present injury. Cod. Nap. Art. 1112. Neth. Code 1360. The Prussian law, Part. I. Tit. IV. § 36. — and again, the Austrian Code, § 870, leave greater latitude to the discretion of the Judge.

3) Arg. L. 7. § 1. L. 21. pr. h. t. Schliemann, p. 24.
Sav. Syst. III. § 114. r.

§ 52. OF ERROR, OF IGNORANCE, AND OF DECEPTION. IGNORANTIA, DOLUS.)

Volition might, also, be the result of ignorance, as when a person had no idea of a thing; — or of error, as when a person had formed a mistaken notion of it. (Ignorantia, error, falsa existimatio). L. I. § 2. L. 9. § 5. D. de jur. et facti ign. (22. 6). Generally, in both these cases, the legal consequences attached to the declaration of the will, took effect in the usual manner. Indeed, volition does not the less exist, because induced by ignorance or error [1]). Nevertheless, even though in fact, the volition might exist, it is no less true, that without the error it would not have existed [2]); and it was therefore, that an error which had formed the basis of an act or an omission [3]) had, sometimes, the effect of modifying the injurious effects which would otherwise ensue therefrom. But error had this modifying influence only in case it could not be imputed as blameable to the person who had committed it; — in other words, only in case it was excusable. *probabilis, (non culpabilis)*. Error in matters of *fact* was generally considered excusable; error in point of *law* as blameable. It some

1) The fragments which appear to decide otherwise, — such as L. 20. D. de aq. et aq. (39. 3). "Nulla voluntas errantis"; — or L. 116, § 2. D. de R. J. "Non videntur qui errant consentire," — concern cases were there was only an apparent declaration, or a declaration in which the error excluded the *presumption* of intention (tacita voluntas) L. 15. D. de jurisd. (2. 1). L. 2. pr. D. de jud. (5. 1). L. 9. C. de jur. et fact. ign. (1. 18). Sav. III. p. 342. Windscheid, § 78, note 1.

2) Windschied, l. c. "Volition, evoked thus by an erroneous idea, does not, for that cause alone, cease to be real and actual volition; but it is not the true volition (intention) of the declarant; that is to say, that without the error the volition would not have been evoked."

3) Thus, in matter of acceptance or refusal of inheritances. L. 22. L. 32 and 34. D. de acq. vel om. her. (29. 2); — and for application of the exception Scti Maced. L. 3. pr. D. de Scto. Maced. (14. 6).

times happened, nevertheless, that error in point of law was unavoidable, and was, consequently, excusable; — and conversely, error as to fact was sometimes blameable [1]). It was for him who pleaded either of these exceptions to prove its existence [2]) L. 9. pr. D. eod "Regula est, juris quidem ignorantiam cuique nocere; facti vero ignorantiam non nocere." L. 2. D. eod. "In omni parte error in jure non eodem loco; quo facti ignorantia haberi debebit: cum jus finitum et possit esse et debeat; facti interpretatio plerumque etiam prudentissimos fallat").

As to certain classes of persons, error in point of law was, also, more or less absolutely excusable. Thus:

I. For minors under 25 years of age; for whom the excuse was general. [3])

II. For women, — in certain specified cases, and provided there was no question of their making a profit. L. 9. pr. D. h. t. "Minoribus viginti quinque annis jus ignorare permissum est, quod et in feminis in quibusdam causis propter sexus infir-

1) L. 9. § 3. D. de jur. et fact. ign. "Sed juris ignorantiam non prodesse, Labeo ita accipiendum existimat, si jurisconsulti copiam haberet, vel sua prudentia instructus sit, ut cui facile sit scire, ei detrimento sit juris ignorantia, quod raro accipiendum est." See, as to these latter words, Sav. III. p 334 K. L. 10. D, de bon. poss. (37. 1). L. 2. § 5. D. si quis ordo. (38. 15). L. 3. § 1. L. 6. D. de jur. et fact. ign. "Nec supina ignorantia ferenda est factum ignorantis ut nec scrupulosa inquisitio exigenda. Scientia enim hoc modo aestimanda est, ut neque negligentia crassa, aut nimia securitas satis expedita sit, neque delatoria curiositas exigatur."

To my mind, the erroneous application of law to facts is always an error in matter of law. In truth, the law is either extended to things which it was not intended to govern, or a fact is improperly withdrawn from its domain; — and in either case, there is really an error as to the purport or the scope of the law. The L. 38. D de cond. indeb. (12. 6). upon which Savigny founds a contrary opinion, concerns positively an error as to law, but supposes it excusable by reason of the complication of the great number of questions which cross each other in the matter. This point, however, is a subject of controversy. — Sav. l. c., p. 327. 329. Unger. § 77. and Puchta, Vorles. I. p. 131. d. Wächter, § 21. note 21.

2) Upon the principle that the onus of proof devolves upon him who seeks, in a particular instance, to escape from the application of a general rule. Sav., l. c. p. 335. Unger, l. c. note 19.

3) Except as to illegal acts. Sav. l. c. p. 430.

mitatem dicitur." L. 7. 8. D. eod. [1]) L. 3. 11. 13. C. eod. [2]).

III. For soldiers, in the cases provided for by law [3]). L. 22. pr. C. de jus. delib. (6. 30). "Arma etenim magis quam jura scire milites, sacratissimus legislator existimavit."

IV. Finally, for persons of uncultivated intellect, under circumstances when it seemed necessary to treat them more favourably [4]) by reason of their want of knowledge. L. 8. C. qui adm. ad b. p. (6. 9). L. 1. § 5. D. de ed. (2. 13). L. 2. § 7. D. de jur. fisci. (49. 14). "Ita demum non nocere si ea persona sit quae ignorare propter rusticitatem jus suum possit."

1) See, in reference to these difficult Fragments, which have never yet been completely elucidated, Puchta, Vorles, I. p. 460; Wächter, § 21. note 17; Sav. III. 344. Despite the criticism of Vangerow (I. § 83. obs. 1), I think, with Savigny, that these passages, — doubtless arbitrarily detached from a context which served to show their precise bearing, — should not, in any case, be recognised as authorities, in presence of so many other passages which contradict them. See, also, Windscheid, § 79. note 14. It is probable that Papinian had originally in view acts of procedure. Indeed, by reason of the numerous and rigorous formalities which anciently encumbered that matter, a person might easily, through ignorance or error, lose all that he possessed. In those cases, therefore, where it was not a question of acquiring fresh rights, but simply of preserving rights previously acquired, (non acquirere volentibus, sed suum petentibus) an error of law might be recognised without injury. It was, perhaps, also, to acts of procedure, that the following words had reference": — *in damnis rei suae amittendae*, — in L. 8. cet. —

2) Sav. l. c. 434. et s.

3) L. 9. § 1. D. h. t. L. 1. pr. D. de test. mil. (29. 1). L. 1. C. de rest. mil. (2. 51).

4) Sav. l. c. p. 436. Compare, also, the theory respecting error, in the Prussian and Austrian systems of law. (Sav. III. p. 470). — The Prussian law considers error of law as imputable (blameable), and "could do no otherwise," (as Savigny, with delicate irony, observes), "since the illusion had been cherished, that after codification, the Law would not only be clear and certain, but be known in all its parts by the entire Prussian people!" — See in the Neth. Code, as to error, the observation of Opzoomer, upon art. 1358. N°. 1. — and, on the same subject in the French Code, (which served as a model for the Dutch), Marcadé, as to art. 1110. Code Nap. — These two codes distinguish expressly error of law and error of fact, in reference to compromise and judicial confession. Arts. 1356, 2052, 2053, Code Nap. — arts. 1895 and 1963 Code Neth. On the contrary, they do not make this distinction as to the condictio indebiti. Sav. l. c. p. 472. Dalloz V°. Obligation T. 8. chap. I. Sect. 2. N°. 5546. See also project of 1820. art. 2994.

It was otherwise when error did not appear in an isolated form, but rather as the result of a fraudulent manoeuvre practised by the other party. (*dolus malus*) [1]). Doubtless, it must be admitted, in this case also, that volition exists [2]); but the law could not permit that confidence, which is the soul of commerce, should be diminished or betrayed by deceit and fraud; [3]) or that the deceiver should, without substantially just cause, enrich himself at the expense of him whom he had deceived. The law gave therefore, according to circumstances, various means of counteracting the prejudice suffered [4]), or of depriving the act tainted with fraud of the whole or a part of its effect [5]).

1) As to the notion of dolus, see L. 1. § 2. § 3. D. de dolo. (4. 3). L. 7. § 9. D. de pact. (2. 14). "*Dolus malus* fit calliditate et fallacia — quoties circumscribendi alterius causa, aliud agitur et aliud agi simulatur." There might also be dolus malus on the part of him who was silent when it was his duty to speak. L. 43. § 2. D. de contr. emt. (18. 1). "Dolum malum a se abesse praestare venditur debet: qui non tantum in eo est, qui fallendi causa obscure loquitur, sed etiam qui insidiose obscure dissimulat."

2) On this point, also, an entirely opposite opinion was formerly held. See Vangerow III. § 605. Sav. l. c. p. 116; Windscheid, § 78. note 5.

3) L. 5. C. de resc. vend. (4. 44). "Si dolo adversarii deceptum, venditionem praedii te fecisse Praeses Provinciae aditus animadvertit: sciens contrarium esse dolum bonae fidei, (quae in hujusmodi maxime contractibus exigitur) rescindi venditionem jubebit."

4) By means of an *exceptio doli*, which, in case of actions in good faith (*bonae fidei actiones*), had no need to be proposed *in jure* before the Praetor; — *bonae fidei judiciis inest* L. 7. § 6. D. de pact. (2. 14). L. 3. D. de resc. vend. (18. 5). L. 21. D. sol. matr. (24. 3.) L. 84. § 5. D. de leg. 1. (30).

5) By the *actio doli* or *de dolo*, which deprives the act either of its entire effect or of some of its consequences only. This difference served as the basis of the distinction between what was called *dolus causam dans* and *dolus incidens* L. 11. § 5. L. 13 § 5. D. de act. emt. vend. (19. 1). There is between the effects of constraint and those of deceit this difference; — that he who is the victim of violence is protected, by the law, even against innocent third parties, while the victim of deception is protected only against the author of the deception. L. 9. § 8. D. quod met. causa (4. 2). L. 4. § 33. D. de dol. mal. exc. (44. 3).

SECTION

Of legal (juridical) acts, in particular.

§ 53. GENERAL IDEA, AND SUBDIVISION.

Those were called legal acts (negotia) which had for their object the creation, modification, or extinction of legal relations, and without which those effects would not have been produced. L. 33. D. de cond. ind. (12. 6). L. 17. § 3. D. comm. (13. 6). L. 2. § 1. 2. D. de O. et. A. (44. 7). L. 83. pr. D. de V. O. (45. 1). L. 5. D. de R. J. (50. 17).

The true notion of a legal act supposes, therefore, the union of two conditions: — I. That the will (intention) be directed towards the production of the legal effect [1]); II. That the legal effect be not produced independently of the intention [2]).

Legal (juridical) acts were divided:

1) It mattered little whether the will (intention) were directed, also, toward other objects, — or what was its principal object. Acquisition by hunting or fishing, as well as what is termed *rem pro derelicto habere*, are certainly legal acts, as is also the management of the business of another without his authority. Wächter, II. p. 635. note 2. Unger, § 78. note 2.—Savigny. III. p. 6. g. denies this; but he is in contradiction with L. 17. § 3. D. Commod. (13. 6). "*Geritur enim negotium* invicem et ideo propositae sunt actiones, ut appareat, quod principio beneficii ac nudae voluntatis fuerat, converti in mutuas praestationes actionesque civiles: ut accidit in eo qui absentis negotia gerere inchoavit."

2) Wächter, (l. c.) insists particularly upon this important point.—He justly observes, that, on the one hand, the loss of a right by the effect of prescription, (lapse of time), even when one has willed this loss, and on the other hand the fact of unjustly causing damage to another, do not constitute legal acts, because in both these cases the legal effect would be produced just as well without the volition of him who loses the

I. Into unilateral and bilateral. (*Negotia unilateralia et teralia*). The unilateral act was that of which the formation and the purport were the emanation of one sole will, — even though the will of another might be necessary to give it entire effect: as, for example, a testament [1]). — The act was bilateral when it required the concurrence of two distinct parties, each acting for himself. In this case there was an agreement, or convention. (*pactio, conventio*). An agreement (convention) may, therefore, be defined as follows: — "the accord or concurrence of the will (volition) of two, or of several, distinct persons, reciprocally declared and serving to regulate legal relations;" and it is made available not merely in the matter of obligations, but throughout the whole realm of law, whether public [2]) or private [3]). L. 1. § 2. 3. D. de pact. (2. 14). "Et est

right or causes the damage; and that, consequently, that volition is, here, an unimportant and superfluous element. It is surprising that Wächter and those who agree with him have not invoked in support of their opinion the L. 33. D. de cond. ind., which develops and applies this principle as clearly as it is possible to do. He who builds, in good faith, upon anothers land, has no claim to restitution of what he has expended, even though he has put the owner of the land into possession of the building. "Sed etsi is qui in aliena area aedificasset, ipse possessionem tradidisset." And what is the reason assigned by Julian? "Quia nihil accipientis faceret, sed suam rem dominus habere incipiat;" — which means, that even when he who had made the surrender had proposed to effect it only in return for an equivalent to be subsequently received, his volition would be inoperative, because without it the owner of the soil would not the less have acquired the ownership of the buildings. It is otherwise as to the *condictio indebiti*, — where it is only upon payment that the property is transferred, so that the transfer is effected only in consequence and by virtue of the will of him who pays. "Is qui non debitam pecuniam solvit, hoc ipso aliquid negotii gerit. Cum autum aedificium in area sua ab alio positum dominus occupat, nullum negotium contrahit." However, the definition of a "legal act" is still a subject of controversy among modern authors. Arndts, § 63. obs. 1. Windscheid, s. 69. obs. 1.

1) Among unilateral acts, besides testamentary dispositions, were the acceptance and refusal of inheritances; occupation; negotiorum gestio; and also (by Roman law) the pollicitatio. L. 3. pr. D. de pollicit. (50. 12).

2) Gaius, III. § 94.

3) It was thus that real rights could be established or extinguished by an agreement or convention; —and thus again a surrender (tradition) is an agreement. Family rights and rights of inheritance may be founded on an agreement; — and, finally, marriage

pactio duorum pluriumve in idem placitum consensus. Conventionis verbum generale est, ad omnia pertinens de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt sicut convenire dicuntur, qui ex diversis locis in unum colliguntur, et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententiam decurrent. Adeo autem conventionis nomen generale est, ut eleganter dicat Pedius, nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re, sive verbis fiat; nam et stipulatio, quae verbis fit, nisi habeat consensum, nulla est."

II. Into acts "onerous" and "non-onerous." (*onerosa, gratuita, lucrativa*). The first were those which in return for an advantage imposed a sacrifice; the others those which procured an advantage gratuitously [1]).

III. Into acts between living parties, and acts in case, or on account, of death. (*inter vivos, mortis causa*). L. 25. pr. D. de inoff. test. (5. 2). The latter were those by which a person made, for the event of his death, arrangements or dispositions concerning his affairs and his property: — dispositions which his death confirmed, the moment it occurred.

IV. Finally legal acts were divided into acts founded on the *jus civile* and acts founded on the *jus gentium*; — into acts of strict law and acts of good faith; — into acts solemn and

is an agreement. Before Savigny (Syst. III. § 141), this general character of the agreement or convention was to a great extent unrecognised by both jurists and legislators. See, for example, the Prussian law, Part I. Tit. V. § 1 and 2; — Code Nap. art. 1101, and Marcade's observations thereon; — (although this author promulgates erroneous notions as to Roman Law); — and finally, the Neth. Code, which treats of Conventions only in art. 1349, and therefore seems to recognise them only as sources of obligations, which is direct contradiction to the provisions of arts. 801, N°. 2, and 854, N°. 4, where conventions appear as a means by which real rights may be extinguished. See Unger, § 93. Wächter, II, pag. 650. Arnds, § 63. obs. II. Exner, Die Lehre vom Rechtserwerb durch Tradition (Wien. 1867) pag. 5, note 8.

1) L. 13. § 15. D. de act. emt. et vend. (19. 1). "Si fundum mihi alienum vendideris, et hic ex causa lucrativa meus factus est." L. 4. § 29. D. de doli mali exc. (44. 4). "Cum lucrativam causam sint nacti." § 6. I. de leg. L. 82. § 4. D. de leg. I. The expression "ex causa gratuita acquirere" is not to be found in the primitive sources.

not solemn. (Negotia juris civilis, juris gentium, stricti juris, bonae fidei, solennia, minus Solennia).

An important place among legal acts was occupied by the alienation and renunciation of rights. (Alienatio, renuntiatio). In a general sense, alienation was any act, by which a right of any nature was abandoned, even though the abandonment implied no transfer of the right to another person [1]). L. 5. § 8. D. de reb. eorum. (27. 9). "Fundum legatum repudiare pupillus sine praetoris auctoritate non potest. Esse enim et hanc alienationem, cum res sit pupilli nemo dubitat"). In a more limited sense, alienation was the act by which one person transferred to another something which he owned, — or by which a person restricted or narrowed his right of ownership, by giving to another a right over that which was his. L. 1. C. de fund. dot. (5. 23). "Est alienatio omnis actus per quem dominium transfertur." L. 7. C. de rebus alien. (4. 51). "Sancimus: sive lex alienationem inhibuerit, sive testator hoc fecerit, sive pactio contrahentium hoc admiserit, non solum dominii alienationem, vel mancipiorum manumissionem esse prohibendam; sed etiam ususfructus dationem vel hypothecam, vel pignoris nexum penitus prohiberi. Similique modo, et servitutes minime imponi nec emphyteuseos contractum nisi in his tantummodo casibus, in quibus constitutionum auctoritas, vel testatoris voluntas, vel pactionum tenor, qui alienationem interdixit, aliquid tale fieri permiserit." L. 3. § 5. D. L. 5. D. de fund. dot (23. 5). L. 3. § 5. D. de reb. eorum (27. 9). In a broad and little used acceptation, the term alienation was also applied to the loss of a right already created, if the loser had knowledge of it, even though the loss might have been caused independently of his volition. (L. 8. D. de V. S. (50. 16). "Alienationis verbum etiam usucapionem continet; vix enim est, ut non videatur alienare qui patitur usucapi").

1) According to Unger (§ 94. note 4). abandonment of possession did not constitute alienation; but I cannot concur in this view. The passages which he cites. viz. L. 119. de R. J. and L. 4. § 1. D. de alien. jud. mut. causa. (4. 7). "non alienat qui duntaxat omittit possessionem," exclude only fraud, — because the alienation did not take place "ut molestus adversarius subjiceretur."

The question whether to attach to the word *alienatio* its broad or its restricted signification, depends upon the nature and the purpose of the rule of law which it is sought to interpret [1]).

Moreover, alienation might be voluntary, (*voluntaria*), or legally compulsory. (*necessaria*). The consequences of this distinction were manifested in the case of persons who had not the capacity of alienation, or had it in only a limited degree; for these incapacities, and the rules which affected them were generally without effect in regard to necessary (compulsory) alienations. L. 1. § 2. D. de reb. eorum. (27. 9). L. 1. 2. 17. C. de praed. vel aliis reb. (5. 71). L. 1. pr. D. de fund. dot. (23. 5). "Interdum Lex Julia de fundo dotali cessat, si ob id quod maritus damni infecti non cavebat, missus sit vicinus in possessionem dotalis praedii, deinde passus sit possidere; hic enim dominus fit, quia haec alienatio non est voluntaria" [2]).

The renunciation of a right, (*renuntiatio*), in the true sense of the word [3]), is the legal act by which a person abandons a right acquired, but without transferring it to another. In the case of a right not yet acquired, it is universally admitted that a unilateral declaration of volition, having a renunciation for its object, bound its author and was irrevocable. L. 4. C. de repud her. (6. 31). L. 1. § 6. D. de succ. Ed. (38. 9). "Pui semel noluit bonorum possessionem petere, perdidit jus ejus, etsi tempora largiantur; ubi enim noluit, jam coepit ad alios pertinere bonorum possessio aut fiscum invitare." L. 4. pr. D. quis ordo (38. 15).

See Windscheid, § 69. note 12. Thus the rejection by a minor under tutelage, of an inheritance or a legacy was considered as an alienation; but the same by an insolvent debtor was not so considered as towards his creditors. L. 5. § 8. D. de reb. eorum. L. 6. § 4. D. quae in fraud. cred. (42. 8). Compare, also, L. 16. D. de fundo dot. (23. 5). with L. 5. § 6. D. de don. i. v. et ux. — "Thus then", as Wächter says, "even in cases where there has been no legal act, there may be alienation, if the word be taken subjectively; that is to say, in reference to him who has omitted to act."

2) See Neth. Code, Art. 455.

3) In a more general sense, the word renuntiatio was employed to designate as well the abandonment of a right not acquired, as the abandonment by which an acquired right was transferred to another.

L. 38. § 1. L. 44. § 1. D. de leg. I. (30). L. 59. D. de leg. II. (31). L. 1. C. de repud. bon. possessione (6. 19) [1]).

But it is, on the contrary, a disputed question, whether (putting aside the formalities which might be requisite for changing or modifying existing legal relations) a right actually acquired could be abandoned without the concurrence of him who profited by the renunciation; — or in other terms; whether the volition of abandoning an acquired right, once declared, was obligatory upon him who had expressed it, or whether he could revoke it at his pleasure. The most acceptable opinion, seems to me to be, that which considers [2]), that in the case of real rights, (the distinctive feature of which is the immediate subjection of the thing to the domination of the person entitled,) the isolated declaration, — the unilateral act, — was sufficient to complete the renunciation; and this view is confirmed by the provisions of the laws concerning usufruct [3]); — but that, on the contrary, in the matter of obligations, where the concurrence of volitions linked together, in a certain sense, the persons who were parties to the act, the legal relation existing between them could be annulled only by a new concurrence of volition [4]).

1) According to French and Dutch law, the renunciation of an inheritance is not irrevocable, so long as other parties entitled have not availed themselves of it. Art. 1102. Neth. Code. Art. 790 Code Nap. — It is otherwise in Prussian law, Part. I. Tit. IX, § 41. — and Austrian law, § 806.

2) Bacher, Jahrb. für die Dogmat. V. p. 222, advances strong arguments in support of this view. The ideas of this author, except as to the law of mortgage (hypothecation) have the assent of Vangerow, D. I. § 127. The contrary opinion is taught by Sav. Syst. IV. p. 544. Fritz civ. Archiv. D. 8. N°. 15. Wächter; II. p. 644. et. s.; Unger II. p. 192; Windscheid § 69, note 14. and Arndts, § 57. note 4.

3) L. 48. pr. D. de usufr. (7. 1). "Sed si paratus sit *recedere* ab usufructu fructuarius, non est cogendus reficere." L. 64. D. eod. "Cum fructuarius paratus est usumfructum *derelinquere*, non est cogendus domum reficere, sed si post acceptum contra eum judicium, parato fructuario *derelinquere* usumfructum." L. 65. D. eod.

4) L. 91. D. de solut. (46. 3). "Si debitor tuus non vult a te liberari, et praesens est, non potest invitus a te solvi." — Bacher (l. c. p. 259) shews, very clearly, the difference between real rights and obligations, in the connection now in question. "A personal right produces, by its nature, a duality, a sort of putting face to face, which supports that right; and the concurrence of which is, consequently, equally necessary for

Rights concerning the condition of persons and the rights of families, could not become the subject of a renunciation [1]). They are *juris publici.* (L. 34. D. de pact. (2. 14). "Jus agnationis non posse pacto repudiari, non magis quam ut quis dicat nolle suum esse."

§ 54. CONDITIONS REQUISITE FOR THE EXISTENCE OF A LEGAL ACT.

In order to the existence of a legal act, three conditions were requisite.

I. The capacity of the persons who acted; — and sometimes, also, the coöperation or consent of other persons.

II. That their volition should be directed toward the accomplishment of an object which was lawful.

its cessation; but real rights are of an entirely different nature; they exist alone and by their own force, and include the idea of a stable and permanent domination. At p. 241, the same author says, again, "Taking into account the nature of real rights, and the idea of sovereignty and of independence which they imply as towards all specified (determinate) persons, as well as the manner in which these rights are exercised and the effects that they produce, — it must be confessed, that these rights, by their very essence, admit, logically and inevitably, the possibility of a unilateral renunciation.

1) Fritz, l. c. § 5. Bacher. p. 255. et s. — As to Prussian and Austrian law, see Unger, § 94. No. 25a. and the Pruss. Code, Part. I. Tit. XVI. § 378. The Dutch law treats the subject of the abandonment of real rights only in reference to usufructs art. 854, No. 4. According to that article, it appears to me at least doubtful, whether this abandonment can take place, without the consent, or against the will of the owner. Neither the words *ten behoeve van den eigonaar* — (for the benefit of the owner) — nor the idea of the abandonment itself, justifies any such conclusion; which therefore Diephuis is wrong in deducing thence. (D. IV. § 301). This doubt is augmented still further, if we consider that the Neth. Code reproduces the art. 1477, N0. 4, of the Project of 1820, but not the art. 1485, the object of which was, precisely, to permit, in formal terms, abandonment *without the consent of the proprietor.* — Finally, in the matters of rents from land and of tithes, *mutual consent* is a condition required by art. 801. N0. 2.

III. That their volition (will) should be duly manifested.

The manifestation of volition might be express or tacit. — It was express, when it was effected either by words, pronounced viva voce or written, or by gesture [1]), or other signs whether by themselves, or accompanied by words [2]). L. 38. D. de O. et A. "Non figura literarum, sed oratione quam exprimunt literae, obligamur: quatenus placuit non minus valere quod scriptura, quam quod vocibus lingua figuratis significaretur." Volition might, moreover, be manifested by actions or by omissions [3]); and even silence might be equivalent to consent, in cases where the law formally attached to it that effect [4]), or where the circumstances, *in concreto*, were such as to admit no other reasonable explanation [5]).

1) L. 29. D. de adopt. (1. 7.). L. 52. § 10, D. de O. et A. L. 21. pr. D. de III. (32).

2) L. 58. pr. D. de her. inst. (28. 5). "Nemo dubitat recte ita heredem nuncupari posse, *hic mihi heres esto*; cum sit coram qui ostenditur."

3) L. 5. D. rem. rat. hab. (46. 8). L. 95. D. acq. vel omitt. her. (29. 2). L. 2. § 1. D. de pact. (2. 14). Art. 1094. 1475. Neth. Code.

4) As in the case of tacitly holding over property, after the expiration of a lease:— "taciturnitate utruisque partis colonum reconduxisse videri." L. 13. § 11. D. loc. (19. 2). L. 4. § 4. D. de prec. (43. 26). Care must be taken not to confound with consent inferred from silence, certain cases in which the law admitted the existence of volition, although it was certain either that it did not exist, or that its existence was not necessary to produce legal effects. The L. 6. D. in quib. caus. pig. (20. 2). expresses this "in praediis urbanis tacite solet conventum *accipi*." L. 4. pr. D. eod. L. 2. § 2. D. sol. matr. (24. 3): "ubi non potest per dementiam contradicere, consentire quis eam merito credet." Sav. Syst. III. § 133. Keller, § 57.

5) L. 142. D. de R. J. "Qui tacet non fatetur, sed nec utique negare videtur." — Thus, when we read in the canon-law, "qui tacet consentire videtur," these words can, by no means, be understood as expressing a general rule. (Sav. § 132 a.)—The Romans seem to have considered the absence or default of contradiction as equivalent to consent, chiefly in acts concerning the condition of persons, because of the peculiar importance of the matter. L. 7. § 1. L. 12. pr. D. de spons. (23. 1). L. 5. C. de nupt. (5. 4). L. 5. D. de adopt. (1. 7). L. 1. § 4. D. de agn. et al. lib. (25. 3.) But there were also other cases in which silence was equivalent to consent. L. 12. L. 16. D. de Scto. Maced. (14. 6). L. 38. § 1. D. de don. i. v. et ux. — In general it may be said, that silence is equivalent to consent, in all cases where equity, good sense, and loyalty made it a duty for him who intended not to consent, to speak. When the publisher of a newspaper or a review sends me a specimen copy, and informs me that unless and

If volition was manifested by a means which did not express a specific purpose, the declaration so made was called tacit [1]), but a person could protect himself from the consequences of such a tacit declaration, by making a declaration to the contrary [2]) (*protestatio*); although the latter would be of no effect, if the act against which it was directed admitted of no other explanation than that which was apparent. (*protestatio actui contraria*). The consequences of a tacit declaration could be avoided, also, by an express reservation of rights, (*reservatio*), in a case where the act would otherwise comport, or sustain the presumption of a renunciation [3]). A presumption founded upon a tacit declaration of intention ceased to exist in case of violence or of error.

§ 55. OF THE FORM OF LEGAL ACTS [4]), OR TRANSACTIONS.

By the form of legal (or juridical) acts, is meant the external shape in which volition or intention appears. Generally the acting parties could clothe their declaration of volition in such form

return it he shall consider me a subscriber, my silence in presence of such an intimation does not create, on my part, any obligation whatever; because it is not in the power of a person with whom I have no relations, to force me to speak or to act. But if, on the contrary, my own bookseller usually sends me books on approval, and I am in the habit of returning, within a certain time, those which I do not desire to keep; he would have a reasonable ground for regarding my failure to return a book as an acceptance of it. The Prussian Law, P. I, Tit. 4, § 61, goes too far, in attributing to silence the effect of consent only in cases where an express refusal is required by law. As to the Austrian law, see Unger, § 85, note 25. In the United states, he who receives a newspaper regularly, and continues to accept it without protest, becomes liable as a subscriber.

1) See examples in L. 69. pr. D. de leg. II; and in L. 11. § 4. D. de leg. III; Sav. § 131; Arndts, § 64. obs. 3.

2) L. 20. § 1. D. de acq. vel om. her. (29. 2). L. 34. D. de neg. gest. (3. 5). L. 1. § 11. D. de agn. et al. lib. (25. 3).

3) L. 57. pr. D. de pact. (2. 14). L. 5. D. rem. rat. hab. (46. 8).

4) **Note by the Translator.** Although a large proportion of the "acts" here referred to, are those performed by means of written instruments, the application of the word is not *restricted* to things so done; and the learned Author being strongly of opinion that I ought to employ the word "act", and not the word "instrument", I have deferred to his opinion. The Dutch word is "*Rechtshandelingen*".

as they might see fit to adopt. L. 1. 9. 10 [1]). 11. 15. C. de fid. instr. (4. 21). But, sometimes, the observation of certain formalities was prescribed by law, and sometimes the parties themselves agreed to adopt a certain form. The purpose of such formalities might be: I. To favour mature and calm reflection, especially in case of important acts, which once performed were, in fact or by law, irrevocable [2]). — II. To establish unequivocally that the matter had not only been arranged but concluded; not only discussed, but decided [3]). — III. To procure, for the parties, a mode of proof, in the future, or in case of denegation or dispute. IV. To give publicity to the act [4]).

The formalities prescribed by law were of various kinds. Thus, there were: — writing [5]); — attesting witnesses; (solemnitatis causa); — the preparation of the instrument in presence of a functionary or an administrative college [6]); — and finally the intervention of justice, especially as to acts of voluntary jurisdiction. (Jurisdictio voluntaria) [7]).

When the form to be given to the expression of volition was prescribed by law, otherwise than as a simple means of proof, it

1) "Instrumentis etiam non intervenientibus, semel divisio recte facta non habetur irrita." — "Cum instrumentis etiam non intervenientibus venditio facta rata maneat: consequenter amissis etiam, quae intercesserant, non tolli substantiam veritatis placuit." — "Non idcirco minus in vacuam inductus praedii possessionem donationis causa, quod ejus facti praetermissum instrumentum adseveratur, hanc obtinere potes." As to modern law, see Sav. Obl. II. p. 247 et s.

2) For example, gifts between living persons.

3) It was in this, that consisted the great advantage of the Roman form of stipulation. Sav., l. c. p. 218. Keller, § 57. Country-folk and cattle-merchants, and illiterate people generally, have still the habit of "striking hands," to mark the conclusion of a bargain.

4) For example, transcription into the public records.

5) The signature is with us of the essence of the instrument. It was not so with the Romans. Keller, l. c., n^{0}. 1.

6) Insinuari actis, publicari apud officium. L. 18. C. de test. (6. 23). L. 27. C. de don. (8, 54). "Donationes interveniente actorum testificatione conficiantur: si quidem clandestinis ac domesticis fraudibus facile quidvis pro negotii opportunitate confingi potest, vel id quod vere gestum est, aboleri." L. 30. C. eod.

7) For example, adoption and emancipation. L. 1. L. 4. C. de adopt. (8. 48). L. 1. 3. 6. C. de emanc. (8.

became an essential condition of the act, as constituting the sole valid expression of the will of the parties; and in such case the neglect of this form involved the nullity of the act; — unless the contrary resulted from some express provision [1]), or was necessarily recognised by the rules of interpretation [2]). Where the parties themselves had agreed upon certain formalities, it was necessary to distinguish whether they had done so before or after the completion of the act [3]). In the former case, it was requisite to seek in the contents of their agreement what had been their intention; for it was that which must serve as a guide. In case of doubt, it was considered that if the agreed form had not been observed, the act was deprived of its ordinary consequences [4]). In the second case, it was presumed that the parties had desired simply to secure a means of proof; and there was applied the rule: — "fiunt scripturae, ut quod actum est, per eas facilius probari possit; et sine his autem valet, quod actum est, si habeat probationem." L. 4. D. de fid. instr. (22. 4).

1) See, for example, art. 154 of the Neth. Code.

2) Sav. Syst. III. p. 238. Wächter, II, p. 768. Unger, II, p. 114. Windscheid, § 72. By the Prussian Law (P. I, tit. 16, § 176, 184) as well as in the Austrian (§ 1432), the *condictio indebiti* is not admitted when a person has paid a debt which the omission of a formality had rendered non-enforceable. By Dutch law the question depends primarily upon the notion which is formed of natural obligation. If by that is understood only a purely moral obligation, not recognized by the law, (and I conceive that such was the view of the legislator), there then arises, in the second place, the question for what purpose the legislator has prescribed the formality! See Regelsberger Civil R. Erörter. I. pag. 140.

3) This distinction is found again in the Glossaries, ad L. 17. C. de fid. instr. (4. 21): "Quum in contractu vel ante conveniunt ut scriptura inde fiat, gerentes in animo non prius contrahere, quam scribatur. Secus si a principio simpliciter contrahant et postea ad probationem fit inde scriptura."

4) L. 17. C. de fid. instr. (4. 21). pr. I. de emt. (3. 23). It is thus in the Austrian Law § 884. By Prussian Law, P. I, tit. 5, § 117, there is a legal presumption that the parties who have agreed to reduce their contract to writing, have made the binding force of the contract to depend upon the writing. This provision is criticized by some; but Keller, § 222 B, supports it by sound reasons. See, also, Sav. Obl. II, 243; Unger, II, § 26; Wächter, § 107, note 11. (English Law holds most strictly to this doctrine).

§ 56. OF THE CONTENTS OF LEGAL ACTS.

With respect to the contents of legal acts there existed the following distinctions: — I. As to the elements which were of their essence. II. Those which were not of their essence.

The essential elements (essentialia, substantialia, de substantia negotii) were those which, by reason of prescriptions beyond their control, the volition of individuals could not modify, and the default of which changed entirely the substance and the character of the act [1]).

Non-essential elements were. I. Natural, regular, normal (naturalia, sive de natura negotii.) Those were thus called, which the law considered as inherent in the nature of the thing, and which were, therefore, regarded as tacitly intended by the parties, but in which they might, by express declaration, make such changes as they thought fit or desirable. (L. 11. § 1. D. de ad. emt. (19. 1). "quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt hujus judicii potestate") [2]). II. Accidental (accidentalia) [3]); that is such as were neither of the essence, nor of the nature of the act, but rested solely upon the expressed will of the parties. Among accidental elements an important place was occupied, in acts generally, by the conditions and the term

1) Such as, the price in contracts of sale; the institution of an heir in a testament; and the amount of rent in a lease. L. 36. D. de contr. emt. (18. 1). L. 20. § 1. D. loc. (19. 1). § 34. I. de leg. (2. 20). The Glossarists express accurately the character of essential elements, when they say: "quibus deficientibus tollitur nomen ac notio." See Sav. Oblig. I. p. 18.

2) Of this number, are, for example, the rules as to who bears the risk after conclusion of the sale. L. 1. pr. L. 10. D. do comm. et. per. (18. 6); those relative to guarantee in case of eviction; L. 18, 19, 60, 68. D. de evict. (21. 2).; and as to responsibility in case of fault (*culpa*), or casualty (*casus*). L. 7. § 15. D. de pact. L. 23. D. de R. J. (50. 17).

3) In L. 72. pr. D. de contr. emt. (18. 1), these elements are called *adminicula*. Elsewhere we find *adjectio, lex contractus, clausula*. See the passages cited by Schilling, § 71, note h, and § 80, i. f. As examples, we may name the Lex commissoria, the in diem addictio, and the pactum de retro vendendo.

or duration, and in testaments and donations, by the modus or charge. (conditio, dies, modus).

A. Of conditions. (Conditio).

§ 57. THE IDEA. (NOTION).

In a general sense [1]), a condition is a restriction incorporated with an act [2]), the consequence of which is to make the effect of the

1) In its broadest acceptation the word *conditio* is used to designate every clause which serves to define more precisely the meaning of a legal act. Thus it is said: "meliorem conditionem *facere, offerre, admittere, sequi, abjicere.*" L. 1. L. 9. D. de in diem add. (18. 2). Thus we say, also, "stipulate for better conditions." Besides, the word *conditio* expresses as well the restriction itself as the event upon which the effect of the act depends. L. 16. D. de inj. rupto test. (28. 3). L. 37. D. de R. C. (12. 1). "Cum ad praesens tempus *conditio* confertur, stipulatio non suspenditur, et si *conditio* vera sit stipulatio tenet." Windscheid, § 86. Unger, II, § 82. Arndts, § 66, obs. 3.

2) Writers are by no means agreed as to the precise meaning of *condition*. Many consider it to be a *clause accessory* to legal acts (Nebenbestimmung). But it is, very properly, objected that this qualification of "accessories" can apply only to those clauses which are added to the act without affecting its substance, — whereas, if the operation of the intention depends upon a condition, the very existence of this effect is at stake. Fitting, Archiv für Civ. Pr. T. 39, p. 308; Unger, II, § 82. This objection is not met by Windscheid (§ 86, note 4), when he asks: "must we then, by "accessory clause" understand necessarily, a part distinct from, and independent of, the declaration of volition?" I answer: Certainly not! But the error is caused by the fact that, in speaking of an *accessory* clause, we think, inevitably, and by antithesis, of a something *principal*, having an existence of its own, independent of everything else; whereas in the matter of conditions, the act and the condition are, in reality, so closely united that they form but one whole, undivided and indivisible. According to Savigny (Syst. III, pp. 99, 100), the condition, like the *modus* and the *dies*, is a restriction, which volition itself lays upon the extent of its own operation; but this is losing sight of the fact that the condition does not merely limit the operation of volition, but actually renders that operation uncertain. Unger, l. c, sees in the condition a restriction as to the *existence* of volition. "Volition," says he, "fixes itself; (takes a fixed or determinate position); but, while it thus fixes itself conditionally, it limits its fixation (sein Sichsetzen) by making its fixedness (sein Gesetztsein) dependent upon the occurrence of an event: that is, the volition is positive, but only in a certain event; thus — I will in case such an event happens; — I will in case such an event does *not* happen."

volition or intention dependent wholly or in part, upon an external circumstance [1]). Strictly speaking, however, there is a "condition" only when the effect of a legal act is suspended until the accomplishment or non-accomplishment of a future and uncertain event. "Conditions" have therefore, a suspensive power; and it thence results that we cannot regard as within their domain:—

I. Those cases, in which the legal effect of an act is not dependent upon a future event, but upon a fact already existing, or which is accomplished at the same moment; (conditio in praeteritum, in praesens relata); because, then, the legal situation is objectively certain [2]), although an uncertainty purely subjective may exist in the mind of him who declares his will.

It is as if I were to say: "I desire (or will) to take a walk, if the weather be fine; but, inasmuch as I desire to walk only in case the weather be fine, in case of bad weather I desire *nothing*." It is evident that Unger wishes *Gesetztsein* to be taken as signifying the effect or result of volition; but, in that case, Windscheid is quite right in saying that it is not the volition itself, but the effect desired which is conditional: i. e. that the formula is not "I will, if, — that," but "I will that, — if"; and this remark of Windscheid's is so much the more conclusive, because the declaration of volition restricted by a condition is far from producing *no* effect. The reasoning of Arndts (§ 66, note 2), who contradicts Windscheid, seems to me ill-founded. Volition cannot be *in* suspense. A person wills certain results if a condition be fulfilled, — certain others if the condition be *not* fufilled; but, come what may, he *wills*, and it is only the *effect* which is uncertain. In fine, the chief point is, never to regard the condition as a thing distinct from the declaration of volition, but, on the contrary as an integral part of it; and this mode of regarding the matter exercises an influence impossible to be disregarded, — especially as to the question upon whom devolves the onus of proof. Unger, § 129, p. 572. I cannot, therefore, approve Windscheid, (although he has discerned the true character of the "condition"), when he thus again defines it: — "an *addition* to a declaration of volition." — By employing the expression which I have adopted in the text, this inaccuracy is avoided.

1) That is to say, a circumstance which is not identical with the volition of him who acts. If it is solely upon his own will that he has made to depend the effect of his declaration of his will (*si volam*), there is no binding declaration. L. 17. L. 46. § 3. L. 108. § 1. D. de V. O. (45. 1). L. 7. pr. D. de contr. emt. (18. 1). Sav., l. c., p. 131, et Fitting, p. 337.

2) L. 100. D. de V. O. (45. 1). "Conditio in praeteritum, non tantum in praesens relata statim aut perimit obligationem, aut omnino non differt." L. 10. § 1. D. de cond. inst. (28. 7). "Cum nulla sit conditio quae in praeteritum confertur, vel quae in praesens."

(L. 120. D. de V. O. § 6. I. de V. O. (3. 16.) "Quae per rerum naturam sunt certa, non morantur obligationem, licet apud nos incerta sint.") If he who imposes the condition has regarded the event as still future, the condition is considered as fulfilled, if, in fact, the event has already happened, or happens at the same moment [1]); and if default has already been made, the condition is reputed not stipulated. L. 6, § 1. L. 10. § 1. D. de cond. (35. 1). L. 45. § 2. D. de leg. II. (81).

II. Those cases in which the event which the parties had in view, is in fact future, but of such a nature that it must, inevitably, happen; in which case, also, whatever may have been the belief of the author of the act, its effect is objectively certain and its fate decided in advance. L. 9. § 1. D. de Nov. (46. 2). "Qui sub conditione stipulatur, quae omnino exstitura est, pure videtur stipulari" [2]). L. 18. D. de cond ind. (12. 6). L. 79. pr. D. de cond. (35. 1). It is equally so, in the case where a consequence has been attached to the non accomplishment of an impossible event. L. 7. D. de V. O. "Impossibilis conditio cum in faciendum concipitur, stipulationibus obstat: aliter atque si talis conditio inseratur stipulationi, si in coelum non adscenderit, nam utilis et praesens est et pecuniam creditam continet" [3]).

III. Cases in which, under the form of condition, there has been inserted a clause inherent in the nature of the thing or imposed by the law; (tacita conditio juris); unless it appears [4]) that

1) It was presumed, that he who disposed attached importance only to the accomplishment of the event, without regarding the time of that accomplishment. Fitting, p. 318. Sav. § 116 and 121. h. Arndts, § 66, obs. 5.

2) By Prussian Law (Part. I, Tit. IV, § 127) a clause of this kind is considered as a *term*. It might be said, regarding only the intention of him who imposed the condition: "Licet ad conditionem committi videatur, dies tamen superest." (L. 8. D. de V. O.). According to French and Dutch law the act is pure and simple. Art. 1168 Code Nap., and art. 1289 Neth. Code.

3) There is an exception, when a person is to execute a bequest if he abstain from an act impossible or immoral. In this case the bequest lapses, as *poenae nomine relictum*. § 36. J. de leg. L. un. C. de his quae poem. nom. (6. 41). Sav. III, p. 176. Arndts, Beiträge, I, p. 172, note 13.

4) Fitting and Unger consider that it is in the power of the will (volition) to trans-

it was intended to impose a restriction legally possible, but which is not always met with. L. 99. D. de cond. "Conditiones extrinsecus non ex testamento venientes, id est: quae tacite inesse videntur, non faciunt legata conditionalia." L. 22. § 1. D. quando dies leg. (36. 9). L. 68. D. de jur. dot. (23. 3). L. 21. D. de cond. (35. 1). L. 19. § 1. L. 69. D. de her. inst. (28. 5). "Non solum figuram sed vim quoqŭe conditionis continere."

In all these cases, modifications, though expressed as conditions, lack the power of rendering the effect of the act uncertain; but they partake, nevertheless, to some extent, of the nature of a veritable condition; especially inasmuch as they also annul acts, which by reason of form or substance, do not permit the addition of any condition whatever. L. 77. D. de R. J. L. 51. § 2. D. de acq. vel om. her. (29. 2). "Sed et si quis ita dixerit, *si solvendo hereditas est, adeo hereditalem*, nulla aditio est."

§ 58. OF DIVERS KINDS OF CONDITIONS.

There were:

I. Affirmative conditions, (In Dutch *stellige*; in German *bejahende*); — or negative conditions, (Dutch *ontkennende*; German *verneinende*); — according as the effect of the act was depen-

form every condition styled *juris* into a veritable condition; but that it is presumed (chiefly in matter of testaments) that he who has imposed such a condition has not intended to attach thereto special consequences. This opinion is, rightly, combated by Windscheid, § 87, note 8; and by Arndts, § 63, note 10. In the first place, it is contradicted by L. 99. D. de cond. and L. 12 D. de cond. inst. (28. 7). In fact, if it were the *will* which decided, and if it were a question only of an interpretation of facts, the law last cited would not contain the words "*frustra adduntur*," which would be very inaccurate; and if it were desired to rely upon a presumption, it would be, in any case, much more reasonable to suppose that the author of the declaration had not intended to say something superfluous, than to presume the contrary. Substantially, it seems to me, that the *will*, however powerful, cannot have the faculty of treating as uncertain that which is made objectively certain by the law, and thus bringing right into collision

iuris. Archiv. für Civ. Prax. Tom. 54 p. 108.

dent upon the occurrence or non-occurrence of an event. L. 7. pr. L. 67. D. de cond. (35. 1). L. 7. D. de V. O. (45. 1).

II. Potestative, casual, and mixed conditions (potestativae, casuales, mixtae, "quarum eventus ex fortuna vel ex honoratae personae voluntate, vel ex utroque pendeat"). L. un. § 7. C. de cad. toll. (6. 51). L. 4. D. de her. inst. (28. 5). The potestative condition was one, the fulfilment of which depended entirely upon the will of him who was conditionally called upon to acquire a right. The casual condition was that which was in no way dependent upon his will [1]). The mixed condition was that which was dependent partly upon his will, and partly upon external circumstances.

If the condition whether suspensive or determining, (precedent or subsequent), which was attached to an act, caused the operation of the obligation to depend upon the mere will of the obligor, such a declaration of volition was not valid either between living persons nor for instruments to take effect in case of death [2]); but it was otherwise where the condition imposed did not depend merely upon the will of the obligor, but upon an act which it was in his power to perform or not; for in that case there was an efficient obligation. L. 8. D. de O. et A. (44. 7). "Sub hac conditione *si volam*, nulla fit obligatio, pro non dicto enim est, quod dare, nisi velis, cogi non possis." L. 17. L. 46. § 3. L. 108. § 1. D. de V. O. L. 13. C. de contr. emt. (4. 38). L. 13. D. de leg. II. (31). "Si ita legetur, heres dare damnas esto, si in capitolium

1) This is the proper form of expression. In fact, the condition styled "casual" may be dependent upon the will of a third party. If A covenants to do something, on condition that C shall do something else, the condition is potestative for C, and casual for A. Wächter, II, § 92, note 2. Unger, § 82. The Code Nap. (art. 1170), includes under the denomination of condition potestative, the condition which depends upon the will of him who is bound.

2) It is necessary, however, in such case, to ascertain, clearly, if it is a question of the purely arbitrary will of the obligor, or whether it has not been intended rather to reserve to him the faculty of judging and appreciating, — freely it is true, but nevertheless equitably. L. 7. pr. D. de contr. emt. (18. 1). L. 75. pr. D. de leg. I. L. 11. 7. D. de leg. III. L. 46. pr. et § 3. D. de fideicomm. lib. (40. 5).

non adscenderit, utile legatum est, quamvis in potestate ejus sit adscendere vel non adscendere" [1]).

III. Conditions precedent or suspensive, and conditions subsequent or determinant, " negotium conditione suspenditur, sub conditione resolvitur." L. 1. D. de leg. comm. (18. 3.) The suspensive condition adjourned the effect of the act until an event should happen, and the act itself was, moreover, conditional. The subsequent or determining condition, rendered the extinction, or withdrawal, of a right already established dependent upon some future and uncertain event; and in this case the legal act produced immediately all its effects, and the position was at first plain and simple; — but it was uncertain (and the uncertainty went no farther), whether the situation thus established would continue to subsist [2]). " Purum negotium, quod sub conditione resolvitur." L. 2. D. de in diem add. (18. 2). L. 2. § 4. D. pro emt. (41. 4).

§ 59. OF THE TOTAL OR PARTIAL EXCLUSION OF CONDITIONS.

There were acts to which no sort of condition could be attached, under pain of nullifying those acts themselves [3]). Other acts ex-

1) This difference between that which depends upon the mere will of the obligor, and that which is dependent upon an act in his power to perform or not to perform, has been maintained by the Prussian law (Part. I, Tit. IV, § 108) and by the Neth. Code (art. 1292). The Code Nap. art. 1174, has lost sight of it. See, also, Windscheid, § 93.

2) Strictly speaking, every condition is suspensive, since it always suspends either the operation or the annulment of the effects of the act. Thibaut, Civ. Abhandl. n^{0}. 17. Wächter, § 92, n^{0}. 9. Windscheid, § 86, note 6. Arndts, § 67, note 2. The inaccurate wording of art. 1181 of the Code Nap., (copied literally in art. 1300 Neth. Code), has already been censured by more than one French writer. See, among others, Marcadé, as to this article.

3) It is thus, also, besides the cases provided for by L. 77. D. de R. J., that no condition could be annexed to dative tutorship; nor yet by the guardian to the authorisation which he gave; nor to the establishment of a servitude. L. 6. § 1. D. de tut. (26. 1.). L. 8. D. de auct. tut. (26. 8). L. 4. D. de Serv. (8. 1). The motives of this prohibition are developed by Fitting (l. c. p. 340), in a manner somewhat too

cluded certain specified conditions [1]); others, again, only conditions subsequent or determinant [2]). L. 77. D. de R. J. "Actus legitimi, qui recipiunt diem vel conditionem, veluti emancipatio, acceptilatio, hereditatis aditio, servi optio, datio tutoris, in totum vitiantur per temporis vel conditionis adjectionem. Nonnumquam tamen actus suprascripti tacite recipiunt, quae aperte comprehensa vitium afferunt." Fragm. Vat. § 329. "Sub conditione cognitor non recte datur non magis quam mancipatur aut acceptum vel expensum fertur, nec ad rem pertinet, an ea conditio sit inserta, quae non expressa tacite inesse videatur."

§ 60. OF THE FULFILMENT OF CONDITIONS.

The *affirmative* condition was regarded as fulfilled, (*existit conditio*), when the event which was in view had been realised in the manner desired and intended by him who had imposed the condition. L. 19. pr. D. de cond. "In conditionibus, primum locum obtinet voluntas defuncti, eaque regit conditiones" [3]).

subtle, but substantially correct. He shews, very clearly, that the conditions *in praeteritum et praesens relatae* were comprised in the prohibition. L. 51. § 2. D. de acq. vel. omitt. her. (29. 2). Windscheid, § 95, note 2. Of the cases enumerated in the Roman law, the Dutch law has, retained that which excludes all conditions in the acceptance of an inheritance and has applied the same rule to the acceptance of a bill of exchange. Compare, art. 677 and art. 120 of the Netherlands Commercial Code. As to the Austrian law, see Unger, § 82, note 116; as to Prussian law, Part. I, Tit. IX, § 394; and as to the French law, Marcadé on art. 774 Cod. Nap. See also Von Scheurl. Zur Lehre von den Nebenbestemmungen bei Geschäften (Erlangen 1871) pag. 3.

1) For example, in instituting an heir, the conditions termed *captatoriae*, and those which render the effect dependent upon the volition of a third party, are prohibited. L. 52. D. de cond. L. 70 and 71. D. de her. inst. (28. 5). In the institution of an *heres suus*, all conditions non potestative and all impossible conditions were excluded. L. 15. D. de cond. inst. (28. 7). L. 4. C. de inst. et subst. (6. 25).

2) Particularly in the institution of an heir: "cum semel heres exstiterit, non potest adjectus efficere, ut qui semel heres exstitit desinat heres esse." L. 88. D. de her. inst. (28. 5).

3) Applications of this principle may be found in the Laws 2, 10, 11, 68, 76, 78, § 1, 91, 10 pr. D. de cond.; and in L. 7. C. de inst. et subst. (6, 25). Art. 1175 Code Nap. Art. 1293 Neth. Civ. Code.

The *negative* condition was considered to be fulfilled, when the event which was *not* to happen had not taken place or had become impossible [1]). L. 115. § 1 and 2. D. de V. O. (45. 1). In the matter of testaments [2]) the *cautio Muciana* was introduced in favour of those who were to profit by a negative potestative condition. L. 7. pr. L. 73. L. 103. 106. D. de cond.

Sometimes a condition which was not fulfilled was reputed or assumed to be so, in virtue of a fiction. This was the case:

I. When he for whose interest it was that a condition should *not* be fulfilled, had, deliberately, eluded or prevented its fulfilment, contrary to the intention of him [3]) who had imposed it. "Jure civili receptum est, quoties per eum cujus interest, conditionem non [4]) impleri, fiat quominus impleatur, perinde haberi ac si impleta conditio fuisset." L. 161. D. de R. J. (50. 17). L. 24. L. 81. § 1. D. de cond. (35. 1). L. 5. § 5. D. quando dies leg. (36. 2). L. 3. § 9. D. de cond. c. d. c. n. s. (12. 5). L. 85. § 7. D. de V. O. L. 50. D. de contr. emt. (18. 1).

1) When the negative condition was to be fulfilled within a specified time, it was always necessary, — if it was potestative, — to wait till the time had elapsed. "Licet ad conditionem committi videatur, dies tamen superest." L. 8. D. de V. O. Donellus ad h. l. Averanius, II, 21, n^{0}. 2). This principle is disregarded by the French and Dutch Codes. Art. 1177 Code Nap., and art. 1295 Neth. Code.

2) It is otherwise as to contracts. § 4. I. de V. O. The Austrian Code, § 708, in all cases of negative conditions, assimilates the person called to acqnire a right, to a fiduciary heir. Unger, II, § 82, note 45. It is surprising, that neither the French nor the Dutch Law has provided for this case. The Neth. Project of 1820 regulated it, in art. 1718.

3) L. 38. D. de stat. lib. "Non omne ab heredis persona interveniens impedimentum statulibero pro expleta conditione cedit, sed id duntaxat quod impediendae libertatis fit." Sav. III, p. 141. Wächter, § 93, note 5. Unger, § 82, note 38. Arndts, § 69. The Prussian law, P. I, tit. 4, § 105 is conceived in the spirit of the Roman law. As to Austrian law, see Unger, l. c. note 37. The French and Dutch legislators have gone farther. Art. 1178 Code Nap., and 1296 Neth. Civ. Code. See Diephuis, T. VI. § 157. The Project of 1820 required that the interference by way of prevention should have been deliberate. (Art. 2240).

4) As to the text of this passage, see Sav. III, p. 140, g; Arndts, § 69, obs. 1. The words: "*Alicujus interest conditionem impleri*" cannot be made to signify, as Vangerow would wish: "The interests of some one are attained by the fulfilment of the condition;" but rather: "He profits, he derives an advantage, from the failure of fulfilment."

II. When the person on behalf of, or for the benefit of whom the condition had been imposed, had prevented its fulfilment [1]); always provided, however, that it was not evident that the will of the party who had imposed it had in view an effective fulfilment [2]). L. 11. L. 23. D. de cond. inst. (28. 7). L. 14, 31, 78. D. de cond. (35. 1). L. 34. § 4. D. de leg. II. (31). L. 1. C. de don. quae sub modo. (6. 45). L. 54. § 2. D. de leg. I. (30).

III. When a slave, conditionally enfranchised [3]), was prevented, by circumstances accidental and independent of his volition, from fulfilling the condition. This fiction, founded solely upon the desire as far as possible to favour liberty, could be extended to no other case [4]). L. 94. D. de cond. (35. 1). L. 3. § 8. 10. 11. L. 4. § 5. D. de stat. lib (40. 7). L. 19. L. 28. pr. L. 20. § 3. D. eod. "Constituto potius jure quam ex testamento ad libertatem pervenit."

1) The reading "*conditionem impleri,*" in the L. 24, D. de cond. (35. 1) may be interpreted in this sense, as had already been observed in the Glossary, ad h. l.

2) It is, therefore, here again a question of interpretation of intention. Hence the word *plerumque*, in L. 23. D. de cond. inst. (28. 7). This fiction is not recognized, in either the Prussian law, (Part. I, tit. 4, §§ 112, 113, and Koch upon these sections), or the Codes of Austria (art. 699). France, or the Netherlands.

3) Savigny, p. 143, restricts this fiction to mixed conditions. But this is wrong. See L. 19; L. 3. § 10; L. 28. D. de stat. lib. (40. 7). "Favor libertatis eo rem perduxit, ut respondeatur expletam conditionem, si per eum cui data esset, non staret, quominus expleretur."

4) Windscheid, § 92, goes too far, in maintaining that in the case of wills the condition was always regarded as fulfilled, if he upon whom it imposed the performance of an act had done all that seemed necessary to its execution. The passages which he cites refer only to the second fiction. (Arndts, § 69, obs. 3). Moreover, it was necessary, always, by application of the maxim "*voluntas regit conditiones,*" to ascertain whether he who had imposed the condition intended to exact its effective execution, or if he intended that the simple intention of fulfilment, on the part of the person upon whom the execution devolved, should suffice. In this way, may be explained the apparent contradiction between L. 23. § 2. D. ad L. Aquil. (9. 2), and L. 54, § 2. D. de leg. I. (30). Puchta, Vorles. § 60, note 1; Windscheid, l. c. note 8. The reading suggested by Savigny, of the last cited law, — *mora*, instead of *mors* — is inadmissible, first, because of the strange signification which must be given to the word *mora*, and secondly, because Pomponius would not have invoked the innocence of the legatee, but rather the obstacle designedly interposed, by the sole person by whose intervention the condition might and ought to be realized. See Von Scheurl. o. c. p. 166 and pag. 174.

§ 61. OF THE EFFECTS OF A CONDITION, WHEN IT IS IN SUSPENSE, WHEN IT IS UNFULFILLED, AND WHEN IT IS ACCOMPLISHED.

So long as it is uncertain whether a condition will be fulfilled or not, the legal consequence which has been made to depend upon this circumstance is equally uncertain. Thus, in the case of a suspensive condition, it remains uncertain if the legal act will produce the intended effect. (Conditionalis contractus, conditionalis institutio legatum vel fideicommissum conditionale). Yet, although there may be uncertainty as to the result, and that it may be possible, that the person intended eventually to acquire the right may be disappointed, it is not the less true, that, from the present instant there exists a germ which the Law takes under its protection [1]), and of which (especially in agreements between living parties) it assures the transmission to the heirs [2]), if the condition

1) Thus, he who is conditionally bound, has no longer the right, by his act, purposely to obstruct the fulfilment of the condition. Thus, he may, in certain cases, be compelled to find sureties, (L. 1, L. 3, L. 5, § 2, D. ut leg. (36. 3). L. 13, § 5, D. de pign. (20. 1), — or to allow him in whose favour he is bound, to take measures to guarantee and protect his eventual rights. L. 40. D. ad leg. Aquil. (9. 2). L. 6. pr. D. quib. ex caus. in poss. (42. 4); L. 4. D. de Sep. (42. 6) and thus, again, a conditional obligation may be the object of a renewal of debt (novatio), of a guarantee or of a pledge. Gaj. III, § 179. § 3. I. quib. mod. toll. oblig. (3. 20). And thus, finally, the law forbids the enforcement of claims (debts) the demanding of which would be contrary to the purpose of the condition. L. 36. D. de R. C. (12. 1). L. 80, L. 83. D. de jur. dot. (23. 3). In conclusion, it may be said that if he who owes subject to a condition, is not yet absolutely *indebted*, he is, nevertheless *liable* ; and that he who is called eventually to acquire a right, has, in truth, as yet, only a hope, but still not a hope built merely upon the sand, but rather founded upon a legal title. Wächter, T. II, p. 697; Windscheid, § 89; Arndts, § 70 obs. 4. — For the Netherlands law, see art. 1298 Code Civil, and art. 779 Commercial Code. I add, further, that what is due in virtue of a conditional obligation constitutes an acquired (vested) right, inasmuch as it escapes the action of any new legislation, effected subsequently to the act creating the condition. Meijer, Quest. Transit., p. 15, Ed. de Pinto. Von Scheurl. o. c. p. 79 et p. 120.

2) In testaments, the personal character of the gift is opposed to its transmissibility. L. 5, pr. et § 2, D. quando dies leg. (36. 2). L. 18. D. de R. J. L. 27, pr. D. qui et a quib. manum. (40. 9). It is this which causes Ulpian to say, in L. 42, D. de O.

should not have been fulfilled until after the death of the eventual claimant. § 4. I. de V. O. "Ex conditionali stipulatione, spes est debitum iri, eamque ipsam spem in heredem transmittimus, si prius quam conditio existit mors nobis contigerit." L. 54. D. de V. S. (50. 16). "Conditionales creditores dicuntur et hi, quibus nondum competit actio, est autem competitura: vel qui spem habent ut competat." L. 16. D. de inj. rupto test. (28. 3). L. 8. pr. D. de per. et comm. (18. 6). L. 2. § 5. D. de don. (39. 5). L. 9. § 1. D. de jur. dot. (23. 3). If it be a question of a determining condition, it is uncertain, while that is in suspense, whether the situation created by the act to which the condition is annexed, will continue or not, to subsist irrevocably. The contrary is still possible, but until the change be effected, this mere possibility exercises no influence, and the act exerts all its effects [1]). L. 2. § 1. L. 15. pr. D. de in diem add. (18. 2). L. 4. § 3. eod. "Pure vendito et in diem addicto fundo, si melior conditio allata sit, rem pignori esse desinere, si emtor eum fundum pignori dedisset; ex quo colligitur, quod emtor medio tempore dominus esset, alioquin nec pignus tenere."

When it has become certain that a condition will not be fulfilled, (*deficiente conditione*), it is also certain that the intended legal effect will not be produced if the condition is suspensive, or will not be destroyed if it is determining. L. 3. pr. D. de peric. et comm. "Quodsi defecerit conditio, nulla est emtio sicut nec stipulatio." L. 37. D. de contr. emt. (18. 1). § 4. I. de emt et vend. (3. 23).

When the condition is fulfilled, all uncertainty ceases. Consequently, if the condition be suspensive, the legal act, being no longer obstructed, produces its full effect. It is only then, and in that sense, that it constitutes a *negotium perfectum*. L. 8. D. de per. et comm. (18. 6). But this is not all! In more than one

et A.: "Is cui sub conditione legatum est, pendente conditione non est creditor; sed tum cum exstiterit conditio, quamvis eum qui stipulatus est sub conditione, placet etiam pendente conditione creditorem esse." See arts. 1040 and 1179 Code Nap.; arts. 1044 and 1297 Neth. Civ. Code.

Art. 1183 Code Nap; art. 1301 Neth. Code.

respect, the suspensive condition, once fulfilled, has a retro-active effect, as if the conditional provision had received its entire completion from the moment when it was made [1]); and the ground of this retrospective operation is that the fulfilment of the condition does not create the provision, but simply removes the uncertainty which surrounded it; and that therefore it is appropriate to say, — "Est hoc ex his quae post factis, in praeteritum quid fuerit declarent." L. 98. § 3. D. de sol. (46. 3). L. 8. pr. D. de per. et comm. L. 11. § 1. D. qui pot. in pign. (20. 4.) "Cum enim semel conditio exstitit, perinde habetur, ac si illo tempore quo stipulatio interposita est, sine conditione facta esset." Gaius, III. 146. "Idque ex accidentibus apparet, tanquam sub conditione facta cujusque venditione an locatione." L. 26. D. de Stip. Serv. (45. 3). L. 16. D. de sol. (46. 3). L. 27. D. pro soc. (17. 2).

The most important effect of this retro-active operation is, that in the case of a conditional obligation, the claim is considered as established from the moment of the conclusion of the agreement [2]),

1) As to this retro-active operation of the suspensive condition and the reasons which justify it, see Unger, § 82, note 59, who discusses the question thoroughly and observes very justly that, — the formula for indicating the will of him who imposes a suspensive condition is not: "I desire to will *then* — (ex gr. — I wish to buy *then*; — I desire *then* to convey the property; — I desire *then* to constitute a legatee) *if*; — but I desire *to have willed* — to *have* bought, to *have* conveyed, to *have* constituted, — *if*." — The Prussian and Austrian codes do not speak of this retro-active effect; but the French Code, art. 1179, and the Netherlands Code, art. 1297, recognize it. The retro-active effect of the condition has been disputed by Eisele Arch. für Civ. Prax. T. 50 pag. 253 but defended by von Scheurl. o. c. p. 192 who justly observes. "Doch is der Aufschub des wirklichen Eintritte jenes Rechtserfolges nicht seine eigentliche Absicht, sondern etwas, dass er sich nur gefallen lässt und gefallen lassen muss — Darum liegt die Aufhebung der Folgen des von ihm in der Thab nicht beabsichtigten Aufschubs der verwirklichung wirklich in seinem willen." Von Scheurl considers the L. 8 pr. D. de comm. et peric (18. 6) as a very strong proof of his meaning.

2) It follows, thence, that the debtor is responsible, *pendente conditione*, for his fraud and his fault. But it is obvious that the conditional debt is due only after fulfilment of the condition; so that it is only from the moment of such fulfilment that any prescription, (limitation by lapse of time) could commence; and the fruits produced in the interval belong to the debtor. See Wächter, II, p. 708; Vangerow, I, p. 143; Unger, § 82, note 69. For the Netherlands law, see, as to prescription, (limitation by lapse of time) art. 2027 of the Civil Code; and as to fruits, Opzoomer upon art. 1297, and

and that in case of a conditional delivery the property is regarded as having been transferred at the moment of delivery [1]). L. 144. § 1. D. de R. J. (50. 17). L. 69. § 1. D. de leg. I. (30). L. 11. § 1. D. quemadm. serv. amitt. (8. 6). L. 105. D. de cond. (35. 1). Nevertheless, this retro-active effect is derived solely from the will of the parties, who may at once dissent therefrom,

Diephuis, T. VI, § 176. Both these authors have neglected to consider whether, — even admitting the retro-active operation to its fullest extent, — it would necessarily thence result that the debtor would be required to restore the fruits. The debtor is not bound to *pay* until after fulfilment of the condition, and there is no general rule of law, in virtue of which the debtor can be compelled, even where the debt is due, if he be not *in morâ*, to restore the fruits which he has gathered; and a fortiori, he cannot be so compelled in the case now in question. Moreover, as Wächter justly observes, this obligation to account for fruits collected *pendente conditione*, would scarcely be in accord with the intention of the parties. Here again, we must recognize the sagacity of the author of the Netherlands project of 1820, who says, in art. 2226: "The fruits of the thing which forms the object of an obligation, can be exacted only from the moment when the obligation to pay the debt exists by reason of the fulfilment of the condition; unless the contrary results from the will of the legislature or the contracting parties."

1) Vangerow, I. p. 144, and Fitting, whom he quotes, contest this point, on the ground that, in general, every suspensive condition contains also a limit and that this limit has an entirely different effect as to obligations, from that which it has as to delivery, where the acquisition itself is suspended.

I cannot approve this reasoning. In fact, if it is true, as Vangerow himself admits, that the intention of parties must be considered, it seems that nothing is more natural than to admit that he who delivers something under a suspensive condition, desires that the ownership be transferred from that moment, in case the event which he has in view subsequently happens. In the case of obligations, it is quite as natural that the debt should not become due until the fulfilment of the condition, because it is only then that the debtor can and ought to perform the act to which he is bound; and that, consequently, it is only then that the right is exercised; while in the transfer of property all has been actually terminated at the very moment of delivery. The passages cited by Vangerow do not, in any way, sustain his opinion; which, moreover, is formally contradicted by L. 8. D. de R. C., of which his arguments vainly endeavour to diminish the effect. Besides, if the retro-active operation is not admitted, it becomes impossible to explain why it is that real rights established in the interval over the thing, by the owner, are annulled on the fulfilment of the condition. The rule: "*Nemo plus juris transferre potest quam ipse habet*," does not apply in this case; for the then proprietor was quite at liberty to dispose of his property, and the party eventually entitled had only a right of personal action against the debtor, in order to obtain the property free from all charge, — an action in no way concerning the third party who had acquired a real right. When, at length, Vangerow relies upon the adage: "*resoluto jure concedentis resolvitur jus con-*

by declaring, expressly or tacitly, a contrary intention [1]). But even if they have not done so, it is only according to the state of matters at the time of the event, that it must be decided whether the elements objectively necessary, and indispensable to the effect of the act, exist; and it is by reason of this, that the conditional obligation expires, if, *pendente conditione*, the thing has accidentally perished [2]). L. 8. pr. D. de per. et comm. (18. 6). L. 10. § 5. D. de jur. dot. (23. 3). L. 14. D. de Nov. (46. 2).

As to the subsequent or determining condition, its accomplishment cancels the effects of the act as completely as if it had never existed. "Ut si ad diem pecuniam non solvisset, res *inemta* fieret," "ut si ex die pecunia omnis soluta non esset, — *invendita* essent"). L. 10 pr. et § 1. D. de resc. vend. (18. 5). L. 2. § 3, 5. D. pro emt. (41. 4). — Hence the following corollaries:

I. If none of the parties had given effect to the agreement concluded subject to such a condition, the fulfilment of that condition destroys all power of exacting the performance of the agreement.

II. If the agreement has been already performed, he who in virtue of that performance has received something, is bound to restore what he has received; or, if he has, by his own act, rendered it impossible to make restitution, — or if he has neglected or injured the thing to be restored, — he may be compelled to pay damages.

He is bound, also, to restore the fruits, and all other benefits which he has, during the interval, derived from the thing; the effect of the condition subsequent being to place things and parties in the same position as if the legal act had never taken place [3]). L. 4. pr. D. de leg. comm. (18. 3); L. 5. D. eod.; L. 4. § 4;

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cessum," he loses sight of the fact that this principle applies only to the annulment *ex tunc*, while, according to his opinion, the annulment, in case of delivery, would take place only *ex nunc*.

1) Unger, l. c., note 71, teaches the contrary and cites L. 78. pr. D. de V. O. and L. 40. D. de stip. serv. (45. 3); but in both these fragments it is a question of persons whose will has not the power arbitrarily and purposely to withdraw their acquisitions from those under whose control they are placed. In truth, the question is of little practical importance, from the moment when it is admitted that the parties can, even tacitly combine a limit with the condition.

2) Wächter, p. 710. Unger, § 82, note 68.

3) Wächter, p. 718. Arndts, § 71, obs. 5.

L. 16. D. de in diem add. (18. 2). We again find, then, here, the same retro-active force (*resolutio ex tunc*) as in the case of a suspensive condition and founded on the same principle; which is that fulfilment of the condition only puts an end to an uncertainty, and by no means creates a really new state of things [1]). Thus, if one had assigned something to another, subject to a subsequent condition, the assignor had the right to recover it, not only from him who had received it, or his representatives, but against any holder; and all real rights thereto which the possessors might have acquired in the interval were absolutely annulled by the fulfilment of the condition [2]). L. 41. pr. D. de R. V. (6. 1). L. 29. D. de mort. causa don. (39. 6). L. 4. § 3. D. de in diem add. (18. 2). "Pure vendito et in diem addicto fundo, si melior conditio allata sit, rem pignori esse desinere, si emtor eum fundum pignori dedisset; ex quo colligitur, quod medio tempore dominus esset; alioquin nec pignus teneret". It was, also, of little importance as to the retroactive effect, whether the fulfilment of the condition (suspensive or determining) had or had not been in the power of the conditional debtor [3]); since, in neither case, had the debtor

1) Unger, § 82: "He who declares his will in this sense: I desire, — for example, to have bought, or to have conveyed the property, — if a certain event does not occur, declares thereby at the same time, that he desires *not* to have purchased, or *not* to have conveyed the property, if the event *does* occur." This is also the doctrine of the Code Nap., arts. 1183, 2125; and of the Neth. Code arts. 1215, 1301. The Prussian Law recognises the determining effect only *ex nunc*, and adds, moreover, important restrictions as to the *jura in re*. Pr. L. R. Part. I. Tit. IV, s. 115. Tit. 19. § 33. As to the Austrian Law, see Unger, l. c.

2) If, on the contrary, it was agreed, by means of a *pactum adjectum*, to conclude a new agreement, having a tendency opposed to that of the original convention, there existed in that case, only a personal right of action to enforce execution of the accessory clause, and there can be no retroactive effect. Sav. Syst. III. p. 155.

3) This point is still in dispute, See Sav. III. p, 15, and the enumeration of authors by Windscheid, § 89, note 15. — The passages upon which the partisans of the contrary opinion rely, do not, however, sustain their doctrine. Thus, the L. 3. D. quid. mod. pign. solv. (20. 6), refers not to a condition potestative, but to a condition dependent upon the mere will of the purchaser; (Windscheid, Archiv. für Civ. Pr. 35. p. 54); and besides, this law may have been founded upon the apprehension of collution between the buyer and the seller, the first of whom in order to elude, after a long lapse

the right to act or despose arbitrarily, but could only so act that the condition should not be fulfilled.

§ 62. OF SUCH CONDITIONS AS ARE IMPOSSIBLE, IMMORAL, INCOMPREHENSIBLE, ABSURD, OR PURPOSELESS.

A condition was impossible, when it was certain, from the moment of its imposition, that it could never be fulfilled; whether because it was contrary to the laws of nature, or contrary to positive law. (a condition naturally or legally impossible). Paulus, III. § 4. b. " Conditionum duo sunt genera; aut enim possibilis est, aut impossibilis. Possibilis est, quae per rerum naturam admitti potest; impossibilis quae non potest: quarum ex eventualtera exspec-

of time, giving the security which he had promised, would have simply to pretend that the thing had displeased him and that he had restored it to the vendor. The Glossaries, indeed, have suggested this explanation : " quia in arbitrio debitoris non debet esse, sitne res obligata nec ne." Nor do the L. 4. D. quae res pign. (20. 3). or the L. 11. pr. et § 2. D. qui pot. in pign. (20. 4); prove anything more in favour of our adversaries. They do not relate to conditional obligations, but to cases where no obligation existed. Wächter, § 94, note 22. Finally, the L. 9. § 1. D. qui pot. in pign., cited among others, by Arndts, § 71, must also be taken as referring to a case of the same kind; and this is what the Glossarists had already felt, in commenting the words "invito debitore impleri non possit" by " ut puta si tibi numeratum fuerit; invitus enim debitor non cogitur nummos a creditore accipere". Arndts objects that the agreement " nisi emtori displicuisset," did not prevent the vendor from being bound; — but this objection is unfounded, because every thing here, depends solely upon knowing whether the purchaser, as such, could eventually be constrained to fulfil the condition. If not, the thing would return to the vendor solely in virtue of the *present* declaration of the purchaser; and there could be no question of retrospective operation. It is with good reason that Windscheid (§ 89, n^{0}. 15) observes that the *in diem addictio* and the *lex commissoria*, both contain conditions which cannot be fulfilled against the will of the buyer, (*quae invito debitore impleri nequit*), but which are, nevertheless, retroactive; and the circumstance (from which Arndts seeks to derive an argument), that the buyer may be prohibited by want of money, is utterly unimportant in regard to the question of law. The doctrine which we defend is evidently adopted in the Dutch law, as is shown by Opzoomer's comments upon art. 1297, n^{0}. 1, of the Civil Code.

tatur altera submovetur." L. 137. § 6. D. de V. O. (45. 1). L. 72. § 7. D. de cond. et dem. (35. 1). It is indifferent whether the impossibility be absolute, or simply relative as being the result of accidental circumstances. L. 6. § 1. D. de cond. et dem. (35. 1). L. 45. D. de her. inst. (28. 5). L. 26. § 1. D. de stat. lib. (40. 7). L. 6. D. de cond. inst. (28. 7). Moreover, the condition might be impossible either *positively* or *negatively* [1]), accordingly as it referred to the case of an event which could not happen, or to the non-occurrence of an event which must inevitably happen. By the nature of things, the legal act which is made to depend upon fulfilment of an impossible condition, can have no effect. It is certain, indeed, that he who wills only on condition that something impossible shall happen, does not really will at all [2]). This doctrine has been admitted as to conventions, (agreements) but as to testamentary acts, preference has been given to the opinion of the Sabiniens, who consider the suspensive condition impossible as unwritten; an opinion of which we may say, with Gaius: (III, § 11): "vix idonea diversitatis ratio reddi potest" [3]).

1) Arndts, (Beiträge, I. p. 161 et supra) has clearly shown that it is inexact to describe as a condition negatively impossible, one which embodies the negation of an impossible event (*si mare non ebiberis, si coelum non adscenderis*). Such a condition is not negatively impossible, but rather negatively inevitable! The difference from a practical point of view, is very important. The condition negatively impossible, — properly so styled — annuls the act *inter vivos* to which it is annexed; but, on the contrary, the condition negatively inevitable has no effect whatever upon the act. L. 50. § 1. D. de her. inst. (28. 5). L. 8. D. de V. O. (45. 1). L, 9. § 1. D. de Nov. (46. 8). Vangerow, § 93. As to the faulty wording of the arts. 1290, 1291, Neth. Civ. Code, See Opzoomer, II. p. 31.

2) For this reason I cannot concur in the view taken by Opzoomer, (upon art. 935 Neth. Code), when, separating things which are inseparable — notably the institution of an heir and the condition which accompanies it — he considers this conditional institution as an equivocal one.

3) In fact, the words of Marcian, in L. 31. D. de O. et A: "In hujusmodi actu talis cogitatio est, ut nihil agi existiment, apposita ea conditione, quam sciant esse impossibilem," are no less true in the case of a testament than in that of an agreement. Savigny's explanation, syst. III. p. 194, to the effect that we must take as a point of departure the immoral condition, the effects of which were finally extended to impossible conditions, seems more ingenious than sound. Indeed, we everywhere find conditions natu-

L. 1. § 11. L. 31. D. de O. et A. (44. 7). L. 29. D. de fidej. (46. 1). L. 9. § 6. D. de R. C. (12. 1). L. 3. D. de cond. et dem. (35. 1). "Obtinuit, impossibiles conditiones testamento adscriptas pro nullis habendas". If the impossible condition is a determining one, the act to which it was attached was no longer coditional but absolute.

In order that an impossible condition should have the effects described, it is requisite that the impossibility should have existed from the time of the performance of the act. If the impossibility did not arise till afterwards, the condition was regarded as unfulfilled (*deficit conditio*). L. 94. pr. D. de cond. et dem. (35. 1). L. 23. § 2. D. ad. L. aq. (9. 2)[1]). If the condition was possible in part, and in part impossible, the part which was possible was required to be fulfilled. L. 45. D. de her. inst. (28. 5). On the contrary, that was considered impossible which could not be attained but by the utmost efforts of a gigantic strength, or by employment of very extraordinary resources; or again that which was within the power only of some exceptional persons. L. 4. § 1. D. de statu lib. (40. 7)[2]).

rally impossible in the foreground. See § 10. I. de her. inst. (2. 14). § 11. I. de inut. stip. (3. 20); the passage already cited from Gaius; and L. 15. D. de cond. inst. The opinion of Fitting (Archiv. T. 39. p. 322) is not more plausible. He supposes that perhaps the Testator may have thought the fulfilment of the condition possible. If it were so, the condition should be regarded as unfulfilled. On the contrary, there is nothing very strange in the supposition that a sarcastic testator had chosen that form and manner of manifesting his aversion to him whom he makes a pretence of favouring. Analogous cases are found in L. 61. pr. D. de manum. test. (40. 4), and in L. 4. § 1. D. de statu lib. (40. 7), where we see even manumission remain inoperative; "cum testator impediendae magis, quam dandae libertatis gratia ita scripsisse intelligitur." We see how, in departing from a declaration of will, as it was really made, we are involved in a maze of uncertainties and conjectures. Much praise is, therefore, due to the Austrian and Prussian legislators, for having returned to the sound doctrine of the Proculians. Aust. Code, § § 698, 897. Pr. L. R. Part. I. Tit. 4. § § 133—136. Tit. 12. § 504 et supra. Unger, § 82. nº. 23. On the contrary, Code Nap., art. 900. Code Neth., 935. art. 1702 Neth Project of 1820.

1) The Austrian Code § 698, annuls a testamentary disposition even when the impossibility subsequently arising had become known to the testator. The Prussian law (Pr. L. R. Part. I. Tit. 12. § 505), presumes, in this case, that the Testator had abandoned the condition.

2) Sav., III. p. 165.

L. 6. D. de cond. inst. (28. 7). On the other hand, the condition was not treated as impossible, unless it was so in a permanent and invariable manner; not where the impossibility was but temporary "si perpetuam causam servaturum sit." [L. 35. § 1. de V. O. (45. 1). L. 58. L. 59. § 1. D. de cond. et dem. (35. 1)]; for in that case he who had imposed it might have had in view a change of circumstances which, although unlikely, was not impossible. And in this regard, it was indifferent whether the possible change so anticipated might occur as to actual events or be effected by legislation [1]), provided that the anticipation of the occurrence was not of an immoral nature; such for example, as in the cases indicated by L. 34. § 2. D. de contr. emt. (18. 1). L. 35. § 1. L. 83. § 5 and L. 137. § 6. D. de V. O. (45. 1).

Illicit or immoral conditions (*conditiones turpes*) were assimilated, to conditions naturally impossible in more than one particular, as to their effects; [2]) in so far that the law took precautions to prevent their maintenance from favoring or encouraging immorality. For the rest, they have the same force as ordinary conditions [3]).

1) L. 31 and L. 98. pr. D. de V. O., prove clearly, that the expressions of L. 137. § 6. D. eod.: "non secundum futuri temporis jus, sed secundum praesentis aestimari debet stipulatio", are far too general. In opposition to Savigny, see Wächter, (§ 36, notes 8 and 9), who justly observes that there is nothing contrary either to nature or to morality in promising (for example) in a country where tithes are collected, a sum of money to a person on condition, that tithes should be no longer levied; or if in a country where Jews are denied political rights, a Jew should bequeathe money to a charity, in case his coreligionists should, by fresh legislation, be admitted to the enjoyment of those rights, this condition would be neither impossible nor immoral.

2) Not as to their nature. The fulfilment is possible, but is forbidden. By putting on the same level illicit conditions and those which are naturally impossible, much confusion has been created. Arndts, Beiträge, l. c. Sav. Syst. III. p. 170. Vangerow, § 93. obs. 3, n^0. 3.

3) Thus, for example, the stipulation for an advantage in return for the commission of a reprehensible act had the same effects as the stipulation of something impossible. On the contrary an obligation contracted on condition of the commission of an immoral act was perfectly valid. L. 121. § 1. L. 123. D. de V. O. L. 50. D. de pact. (2. 14). L. I. 2. C. si manc. venierit. (4. 56). The condition negatively necessary, generally ren-

As to what conditions were regarded as immoral Papinianus himself could speak but in general terms [1]). (L. 15. D. de cond. inst. (28. 7)): "Quae facta laedunt pietatem, existimationem, verecundiam nostram, et (ut generaliter dixerim) contra bonos mores fiunt: nec facere nos quidem posse credendum est." L. 27. pr. D. eod. — It is, nevertheless, true, that in this category were included not only those conditions which pointed directly to something immoral or illegal in itself, but also those which, indirectly tended thither; and even those which, by the temptation of an advantage or a recompense, provoked the performance or the omission of some act which every honorable man ought either to perform or to forbear, from a simple sense of duty [2]). L. 7. § 3. D. de pact. (2. 14). L. 1. § 2. L. 2. L. 9. pr. D. de cond. ob caus. dat. (12. 5). L. 6. 7. C. eod. L. 34. D. dep. (16. 3). The original sources give the following special cases :

dered the act pure and simple. On the contrary, if one obtained the promise of something, on condition of abstaining from a crime or misdemeanour, the convention was void. L. 7. § 3. D. de pact. L. 1. § 2. L. 2. D. de sond. ob turb. caus. (12. 5). Vangerow, I. 1. c. As to the Dutch law, see the sound observations of Opzoomer, on arts 1290 and 935 of the Civil Code.

1) On this point, it is necessary to take largely into account the social and economical condition, as well as the moral notions of a people, at a particular epoch. Thus, for example, in a country where the habit of imprudent marriage had greatly augmented pauperism, every condition tending to check the mania for rash marriages, could not be regarded as immoral; and in some countries, the condition of residence in a fixed place might be tolerated. I think, also, that the vexed question concerning the validity of a condition for changing religion (Vangerow, I. p. 138) is not susceptible of the same solution in countries where the law tolerates but one sole creed, recognised as that of the state, as in other countries where unlimited freedom of belief exists. Under the latter system, I regard this condition as immoral. The Prussian law, (Pr. R. L., Part. I. Tit. 4. § 2) pronounces as follows upon this point: "Liberty of conscience cannot be restricted by any declaration of will." The Neth. Project of 1820 displayed a very liberal spirit in its art. 1705. "Are prohibited all conditions, arising from a hostile feeling founded upon disagreement in matters of religious belief, or tending to restrict any person in the free choice of his religion." Art. 1708 of the same Project is less praiseworthy, or at least far too positive.

2) Puchta, (Vorles. § 60.) justly observes "That is also a *conditio turpis* which without strictly requiring an immoral act to be done, yet tends to introduce an impure motive, by the operation of which an act indifferent in itself degenerates into immorality."

I. In testaments, the condition of not marrying or of marrying only according to the choice of a third party [1]) L. 22. L. 72. § 4. L. 79. § 4. D. de cond. (35. 1).

II. A clause inflicting a penalty upon one who should either be divorced, or not divorced. L. 2. C. de inut. stip. (8. 39). L. 5. C. de inst. et subst. (6. 25).

III. All restrictions upon the liberty of choosing or quitting a place of abode. L. 71. § 2. D. de cond. (35. 1).

IV. A clause restricting the right to make a Testament by the menace of a penalty. L. 61. D. de V. O. (45. 1).

V. A condition requiring the heir or the legatee to bind himself by oath to obey the requirements of the testament [2]). This oath was not to be taken, and the disposition was transformed into a disposition *sub modo*. L. 8. D. de cond. inst. (28. 7). "Quae sub conditione jurisjurandi relinquuntur, a praetore reprobantur."

Finally, when a condition was stated in a manner so obscure or so confused that the intention of its author could not be discovered (*conditiones perplexae*), the act subordinated to the condition was null [3]). L. 16. D. de cond. inst. (28. 7). L. 39. D.

1) But it was not forbidden to impose certain restrictions; for example: "Si a liberis impuberibus non nupserit, quia magis cura liberorum quam viduitas injungeretur." L. 62. § 2. D. de cond. (35. 1), or that of not intermarrying with certain specified persons. L. 63. pr. and § 1. L. 64. L. 71. § 1. D. de cond. (35. 1). As to widows, the law was variable. See L. 62. § 2. (cited) L. L. 2 and 3. C. de inj. viduit. (6. 40). Nov. 22. Cap. 43. 44. Sav. Syst. III. p. 180. The Prussian law has reproduced, with some modifications, the provisions of the laws Julia and Papia Poppaea. (Pr. L. R. Part I. Tit. 4. § § 10, 12, and Koch as to these sections).

2) This dispensation as to the oath applies only to testaments, and not where it has been imposed by convention. L. 19. § 6. D. de don. (39. 5), nor does it apply in reference to *municipes*, nor to slaves emancipated on this condition. L. 97. D. de cond. (35. 1). L. 12. pr. et § 1. D. de manum. test. (40. 4).

3) Sav. III. p. 162 m. The Dutch Law — more consequent than the Roman — regards an unintelligible condition in a Testament as if it had not been written. (Code Civ. art. 935). In conventions it causes (like an impossible condition) the nullity of the act. (Diephuis, VI. § 141.) The Project of 1820, art. 1704, annulled conditions in testaments, "when they are stated in a manner so obscure and confused that they can be regarded only as the product of a diseased mind."

de manum. test. (40. 4). Absurd or objectless conditions appended to a Testament, were not to be observed [1]). L. 27. D. de cond. inst. (28. 7).

B. Of the Term.

§ 63. ITS NATURE AND ITS LEGAL EFFECTS.

A term attached to or prescribed by a legal act, might be either suspensive or determining, according as it fixed the time for the commencement or for the ending of its legal operation. (*Ex die, ad diem*). L. 44. § 1. D. de O. et A. (44. 7). L. 34. D. de her inst. (28. 5). § § 2 et 3. I. de V. O. (15). Again, a term was either immediately certain, as when it related to a specified day of the calender; or mediately certain, as when it fixed an epoch dating from an event which must necessarily happen. It might, again, refer to a future event, as to which it was uncertain *if* it would happen, or *when* it would happen; or (finally), uncertain, both, *if* it would happen and *when*. The term certain was called *dies certus*. The term uncertain, *dies incertus* [2]) *an? quando? an et quando?* L. 41. pr. L. 46. pr. 47. D. de V. O. (45. 1). L. 21. pr. et 22 pr. D. quando dies (36. 2). L. 16. § 1. L. 17. D. de cond. ind. (12. 6). If the event specified as a term was uncertain (*dies incertus an*), the term contained in itself a condition [3]), upon which depended the commencement or the end of a legal relation, [L. 21. pr. L. 22. pr. D. quando

1) The Dutch Law being silent on this point, the fulfilment of the condition may always be exacted. The Prussian Law contains very creditable provisions, in this matter. (See Part. I. Tit. 4. § 133 et supra). The English Law, in this particular, is in accord with the Roman.

2) The expressions *dies certus* and *dies incertus* do not always imply the same antithesis. Thus, in L. 75. D. de cond., dies incertus signifies incertus *quando*, while in L. 16. § 1. D. de cond. ind. (12. 6), it signifies incertus *an*. Sav. Syst. III. p. 212 c. Arndts, § 73. 3.

3) Unger, § 83, note 11.

dies (36. 2). L. 49. § 1. D. de leg. I. (30)] unless there was reason to suppose that the clause expressed in this form had no other purpose than to suspend some effect of the act until the moment when the event should happen, if, indeed it was to happen [1]). L. 46. D. ad Setum Trebell. (36. 1). L. 18. § 2. D. de alim. leg. (34. 1). L. 5. C. quando dies (6. 53). "Non conditio — inserta, sed petitio — dilata videtur." L. 12. pr. C. de usufr. (3. 33): "Neque enim ad vitam hominis respexit, sed ad certa curricula." If the event was certain in itself, but there was doubt as to the time when it would happen, (*dies incerto quando, certus an*), there was nothing conditional about the term, except in the case of testaments, as to which it is always uncertain whether the event will happen in the life-time of the person in whose favour the disposition is made. "Dies incertus (quando) conditionem in testamento facit." L. 75. D. de cond. et dem. L. 79. § 1. eod. L. 4. L. 13. D. i. f. quando dies (36. 2). L. 12. § 1. D. de leg. II. (31).

The term itself, differed from the condition, inasmuch as it did not render uncertain either the creation or the extinction of rights, but merely suspended their commencement or their ending [2]). This difference between a condition and a term forms the basis of different effects resulting from the one and the other [3]).

1) As to the Netherlands Law, See arts. 1044, 1046 and 856 Civ. Code.

2) Formerly, it was generally thought that a term suspended only the execution and not the right itself; but according to the best opinions of modern writers, there can be no right acquired (vested right) so long as the term is not accomplished; and this is especially apparent in matters of ownership and of real rights. When one says: "You shall be owner next year," one does *not* say "You shall be owner forthwith". See Unger, II. p. 89—91. Windscheid, § 96, note 5. The French and Dutch Codes follow the ancient doctrine. Art. 1135, Code Nap. art 1304, Neth. Code. See also, 2295, of the Project of 1820, and the Prussian Law, Part. I. Tit. 4 § 165. On the contrary, the Austrian Code, § 903, says: "A right, the acquisition of which is deferred till a certain day, is acquired from the moment that day commences."

3) Hence, where there is a term, the transmissibility of the legacy to the heirs of the legatee, the exclusion of the *condictio indebiti* and the faculty of instituting the actio hypothecaria. L. 5 pr. et § 1. L. 14. § 3. D. quando dies (36. 2). L. 10. D. de cond. ind. (12. 6). Hence the rule: "in diem debitor, adeo debitor est, ut ante diem solutum repetere non possit." L. 16. D. eod. L. 14. D. de pign. (20. 1).

L. 46. pr. D. de V. O. "Centesimis Kalendis dari utiliter stipulamur; quia praesens obligatio est, in diem autem dilata solutio." L. 41. eod. "Dies adjectus efficit, ne praesenti die pecunia debeatur." L. 213. D. de V. S. "Cedere diem significat, incipere deberi pecuniam."

As to a determining term (*dies ad quem*) it seems natural that its accomplishment should, *ipso jure*, put an end to the legal relation, since one had willed only *until* that moment; the Roman Law, however, did not give it that effect, at least not in the matter of predial servitudes and of stipulations [1]).

Finally there were certain legal acts which did not admit the addition of either a suspensive or a determining term. L. 77. D. de R. J. L. 5. D. de acceptil. (46. 5). "In diem acceptilatio facta nullius est momenti. Nam solutionis exemplo acceptilatio solet liberare." L. 34. D. de her. inst. (28. 5). If, however, a term had been fixed, this clause was, in some cases, null and of no effect; while in others it annulled the act itself. L. 34. D. de. adopt. (1. 7). § 9. I. de her. inst. (2. 14). L. 77. D. de R. I.

C. Mode (modus) [2]). Charge or restriction.

§ 64. ITS NATURE AND EFFECT.

The name *modus* was applied to a clause added to a deed of gift or a Testament, and by which the donor or testator imposes

1) The maxim: "ad diem non potest deberi," appears never to have been applied to contracts of mutual consent. Sav. Syst. III. p. 222. § 3. I. de V. O. L. 44. § 1. D. de O. et A. (44. 7). L. 56. § 4. D. de V. O. L. 4. pr. D. de serv. (8. 1). The Dutch Code speaks only of the *dies a quo*. There is, however, no doubt that the *dies ad quem* operates *ipso jure* the forfeiture of the right. Vide, the Prussian Law, Part. I. Tit. 4. § 167, and art. 3061 of Neth. Proj. of 1820.

2) Hugo, R. G. p. 539, believes himself able to attribute to the *modus* a connection with the legal scale or tarif (*modus legis cinciae*) which legacies and gifts were forbid-

upon him on whom he confers a gift, the charge of employing it, wholly or in part, for certain specified purposes, or the duty of doing something else which restricts or diminishes the extent of the gift or legacy. L. 92. D. de cond. (35. 1). L. 17. § 2. D. de manum. test. (40. 4).

The effect of the *modus* is not to suspend or to render uncertain the right conferred by the act, but rather to cause that he upon whom the charge or duty is imposed may be forced, by means which vary according to circumstances [1]), to perform this duty, provided there is in it nothing contrary to law or to morality. L. 17. § 2. D. eod. "Hac scriptura testamenti, Pamphilus liber esto, ita ut filiis meis rationes reddat, an sub conditione libertas data videretur, quaesitum est? Respondi: pure quidem datam libertatem, et illam adjectionem, ita ut rationes reddat, conditionem libertati non adjicere: tamen quia manifesta

den to exceed, but which did not include the amount of the charges, imposed, in one way or another, upon the person favoured. The idea is ingenious, but seems rather too far-fetched. As a technical term, the word *modus* is found in the inscription of the title of the Pandects de cond. et dem. (35. 1); of the titles of the Code 6. 45 and 8. 55, and in L. 17. § 4. D. t. l. — The Germans say *Zweck, Zweckbestimmung*, (purpose, designation of purpose), and also *Verwendung* (employment), expressions which are criticised, with good reason, by Sav., III. p. 228. The authors who wrote upon the old Dutch Law, said, *Voornemens* or *Oogmerken* (intentions, views). Huber, Hedend. Rechtsgel. II. 16. § 45. The Project of 1820 art. 1947, says, *Doeleinde* (purpose). The Prussian Law (Part I. Tit. 4. § 152) says *Endzweck* (purpose, end); and the Austrian Code (§ 706, 712), says *Auftrag* (charge, commission). — The theory of Windscheid (die Lehre des Röm. R. von der Voraussetzung, Dusseldorf, 1850), who substitutes for *modus* a general idea of *supposition* (voraussetzung) is rejected by most modern authors. Arndts, § 74. Unger, II. § 84. obs. 9. Windscheid, has replied in his Pand. § 97. 1; but his answer is not convincing. Upon the practical necessity of the *modus*, by the side of the condition, see Sav. Syst. III. l. c.

1) If the donor or the testator had determined nothing in this particular, the constraint might be exercised by the public authority, or by the donor, or by the heir of the deceased, whether they had any interest in its exercise, or not. The ordinary method was to refuse the delivery of the legacy or the gift, until the legatee or donee had furnished security for execution of the charge. L. 50. § 1. D. de her. pet. (5. 3). L. 40. § 5. L. 71. pr. § 1. 2. D. de cond. L. 48. D. de fideic. lib. (40. 5.). L. 19. D. de leg. III. (32). Sav. III. p. 129.

voluntas testantis exprimeretur, cogendum eum ad rationes reddendas." L. 80. D. de cond. (35. 1) [1]). L. 37. D. eod. L. 7. D. i. f. de ann. legg. (33. 1.). L. 16. D. de usu (33. 2). L. 113. § 5. D. de leg. I. (30). L. 1. C. de his quae sub modo (6. 45).

The following are the differences between the *conditio* and the *modus*.

I. The condition suspends: the *modus* does not suspend. II. The *modus* implies a necessity of accomplishment: the condition implies no such necessity [2]). III. The *modus* does not prevent, — in matter of testament — the gift from passing to heirs (*dies cedit*); it is otherwise with the condition. IV. In the *modus*, it sufficed that the person charged furnished sureties, in the case of a condition this was not sufficient. V. In the *modus* the impossibility of executing the duty did not prejudice him upon whom it was imposed, if it was not caused by his own act; it was otherwise as to a condition [3]).

1) "Eas causas, quae portinus agentem repellunt, in fideicommissis *non* pro conditionalibus observari oportet; eas vero, quae habent moram cum sumtu, admittimus cautione oblata." — I do not think, with Savigny (l. c. p. 233), that it is necessary to expunge from this text the word *non*, inasmuch as the protinus agens is likewise rejected in the case of a term. See the Glossary, which gives several variations of this passage, and Puchta, Vorles. § 63.

2) Sav. p. 231. "A condition suspends, but does not impose an obligation; the modus creates an obligation but does not suspend." It is for this reason that it is so important to carefully distinguish the *modus* from the condition. The Romans ordinarily expressed the condition by the particle *si* and the modus by *ut*, but did not invariably adhere to this rule. L. 45. § 3. D. de V. O. According to Savigny and others, who argue from L. 9. D. de R. I., in case of doubt, the presumption was in favour of the *modus*, but this opinion seems to me inadmissible. The law cited establishes a presumption, in case of doubt as to the extent of the obligation, but has no concern with the means which he who imposes the obligation may have chosen, to ensure its faithful execution. It should rather, be presumed, that he had given a preference to the means tending the most surely and most efficaciously to the desired end.

3) While the Prussian Law, (Pr. L. R. Part. I. Tit. 4. § 152 e seqq) and the Austrian Code (§ 709—719, treat of the *modus*, and distinguish it, more or less happily, from the condition, as to the respective effects of the two forms, the French and Dutch codes have entirely neglected this question. In fact, not to speak, here, of arts. 953 Code Nap. and 1051 Neth. Code, which make use of the word *condition* where they should evidently use *modus*, (non-execution of a charge) it is left in doubt by both these codes, first whether the default of fulfilment of the *modus* should always involve the nullity of

L. 8. § 7. D. de cond. inst. (28. 7). L. 6. pr. D. de cond. et dem. (35. 1). On the other hand, it is important to distinguish the *modus* from a simple wish or recommendation, which left him who received the benefit, free to act as he might see fit. In order to ascertain whether the intention of the testator or donor was to impose an obligation, or simply to express a wish, it suffices generally to ascertain whether he had or had not some moral or pecuniary interest in the fulfilment of the *modus*. "Titio centum ita ut fundum emat, legata sunt, non esse cogendum Titium cavere; quoniam ad ipsum duntaxat emolumentum legati rediret." L. 71. pr. D. de cond. (35. 1). "Facti magis, quam juris quaestio est. Nam si Titio decem in hoc dedi, ut Stichum emeret, aliter non daturus, mortuo Sticho condictione repetam. Si vero alias quoque donaturus, Titio decem, quia interim Stichum emere proposuerat, dixerim in hoc dare, ut Stichum emeret: causa magis donationis. quam conditio dandae pecuniae existimari debebit." L. 2. § 7. D. de don. (39. 5).

§ 65. OF THE INTERPRETATION OF LEGAL (JURIDICAL) ACTS.

When there was doubt as to either the contents or the scope of a declaration of volition, he whose duty it was to interpret it was bound to make every effort to ascertain what was the true intention

the disposition, as by the Prussian Law, or that such nullity should ensue (as by Roman and Austrian Law) only when the default is imputable to the person favoured. But, secondly, no article settles the question as to how the execution of a charge shall be assured; and as the *modus* is not suspensive, the legatee or donee enters immediately into possession of the legacy or gift; whence it ensues that nothing protects the property, (at any rate the personal property) from acts of disposition or alienation by a careless legatee or donee; while, should he be insolvent, the charge may remain unfulfilled, without the possibility of remedy. The omissions in question are so much the less excusable in the Dutch Code, because of the fact that the Project of 1820 had indicated and settled both these points. See arts. 1726, 1947.

of the parties, and to penetrate the spirit of clauses, the mere letter of which often expresses but imperfectly the purport. L. 7. § 2 D. de supell. leg. (33. 10). In such case, he could, to a certain point, have recourse to an authentic interpretation, in so far that in unilateral declarations [1]), that which was obscure or ambiguous [2]) could be made clear and explicit by the author of the declaration. L. 21. § 1. D. qui test. fac. poss. (28. 1). "Quod quis obscurius in testamento, vel nuncupat vel scribit, an post solennia explanare possit, quaeritur. Et puto posse: nihil enim nunc dat, sed datum significat." Moreover, it is necessary to adopt as a basis here, as in the interpretation of laws, the signs, and above all the words, employed by him who has sought to express his wishes; taking always into account the meaning attributed thereto by the generally admitted usage of the place where the act has been done; unless indeed it can be proved that the party was in the habit of departing from such usage. L. 96. D. de R. I. "In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset." L. 69. § 1. D. de leg. III. (32). "Non enim in causa testamentorum ad definitionem utique descendendum est, cum plerumque abusive loquantur, nec propriis nominibus ac vocabulis temper utantur." If, after this, the doubt could not be removed, that interpretation was adopted which was most in harmony with the nature and character of the case; and as it was not to be supposed that a person of sound mind would have acted without any purpose, preference was given to that interpretation which assured the maintenance of the act. L. 67. D. de R. I. "Quoties idem sermo duas sententias exprimit, ea potissimum accipiatur, quae rei gerendae aptior est." L. 80. D. de V. O. (45. 1). "Quoties in stipulationibus ambigua oratio

1) As to bilateral acts, it is clear that one party could not give an interpretation which should bind the other. L. 12. D. de transact. (2. 15).

2) It is to this that interpretation should be restricted. That which has not been expressed cannot be admitted as forming a part of legal act. L. 9. pr. D. de her. inst. (28. 5). L. 3. D. de reb. dub. (34. 5). See also, as to Dutch Law, arts. 932—934, 1378 and 1387 of the Civil Code.

est, commodissimum est, id accipi, quo res qua de agitur in tuto sit." L. 12. D. de reb. dub. (34. 5). "Quoties in actionibus, aut in exceptionibus, ambigua oratio est, commodissimum est, id accipi, quo res qua de agitur magis valeat, quam pereat."

Farther, if an ambiguous clause was found in a unilateral deed, the interpretation which was most favorable to the debtor or obligor was preferred; — that which imposed least restraint upon his natural liberty; — and if such a clause occurred in a synallagmatic deed, — (a deed creating reciprocal obligations), — that interpretation was adopted which was least favorable for him who, having taken the principal part in the contract, should take the responsibility and the consequences of any inaccurate or defective expression which it contained. L. 9. D. de R. J. L. 34. D. eod. "Quid ergo si neque regionis mos appareat, quia varius fuit? ad id quod minimum est redigenda summa est. In stipulationibus, cum queritur quid actum sit, verba contra stipulatorem interpretanda sunt." L. 39. D. de pact. (2. 14). "Veteribus placet, pactionem obscuram vel ambiguam venditori et qui locavit nocere, in quorum fuit potestate legem apertius conscribere." L. 21. L. 33. D. de contr. emt. (18. 1). L. 99. D. de V. O. (45. 1). L. 172. D. de R. J.

Finally there were certain situations and certain legal conditions or relations, for which the law, in order to favour them, prescribed that interpretation which in the most complete and certain manner assured their maintenance. — For instance: — Liberty; Dowry, in so far as it concerned the rights of the woman; — and Testaments. (*causae favorabiles*). L. 179. D. de R. J. "In obscura voluntate manumittentis, favendum est libertati." L. 85. pr. D. eod. In ambiguis pro dote respondere melius est. L. 12. D. eodem. "In testamentis plenius voluntates testantium interpretantur." L. 24. D. de reb. dub. (34. 5).

§ 66. OF JURIDICAL ACTS PERFORMED BY AN INTERMEDIARY, [1]) OR BY THE INTERVENTION OF ANOTHER [2]).

In general, a person in order to manifest his will or intention, might make use of another, whose part was restricted to being, in some sort, the channel or instrument, through or by which a volition foreign to his own was expressed, and communicated to third parties. " Ministerium tantummodo praestare videtur." L. 15. D. de pec. const. (13. 5). Such, for example, was the case where some one who might be called an aid or assistant, conveyed an oral message (*nuntius*), and performed thus the office of a letter [3]). It is evidently unimportant whether such an aid did or did not act with intelligence and purpose, and whether he had or had not legal capacity : — these circumstances could exercise no influence upon the effects or consequences of his act. But we may imagine the intervention of an aid, in such a manner that this aid, instead of simply serving as a medium for the volition of another, expresses rather (himself) a will or purpose of his own; — the declaration of which would, however, be regarded as emanating directly from him for whom he acts [4]). The Roman law did

In matter of offences, representation is impossible. The order to commit an offence constitutes an offence in itself : — the mandant is *auctor intellectualis ;* — the mandatory is *auctor physicus.* — In family and hereditary law, also there is little room for representation. Sav. III ; § 113. Puchta, Vorles. § 82. Unger, § 99. notes 35, 36.

2) Windscheid, § 73, enumerates the modern works which treat of this matter.

3) This is why the Romans usually couple these two modes of making known ones' will : — " *agere vel contrahere per nuntium vel per epistolam.*" L. 2. pr. D. de pact. (2. 14). L. 2. § 2. D. de O. et A. (44. 7). § 2. I. de oblig. ex cons. (3. 23). — Unger, § 90, is right in saying. — " Aids extend our physical organs, as natural instruments would do ;" and Windscheid, § 73, note 2, admirably characterizes this office, when he says, — They are not representative as regards volition, but merely as to the *declaration* of volition."

4) The definition given by Von Scheurl, (Muncher Krit. Ueberschau, I. p. 320), is therefore correct :—" To represent is to undertake a juridical act, which in fact belongs to another person, with the intention of producing the legal effects proper to that act, precisely as if that other person had himself performed it." That which distinguishes the *procurator* from the simple *nuntius,* is that the former has, in the execution of his

not, originally, recognize this direct, or immediate representation [1]); but later, the increase of commercial relations rendered it impossible to maintain the ancient principle, absolutely and in all its rigour. — It was no longer adhered to, as to the acquirement of possession and of the right of property [2]), of which it is the basis [3]); nor as to the law of hypothec, nor as to hereditary right according to the Edict of the Praetor; — nor, finally, as to the case where one person had given something in the name of another on condition of its restitution. In this latter case, the consent of him who received the thing had the effect of giving directly to the person represented the right of action for restitution [4]). L. 9. § 8. D. de R. C. L. 35. § 3. D. de don. (39. 5). L. 126. § 2. D. de V. O. (45. 1). L. 2. C. per quae pers. (4. 27). Apart from these cases, the Justinian law adheres to the ancient maxim: "per extraneam personam nihil acquiri posse [5]). § 5. 1. per quas"

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mandate a certain latitude, not left to the other, — who performs simply the office of a letter. It is not, therefore, surprising, that the knowledge and the will of the mandatory are matters of as entire indifference as those of a simple messenger. L. 1. § 9. 10. D. de acq. poss. (41. 1). L. 51. § 1. D. de aedil, edicto (21. 1). See Buchka, die Lehre von der Stellvertretung, pp. 206 and 237. Unger, note 20, attaches no importance to the greater or lesser amount of latitude accorded to the intermediate person. He thinks that the only thing to consider is, which is the person who acts *effectively*; — But it is precisely to settle this question that a *criterium* is indispensable! — The examples cited by Unger prove nothing in his favour. A procuration to contract marriage, or even to buy a specified article for a specified price, would, ordinarily, be less restricted as to details, than a message confided to a domestic. The difference between the procurator and the nuntius has, also, some importance according to Dutch law; — for example in matter of possession. Art. 596, Civil Code.

1) L. 6. C. si quis alteri (4. 50). "Si negotium uxoris gerens comparasti nomine ipsius, emti actionem nec illi, nec tibi quaesiisti, dum tibi non vis, nec illi potes." — If the Romans discovered only at a late period the necessity of representation, it was, no doubt, because with them one could acquire by the intermediary of slaves and of children.

2) L. 41. D. de usurp. (41. 3). L. 1. C. de acq. poss. (7. 32). § 5. I. per quas pers. (2. 9). L. 20. § 2. D. de A. R. D. (41. 1).

3) L. 2. C. per quas pers. (4. 27). L. 21. pr. D. de pign. (20. 1).

4) As to the motive of this derogation, see an essay as remarkable theoretically as practically, inserted by Ihering in the Jharb. für Dogm.., T. II. p. 87 et supra. See also Windscheid, T. II. § 313.

5) Savigny (Syst. III. p. 94 et Seq, and Oblig., II. et Seq) has adopted another view, founded principally upon L. 53. D. de A. R. D. "Ea quae civiliter acquiruntur,

pers. acq. (2. 9). Paul. V. 2. § 2. Since the Middle Ages, a new principle has been recognized; i. e. that when, in declaring his own will or intention, a person makes known that he represents another, his declaration, — provided that he has not exceeded the terms of the procuration, — gives the same effect to his acts as if the person represented had acted in person or by a messenger. This principle had since been recognised by all modern legislation [1]).

Another mode of representation, admitted in its generality by Roman law, was this: The representative acted in his own name, and it was he, who felt the immediate consequences of his act; but he acted with the intention, subsequently, to transfer, in some manner, to his mandant, the rights and the obligations which he had created [2]). This kind of representation was distinguished from the former by having less force and less simplicity. Some authors, justly enough, call it *incomplete* or *mediate*, in contradistinction to the former, which they term *complete* or *immediate*; and they give the name of *tacit* representative to him who thus intervenes in the act, as if the rights which it affects concerned himself and himself only [3]).

The effect of immediate representation was to cause the act of the representative to be regarded as if it had been performed by the person represented; and the latter became immediately and directly possessor of the right acquired, or bound by the engagement contracted. It hence resulted that it was the person of the party represented which had to be considered as to the capacity

per eos qui in potestate nostra sunt, acquirimus, veluti stipulationem; quod naturaliter acquirimus. Secuti est possessio, per quemlibet, volentibus nobis possidere acquirimus." But this opinion has been, with good reason, rejected by the majority of contemporary authors. See von Scheurl, l. c., p. 326, and Windscheid, § 73. note 14.

1) Aust Code § 1017. Prus. L. R. Part. I. Tit. 13. § 85. Code Nap. Arts. 1119, 1997, 1998. Neth. Code. Art. 1836, 1844, 1851. Allgem. Deuts. Handelsgestzbuch Art. 52 "zwischen dem Prokuristenoder Bevollmächtigten und dem Dritten erzeugt das Geschäft "weder Rechte, noch verbindlichkeiten." See also Art. 241, 298.—Upon the law of representation in the Middle Ages, see the work (already quoted) of Buchka, pp. 121—151.

2) We recognize here the modern Commission-merchant or agent. — As to the object and the utility of this kind of representation, See Ihering, Jahrb. I., p. 317 et supra.

3) Ihering, l. c., p. 350. — Unger § 90, p. 135, does not admit that there is any

to act, although it was necessary, on the contrary, to look to the representative, in order to judge whether volition really existed or not [1]).

The right to perform legal acts, in the name of another was derived: I. From relations, or from a state of things, which implied the necessity for a representative, either by reason of their special nature [2]), or from a prescription of law [3]) which also determined the limits of the representation; or, II. From a procuration given, voluntarily, by the person interested, and the extent of which was specially limited, or might be decided by means of interpretation [4]).

Where one acted for another without authority, (*negotiorum gestio*) the default of previous authorization by the (*dominus negotii* could be remedied by subsequent approval, (*ratum habere, ratihabitio*), which produced a retro-active effect towards him who

representation, where the act produces no immediate consequence for another person. In this case he considers that he who acts cannot be considered as a representative, but simply as a person interposed: This observation seems to me to want foundation. Even where the character of representative does not manifest itself externally, but remains (as in the case of a sleeping partner) latent as towards third parties, it does not the less influence the relations between him who acts and him upon whom the effects produced will subsequently re-act. Arndts, § 76. obs. 1. — On the contrary, there is no representation, in the proper sense of the word, when we acquire, or when we become bound, by the intervention of persons subject to our *postestas*; because the effects there produced are the result of a legal necessity, independent of the volition of those who act. L. 79. D. de acq. vel omitt. her. (29. 2). Nor is there any representation in acts which may produce certain effects as towards a third party, but not the *same* effects as if he himself had acted: for example, the *expromissio*. Vide Puchta, Vorles, § 52. 2. Brinz, Krit. Blätter, N^{0}. 2. p. 3. et s. Von Scheurl, l. c. p. 317.

1) Unger, § 90, note 28. Windscheid § 73, note 18. Aust. Code, § 1018. Code Nap. Art. 1990. Neth. Code, Art. 1834. Asser, § 852.

2) For ex. as in case of legal persons.

3) For example: — Guardianship, curatorship, the representation of infants by their parents and again (in modern law) of the wife by her husband.

4) Puchta, (Vorles, § 52) says justly, that the notions of procurations, general or special, are purely relative; and that even in a general procuration there are limits which may not be exceeded. L. 58, 60. 63. D. de proc. (3. 3). L. 7 pr. D. de don. (39. 5). L. 12. D. de pign. act. (13. 7). "A procuration is general or special, according as it is more general or more special than another." Windscheid, § 74, note 2. Arndts, § 77, also, Neth. Code. Art. 1832.

gave it [1]), placing him in the same position as if the act had, from the first been performed with his full consent. L. 60. D. de R. J. (50. 17). L. 56. D. de jud. (5. 1). L. 12. § 4. D. de sol. (46. 3). L. 25. i. f. C. de don. i. v. e. u. (5. 16). L. 7. C. ad Sctum Maced. (4. 28). "Cum nostra novella lege generaliter omnis ratihabitio prorsus retrotrahatur et confirmet ea, quae ab initio subsecuta sunt." L. 16. §1. D. de pign. (20. 1). "Si nesciente domino res ejus hypothecae data sit, deinde postea dominus ratum habuerit, dicendum est hoc ipsum, quod ratum habet, voluisse eum retro recurrere ad illud tempus quo convenit."

§ 67. OF THE INVALIDITY OF LEGAL ACTS AND INSTRUMENTS.

A legal act, or a legal instrument, was invalid when, in consequence of its not fulfilling the requirements of the law, it was deprived of the effect which it was intended to have. There were two kinds, of invalidity: nullity and annulabillity: — i. e. an act might be *void*, or only *voidable*.

First. — There was nullity [2]) when the act or the instrument had a *material*, but not a *legal* existence: — when it existed *de facto* but not *de jure*. — Nullity existed sometimes at the outset; sometimes it was the result of a subsequent circumstance, in consequence of which that which was originally valid was annulled or rescinded by operation of law. The original nullity might be caused by the absolute prohibition of certain acts [3]), or by the omission of a necessary condition regarding the capacity of the person who

1) But without prejudice to rights acquired by third parties. See Dernburg, Pfandrecht I. p. 229. Windscheid, § 74, note 6. Seuffert (über die Lehre von der Ratihibition page 69) "Der Genehmigende eigner sich das vor ihm liegende Geschaft des Gesehäftfürers "auch Seinen zeitverhältnissen nach an."

2) The Romans say: "*negotium nullum nullius momenti;*" but they also apply to a void act the word, *rescindere*. See Brisson, I. v.

3) There were anciently reckoned, *leges perfectae, minus quam perfectae, et imperfectae;* but these distinctions were abolished by a Constitution of Theodosius and Valentinian, which declares void every act forbidden by any law whatever. He who

acted [1]); or the object [2]), or the form [3]), or the essential elements of the instrument [4]).

Causes which might subsequently invalidate acts originally valid, varied according to the diversity of cases [5]); but this subsequent nullity had also a retro-active operation, referring back to the date of the act so that it was regarded as having never had any legal existence. — Another question arises out of this: — i. e. whether an act legally performed was invalidated by the subsequent occurrence of a circumstance which, if it had occurred earlier, would have prevented its performance. The decisions of the Roman jurisconsults on this point are contradictory [6]). The efforts made hitherto to discover in the ancient authorities a general rule, applicable to all cases, indiscriminately, have been fruitless, and must necessarily be so, [7]) inasmuch as the Romans founded their decisions in each case upon considerations of utility

eluded the law was placed on the some footing as he who violated it. Ulpian. I. § 2 L. 5. C.de legg. (1. 14). L. 29, 30. D. eod. (1 3).

1) For example, when the act had been performed by a lunatic.

2) When the object of the transaction was excluded from commerce.

3) The following (ex. gr.) were null: a donation without registration and a testament made without the legal number of witnesses.

4) A Sale without the fixing of a price.

5) Ex. a Testament "*ruptum agnatione heredis sui*" or "*irritum cap. dim.*"

6) L. 3. § 2. D. de his quae pro non script. (34. 8). "Quae in eam causam pervenerunt, a qua incipere non poterant, pro non scriptis habentur." L. 85. § 1. D. de R. J. "Non est novum ut quae semel utiliter constituta sunt, durent, licet ille casus exstiterit, a quo initium capere non potuerunt." § 14. I. de leg (2. 20). "Non enim placuit sententia existimantium, exstinctum esse legatum, quia in eam causam pervenerit, a qua incipere non potest." L. 16. D. ad leg. Aquiliam. L. 98. pr. L. 140. § 2. D. de V. O. (45. 1). L. 31. pr. D. de don. (39. 5).

7) Sav. IV, p. 554. Some writers, — among others Wächter, II, p. 669, and Unger, II, p. 144, — teach that there is nullity, if the condition which fails is of those which are not merely indispensable to the performance of the act, but also to its continued existence. But Windscheid, § 82, note 11, justly observes, that with such a definition we turn in an endless circle. — Why, for example, should a testament preserve its validity if the testator became insane after its execution, and not if he lost his civic rights? § 4. I. quib. mod. test. infirm. (2. 17). § 1. I. quib. non est perm. fac. test. (2. 12). L. 6. § 5 — 13. D. de inj. rupt. test. (28. 3). — It may be answered, that, in the latter case, the testator lost his legal capacity, and in the other, only the capa-

and propriety, which prompted sometimes one judgment, sometimes another. From the fact that the act had never any legal existence, it followed:

I. That it could not found, nor modify, nor extinguish any legal relation [1]). L. 6. D. de V. O. (45. 1). L. 70. § 4. D. de fidej. (46. 1). "Si a furioso stipulatus fueris, non posse te fidejussorem accipere certum est, quia non solum ipsa stipulatio nulla intercessisset, sed ne negotium quidem ullum gestum intelligitur."

II. That not only was it superfluous to call into operation any legal means whatever, to effect the rescinding of such an act [2]), but that the employment of any such means was simply impossible.

city to act: — but what effect can this distinction have here? Why should the law recognize a testament left by a person who, at the moment of his death was incapable to will or to dispose, and not that of a person whose condition has been changed by a *capitis diminutio*? I think, as shown by the L. 140. § 2. D. de V. O., — ("Etsi placeat extingui obligationem, si in eum casum inciderit, a quo incipere non potest, non tamen hoc in omnibus verum est"), — that the Romans, in despite of their apparent abstractions, were guided in this matter by the practical considerations which each case presented; and really, if this mode of view be admitted, nearly all the opposing decisions are explained. See Placentinus ad L. 85. s. r. D. de R. I. Donellus ad L. 140. s. r. D. de V. O. It is moreover the same with modern law. Thus, for example, the capacity of the testator must exist at the time of the making of the testament; (Neth. Code, art. 945; — Asser, § 477; — Aust. Code, § 575, 576; — Pruss. L. R. Part. I. Tit. 12, § 11.); — that of the heir from the moment of the decease of the testator. (Code Nap. Art. 1043; Neth Code, art. 1048; Austr. Code, § 545, 546. Pruss. L. R. Part. I. Tit. 12. § 43). An obligation retained its force, although he who contracted it had lost his capacity to act; but on the contrary, it became void, if the specific thing which was the object of the engagement happened to perish. See arts. 501 and 1480 Neth. Code, and arts. 503 and 1302 Code Nap.

1) In this respect, it was indifferent whether the nullity was absolute or relative. L. 3, 8, 11, 15, C. de praed. min. (5. 71).

2) Respecting marriage, — the stability of which it seems to have been thought undesirable to leave to the discretion of parties interested; — modern legislation, by exception, requires an action for declaration of nullity. Austrian Code. § 93, 94. Prus. L. R. Part. II. Tit. I. § 973; also in French Law; as to which see Zachariae III, § 462; and in Dutch Law, art. 140 Civ. Code. It was otherwise in the Project of 1820, art. 189. See, moreover, Brandis, Ueber absolute und relative Nichtigkeit. Zeits. für C. R. und Proc., T. VII, p. 123. — Sav. Syst. IV, p. 340. As to what is called *querela nullitatis*, and upon the suit for nullity according to the Code Napoleon, (art. 1304), see Windscheid, zur Lehre des Code Nap. von der Ungültigkeit der Rechtsgeschäfte,

Nullity was either absolute or relative [1]). The first could be invoked by any one interested in the act; the other only by those in whose favour it was established by law; so that if the latter did not see fit to exercise the power allowed them, the act would remain of full effect as towards all parties; exactly as if, from the first, its validity had been incontestable. L. 13. § 29. D. de act. emt. (19. 1). L. 65. § 8. D. pro soc. (17. 2).

There was moreover, between absolute nullity and relative nullity this difference; that as to the first, neither the neglect of parties to avail themselves of it, nor any other possible means, could so operate as to cause the act or instrument to be considered as having been originally valid. ("*Quod ab initio vitiosum est, tractu temporis non potest convalescere.*" L. 201. 210. D. de R. J.). If subsequently the act were confirmed, expressly or tacitly, by the party having a right to avail himself of its nullity, this confirmation did not constitute a corroboration, (with a retro-active effect) of a thing already existing [2]), but rather a mere renewal of an act which had certainly been previously performed, but, at that time, without effect [3]). It was quite otherwise

1847. — As to the confusion existing in the Neth. Code, see Opzoomer, upon art. 1482. § 1.

1) This expression is criticised by some writers, and their criticism would be just if by relative nullity was meant that which exists as towards one of the parties only; but the expression is accurate if applied to the capacity of availing oneself of the nullity. Certain German authors style this species of nullity *unentschiedene, bedingte, schwebende, heilbare.* (Undecided, conditional, floating, susceptible of being cured). Sav. Syst. IV, p. 538. Puchta, Vorles. § 67; Wächter, II, p. 667; Unger, § 91, note 42; Windscheid, § 82, note 8.

2) Austrian Code, § 1351. "An obligation which has never had a legal existence, or which is already extinguished, can be neither transferred nor confirmed."

3) Sav. Syst. IV, p. 556, thinks that he finds, two exceptions to this rule, in L. 42. D. de usurp. (41. 3), and in L. 4. § 32. D. de dol. mol. exc. (44. 4); but, in truth they are not exceptions. Unger, § 91, note 65, and § 92, note 7. — Windscheid, (§ 83, note 10), on the strength of L. 25. C. de don. i. v. et u. (5. 16,) — although he admits that his opinion sins against the *juris elegantia*, — teaches that the Roman law gave to an act of confirmation a retro-active effect. But the law which he cites does not prove his doctrine; because according to Justinian law the nullity of the gift has the

when the nullity was only relative. This species of nullity was declared only in the interest of one specified person; — if that person preferred not to assert it, the act, which was only conditionally void, was regarded as having been valid from the beginning; — and in this case, also, it would be inaccúrate to say that it had been cured of a defect. (*Convalescere*).

In the second place, nullity might be complete or partial, according as it attached to the whole effect of an act or instrument, or only to a part [1]). If the portion impeached constituted one of the essential or fundamental elements of the acts; — or, again, if the portion which was void and the portion which was valid were, — from the nature of the case, or by the intention of the parties, — so closely united that they could not be separated; — in that case the entire act was annulled [2]). On the contrary, if separation was possible, or if the nullity affected only accessory points or clauses, the rule was applied: "utile per inutile non vitiatur." L. 1. § 5. D. de V. O. (45. 1). "Nam si tot sunt stipulationes, quot corpora: duae sunt quodammodo stipulationes, una utilis, alia inutilis, neque vitiatur utilis per hanc inutilem." L. 110. pr. D. eod. L. 17. pr. D. commod. (13. 6.)

effect of a simple right of revocation. Puchta, Vorles. § 51, p. 116; Wächter, § 100, note 5. The words: "sicut et alias ratihabitiones neg. gestorum ad illa reduci tempora oportet in quibus contracta sunt", referred to the *negotiorum gestio* properly so called; or, at any rate, were limited to a particular case or to the production of a single legal effect. They were thus explained by the Glossarists, and afterwards by Azo; *Summa ad Tit.* C. 1. § 29. — The principle which we defend in Roman Law is equally applicable to French and Dutch Law. Marcadé, in speaking of art. 1338 of the Code Napoleon, well says: "Reason plainly enough tells us, that it is impossible to fortify, repair, or corroborate, in any conceivable manner, that which does not exist; it can no more be confirmed than it can be destroyed." It is for this reason, that I think, (in opposition to the opinion of Opzoomer), that art. 1929 of the Dutch Code is applicable exclusively to the cases named in Tit. IV. sec. 8. Book III. It is, in fact, only in these cases, that the law admits in express terms, an action for rescinding or nullification.

1) Thus in donations without registration, L. 34. pr. L. 35. § 3. C. de don. (8. 54). L. 5. § 5. D. de don. i. v. et ux. (24. 1).

2) L. 178. L. 129. § 1. D. de R. J. "Cum principalis causa non consistat, plerumque ne ea quidem, quae sequuntur locum habent."

L. 1. § 7. D. depos. (16. 3). L. 42. C. de transact. (2. 4) [1]).

It might be that an act was defective as such, but contained all the elements necessary to form a *different* act. The question would then arise: "Does the act, of which all the elements are present, exist, although the parties intended to form a different one? In other words must we here admit a *conversio actus juridici* [2])? Every thing would depend upon the intention of the parties. If it seemed probable that in case what was primarily intended could not be realised, they had intended (subordinately) that which *could* be performed, that intention should be respected [3]). And it must be presumed that this is the case, whenever the two acts lead, in fact, to the same result [4]), although it be in a different form and manner.

1) See art. 1841, 1858. Neth. Code.

2) See, on this question, a short but comprehensive dissertation, by Römer, zur Lehre von der Conversion der Rechtsgeshäfte, inserted in the Arch. für Civ. Prax., T. 36 No. 4. — Windscheid, § 82, notes 13 and 14.

3) L. 5. D. de resc. vend. (18. 5). L. 3. D. de test. mil. (29. 1). L. 8. pr. L. 19. pr. L. 23. D. de acceptil. (46. 4). L. 66. L. 112. D. de R. J.

4) L. 1. § 4. D. de const. pec. (13. 5). L. 1. § 2. D. de V. O. (45. 1). L. 9. D. de spons. (23. 1). L. 1. D. de jur. Cod. (29. 7). L. 13. § 1. D. eod. L. 41. § 3. D. de vulg. et pupill. subst. (28. 6). L. 29. § 1. D. qui test. fac. poss. (28. 1). L. 88. § 17. D. de leg. II. (31). L. 8. C. de Cod. (6. 36). L. 11. C. de testam. manum. (7. 2). Art. 102, 135 Code Com. Neth. — In Dutch law, the question is presented, whether the nomination of a testamentary executor, made by an instrument which did not combine the conditions necessary for a testament, was valid; — such a nomination being susceptible of being made by an instrument bearing simply the signature of the party, without other formality. [That is, without the notarial authentication required in Holland to render a Testament valid.] For the decision of this question, the supreme Court, (decree of 11 April, 1845), has acted upon a rule apparently of general applicability: — "utile per inutile non vitiatur," — without taking into account the intention of the testator; —thus ignoring the true point of view from which the question should have been regarded; for the question was not merely whether the testator *could* appoint an executor by an instrument which would have been void as a will, but also if he had really *intended* to make the appointment. See Regtzaal, III, p. 9. Rechtgel. adviezen, T. V. p. 85.

Note by Translator. It is scarcely necessary to remind English or American readers, that by their laws the nomination of an executor *must* be made with the same formalities as a testament; and even, that, by the old rule, to appoint a person executor, without any farther disposition, was, in fact, to make him *universal legatee*!

Otherwise, an express declaration is necessary to the *conversio actus juridici.*

Voidability, or annullability, (*Anfechtbarkeit, Angreifbarkeit*), existed, when the act was tainted by a defect which did not prevent its legal existence, but which, by reasons of special circumstances, — ordinarily for equitable reasons, — gave to one of the parties the right to demand the cessation or nullification of its effects [1]). The cause of voidability might have existed from the outset, or might have arisen subsequently [2]). The differences between nullity and annullability may be noted as follows:

I. An act or an instrument which was *null,* had no legal existence or effect. An act or instrument which was only *voidable,* produced, at first, its normal effects; and lost its force only in the event of an attack made upon it by legal means [3]).

II. Hence it results that a voidable act might be guaranteed by an hypothecation, a pledge, or a warranty [4]); differing in this respect from an act actually void. L. 6. D. de V. O. (45. 1). L. 6. § 2. L. 70. § 4. D. de fidei. (46. 1). L. 11. § 3. D. de pign. act. (13. 7).

1) For example: annulment *ob laesionem,* or by reason of violence or fraud, — or for latent defect;—the *querela inofficiosi,* — the revocation of donations by reason of ingratitude etc. — Wächter, II, § 86. Windscheid § 82.

2) A change in the circumstances under which an act had been performed gave no ground for annulling it, except in cases provided for by law, or agreed between the parties. L. 8. et. L. fin. C. de revoc. don. (8. 54), and L. 3. C. loc. cond. (4. 65). Since Weber, (Natürl. Verbindlichkeit, § 90,) this doctrine is considered incontestable. To recognize in acts, the existence of a tacit, or unexpressed condition, "rebus sic stantibus", would be fatal to commerce! See Puchta, Vorles. p. 154; Wächter, § 86. note 16.

3) Windscheid, l. c.: When the legal act is not void, a counter-act is indispensable, to deprive it of its effects; while for an act really null, this counter-act, is not only not necessary, but cannot even be conceived."

4) But if it was not expressly to cover the defect of the act that guarantees had been demanded, the influence of the voidability would extend itself to them, in some degree. L. 7. § 1. L. 9. D. de exc. (44. 1). L. 32. D. de fidej. (46. 1). § 4. I. de replic. (4. 14). L. 11. C. de exc. (8. 36). L. 13. pr. D. de min. (4. 4). Art. 2012 Code Nap. Art. 1858 Code Neth. Art. 1351 et 1352 Code Autr. Pr. L. R. Part. I. Tit. 14, § 251 et 254.

III. An act merely voidable could be impeached only by those in whose favour the cause of annulment was established by law. On the contrary, an act absolutely void is deprived of all force and effect towards all parties concerned or interested [1]).

IV. A voidable act, (in contradistinction to one actually void) might be cured of its vice or defect, by an express, or even a tacit, renunciation of the means of attacking it [2]); — a renunciation the effect of which was not to give to the act an efficacy which it had not previously possessed, but rather to suppress the possibility of rendering it *in*-efficacious [3]).

V. Finally, in case of annullability, the nullification had no retro-active effect; and if the parties were, as nearly as possible, restored to the position which they occupied when the act was done [4]), any legal rights acquired, in the interval, by third parties, were in no respect attainted or diminished. L. 10. C. de resc. vend. (4. 44). "Quem (dolum) si fuerit intercessisse probatum, non adversus eum in quem emtor dominium transtulit rei vindicatio venditori, sed contra illum cum quo contraxerat, in integrum restitutio competit." L. 43. § 8. D. de Aed. Ed. (21. 1). "Pignus manebit obligatum, etiam si redhibitus fuerit servus." L. 4. pr. D. quib. mod. pign. solv. (20. 6) [5]).

1) Wächter, § 86, No. 3. Art. 171, 1367, 1482 Neth. Code.

2) L. 24. S. 26. § 3. D. de cond. ind. (12. 6). L. 4. C. de his quae vi (2. 20). L. 3. § 1. D. de min. (4. 4). A certain lapse of time might, also, cure the defect. There are even a few cases where this cured a positive nullity. L. 3. C. si maj. fact. (5. 74). See, also Art. 172, 1492, 1929 Neth. Code.

3) Sav. Syst. IV. p. 560. Wächter, p. 657.

4) L. 23. § 7. D. de Aed. Ed. (21. 1). "Judicium redhibitoriae actionis, utrumque id est venditorem et emtorem *quodammodo* in integrum restituere debere." L. 60. D. eod. "Facta redhibitione, omnia in integrum restituuntur perinde ac si neque venditio intercessit."

5) The same principle must be recognized in Dutch Law. — Diephuis, T. VI. § 1085, disputes it, but his reasons are not conclusive.

SECTION IV.

Of donations, considered as legal acts of a special nature.

§ 68. THE IDEA AND THE CHARACTER OF A DONATION.

By donation, in the extended sense of the word, was meant every act by which one person conferred upon another a favour appreciable in money. (Having a pecuniary value). L. 9. pr. L. 23. pr. L. 29. pr. D. de don. (39. 5). "Donari videtur quod nullo jure cogente conceditur." L. 18. L. 5. § 13. 14. 16. D. de don. inter vir. et ux. (24. 1). Donation [1]), thus understood in its general acceptation, must be distinguished from donation in the more restricted sense; and this the more scrupulously because to the latter alone were applied those special legal rules [2]) which were

1) As to the place which donations should occupy in law, and as to that which was assigned to them, both in Roman and in modern law, See Puchta, Instit., II. § 205; Sav. Syst. IV. § 142; Schilling, § 350. Erinnering; Unger, § 95, note; Arndts, § 80. We say with Puchta, (Vorles. § 68): "A donation may produce the acquisition of every species of proprietary right; and as, moreover, it belongs to no particular class, its place is, consequently in the theory of rights in general." The Dutch legislator — (and the same is true of the Prussian, L. R. Part. I. Tit. II, § 1037),—has evidently regarded only one of the forms of donation, — that of a promise of donation; although it is difficult to reconcile this restricted conception with the art. 1724, unless indeed, one finds an obligatory convention even in the gift of an alms; which certainly seems forced.—The Austrian Code (§ 938) unites *datio* and *promissio*. See Unger, l. c. § 93.

2) Prohibitions between husband and wife; the formalities required and the power of revocation. Sav. l. c.

unknown to any other species of liberality. Now, in its proper sense, a donation was a legal act, by which one person gratuitously and of his liberality, deprived himself of, and attributed or made over to another, with the intention of benefiting him, an advantage having an appreciable money value, which the latter accepted.

It follows from this definition, that the distinctive characteristics of a donation were:

I. The absence of all legal necessity for the act. — From the moment that there existed an obligation, — were it only a natural obligation [1]), which must not be confounded with a simple charitable duty, — there was no donation. L. 15. § 4. D. Loc. (19. 2). L. 19. § 4. D. don. "Si quis servo pecuniam crediderit, deinde is liber factus, eam expromiserit, non erit donatio, sed debiti solutio. Idem in pupillo qui sine tutoris auctoritate debuerit, dicendum est, si postea, tutore auctore, promittat."

II. The liberality might not be compensated by any reciprocal advantage, actual or expected. L. 19. § 5. D. h. t. "Sed et hae stipulationes, quae ob causam fiunt, non habent donationem." L. 1. pr. D. eod. "Propter nullam aliam causam, quam ut liberalitatem et munificentiam exerceat." L. 18. pr. eod. L. 28. § 2. D. de pact. (2. 14). L. 8. § 5. D. quib. mod. pign. (20. 6).

III. The donor made the sacrifice of a something already existing and within his own proper ownership [2]), and to that extent actually impoverished himself by his liberality [3]). He who,

1) It is for this reason that the accomplishment of a promise of donation is not a donation. Sav. Syst. IV, p. 53. Unger, l. c. note 5.

2) The sacrifice might consist, among other things, in an engagement towards another, and in (consequently) adding to the property of another, a claim against himself. L. 43. D. de V. S. "Id apud se quis habere videtur, de quo habet actionem, habetur enim quod peti potest." L. 28. i. f. D. de neg. gest. (3. 5).

3) For this reason, the following are excluded from the category of donation: — Deposit, loans without security or during pleasure, the management of business, and the gratuitous performance of labour. It was so, even when it was possible or usual to claim in this respect payment as from any other person for whom the labour might have been performed; and the reason is that even in this latter case, it is true that one has omitted to acquire something, but has *given* nothing. The same may be said of

in favour of another, neglects to acquire something [1]), is liberal, but he does not give. L. 31. § 7. D. de don. i. v. et ux. (24. 1). "Non videtur ea esse donatio: quia nihil ex bonis meis diminuitur." L. 28. D. de V. S. (50. 16). "Qui occasione acquirendi non utitur, non intelligitur alienare." L. 5. § 14. D. de don. i. v. et ux. (24. 1). "Neque enim pauperior fit, qui non acquirat, sed qui de patrimonio suo deposuit." L. 5. § 5. D. de jur dot. (23. 3). L. 6. § 2. 5. D. quae in fraud. cred. (42. 8). L. 1. § 6. D. si quid in fraud. patr. (38. 5).

IV. The donee was enriched; or, in other words the bulk of his property was really augmented. "Definiri solet eam demum donationem impediri solere quae et donantem pauperiorem et accipientem facit locupletiorem." L. 5. § 16. D. cod. In case of an act which tended only to guarantee the maintenance of a right, — or on the contrary tended to the abandonment of such a guarantee, — there was no donation. L. 1. § 19. D. si quid in fraud. patr. (38. 5). L. 18. D. quae in fraud. cred. (42. 8). L. 1. § 1. L. 11. D. quib. mod. pign. solv. (20. 6.)

V. The intention to give (*animus donandi*) was indispensable. He, who pressed by the want of money, sells something at a price below its value, or induced by some urgent necessity, buys something at a price beyond its worth, no more makes a donation, than he who, to avoid the risk and trouble of a suit,

permitting the gratuitous occupation of a house by another. See, on the contrary, Savigny, Schilling, § 349, note f. x; § 351, note o. In L. 9. pr. D. de don., one must either look, with the Glossarists, at the *servitus habitandi*, or take the word *donare* in an extended sense. Savigny, who cites this law in support of his opinion, p. 33, contradicts himself at p. 39, where he recognises in the word *donatio*, which occurs in the same section of the same law, "a donation improperly so called."

1) For the same reason, the reduction or the remission of interest to accrue did not constitute a donation. L. 23. pr. D. h. t. "Modestinus respondit: creditorem futuri temporis usuras et remittere et minuere pacto posse, nec in ea donatione ex summa quantitatis aliquid vitii incurrere." L. 31. § 6. D. de don. i. v. et ux. (24. 1). Unger, note 17, — who limits this decision to the case where the loan of money was not made for a fixed time, — forgets that the acquisition of future interest supposes that the principal obligation continues to subsist; which usually, depends upon the sole will of the debtor. This case cannot, therefore, be placed in parallel line with the remission of a debt due at a certain date.

effects a compromise with his debtor. L. 65. § 1. D. de cond. ind. "Nam si lis fuit, hoc ipsum, quod a lite discedítur, causa videtur esse."

VI. It was requisite that the intention of the donee should agree with that of the donor; that is to say, that the donation should be, either expressly or tacitly, accepted; and although the unilateral act of him who desires to confer a favour upon another, might, at first, produce some effect, a donation, properly speaking, could not be effected without the concurrence of him upon whom the favour was bestowed

§ 69. OF THE DIVERS MODES OF DONATION.

All donations contained the attribution to another of some pecuniary benefit; whence it follows that they might be made in as many different manners as there are different means of assuring a pecuniary advantage to another. A donation might consist. 1°. Of the transfer of the ownership of a real right, [2]) or of a

[1]) The question whether, by Roman Law, acceptance by the donee was requisite, is answered affirmatively by a majority of authors. — Savigny, however, — (Syst. IV. § 160), — and Keller (§ 65) teach the contrary; but the former opinion is the true one. — In fact, and to begin with, no one could *impose* a favour upon another. L. 19. § 2. D. h. t. "Non potest liberalitas nolenti acquiri." L. 69. D. de R. J. Moreover a donation was always classed among conventions and treated as such. L. 4. C. de litig. (8. 37). L. 14. pr. C. de SS. Eccles. (1. 2). L. 17. C. de fid. inst. (4. 21). "Contractus venditionum, permutationum vel *donationum*." L. 44. D. de don. i. v. et ux. L. 55. D. de O. et A. (44. 7). "Sive ea venditio, sive *donatio*, sive conductio, sive quaelibet alia causa contrahendi fuit, nisi animus utriusque consentit, perduci ad effectum id quod inchoatur non potest." Cic. Top. c. 8. i. f. "Neque *donationem* sine acceptione intelligi posse." Thus, if I pay *donandi* animo another person's debts, or if I bind myself for him without his knowledge, his debt might be extinguished, but there would be no donation. The provisions respecting acts done *in fraudem legis*, served to prevent any one from eluding the law by this means. — Vangerow, I. § 121. Unger, § 95, notes 26 — 0. — Prussian law recognizes no unilateral donation, but requires acceptance in all cases. (Part. I, Tit. 11, Koch, ad § 1037. 1058). It is the same with the Austrian Code (Unger, l. c.), the Code Napoleon, (art. 894), the Dutch Civ. Code, (arts. 1073, 1720, 1724, and arts. 2367, 2374, of the Project of 1820).

[2]) Thus the owner might gratuitously create, for the benefit of another, a right of use

debt[1]). 2°. Of the renunciation, without a transfer properly so called, of a right already acquired [2]), or of a debt to accrue against the person favoured [3]). 3°. Of the creation by the donor, of a claim against himself, for the benefit of the person whom he sought to favour, thus engendering a promise of donation [4]), the execution of which would be no longer a liberality, but the payment of a debt [5]). It is because of this diversity in the forms in which a donation might be effected, that it is desirable to treat the subject as a part of the general system of law. All simple donations might, however, be included in three principal classes, — according as they were effected *dando, obligando,* or *liberando* [6]).

Donations were yet further divided, into donations *inter-vivos,* and donations *mortis causa.* Pr. I. de don. (2. 7). L. 1. pr. D. de m. c. don. (39. 6). — The donation in case of death was that, the creation or subsequent existence of which were dependent upon the death of the donor; so that it remained in suspense until the moment of his decease, or until it lapsed,

or of usufruct, or a territorial servitude. Thus the holder by emphyteusis, or the owner of the surface, might, by donation, transmit his rights to another; or the usufructuary could convey the exercise of his rights, in the same manner. § 3. I. loc. (3. 24). L. 1. § 7. D. de superf. (43. 18). Sav. Syst. IV. p. 117, and passages cited by that author.

1) L. 2. 3. C. de don. (cession). L. 2. §. 1. L. 21. § 1. L. 33. § 3. D. de don. (delegation).

2) For example, — the renunciation of a servitude or of any other real right. (L. 86, § 4. D. de leg. 1.); the express or tacit remission of a debt, even when made to an insolvent debtor. L. 115. D. de R. J. "Si quis obligatione liberatus est, potest videri cepisse." L. 31. § 1. § 4. D. de m. c. don. "Per accepti quoque lationem egens debitor liberatus, totam eam pecuniam, qua liberatus est cepisse videtur." L. 6. 15. C. de sol. (8. 43).

3) When, for example, one manages the business of another, with the intention of not charging the expenses of his management. L. 14. D. 1. L. 2. i. f. C. de R. V. (3. 32). L. 12. C. de neg. gest. (2. 19). L. 6. § 2. D. mand. (17. 1). L. 4. D. neg. gest. (3. 5). L. 32. D. de pact. (2. 14).

4) That is, not a promise that one *will give,* but a promise which is a donation. L. 49. D. de V. S. "Aeque bonis adnumerabitur etiam si quid est in actionibus, petitionibus, persecutionibus." Sav. Syst. IV. p. 119. Puchta, Vorles. § 63. Unger, p. 198.

5) It hence follows, that the fact of the execution was not subjected to the rules respecting form, nor to the prohibitions between husband and wife.

6) Sav. l. c., p. 105.

when he was the survivor. (L. 29. L. 32. D. eod. "Non videtur perfecta mortis causa donatio facta, antequam mors insequatur." L. 2. D. eod. "Aliam esse speciem mortis causa donationum, cum quis imminente periculo commotus, ita donat, ut statim fiat accipientis. — Tertium esse genus donationis ait, si quis periculo mortis non sic dat, ut statim fiat accipientis, sed tunc demum cum mors fuerit insecuta."). In the absence of this element, a donation, — even when made on the occasion of death, [1]) constituted only a simple donation *inter vivos*, — a *donatio absoluta*, in contradistinction from the *mortis causa donation*, which is really conditional. — L. 35. § 2. D. eod. "Sed mortis causa donatio longe differt ab illa vera et absoluta donatione, quae ita proficiscitur, ut nullo casu revocetur; et ibi, qui donat, illum potius quam se habere mavult; at is qui mortis causa donat se cogitat, atque amore vitae recepisse potius quam dedisse mavult et hoc est, quare vulgo dicatur, se potius habere vult quam eum cui donat, illum deinde potius, quam heredem suum."

§ 70. CONDITIONS NECESSARY TO A DONATION BETWEEN LIVING PERSONS [2]).

The following conditions were necessary to a donation between living persons:

I. That the donor should have the capacity for disposing gra-

1) Papinian shews in a striking manner, the difference between a donation made *on the occasion* of death or by *reason*, or in the *event*, of death. "Non enim ad alia constitutionem pertinere, quam quae certa lege donarentur et morte insecuta quodammodo bonis auferrentur, spe retinendi peremta: eum autem qui absolute donaret, non tam *mortis causa* quam *morientem* donare." L. 42. § 1. D. de m. c. don. — By Prussian and Austrian Law the donation *mortis causa* is still in force. Prus. L. R. Part. I. Tit. 11, § 1134. Aust. Code, § 956. The Code Nap. (art. 893) and Dutch Code (art. 1703) exclude it.

2) By reason of the affinity which exists between the donation *mortis causa* and a legacy, we propose to treat it under the head of hereditary rights.

tuitously of his property. This capacity was not derived from the right of administration, (management), nor did it appertain even to all those who had the power of alienation [1]).

II. That the donee should have the capacity of acquiring the objects intended in the donation. L. 9. § 3. D. de don. (39. 5). "Donari non potest, nisi quod ejus fit, cui donatur" [2]).

III. That the formality prescribed by law should be observed. This formality consisted of a registration upon the public records, [3]) whenever the value of the gift exceeded 500 *solidi* [4]). Below this sum, simple consent was sufficient. L. 34. pr. L. 36. § 3. C. h. t. § 2. I. de don. (2. 7). The valuation of the gift was founded upon its saleable value, after allowing for expenses and charges attaching to the gift. L. 18. § 3. D. de m. c. don. L. 1. § 16. D. ad Sctum. Trebell. (36. 1). In case of an usufruct or other personal servitude, the valuation was made according to the probable duration of the life of the donee. L. 68. pr. D. ad

1) The son (*filius familias*) who had the free control of his *peculium*, could not make a donation; and the same was the case with mandataries or guardians, L. 7. pr. D. h. t. "Non enim ad hoc conceditur libera peculii administratio ut perdat." L. 22. 46. § 7. D. de adm. et per. tut. (26. 7). Arts. 1713, 179. Civ. Code Neth. arts. 902, 1421, Code Nap.

2) As to this Fragment, see the Glossaries, and Sav. Syst. IV., p. 111, et supra.

3) The Cincian Law limited the amount of gifts (*modus legis Cinciae*), and prescribed certain strict formalities; the omission of which did not, however, involve nullity but gave room for the *exceptio or replicatio* leg. Cinc., so long as the donor had not fulfilled his generous intentions by a complete abdication of all power over the thing given; while the death of the donor confirmed the gift. — "*Cincia morte removetur.*" Fragm. Vat. § § 259, 266, 293, 310, 311, 313. These rules and these forms afterwards fell into desuetude, and gave way to others. Vangerow, I. § 122. Savigny (Oblig. II. p. 130) thinks that the permission to make a donation, — especially of a sum relatively so large, — without the requirement of any formality is not justifiable; considering that such an act may, more than any other, be the result of rashness or want of reflection. It is not therefore surprising that all more recent legislation has subjected the *pactum, donationis* to formalities more or less strict. Prus. L. R. 2., Part I, Tit. 11, § 1063. Aust. Code, § 943. Code Nap., art. 931. Civ. Code Neth., arts. 1719, 1724.

4) The amount of the fruits was not reckoned. "Cum de modo donationis quaeritur neque partus nomine, neque fructuum, neque pensionum, neque mercedum ulla donatio facta esse videtur." L. 11. § 1. D. h. t. L. 9. § 1. eod.

leg. Falc. (35. 2). If the gift consisted of an annuity not exceeding 500 *solidi* per annum, it was at one time, doubtful whether it was to be taken as one collective gift, or as several separate and independent gifts [1]). Justinian, however, decided the question, by distinguishing between a gift ceasing on the death of the giver or of the receiver, or continuing thereafter. In the latter case, registration was necessary. L. 34. § 4. C. de don. [2]). If the object of the gift was a debt which depended upon a suspensive or determining condition, there was the alternative of awaiting the time when the accomplishment or non-accomplishment of the condition should have become certain, — or taking for basis, (as in the Falcidian law), the probable or contingent value of the gift, in order to ascertain if the observation of the formality was necessary. — L. 45. § 1. L. 73. § 1. D. ad leg. Falc. (35. 2). If the claim or debt given was of doubtful value, the price at which it could be sold was considered as representing the value of the gift. Arg. L. 82. D. eod. — The remission of a debt constituted a gift of the amount of that debt, even when the debtor was not in a condition to pay. L. 82. eod. "Cum debitori liberatio relinquitur, ipse sibi solvendo videtur, et quod ad se attinet, dives est." L. 31. § 1 et 4. D. de m. c. don. (39. 6).

"Variabatur, utrum eum ex particulari donatione, multas fecisse donationes existimandum sit, et eas actis non indigere, an ex totius stipulationis fundamento et fonte eius ex quo annuae donationes profluxerunt, et unam eam esse donationem putandam et procul dubio, monumentorum observatione vallandam."

2) "Ut si hujusmodi quidem fuerit donatio ut intra vitam personarum stetur, vel dantis, vel accipientis, et multae intelligantur donationes, et liberae a monumentorum observatione — sin autem heredum ex utraque parte fuerit mentio, vel adjiciatur *tempus vitae* vel donatoris vel eius qui donationem accepit, tunc ei quasi perpetuata donatione et continuatione eius — et una intelligatur donatio." There is a dispute as to the concluding words of this passage. Cujas, (Observ. 15, 22), relying upon a scholium of the Basilicae, reads *adiiciatur*, or *vel non adiiciatur*. — Sav. Syst. IV, 213, reads, "nec adiiciatur tempus vitae heredum vel donatoris"; and there are yet other variations. The true explanation, — i. e. that *vitae* is not in the genitive, but in the dative, — has been given by Briegleb, Arch. für Civ. Pr. Tom. 38, p. 192, et s. See also Vangerow, I, § 122; and Arndts, § 81, note 4.

When several donations had been made, at different times, to the same person, each of which gifts was within the legal limit of amount, registration was not required, — in so far at least, as there had been no attempt, by this means, to evade the law. L. 34. § 3. C. h. l. "Et plures intelligantur, et sigulae secundum sui naturam obtineant, et monumentorum observatione non indigeant."

When the requisite formality had not been observed, the gift was void in so far as it exceeded the legal limit; but as to the rest it was valid [1]). This modification had, sometimes, the effect of creating between the donor and the donee a compulsory indivisible joint ownership, from which the rules established by Justinian offered a means of release. L. 34. pr. et § 2. l.

The following were exempt from the formality of Registration [2]).

I. Donations made to or by the Emperor. L. 34. pr. Nov. 52. 2.

II. Donations made for the ransom of prisoners. (*In causas piissimas*). L. 34. pr. L. 36. pr. eod.

III. Donations of personal property, made to deserving soldiers, by the military commandant, (magister militum), whether drawn from booty or furnished from his own property. L. 36. § 1.

IV. Donations made for the restoration of buildings destroyed by accident or fire.

V. Donations serving to constitute a marriage portion. L. 36. § 2. eod. L. 31. pr. C. de jur. dot. (5. 12). Between husband and wife, gifts were made valid by death, provided, that when they exceeded 500 *solidi*, they had been registered. L. 25. C. de don. i. v. ei ux. (5. 16).

"Hoc quod superfluum est tantummodo non valere, reliquam vero quantitatem quae intra legis terminos constituta est in suo robore perdurare." — L. 34. pr. l.

2) Sav. Syst. IV., § 167.

§ 71. REVOCABILITY OF DONATIONS BETWEEN LIVING PERSONS.

A donation, although generally irrevocable, might be revoked, either by a third person whose rights had been infringed by the generosity of a donor, or by the donor himself. The former mode of revocation was effected by means of the *querela inofficiosae donationis*, and belongs to those, whose, hereditary portion (*legitim*) had been diminished or exhausted by the gift [1]). Fragm, Vat. § 270, 271, 280, 281. L. 5. C. de inoff. don. (3. 29). Moreover, creditors might demand the nullification of donations made by their debtor in fraud of their rights; and they retained this right even when the person enriched by the gift had no knowledge of the fraud committed by the donor. "Nec videtur injuria affici is qui ignoravit, cum lucrum extorqueatur, non dam num infligatur." L. 6. § 11. D quae in fraud. cred. (42. 8) [2]).

The donor might, himself, revoke his gift:

I. By reason of the birth of children after the making of the donation. (But this right belonged only to the Patron as against his freed man [3]).

1) Schilling, p. 973 xx, — (and the opinion which he expresses, had been already set forth in the Glossa,) — believes that the donor himself, in case children were born to him, could revoke the gift, by a *condictio ex lege*, on the ground of attaint to their reserved portion (*legitim*). This opinion seems to me erroneous; for, first, since no other than the donor is exactly aware of the state of his fortune, such a revocation would, in reality, depend upon his caprice, and would degenerate into a *revocatio ob supervenientes liberos*. Again it is uncertain whether the children will survive the donor, or whether, for some reason, they may not be deprived of the right to contest the donation. The rescript quoted in L. 5. C. de inoff. don., has in view, solely, to allay the fears of an anxious father, who seemed uneasy as to the excessive donations which he had made to his children already born; and to this end the authors of the rescript remind the father of the legal means of which the children yet to be born *might* avail themselves at his death: — *ad patrimonium tuum revertetur*. The L. 8. C. de rev. don. (8. 56). upon which Schilling relies, does not prove his case; for this text does not read, like the other, *revertetur*, but *revertatur*, — while the right of revocation by the patron is founded exclusively upon the subsequent birth of children. See Sav. Syst. IV, § 168 c.

2) See also art. 1377, Neth. Civ. Code; arts. 775, 776. Neth. Com. Code.

3) In practice, this provision was extended to all donors, but wrongfully so. Formerly

II. For ingratitude on the part of the donee, [1]) — provided it was manifested by the acts specified by law [2]), and that these acts were proved before the judge. L. 31. § 1. D. de don. L. 7, 9, 10. C. de rev. don. (8. 56). To recover the thing given, the donor had the *condictio ex lege*, by means of which he demanded the restoration of the object itself, if it still existed, (identically or in kind), and in the contrary case its value; but solely for so much as the donee had gained by the donation [3]).

this extension might have been thought legal, but all doubt on the subject is removed by the Fragm. Vat. which prove that the L. 8. C. de rev. don., far from extending the power of revocation by the donor, limits even that of his patron to this sole and unique case. (§ 272, 313). Sav. Syst. IV, p. 229. The Austrian Code forbids the revocation, but shews some favour to children subsequently born. The Prussian Law, (Part. I. Tit. 11. § 1140, 1141). permits revocation only as to the *promise* to give, but forbids it when the thing given is already in possession of the donee. The Code Napoleon permits it as to all donations, and with a rigour which leads to acts of great injustice (art. 960). The Dutch Code has wisely forbidden it absolutely.

1) Anciently, revocation for ingratitude was a right of the Patron only. It was afterwards given to ascendants, and finally, by a law of Justinian, to all donors. L. 1. 7. 9. 10. C. h. l. It is the same in Prus. L. R. Part. I, Tit. 11. § 1151 et seq; — in the Austrian Code, § 948; in the Code Napoleon, arts. 953, 955; and in the Neth. Code, art. 1725, nos. 2 and 3.

2) " Ex his enim tantummodo causis si fuerint in judicium dilucidis argumentis cognitionaliter approbatae, etiam donationes in eos factas everti concedimus." L. 10. C. 1.

3) If the donee was not enriched (by the gift) there was nothing to restore. L. 65, § 8. L. 26, § 12. D. de cond. ind. (12. 6). L. 28. pr. D. de don. i. v. et ux. (24. 1). As to this last law, the Glossa makes this very just remark: " Validior tamen ratio est quia hactenus revocatur donatio, quatenus locupletior est qui accepit." — I even regard as at least contestable, the opinion of Savigny (p. 236), and of Unger, (II, p. 216), who admit, as does also the Dutch Law, (Code civ. art. 1728), that the donee is responsible for the destruction or consumption of the gift, if effected after the act of ingratitude, but before the revocation. At least, the L. 7. C. maintains all which, " matre pacifica et ante inchoatum coeptumque jurgium perfectum est." To invoke, by way of analogy, what took place in the m. c. donatio, (quoniam scit sibi posse condici, si convaluerit donator, (L. 39. D. d. c. m. d.), is to lose sight of the fact that in this case the revocation is inherent in the nature of the donation itself, and is but the immediate consequence of the express will of the parties; while the revocation by reason of ingratitude depends entirely upon the disposition of mind of the donor; who may grant a generous pardon, upon which the donee may have reckoned, without bad faith.

There is controversy, also, as to the restitution of fruits in case of ingratitude. Savigny (p. 239) imposes it upon the donee. Schilling combats this doctrine, but on the not

The right of action in revocation by reason of ingratitude, was personal, and of those which have a vindictive character, (*vindictam spirantes*); — and not having properly the character of action of patrimonial right [1]) did not pass to the heirs of the donor, and could not be exercised against the heirs of the donee, unless indeed, it had been already, commenced against the donee by the donor himself, during his life [2]).

A renunciation *a priori* of the right of revoking a donation for the motives above cited, would appear to have been void, as contrary to good morals. L. 27. § 4. D. de pact. (2. 14). "Expedit enim timere furti vel injuriarum poenam." L. 1. § 7. D. Dep. (16. 3). L. 23. D. de R. J.). On the contrary the mother

very strong ground that the donee, until the revocation, was owner of the thing and entitled to its produce. The real question can be only whether the restitution of fruits should, in this special case, be regarded as equitable; and I should answer this question in the negative, because, so long as the revocation has not taken place, the donee has had possession not only by a legal title, but by the wish and with the full consent of the donor. The French and Dutch legislators (Code Nap. 958, and Neth. Code 1728), ordain restitution of products (fruits) only from the date of the demand; and this is, in every way, preferable to the Prussian and Austrian systems, which consider the donee as a possessor in bad faith from the moment of the act of ingratitude. Vide, for Prussian Law, Part I, Tit. 11, § 1167, Koch. ad h. l.; and for the Austrian Code, § 949, Unger § 98, note 19. Both consider this rigour as contrary to the nature of things.

1) L. 7 et L. 10. C. l. "Hoc tamen usque ad primas personas tantummodo stare censemus, nulla licentia concedenda donatoris successoribus huiusmodi queremoniarum primordium instituere." The provisions of modern law are more severe. See art. 957 Code Nap., art. 1729 Code Neth.; Part I, Tit. 11. § 1157—1160. Pr. L. R.; et § 949 Cod. Autr.

2) I. The simple manifestation of dissatisfaction on the part of the donor did not suffice to convey his right of revocation to his heir; and this Schilling justly maintains, against Savigny. II. Did the right of revocation pass to the heirs, when it was founded upon the non-execution of charges? The point is doubtful; because Justinian classes such non-execution with acts of ingratitude. I think, nevertheless, with Savigny t. c. p. 934, and with Doneau, that it should be answered affirmatively. In fact it was only to ingratitude, strictly so called, that the following phrase would seem to have been applicable: "*si ipse qui hoc passus est tacuerit, silentium ejus maneat semper.*" (L. 10. C. I.); and besides, the revocation for non-execution of charges is not an action *quae vindictam continent*, but far more a veritable action of patrimonial right.

lost her right of revocation, if she led an excessively immoral life; (*Portentosae vilitatis abjectaeque pudicitiae*); and she retained it for but three causes in case of remarriage. L. 7. C. de rev. don. Nov. 22. C. 35 Auth. quod matr. C. eod.

§ 72. OF THE GIFT OF AN ENTIRE PATRIMONY OR ESTATE, OR OF A PORTION OF AN ESTATE.

A donation might have for its object, not only certain property, — or certain specified rights, — forming a part of an estate or patrimony; but also the entire estate, or any portion of it [1]); no matter whether certain things, or certain rights, were or were not reserved, or there were or were not charges laid upon the donee. L. 35. § 5. C. cit. L. 37. § 3. D. de leg. III. (32). L. 22. C. de don. (8. 54) [2]). Such a donation, even when it embraced the entire estate, did not create a *successio per universitatem* [3]). It is for this reason, that: — I. All the goods, property and rights which were conveyed, were required to be separately transferred and bestowed. L. 6. C. de her. vend. (4. 39). L. 3. pr. D. pro soc. (17. 2). — II. That the donor did not cease to be responsible for the engagements previously contracted by him, and that his creditors could sue him only, with no recourse whatever against the donee, who was not *successor juris*; saving, always, the right, in case of fraud by the donor, to sustain the *actio Pauliana* [4]), against even the donee

1) L. 35. § 4. de don. "Sed etsi quis universitatis faciat donationem sive bessis, sive dimidiae partis suae substantiae, sive tertiae, sive quartae, sive quantaecumque, vel totius."

2) "Cum res filio emancipato ea conditione ut creditoribus tuis solveret, te donasse proponas."

3) Vide ante p. 119.

4) Fraud was presumed when the donor alienated his entire estate, knowing that he had debts. L. 17. D. quae in fraud. cred. (42. 8). "Lucius Titius, cum haberet creditores, libertis suis iisdemque filiis naturalibus universas res suas tradidit. Respondit: quamvis non proponatur consilium fraudandi habuisse, tamen qui creditores habere se

in good faith, "*qui de lucro certat.*" L. 72. D. de jur. dot. (23. 3). L. 6. § 11. D. quae in fraud. cred. (42. 8). The same principles were applicable when the donor did not give his own proper estate, but only the title to an inheritance, the right to which had already vested in him, by the death of the predecessor. In that case, he retained his character of heir and his obligations as debtor; and no direct relation was formed (by the donation) between his creditors and the donee [1]). L. 28. D. de don. L. 2. C. de her. vel act. vend. (4. 39). L. 2. C. de pact. (2. 3). The gift of an inheritance which had not already accrued — the predecessor or testator being still alive, — if made without the consent of the latter [2]), was forbidden under pain of confiscation. L. 30. C. l. "Hujusmodi pactiones odiosae esse videntur, et plenae tristissimi et periculosi eventus." L. 29. § 2. D. de don. L. 2. § 3. D. de his quae ut indign. (34. 9).

There is dispute as to the question whether a future property could form the subject of a gift, as well as property in possession; but the solution seems to be affirmative [3]). In fact, as such a donation did not create a *successio per universitatem*, there is no reason why a universal successor should not take his place beside the donee, even though there were nothing left to the latter *praeterquam inane nomen heredis* [4]). Moreover, such a

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scit, et universa bona sua alienavit, intelligendus est fraudandorum creditorum consilium habuisse, ideoque, etsi filii ejus ignoraverunt hanc mentem patris sui fuisse, hac actione tenentur." If there had been no agreement between the donor and the donee relative to the payment of the debts, it was presumed that the donee had assumed them as his own, in virtue of the adage: "*bona non intelliguntur nisi deducto aere alieno.*" L. 72. pr. D. de jur. dot. Sav. Syst. IV, § 159.

1) It is the same in Dutch law, — by analogy of arts. 1574, 1575, Civ. Code, and arts. 1697, 1698, Code Napoleon. — Austrian and Prussian law enact otherwise. Pruss. L. R. Part. I. Tit. 11. § 463 et supra. — [Koch considers that these provisions are derived from the ancient Dutch practice, as it is reported by Voet, ad Tit. Pand. de hered. vend. § 6]. Aust. Code, § § 1278, 1282, — the provisions of which are criticised by Unger, II, § 97, note 24. I. § 64, note 11.

2) By modern law the gift of an inheritance not yet accrued is not permitted, even with the consent of the testator or a predecessor. Pruss. L. R. Part. I, Tit. 11, § 445, 446 — Aust. Code § 879, N°. 4. Code Nap. art. 1130, and Code Civ. Neth. art. 1370.

3) See, against Savigny, Puchta, Vorles. § 71.

L. 119. D. de V. S. (50. 16). "Hereditatis appellatio sine dubio continent etiam

donation could be made only in the form of a promise or of an obligation; — and no one can be forbidden to exhaust, indirectly, all his estate, by contracting towards others all sorts of obligations.

§ 73. OF CERTAIN SPECIAL KINDS OF GIFTS.

The following are of a special character:

I. Mixed gifts; that is those which are combined with a legal act upon an onerous condition. (*mixtum negotium cum donatione* [1]). A mixed act of this sort was considered a gift as to a part, — and for the rest as a separate act; — provided, of course, that the nature of the thing did not render such a division impossible [2]), and that the intention of the parties permitted the amount of the gift to be calculated. It is important to distinguish between this species of mixed or impure gift, and one to which the parties had falsely given the name or appearance of a different declaration of volition. This latter case was governed by the rule which regulated simulated acts in general. In other words, the principles which affected gifts were alone applicable. L. 5. § 5. L. 32. § 24, § 26. L. 31. § 4, § 5. D. de

damnosam hereditatem. Juris enim nomen est sicut bonorum possessio" — L. 50. D. de her. pet. (5. 3). "Hereditas etiam sine ullo corpore juris intellectum habet." The Austrian Code, § 944, limits such a promise of donation to the half of the property. By the French and Dutch laws, all gift of future property is prohibited. Code Nap. art. 943. Code Civ. Neth. Art. 1704.

1) L. 18. pr. D. de don. "Aristo ait, cum mixtum sit negotium cum donatione, obligationem non contrahi eo casu quo donatio est." For example: when, for the purpose of bestowing a gift, one bought a thing at more, or sold it for less than its value: — or when the agent charged himself with the expenses of executing the order of his principal: — or when the borrower of a sum of money engaged to repay a sum greater or less than the true one; — or when a purchaser agreed that he would not, in the event of being deprived of the property by legal process (*evictio*), compel the seller to make good the loss. (*evictionem praestaret*). Sav. Syst. IV. § 154.

2) L. 5. § 2. D. de don i. v. et ux. "Quod si aliarum extrinsecus rerum personarumve causa commixta sit: si separari non potest nec donationem impediri. Si separari possit, cetera valere, id quod donatum sit, non valere."

don. i. v. et ux. (24. 1). L. 12. pr. et § 1. D. Mand. (17. 1). L. 11. § 1. D. de R. C. (12. 1). L. 5. § 2. D. pro soc. (17. 2). L. 36. § 1. D. de min. (4. 4). L. 36. 38. D. de contr. emt. (18. 1). L. 20. § 1. L. 46. D. loc. (19. 2) [1]).

II. Remunerative gifts; (*donationes remuneratoriae*); that is those which were made in recompense of benefits or services which the donor neither was, nor believed himself, legally bound to remunerate. They were independent of the reality of the motives which prompted them [2]), and differed from other gifts neither in respect of formalities or restrictions, nor as to their effects [3]).

However, although no renumeration may have been stipulated or

1) Sec. art. 2390, Neth. Project 1820. "Are also considered as gifts, all alienations which, either from the insufficiency of the consideration, or because the alleged price of sale or exchange has not been paid, are evidently simulated, for the purpose of fraudulently evading the requirements of law."

2) L. 52. L. 65. § 2. D. de cond. indeb. (12. 6). Erxleben (Die Cond. sine causa, p. 58), admits the donor to prove that without this erroneous supposition he would not have made the gift; arg. L. 72. § 6. D. de cond. et dem.

This opinion is formed in the Glossary ad L. 72. 1, and it is also approved by Unger. (II, § 99, note 7.) I cannot, however, concur in it. The proof required to be furnished by the donor, that he has been influenced by no other private motive, is impossible; and we should be forced to content ourselves with probabilities, which would deprive the gift of all stability. Moreover, a disposition so exceptional as that which takes into account, in the matter of a legacy, the *ratio legandi*, is not susceptible of being extended, by analogy, to other matters, even were there absolute purity of motive. The Austrian Code, § § 572, 901, authorizes the revocation of gifts, even for error in the motives. Moreover, in the Roman Law it was indifferent whether the error of motive related to the past or to the future. L. 3. § 7. D. de cond. c. d. c. n. s. (12. 4). L. 7. C. de cond. ob caus. dat. (4. 6).

3) Hence, they were required to be intimated (or "insinuated") when they exceeded the legal renumeration. They were prohibited between husband and wife, and were revocable by reason of ingratitude.—See Sav. Syst. IV. § 153, who shows this point with great clearness; Unger, § 99. Keller, § 71. By the Code Nap. even remunerative gifts are revocable, as of right, upon the subsequent birth of children to the donor (art. 960); and they are also revocable in the same way and for the same causes as other gifts. (Marcadé upon art. 959). Neither does Dutch legislation make any distinction respecting them. (art. 1725, Code Civ.) The Prussian law requires formalities, but does not permit revocation. (P, I, Tit. 11, § § 1169, 1170, and Koch, ad h. l.) The Austrian Code, § 940, contains the following, eminently practical provision: — "Nothing is changed in the

promised, yet if the gift had been made with the intention of remunerating services which are not usually rendered gratuitously; in other words if it appeared from the circumstances that the gift had been made not *donandi*, but *solvéndi animo*; — the rules regulating gifts were inapplicable. (L. 27. pr. D. de don.) [1]). "Posse defendi, non meram donationem esse, verum officium magistri quadam mercede remuneratum, ideoque non videri donationem sequentis temporis irritam esse." Finally a remunerative gift was, by exception, irrevocable if the donee had saved the donor's life. L. 34. § 1. D. de don. (39. 5) compared with Paul V. 11. § 6. [2]).

III. A gift might be made, with the addition of a charge upon the recipient. (Tit. C. de don. quae sub modo. 8. 55). Here again, the gift takes somewhat of a mixed character [3]). In fact, if on one hand the purpose of the giver is to bestow a gift [4]), and if, in consequence, the recipient is enriched, on the other hand, the latter assumes an obligation and thereby, — (such being equally the intention of the giver) — the gift is diminished, though not destroyed. The obligation imposed upon

essence of the gift, when it has been made from gratitude, or in consideration of the merit of the recipient, or as a special recompence; but it is necessary that the donee should not, previously, have had a right of action to recover remuneration."

It may be remarked that the Dutch Project of 1820, although it placed remunerative gifts in the same line as other gifts, did not permit their revocation, even where the donee had attempted the life of the donor. Arts. 2367, 2386.

1) As to this important fragment, see Sav. Syst. IV. p. 95, et Seq.

2) Sav. l. c. p. 97.

3) The difference between the present case and that of a mixed gift, properly so called, (*negotium mixtum cum donatione*) lies in the fact that in the gift *sub modo*, the *modus* is subordinate to the *donatio*, — while in the *neg. mixt. cum don.* it is, on the contrary, the *donatio* which is subordinate to the *negotium*. It is therefore that the denomination of *donatio mixta cum negotio*, which Unger gives (§ 99, note 27), to the gift with a charge, is not wanting in accuracy.

4) In this consists the characteristic difference between the gift *sub modo* and the contracts *do ut des, ut facias, ut non facias* L. 19. § 6. D. h. t. "Si tibi centum spopondero hac conditione, si jurasses te nomen meum laturum, non esse donationem quia ob *rem* facta est, res secuta est."

the donee might be either a payment or a service, to be rendered to the donor himself or to a third person, — or an act or a prohibition, which did not confer a right upon any one. L. 1. L. 2. L. 3. C. de don. quae sub modo (8. 55). L. 8. C. de permut. (4. 64). L. 22. C. de don. L. 2. L. 3. C. de cond. ob caus. (4. 6). L. 2. § 7. D. h. t. In the first and in the third case, as the acceptance of the gift included the promise to fulfil the obligation attached to it, the donor might enforce this fulfilment by means of the action *ex stipulatu* if the forms of stipulation had been employed, — or by the action in *factum praescriptis verbis,* of the contracts *do ut des, — ut facias aut non fucias*. L. 9. 22. C. h. t. L. 8. C. de perm. (4. 64). L. 135. § 3. D. de V. O. (45. 1). In the second case, the donor alone had an action for fulfilment of the promise, provided that he had an interest in the fulfilment: but the emperors (*benigna juris interpretatione*) gave also an action to the third person in whose favour the stipulation had been made. L. 11. D. de O. et A. (44. 7). L. 73. § 4. de R. I. (50. 17). L. 3. C. de don. quae sub modo. Fragm. Vat. § 286 [1]).

But whatever might be the obligation laid upon the donee, the donor could always, in case of non-fulfilment, reclaim the thing given, by a *condictio ob causam datorum* [2]). L. 2. 3. 6. 8. C. de cond. ob caus. dat. (4. 6). L. 10. C. de rev. don. (8. 56). Only the impossibility of fulfilling the obligation excluded the reclamation. [3]) L. 8. 10. C. de cond. ob c. d. Moreover these gifts,

1) Sav. Syst. IV. p. 265.

2) It has been erroneously considered, that where the charge or obligation consisted in furnishing aliments to the donor, he could, in case of non-fulfilment, by a rei vindicatio, reclaim the thing given. This mistaken opinion was based upon L. 1. C. de don. quae sub. mod.; but the true explanation of this text has been given by Ihering, Jahrb. für Dogm. I, p. 123, 158.

3) Sav. Syst. IV. p. 282. Unger, § 99, note 42. Keller, § 70, note 4. The L. 2, § 7. D. de don, of which some authors have made use to teach the contrary, — and of which Savigny, also, gives a forced interpretation, — does not speak of a charge (*modus*), but of a condition. "Donavi ea *conditione* — causa magis donationis, quam *conditio* dandae pecuniae."

in so far as they were gifts, were submitted to the general principles which govern such matters. It results, however, from the nature of things, that in case of revocation for any cause, the obligation of the donee ceased, and that he could, at the moment of restoring the thing given, deduct the amount already expended by him in fulfilment of the obligation. — He was, in fact, bound to restore, only to the extent to which he had been enriched [1]).

[1]) Sav. Syst. T. IV, p. 287. Schilling, § 363, note m. m. Unger, § 99, note 29.

SECTION V.

Of Illicit Acts.

§ 74. THE IDEA, AND THE REQUIRED CONDITIONS.

In the domain of private right, the designation of "Illicit act" was applied to every act and every omission which assailed the rights of another, and created the obligation of atoning for the damage which it had caused. Such an act might be illicit in itself, from the mere fact that it disturbed public order, and independently of any pre-existing relation of right between the author of the act and him who is prejudiced by it. In this case it was called *delictum privatum.* — Or, the act was illicit, only by reason of a legal obligation [1]), existing between the two persons before the accomplishment of the act or the omission which caused damage.

In order that an act — (which must have been an act *done* [2]), should be considered illicit, it was requisite :—

I. That it should be objectively unjust ; that is to say that the author of the act should have attacked the rights of another, by going beyond the limits of his own legitimate powers. — On the contrary, if he had kept within those limits [3]), the act, how-

1) Whether it derives *ex contractu* or *quasi ex contractu*, or is a direct consequence of law. Unger, § 100, notes 1 and 2.

2) Civil law took no notice of the mere *attempt* to commit an injurious act. L. 36. § 1. D. de R. V. (6. 1). "Culpae reus est possessor, qui per insidiosa loca servum misit, *si is periit*, et qui servum a se petitum in arena esse concessit, *et is mortuus sit.*"

3) Hence it follows, that there is no unjust act when a functionary acts in virtue of

ever prejudicial it might be, was not illicit. (L. 1. pr. D. de injur. (47. 10). L. 5. § 1. D. ad L. Aquil. (9. 2). "Injuriam accipere nos oportet, quod non jure factum est, hoc est contra jus." L. 151. D. de R. J. "Nemo damnum facit, nisi qui id fecit, quod facere jus non habet." L. 55. D. eod. "Nullus videtur dolo facere, qui suo jure utitur").

II. That the act objectively unjust could be attributed to its author as a culpable act. — This assumed: 1st. The existence of volition; without which, — (as in the cases of infants or lunatics) — there could be neither imputation nor culpability [1]). L. 5. § 2. D. ad L. Aq. "Et ideo quaerimus si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit: Quae enim in eo culpa sit, cum suae mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliae actio quemadmodum si quadrupes damnum dederit, aut si tegula ceciderit, sed et si infans damnum dederit, idem erit dicendum." L. 61. i. f. D. de adm. et per tut. (26. 7). "Impune — puto admittendum, quod per furorem alicujus accidit; quomodo si casu aliquo, sine facto personae id accidisset"). 2nd. That the volition should have been free; consequently that it had not been influenced by physical violence. —

the authority with which he is invested; nor when the act is demanded by the necessities of legitimate defence; nor yet, when it is done with the consent of the person who is thereby injured: — ex gr. in a duel, — save, of course, in this latter case the responsibility to be eventually incurred towards criminal justice. L. 45, § 4. L. 29, § 7. L. 7, § 4. D. ad L. Aq. (9. 2). Unger, l. c., notes 8 and 9.

1) The Prussian Law (Pr. L. R., P. I, tit. 6. § 41), and after it the Austrian Code, § 1310, adopting the views formerly taken of natural right, have subjected infants and lunatics to a sort of subsidiary responsibility; and this in a manner sufficiently illogical. (See Unger, l. c., note 15). On the contrary, French legislation requires that there should be *culpability*. (Code Nap. art. 1382). See Pothier, Traité des Obligations, Tit. I, Sect. 2. § 118, and Marcadé upon art, 1382. "The omission must be imputable; and that a madman, or an infant of tender years, is no more responsible for an omission than for a positive act, has never been denied." The Netherlands Code (art. 1401), requires also that there should be culpability: — thus, "quaenam in eo culpa sit, cum suae mentis non sit." Diephuis, VI, 664, invokes, indeed, the art. 1483 of the Dutch Code, to sustain the contrary opinion; but this article concerns only minors and persons utpote tales. The Project of 1820, art. 3020, expressly exempted from all responsibility children under twelve years of age, and deranged persons.

3rd. That the author of the act, under the circumstances in which he found himself, should have been able to avoid doing the injury in question, by using the precautions which every one is bound to use in performing any act. "Ignoscendum enim — si non divinavit." L. 29. § 2. D. mand. (17. 1). L. 31 i. f. D. ad L. Aq. "Quodsi nullum iter erit, dolum dumtaxat praestare debet, ne immittat in eum, quem viderit transeuntem; nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit."

§ 75. OF FAULT, OR CULPABILITY. (CULPA).

When the conditions already described were jointly realised, the author of the injurious act or omission was *in fault*, — or *to blame*, — (*culpa*) [1]), — in the extended sense of those words: — that is to say, his volition embodied all the elements necessary to cause him to be regarded as the cause of an attack upon the rights of another, and responsible for the injury unjustly suffered by the latter. But here arises a distinction. It might be 1st, that the author of the illegal act was conscious of the wrong that he committed; — which was the case if he had deliberately committed the act, or caused the omission, which attacked the rights of another; no matter what might be his motive or his purpose [2]), nor whether the injurious act was for him an end

It is in this sense that one says of husband and wife: — "*culpa* divertere, divortium fit *culpa* mariti." Ulpianus, VI, § 10.

2) The desire to enrich himself was not necessary. He who stole with the intention of giving in alms that which he had stolen, was not, for that, the less guilty of theft. L. 54, § 1. D. de furt. (47. 2). Whether to read "*etsi quis usum alienae rei in suum usum non convertat*, or *usum non suae rei in alienum lucrum convertat*." See Petri Exceptiones in the work of Savigny, Geschichte des Röm. Rechts im Mittelalter, T. 2, p. 159 and p. 371. The Basilica and the scholia Basilicorum however, maintain the vulgar text. The motive was not considered, except in so far, that sometimes, instead of the actio *doli*, (a degrading prosecution) the actio *in factum* was permit-

or a means [1]). — In this case there was a wrongful purpose, — malice. — (*dolus malus.*)

But, it might also be: — 2nd. That the injustice consisted in the fact that, — without exactly having in view the violation of another's rights, or without having foreseen the injurious effect of the act performed, — the author of it had failed to make the effort of volition, to give the attention, or to employ the skill, which would have prevented the injury. In this case, — in contradistinction to malice, — there was, either *in faciendo* [2]), or *in non faciendo* [3]), fault, culpability, (*culpa*), in the limited sense of the word [4]).

§ 76. OF DEGREES OF FAULT [5]).

Every unjust infringement of the rights of another, — whether it was the result of malice, or of negligence, — obliged its author to repair the injury which he had inflicted, so far as there existed, between him and the person injured, no ante-

ted. L. 7, § 7. D. de dol. (4. 3). L. 7. pr. D. dep. (16. 3). L. 8, § 10. D. mand. (17. 1). Windscheid, § 101, note 6. Wächter, II, p. 780. — The latter observes, very justly, that this merely formal modification has no practical interest in connection with the law of the present day.

1) Thus then there is malice (*dol*) on the part of him, who to shorten his road, crosses the field of another and tramples the corn. Unger, § 101, note 6.

2) The Germans call it "*die Aquilische culpa*".

3) L. 91. pr. D. de V. O. (45. 1). L. 1. pr. D. de tut. et rat. distr. (27. 3).

4) Unger, l. c. p. 236. "In case of malice the author of the violation of right has positively intended it: — in case of fault he has not intended it; but as his will has lacked the energy required to avoid it, it is right to say, that it is not *seriously* that he has "not intended it". As, moreover, the consciousness of the injustice committed is an essential element of malice, (*dolus*), it follows that malice cannot exist, from the moment that one falls, in this respect, into an error of either law or fact. L. 3. § 4. D. de injur. (47. 10). L. 46. § 7. D. de furt. (47. 2). "Malice, says Savigny, (Syst. III, p. 388), is a thing which cannot co-exist with an error, of no matter what nature."

5) Malice (dolus) has no *degrees*, in private law. Unger, § 102.

rior legal obligation; and that thus the wrong came within the terms of the Lex Aquilia. (§ 3. I. de leq. Aq. (4. 3). "Non minus ex dolo, quam ex culpa quisque hac lege tenetur." L. 44. pr. D. ad. leg. Aq. (q. 2). "In lege aquiliâ et levissima culpa venit."

But he who was engaged with another in some matter of obligation, — especially if resulting from an agreement or contract, or what was assimilated to it — was also bound to take certain precautions, the neglect of which, — whether resulting in an act or in an omission, — was imputable as a fault. In this case, however the measure of the care to be taken was not every where the same; and it depended chiefly upon the nature of the legal relations between the parties, whether the fault or the negligence committed was or was not legally imputable to its author. For this reason the Roman Law [1]) established in these matters two degrees of fault :— the grave or serious fault and the slight fault. (*Culpa lata culpa levis.*)

There was grave fault (*culpa lata*) where one neglected the measures of precaution that every man habitually takes, under ordinary circumstances, and with due regard to the manners, the usages or the peculiarities of the place where the act is done. (L. 213. § 2. D. de V. S. "Lata culpa est nimia negligentia; id est: non intelligere quod omnes intelligunt." L. 223. pr. D. eod. "Latae culpae finis est non intelligere id quod omnes intelligunt.)" But there was, also, grave fault, where, being under obligation

1) The chief work on this subject is that of Hasse: — *die Culpa des Römischen Rechts*, 1815: — second edition by von Rethmann-Hollweg, 1838. — For the history of the theory of degrees of fault, in modern times, see Unger, § 101, note 5. The Prussian Law, (P. I, Tit. 3, § 18—22), conformably to the ideas in vogue at the time of its promulgation, defines three degrees: The heavy, the ordinary, and the light fault. (*Ein grobes, mässiges, geringes Versehen*). See Koch, ad h. l. — It is otherwise with the Austrian Code, (see Unger, l. c.). The French Code, (see Marcadé, t. IV, p. 410), and the Dutch Code (art. 1271, 1392, 1596, n°. 1, 1793, 1781: "Like a good father of a family, — the same care which he gives to the preservation of his own goods". See, on this subject, the remarkable dissertation of Mr. P. R. Feith, — "*Over de Culpa in de verbintenissen*" (of fault respecting obligations). Amsterdam, 1859. The Neth. Project 1820 contained some eminently practical provisions on this subject, and defined but two faults: — the *great* and the *small*. (art. 3046).

to another, a person had not given to the property or the business of that other the same care and attention that he habitually gave to his own. This is called *culpa lata in concreto.* (L. 32. D. Depos. (16. 2). "Nam etsi quis non ad eum modum, quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret; nec enim salva fide minorem iis quam suis rebus diligentiam praestat"). In either of these cases, it is difficult, in the ordinary course of affairs, to find any distinction between a negligence so grave and a formal intention of wrong-doing. Hence in matters of private law, the grave (or "heavy") fault was assimilated to malice;— particularly with reference to the obligation to repair the damage [1]). (L. 221. D. de V. S. (50. 16). "Magna negligentia culpa est, magna culpa dolus est." L. 1, § 1. D. si mens. fals. mod. (11. 6). "Lata culpa plane dolo comparabitur."

The slight fault (*culpa levis*) consisted in neglecting the care which an attentive and intelligent man of business, under ordinary circumstances, habitually gave to his own affairs [2]). (*Diligentia diligentis patrisfamilias.*)

1) But not in cases where fraud (dolus) was a necessary element of the offence. "In lege Cornelia dolus pro facto accipitur, nec in hac lege culpa lata pro dolo accipitur." L. 7. D. ad leg. Corn. de Sic. (48. 8). Thus it may be agreed: *ne culpa lata*, but not *ne dolus praestetur.* Wächter, II, § 112, 12. It is an error that certain legislations establish a difference between fraud and fault as to the obligation to repair the damage. See, for ex., art. 1150, Code Nap., and art. 1283 Neth. Code. As to the Austrian, see Unger, § 102, note 23. Prussian Law, (Pr. L. R. Part. I, Tit. 3, § 19), recognizes a more just principle. "The consequences of a grave fault, in respect to the reparation of the damage, are exactly the same as those of fraud".

2) L. 25. pr. in. f. D. de prob. (22. 2). "Homo diligens et studiosus paterfamilias, cujus personam incredibile est, in aliquo facile errasse." L. 65. pr. D. de usufr. 7. 1). "Debet omne quod diligens paterfamilias in sua domo facit et ipse facere." L. 14. D. de pign. act. (13. 7). L. 54. pr. D. de act. emt. (19. 1). L. 137. § 2. 3. D. de V. O. (45. 1). It is evident, that, in appreciating circumstances, the judge should avail himself of the knowledge of men which he has acquired from experience; taking into account, also, the ideas, habits, and character of the people: Hasse explains this exceedingly well. He says: "Undoubtedly, in this matter, it is necessary to take into consideration, the manners and mode of life of the people; for it is upon those that are formed the normal aptitude of individuals. A Turkish judge who should exact from those

In the interests of commerce and for the security of various business transactions, this degree of care was exacted from him who sought to form business relations with others in legal form. Outside of these limits, fault (blame) seemed not to exist; and injuries came within the category of accidents, — for which there was no responsibility [1]).

But as there was a grave fault *in concreto*, so was there also a slight fault *in concreto;* — as when the Law, instead of an objective, adopted a subjective estimate of fault; — exacting from the debtor, only the same care and diligence that he gave, habitually, to his own proper affairs.

In the same way, then, that in the *culpa lata in concreto*, the responsibility was extended, so in the *culpa levis in concreto* it was restricted; in this sense, that the debtor was then permitted, by exception [2]), to prove, that if he had not taken all possible precau-

under his jurisdiction the agility, (for example) of a Frenchman, would act as stupidly as he who should require a sick person to display the same powers as a man in full health. An abstract *average* of human aptitude in general, but exceeding the level of the aptitude of the people to whom it is to be applied in estimating fault, is, to my mind, a chimera; and I think that, on mature reflection, every one must be of the same opinion." See, also, Unger, l. c., note 31.

[1]) It cannot be required, that, to prevent damage, extraordinary efforts should be made, nor that exceptional precautions should be taken. *Diligentia, exacta diligentia* and *exactissima diligentia*, are expressions having the same signification and the same extent. "Theory would vainly attempt to establish a general barometric scale of fault." Arndts, § 16, obs. 1. Unger, l. c., p. 243. Since, therefore, the *diligentia diligentis patrisfamilias* is the ordinary standard for estimating responsibility, it naturally follows, that when the Romans speak of "*culpa*" without any qualifying term, they must be understood to mean the *culpa levis*. L. 31. D. ad Aq. (9. 2.) "Culpam esse quod cum a diligente provideri poterit, non esset provisum."

[2]) This restriction of responsibility seems to me to be founded either upon the fact that he who is subjected to it had been called to occupy himself with the affairs of others only by necessity, (*causam habuit gerendi*); or that the relations established with another, instead of being casual and temporary, had assumed a permanent character; — so that it was supposable that the creditor had reckoned in advance only upon the aptitude and capability which he had remarked in the debtor with reference to his own affairs. Such seems to me the real bearing of the words, "qui parum diligentem sibi socium acquirit, de se queri debet." L. 72. D. pro soc. 1. — It is as if the jurist should

tions, he had, nevertheless, taken all which he was accustomed to take in relation to his own interests. L. 25. § 16. D. fam. ercisc. (10. 2). "Non tantum dolum, set et culpam in re hereditaria praestare debet, qualem diligens paterfamilias; quoniam hic propter suam partem causam habuit gerendi — talem igitur diligentiam praestare debet, qualem in suis rebus." L. 72. D. pro soc. (17. 2). L. 17. D. de jur. dot. (23. 3). "In rebus dotalibus virum praestare oportet tam dolum quam culpam: quia causa sua dotem accipit: sed etiam diligentiam praestabit, quam in suis rebus exhibet."

When the question was of corporal objects, and principally of things movable, the care to be bestowed sometimes took a particular direction, when (and in so far as) he who was bound as to the thing was required to preserve it from all accident from without; — to prevent (for example) its being stolen, or lost, or deteriorated, even when such an accident, in itself, came within the domain of fortuitous occurrences. This obligation, which was called *custodiam praestare* [1]), did not form a distinct degree of fault, but a particular direction given to the responsibility, or *diligentia*.

say: — "He who takes a partner, and who thus forms relations with another which are intimate and generally durable, must be presumed to have first assured himself of his character and qualities. If he did not do so, he has but himself to blame." See L. 22. s. 3. D. ad sctum Treb. (36. 1.) and L. 1. pr. D. de tut. act. (27. 3).

[1]) L. 13. § 1. D. de pign. act. (13. 7). "Venit autem in hac actione, et dolus et culpa ut in commodato; venit et custodia." § 3. I. de emt. vend. (3. 24). See also on this point: Hasse, p. 282 and s. Vangerow, I. § 105. Unger, p. 246, Arndts § 250, not. k. and Feith, Dissertation before cited, p. 95 and s. This really difficult question is discussed by the latter with much judgment and sagacity; — so that I think I may refer the reader to that work, without treating the subject more fully here.

SECTION VI.

Of Time, with reference to the origin and the cessation of rights.

§ 77. OF THE EFFECT OF TIME IN GENERAL.

Time operated in various manners upon the formation, the modification, or the extinction of rights.

Thus, it might be: —

I. That to exercise a right, to perform an act, or to make a declaration, there had been fixed, — by law [1]), or by the judge [2]), or by agreement [3]), — a certain time, after which the right could no longer be exercised, nor the act performed, nor the declaration made.

II. A right might be so connected with a certain moment of time, that it would begin, or would cease, to exist, when that moment had arrived [4]).

1) The Germans employ, in these cases, the terms: *Fallfristen*, *Praeclusivfristen* and *peremtorische Fristen*. In French, *délai*; in Dutch, *termijn*. Examples: time for demanding the *bonorum possessio*, or the *restitutio in integrum*, and the delays allowed in procedure. See, as to Dutch law, arts. 311, 435, 1071, 1082 and 1547, of the Civil Code.

2) Examples: § § 2, 3, I. de off. jud. (4. 17). Art. 1302 Neth. Code. — Neth. Code of Procedure, 616.

3) L. 1. D. de in diem add. (18. 2). L. 2. D. de leg. comm. (18. 3). L. 6. D. de resc. vend. (18. 5). Neth. Code, arts. 1556, 1557.

4) Examples: the *dies justi* for execution, and interest which did not begin to accrue until a specified time.

III. A right might be dependent upon the continuation, during a certain time, of a particular state of things [1]).

It is by reason of the important influence thus exercised by *time*, that it is desirable to give some explanation of the principles which regulated its division and its computation.

§ 78. OF THE DIVISION OF TIME.

Time was divided into certain periods, which were considered as units, without regard to the lesser periods of which they were composed. These principal periods were the day, the month, and the year; and the calendar gave the sequence of these divisions in a fixed and invariable order [2]). It was upon the authority of the calendar, that the terms a civil day, a civil month, a civil year, were used [3]). *Dies civilis, mensis civilis, annus civilis*). But, as in the relations of life, the computation of time is seldom regulated by the precise rules of the calendar, but rather by reckoning from or to certain variable and accidental epochs, — (*tempus mobile*) — it is important to know the

1) As in the case of prescription acquisitive or extinctive; and thus also a certain age must be attained for the exercise of legal capacity; and absence must be prolonged to a certain time in order to constitute legal "desertion" as between husband and wife. Windscheid, § 162, notes 3 and 4.

2) For the history of the Julian and Gregorian calendars, see Sav. Syst. IV. § 179.

3) The day, divided into 24 hours, commenced and ended at midnight. L. 8. D. de feriis (2. 12). "More Romano dies a media nocte incipit: et sequentis noctis media parte finitur: ita quidquid in his viginti quatuor horis (id est: duabus dimidiatis noctibus, et luce media) actum est, perinde est quasi quavis hora lucis actum esset." Pr. L. R., P. I, tit. 3. § 45. As to the French reckoning, see Zach. I, p. 142. (The week, which forms no essential part of the month or the year, was not recognised by the calendar; and the sources of Roman Law make no mention of it, in the rules which they contain. Sav. Syst. IV, p. 334). The month counts from the first day, by the calendar, on which it commences, to the last. (*mensis civilis*). The year reckoned from the 1st. of January to the 31st. of December.

natural duration attributed to each division. — According to the Roman rule a movable day contained twenty-four hours [1]), a movable month thirty days [2]), a movable year three hundred and sixty five days. L. 4. § 5. D. de stat. lib. (40. 7). L. 134. D. de V. S. (50. 16). L. 51. § 2. D. ad L. Aq. (9. 2). L. 40. D. de R. C. (12. 1). L. 4. § 1. L. 11. § 6. L. 29. § 5. D. ad L. Jul. de adult. (48. 5). L. 22. § 2 et 11. C. de iur. del. (6. 30). Nov. 115, cap. 2.

Every fourth year, a day was interposed after the 23rd February, (*dies intercalaris, bissextilis*); which, nevertheless, in the legal or judicial reckoning of a term of days was regarded only as forming one and the same with the ensuing day of the

1) Varro, cited by Gellius (3. 3). "Homines qui ex media nocte ad proximam me diam noctem in his horis viginti quatuor nati sunt, una die nati dicuntur." § 902. Aust. Code, as to which see Unger, § 105, note 14.

2) This opinion, formed upon the fragments cited in the text, is adopted by most modern authors. See Vangerow, I. § 194. Windscheid, § 103, note 20. Arndts. § 88. obs. 5. Schrader believed that he had found in L. 101, D. de R. J., proof that the Romans reckoned the month as the twelfth part of 365 days; two months as 61 days, — three months as 91, — four as 122. For six months, by this reckoning, we have 182½ days; — so that to obtain an unbroken number we must choose between 182 and 183. According to Schrader, 182 was the number adopted by the Romans. L. 3. § 12. D. de suis et leg. her. (38. 16). L. 12, D. de stat. hom. (1. 5). Schrader is contradicted by Puchta, Vorles. ad § 74, and by Savigny, Syst. IV, § 181, i. In modern legislation and practice, the movable month is counted from such a day of one month of the calendar to the day bearing the same date in the following month, or in the month in which a specified term expires. Code de Com., art. 132. Dalloz, V., *délai*, § 1, n°. 17. Dutch Com. Code, art. 152. Deutsche Wechselordnung, § 32. The Prussian L. R. fixes the month, in matters of prescription, at 30 days; on the contrary in respect to bills of exchange and other contracts, it follows the computation of from one day to the same subsequent day, according to the Gregorian calendar. As to Austrian rule, see Unger, § 105, note 14. In penal matters this calculation could not be applied without injustice. Hence the dispositions of art. 40. of the Code Penal, and art. 1 of the Dutch Law of 22 April 1864 *).

*) Hence also the necessity for the English judicial usage of naming "*calendar* months", in passing sentence upon criminals; — who, if that form is omitted, are entitled to have the time reckoned by *lunar* months; — which, in fact, occasionally occurs, and was indeed of frequent occurrence in sentences of remand or imprisonment under the old Insolvent and Bankrupt laws. *Translator.*

calendar. L. 98. D. de V. S. "Cum bissextum calendis est, nihil refert, utrum priore, an posteriore die quis natus sit, et deinceps sextum calendas eius natalis dies est: nam id biduum pro uno die habetur. Sed posterior dies interealatur, non prior; ideo quo anno intercalatum non est, sexto calendas natus, cum bissextum calendis est, priorem diem natalem habet." L. 2. D. de div. temp. praescr. (44. 3) [1]). L. 3. § 3. D. de min. (4. 4).

§ 79. THE MANNER OF CALCULATING THE BEGINNING AND THE END OF A LEGAL "DELAY", — OR FIXED TIME.

When there was question of the expiration of a time which was to be counted from such or such an event, to which legal effects were attached, it would have been necessary, in order to render the calculation perfectly exact, to find in the last civil day of the prescribed period, the moment which would correspond precisely with that at which the event had taken place, on the day of its occurrence [2]). But, such a mode of calculation (*termed natural*) by hours, minutes and seconds, could not, ordinarily, be admitted for legal purposes; — first, because means and instruments were wanting for such minute reckoning; and secondly, because it is very rarely, in business, that note is taken of the hour and minute when an act is performed. It was, therefore, only by exception, that such calculation was adopted, — either in virtue of some law which directly ordained it, or in consequence of the desire, (declared or supposed) of the parties. The rule was, that such periods were reckoned by entire

1) Sav. Syst. IV, § 193. — Puchta, Vorles. I, appendix V. — Windscheid, § 103, note 18. As to French and Prussian law, on this subject. See Sav. l. c. § 194; Zachariä, I, p. 143; Dalloz V. *Délai*, § 1, n°. 19. Upon Austrian law, Unger, § 106. — As to the Dutch, the essay of Prof. Van Boneval Faure, obs. ad tit. 7, lib. 4, c. c Gron. 1848, p. 39, and Diephuis, t. IX, n°. 573.

2) Sav., l. c., p. 345, calls the term thus reckoned, a mathematical term: "den mathematischen Endpunkt."

civil days [1]); *ad dies numerare, civiliter computare*;) — so that, without reference to the hour or the minute, the day when the event happened was considered the first of the prescribed period, and the last (*novissimus, postremus, extremus dies*) was reckoned by counting from, and inclusive of the first. To determine whether it was sufficient that the last day should have commenced, or necessary that it should have ended, it is requisite to distinguish the case in which the expiration of the time conferred a right or a capacity, and that in which it caused the loss of a right, by reason of non-usage. In the first case, it sufficed that the day had begun [2]) — (*dies coeptus pro completo habetur*); — in the second case it required to be ended. L. 15. pr. D. de div. temp. praescr. (44. 3). "In usucapione ita servatur,

[1]) L. 134. D. de V. S. "Anniculus non statim ut natus est, sed trecentesimo sexagesimo quinto die dicitur, incipiente plane, non exacto die, quia annum civiliter, non ad momenta temporum, sed ad dies numeramus."—There was exception for the *restitutio in integrum* of minors; — probably in order to ensure to them, as long as possible, the benefit of this special aid. L. 3. § 2. D. de min. (4. 4). "Minorem autem viginti quinque annis natu, videndum, an etiam diem natalis sui adhuc dicimus, ante horam qua natus est, ut si captus sit, restituatur? Et quum nondum compleverit, ita erit dicendum, ut a momento in momentum tempus spectetur." Sav. Syst. IV. p. 407. Puchta, Pand. § 75, b. Vangerow, I. § 196. Heimb. Weiskes Rechtslex. t. XV. p. 144. We see applications of the principle of the civil calculation (among others) in L. 16. § 8, D. de pign. (20. 1); art. 2147 Code Nap., and art. 1226 Neth. Code. As to Austrian law, see Unger, § 106, note 11; — for the Prussian, Sav. l. c. p. 420.

[2]) Savigny, § 282, takes for the last day, — (whether in reference to its commencement or its end) — the corresponding day of the month with the first day. This is, however, rejected, with reason, by almost all writers. In fact, it conflicts with the principle of the civil computation; for if we commence to count from the 1st. of January, (taken as one day), it is evident that the 365th. day will be the 31st. of December following, and not the 1st. of January. His view is, moreover, in contradiction to the L. 5. D. qui test. fac. possunt (28. 1). "*Plus* arbitor etiam si pridie kalendarum fecerit"; — a law which it is impossible to interpret in the sense of adopting the 1st. of January, without doing violence to its terms. The other passages invoked by Savigny are all more or less equivocal. Windscheid, § 102, note 12. By the French and Dutch Codes, prescription is not accomplished until the last day of the term is fully completed; nor does it seem that, it had been intended to recognize as an *entire* day that which was only a *part* of the first day of the term. See Marcadé, upon the arts. 2260 and 2261 of the Code Nap. Diephuis, t. IX, § 571.

ut etiamsi minimo momento novissimi diei possessa sit res, nihilominus repleatur usucapio, nec totus dies exigitur ad explendum constitutum tempus." L. 6. et L. 7. D. de usurp. (41. 3). "In usucapionibus non a momento ad momentum, sed totum postremum diem computamus. Ideoque qui hora sexta noctis diei Kal. Januariarum possidere coepit, hora sexta noctis pridie Kalendas Januarias implet usucapionem."

§ 80. OF THE COURSE, OR RECKONING OF A "DELAY." (A PRESCRIBED TIME).

In law, a period of time was usually treated as a continuous series of years, months, or days; so that each day comprised in the period was reckoned, without considering what acts it was possible or impossible to execute, on such or such a given day. (*Dies continui, tempus continuum* [1]). There were exceptions, however, for certain judicial acts, in regard to which the time fixed by law for their accomplishment [2]) was composed exclusively of days on which the person interested was in a condition to act. (*Available days, tempus utile, annus utilis, mensis sive dies utilis.*) [3])

It might be impossible for a person to act: —

I. Because the magistrate before whom the act should be performed was inaccessible. L. 2. § 1. D. si quis. ordo. (38. 15) [4]).

L. 31. § 1, D. de usurp. (41. 3). "In usucapionibus mobilium, tempus continuum spectatur". L. 8, C. de dol. (2. 21). L. 7. C. de temp. i. i., rest. (2. 53).

2) Of one year, at most. Sav. Syst. IV, p. 426. Puchta, Vorles. I, p. 174. Windscheid. § 104, note 2.

3) L. 2. pr. D. quis ordo (38. 15). L. 1, D. de div. temp. praescr, (44. 3).

4) "Sessiones erunt, — computandae quibus sedet is, quibusque per ipsum Praetorem factum non est, quominus daret bonorem possessionem". (The days styled by the Romans dies *nefasti* and *comitiales* (which were very numerous) were, in this sense, unavailable). In modern law this obstacle does not exist. Sav. Syst. IV, p. 432.*)

*) [In English practice a Sunday, or holiday (*jour férié*, — *dies non*) does not count, when it is the last day of the prescribed time. *Translator.*]

L. 1. D. i. f. de div. temp. praescr. (44. 3). L. 1. § 9. D. quando appell. sit. (49. 4).

II. By reason of the absence, whether intentional or accidental, of the adverse party. L. 1. § 1. D. ex quib. caus. maj. (4. 6).

III. In consequence of a temporary cause [1]), personal to him who should have acted; — as for example, illness, absence [2]), or an excusable ignorance of the facts which rendered his right operative [3]).

This reckoning of available days must not be confounded with the case where the starting point of a period, afterwards continuous, was in suspense until the moment when the party interested had knowledge of the circumstance which would lead him to act. Tempus utile ratione initii, continuum ratione cursus [4]). § 16. I. de excus. tut. (1. 25). L. 1. § 15. D. quando app. sit. (49. 4). L. 19. L. 22. C. de jur delib. (6. 30).

1) If the obstacle was the result of a persistent cause, the law dealt with it in anothe rway, L. 7, § 2, D. de bon. poss. (37. 1). "Dies quibus tutor aut pater scit, cedere placet." Sav., Syst. IV, p. 432.

2) L. I. D. de div. temp. praescr. (44. 3). "Sive apud hostes sit, sive rei publicae causa absit, sive in vinculis sit, aut si tempestate in loco aliquo vel in regione detineatur experiundi potestatem non habet."

3) Savigny is wrong (Syst. IV, p. 433), when he denies this. In the L. 2, pr. D. quis ordo, the reason for requiring a knowledge of the facts is that in the *bonorum possessio* the time is reckoned availably. See also, L. 6. D. de calumn. (3. 6). "Qui nescit, is videtur experiundi potestatem non habere." L. 55. D. de Aed. Ed. (21. 1). "Non videbitur experiundi potestatem habuisse qui vitium fugitivi latens ignoravit." L. 8. C. de dol. (2. 21). See contre Savigny, Wächter, II. § 121. note 14. Windscheid, § 104, note 7. Moreover, the time during which the person has been in ignorance is even, sometimes, deducted, when the time is continuous. § 16, I. de Excus. (1. 25). By Prussian and Austrian law the time is always regarded as continuous. See Unger. § 106. In like manner, by the Dutch and French Codes, Sundays and holidays are, generally, without effect upon the reckoning of prescribed time. Zach. I, p. 144. See however, arts. 162, Code de Com., — 179 Dutch Com. Code, and 14 Dutch Code of procedure.

4) As to these expressions, see Sav., l. c., p. 446; Puchta, Vorles, p. 174; Unger, § 106, i. f.

§ 81. OF TIME IMMEMORIAL. — VETUSTAS, PRESCRIPTIO IMMEMORIALIS, INDEFINITA, IMMEMORIALE TEMPUS [1]).

When any state of things had endured so long a time, that its origin dated back to a period to which the memory of man did not extend, there was a legal presumption that such origin had been legitimate, and the parties were dispensed from furnishing *proof* that it was so.

This rule, — designated *praescriptio immemorialis* [2]), — was applied by Roman law to local roads (*viae vicinales*), — to barriers erected to prevent the escape of rain-water, — and to aqueducts. L. 3. pr. D. de loc. et itin. publ. (43. 7). "Viae vicinales, quae ex agris privatorum collatis factae sunt, quarum memoria non extat, publicarum viarum numero sunt." L. 2. § 8. D. de aq. et aq. pluv. (39. 3). "Cum quaeritur, an memoria exstet facto opere; non diem et consulem ad liquidum exquirendum, sed sufficere, si qui sciat factum, hoc est si factum esse non ambigatur: nec utique necesse esse, superesse qui meminerint, verum etiam si qui audierint eos, qui memoria tenuerint." L. 1. § 23. L. 2. D. pr. eod. "Vetustas quae semper pro lege habetur, minuendarum scilicet litium causa." L. 26. D. eod. "Scaevola respondit: solere eos, qui juri dicundo praesunt, tueri ductus aquae, quibus auctoritatem vetustas daret tametsi jus non probaretur." L. 3. § 4.

1) As to this various nomenclature, see Sav. Syst. IV, p. 481.

2) Savigny (IV, § 195), and Puchta (Vorles. § 77), limit the influence of time immemorial to rights which have some character of *public* right. On the contrary, See Windscheid, § 113, note 5. The opinion of Savigny would be well founded, only if the "*ductus aquae*" in L 3, § 4, D. de aq. quot., and in L. 26, D. de aq. pluv., could be understood as referring merely to public aqueducts; an interpretation at least problematical. Whatever may be the case with Roman law, the Canon law extended immemorial prescription to all cases in which the conditions required for ordinary prescription were wanting. In Germany it was formely also recognised as to exemption from taxes. It is now replaced in Prussian law by a long prescription; and is completely abrogated by the Austrian, French and Dutch Codes. See Pr. L. R. P. 1, tit. IX, § § 654—659; Unger. § 104; Code Nap., art. 691; and Code Neth. art. 746.

D. de aq. quod. (43. 20). "Ductus aquae, cujus origo memoriam excessit, juris constituti loco habetur."

What was called "immemorial prescription," tended to maintain and confirm a state of things already existing. It was sufficient, if shown that the same state of things had always existed, during the time covered by the memory of the contemporary generation. In such case there was the presumption [1]) that the state of things had been lawfully created originally. — "The memory of man," however, in this matter, was not restricted to that which persons themselves remembered, but extended to things stated to the existing generation by that which had preceded it. The proof to be adduced had, therefore, a double direction; — positive on the one hand, negative on the other. — In the positive sense, it had to be established that the generation still living knew that what was thus existing *had* existed, in the same state, for so long as their memory extended; and in the negative sense, that they had *not* learned from their immediate predecessors that the latter had ever seen a different state of things from that actually

1) "Prescription by time immemorial" did not (like true prescription) *create* a legal situation, but simply dispensed with *proof* of its origin. This is demonstrated by Arndts, (Beitrage, I, p. 139, et seq.), who thus characterizes the difference between the two. "When possession has continued, without interruption, during a certain time, a right is acquired by the *effect itself* of the possession so continued, and the acquisition of a title is considered as perfected, at the precise moment when the time prescribed has elapsed; — while the nature of the prescription immemorial is simply to cause the right to be regarded as having been *previously* acquired, *at* some time which is no longer remembered, but not as an *effect* of the lapse of this same indefinite and unremembered time. Sav., (l. c. p. 528,) and Schirmer, (Annotatiǒns upon *Unterholzner Verjähr.* T. I, p. 522,) are in accord with Arndts. But the strongest argument against the doctrine which gives to the time immemorial the character of actual prescription, lies in the fact that *disproof* is possible, — while it is *not* admitted in the case of actual prescription. And when Puchta says: — "Auch als Ersitzung ist die unvordenkliche Zeit eine solche, die das Erforderniss der Nichtermittelbarkeit des Anfangs hat," — I answer: — He who invokes immemorial prescription has to prove only the *existence* immemorial of the state of things which he desires to maintain, while the proof of the *unlawful origin* of this condition lies upon the adverse party. On the contrary, he who founds his right upon the prescription acquired by a specific lapse of time, has simply to prove his undisturbed

existing. L. 2. § 8. D. de aq. (39. 3). L. 28. D. de prob. (22. 3) As to proof to the contrary, its object would be not to establish that there had been a time when that which now exists did *not* exist, — (which is true of every possible state of things! —but that the existing state of things had been originally created in an irregular manner, and, consequently, could not be made the basis of a right; and moreover that during the life of the last two generations the original irregularity had remained, continuously and uninterruptedly, engrafted upon the existing state of things [2]).

enjoyment during the time prescribed; and this proof once given, has no disproof to fear. — Puchta, confounds, then, a *proof* and a *required condition.*

1) This passage is corrupted. Huschke, Zeitschr. für Civ. R. und Proc. N. F. IV, 301—305, thus restores it: "Et hoc ita quod Graeci dicere solent: ἐν πλάτει. Etenim potest hoc memoria teneri, nonum intra annum puta factum, cum interim nemo sit eorum, qui meminerint, quibus Consulibus id viderit. Sed cum omnium haec est opinio, nec audisse, nec vidisse, cum id opus fieret, neque ex iis audisse qui vidissent aut audissent, et hoc infinite similiter sursum versum accidit, tum memoria operis facti non exstabit."

2) Sav. Syst. IV. § § 200 and 201. Arndts, § 91. obs. 4. Windscheid, § 113, note 7.

CHAPTER VI.

OF THE EXERCISE OF RIGHTS AND THE MEANS OF ENFORCING THEM.

SECTION I.

Of the Exercise of rights.

§ 82. THE NATURE AND EXTENT OF THE EXERCISE OF A RIGHT.

We exercise a right, [1] when we actually [2] and consciously [3] make use of our power, in relation to some specific object. —

[1] Unger, I. § 68: "To exercise a right, is to make actually available the capacities which that right confers; and consequently to realize its contents, — render available the matter which it contains." The abandonment or the alienation of a thing does not, according to Unger, constitute the exercise of a right; but I cannot assent to this. In fact either the abandonment is gratuitous, — in which case the alienation is equivalent to the destruction of the thing, which according to Unger himself (l. c. note 15), constitutes the exercise of a right; — or the thing is given in exchange for some equivalent, and then the exercise of the right consists of the fact that there is found in the property that is alienated, or by its means, the opportunity of satisfying one's wants in a manner in which it had not previously been done.

[2] From the circumstance that the exercise of a right consists of the actual use of that right, it follows that he who has *not* the right may, nevertheless exercise it! The thief exercises (unlawfully it is true) a right of ownership which he does not possess!

[3] L. 7. D. itin. (43. 19). "Si per fundum tuum nec vi, nec clam, nec precario commeavit aliquis; non tamen tamquam id suo jure faceret, sed si prohiberetur non facturus, inutile est ei interdictum de itinere actuque; nam ut hoc interdictum competat, jus fundi possedisse oportet." L. 25. D. quemadm. serv. (8. 6). "Servitute usus non videtur, nisi is qui suo jure uti se credidit: ideoque si quis, pro via publica vel pro alterius servitute usus sit, nec interdictum nec actio utiliter competit." — On this passage, see Sav. Possession, p. 410, note 2. Ed. Rudorff.

Certain rights are, by their nature, susceptible of being repeatedly exercised without exhausting their substance; while others are expended or annihilated at the moment of their exercise. [1] This matter was generally regulated by the following principles.

I. He who had a right, had the faculty of exercising it wholly or in part, — or of not exercising it at all. [2]

II. He could act in this respect, as he thought fit; consulting only his personal convenience, and without being required to consider whether he caused, or might cause, to another, some injury or some discomfort, — so long as he kept within the limits of the capacity conferred by his right. [3]

III. This power (otherwise absolute) of the possessor of a right, was limited by rules promulgated by the legislator, with a view to the general interest, [4] and to public order and morality.

The exercise of absolute *rights* is continuous. It is otherwise with *obligations*; which, for this reason, are not, generally, susceptible of possession. See Bruns, das Recht des Besitzes im Mittelalter, p. 480 et seq.

[2] L. 41. D. de min. (4. 4). "Unicuique licet contemnere haec, quae pro se introducta sunt." L. 156. § 4. D. de R. J. (50. 17). L. Un. C. ut nemo inv. (3. 7).

[3] "Nullus videtur dolo facere, qui suo jure utitur." L. 55, D. de R. J. L. 151. D. eod. "Nemo damnum facit, nisi qui id fecit, quod facere jus non habët." L. 9. D. de S. P. U. (8. 2). L. 24. § 12. L. 26. D. de damn. inf. (39. 2). L. 21. D. de aq. et aq. pl. (39. 3). There is still dispute as to the extent to which a right may be used, by a person who himself has no interest in it, while it causes damage to another. See the Glossary ad L. 1, § 12, D. de aq. et aq. pluv. "Item quod alii noceat et sibi non prosit. non licet." Wächter, II, p. 194, note 8; Unger, I, § 68, n0. 4; Arndts, § 92, nòte 2; and Windscheid, § 121, who observes, justly, that the passages of Roman Law which relate to this question, do not form so many special exceptions; but, on the contrary, embody rather a general principle; — that however, the restriction which they express, can have had little importance in practice; considering that, to prevent the exercise of a right, it was necessary to prove that he who sought to exercise it had absolutely no interest in it; a species of proof necessarily almost impossible to obtain. L. 38. D. de R. V. (6. 1). L. 1. § 12. L. 2. § § 5. and 9. D. de aq. et aq. pluv. (39. 3). L. 3. pr. D. de oper. publ. (50. 10)). As to Austrian Law, see Unger, l. c., note 21. See also, art. 544 Code Nap., and Arts. 625, 728, Dutch Civ. Code. Marcadé says of the right of ownerhip; — "This right renders the owner master and lord of his thing, and gives him, in regard to it, an absolute omnipotence, — a complete despotism."

[4] "Expedit Reipublicae ne quis suam rem male utatur." § 2. I. de his qui sui vel

IV. He who possessed a right, might use the means which were indispensable to the realization or enjoyment of his right.

§ 83. OF THE CONFLICT OF RIGHTS.

When the rights of different persons bore upon one and the same object, or against one and the same debtor, this rivality produced no change of legal relations ; so long as all these rights, — independent of each other in their exercise and in their effects, — might concurrently find complete satisfaction. [2] But in the contrary case, there would be a conflict. These different rights would come into collision. There was conflict, then, when different persons had rights lawfully acquired, equally capable of being realized, and of which the purport was the same and the force equal ; [3] — so that the exercise of one would necessarily exclude

al. jur. sunt (1. 8) ; comp. Gaius, who adds (1. 53) : " qua ratione et prodigis interdicitur bonorum administratio."

[1] L. 10. D. de Serv. (8. 1). L. 20. § 1. D. de S. P. U. (8. 2). L. 3. § 3. D. de S. P. R. (8. 3). L. 11. D. comm. praed (8. 4). L. 2. D. de jurisd. (2. 1). L. 15. § 1. D. de usufr. (33. 2). Art. 697. C. N. et art. 735 Code Civ. Neth.

[2] For example : Two persons have servitudes charged on the same property ; — divers creditors have the same debtor for different debts, — or have the same pledge, sufficing to guarantee all their claims. See Wächter, II, § 76.

[3] There was no conflict : I. When a right, by the mere fact of its existence, rendered the existence of another similar right impossible ; — such as the right of ownership, which consisting of the absolute and complete domination over a thing excludes the possibility of a second person having, simultaneously, the same right over the same thing. Such, again, are the *bonae fidei possessio*, — the emphyteusis, — the right of surface, and the usufruct. Kierulff, I, p. 231 ; and Unger, I, p. 426 ; — who makes, on this subject, this striking remark : — " marriage, consisting of the mutual surrender of the entire personality, is in its very nature monogamous." II. When the conditions requisite for the realization of the right of one of the competitors were fulfilled, while it was not so with the other. For example : — when some thing was due, absolutely to

that of the others. [1] The means and the manner of terminating such a conflict depended upon facts and circumstances proper to each case. Thus, if one of those possessing a right had placed himself in advance of the other, — whether by judicial or extra-judicial proceedings, — and had occupied that foremost position, which another *might* have occupied, if he had been more diligent; — in such case the adage obtained: — "Occupants melior est conditio". [2] If no one had secured this priority, the exercise of the right of one was restricted by that of the other; whence it arose that they must exercise their rights in common. [3] And if, in such case, the exercise of the right in common was impossible, the solution of the conflict was determined by lot. [4] L. 6. § 7. L. 24. D. quae in fraud. cred. (42. 8). L. 128. D. de R. J. "In pari causa possessor potior haberi debet." L. 32. D. de reb. auct. jud. possid. (42. 5). L. 10. D. de pign. (20. 1). L. 9. § 4. D. de Publ. (6. 2). L. 16. D. de duob. reis (45. 2). L. 13. D. de jud. (5. 1). L. 33. D. de leg. I. (30). L. 32. D. de Proc. (3.

the one and only conditionally to the other. III. When the rights of the several competitors had not the same purport. (contents). A real right and a personal claim which had, mediately, the same thing for their object, might exist, and be exercised, simultaneously. IV. When one of the rights was to the other as the rule to the exception: — as, for example, the *jus singulare* in opposition to the *jus commune*; — ownership in opposition to the *jura in re aliena*. L. 80. D. de R. J. — V. When the opposing rights were not of equal force. Wächter, l. c., and Unger, p. 627, think, that in this case, the conflict existed, but that the law solved the difficulty (as, for example, in matter of mortgages), by the rule "*prior tempore, potior jure.*" For my part, I think that in such cases the law did not interrupt a conflict already created, but rather prevented its creation; and that it was only when rights were of positively equal force, that mere chance could be invoked to solve the difficulty. It is therefore, with justice, that Kierulff has included this condition in his definition of "conflict." (p. 230.) Arndts does the like. (§ 92, obs. 3).

[1] See divers examples in Unger, l. c., note 27.

[2] See art. 1198, Code Nap., and art. 1315 Dutch Code.

[3] See arts. 1178, 1226, Dutch Code. Unger, l. c., note 31, cites the case where sums subscribed for an anonymous society, exceed the amount fixed for its capital; — in which case the number of shares taken by each of the various subscribers is reduced.

[4] See art. 1125, Dutch Code.

3). L. 16. § 8. D. de pign. (20. 1). L. 10. D. de pec. (15. 1). L. 4. D. de in rem verso (15. 3). L. 14. pr. D. de nox. act. (9. 4). L. 6. C. de bon. auct. jud. poss. (7. 72). L. 14. de jud. (5. 1). L. 3. C. comm. de leg. (6. 43). L. 5. D. Fam. ercisc. (10. 2). L. 24. § 17. D. de fideicomm. libert. (40. 5).

SECTION II.

Of the means of enforcing rights, generally.

§ 84. OF THE VIOLATION OF RIGHTS.

Concurrently with the right, the possibility exists of contesting it, of denying it, of damaging it, or of violating it; in a word concurrently with the right exists the possibility of a wrong. If, then, it is desired that the right should be freely exerted and peaceably developed, and attain its complete realization without obstacle, the State, the organ of social interests, ought always, in the first place, to charge itself with the mission of watching, to see that wrong is prevented, or its effects counteracted and the right which has been assailed re-established in its primitive state. The duty which is imposed upon the State, in this particular, is that of protecting and maintaining rights; but this refers only to those rights the exercise of which is susceptible of being assured and guaranteed by means of external compulsion; — otherwise the State does not take them under its protection.

[1] "Thus" says Puchta, (Vorles § 78), "one can have no right to such and such a feeling on the part of others, for a feeling cannot be imposed by compulsion; but one may have a right to certain outward acts by which such a feeling is evinced. Thus, I cannot insist that another should have feelings of esteem for me; but I may insist that he abstain from all outward acts by which he might manifest the absence of those feelings."

The violation of right may be *absolute*, as when it constitutes a violation of "right" in the objective sense; or *relative*, if it attacks "*a* right", belonging to a particular person. The first, which falls under the operation of penal law, is, in itself and independently of the particular interests which it may have injured, an infraction of public order and an attack upon the institutions which support it. He who commits it, evidently refuses to submit himself to the sway of the moral idea which is embodied in "right". As to the relative violation, (civil), it manifests itself in the opposition of a private volition to the authority or the volition of him who possesses a right: He who is guilty of this violation recognizes an objective, or abstract right, but not *the* alleged right of his adversary. [1] In matter of private rights, then, — (and this is the only subject that we have to consider) — there is a violation of right when one has, voluntarily or involuntarily, committed or omitted an act in opposition to the legitimate will of another. [2] It is evident that as the exercise of rights differs, according to their character and according to the nature of their various legal relations, there exists a corresponding diversity in the violations of right, [3] and in the manner of applying a remedy. [4]

[1] Puchta, l. c., "He recognizes the right as by prescription; but he refuses to acknowledge the legal power of a particular person. Unger § 109. — "Putting his individual will in contradiction to the individual will of another".

[2] Unger, l. c., note 5.

[3] An act which is not in contradiction to the will of the person possessing a right, may give birth to a legal claim, but never constitutes a violation of a right. (Unger, p. 330. Windscheid, § 122). Some authors teach that every action supposes the violation of a right; and that it is, therefore, only from that moment that prescription commences. We will examine this doctrine in treating of prescription.

[4] It is thus that the manner of assailing a right differs, according as it relates to a family right, a real right, an hereditary right, or an obligation. See, especially, Unger, l. c., note 7 — 11a and Windscheid, § 122.

secure to himself the payment of what was due to him, [1] seized, without the authority of the judge or the law, and against the will of the debtor, [2] something [3] belonging to the latter, or forced the latter to deliver it to him.

The second provision ordained that he who took by force, [4] something of his own out of the possession of another, [5] forfeited his ownership, which passed to the possessor; and if the author of the violence, was not the owner of the property attacked, he was compelled to restore it, and in addition to pay its value by way of penalty. L. 7. C. *unde vi* (8. 4).

would apply only to those cases where the plaintiff was deprived of his right of action; but this is a mere begging of the question; and even in the L. 19, it is a question of liberation in general. The words "jus crediti amittit" are, moreover, according to the phraseology of the Roman jurisconsults, quite compatible with the maintenance of a natural obligation. L. 10 D. de V. S. "Quodsi natura debeatur, non sunt loco creditorum." L. 108, D. eod. The question again presents itself whether, in case of reciprocal obligations, the debtor thus liberated could, on his side, exact the execution of the obligation of the creditor: I think not. Though the L. 50. D. de act. emt. (19. 1) does not concern this hypothesis, the principle which it asserts is not the less applicable to it. "Bona fides non patitur, ut cum emtor alicujus legis beneficio pecuniam rei venditae debere desiisset — venditor tradere compellatur et re sua careret." Vangerow assumes, that in deciding thus, the author of the violence would not be punished; but this is an error; — the punishment consists in the fact that the contract becomes unilateral or claudicans — A case curious enough, occurring in practice, is reported by Burchardi, Archiv. für Civ. Prax., t. 18, p. 16. The distinction imagined by Windscheid, l. c., note 8, is arbitrary.

[1] This penalty naturally affected only him who claimed an actual debt; though the words *quod deberi sibi putat* appear to include also him who believed himself a creditor, without being so in reality. Benfey, l. c. p. 17; Unger, § 111, note 1.

[2] It is not necessary that there should have been actual violence, properly so called. "Vis est tunc quoties quis id quod deberi sibi putat non per judicem reposcit."

[3] Without distinguishing whether it is the object of the debt, or any other property movable or immovable. (*rem ullam debitoris*). The analogy with the actio vi bon. rapt. L. 2. § 22. D. vi bon. rapt. (47. 8) tends even to cause the belief that it sufficed that the property was "*ex bonis*". Benfey, p. 24; Windscheid, § 123, note 6. In another sense, see Keller, l. c., note 1.

[4] In tantam furoris pervenerit audaciam — violenter invaserit." Vangerow, l. c.

[5] If he was but the simple detainer, (nudus detentor), the rule was inapplicable; *possessionem* restituat, *possidentibus* restituat. Benfey, p. 37. According to the Prussian law, (P. I., tit. 7, § 144), he in whose name another possesses, can expel the latter without the intervention of justice. It is otherwise with the Austrian Code. Unger, l. c., note 7.

Other imperial edicts, of more recent date, also threatened with punishment him who detained as a pledge the property of another, without his consent; also him who detained the children of his debtor as hostages, or forced them to labour as slaves; and finally, those who prevented the interment of their debtor. Nov. 52. Cap. I; Nov. 134. Cap. 7; and Nov. 60. Cap. I. [1]

The law which prohibited the doing of justice to one's-self, admitted of exceptions in cases where the interposition of the judge could not be invoked speedily enough to avert an imminent danger. [2]

But if the law generally punishes the act of doing justice to one's-self, it is necessary to guard against confounding this case with that which is termed legitimate defence. He who makes use of the latter, does not allow himself to invade insolently and of his own authority the lawful rights of another; his effort, provoked by necessity, confines itself to defending himself in a position which is menaced. Now this purely defensive employment of force is perfectly legal, in so far (be it understood) as it is indispensable in order to guard against an imminent attack or against dangers which it would be impossible to escape in any other manner. Examples are to be found in L. 4. § 1. [3], L. 5. pr. L. 29. § 3. L. 45. § 4 [4]. L. 49. § 1. L. 52. § 1. D. ad leg. Aq. (9. 2). L. 1. § 27 en 28. L. 3. § 9. L. 17. D. unde vi (43. 16). L. 1. C. eod. (8. 4). L. 3. § 7. D. de inc. ruina (47. 9). L. 1. C. quando liceat (3. 27) [5].

[1] Benfey, p. 32.

[2] This exception results rather from the very nature of the case than from the L. 10, § 16. D. quae in fand cred., (42. 9), which is invoked in its support, (see Puchta, Vorles. p. 182; Unger, l. c., note 17) but which simply regulated the relations of creditors among themselves. ("Si quas putas te habere petitiones actionibus experiaris"). Some legislations have formally adopted this exception. See § 78 of the Pr. L. R. Introd., cited above; and the Austrian Code § § 19 and 344. "Among the rights inherent to possession, is that of defending it, and of opposing force by corresponding force, in all cases where judicial assistance would arrive too late."

[3] "Adversus periculum naturalis ratio permittit se defendere."

[4] "Vim vi defendere omnes leges omniaque jura permittunt."

[5] "Melius est enim occurrere in tempore, quam post exitum vindicare." See, also arts. 328, 329 Fr. Penal Code.

§ 86. OF THE MEANS OF ESTABLISHING RIGHTS BY JUDICIAL AUTHORITY.

In order that rights might enjoy complete protection, — secure against and independent of the arbitrary will of individuals, — it was necessary that an authority should exist superior to and unconnected with the interested parties; possessing knowledge and skill sufficient to decide disputes by regarding them from an impartial point of view, and with sufficient power to enforce the prompt execution of the decisions rendered by the organs which it had empowered for that purpose.

Thus whoever wished to cause rights which were contested or damaged, to be recognized or respected, was required, by means of a complaint or an action, to have recourse to the intervention of the judge. If the adverse party did not seem disposed to recognize or respect the right, but contested the action commenced against him, (*Litis contestatio*), he was heard as to his grounds of defence; after which the precise point at issue was declared. The judge used the means at his disposal to assure himself of the true nature and grounds of the respective claims; and it was upon the result of this investigation that he based his decision between the parties; guaranteeing at the same time the execution of his judgment. The collection of rules and prescriptions, relative to the acts of litigant parties and of the judge, during the course of an action touching civil rights, (action, defence, litis contestatio, proof, judgment and execution) constituted what was termed *civil procedure*, which might be regarded in two ways: that is as to the *form* of the rules in question and as to their *substance*. As to form, the rules of procedure determined the regular course and the successive development of the action in its different phases, and the formalities to be observed in each step that it rendered necessary. (We speak here, of civil procedure, in the restricted sense of the term). With regard to the contents or substance of the rules in question, there are to be examined and explained the conditions to which the exercise of the

right to act *in judicio* was subjected. — Hence the following questions: —In whom does society recognize the existence of this right? What are the means of attack and defence accorded to the plaintiff and the defendant? What are the power and the duration of such means? What modes of proof are recognized as admissible? What are, in fine, the extent and the operation of the judicial decision? All these questions are, necessarily, within the domain of *the right of action* [1] or the *theoretic*

[1] Puchta, Vorles., § 80; Windscheid, § 124; Arndts, § 95; Unger, II, § 112 note 5. "It belongs to procedure to shew how, when, and where, the action and the exception should be presented; how proof should be given; — how a judgment is pronounced, and how it acquires the force of the *res judicata*. But it is to the Civil Law that it appertains to determine what is the object of the action, what is the thing to be proved and what is the point that the judgment decides; the question is of the very substance of private right; — which presents itself before the tribunal; seeks to convince the judge of its existence; and finishes by being acknowledged or denied by the judgment". The historical school may, above all, pride itself upon having originated and developed the special study of the right of action, in its fullest sense. See Puchta, Rhein. mus. III, p. 251. In France this subject (omitted from the codes) is neglected by the jurisconsults: — a lamentable omission, the inconveniences of which are very obvious. — See, among others, an article of Blondeau, in the Themis, t. IV, p. 112, s. (Brux. 1824). It was to guard against the same omission in the legislation of the Netherlands, that men of judgment demanded the addition to the Civil Code of that country, of a fourth book, in the sense of the project of 1820; — They argued with reason, "that if only the theories of proof and of prescription were included in the Code, this would certainly be treating of the right of action, but only in an imperfect manner; that it might be possible, indeed, to leave to the Code of Procedure the regulation of pure formalities; but, that as to the bases of the right of action, they form an important branch of positive law, which should be discussed in all its bearings in the Civil Code, and which cannot by any means be abandoned to the judgment of writers; as indeed the court of Cassation in France has demonstrated, in its remarks on the Code of Procedure". See Voorduin, V., p. 433. Nienhuis (conference granted to the society *pro excolendo jure patrio*), the 27th Nov. 1832, "to prove that it is desirable to profit by the revision of our civil legislation, to complete it by the addition of a series of regulations as to the means of making rights available." This conference has been made the subject of an article by professor Van Hall, in the Collection, Rechtsgeleerde Bijdragen, t. VIII, p. 335—352. But the voices of Nienhuis and others were not heard. Our legislators had neither a sense of the necessity of this labour, nor the courage to undertake it; — and yet at each step in this region this void makes itself felt. Thus, to cite but one example, would it be possible to raise a discussion upon the rule: — "no one, unless it be the king, pleads by attorney", (Pinto, R. V. T. 2, p. 40), if we had a provision in this sense, in the art. 3109 of the Project of 1820?

portion of the system of procedure; thus named to distinguish it from procedure in its limited or literal sense, which may be designated as the *practical* portion. In treating here of the matter of "right", we have to consider only the theory, or the theoretic portion, of procedure. But the process as such, exercise a considerable influence on the material rights of parties. By the mere fact, that they are submitted to the consideration of the judge, those rights might be subjected to modifications [1] more or less important. Thenceforward the modifications, the changes, which affected rights during the time that they were the subject of litigation, come within the domain of positive law, and must therefore find a place in our treatise.

[1] Think of what the Romans call *causam rei restituere*; of the delay after the litis contestatio; of the prohibition to alienate a res litigiosa; of prescription, and of the transmission to heirs, or their exclusion. See on this subject, Buchka, die Lehre vom Einfluss des Processes auf das materielle Rechtsverhältniss; Rostock, 1846. —

SECTION III.

Of the maintenance of rights by means of actions.

§ 87. THE NATURE OF AN ACTION.

An *action*, in the proper acceptation of the word, [1] is the legal means by which, as plaintiffs, we invoke the intervention of the judge against a particular person, in order to force him to respect our legal position, and to redress, when necessary, the wrong which he has committed. The bringing of an action,

In a more general sense, by *action* was meant all legal means, ordinary or extraordinary, by which one sought to maintain and secure, in a lawful manner, rights which were menaced, contested, or damaged; and the Right of actions, Jus actionum, constituted the embodiment of all these means. The word *agere* had sometimes the same extended signification. "Agere etiam is videtur, qui exceptione utitur." L. 1. D. de exc. (44. 1). L. 37. pr. D. de O. et A. "Actionis verbo continetur in rem, in personam, directa, utilis, praejudicium: stipulationes etiam, quae praetoriae sunt, quia actionum instar obtinent, ut damni infecti, legatorum et si quae similes sunt. Interdicta quoque actionis verbo continentur." In a sense more restricted, the action excludes the exception. L. 8. § 1. D. de V. S. "Actionis verbo non continetur exceptio." L. 2. pr. D. de exc. L. 68. D. de R. V. (6. 1.) — In a sense still more restricted, the word action was employed to designate only personal actions. L. 28. D. de O. et A. (44. 7). "Actio in personam, petitio in rem." L. 178. § 2. D. de V. S. "Actionis verbum et speciale est et generale: nam omnis actio dicitur sive in personam, sive in rem sit petitio. Sed plerumque actiones personales solemus dicere." § 2. I. quib. mod. toll. oblig. (3. 30). "Quarumque rerum mihi tecum actio est, quaeque adversus te petitio vel adversus te persecutio est." As to this terminology in general, See Savigny, Syst. V. § 208. Schilling Instit. II. § 102. Wächter, II. p. 412. Unger, § 113, note 1. Keller, § 78, note l.

is then, the act by which the claimant, presenting himself before the judge as plaintiff, opens the suit in the form prescribed by the rules of civil procedure. But, independently of this objective signification, (which concerns only the form of the proceeding), by "action" is understood the power, inherent in a right, [1] of invoking the protection of the tribunals for its defence against a hostile volition which ostensibly places itself in opposition to it. In this subjective acceptation, the "action" is not the act by which a complaint is made, but rather what precedes that act; namely the *faculty* of making complaint; the *right* of complaint or proceeding, which properly belongs to every right and the substance of which is governed by the prescriptions and dispositions of the civil law [2].

The faculty of having recourse to the means of compulsion necessary to its protection and its maintenance, [3] is of the nature, if not of the substance of all right. [4] Consequently, from the moment that the law, or some other source of right, recognizes a right, this right, in the absence of some express provision to the contrary, is susceptible of being prosecuted before the judge; and reciprocally, from the moment that an action is permitted, it implies the recognition of a right which seeks to enforce itself by this means: moreover the action is not a distinct right

Pr. I. de actt. (4. 6). "Actio nihil aliud est quam jus persequendi in judicio quod sibi debetur." The Germans say *Klage* or *Klagrecht*; (complaint or right of complaint). Sav. Syst. V. p. 5. I use the expression "right of pursuit" (*vorderingsrecht*), which I oppose to the "pursuit of the right" (*rechtsvordering*), that is to say the action considered in an extrinsic point of view.

[2] Puchta, Vorles I. p. 184.

[3] This principle is expressed in § 19 of the Austrian Code, and in art. 3191 of the Dutch Project of 1820, is thus stated: "All persons to whom a right belongs, may assert this right by means of an action." See, also Sav., Oblig. 1. § 7; Unger l. c.; Windscheid, I. § 44.

[4] Although the faculty of pursuit, or of action, may not be an *essential* element of a right, yet, if this means of enforcement be wanting, a right will lack a quality which is of its very nature. The right still exists, but is without defence and its powers are paralysed.

having a separate existence; [1] it is the very principle of right, which, feeling itself attacked, arms itself for the struggle. [2] In other words, it is *the right in action.* Yet, as every action is directed against a particular person, from whom it demands the reparation of a wrong or of an injustice, the right of suit assumes a relative, personal, and obligatory character, by reason of which it establishes between the plaintiff and the defendant a relation of creditor and debtor. [3]

Observation. — Windscheid, in his work entitled: Die actio des Röm. Civ. Rechts, vom Standpunkt des heutigen Rechts; Dusseldorf, 1856, (see the answer of Muther, zur Lehre von der Röm. Actio, Erlangen, 1857, and the reply of Windscheid, di Actio, Abwehr gegen Muther, Dusseldorf, 1857); Windscheid, I say, has sought to prove that, according to modern legal ideas, the *action* is something entirely different from that of the Romans. In their system the *action* would have been, (according to his view), an organ of the law, endowed with a separate existence and completely independent of all specific right; a mere claim to legal

[1] This is assumed by some authors who are led into error by the definition given in the preceding note 1. Thus, Blondeau, l. c., p. 114: "When a person encounters an obstacle in the exercise of an ordinary right, it is in granting him *another right* that the law comes to his assistance." Puchta, l. c., is much nearer the truth. "The action is not a separate right, but a something annexed to the right; an element of the right itself; a faculty which is inherent in it: like, for example, the right of disposing of a thing which one owns."

[2] Unger, § 113, note 13. "The right of action is, in some sort, right on a war footing, — right clad in the *sagum*, — as opposed to right in a state of peace, — right clothed with the *toga*;" — and again, "Since, finally, it is right itself which goes to war, (*res in judicium deducta*), and that the right of action is, in truth, a right of the right." Brinz, Pand. I, p. 50, uses expressions of great accuracy. "To every complete right — (in matter of private law) — there is inherent a right of action which the Romans designated by the energetic term *jus agendi*; that is, the power of asserting one's-self by acting. The words *domi militiaeque*, and the two conditions of peace and war which they express, are applicable to each particular right: — The peaceable exercise of a right (*jure suo uti*) should be distinguished from the acts by which it is enforced."

[3] Sav., l. c.; Unger, p. 354; Keller § 78; § 5. I. de exc. (4. 13). "Item si judicio tecum actum fuerit, sive in rem, sive in personam, nihilominus *obligatio* durat."

protection; a claim which became a *right* only because it obtained satisfaction. In our modern law, on the contrary, the action is only an auxiliary means employed for the purpose of demanding the maintenance of a pre-existing right, in the exercise of which we have been disturbed or damaged.

"Amongst us", Windscheid again says, "the law assigns to each person the limits within which his will is absolute against all other. If he encounters any obstacle in the exercise of this sovereignty which is lawfully acknowledged to be his, he addresses himself to the State, in order that the latter, in its character of guardian of these limits, may protect him against all damage. The Roman on the contrary, does not say, "You have such or such right;" but "You may declare your will (or claim) before the judge." It might thus happen, that one had an action without having a right, in the same way that one can imagine a right without an action. The joinder of the right and the action was but the result of an accident. Even then, however, the action had not its source in the right, but only in the decision of the judge and in the authority with which he was invested." This reasoning leads Windscheid to conclude, that, according to our manner of regarding matters, actions are only emanations, or, as it were, shadows of rights; that they are deprived of separate life and existence, and that consequently, they ought to be excluded from the system of modern law, and to be replaced by the theory of rights or claims [1].

This doctrine of Windscheid, despite the talent and the subtlety which he displays, is really contrary to the nature and the essence of right. [2] Always and everywhere, in fact, not only

[1] "With us", says he, "the System of Law is the organization of rights. With the Romans, on the contrary, the System of Law was *not* the organisation of rights, but of legal claims susceptible of being prosecuted." In his reply to Muther, p. 13, he says, again: "There is a right, since the judgment proclaims it; but it is not *because* there is a right that the judgment proclaims it". In conformity with this doctrine, Windscheid has substituted, in his Lehrbuch der Pandekten, the theory of *claims* (pretentions) for that of *actions*.

[2] In opposition to Windscheid, — besides Muther, already cited, — see Zimmer-

are the right and the action linked to each other by the closest of ties, but this tie is formed and founded upon the fact that actions serve to put into execution and to enforce the universal recognition of rules which govern and regulate the relations of men with each other. Thus, then, when any one asks for justice, it is indispensable that he should, in the first instance have a *right*, which may perhaps manifest itself for the first time by the decision of the judge who proclaims it, but which cannot have been created by that decision. In a word, the right is the creator, the action the creature; — the contrary is impossible. It is of little moment, therefore, that the Roman Praetors should have introduced a number of actions which were not founded on the *jus civile*. What was in fact the case? The action permitted by the Praetor in a particular instance, whether it had or had not been previously published in the Edict, was but the consequence and the emanation of a right. In a certain sense, it was, it is true, sometimes the Praetor himself who created this right by virtue of his legislative power; and sometimes he did so only at the moment when he placed it under the aegis of his *judicial* power. But he to whom this action came in aid, — although it was only the work of the magistrate, — was really *in possession of a right;* and this not by operation of the *judicial decision* which might apparently have given it birth, but because the Praetor had recognized the basis of the claim which had been advanced; — his action in so doing being in some sort legislative. [1] We know, in fact, that the Praetor was regarded as the living organ of the general conscience of the nation; and that in this capacity, even when he appeared to proclaim and apply a

man, Heidelb. Krit. Zeitschr. V, p. 461, et seq.; Unger, § 113, note 19; Arndts, § 96, obs. 5, and Kuntze, Schletters Jahrb. V, p. 1, et seq.; who mentions that, "in the Twelve Tables, the *jus* is set forth in its highest sense; and that it was only a latter epoch which produced, by way of consequence, the *legis actiones;* with which it, (so to speak) armed and clothed rights". L. 2, § § 4, 5, 6, D. de orig. jur. (1. 2).

[1] This against Bruns, (Symb. Bethm. Hollwegio oblatae die 12 Sept. 1868, Berol. 1868) who assents to the opinion of Windscheid, respecting the Praetorian law.

right entirely new, he was considered as merely completing, or modifying, the ancient civil law, in conformity with its spirit. [1] Thus the modern manner of regarding rights does not really differ from that of the Romans; although it must be admitted that the latter, guided by the practical spirit which distinguished them, paid more attention to the immediate help required in case of damage than to the abstract *right* following its tranquil march; and that the *action* — as if the action and not the right had the priority — figures in the foreground of their terminology; and that they use the word *actions,* [2] where we moderns say *rights* or *claims.*

[1] L. 7, § 1, D. de Just. et Jur. (1. 1). "Jus praetorium est quod Praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam — nam et ipsum jus honorarium viva vox est juris civilis." Kuntze, l. c.: "It is very true that it is by means of the *action,* — (by adding other actions to the *legis actiones*) — that the organs of honorary law have developed an ulterior Law; and in this manner they have, so to speak, not created, but perfected, the form rather than the substance. But that which constitutes one of the chief works of the Romans, is, precisely, the having *substantialised* the system of actions formed by honorary law, and having blended it with the general system of laws. It is in this that consists the truly essential portion of the task accomplished by the Jurisprudence of the *Veteres;* which in analysing the honorary law, brought to light its substance, incorporated it with the Civil Law, and recognized in the action the obligation which had before been latent there." Windscheid has vainly endeavoured, in his Lehrb. der Pand., § 44, note 5, to refute the objections advanced, in various quarters and from different points of view against his system. See also Siebenhaar Correal-Oblig (Leipzig. 1867) pag. 64.

[2] It is thus that they spoke of actions "quae *heredibus* et *in heredes* competunt," when there was question of a transmission of rights; and thus again, more than one division of actions is, strictly speaking, a division of rights. Wätcher, p. 412, note 2; Zimmerman, l. c., p. 477; Kuntze, Heidelb. Krit. Zeitschr., V, p. 376; Unger, § 113, note 19; Kierulff, p. 156, note: "That which we call right, was presented, in preference, by the Romans, under the aspect of a possibility of bringing an action." The Roman Law had, in fact, no term to express what, in our day, is very generally called "a real right".

SECTION IV.

Division of actions.

§ 88. A. — DIVISION OF ACTIONS WITH RESPECT TO THE RIGHTS ON WHICH THEY WERE FOUNDED.

With reference to the rights on which they were founded, all actions were divided into personal and impersonal. (*In personam, personales, in rem actiones*). The personal action was that which arose from a right in virtue of which a certain person was bound towards another certain person, to do or not to do some specified thing, in such manner that he against whom the action would be brought, in case of non-fulfilment of the obligation, was known and determined, from the moment of the creation of the obligation. [1] — The impersonal action (*in rem* [2]) was founded upon a right endowed, in itself and by

[1] Under the rule of the *judicia ordinaria*, the personal element manifested itself in that part of the formula in which the ground of the action was set forth. (*Intentio*). In the *actiones in jus conceptae*, this part of the formula was framed thus: "Si paret . Nm. A0. A0. dare, or dare facere oportere." In actions *in factum*: "Si paret . Am. apud Nm. Nm. mensam — deposuisse." On the contrary, in actions *in rem* the "intentio" was not directed against a specified person, but to the right itself. "Si paret — fundum esse Ai. Ai.," "si paret jus esse A0. A0. eundi, utendi," cet. — Gaj. IV. 87: "Sed cum in rem agitur nihil in intentione facit ejus persona, cum qua agitur — tantum enim intenditur rem actoris esse."

[2] The expression *in rem* did not, therefore, indicate the object of the demand, but simply its impersonal, absolute, and objective character; "cum eo agit qui nullo

itself, with an independent existence, without reference to any particular person and which every one is under the negative obligation to respect, in the person of him who possesses it; and to abstain from violating or disturbing it. In this case, he against whom the action would be eventually directed, was not indicated at the outset, as in a personal action; it was only after the attack made upon our absolute right, and in consequence of that attack, that the adversary appeared, from whom we had to demand the recognition of the right which he had contested or violated, and the reparation of the wrong of which he had been guilty. "Omnium actionum quibus inter aliquos apud judices arbitrosve de quacumque re quaeritur, summa divisio in duo genera deducitur, aut enim in rem sunt, aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est, vel ex contractu, vel ex maleficio; quo casu proditae sunt actiones in personam, per quas intendit adversarium ei dare aut facere oportere, et aliis quibusdam modis aut cum eo agit, qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam; quo casu proditae actiones in rem sunt, veluti si rem corporalem possideat quis, quam Titius suam esse affirmet; possessor autem dominum eius se esse dicat, nam si Titus suam esse intendit, in rem actio est. Aeque si agat quis, jus sibi esse fundo forte vel aedibus utendi, fruendi, vel per fundum vicini eundi, agendi, vel ex fundo vicini aquam ducendi, in rem

jure ei obligatus est, movet tamen de aliqua re controversiam". In this sense there could be a pactum in rem, as distinguished from pacta in personam; — "quoties generaliter paciscor ne petam" L. 7. § 8, D. de pact. (2. 14). Thus the exceptio doli was styled *in rem*, because it did no more than raise the question an *in ea re* dolo malo factum sit, non adversus quem commissus sit dolus. L. 2. § 2, D. de doli m. exc. (44. 4.) Thus again it was said of the denunciation of a new work: "operis novi nuntiatio *in rem* fit, non in personam." L. 10. D. de O. N. N. (39. 1.) Thus, finally, the Edict which does not distinguish whether one defends one-self or his defended by another, is styled "*in rem scriptum*". L. 5. § 3. D. quib. ex. caus. in poss. (42. 4). Sav. Syst. V. p. 14; Keller, § 79; Windscheid, § 43, note 4. In the remotest times, the designation of *actio in rem* was applied *par excellence* to the "rei vindicatio", which was then the only real action. Gaius IV, 16, 17, 86, 87; L. 23. D. de R. V. (6. 1); Sav. l. c., p. 30; Unger, § 114, note 9.

actio est." § 1. I. de act. (4. 6). L. 25. pr. D. de O. et A. (44. 7.). "In rem actio est, per quam rem nostram quae ab alio possidetur, petimus; et semper adversus eum est, qui rem possidet. In personam actio est, qua cum eo agimus, qui obligatus est nobis, ad faciendum aliquid vel dandum: et semper adversus eundem locum habet." Gaj. IV. 1.—3, 100, 106.

The class of impersonal actions included also those which did not seek to obtain directly a condemnation against a specified adversary, [1] but the purpose of which was rather to obtain from the judge a declaration of the existence of an absolute right, of a condition of things, [2] or a legal relation; in order to be able, afterwards, to make use of this judicial declaration, to sustain claims founded upon the right thus recognized. These actions were known under the name of "*actiones praejudiciales.*" They differed from other actions in rem, in not tending directly to a condemnation. They were, in some sort, only the prelude of another proceeding, upon which they would have a decisive influence. But they had this in common with other impersonal actions, that the adversary whom they repulsed was indeterminate and uncertain, until some one came to disturb or contest the existing position. § 13, I, de Act. "Praejudiciales actiones in rem esse videntur, quales sunt per quas quaeritur an aliquis liber vel libertus sit, vel de partu agnoscendo [3]."

[1] Gaius, IV. 13. "Intentio aliquando sola invenitur sicut in praejudicialibus formulis." Theoph. ad § 13. I. "Praejudicialis est formula ex sola constans intentione, neque enim condemnationem in se habet."

[2] Vict. Art. Rhet., cited by Schrader, ad § I. 1: "Simplex petitio, cum quaeritur in quo jure sit res aut persona". The *praejudicia* served to fix legal relations of various kinds, and among others rights of obligation. See Gaius, III, 123; IV, 44; L. 30. D. de reb. auct. jud. possid. (43. 5). "Eos qui bona sua negant jure venisse, praejudicio experiri debere." Justinian, § 23, I. 1, mentions only those which are founded upon the jura status et familiae. In the Dutch law, the dispositions (inexact in every particular) of art. 129 of the Code of Procedure exclude from the category of real actions those which are founded upon family rights. The phrase *actio in rem* has partly contributed to this blunder. In order to avoid all misunderstanding, the word *impersonal* is preferable to *real*. The Dutch Project of 1820 gave a place to these actions, and defined them as "tending to establish rights affecting the civil status, the relations with a specified family, or the free exercise of rights which the law allows to persons."

[3] Rudorff, annot. on Puchta, Vorles, § 84, note 1.

Some other actions resembled impersonal actions, [1] inasmuch as not only might they be employed against those who had voluntarily incurred obligations, (whether by agreement or by misconduct), but that any one who was unjustly prejudiced might avail himself of them, against whomsoever might, accidently, be in a position to afford reparation. By the mere fact of being in such a position (for example, by reason of being in possession of something, or because of the profit that had been derived from it), one was bound, according to this hypothesis, to repair the injury inflicted. The texts give to one of the actions of this kind the designation of *in rem scripta*, (L. 9, § 8, D. quod, met. caus. (4. 2)), because any person is amenable to it, from the moment that he came within the requisite conditions of fact. However, such actions were not emanations of an absolute and permanent right, but of a right which expired directly it had obtained satisfaction; and consequently they were personal. [2] On the other hand, the Paulian action was distinguished by a particular character: — it became real by means of the *restitutio in integrum*, but had not quite the absolute nature of other actions *in rem*; for third parties were not amenable to it unless they had rendered themselves accomplices of the fraud committed by the debtor, or had acquired the thing *ex causa lucrativa*. L. 38, pr. et § 4, D. de

Examples: L. 9, § 8. D. quod met. causa (4. 2), compared with the L. 4. § 33. D. de dol. m. exc. (44. 4). L. 3. § 15. D. ad. exhib. (10. 4). L. 12. D. de aq. pluv. arc (39. 3). L. 5. § 13. L. 7. pr. and § 1. D. quod vi aut clam (43. 24). L. 1. § 13. D. quod leg. (43. 3), compared with the L. 1. § 3. D. de interd. (43. 1). § 5. I. de nox. act. (4. 9). L. 1. § 12. D. Si quadrup. (9. 1).

[2] L. 3. § 3. D. ad exhib. "Est autem personalis haec. actio." L. 6. § 5. D. de aq. et aq. pluv. arcenda. "Aq. pluv. arcendae actionem, sciendum, non in rem, sed personalem esse." § 31. I. de act. "In personam veluti quibus de eo agitur quod — metus causa factum est." — See besides Sav. l. c., p. 25; Kierulff, l. c., p. 165; Sintenis, I, § 29, note 11; Windscheid, § 45, note 6; Arndts, § 97, note 6; Unger, I, p. 551: "It does not, therefore, cease to be a personal action; it only acquires the power of causing an *absolute result*, — inasmuch as it can be employed against any possessor of the thing in litigation."

usuris (22, 1). L. 6, § 11. D. quae in fraud. cred. (42, 8). § 6, I. de act [1].

Actions *in rem* and *in personam*, like the rights which they protected, differed diametrically from each other. Consequently, as no right can possess simultaneously an absolute and a relative character, [2] so there could be no "mixed actions", if by that term were to be understood actions which, founded, in some sense, upon a double basis, might be at once real and personal. [3] Thus, then, when it is said that the *petitio hereditatis* is a mixed personal action, (*mixta personalis actio*, L. 7. C. de pet. hered. 3. 31), and that the *judicia divisoria* "mixtam causam obtinere videntur", — (§ 20, I. de act) — it is not to their essence that these terms apply, but merely to such or such an isolated legal consequence, of which these actions are susceptible. In all else, the *judicia divisoria* are undeniably personal, and the *petitio hereditatis* as unquestionably impersonal. [4]

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[1] Sav. l. c.; Sintenis, l. c., note 12; Arndts, Weisk., R. L. V., p. 211. Savigny — on the ground that the petition of hereditary right could be presented only against certain classes of possessors, (L. 9—13, D. de her. pet. 5. 3), erroneously concludes that this action came also within the category of actions *in rem* of limited extent. He forgets that, differently from what exists in the case of the *rei vindicatio*, hereditary right, as such, is not exactly violated but by the kind of specially qualified possession against which the *petitio hereditatis* was directed. (See the authors before quoted.)

[2] The provisions of art. 3200 of the Project of 1820 were therefore vicious. "A right which affects simultaneously persons and things exists when the thing and the persons are jointly bound, in virtue of an act or an agreement."

[3] Consequently, the provision of the art. 129 of the Dutch Code of Procedure is no less vicious. That which the French understand by "*actions mixtes*" forms the subject of an endless controversy. Zach. IV, p. 438, note 6; Carré, Proc. Civ. T. 1. n°. 259.

[4] I. This results, primarily, from the very nature of things. In fact the *petitio hereditatis* was the assertion of an absolute right of inheritance belonging to the petitioner, against all possessors of any thing belonging to the inheritance. II. The *petitio hereditatis* is formally termed *actio in rem* by the texts, and the petitioner is said "*hereditatem vindicare.*" L. 25. § 18. L. 8. D. de her. pet. (5. 3). L. 8. C. comm. de succ. (6. 59). The expression "*mixta personalis actio*," which occurs but in one single instance, (viz. L. 7 above cited), may be explained by the consideration that he who presented himself as heir was sometime condemned, as *debitor hereditarius*, to one or other personal payment; although, strictly speaking, it was as *juris possessor* that he incurred this condemnation. L. 13. § 15; L. 42, D. de her. pet. (5. 3); Kierulff, p.

162, note, Sintenis, § 29, note 13; Arndts, Pand. § 97, note 7; and Rhein. Mus. II, p. 144. In this last passage Arndts justly says that the character of an action is not determined by the object of the condemnation, — which, moreover, in classic law, always resolved itself into a sum of money, (Gaius, IV, 48), — but rather by the right affirmed and manifested in the *intentio*. On the contrary the *judicia divisoria* are incontestably *in personam*, [L. 1. D. fin. reg. (10. 1); L. 1. § 1, C. de ann. exc. (7. 40)], because they are founded upon an obligation resulting from a community, (a joint ownership), and directed against a specified opponent, who having become co-partner or joint-owner, accidentally or by agreement, is thereby bound to take part in the division and liquidation, — or at least to submit to it. But the duty of the judge, in such case, is double. It consists, first, of the adjudication which attributes to each of the parties an exclusive right to certain things previously held in common. This adjudication is *in rem*, inasmuch as the parties are passive and incur no condemnation. But the judge might couple a condemnation with his adjudication, — either in respect of expense incurred, or deterioration committed, upon the joint property, or to compel a payment in equalization of the respective share; — " et si unius pars praegravare videbitur eum invicem certa pecunia alteri condemnare." § 20, I. t. 1. L. 4, § 3, D. comm. div. (10. 3). It is by reason of this mixed element, which is found in the suit for partition, that Justinian (l. c.) says: — mixtam causam obtinere videntur." L. 22, 4. D. fam. ercisc. (10. 2). — This explanation, given by Kierulff, p. 168, appears to me the most plausible. Sav., p. 36, has given another, which is adopted by Sintenis, I, § 29, note 13. In his view, the " mixed" consisted in the fact, that in suits in partition the question of absolute right might also be raised and decided; — but this explanation seems less probable, for the action could thus be real only in case the right of ownership, or the right of succession, were contested; whereas, if the parties admitted that the absolute right existed, the real element would have no place in the suit; for then the discussion would be simply as to the personal payments. Keller, (Civ. Proc., p. 374) calls these actions *real*, because, he says, if it be true that they were founded on an obligation, that obligation itself was founded and dependent upon a community which was real: — but the same reasoning must lead its author, also, to term " mixed", for instance, the *condictio ex mutuo*, which is evidently personal. Moreover, this interpretation is contrary to the § 20 I. de act., already cited; which assumes, in the first place, the existence of a community not contested, (inter quos aliquid commune est), and on the other hand indicates only the effect. Thus, then although we must not say, with Puchta, (Vorles. § 83) that " the compilers of the Institutes were asleep, when they inserted this passage," — it is nevertheless true, that the term " mixed action" has little or no practical value. It should be observed, also, that Justinian does not place actions in general in three chief categories, — as *in rem*, — *in personam*, — *mixtas*; — but assigns to the latter a very insignificant part, beside the *Summa actionum divisio*, ("quaedam actiones mixtam causam obtinere videntur"); whereas, elsewhere, and when there is really a question of practical interest, he places mixed actions (in another sense, of course), in one of the principal divisions of his subject. (§ 16, I. de act.)

§ 89. B. — DIVISION OF ACTIONS, WITH REFERENCE TO THEIR OBJECT.

The object of an action, [1] was that which the complainant endeavoured to attain, to realize, by means of the intervention of the judge. In most cases, he demanded that the defendant should be adjudged to give, to do, or not to do something. There were, however, actions the object of which was not to obtain a judgment susceptible of being immediately executed, but the tendency of which was simply to obtain a judicial decision, as to whether a certain position, or a certain legal relation, was, or was not legitimate. [2] Praejudicialis actio, praejudicium, § 13. I. de act. "simplex petitio qua quaeritur in quo jure sit res aut persona". [3]

Actions, considered with reference to their object, admit yet another division. They might: 1st, have in view the reparation of an injury suffered by the complainant in his estate, by reason of a violation of his right; — so that the judgment only restored him to the position which he would have occupied if his right had not been violated. "Rei persequendae causa comparatae" [4],

[1] The Germans give to the object of the action the name of *Juristicher Gegenstand*, (legal object), which however, must not be confounded with the *material* object towards the attainment of which the action, directly or indirectly, tends. The same material object may be the motive for divers actions, which have no point of contact as to their *legal* object. Sav. § 231. f. Wächter, II. p. 422. Unger, § 115, note 4.

[2] This class includes, for example, in Dutch Law, the action for a declaration of nullity of marriage; for the recognition or denial of the legitimacy of a child; or for a declaration of nullity as to an obligation. This is why the definition in art. 3189 of the Project of 1820 was too restricted. "Are called actions, all means of law by which a person is brought in presence of justice, in order to be compelled to do, to give, or to forbear something, because the law obliges him so to do." Compare art. 207, n°. 3, of the same Project.

[3] See p. 243, note 2. As to the general use of which it is susceptible in modern law, see Windscheid, actio p. 18, note 14. In Holland they deny too generally, and upon very inconclusive grounds, the possibility of those judicial decisions called *sententiae declaratoriae*. This subject deserves to be treated specially.

The Germans say: — Sachverfolgende, Entschädigungs, — Erhaltende,-

§ 16. seqq. I. de act. — But, 2nd, actions might have for their purpose the condemnation of the author of the wrong to some penalty, the effect of which would be to augment by a certain sum the estate of the complainant, and to impoverish to the same extent the property of the defendant. (Poenae persequendae causa comparatae) [1]. Finally, actions might tend to pursue both the objects just named. (Tam rei quam poenae perseqendae causa comparatae et ob id mixtae sunt). § 16. I. 1. Gai. IV. § 6—9. § 1. I. de perpet. et temp. act. (4. 12). L. 21. § 5. D. de act. rer. am. (25. 2). L. 111. § 1. D. de R. J.

From the point of view of the defendant, actions which tended to impoverish him without enriching the plaintiff, — who obtained only the reparation of the injury which he had suffered, — came also within the category of actions "poenae persequendae causa comparatae" [2]. Examples are found in the L. 4. 7. D. de alien. jud. mut. (4. 7). "Pertinet quidem ad rei persecutionem, videtur autem ex delicto dari." L. 40. D. de dol. (4. 3). L. 9. § 8. D. de reb. auct. jud. poss. (42. 5). L. 1. § 8. D. ne vis fiat (43. 4).

Actions purely penal, as well as those which were mixed, might have for object the obtaining of a sum many times greater than the damages really due to the plaintiff; (In simplum, in duplum, vel in triplum, vel in quadruplum conceptae); — and they might have this effect, either from the outset, by reason of the nature of the action, or because the defendant had forced the plaintiff to bring the dispute before the judge; — or, finally because he had, in bad faith, denied the legitimate rights of his opponent. (Lis

klagen Wächter, § 64. Sav. Syst. V, § 210; Windscheid, actio § 3. Unger II. p. 364. Perhaps they might receive in Dutch the qualification of *behoudende*: — "conservative". In ancient Dutch Law, we find the phrase: "actions bearing upon *Interest*". Huber, Hedend. Rechtsgel. L. V. chap. 6, § 29.

[1] Being no longer in harmony with the legislation and the political organisation of modern times, the greater part of private penal actions have fallen into desuetude. See Kierulff, p. 173, note. Arndts, § 98. Unger § 114, note 6.

[2] Sav. Syst. V, p. 41, calls them "unilateral penal actions." (Einseitige Strafklagen).

inficiando crescit in duplum). § 21—28. I. de act. L. 14. § 1. D. quod met. causa. (4. 2). L. 1. pr. D. de public. (39. 4).

In the third place, actions were divided into principal or direct actions, [1] and contrary actions. Directae et Contrariae L. 17. § 1. L. 18. § 4. D. comm. vel contra (13. 6). Rubr. Tit. D. de pign. act. vel contra (13. 7). Depos. vel contra (16. 3). Mand. vel contra (17. 1). L. 6 § 7. D. de his qui not. inf. (3. 2). The first, were those which served to reclaim that to which the parties were immediately bound, merely by reason of obligations contracted by themselves. As to contrary actions, they do not follow immediately or necessarily from the obligation contracted, — but have their origin in subsequent and accidental circumstances, which, by reason of their connection with that obligation, and according to equity and the probable volition of the parties, give birth to a right of complaint or of action [2].

As to the division of actions in solidum and in minus quam solidum, see § 36. I, de act.

§ 90. C. — DIVISION OF ACTIONS WITH REFERENCE TO THEIR SUBJECTS AND TO THE RECIPROCAL RELATIONS OF THE LITIGANT PARTIES.

With reference to the capacity (or right) required for the bringing of actions, they were divided into *actiones privatae* and

[1] This division is, properly speaking, a distinction of rights; and in fact, it forms the basis of the division of contracts, taught by the French writers, into synallagmatic or bilateral, *perfect* and *imperfect*.

[2] It is thus with the deposit, the loan, the pledge, wardship, and the management of affairs. (Neg. gestio). Moreover, that which the contrary action tends to obtain, could also be preserved by means of compensation; but this means was not always sufficient. L. 18. § 4. D. de Comm. (13. 6). L. 1. § 4. D. de contr. tut. act. (27. 4). On the other hand the contrary action —which must not be confounded with the reconventional action,— might be brought *without* the direct or principal action. L. 17. § 1. D. comm. "Contraria commodati actio etiam sine principali moveri potest; sicut et ceterae, quae dicuntur contrariae". See Kierulff, p. 166, note. Schilling, II. § 105.

actiones populares. [1] The first were those instituted by individuals, for the maintenance or defence of their private interests and personal affairs. The second, which were founded upon the infraction of rules ordained in the public interest, [2] might be brought by any one to whom such a proceeding was not specially forbidden. [3] (L 1. D. de popul. act. (47. 23). "Eam popularem actionem dicimus qua suum jus populi tuetur". The popular action had this peculiarity, that he who prosecuted it successfully, gained in his own name (altho' he might not have been personally wronged) the amount of the penalty imposed upon the offender. [4] The L. 7. pr. D. de jurisd, (2. 1.) L. 5. § 5. D. de his qui effud. (9. 3). L. 25. § 2. D. de Scto Sil. (29. 5) [5], all contain examples.

From the point of view of the reciprocal position of the litigant parties, actions were either simple or double. (*simplices, duplices, sive mixtae*). L. 37. § 1. D. de O. et A. (44. 7). L. 10. D. fin. reg. (10. 1). L. 44. § 4. D. fam. ercisc. (10. 2). L. 2. pr. D. de int. (43. 1). L. 3. § 1. D. uti poss. (43. 17)). Simple actions (which were the more common) in the very nature of things gave a single part or character — either of plaintiff or of

[1] The distinction is noted in the L. 42. D. de proc. (3. 3). In L. 30. § 3. D. de jurei. (12. 2) we read: "actio popularis, publica."

[2] L. 1. et L. 6. de pop. act.

[3] Nevertheless, the private interest was considered to a certain extent: — for instance, he who had an interest in bringing the action had the preference. "si cujus interest, praefertur." L. 5. § 5. D. de his qui effud. (9. 3).

[4] Mommsen, (Tab. Malac. p. 461), denies this peculiarity; invoking, among others, the L. 7. § 1. D. de popul. act. "Item qui habet has actiones non intelligitur esse locupletior". But those words were already interpreted by the Glossary, in combining them with the L. 82. D. de V. S., in such a way as to signify that the question, who it was that had the best right to prosecute the offender, (and who would, consequently profit by the suit) could be decided only at the moment of the litis contestatio. L. 3. D. de popul. act. — Mommsen is refuted by Dernburg; Heidelb. crit. Zeitschr. III. p. 91. As to popular actions in general, see a dissertation of Bruns, Zeitschrs. für R. Geschichte, III. p. 168, 341, 415.

[5] In our modern law, the greater part of the objects for which popular actions were brought, come within the purview of the police.

defendant, — to each of the litigants; and the plaintiff must find his demand accorded or refused, but could not be condemned, except to costs. On the contrary, in double actions, the reciprocal claims and obligations having the same purport, gave to each party the double character alike of plaintiff and defendant. [1] (L. 10. D. I. "Judicium communi dividundo, familiae erciscundae, finium regundorum, tale est ut in eo singulae personae duplex jus habeant agentis et eius cum quo agitur". L. 2. § 3. D. fam. ercisc. "In fam. ercisc. judicio, unusquisque heredum et rei et actoris partes sustinet"). It follows, that the result of the proceeding might induce the judge to condemn [2] him who first had recourse to judicial intervention — (i. e. the original plaintiff) — to either do or forbear something, as towards the original defendant. Among these double actions were reckoned the *judicia divisoria*, [3] and the *interdicta retinendae possessionis*. (Gai. IV. 160. § 7. I. de interd. 4. 15). However, the reciprocally double character of the parties affected only the substance of their rights. As to the form, he who first applied to the judge appeared as plaintiff; and if, by chance, both parties presented themselves at the same moment, it was reserved to chance to decide which should be plaintiff and which defendant. L. 2. § 1. D. comm. div. (10. L. 13. 14. D. de jud. (5. 1).

§ 91. D. — DIVISION OF ACTIONS, WITH REFERENCE TO THE SOURCES OF LAW FROM WHICH THEY EMANATED.

In this respect, actions were divided: —

I. Into civil or legitimate, (*civiles, legitimas*), and honorary.

[1] Kierulff, p. 168, note.

[2] Thus these actions were distinguished from the case of a reconventional action, inasmuch as they did not imply the existence of *two* actions and two lawsuits, and inasmuch as the respective characters of plaintiff and defendant were not determined by the will of the parties, but solely by the official act of the Judge. Sav. Syst. VI. p. 329. Unger, II. § 131, note 26; and Arndts. § 99. obs. — The latter refutes Windscheid.

[3] In these *judicia* there was no notion of partition or liquidation, unless, at the same time, rights were recognised and obligations imposed, as towards all parties.

or Praetorian, or Edilian. — (Honorarias, Praetorias, Aedilitias). § 3—12. I. de act. L. 28. D. de leg. I. (30). L. 25. § 2. D. de O. et A. (44. 7). L. 178. § 3. D. de V. S. L. 32. pr. D. ad L. Falc. (35. 2). The first were founded upon the Civil Law, properly so called; the others upon powers conferred on the authorities charged with the administration of justice. [1] "Ex legitimis et civilibus causis descendunt. Aliae sunt quas Praetor ex sua jurisdictione comparatas habet". —

II. Into actions direct or vulgar (*directas, vulgares; — utiles;* or *in factum;* [2] — according as they operated exclusively within the domain for which they had been originally formed and organized, or that they had subsequently found their basis in the practical necessity of supplying a defect in the letter of the law, by an extension *conformable to its spirit.* [3] L. 21. D. de praescr. verb. 19. 5. "Quoties deficit actio vel exceptio utilis danda est". — By the time of Justinian this distinction had ceased to have any practical importance. [4] However, the designation of "*utilis*", attached to an action, had not lost all significance; since it was by analogy with the mother-action that the effect and the consequences of the *utiles* actions were judged. L. 19. pr. D. de inst. act. 14. 3; L. 1. § 2. D. de superf. 43. 18.

[1] Sav. Syst. V. p. 61 et seq.

[2] L. 46. D. de her. inst. (28. 5). § 16. I. de leg. Aq. (4. 2). Gai. IV. 34.

[3] They might be termed "*derived*". See Wächter II. p. 417 et seq. Kierulff, p. 270, who says, justly, "Each new utilis action is, according to the conviction of the organ charged by the State to form the law, a more profound recognition of the spirit and the substance of a law. — The veritable base, the veritable foundation of the already existing action is discovered; — and thereby its scope, as to the facts which it embraces, is enlarged." It belongs, however, to the History of Law to treat this question fully, as well as that of the *actiones fictitiae, utiles,* and *in factum,* and their relation to each other. The same may be said as to the actions *in jus et in factum conceptas.* See Sav. l. c. § 215, — but especially Keller, Civ. Proc. § 32.

[4] L. 47. § 1. D. de neg. gest. (3. 5).

§ 92. E. — DIVISION OF ACTIONS, WITH REFERENCE TO THE MODE OF PROCEDURE.

Considered with reference to the divers modes of procedure, actions were either ordinary or extraordinary. (*persecutiones*). L. 178. § 2. D. de V. S.; L. 17. D. de R. C. (12. 1); pr. I. de succ. subl. (3. 13); Dig. Tit. de extraord. cogn. (50. 13). The first, — (ordinary actions) — were those in which the affair, after having been brought before the magistrate (*in jure*) and provisionally examined by him, passed into the hands of one or more judges whom he appointed, in order to receive from them its definitive solution (*judicium*). In extraordinary actions, it was the magistrate himself who decided the matter in contest. From the time of Diocletian, this extraordinary procedure had become the rule. L. 2. C. de ped. jud. (3. 3). § 1. I. de interd. "Extra ordinem jus dicitur".

There were also Interdicts, (*Interdicta*); which was the name originally given to certain ordinances, [1] which it was competent to the Praetor to pronounce, at the demand of one of the parties; and by which he commanded or forbade something. [2] Their sole effect was, that, in case of refusal of obedience, they served as a basis for the action which followed. The special purpose of interdicts was, therefore, to urgently enjoin those to whom they were addressed, to repair the wrong which they had committed, or to abstain from committing one; — shewing to recalcitrants the perspective of a suit which might expose them to considerable loss and expense. In the time of Justinian, interdicts were an ordinary proceeding, [3] the violation of which, gave

[1] The origin and historical development of the procedure in matter of Interdicts, belong to the History of Law. Possessory interdicts will be considered in the chapter on Possession. See, principally, Schmidt, das Interdicten-Verfahren der Römer, Leipz. 1853. Bethmann-Hollweg, der Röm. Civ. Proc. Bonn, 1865, T. II. p. 343—383. Keller Civ. Proc. § 74—76.

[2] Gai. IV. 139. Pr. I. de interd.

[3] Keller, Pand. I. § 84.

rise to actions, without any precedent order of the magistrate, but also without involving any penalty, — the incurring of which was, originally, its necessary consequence. § 1. I. de interd. " Nam quoties extra ordinem jus dicitur (qualia sunt hodie omnia judicia) non est necesse reddi interdictum, sed perinde judicatur sine interdictis, ac si utilis actio ex causa interdicti reddita fuisset." [*]

§ 93. F. — DIVISION OF ACTIONS, WITH REFERENCE TO THE LIBERTY OF APPRECIATION ALLOWED TO THE JUDGE.

Certain [1] actions (*actionum quaedam*) were divided into *actiones stricti juris, stricti judicii,* or *condictiones,* and *actiones bonae fidei.* § 28. I. de act. (4. 6); Gai. IV. 62. L. 5. § 4. D. de in lit. jur. (12. 3). This distinction originally concerned the greater or lesser power of the judge, as to the decision of contentions arising from legal acts. Thus, in the *condictiones* his judgment was restricted within the limits fixed by the *formula* which was referred to him by the magistrate; while actions of good faith gave him much greater latitude. [2] The distinction appeared in the formula, [3] but, evidently, was not a consequence of it. It had its origin in the intrinsic differences which characterised

The English reader will hardly need to be reminded of the affinity between the Roman *Interdict,* — in so far as its prohibitory operation is concerned, and with its penal consequences in case of disobedience, — and the *Injunction* of the Court of Chancery; while the mandatory Interdict finds its parallel in the *Order* or *Decree* of the same Court. THE TRANSLATOR.

[1] This division was not applicable to the generality of actions. It concerned only those styled *civiles in personam, ex contractu et quasi ex contractu.* Sav. Syst. V. § 218.

[2] Cic. pro Rosc. Com. c. 5: "Aliud est judicium, aliud arbitrium. Quid est in judicio? directum, asperum, simplex: si paret, H. S. ɪɔɔɔ dari oportere. Quid est in arbitrio? mite, moderatum: quantum aequius et melius id dari". § 30. I. l. "In b. f. judiciis libera potestas permitti videtur judici ex aequo et bono aestimandi quantum actori restitui debeat".

[3] Gai. IV. 47. "Quidquid ob eam rem N^{m}. N^{m}. A^{o}. A^{o}. dare facere paret oportere *ex fide bona* ejus judex", etc.

the rights themselves. Thus we see, that in Roman Law the domain of the *condictiones* was narrowed more and more, as law in general became more flexible and more malleable; — but, nevertheless, the distinction in question was still regarded by Justinian as in force, in practice; and we even find him thinking it necessary to determine, as to certain actions, the category in which they should be placed. [1] § 28. § 29. I. de act. (4. 6).

There was, finally, a class of actions, called *arbitrariae*, [2] the peculiar character of which was, that the arbiter had power to constitute himself, to a certain extent, mediator between the parties and he could pronounce a definitive condemnation only in case the defendant refused to execute, voluntarily, the sentence provisionally pronounced. ("Pronunciatio; — nisi arbitratu tuo restituat"). In that case, however, the condemnation involved, for the recalcitrant party, consequences more onerous than if he had submitted directly to the provisional judgment. (§ 31. I. de act. praeterea quasdam actiones *arbitrarias;* i. e. ex *arbitrio* judicis pendentes appellamus, in quibus, nisi arbitrio judicis is cum quo agitur actori satisfaciat, veluti rem restituat, vel exhibeat, vel solvat, vel ex noxali causa servum dedat, condemnari debeat. — In his enim actionibus, et ceteris similibus, permittitur judici ex bono et aequo, secundum cujusque rei de qua actum est naturam, aestimare, quemadmodum actori satisfieri oporteat". L. 14. § 4. D. quod met. causa (4. 2)). This provisional sentence, and the

[1] In modern law this difference no longer exists; and the greater part of the material effects which Roman Law permitted only to actions of good faith, are now applicable even to strictly formal contracts. Windscheid, § 46, notes 5 and 6, erroneously contests this. See Wächter, II. § 65. Sintenis, I. § 29, note 50. Arndts, § 100, and the authors whom he cites. As to old Dutch Law, see, Voet, ad Tit. D. de O. et A. § 13. Vinnius, ad Tit I. de act. § 28. n°. 4. " Apud nos tota haec judiciorum distinctio generali desuetudine pene deleta est, et genera actionum sic confusa, ut omnes vi et effectu nunc videantur esse bonae fidei". Huber, Nederd. Rechtsgel. Book V, kappitt. § 33. Groenewegen, de Legg. Abrog. p. 59. For French Law, see Pothier, Traité des Oblig. I. § 9. Art. 1134, C. Nap. and Marcadé on this art. Toullier, Livre III, Sect. I, n°. 195. For the Dutch Law, see art. 1374, C. civ. Deiphuis, VI, § 550.

[2] On this point, and its application to modern law, see Sav. Syst. V. § 218—225.

means of compulsion attached to it, were intimately allied with the principle, recognized in the *judicia ordinaria*, by which all condemnations, — even those which affected a specific thing, — must be resolved into the payment of a sum of money. (Gai. IV. 48). Subsequently, when the immediate execution of judgments had come into practice, the natural consequence was, that the delays and the formalities which had previously seemed indispensable to the result, soon disappeared : and that, already, in the time of Justinian, the *actiones arbitrariae* had fallen almost entirely into disuse. L. 68. D. de R. J. (6. 1). " Qui restituere, justus, judici non paret, contendens non posse restituere, si quidem habeat rem, manu militari officio judicis, ab eo possessio transfertur, et fructuum duntaxat omnisque causae nomine condemnatio fit : si vero non potest restituere, si quidem dolo fecit, quominus possit, is quantum adversarius in litem, sine ulla taxatione, in infinitum juraverit, damnandus est. Si vero nec potest restituere, nec dolo fecit, quominus possit, non pluris, quam quanti res est, i. e. quanti adversarii interfuit, condemnandus est".

Observation. The controversy concerning the basis of the *condictiones* is far from ended! — See Sav. Syst. V. 107, 511, et seq. — According to this jurisconsult, the *condictiones* were substituted for, and served to replace, rights of ownership voluntarily abandoned or accidentally lost ; — and it is therein that he finds the essence and the special character of this kind of action. The ancient doctrine (Vinnius, ad § 28, I. de act.), revived later by Heimbach (Zeitschr. für civ. R. und Proc., N. F. VI. p. 66 et seq.) and Vangerow, (I. § 139) finds the principle of the *condictio* in the unilateral character of the legal relations in the *stricti juris negotia*. I cannot concur in either of these opinions. As to Savigny, it must be confessed, that for any one who has studied the history of Usury in Roman Law, and the mode of execution which concerned it, the idea of considering the *mutuum* as the prototype of the system of contracts *stricti juris*, is really tempting! But that which argues against the theory of the illustrious author, is the excess of subtlety which it displays, and the impossibility of applying it to the various hypotheses which present

themselves, or of putting it in accord with the sources of Roman Law.

The other doctrine raises, in its turn, objections no less serious. The unilateral character of a legal act, as such and by itself, explains nothing. At any rate, in conventions which did not give rise to direct actions on both parts, (*actiones ab utraque parte directae*), but only to one direct action and one contrary action, the possibility of the eventual introduction of the latter can never have had an influence capable of causing so grave a modification of the ordinary and regular effects of the unilateral. Thus, Heimbach (l. c.) himself confesses, that, "from the point of view of their contents and their formation", bilateral agreements which come within this second category "are really unilateral, — since from the commencement they imply nothing more than the obligation to restore or to do; never that of rendering an equivalent." "Farther", (Heimbach continues) "the contract will present, from the first, in its appearance, a unilateral form; and in many cases will preserve this character to the end". But, if all this be true, how can we admit that an obligation so accidental, so foreign to the essence of the legal act, and which in law is strictly subaltern, — how can we admit that such an obligation can give a synallagmatic character to an obligation originally unilateral, and make it share all the effects of a bilateral act? Add, also, that, in all probability, contrary actions are of later origin, and were introduced only for the infrequent cases where the *rectum judicium* could not effect the purpose. L. 1. pr. D. de contr. tut. act. (27. 4). L. 18. § 4. D. commod. (13. 6).

The testimony invoked by Heimbach in support of his thesis, is very feeble. Thus, he cites a passage from Cicero, (de off. III. 17), "Praesertim quum *in plerisque* essent judicia contraria"; — but these words serve only to indicate that in the *judicia* of this kind the duty of the judge is more elevated and more extended; not that the bilateral nature of the act should form the essence of the bona fides.

Nor does Gaius (III. § 137) say that which it is sought to make him say. He does not oppose the *negotia stricti juris* to the

negotia bonae fidei, but only contracts formed by the mere consent of parties, to those in which mere consent is insufficient; and he mentions, as one of the distinctive signs of *consensual* contracts, the reciprocal obligations of the two parties towards each other. The same is true of Theophilus, paraphr. Instit. 3. T. 22. Heimbach avails himself, also, of a confused Scholion on the L. 7. D. de pact. (Basil, Heimbach, I. p. 563); but this fragment throws no weight into the scale.

I shall try, in my turn, to formulate an opinion; so far as that is possible, with our insufficient knowledge of the historical development of the system of contracts and of actions under the Roman Law. — The *condictiones* which were, perhaps, at first, the only personal actions, as they sufficed for the requirements of commerce, — still very limited at that period; (Sav. Syst. V., p. 487 et seq.) — the *condictiones*, I say, seem to have been in use, for acts and contracts of a simple kind, where the Judge, (who was often ignorant of the law), could limit his judgment to a mere *yes* or *no*, (si paret condemna, si *non* paret absolve); and where it was not only useless to give him a greater power in judging of the dispute, but where such power might often become dangerous; as, for example, in matters like the *mutuum*, — which involved the public credit.

On the contrary, the qualification *bonae fidei* was applicable:

I. To acts resulting from a situation which created, for those interested, numerous and reciprocal rights and obligations, constantly renewed; and consequently legal relations, of which the analysis, the appreciation, and the decision, were not to be effected by every chance comer, but demanded the consideration of a wise and experienced judge; "*magni judicis*", as Cicero expresses it. [1] To this group belong, in my judgment, — tutelage, partnership, mandate, incidental community, the management of the affairs of the absent, and the res uxoria.

II. To certain acts which were regarded as indispensable to the commerce of men, considering that social relations are (so

[1] See, also Top. § 66.

to speak) woven of that material; ("quibus vitae societas continetur", Cic. l. c.); and which, at the same time, had this peculiar character: — that they required, more than any others, celerity, simplicity, and mutual confidence; — whence it ensued that parties seldom had the leisure, at the moment of contracting, to consider all details; but that, for this very reason, the judge who was called, later, to consider the matter, had to decide rather what the parties had intended, than what they had said; — rather the mass of clauses and circumstances, than the separate and abstract elements of the contract; — rather, in fine, custom than positive law. — We thus encounter, here, a distinction which is not without resemblance to the difference, — so important in modern legislation, — between civil and commercial affairs. This second group would include the *emtio venditio*, the *locatio conductio*, and the *fiducia*.

The ideas which I have expressed in reference to the *negotia stricti juris et bonae fidei*, seem to be confirmed by the following coincidences. I. The unilateral character constitutes, substantially, the rule in the *condictiones*. — II. They supposed (at least originally, for the *incerti* condictiones were of later date), the demand of an object circumscribed and limited in all its aspects; while in the bonae fidei negotia the extent and the limits of the object were not invariably fixed, but required to *be* fixed by the judge; — and this is precisely what gave to his mission a more dignified character; since he was no longer a mere instrument, with no duty but that of emitting a "yes" or a "no", in answer to the formula of the magistrate, but, in some sense, a *prud'homme* and an expert, placed above the parties who had recourse to him, and summoned to end all contention relative to the case, and to unravel all its entanglements.

My manner of regarding this subject differs from that of others, in respect that they have considered as the basis and the cause, that which, to my mind, is but an external sign. Moreover, I readily avow that I give these conjectures only as apparently true; and I confess that it remains always difficult to explain, why, in admitting the criterion which I propose, the *commodat* and

the deposit should not have come within the *condictiones.* On the other hand, however, it may be remarked that the passage from Cicero, (before cited), [1] does not, in fact, mention either of these actions, in his enumeration of the objects of which Scaevola, as he states, "Existimabat fidei bonae nomen versari". Now, the deposit especially, — in which good faith plays so prominent a part, — should not have been omitted. It is, also, to be observed, that in Gaius IV. 62, the reading *commodati* is very doubtful. Consequently, it is not at all unreasonable to assume that these two contracts had originally given rise to the *condictiones;* but that, subsequently, they came to be classed among the actions bonae fidei, in order to apply to them such or such an effect proper to the latter; in the same way that, eventually, Justinian thought it right (in the contrary sense) to metamorphose the action *rei uxoriae* into an action *ex stipulatu,* for the sole purpose of rendering it transmissible to heirs.

If this opinion were adopted, there would, perhaps, be occasion to consider the L. 13. § 1. D. depositi, (16. 3), as embodying an ancient reminiscence. — See, however, Sav. V. p. 518, and Ascher, [2] — who affirms, upon slender grounds, that there did not anciently exist any action *depositi in jus concepta,* and that the deposit was made only by means of the *fiducia.*

[1] The passage of Nat. Deorum III. 30, § 74, does not mention them, either.

[2] See also Eisele die materielle Grundlage der Exceptio (Berlin 1871) p. 142; and, against Asher, Arndts, Osterreiches Vierteljahrs T. 17. p. 179.

SECTION VI.

Of Defence.

§ 94. OF CONTRADICTION AND EXCEPTION. [1] (PLEA OR DEMURRER).

He whom justice put upon his defence, might defend himself in three different ways. [2]

I. He could combat the right which the plaintiff asserted by his action, either by denying the facts on which the plaintiff founded his claim, [3] or by denying the legal consequences which he attributed to them. (absolute denial). [4]

II. He might allege facts, from which (if they were proved) it would follow that a right *had* existed, previously, — but that it had lost its legal existence. (Relative denial). [5]

[1] Sav. Syst. V. § 225—229; Kierulff, I, p. 175, and Puchta, Pand. § 93; Unger, II. § 124 et seq.; Windscheid, § § 47. 48.

[2] It will be obvious, that we speak here only of the means of defence which concern the substance of the action, and not of those which regard only the formalities of the procedure: such as the *exceptio fori*, — *procuratoria*, — *quod praejudicium non fiat*, etc.

[3] Unger, l. c. — Denial of the historical ground of the complaint. (*Verneinung des historischen Klaggrundes*).

[4] Denial of the juridical ground of the complaint. *Verneinung des rechtlichen Klagfundamentes*). Savigny includes these two denials under the name of "absolute denial". (*Absolute Verneinung*).

[5] Savigny, l. c. Says: "Relative denial". — (*Relative Verneinung*). Unger says "Qualified denial". (*Qualificirte Verneinung*).

III. Finally, he might resist the action, by alleging an independent right, [1] belonging to himself, and in virtue of which the right asserted by the plaintiff, even though well founded in itself, was estopped or annulled as to its effects. [2] This particular means of defence, originating in divers motives and circumstances, (generally of an equitable character), was designated by the Romans under the name of exception. *Exceptio*). [3] (pr. I. de Except. (4. 13). "Comparatae sunt exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit, ut licet actio qua actor experitur justa sit, tamen iniqua sit adversus eum cum quo agitur". L. 2. D. de Exc. (44. 1). "Exceptio dicta est, quasi quaedam exclusio, quae opponi actioni cujusque rei solet ad excludendum illud quod in intentionem condemnationemve deductum est)".

The first two modes of defence had this in common, — that both consisted of a denial of the present right of the plaintiff; while the third sought simply to paralyse the power of that right, without attacking its foundation. [4]

exception was founded upon an independent right belonging to the defendant; altho' this right could be asserted only by way of defence, and not for purposes of attack. This principle, assailed by some modern authors, (Bekker, Proc. Consumt. p. 63—95. Brinz, I, § 39. Windscheid, Actio. p. 226 et seq.), is justly sustained by Unger, § 125, and Arndts, § 101, note 2. That which constitutes the independent character of this right, is that the defendant finds in it the means of requiring that his adversary, who, in fact, has a right, shall abstain from making use of it, precisely as if it did not exist.

[2] Gai. IV. 116—118. pr. L. de exc. Examples: The *Jus in re* opposed to the *vindicatio*; the *exceptio justi dominii* opposed to the Publician action; the *exceptio pignoratitia* opposed to the action comm. div. L. 6 § 9, D. comm. div. 10. 3. L. 1. § 4, D. de superf. 43. 18. L. 17, D. de publ. 6. 2.

[3] By the Justinian Law, *praescriptio* is synonymous with *exceptio*. (See the titles Dig. 44. 1; —and Cod. 8. 36). The two terms are in accord with the formulae in use in the judicia ordinaria. Sav. Syst. V. p. 163, et seq.

[4] Thus, the facts alleged to demonstrate to the Judge that the pretended right of the plaintiff had no legal existence, do not find place in the idea of the exception. There is in the true sense of the term, neither *exceptio furoris*, nor *solutionis*, nor *novationis*. See Kierulff, p. 177; Windscheid, § 47, note 8. The case of the formula *in factum concepta*, — where the defendant could not strictly speaking, invoke facts posterior to the act from which the suit emanated and which was alone in question, — is the only one where the exception was indispensable to support the second mode

In their turn, the last two modes of defence presented, also, several points of resemblance. Neither contested the truth of the facts alleged by the plaintiff, nor the conclusions which he thence deduced; — both, indeed, rather presumed the truth of those facts, and for both, the manner and the moment of intervening in the suit were the same; [1] — the same, again, as to the onus of proof, [2] and often also, as to the effects which they produced. [3] — It was these points of resemblance which were the cause that, at a very early date, [4] the exact notion and the true character of the exception were lost. The nature of the various means of defence was considered to have the same basis; and upon this basis it seemed no longer necessary to attach any but an historic interest, to differences which the changes in the

of defence. See, on this point, the learned dissertation of Thon: "Zur Lehre von den in Factum Actiones". Zeitschr. für Rechtsgesch. II, p. 239—310.

[1] L. 19. C. de prob. (4. 19). L. 12. L. 13. C, de exc. (3. 36).

[2] L. 1. de exc. (44. 1). L. 9. L. 19. pr. D. de prob. (22. 3).

[3] Hence this phrase of Paul, (couched, however, in terms far too general) in the L. 112. D. de R. J. "Nihil interest, ipso jure quis actionem non habeat, an per exceptionem infirmetur". The Glossa had already added this commentary: "Sed fallit, quia si habes exceptionem pacti, et paciscamur, ut liceat petere, valet; quod non valeret, si ipso jure liberatus fuisset per pactum primum". This rule, in appearance so absolute, refers to the L. 42. § 3. D. de proc. (3. 3). Gothofredus ad h. l. Pfeiffer, Arch. für Civ. Pr. T. 38. p. 336 et seq.

[4] The confusion of names and things extends backward to the epoch of the Glossarists,—although in their day a notion of the distinction still existed.—Glossa ad L. 9. D. de exc. "Ponitur nomen exceptionis pro qualibet defensione contra intentionem" and ad L. 2. D. eod. The modes of defence were divided into exceptiones juris sive actionis, et exceptiones facti sive intentionis. The first were *exceptiones*, properly so called. (Sav. Syst. V. § 228. Unger, § 127. note 19). This confusion was augmented in the Canon Law, and in the laws of the German Empire; and also in the ancient laws of procedure of France and Holland. Voet, ad Tit. Dig. de except. n°. 4. The Code Napoleon and the Dutch legislation use the word *exception* in a sense so wide, that it includes every possible species of contradiction. See arts. 1360, 1361, 2012, Code Nap. and arts. 1967, 1969, 1858, Dutch Civ. Code, arts. 160, n°. 2, Dutch Code Proced. Carré Proc. Civ. II, p. 124: "It suffices to say, generally, that among exceptions are placed the denials founded upon default of quality, the authority of the *res judicata*, compensation, *payment* and prescription". The author of the Project of 1820 enumerated, also, in one phrase, among peremptory exceptions: "Exceptions by payment, — by remission of the debt, — by prescription, — by arrangement, — by novation, — and by judicial decision!"

mode of procedure had rendered superfluous. [1] This view was altogether erroneous. Although, in procedure, that defence may be called and treated as an "exception", which consisted in opposing to facts alleged by the plaintiff other facts which destroyed the basis of the complaint, it is not the less evident, that there always was and will be an enormous difference between the defence which utterly destroys the right of action, and that which only temporarily arrests its effect. [2] In the first case, there remains nothing which is capable of ulterior development; while in the second there is but a temporary obstacle, which may be removed if the circumstances are changed. It is therefore evident, that all legislation which recognizes a distinction between the nullity and the annullibility of acts, establishes the difference between direct and indirect means of defence; and this difference cannot fail to make itself felt, whatever the forms of procedure, and although the limits of the applications of principles among the Romans differed, in certain cases, from those fixed generally by modern legislation. [3]

Kierulff, p. 182, says very truly: "He who regards the exception only as a corrective and an antithesis of the Roman Civil Law, which was treated *stricto jure*, takes a narrow historical view; or, to speak more correctly, a view contrary to history, and which ignores completely the spirit of the later Roman Law as well as of modern law".

[2] L. 95. § 2. D. de sol. (46. 3). L. 27. s. 2. D. de pact. (2. 14). Sav. Syst. V. p. 157. 166. Kierulff, p. 176. note. In ancient Roman Law, the essence of the exception was shown in the formula, in which it was inserted by way of reserve or limitation of the condemnation. "Condemna, si inter Am. Am. et Num. Neg. non convenit ne pecunia peteretur". (Gai. IV. 119, 126. L. 2. pr. D. de exc.) However, when the defendant had really a right to the exception, its insertion, although desirable for greater precaution, was not always necessary. "Bonae fidei judiciis inest doli mali pacti exceptio". The Praetor might even refuse to allow the action, if the ground of the exception was proved during the instance *in jure*. L. 7. § 6. D. de Scto Maced. (14. 6). L. 3. pr. et § 5. D. de jurei. (12. 2). L. 21. sol. matr. (24. 3). L. 80. § 5. D. de leg. I. L. 9. D. de resc. vend. (18. 5). Fragm. Vat. § 94. — After the suppression of the judicia ordinarie, the exception, in the sense of the ancient forms, disappeared; but, at bottom, there was nothing changed as to its essence. Sav. l. c. Windscheid, § 47, note 8. Arndts, § 101, note 1.

[3] See a series of examples, in Unger, § 124, note 20. I speak here only of the influence exercised, among the Romans, by the different modes of extinguishing an obligation, according as the extinction was effected by an *acceptilatio* or by a *nudum pactum*,

The exception, then, in its proper acceptation, was an independent defence, resting upon a right belonging to the defendant, and the effect of which was to paralyse, wholly or partially, for ever or for a certain time, the force of a claim well founded in itself, advanced by the plaintiff. L. 22. D. de Exc. 44. 1. "Exceptio est conditio, quae modo eximit reum damnatione, modo minuit damnationem." The following is, then, the veritable aspect of this means of defence: — The complaining party (it was not denied) possessed the right which he asserted, taking account only of the allegations which he submitted to the judge from his own point of view; but, on the contrary, when the affair was thoroughly examined in all its bearings, and all the concomitant circumstances considered, it appeared that the plaintiff's action, although seemingly well founded, was opposed to equity; — that superior expression of true justice. The law had, therefore, to oppose to the plaintiff's right a counter right of the defendant; — so that the interested and inequitable claim of the former, instead of being recognized and confirmed, was held in check by the just right of the defendant.

and of the consequences of the principle, rejected by modern legislation, — *ad tempus non potest deberi.* § 3. I. de V. O. "Servitutes, — neque ex tempore, neque ad tempus constitui possunt". L. 4. pr. D. de serv. (8. 1).

[1] No one has better explained the nature and essence of the *exceptio* than Kierulff, p. 178; and I think it best to reproduce the entire passage; — the more so that Kierulff's work is difficult to obtain. "He who submits to the judge facts which justify the claim that he advances, has, by this visible proceeding, established his right in the eyes of the Judge. But this right reveals itself as merely apparent, — as a simulacrum of right, — *prima facie justum*, — if the assertions of the adverse party prove that the plaintiff has restricted himself, in the statement of his case, exclusively to elements which would serve his own interests, and has omitted to state the facts of the case in their totality, or to reveal the general mass of circumstances legally relevant, belonging to the matter to be judged. This partial and selfish conduct destroys the force of the plaintiff's claim. The judge cannot fail to see, how he who should have stated the case in a manner to shew its entire character, has neglected this duty, and restricted himself, (intentionally or otherwise), to presenting it under one aspect only, and that the aspect favorable to his own pretentions. This obligation of completeness, the plaintiff had assumed by the character, the basis, and the purport of his attack, — of his action". And again, p. 181: — "He has a right, — but in view of the entire question

§ 95. OF THE VARIOUS KINDS OF EXCEPTIONS. (PLEAS, OR DEMURRERS).

With reference to their *origin* exceptions were divided into *civiles, pretorias, vulgares, utiles* and *in factum*. (Gajus, IV. 118: "Exceptiones alias in Edicto praetor habet propositas, alias causa cognita accommodat, quae omnes vel ex legibus, vel ex his, quae legis vicem obtinent, substantiam capiunt, vel ex jurisdictione praetoris proditae sunt". § 7. I. de exc. (4. 13). L. 4. § 16. § 32. D. de d. m. exc. (44. 4). L. 21. D. de praesc. verb. (19. 5)).

With reference to their *effects*, there were exceptions peremptory or perpetual, and temporary or dilatory: *perpetuae, peremtoriae, temporales, dilatoriae* (Gai. IV. 120. § 8—12. I. de exc. L. 2. § 4. D. eod. (44. 1)). The first were those, which rejected and destroyed for ever, either wholly or in part, the right to which they were opposed. ("Quae semper agentibus obstant, et semper rem de qua agitur perimunt." § 9. I. 1.). Dilatory exceptions, on the contrary, obstructed only temporarily the course of the suit; — the obstacle being removed, the claim resumed its force. [1] ("Ad tempus nocent, et temporis dilationem tribuunt").

A third class of exceptions was formed by *exceptiones personae cohaerentes* and *exceptiones rei cohaerentes, in rem*, — according as they were or were not exclusively attached, or opposed, to specified persons. (§ 4. I. de replic. (4. 15). L. 7. L. 19. D. de exc. L. 2. § 2. D. de d. m. exc. (4. 4). L. 3. D. de exc. rei vend. (21. 3). L. 11. C. de exc. (8. 36)). There were, notably, exceptions so closely attached to certain persons, (*privilegium personae, personale beneficium*), that they could be invoked only by those

and the relations of the parties, he has only a narrow or restricted right, (*jus strictum*) which is opposed to true justice, (*aequitas*), and remains, for this reason, in the position of an abstract right; — that is to say, inefficacious, incomplete, imperfect".

[1] By the ancient Law, nevertheless, when the exception referred to the contents of the *intentio*, there was litis *consumtio*. In the Justinian Law, this was no longer the case. Gaius, IV. § 123. § 10. I. de exc. Sav. Syst. V. 227. u.

to whom they were specially accorded, — either by reason of particular circumstances or qualities, or from special relations between themselves and the plaintiff; — or could be opposed only to the plaintiff and some of his successors. Such were the *exceptio pacti in personam*, and those founded upon the *beneficium competentiae*, or the *cessio bonorum*., (L. 22. L. 57. § 1. D. de pact. (2. 14). L. 63. § 1. D. pro socio (17. 2). L. 7. pr. D. de exc. L. 24. § 1. L. 25. D. de R. J. (42. 1)). But exceptions of this kind were altogether special; [1] for the great majority of exceptions were so closely allied to the right of action, that they were available not only for the persons who had originally incurred the obligation, but also for their successors, whether *in jus* or *in rem*, and for every one who was bound for them; — as, on the other hand, they could, generally, be opposed to whoever sought to assert the right which it was the purpose of the exception to dispute. L. 3. pr. D. de exc. rei vend. (21. 3). L. 9. § 2. L. 11. § 9. D. de exc. rei jud. (44. 2). L. 12. D. de div. temp. praescr. (44. 3). L. 4. § 27. § 33. D. de d. m. exc. L. 14. § 1. D. comm. div. (10. 3). L. 5. pr. D. de lib. leg. (34. 3). L. 9. § 3. D. de Scto Maced. (14. 6). L. 13. pr. D. de min. (4. 4).

An exception of a very extended character, — inasmuch as the greater part of those which relate to the ground of the action might take this form, — was that which was termed "exceptio doli generalis sive praesentis". [2] It was founded upon the assumption that the plaintiff, whatever right he might previously have had, was acting inequitably in asserting it by process of law, under the then existing circumstances. (L. 2. § 5. de dol. mal. (44. 4). "Et generaliter dicendum est, ex omnibus in factum

[1] Sav. Syst. V. p. 177 et seq. Puchta, Vorles., § 94.

[2] In this form, the exception was the means by which the judge could take into account all the grounds of defence, even though they had not been expressly mentioned in the formula. "Dolo facit quicumque quod quaque exceptione elidi potest, petit." L. 4. § 5. D. de d. m. exc. Arndts, § 102, obs. 2. Puchta, l. c. Dernburg, Compensation, p. 177 et s.

exceptionibus doli oriri exceptionem, quia dolo facit quicumque id quod quaqua exceptione elidi potest, petit. Nam etsi inter initia nihil dolo malo fecit, attamen nunc petendo facit dolose." L. 2. § 3. eod. "Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit. Licet enim eo tempore, quo stipulabatur, nihil dolo malo admiserit, tamen dicendum est, eum cum litem contestatur, dolo facere, qui perseveret ex ea stipulatione petere. Etsi cum interponeretur justam causam habuit, tamen nunc nullam causam idoneam habere videtur"). One of the applications of this principle, was that he who was summoned to make restitution or delivery of a thing, could, by means of such an exception, refuse to do it, so long as he had not obtained satisfaction in respect of counter pretentions [1] which he had himself advanced with reference to the same thing. L. 4. § 9. L. 14. D. de d. m. exc. L. 50. § 1. D. de her. pet. (5. 3). L. 13. § 8. D. de act. emt. (19. 1).

The exception *doli specialis sive praeteriti,* [2] (differing from that *doli generalis*), was founded upon a fraud alleged to have been committed before the commencement of the suit, and which the defendant considered as authorising him to resist it. L. 2. § 1. D. de d. m. exc.

But the reciprocal relations of the litigant parties were susceptible of other developments. In fact, the independent right of the defendant, as it was asserted in the exception, might, in its turn, be disputed by the plaintiff; — whether he contested the present right of the defendant, or himself asserted yet another right which neutralised that of his adversary. This latter mode of contradiction, which was called replication, and is still so called in English procedure, ("quia per eam replicatur atque resolvitur vis exceptionis," Gajus, IV. 126), was, in reality, as appears in the L. 22.

[1] As to the *jus retentionis* and its foundation, see Puchta, l. c.; Lenz. Weisk. R. L. IX, p. 382; Arndts, l. c., note 3.

[2] The formula set forth, also, this difference: — 1. "Si in ea re nihil dolo malo A^i. A^i. factum est." 2. "Si in ea re nihil dolo malo A^i. A^i. factum sit *neque fiat.*" L. 2. § 1. D. h. l.; Gaius, IV, 119.

§ 1. D. de exc., an exception to the exception; ("*exceptionis exceptio*"); [1] inasmuch as it was destined to weaken, by way of exception, the right of exception of the defendant. [2] L. 2. § 1. D. h. l. — As to their origin, replications as well as exceptions were known as either civil or pretorian. [3].

The replication, in its turn, might form the object of a fresh contradiction, offered by the defendant, and similar to that which the plaintiff might oppose to the exception. If this contradiction was founded upon an alleged independent right, it was called *duplicatio*. [4] This was, again susceptible of being encountered by a *triplicatio*, and this last by a *quadruplicatio*, — and so onward. L. 2. § 3 D. b. l. Gaj. 129. "Quarum omnium adjectionum usum interdum etiam ulterius quam diximus varietas negotorium introduxit."

[1] In the formula, the replication was expressed by *aut si*. The judge was asked to condemn, if he considered either that the defendant's independent right did not exist, (*si non*), or that such right had been destroyed by another right. (*aut si*). Gaius, IV, 126. D. de Proc. L. 32. § 2. D. ad Sctum Vellej. (16. 1). L. 7. § 1 en 2. D. de curat. L. 48. fut. (27. 10). Keller, Civ. Proc. p. 148. Rudorff, Röm. Rechtsgesch. II, p. 113.

[2] In modern procedure, the name of replication is given to every contradiction of the allegations of the defendant. Sav. Syst. V. p. 194 et s.; Unger, II. § 126, note 3; Huber, Heedendaagsche Rechtsgeleerdheid, L. V. chap. 22: "*wesende replijk niet anders als wederlegginge van antwoordt*". (The replication being nothing else than a refutation of the answer of the defendant.) Van der Linden, Jud. Praktijk, T. II, p. 173 et s. Art. 144, 146. Code de Proc. Neerl.

[3] Sav. l. c. p. 191.

[4] As to the expressions replicatio, duplicatio, et triplicatio, see Keller, Litis Contest., p. 335, 341. Sav. Syst. V, p. 193.

SECTION VI.

Of the extinction of actions and of exceptions.

§ 96. OF EXTINCTION IN GENERAL.

Independently of the extinction of the right itself forming the basis of an action, — of the satisfaction which the plaintiff might obtain accidentally, — and of the modifications occurring in the state of facts existing as between the parties, [1] the action (alone) was extinguished:

I. By the death of one of the parties.

II. By a concurrence of actions; in which case the claim obtained satisfaction by the bringing of another action tending to the same end.

III. By prescription.

§ 97. DEATH OF ONE OF THE PARTIES.

A right, either from its intrinsic nature, or in virtue of an agreement or a grant, might attach to only one specified person, without preventing the suit founded upon it from being transmissible

Sav. Syst. V. § 230.

to heirs, actively and passively. [1] On the other hand, the right on which an action was founded might continue to exist, and yet not be transmissible, by reason of the successor's lacking an attribute or a quality which was indispensable to its effective assertion. [2]

The general rule was, that an action, from the moment that the right to it had accrued on the part of any person, passed to heirs and against them. — There were excepted:

I. On the side of the person having the right, those which, although apparently having a pecuniary advantage for their object, could not, nevertheless, be regarded as affecting rights of property [3] which were transmissible to heirs; because their chief

[1] It was thus that the action founded upon a *pactum personale* passed to heirs, when an act had been executed which was contrary thereto; and the same as to actions founded upon partnership or agency. L. 26. pr. D. mand. (17. 1). " Mandatoris morte solvi mandatum, sed obligationem aliquando durare." L. 6. § 6. D. his qui not inf. (3. 2). " Heres neque in tutelam, neque in societatem succedit, sed tantum in aes alienum defuncti." L. 65. § 9. D. pro soc. (17. 2). Kierulff, p. 216, note 2.

[2] Example: — The *reivindicatio* could not be exercised against an heir who was not in possession of the thing, — nor any other real action which presumed possession by the defendant, or the power of restitution. L. 42, 52, 55. D. de R. V., (6. 1). — Keller, Pand. I. § 82. — I cannot, however concur in the opinion of those who think that there can never be any occasion to speak of the extinction of an action by death, but that it must always be regarded as an extinction of the right itself. (Windscheid, Actio, § 5. Wächter, § 68, note 1. Unger. § 118, note 1.) I think rather, that, except in the rare cases where the right is personified in the action, the failure of transmission of the former to the heirs does not prevent the right from continuing to exist *in abstracto*, although deprived of all efficacy. It is as if the law said to the heir; — " your predecessor had an established right, which he could have maintained by means of an action; — he did not see fit to do so, and now, in this special case, the *right* of action cannot originate nor be continued in your person. That which proves, above all, against Windscheid, is the *querela inofficiosi testamenti*, which rested upon the right of demanding the annulment of a testament made to the prejudice of the necessary heir. (In short upon the right of inheritance). — Now this right was so slightly identified with the action, that a simple menace of bringing suit effected its transmission to heirs; — while, in addition, it cannot be pretended that the *querela* concerned a right the exercise of which consisted only in the complaint; since the heir unjustly disinherited, if he found himself accidentally in possession of the estate, could hold it, so long as the instituted heir had not established the superiority of his right. L. 8. § 13, D. de inoff. test. (5. 2).

[3] " Injuriarum actio in bonis nostris non computatur, antequam litem contestenur." L. 28. D. de injur. (47. 10). See the Glossa, upon this passage.

object was to obtain reparation for some moral injury, or personal affront; (*vindictam spirantes*); and that no one, — not even the heir, — could be the representative of the feelings of another. [1] L. 2. § 4. D. de coll. bon. (37. 6). "Magis enim vindictae, quam pecuniae habet persecutionem." L. 10. D. de sep. viol. (47. 12). "Neque id capiatur, quod in rei persecutione sed in sola vindicta sit constitutum". It was the same with the actions called "popular," which had not to protect private interests, but the interest of the public, and should not, therefore, be recognised in the heir, as the representative of the deceased, since as a citizen, he could bring them of his own motion. L. 7. pr. et § 1. D. de popul. act. (47. 23). L. 5. § 5. D. de his qui effud. (9. 3).

II. On the side of the obligor, actions resulting from an offence, in so far as their object was merely the penalty payable to the party possessing the right, were not transmissible as against the heirs of the delinquent. The injured person could not exact from them, who were innocent, the advantage, known as a "penalty", which the law had allowed him. Gaius. IV, 112. "Est certissima regula, ex maleficiis poenales actiones in heredem nec competere." L. 1. pr. D. de priv. del. (47. 1). "Civilis constitutio est. poenalibus actionibus heredes non teneri, nec ceteros quidem successores." L. 22. D. de O. N. N. (39, 1). "In poenam heres non succedit". If the action was of a mixed nature, it passed to heirs only with the exclusion of the penal element which it contained. L. 4. § 2. D. de inc. (47. 9). Finally, when the action founded

[1] Puchta, Vorles. § 88. As to what those actions were, see Vangerow, § 145; Kierulff, p. 227. Arndts, § 104, obs. There is divergence as to the action *in factum* by reason of an obstacle interposed to the interment of a dead person. L. 9. D. de relig. (11. 7). — Sav. Syst. V. p. 200, and Puchta, Pand. § 88, combat, with reason, Mühlenbruch, who interprets the words "*miror quare constare videatur*," as if really this opinion had not been followed in practice. However, the interpretation of Mühlenbruch accords with the Glossa, which renders the words "quare constare videatur" by "*imperitis*". The Dutch Code (art. 1729) in imitation of the Code Nap. (art. 957) permits the heir to demand revocation of a donation, by reason of ingratitude, when the donor has died during the year of the offence.

upon an offence tended solely to the obtaining of damages, (a penal action termed unilateral), it could be maintained against heirs, only to the amount of the profit, — even though but temporary, [1] — which they had gained by the offence. [2] This last rule, — evidently contrary to equity, [3] — originated, no doubt, in the confusion of two very different things, — penalty and indemnity. It is therefore justly that it has been criticised, and that modern legislation has rejected it, in accordance with the example of the canon-law. [4]

Fraud committed in connection with a legal act, laid an obligation upon the heirs of him who committed it. This principle is incontestable. In fact, the damage to be repaired attached itself inseparably to the legal act itself, the consequences of which should be borne by the heirs indiscriminately, although they, personally,

[1] L. 127. D. de R. J. "Cum Praetor in heredem dat actionem, quatenus ad eum pervenit, sufficit si vel momento ad eum pervenit ex dolo defuncti." L. 17 et 18 D. quod. met. causa (4. 2).

[2] L. 38. 44. D. de R. J. and other fragments, cited by Sav. Syst. V. § 211, d.

[3] "Suppose", says Savigny, l. c., p. 50, "a rich man, who, in a spirit of revenge, burns the house of another, and who dies before an action can be commenced against him. The heir, not finding himself enriched by this crime, is protected from all responsibility, and the person wronged is deprived of all recourse for damages." Kierulff, p. 224, justifies this principle, by saying that the heir is innocent of the deed, and that the fiction of "representation" does not extend to offences.—

But here is the injustice: — that from the moment of committing the crime, the defunct had *impoverished himself* to the extent of the indemnity which he would have had to pay; but, in spite of that, the estate is transmitted to his heirs, without deduction of this sum to the great prejudice of him to whom the crime had given an irrevocable right. Ihering, (Geist des R. R. I., p. 139) explains the rule, but does not justify it. See note 49.

[4] Sav. p. 51. Vangerow, § 145, note 5; Arndts, § 104, obs. 2. — The ancient Dutch Law departed also from the Roman. See Voet, ad Tit. Dig. de fidei tut. § 6. Groenewegen, de leg. abr. ad Tit. C. si ex del. def. — For the modern law, See art. 2, French Code Crim. instr., and art. 1415, Dutch Civil Code. But if the Roman Law had fallen into error, in confounding a penalty with the reparation due for damage, the Dutch legislator has done the like, in a contrary sense, by making heirs responsible for penalties in the matter of taxes; (art. 447 Dutch Code of Crim. Instr.); — being deceived by reasons which are neither logical nor legal. Voorduin, Strafv. II, p. 695; and De Bosch Kemper, upon the article mentioned.

were free from reproach. L. 12. L. 49. D. de O. et A. (44. 7). L. 121. § 3. D. de V. O. (45. 1). L. 152. § 3. L. 157. § 2. D. de R. J. L. 7. § 1. D. dep. (16. 3). "Quamquam alias ex dolo defuncti non solemus teneri, nisi pro ea parte, quae ad nos pervenit, tamen hic dolus ex contractu reique persecutione descendit, ideoque in solidum heres tenetur". [1]

The exceptions to the rule of the transmission of actions to heirs, were applicable only in case of death before the *litis contestatio*. Litigation once begun, all actions acquired a character having somewhat of the nature of a contract; and the rule then was: "omnes actiones quae morte pereunt, semel inclusae judicio salvae permanent." L. 139. D. de R. J. L. 164. eod. L. 26. L. 58. D. de O. et A. (44. 7). L. 28. D. de inj. (47. 10).

As for actions, so for exceptions: — transmissibility was the rule. There were only a few, which, by reason of their personal nature, (*personae cohaerents*), [2] did not pass to heirs.

§ 98. OF THE CONCURRENCE OF ACTIONS. (CONCURSUS ACTIONUM, KLAGEN-CONCURRENZ) [3].

To constitute a concurrence of actions, it did not suffice that a person possessed several, of which he could make use as of so many means. It was requisite, in addition, that the different actions which he could simultaneously command, should have, among themselves, a point of contact, by reason of which they were, to a certain extent, so blended as to form but one. This point of

[1] As to the difficult, and apparently contradictory passage of the Institutes, § 1. I. de perpet. et temp. art. (4. 12), See Kierulff, p. 219; Sav. Syst. V. p. 55, et s., and Vangerow, § 115, note 4.

[2] See above, § 95, Sav. l. c., p. 204. Arndts, § 104.

[3] As to the works in which this subject is treated, see Unger, § 117, note 1. Arndts, § 105.

contact might not be the fact on which they were founded, [1] nor the analogy which they presented, nor the name that they bore, [2] nor yet the identity of the persons whom they concerned; [3] — but simply the legal claim which they advanced, [4] — the purpose which they sought to attain. As to the effects produced by the concurrence of actions, the following rules were followed —

I. If the object of the right was due but once, [5] and that object had been attained by bringing one of the actions, it was no longer possible to sustain another action for the same end. [6]

Think of the *actio furti* and the *condictio furtiva*, originating in the same fact; and, on the other hand, of the *condictio furtiva* and the *Aquilia*, originating in different facts. In the first case there was no concurrence; — in the second there was so, as to the amount of damages. L. 45—51, D. pro soc. (17. 2). L. 2. § 3, D. de priv. del. (47. 1).

[2] There was concurrence between the *reivindicatio* and the *actio commodati* or *depositi*, for the restitution of the thing to the owner; — and, on the contrary, no concurrence between the exercise of the *lex commissoria* and the demand of the price of a purchase. L. 4. pr. and § 2, D. de leg. commiss. (18. 3).

[3] If the same persons contracted, for example, three different agreements, there were three entirely independent actions. On the contrary, if two persons conjointly deceived a third, and the latter had been indemnified by one of the former, his action would be barred as against the other. Sav. Syst. V. p. 208.

[4] Savigny uses these words: — "juristiche Gegenstand oder Zweck"; legal object or purpose. Unger, l. c., says: "das praktische klag-object," — the practical object of the suit. This object must not be confounded with the material object, which might give rise to different claims, without one exercising the least influence upon the others. This shews that it was erroneously that the art. 2305 of the Project of 1820 made the concurrence of actions to consist in their pursuit of one and the same right, as to things or persons. In fact, there is, for example, concurrence between the *actio locati* and the *reivindicatio*, because the demand for restitution is the same, although these two actions do not assert the same right. Besides, the author of the project evidently confounded the concurrence with the cumulation of actions.

[5] It was otherwise when diverse causes produced as many claims, even though directed to the same object. Examples in L. 18. D. de O. et A.

[6] If the right and the corresponding obligation were totally destroyed, the exclusion of the second action followed *ipso jure*. If the right still existed as a matter of strict law, the action was rejected *per exceptionem*, upon the principle: "Bona fides non patitur ut bis idem exigatur." L. 57. D. de R. J. L. 28. D. Mand. (17. 1). L. 28 D. de act. emt. (19. 1). Sav. l. cit., p. 260; Unger II, p. 392.

L. 43. § 1. D. de R. J. "Quoties concurrunt plures actiones ejusdem rei nomine, una quis experiri debet." L. 35. § 2. D. loc. (19. 1). "Cum alterutra actione rem servaverim, altera perimatur." L. 14. § 13. D. quod met. causa (4. 2). "consumi alteram actionem per alteram, exceptione in factum opposita." L. 18. D. ad l. Aq. (9. 2). L. 53. pr. D. de O. et A. (44. 7).

II. If the plaintiff had commenced by bringing the action of the least extent, and that, consequently, his right had not obtained complete satisfaction, he might again bring his action for the surplus. [1] L. 34. pr. L. 41. § 1. D. de O. et A. "Si ex eodem facto duae competant actiones, postea judicis potius partes esse, ut quo plus sit in reliqua actione id actor ferat. Si tantundem aut minus id consequatur." [2]

III. But the obtaining of the desired result, — the efficient satisfaction of the demand, — prevented the bringing of one action after having already had recourse to another; while neither the mere commencement of the latter, [3] nor the *litis contestatio* [4] produced this effect. Thus, as the Romans have it: "ma-

[1] As to this surplus, the claims were not identical, and consequently there was no concurrence.

[2] Cujas, and in his train Savigny, Syst. V. p. 224, Unger and Arndts, l. c., propose: "*nil consequatur.*" It seems to me that, without changing the text, the passage should be interpreted thus: — The plaintiff obtains that which the second action demands in excess of the first; and even when this surplus reaches a sum equal to that which he has already obtained, this circumstance is of no importance. He always obtains "quo plus sit in reliqua actione, sive id, quod plus sit, tantundem sit aut minus." This correct explication has already been suggested by Merillius, Var. ex Cujac. III, 10; but has met little applause. Applications of the principle may be found in L. 43. et 47. D. pr. D. pro Soc. (17. 2). L. 2. § 3. D. de priv. del. L. 7. § 1. D. commod. (13. 6). L. 34. § 2. D. de O. et A. As to this last, see Sav. l. c. p. 229. With the Romans, this case presented itself especially in the application of the lex Aquilia, where it was usual to estimate the value of the thing at a time anterior.

[3] In the ancient law it was otherwise, thanks to the influence of the *litis contestatio* and the *litis consumtio*. The earlier law was abolished by Justinian, expressly as to the *correi* and tacitly as to other identical obligations. L. 28. C. de fidei, (8. 41). Sav. l. c. p. 254. In modern law there is no longer question of this concurrence arising from the proceedings.

Another question is this: — Did a judgment of condemnation, obtained in the

gis eos perceptio, quam intentio liberat." L. 32. pr. D. de pec. (15. 1). L. 18. § 3. D. de pec. const. (13. 5). L. 7. § 4. D. quod fals. tut. (27. 6).

IV. These principles were applicable, not only to the case where concurrent actions were directed against one and the same person, but also when they were directed against different persons. Then, also, it was the satisfaction once obtained by the plaintiff, which alone forbade him to pursue, a second time, the same object, by means of another action. L. 28. C. de fidej. (8. 41). "Ex unius rei electione praejudicium creditori adversus alium fieri non concedentes, sed remanere et ipsi creditori actiones integras, donec per omnia ei satisfiat." L. 8. § 1. D. de leg. I. (30). "Ut si cum uno actum sit *et solutum* (interpolated) alter liberetur."

first action, prevent the bringing of a concurrent action against the same debtor? Kierulff, p. 264, Wächter, II. p. 406, and Unger. l. c. note 25, reply affirmatively, because the plaintiff could not have any imaginable interest in bringing a fresh action, after his claims had been already recognised by the judge. Besides: "Praetoris est litis diminuere." — Savigny (§ 235 a) sustains nevertheless, the negative; but his reasoning is feeble. The insolvency of the unsuccessful defendant could be no reason for inundating him with actions and judgments without end. On the contrary, the effects of a judgment which rejected the action were not governed by the principles of concurrence, but by those which concerned the exceptio rei judicatae. Thus, for example, it might happen, that he who reclaimed, by means of the reivindicatio, something which he had lent, was defeated for lack of having sufficiently proved his ownership; but he could, nevertheless, bring, with success, the *actio commodati* without having concurrence made an obstacle,—since he had not obtained satisfaction. As to the relations between the concurrence of actions and the *exceptio rei judicatae* — (which many authors have failed to properly distinguish),—see Sav. Syst. V. p. 213; Wächter, § 67, notes 2 and 18.

[1] By the terms of the Austrian Code § 891, (See, as to this singular disposition, Unger l. c., note 32) the creditor, after having brought his action against one of the joint debtors, retained the power of attacking another only on condition of renouncing the action already brought against the former! The Prussian law falls into the contrary extreme, (P. I. Tit. V. § 433), by allowing the creditor who has begun by demanding from one or from several debtors, his or their individual portion of debt, to recur to another proceeding, and sue *de novo* and *for the whole*, one or other of them;— including, necessarily, him against whom he had before restricted himself to the individual action. The French and Dutch Codes embody a wiser doctrine. See art. 1211. Code Nap. and art. 1326. Dutch Code.

There were, however, some exceptional cases, where the choice made by the plaintiff of one of the actions to which he was entitled, caused him, from the moment of commencing it, to lose the faculty of recurring, afterward, to any of the others. L. 1. § 3. D. furti. adv. naut. (47. 5). L. 9. § 1. D. de trib. act. (14. 4). L. 8. pr. C. de cod. (6. 36).

Of Prescription. [2]

§ 99. A. — NATURE AND LIMITS OF PRESCRIPTION.

When a right of action lost its power, [3] because he who was entitled to exercise it had neglected to do so within the time fixed by the law, this extinction was called the prescription of the action. It was founded exclusively upon the inaction, — the

Wächter, II. p. 472, note 32. It is said, then, that there is *concursus actionum electivus*; an expression, which, like that of *concursus actionum successivus*, is, with good reason, criticised by Savigny. l. c., p. 213, as useless, and serving only to embroil the question. There is an example in the art. 131 of the Dutch Code of Procedure, and in art. 26 of the French Code of Procedure. — "The plaintiff who advances a claim of right, cannot afterwards be allowed to make a claim for possession."

[2] In Dutch law, the word *verjaren* — (to prescribe, — to restrict as to time) — is used sometimes for the effect, for the situation, which is the result of the inaction of the possessor of the right of action, — and sometimes for the *cause* which creates such a state of things. — Art. 1417, 2000, 2015, Dutch Code. See. also Unger, § 119.

[3] Care must be taken not to mistake for prescription the cessation (*déchéance*) of a right, in consequence of the expiration of the time positively fixed by law for its exercise. The difference is this: — In the case of cessation or lapse, there exists, first, a prescribed time; — when this time has passed, the right ceases, of itself; — while in the case of prescription (on the contrary) the right itself is unlimited as to its duration, but continuous inaction on the part of the possessor may cause its extinction. For examples in Roman Law, see Sav. Syst. IV, § 177. Wächter, II. § 117. Unger, II, § 104, and § 122, note 21, and Windscheid, § 115, note 6. — For Dutch law, see art. 311, 312, 435, 188, 1162, and 1556, civil Code. As to the important practical effects of the difference between lapse and prescription, and their distinctive characteristics, see my argument, in the *Weekblad van het Recht*, n°. 1368. Our legislators have not always remarked this difference.

continuously impassive attitude, — of the possessor of the right; (juge silentium, diuturnum silentium, jugis taciturnitas); and was justified, [1] partly by the negligence of the latter, partly by the equitable desire to protect the defendant against antiquated claims, which perhaps had no longer a real existence, but of which, after a long interval of time, it might be impossible to prove the fact and the time of extinction. L. 2. C. de ann. exc. (7. 40); "Sit aliqua inter desides et vigilantes differentia."

The ancient Roman Law did not recognise the prescription of actions. Actions were, literally, perpetual; Gaius, IV, 110. Pr. I. de perpet et temp. act. (4. 12) save, that when the praetors created a new action, they were accustomed to fix a time within which it should be brought. L. 30. § 5. D. de pec., (15. 1). L. 15. § 5. D. quod vi aut clam. (43. 24). L. 38. pr. D. de Aed. Ed. (21. 1). — Subsequently, a limit was fixed for the exercise of the right of certain civil actions, and the *speciales in rem actiones* might, generally, be repelled, by means of the *longi temporis praescriptio*, on behalf of the bona fide possessor armed with a legal title. — Dig. Tit. ne de stat. def. post. quinq. quaer. (40. 15). L. 1. §

[1] Sav. Syst, V. p. 267. Windscheid, l. c. Arndts, § 106. The legal basis and the legislative motives of prescription have been confounded, no less by writers than by legislators. Marcadé, on the art. 2219 of the Code Nap, n^{0}. 2, says: — "Two things which are quite distinct have been confounded, when, in reading, in the works preparatory to the code and in our ancient and modern authors, the development of this idea, the *wherefore* of the institution has been regarded as the institution itself." In consequence of this confusion, the presumption of payment has come to be regarded as the fundamental principle of prescription; — and hence it is that the Prussian Law, (ex. gr. P. I, Tit 9, § 568, 569) admits every species of proof to the contrary; and that the French code (art. 2275) and the Dutch (art. 2010), permit proof by means of declaration upon oath against even long prescription. Sav. Syst. V. p. 346, and Unger § 113, note 5. Directly one has set foot upon this slippery ground, all the advantage of prescription is lost. — The oath produces the "*interrogation sur faits et articles*", and eventually we arrive at the admission of every kind of proof." See Marcadé, as to art. 2278, code Nap. n^{0}. 5. — As to prescription in general, sight is lost of what Windscheid says, § 105: "Time is a power which no human spirit can resist. — That which has long existed, seems to us, by that mere fact, solid and durable; and we are painfully impressed, when we are deceived in this view."

2. D. de jure fisc. (49. 14.) Gaius III. 121. L. 1. C. de praescr. 1. t. (7. 33). — Theodosius, (424, post Chr.) was the first who decreed that all actions not already limited to a shorter time, — as well *actiones speciales in rem*, as those *de universitate*, and especially personal actions, — should be prescribed, by the lapse of thirty years; (L. I. C. Theod. de act. cert. temp. fin. (4. 14);) always excepting the action fin. regund., and the hypothecary action against a debtor. It is this prescription after thirty years which passed into the Justinian Law. The Codex reproduces the Constitution of Theodosius, — but modified by some later constitutions, which established, in certain cases, longer periods for prescription. (L. 3. C. de praescr. XXX vel XL ann. (7. 30). L. 4. L. 9. C. cod. L. 1. 3. C. de ann. exc. toll. (7. 40). It was thus that all actions the duration of which was not fixed for a shorter time, were subject to prescription in thirty years or more; — and from that time the denomination of *perpetuae* was applied to these actions, as distinguished from others. [Pr. I. (cited), compared with Gaius IV, 110.]

The following were not subject to prescription: —

I. Actions for partition, or for determining boundaries; — inasmuch as they had for their object the cessation of community, or the réestablishment of limits which had become uncertain. [1] L. 5. C. comm. div. (3. 37). compared with L. 1. § 2. C. de ann. exc. (7. 40).

II. The demand for liberty. [2] (*Vindicatio in libertatem.*) L. 3. C. de 1. t. praescr. quae pro lib. opp. (7. 22). —

III. The claim of the proprietor of the soil for the person of a serf. (*colonus.*) L. 23. pr. C. de agric. (11. 47).

[1] It would be absurd to perpetuate such a state of things. As to delay in division or partition, the rule, "*nulla societatis in aeternum coïtio est*" would be opposed to it. L. 14. § 2. D. comm. div. (10. 3). Sav. l. c. p. 409. Unger, § 109, note 8 C. Nap. art. 815. cod. Neerl. art. 1112, code Autr. § 1481. Droit Pr. P. I. Tit. 17. § 76.

[2] With us (Holland) the action in reclamation of one's civil *status* is not subject to prescription, in so far as the child is concerned. Code Nap. art. 328; Dutch code, art. 314. Aust. code. § 1481. —

IV. The action of a town against those who evaded the obligations of their class. L. 5. de praeser. XXX ann.

V. Actions concerning taxes. [1] (*Functiones publicae*). L. 6. C. eod.

Prescription is founded upon the public interest. Its purpose is to put an end to uncertain situations, and prevent complicated and fruitless actions; — "humano generi patrona praescriptio"; — whence it follows that the right cannot be renounced so long as it is not acquired by the lapse of the specified time [2]. L. 38. L. 61. D. de pact. (2. 14). "Jus publicum privatorum pactis mutari non potest." L. 45, § 1, D. de R. J. (50. 17). [*]

§ 100. B. — COMMENCEMENT, DURATION, AND END OF PRESCRIPTION.

Prescription did not begin to "run" (the time did not begin to be reckoned), but from the moment when the action might be

[1] It is the same in Anstrian Law. (Code, § 1456.) In the Netherlands, the law of 8 Nov. 1815 subjected actions on behalf of the State to a short prescription; and the same is the case with actions on behalf of Provinces and Communes, according to art. 125 of the provincial law, and art. 228 of the communal law.

[2] Sav. l. c., p. 412. Unger, § 119. Arndts l. c. 61. 3. Unterholzner (Verjähr., I. 93), asks what motive there can be, forbidding a debtor to renounce an advantage given him by the law; but the motive is evident: the renunciation would become a form and a usage, and the purpose of prescription would be completely eluded. — Prussian Law permits the renunciation of prescription, under certain conditions. (P. I. Tit. 9. § 565—567. See Koch, ad h. l.) It is not so with the French, Dutch, or Austrian code. (art. 2220 code Nap., art. 1984, Dutch civ. code, § 1502, Aust. code). The latter expressly forbids the stipulation of a longer term than that fixed by law.

[*] In English practice there is no question of the formal renunciation of prescription as a bar to an action. So far is English law from *forbidding* such renunciation, that in fact no such formality is required, or even known. The courts will take no notice of the existence of prescription, as a ground of defence, *unless it be actually pleaded*; and in actions on contract it is considered scarcely creditable for the debtor to shelter himself behind the "Statute of Limitations," unless under very special circumstances! — THE TRANSLATOR.

begun before the Judge. [That is, in English phrase, from the moment when the right of action accrued.] "Jugi silentio, ex quo jure competere coeperunt." L. 3. C. de praecr. XXX vel XL annorum. L. 7. § 1. C. eod. L. 1. § 1. C. de ann. ex. (7. 40). "Ex quo ab initio competit — et semel nata est." L. 30. C. de jur. dot. (5. 12). "Actioni nondum natae non praescribitur." Prescription was reckoned, thus, for *real* actions, from the time when the person entitled (the person possessing a right) was disturbed by another, in the domination which he exercised over a thing, in virtue of his real right. [1] For *personal* actions founded upon an obligation *not* to do, it was reckoned from the time when the illegal act was done. If, on the contrary, there was an obligation to *do*, prescription was reckoned neither earlier nor later than from the moment when an action might have been commenced with success; nor was any demand by the person entitled to claim performance of the thing to be done, nor any refusal by the party bound to perform it, necessary. [2] Neither was it

For the *rei vindicatio*, the time was reckoned from the day when some one had taken possession of the thing *suo nomine*; — for a confessory action, from the day when some one prevented, by his act, the exercise of the servitude; — for a negatory action, from the day when some one had attributed to himself a servitude upon the property of another. Against him who had possessed something with the consent of the owner, and in the character of tenant, depositary, or borrower, prescription commenced from the moment of the cessation of the legal relation, or the right, from which the holder derived his possession. L. 7. § 6. C, de praesor. XXX ann. L. 6. § 9. D. comm. div. (10. 3). L. 1. § 4. D. de superf. (43. 18). L. 1. § 4. L. 7. pr. D. uisufr. quemadm. cav. (7. 9) — Against him who possessed a thing *precario*, and who could advance no exception in justification, the action accrued immediately that the thing was thus conceded. L. 12. pr. D. de prec. (43. 26). The French and Dutch codes contain no provision as to the starting point of prescription of real actions. The art. 3614 of the Dutch Project of 1820 is as follows: — "The prescription of rights which consist solely of the faculty of preventing or forbidding something, does not begin to be reckoned until the moment when the acts which might have been prevented, have been accomplished."

[2] Some modern authors, — especially Kierulff, p, 192, and Sav. Syst. V. p. 281, — maintain that the prescription of a personal action commences only from the moment when the right is violated; — whence it would follow that it cannot commence directly on the conclusion of the agreement, but only after an extra-judicial demand for restitution, by the creditor, whenever the nature of the obligation is not such as to bind the debtor to pay at once, or to immediately restore the thing which he detains: — as, for example, in the *commodat* without any fixed term, or in case of

necessary to enquire whether the party entitled might have removed, by an act of his own, the obstacle which originally opposed itself to his action. [1] It follows from the above, that there can be no question of prescription, so long as a legal claim cannot be sustained; — whether in consequence of a certain situation which should first cease to exist, — or of a term fixed by law or by agreement, — or of a suspensive condition. L. 7. § 4. C. de praescr. XXX ann. L. 4. pr. D. de tut. et rat. distr. (27. 3).

deposit. This opinion is justly contradicted by Vangerow, (Arch. für civ. Pr. T. 33. p. 292 et seq.), whose ideas are sustained by Wächter, (II, p. 802), Unger, (l. c., p. 377) and Windscheid. (§ 108, note 4). It originates, first, in a confounding of the basis of prescription with its legal motive; — an error against which Savigny himself (p. 270) takes care to caution the reader; — and it leads, eventually, to absurd logical consequences. It is also opposed to the teachings of the sources of Roman Law. See L. 94. § 1. D. de solut. (46. 3). L. 1. § 22. D. dep. (16. 3). L. 8, § 7, D. de prec. (43. 26). Zrodlowski. Uber Nattivitat der Klage, Arch. für Civ. Praxis Tom. 52. p. 358. et seq. The System which we adopt, should be also applied to Dutch Law. See Faure, Nieuwe Bijdragen, V. p. 593 et seq.

[1] Ever since the time of the Glossarists it has been said, that prescription commenced before the right of action accrued, in case it depended exclusively upon the will of the creditor to create that right; as for ex. for the actio pignoratitia directa. (See Dissens. Domin. Ed. Hänel, p. 195). This pretended rule was expressed by the words: "Toties praescribitur actioni nondum natae, quoties nativitas est in potestate creditoris." Most modern authors reject this doctrine, as no less incompatible with the very nature of things than with the language of the texts. L. 9. § 3. D. de pign. act. (13. 7). "Omnis pecunia exsoluta esse debet aut eo nomine satisfactum esse ut *nascatur* pignoratitia actio." L. 7. § 4. c. de praescr. XXX ann. L. 1. § 1, C. de ann. exc. (7. 40). Unger, l. c., p. 409 eb 380. note 11. Thon, Zeitschr. für civ. R. u. Proc. T, VIII. p. 3. — Windscheid, § 138, note 8, admits an exception, in the case were the origin of the action does not depend upon an *act* of the possessor of the right, but upon his mere will; — an opinion which nothing justifies, and which finds no support in the sources. It is, in fact, difficult to understand why the creditor, if he is to be reproached with not creating a cause of action, should be less in fault for not having acted, than for not having spoken. But, in reality, what is imputed to the creditor, is not the neglect to give birth to the right of action, but the failure to make *use* of that right after its creation! It is quite true, that, in this way, it might happen, that a loan of money, stipulated to be paid a certain time after demand, might not be demanded till a century afterward, if the creditor should so long forbear to call upon the debtor; but it may be answered, that, in return, the creditor, by neglecting to make the demand, deprives himself of the means of reclaiming his capital; and that, if the money is lent at interest, his inaction causes him to lose the interest, in consequence of the special prescription in that particular.

L. 30. C. de jur. dot. (5. 12). L. 8. i. f. D. qui bon. ced. poss. (7. 71). When the action concerned prestations which were periodically renewed, — such as rent and rent charge, alimentary allowances, interest of money lent, etc. — the prescription for each term commenced, separately, from the date when the payment became due. L. 7. § 6. C. I. "Tempora memoratarum praescriptionum *non ab exordio talis obligationis*, sed ab initio cujusque anni, vel mensis, vel alterius singularis temporis computari manifestum est" [2]. But when the principal debt, of which the periodical payments were only the accessories, was prescribed, it was but natural that all claim to the latter should also be lost. — L. 26. pr. C. de usur. (4. 32). "Principali actione non subsistente, satis supervacuum est, super usuris vel fructibus adhuc judicem cognoscere." There is dispute as to whether the principal debt might be prescribed by non-payment of interest. [3] — I incline to think that the negative must be admitted.

[1] See art. 2027 Dutch Code, art. 919, Dutch Comm. Code.

[2] Dutch Project of 1820, art. 3601 : — "Prescription is reckoned separately, for each term."

[3] See the authors cited by Windscheid, (l. c., note 7). Savigny, (l. c., page 306), makes prescription of the capital begin as soon as the payment of interest is in arrear ;— on the ground that the mere default of payment of a term constitutes a partial violation of the right which authorizes the creditor to demand repayment of his capital. But the question does not rest there. The creditor finds, no doubt, in the default of payment of interest, the opportunity of demanding repayment of the sum lent ; but is he compelled to *use* this opportunity, under pain of losing his capital ? It seems much more natural, to consider that the interest and the capital have each a distinct character, — in this sense, that the right to one cannot be forfeited, by being generous or negligent in regard to the other ; — and if it be true that prescription is justified by a presumption of payment, this presumption cannot, equitably, be applied, except to each periodical debt, remaining unpaid. The opinion of Savigny is contrary to L. 7. § 6. C, de praescr. XXX ann., and L. 46. § 9. C. de episc. et cl. (1. 3). This latter does not contain, as Unterholzner considers, (Verjähr. II. p. 307, note 741), a privilege in favour of endowments, but simply an application of a general principle. — "Cum per unumquemque annum talis nascatur actio." The L. 8. § 4. c. de praescr. ann. XXX is so far from saying anything superfluous, that, on the contrary, it tends to dissipate the erroneous notion that the prescription of interest is inseparable from that of the capital. The Glossa, ad. h. l. had already limited the effect of the prescription to the interest alone.

The duration of prescription consisted, as a rule, of a continuous lapse of time of thirty years. — L. 3. C. de praescr. XXX ann.; L. 1. § 1. C. de ann. exc. (7. 40). From this general rule were excepted a certain number of actions which were prescribed by a longer or shorter lapse of time. [1]

Prescription ended (became final), when the last day of the term was completed, according to the calendar; — ("In omnibus temporalibus actionibus, nisi novissimus totus dies compleatur, non finit obligationem." L. 6. D. de O. et A. (44. 7)); — the day on which the action might have been, originally, instituted, counting as the first. Prescription was thus accomplished, not only for him who began it, and against the person originally entitled, but also for and against their universal and particular successors. [2]

The immediate basis of prescription is found in the prolonged inaction and negligence of the holder of the right; and the release of the debtor is only the indirect consequence of such inaction; — whence it follows that good faith is not requisite for the prescription of actions. L. 8. § 1. C. de praescr. XXX ann. — According to the Canon Law, prescription did not authorize the defendant to retain possession of a thing or a right, unless he had enjoyed such possession, in good faith, during the whole of the prescribed term. C. 20. X. de praescr. (2. 26). Innoc. III. "Unde oportet ut qui praescribit, in nulla temporis parte rei habeat conscientiam alienae." With reference to personal actions which did not concern the restitution of a thing unjustly possessed, the principle of the Roman Law remained intact. [3]

See the enumeration by Savigny, Syst. V. § 247; Arndts, § 108, note 1. Windscheid, § 110.

[2] This results, primarily, from the nature of the means derived from prescription, which is an exception: — and again, from the analogy of the *longi temporis praescriptio* and the *usucapio*. § 12 et 13, I, de usuc., (2. 6). and L, 1. § 1. c. de praescr. l. t. Sav. Syst. V. p. 362. Windscheid, § 110, note 7. Unger, § 120, note 15. Keller, Pand. § 88. Dernburg, Archiv. für civ. Prax. T. 34. p. 285. This last observes, with reason, that the Roman Law rather supposes the *accessio* tacitly, than proclaims it. —

[3] The decree of Gratianus adhered to the Roman Law. Subsequently, on the faith; it would seem, of some isolated words of Saint Augustin, the false decretals were fabri-

§ 101. C. — OF CAUSES WHICH IMPEDED PRESCRIPTION.

These causes were of two kinds.

I. Those which prevented prescription from commencing, or suspended its course so long as there existed an obstacle to its operation, — but, this obstacle once removed, allowed it to recommence, and to include the time previously elapsed, as if the suspension had never occurred. (Praescriptio dormiens. Causes suspending the course of prescription.)

II. Those which checked a prescription already partly accomplished, in such manner that a new prescription might afterwards commence, but without attaching itself to, or forming a part of that, the course of which had been interrupted. (Interruptio seu usurpatio. Interruption).

Prescription was *suspended*:—

1. With reference towards, (pupils), although they had a guardian. L. 3. C. de praescr. XXX. ann. Nov. 22. cap. 24. i. f.

2. With reference to minors [1], except as to the prescription of thirty and of forty years. L. 5. C. in quibus causis in int. rest. 2. 41.

3. In all cases where the impossibility of bringing the action originated in a disposition of law: [2] — "contra agere non va-

cated; the provisions of which were confirmed by the council of Latran. Sav. Syst. p. 328 et seq. Hildenbrand Arch. für Civ. Pr. T. 36. p. 27. seq. Windscheid § 111, notes 1 and 2. Unger, § 120 note 1. Arndts, § 109. The Austrian Law, § 1493, does not exact good faith: nor do the French and Dutch Codes require it for prescription of long date. As for short terms, they permit denial on oath. Art. 2265, 2275, Code Nap. — Art. 2004, 2010, Dutch Code. — Prussian law, misled by the influence of a writer who once enjoyed a certain authority, has fallen into errors and contradictions. See Koch, as to the P. 1. Tit. 9. § 569; and Sav. l. c., p. 347. —

[1] Lunatics and prodigals did not enjoy this favour. L. 3. C. cit. Sav. Syst. IV. p. 438. Prussian law (P. I. Tit. 9. § 540, 542) assimilates lunatics to minors, but not prodigals. The Austrian code, § 1494, considers whether they are, or are not represented, and whether prescription has, or has not commenced. The French and Dutch Codes grant the suspension only to minors and persons under interdict. (Persons deprived by law of the control of their own affairs.) Code Nap. art. 2252. Dutch Code, art. 2024.

[2] Examples: — L. 30. C. de jur. dot. (5. 12); and see as to this law, Wind-

lentem haud currit praescriptio". [1] On the contrary, ignorance of the possession of a right did not impede prescription, [2] unless for certain *actiones temporales,* in which the time counted only from the moment when the party had knowledge of his right. Tempus utile. L. 15. § 5. D. quod vi aut clam (43. 23). L. 6. D. de calumn. (3. 6.) L. 55. de Aed. Ed. (21. 2). L. 19 § 6. D. eod.)

Prescription was *interrupted* : —

I. By a citation in justice, [3] before a competent judge, [4] or before arbitrators, and the signification of the proceeding to the person cited. L. 3. C. de praescr. XXX. ann. L. 3. C. de ann. exc. " Qui obnoxium suum in judicium clamaverit et libellum conventionis ei transmiserit." L. 5. § 1. C. de rec. arbitr. (2. 56). It follows thence, that an extra-judicial summons was insufficient. [5]

scheid, § 109, note 7 ; L. 1. § 2. C. de ann. exc. " Quis enim incusare eos poterit, si hoc non fecerint, quod etsi maluerint, minime adimplere lege obviante valebant." L. 22. § 11. c. de jur. delib. (6. 30). L. 1. i. f. C. qui bon. ced. (7. 71). According to the Austrian Code, § 1496, and the Prussian law, l. c., § 517, prescription may also be suspended, by material obstacles ; — which is in opposition to the French and Dutch Codes : — Code Nap., art. 2251, (Marcadé as to this article), and Dutch Code, art. 2023. The dispositions of the latter are preferable in every particular.

[1] Prussian Law, P. I., Tit 9. § 523, says : — " Against him to whom the faculty of addressing himself to the Judge is refused, no prescription can commence."

[2] L. 12. C. de praescr., l. t., (7. 33). " Nulla scientia vel ignorantia exspectanda, ne altera dubitationis inextricabilis oriatur occasio." It is the same in the Austrian, French and Dutch Codes. Unger, § 121, note 16. The Prussian law, P. I. Tit. 9. § 512, 530, decides otherwise ; at least as to the commencement of prescription.

[3] Sav. Syst. V. p. 317 ; Schirmer, annot. 425a, on Unterholzner, § 124 ; Unger, § 121, note 26.

[4] L. 7. C. ne de stat. hom. (7. 21). The same provision in the Austrian Code, § 1497, and in the Prussian Law, l. c., § 551. According to the French and Dutch Codes, a citation, even before an incompetent judge, is sufficient ; Code Nap., art. 2246 ; Dutch Code, art. 2017 ; — but interruption fails if the citation is annulled for defect of form. (Art. 2247, Code Nap., art. 2018 Neth. Code). There is here a strange contradiction, which causes Marcadé to say, in reference to the art. 2248 Code Nap. : — " Strange to say, instead of governing these two cases of nullity by either one or the other of these ideas, — (whichever seemed to him the better), — the legislator, as if he had played at " heads or tails" for each case, separately, governs the one by equity and the other by the *summum jus.*" The Dutch Project of 1820, committed the same inconsistency.

[5] The Austrian Code, § 1497, and the Prussian Law, § l. c. § 551, 561, contain

If the action was commenced, but not pursued to the end, a new prescription [1] of forty years began to run from the moment of the last act of procedure. [2] If a condemnation was pronounced, the judgment gave birth to an independent action — (the *actio judicati*), [3] which was subject to the ordinary prescription. If, finally, the defendant gained the cause, there was, in his favour, as a general rule, the *exceptio rei judicatae,* which allowed him to dispense with the prescription. [4]

II. By a formal declaration, made verbally or in writing, in the manner fixed by Justinian, in the cases where the plaintiff was prevented from bringing his action, by the absence of the adverse party, or by some other obstacle on the part of the latter. L. 2. C. de ann. exc. (7. 40). —

III. By the recognition, — express or tacit, [5] — of the debt, by the debtor. The delivery of a new writing, [6] the payment

similar provisions. The Code Nap., art. 2244, requires "une citation en justice, un commandement ou une saisie." By the Dutch Code, a demand made by a competent officer is sufficient, as against the party who would acquire the prescription. Art. 2016 Neth. Code. Voorduin, V. p. 477, says : — "They have acted upon the principle, that any demand is sufficient, which manifests the intention of effecting the interruption." Thus, the interruption is effected, by the un-executed *purpose* of interruption : — i. e. not by an energetic *act*, but by a timid semblance of menace ! The Project of 1820 was still in the right road. —

[1] By the Justinian law. — Anciently the rule was : "Omnes actiones semel inclusae judicio, salvae permanent." L. 139, pr. D. de R. J., (50. 17).

[2] L. 9. C. de praescr. XXX ann. "Ex quo novissima processit cognitio postquam utraque pars cessavit." L. 1. § C. de ann. exc." Quadraginta annos esse exspectandos, ex quo novissimum litigatores tacuerunt." — According to Prussian Law, l. c., § 544, modified by a subsequent law, a new prescription begins from the day of the negligence of the plaintiff. See Koch, ad h. l. — By the Austrian, French and Dutch Codes (art. 2247 Code Nap. and 2018 Neth. Code), prescription is not interrupted in case of "peremption d'instance." See Unger, § 121, note 35 a

[3] Sav. l. c., p. 325 ; Unger l. c., note 38. By Prussian Law l. c., § 558, it is, also, a new prescription of 30 years which begins. — I incline to think, that by French and Dutch law, the new prescription is the same as that of the original action.

Sav. l. c., p. 322. As to Dutch Law, see Diephuis, IX, § 748.

The Project of 1820, art. 3627, well expressed this rule : — "Recognition interrupts prescription, whether such recognition has been expressed in words, or may be deduced from acts which give proof of it. (*sprekende daden*)."

[6] The interrupting effect was not attributed, without distinction, to every acciden-

of interest or of a part of the principal, or the deposit of an agreed security, (pledge), were regarded as modes of tacit recognition. L. § 5 [1]. L. 8. § 4. C. de praescr. XXX. ann. L. 19. C. de fid. inst. (4. 21).

The interruption of prescription, whether caused by a citation in justice or a recognition of the debt, was operative [2] only between those who were parties [3] to these proceedings, and their universal or particular successors. [4]

tal declaration, not made with that purpose; but only to those which were made by means of a legal act. Compare the laws cited and the L. 5. C. de duob. reis. (8. 40). "*Ad certos creditores debitum agnoverunt*, quidam ex debitoribus devotionem suam ostenderunt." Sav. Syst. V. p. 314.

[1] "Si quis eorum, quibus aliquid debetur, res sibi suppositas *sine violentia* tenuerit." Sav., l. c., and Windscheid, § 137, note 4, interpret this text as if the creditor were put in possession of the security without the concurrence of the debtor; but this seems to me inadmissible. In the first place, the comparison with the *conventio* and the *litis contestatio* would not be accurate. Again, the interruption by such means would not operate so far, by itself, that Justinian could have said of it: "*immo et illud procul dubio est.*" Finally, I do not think, that even the simple possession of the security (pledge), without the concurrence of the debtor, and in consequence of some casual act of a third party, could be considered as sufficiently constituting the exercise of a right, to allow the creditor to remain passive. It seems to me that the Glossa better understood the words "*sine violentia*," — which it thus commented: — "*Cum voluntate debitoris pignus accepit, quod debito dedit ei.*"

[2] Unterholzner, Verjähr. I. p. 444.

[3] The introduction of a personal action did not interrupt the hypothecary action against the third party possessor, but simply against the debtor himself. L. 3, C. de ann. exc. In case of correality of creditors or debtors, the interruption effected by or against one of them, operated also to the benefit or the detriment of the others." "Cum ex una stirpe unoque fonte, unus effluxit contractus vel debiti causa ex eadem actione apparuit." L. 5. C. de duob. reis. (8. 40). See art. 2020 Neth. Code.

[4] There was also said to be interruption, when the violation of the right which was the source of the action ceased: — as, for example, when the third party possessor, who was, in that character, subject to the action *reivindicatio*, lost possession, and possession passed to another, without succession, properly so called. But, it is with justice that Unger (l. c., p. 424), remarks that, there could be no question of interruption when the action itself was destroyed. It could happen only that, subsequently, the same real right might give rise to a new action of the same nature and same basis, and that the latter should be subject to a new prescription. — See also Bekker, Jahrb. des gem. Deutsch. R. T. IV, p. 199 et seq.

§ 102. D. — THE EFFECT OF PRESCRIPTION.

The prescription of the action furnished him who was cited in justice the means of protecting himself from that action, by opposing a *praescriptio* or *exceptio temporis*. (We find, also, *temporalis exceptio*, XXX vel XL annorum praescriptio, longissimi temporis praescriptio, annalis exceptio). Moreover, it is undisputed and indisputable, that the extinction of the *actio in rem* did not simultaneously destroy the right from which it emanated. Hence if the possessor in bad faith, who might repulse the owner by means of prescription, lost possession, and this possession passed to another person, the owner was still at liberty to maintain his right of ownership against the new possessor. L. 8. § 1. C. de praescr. XXX ann. (7. 39). [1] But there is controversy as to the effects of prescription when it concerns a personal action. The question is, whether it completely destroys the obligation which serves as the basis of the action, so that there remains not even a natural obligation. [2] The answer must, for many reasons, be in the negative.

"Tunc licentia sit priori domino eam vindicare."

[2] Sav. Syst. V. p. 373, states the question in these terms: "Should the more powerful or the weaker effect of the prescription of the action be admitted?" See in Arndts, § 277, an enumeration of the authors who have discussed this question. It is difficult, because:

I. The classic law recognised only the *actiones temporales*, for which the observance of a prescribed time was, generally, a condition of existence fixed in advance, in the public interest. The nature of this variation from the prescription is misapprehended by Vangerow, I. § 151, note 4. He discovers here no other distinction than between a suspensive condition and a determining condition; while the real distinction is to be found in the objective or subjective character of the delay. It is not, then, surprising, that Donellus, Comment. XVI. 8. § 21, and in his wake more modern authors, have recognised the more powerful effect, in the *actiones temporales*, and the feebler effect in the others. See amongst others Brinz, Pand. § 47.

II. Secondly, because the equivocal expression "*tempore liberatus*," which occurs so frequently, admits two explanations. (Sav. l. c. p. 375 a).

Windscheid, (Pand. § 112, note 5), demands that the partisans of the "feebler effect" should be required to justify their theory, because (according to his idea), an

I. By reason of the analogy with real actions. [1]

exceptio perpetua which should not destroy the obligation, would be an anomaly ; — but it may be answered, that the exception was aimed directly against the action only, ("quaedam exclusio, quae opponi *actioni* — solet," L. 2. pr. D. de exc.), and that moreover, its power depended, in each case, on the motives of utility upon which it was founded, and upon the greater or less resistance which it was necessary to oppose to the attack, in order to repel it. Hence it follows, that there must be a very natural difference between the cases where the exception repels the action because it ought never to have been instituted at all, and those where the action is repelled because it ought to have been instituted sooner ; for in the first case the rejection of the complaint is the legal consequence of a blamable and dishonest proceeding, (nunc petendo facit dolose. L. 2, § 5. D. de exc. dol. mal.) ; whilst in the second case it is, perhaps, only the effect of involuntary forgetfulness. Furthermore, the argument proves too much ; since it is this same peremptory exception that is opposed to real actions. It would be necessary, in my opinion, to attach more importance to such expressions as this : — "*Jus* quod jugi silentio extinctum est," (L. 4. C. de praescr. XXX ann.) were it not, on the one hand, that these expressions find their counterpart in others from which one may deduce entirely antagonistic consequences ; such as : — "submotio, extinctio *actionis*, *actiones* — vivendi non habent facultatem ;" — and, on the other hand, that the texts apply equally the words *jure suo capti* (L. 9. C. de praescr. XXX ann.) to those who have lost a real action ; although there no one pretends that the right itself is lost. Sav. l. c. p. 374. The Dutch Code presents the same confusion and the same difficulties : sometimes it speaks of the extinction of obligations, sometimes of that of actions.

[1] This analogy is disputed. The right of obligation, it is asserted, differing from the real right, really consists in this : that it permits the exaction of something from a third person, whilst the real right confers a control over a thing, quite independently of any person. It would then, be contrary to the nature of things, that the loss of the real action should entrain the loss of the right ; — but on the contrary it is reasonable that it should thus affect the obligation, which, in its nature, belongs to and is blended with the action. (Vangerow, l. c., Bekker, Jährb. für gem. Deutschen R. T. IV. p. 413). The logic of this reasoning escapes me. If the law had sought to subordinate every thing to its desire of suppressing, at any price, uncertain situations, its solicitude would surely have been first directed towards the right of property, the certainty and stability of which interest society in a supreme degree ; and this right would not have been left intact, for him whose thirty years of inaction had caused him to forfeit his right of action against the possessor. L. 8. § 1. C. l. If there had been, then, in this respect, a distinction to be made between personal and real actions, it is to the latter that "the more powerful effect" of prescription should be applied, ("ne rerum dominia incerta essent"), and "the feebler effect" to others. But, in the second place, it is by no means correct, to say that the obligation always resolves itself into the action. When Paul explains, in the L. 3. D. de O. et A., the nature of "obligation", he has not in view solely the right of complaint, but likewise the tie which imposes an obligation upon a particular person. ("ut obstringat nobis"). That which constitutes the essence of

II. Because it follows from this circumstance that the right of pledge survives the prescription of the principal action. L. 3. and L. 7. C. de praescr. XXX ann. L. 2. C. de luit. pign. (8. 11.). [1]

III. Because the purpose of prescription is sufficiently attained when the action is repelled, and that to go farther would be in excess of this purpose. In fact, for the owner of the right, the certainty that his inaction would entail the loss of the means of enforcing his right, constitutes, undoubtedly, a sufficiently powerful

obligation in general, is solely the subordination of the will of the debtor. It preserves its existence separately and independently from the action, even when it is no longer possible for the creditor to cite the debtor in justice; and consequently, it is any thing but rational, to assert that the right itself is extinguished, because one of the means of maintaining it is lost; — even were it its principal means. — Might not, indeed, identically the same reasoning be applied to the *rei vindicatio* as to personal actions? Might it not be said, with quite as much justice: — "the essence of the right of property consists of the domination that we have over a thing; but this domination becomes impossible for A, if B, has possessed the thing during thirty years. It is natural therefore, that A should have lost for ever his right of property, at least as towards B!"

[1] See the reasoning which has been employed to refute this argument, in Sav. Syst. V. p. 392. These well founded observations are by no means refuted by Windscheid, § 112, note 5), who asserts that the right of pledge survived, in every other case where the obligation for guarantee of which the pledge had been given, had not obtained satisfaction. — His allegation is inexact in its generality, Savigny. l. c., shews very plainly, that it is true only where the obligation was extinguished by the result of an inevitable accident and in a manner contrary to all the rules of eqnity; and that it could not be extended to cases such as that of prescription, if it were desired to make the total annihilation of the right appear conformable to the *jus gentium* and the *equitas*. Arndts, l. c., also recognizes, in the survivance of the right of pledge, the strongest proof in favour of "the more feeble effect" of prescription; but he argues, on the contrary, that the opinion which chooses "the more powerful effect" finds its justification in the very purpose of prescription, which would in a great measure fail, if our system were admitted. For my part, I scarcely see this difficulty; nor does it appear to me that the Romans were alarmed about it, to this extent. — As far as modern legislation is concerned, the destruction of the obligation is adopted in Prussia and in Austria. Pr. L. R. p. I. tit. 9. § 501. 502 511. 564. et p. I. tit. 16. § 377. Code Autr. § 1479. 1499. Sav. Syst. V. p. 406. Unger, § 122. note 6. In French Law, opinions differ, despite the art. 1234 C. Nap. See, Zachariae, IV. p. 516. note 2. Dalloz. XXXVI. p, 73. In Dutch Law, we have, on one side, my honoured colleague Boneval Faure, in his dissertation already cited, p. 25 et seq., and Diephuis, IX. 641; and on the adverse side my friend Opzoomer, II. p. 293 et seq. — with whose opinion I have declared my concurrence, in the review Themis, IX. p. 678 and X. p. 534, et seq.

incentive to induce him to exercise that right in due time. And this incentive would, certainly, not be weakened by the hope which he might indulge, of some day finding, in a distant future and by a fortunate chance, the opportunity of recouping himself by means of compensation; or again by the hope of seeing his debtor urged by a sense of honour to come and pay him, without compulsion, that which he no longer owes.

With regard to the liability of exceptions to prescription, — in the absence of direct proof in the sources, — [1] opinions are also divided. On the one hand, the rule is adopted: — "so long as the action exists, so long exists the exception;" on the other hand the adage: "quae temporalia sunt ad agendum, perpetua sunt ad excipiendum." There is a distinction. It must be seen: —

I. Whether the circumstance which gives birth to the exception creates at the same time the basis of an action. [2]

II. Or if he who has a right to the exception, has but that one and sole means of safety. [3]

In this latter case, the lapse of time does not cause the loss of the exception. This is not denied. In fact, a debtor could never be accused of negligence, because, not being attacked, he had not defended himself! In this case, therefore, there is no doubt that the disposition of the L. 5. § 6. D. de d..m. exc. (44. 4) must be applied to the exception: "Perpetuo competit, quum actor quidem in sua potestate habeat, quando utatur suo jure, is autem cum quo agitur, non habeat, potestatem quando conveniatur."

But, even in the case where an exception and an action exist

[1] Sav. Syst. V. p. 432. Sintenis, I. § 32. note 39.

[2] Examples: — The *actio emti*, to obtain delivery of a thing; and the *exceptio non impleti contractus*, to repel the vender who sought to exact payment before delivery; the action and exception for annulment of a contract, (L. § 9. pr. D. de Aed. Ed. 21. 1); — the action and exception *quod metus causa*, (L. 9. § 3. D. quod metus causa, 4. 2); the *condictio sine causa*, and the *exceptio doli*. Sav., l. c. p. 423.

[3] A plaintiff in revindication is nonsuited, because he does not furnish sufficient proof of his right. More than thirty years afterward, he commences afresh the same action. The defendant can invoke only the *exceptio rei judicatae*, — since the judgment had indeed repulsed his adversary, but had not recognized any right of ownership in himself. L. 15. D. de exc. rei jud. (44. 2).

simultaneously, tending to the same end, the fate of one can in no way influence the result of the other. In fact, prescription does not cause the loss of the right itself, but only of the action; — which refutes the objection of those who pretend that the "imprescriptibility" of the exception causes an extinguished right to revive in another form. It must also be remembered, that, in the hypothesis under consideration, nothing disturbs the possessor of the exception in the exercise of his right, and that his position is, in fact, as satisfactory as possible. Under such circumstances, would it not be unreasonable to insist, that, under pain of finding himself eventually deprived of all protection, he must institute a suit, — perhaps a long and expensive one, — against a person, who, far from provoking him thereto, maintains a completely passive attitude, and does not shew the slightest inclination to disturb the placid security of his repose? On the other hand, to justify the prescription of actions, there exists a reason which is wanting in the case of exceptions. It is, that, at the end of a certain time, the defendant might no longer be able to furnish the proofs of his release, — which might have been lost or suppressed. — If therefore the exception were imprescriptible, it would be precisely the person to whom it belonged who would have suffered this unfavourable consequence of his dilatoriness. — It must, then, as a general rule, be admitted that exceptions *were* imprescriptible; — but it seems necessary to except certain special cases, in which prescription of the action tended not only to fix a condition of facts under one of its aspects, but also to decide the parties to submit to the judge, and to assure, without delay, the entire legal position, under pain of losing, for ever, the faculty of causing it to be judicially investigated. [1]

[1] Keller, § 92, includes in this category the *querela inofficiosi*, the greater part of the *actiones praetoriae annales*, and the *actiones aedilitiae*. In our Dutch Law, this principle must be applied, not only in case of forfeiture, but also, for example, in the case of the art. 1547 the Civil Code. Diephuis, VII. § 281, restricts himself to saying, as to this article, "*that it might very well be different!*" In only one case, does our Code expressly recognize the principle, "temporalia ad agendum perpetua ad excipien-

It is evident that in such cases the imprescriptibility of the exception would be unfavorable to the end desired.

dum." See art. 1490 Dutch Code. — The same was true of the Project of 1820, art. 3535. As to French Law, authors do not agree. See Zacharia, l. c., p. 516, and Marcadé, on the art. 1304 Code Nap. The reasoning of the latter is scarcely plausible, and contains, moreover, false notions respecting Roman-Law. It is scarcely necessary to remark, that in Prussian and Austrian Law, both of which give to prescription the power of destroying the right itself, exceptions must, inevitably, be extinguished at the same moment. See Unger, § 125, note 46.

SECTION VII.

Commencement of judicial discussion (contention).

§ 103. INFLUENCE OF JUDICIAL DISCUSSION (CONTENTION,) UPON THE SUBSTANCE OF RIGHTS, [1] AND UPON THE LEGAL RELATIONS OF LITIGANT PARTIES.

The commencement of judicial discussion, or contention, creates between the litigant parties a new relation which resembles an agreement, [2] (although an involuntary one), to submit their differences to the consideration of the judge, and to await, tranquilly and passively, his decision. [3] L. 3. § 11. D. de pec. (15. 1). "Nam sicuti

[1] See, on this subject, Buchka, die Lehre vom Einfluss des Processes auf das materielle Rechtsverhaltniss. 2 vol. 1846, 47. Ihering (Geist des Röm. R. III. 19) very justly says: — "The preponderance of the suit made itself felt upon the very substance of the right, — notably by the effect which it produced upon every portion of that right upon which its light fell, — if it is permitted to use such an expression. In our day, this influence is scarcely observed, but it was then very clear. The same light of intelligence which was thrown first upon the suit, lighted and warmed all the elements, all the aspects, of the right, which were exposed to its rays; and these, in the course of this development, gained a marked advance over those other portions of the right, which (to continue the metaphor) remained in the shade."

[2] "Defensor tutoris condemnatus, non auferet privilegium pupilli, neque enim sponte cum eo pupillus contraxit." L. 22. D. de tut. et rat. distr., (27. 3). Windscheid (Actio, p. 62 et seq.,) has vainly endeavoured to weaken this passage. See Dernburg (Krit. Zeitschr. II. p. 341), who remarks very justly, that the whole Roman suit was a series of compulsory stipulations (covenants.)

[3] See, especially, Ihering, Geist des Röm. Rechts. I. § 12.

stipulatione contrahitur cum filio, ita *judicio contrahi,* proinde non originem judicii spectandam, sed ipsam judicati velut obligationem." By ancient Roman Law, it was the *litis contestatio* solemnly perfected [1] (it might be called "the affirmation or declaration of the contest") which had this effect of extinguishing the legal relation previously existing between the parties, [2] and replacing it by another, — while preserving intact its substance and its purport. (contents.) This negative and destructive power

[1] By *litis contestatio* was meant, in general, the act whence it resulted in an unequivocal manner, that the parties had not only the will and the intention to commence the suit, but also to pursue it to the end. The form of the declaration and the precise moment when it could be said that the contest was affirmed or avowed, differed at different epochs of Roman Law. For the period of *legis actiones*, see Festus, v⁰. *contestari:* — "Contestari est, cum uterque reus dicit testes estote. Contestari litem dicuntur duo aut plures adversarii, quod ordinato judicio utraque pars dicere solet testes estote." Under the rule of the *judicia ordinaria* the litis contestatio was regarded as established, when the Praetor, after having provisionally examined the case, had given his *formula* and sent the parties before the Judge. — Under the Justinian system, it consisted in the declaration made by both parties, before the judge, of the actual existence and the extent of their disagreement. "Lis tunc contestata videtur, cum judex per narrationem negotii causam audire coeperit." L. un C. de lit. cont. (3. 9). L. 14 § 1. C. de jud. (3. 1). "Cum lis fuerit contestata post narrationem propositam et contradictionem objectam." Keller, Lit. contest. § 1—6. Civ. Proc. s. 59. Kierulff, p. 255. Sav. Syst. VI. § 256 et s. Arndts, § 113.

[2] Gaj. III. 180. "Tollitur adhuc obligatio litis contestatione — nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione." Fragm. Vat. § 263. "Inchoatis litibus actiones novavit." L. 11. § 1. D. de Nov. (46. 2). "Fit autem delegatio vel per stipulationem vel per litis contestationem." There is still controversy as to whether the *litis contestatio* constituted a veritable novation. This dispute seems to me tolerably idle, inasmuch as two points are incontestable: I. That the same thing can be considered in justice but once: "bis de eadem re ne sit actio"; — Gaius IV. 106. 121. 131. Bekker, Process Consumt. § 24, and seq.; — and II. That neither the novation which was called "necessary" (*novatio necessaria*), nor the consumption of the primitive right, could ever damage the position of the plaintiff; so that the difference between this species of novation and a voluntary novation was well known. L. 29. D. de Nov. (46. 2). L. 86. L. 87. D. de R. J. "Non solet deterior conditio fieri eorum que litem contestati sunt: sed plerumque melior." L. 8. D. de comp. (19. 2). L. 50. § 2. D. de pec. (15. 1). L. 8. § 3. D. de fidejuss. (46. 1). Keller (Röm. Civ. Proc. p. 245. note 708) justly reproaches the adversaries of the novation with being guilty of a *petitio principii,* in beginning by attributing to novation in general all the character of voluntary novation, and in afterward starting from that point to combat the necessary novation."

of the litis contestatio, disappeared in the Justinian legislation, [1] although the compilers of the Corpus Juris have not obliterated all traces of it. But, independently of this negative power, the commencement of the judicial contention produced other effects, of a positive nature, which were in no way modified by the radical change introduced into the procedure. There passes, necessarily, between the commencement and the end of every suit, a longer or shorter period, during which changes and modifications may occur, either in the reciprocal relations of the parties or with reference to the object of litigation; and if no account were made of these changes, it might be, that the plaintiff, even while gaining his cause, had suffered undeniable damage. The necessity of obviating this danger produced, of itself, a recognition of the following principle: — In so far as no injustice was done to the defendant who had thought himself bound to oppose the action because he believed the right to be on his side, the plaintiff in whose favour the judge had decided should be replaced in the same position in which he would have found himself, if the defendant had acceded to his demand at the outset of the suit. [2]

[1] Sav. l. c. p. 25; Windscheid, Actio, p. 66; Unger, § 127. The basis of the *exceptio litis pendentis* was not that one could not prosecute the same right more than once, but that it could not be done twice simultaneously.

[2] L. 40. pr. D. de her. pet. (5. 3). L. 17. § 1. L. 20. D. de R. V. (6. 1). "Nec enim sufficit corpus ipsum restitui, sed opus est, ut et causa rei restituatur: id est, ut omne habeat petitor, quod habiturus foret, si eo tempore quo judicium accipiebatur, restitutus illi homo fuisset." L. 31 pr. D. de R. C. (12. 1). "Cum fundus vel homo per condictionem petitus esset, puto. hoc nos jure uti, ut post acceptum judicum, causa omnis restituenda sit, id est omne quod habiturus esset actor, si litis contestandae tempore solutus fuisset." L. 2. D. de usur. (22. 1). "Vulgo receptum est, ut quamvis in personam actum sit, post litem tamen contestatam causa praestetur. Cujus opinionis ratio redditur, quoniam quale est, cum petitur, tale dari debet, ac propterea postea captos fructus, partumque editum restitui oportet." L. 3. § 1, L. 38. § 7. D. eod. L. 91. § 7. D. de leg. I. "Cum homo ex testamento petitus est, causa ejus temporis, quo lis contestatur, repraesentari debet actori; et sicut partus ancillarum, sicut fructus fundorum interim percepti in hoc judicium deducuntur, ita quod servo legatorum vel hereditatis nomine interim obvenerit, praestandum est petitori." L. 35. D. de V. S. (50. 16). "Restituere is intelligitur, qui simul et causam actori reddit, quam is habiturus esset, si statim judicii accepti tempore, res ei reddita fuisset, id est ut usucapionis causam et fructum."

The application of this principle produced important legal effects. In fact, to commence, the condemnation itself was so much the more efficient, because it opposed a more energetic resistance to the influence of accidents and events, of which the plaintiff might otherwise have been the victim; and, secondly, the extent of the condemnation was irrevocably fixed and determined. [1]

Let us now see, as to the matter of the suit, an enumeration of the principal legal effects of the *litis contestatio*, whatever might be the formalities which surrounded it.

I. As the commencement of the judicial contention, it fixed the epoch at which it was to be decided whether the action of the plaintiff was susceptible of adjudication. — If the right on which he founded his action had not come into existence until after the *litis contestatio*, [2] then was applied the rule: "Non po-

[1] Sav., l. c, § 256. 260 et s. Unger, § 127. Vangerow, I. § 160.

[2] If the question was not of the right itself, but of some qualification in the person of the defendant, indispensable to his susceptibility of being condemned, it was not the moment of the litis contestatio, but only that of the condemnation, which was taken into consideration. L. 27. § 1. D. de R. V. (6. 1). L. 7. § 4. L. 8. D. ad exhib. (10. 4). L. 18, § 1. D. de her. pet. (5. 3). L. 1. § 21. D. dep. (16. 3). L. 9. § 5 D. de pign. act. (13. 7). L. 7. § 15. D. quib. ex. caus. in poss. (42. 4). Under the rule of the ordo judiciorum privatorum, it might be said that the moment of the litis contestatio served only to determine what constituted the contents of the *intentio*, and that for all else, it was the date of the judgment that had to be regarded. It is to this that the L. 30. D. de pec. (15. 1). refers; a passage well-known, but the key to which was not found until our own times: — "Quaesitum est, an teneat actio de peculio, etiam si nihil sit in peculio cum ageretur, si modo sit rei judicatae tempore. Proculus et Pegasus nihilominus teneri aiunt, *intenditur* enim recte etiam si nihil sit in peculio." Keller, lit. cont., p. 192, 193, 423; Sav. VI. p. 77. Windscheid, § 128, note 5. Unger, § 131, note 1, who believes that, in modern law, one must always be guided by the rei judicandae tempus, instead of the litis contestatio. See, also Wächter, § 71, note 84; and Schmid, Archiv. für Civ. Prax. XXX, p. 200. According to the testimony of the latter, the practice in Germany is that the judgment is rendered in favour of the plaintiff, when the condition on which his right depends is realised only during the progress of the suit. In my opinion, this is a mere question of procedure; — viz. until what stage of the suit the plaintiff is allowed to introduce new evidence. (means of proof.) For example, art. 5, n^{0}. 3, of the Dutch Code of Procedure, requires, indeed, that the citation shall declare the object and the grounds of the demand; — but this is not to say that it is forbidden, after the citation, to invoke subsequent facts, to establish the right which is claimed. If, for example, I declare,

test videri in judicium venisse, id quod post acceptum judicium accidisset." L. 23. D. de jud. (5. 1). L. 35. D. eod. L. 7. § 7. D. ad exhib. (10. 4).

II. The commencement of the judicial contest [1] interrupted prescription, — whether that of the *actiones temporales* or of the *longi temporis praescriptio;* but did not interrupt the usucapio; [2] yet the latter became useless to the possessor, because the plaintiff, gaining his suit, was replaced in the position in which he would have been, if the thing had been restored to him upon his first demand. (*Causa restituitur*).

III. Actions not transmissible to heirs, by reason of their special nature, became inheritable by means of the contractual or quasi contractual obligation created by the *litis contestatio.* [3]

expressly, in the citation, that a deceased person has made me a conditional bequest, and although I may, in fact have begun the action before my right accrued, the art. 5, above named, offers no obstacle thereto, any more than does art. 134 of the same code, — by the terms of which it is forbidden to change or to augment the object of the demand: for he who avails himself of a circumstance which has subsequently caused him to acquire the right, neither changes nor augments that object. But, (it may be said) in this way he substitutes a well founded claim for one which had no foundation. The answer is that this objection is but a begging of the question; — because the question whether a demand has or has not a foundation, depends precisely upon this: — what is required in order to *commence* the action? These observations apply to the article of Professor Gratama; — Nieuwe bijdragen voor Rechtsgeleerdheid, T. I. p. 60.

[1] Anciently, it was the *litis contestatio* which constituted this commencement; — subsequently, it was the signification of the demand to the defendant. L. 7. pr. et § 5. C. de praescr. XXX ann. "Interruptio per conventionem introducta." L. 3. C. de ann. exc. Sav. Syst. V. § 242.

[2] L. 2. § 21. D. pro emt. (41. 4). "Non interpellari usucapionem meam litis contestatione." L. 17. § 1. L. 18. D. de R. V. L. 8. § 4. D. si serv. vind. (8. 5). There is dispute, whether the Justinian Law followed the rule of usucaption or of prescription. See, on one side, Sav. Syst. VI. p. 58; and Vangerow, I. § 160. obs. 2; and to the contrary, Windscheid, § 180, note 7. The latter has in his favour the L. 2. C. de ann. exc. (7. 40), from which Savigny seeks to escape, by great subtility of reasoning. In modern legislation, the Prussian Law still maintains the difference between acquisitive and extinctive prescription. P. I. Tit. 9. § 551, 603; and Koch, ad. h. l. It is otherwise with the Code Nap. ar. 2244. In our (Dutch) law, an extra judicial demand suffices to interrupt prescription. Vide supra, p.

[3] Sav. Syst. VI. § 257 et § 262. For our (Dutch) law, see arts. 312, 313, 1729 Civ. Cod. and arts. 316, 317, 957, Code Nap.

"Sciendum est ex omnibus causis lites contestatas, et in heredem similesque personas transire." L. 58. D. de O. et A. (44. 7). L. 29. D. de Nov. (46. 2). L. 87. D. de R. J. "Denique post litem contestatam heredi quoque prospiceretur et heres tenetur ex omnibus causis." L. 139. pr. D. eod.

IV. From the moment of the *litis contestatio*, not only the defendant in bad faith was regarded as in fault, for retaining possession of the property of another despite his consciousness of wrong, but even the possessor in *good* faith, directly the claim against him was made, was bound to consider, that his persuasion of his own right might be erroneous, and that he could no longer regard the thing demanded as incontestably his own. Consequently, he could no longer alienate or neglect it, save at his own proper risk and peril. This idea [1] was expressed by the Roman jurists in the following adage: which has been often abused: "Post litem contestatam omnes incipiunt malae fidei possessores esse, quin immo post controversiam motam." [2] L. 25. § 7. D.

[1] It is only in this sense, that every defendant became a possessor in bad faith. Moreover, if he remained convinced of his right, even after the contest had begun, it would have been unreasonable to require that he should abandon a right which he believed to be his, under pain of being responsible for every sort of accident. "Non debet possessor aut mortalitatem praestare aut propter metum hujus periculi temere indefensum jus suum relinquere." L. 40. pr. D. de her. pet. L. 16. L. 87. D. de R. V. L. 10. C. de acq. poss. (7. 32). Kierulff, p. 277, note Sav. l. c. p. 96. Windscheid, § 124, obs. 5; Arndts, § 113, 6. In generalizing the decisions of the Roman jurists, modern legislators have come to regard possessors, from the very outset of the suit, as no better than robbers; — although they have, here and there, sought to attenuate the consequences of this rigorous view. Aus. Code, § 38. As to Prussian Law, See Sav., l. c. p. 96. In this respect the Dutch legislator has, also, gone much too far. See art. 588, Civil Code, compared with art. 634, n°. 3. — Opzoomer, who censures this rigour, invokes, (very justly) the authority of Doneau. He might, also, have cited one more ancient: — viz. the Glossa upon L. 25, § 7. D. de her. ped. "Quod possessor hereditatis, facta controversia, per omnia habetur m. f. possessor, nisi quod *ad fatalitatem*," and upon L. 20. § 11. D. eod ad verba: "ubi scit, incipit m. f. esse possessor," et hoc est verum quoad fructus, non quoad fatalitatem." The Dutch Project of 1820 adopted this same pseudo Roman system.

[2] "*Post comtroversiam motam.*" In this text, it is not from the moment of the *litis contestatio*, but much earlier, that the defendant began to be regarded as a possessor *mala fide*. Did this anticipation of the moment when this change took place,

de her. pet. (5. 3). L. 20. § 6 et § 11. L. 31. § 3. D. eod "Tunc enim, quia quasi suam rem neglexit, nulli querelae sub jectus est ante petitam hereditatem, postea vero et ipse praedo est." L. 2. C. de. fruct (7. 51). L. 21. et L. 36. § 1 D. de R. V. (6. 1). But the defendant in bad faith is, moreover, responsible for loss or damage arising from accident, in all cases where the same accident would not have befallen the property, if in the hands of the plaintiff; — or if the latter would have sold it, had it been restored in time. [1] L. 20. § 21. L. 40. pr. D. de her. pet. (5. 3). L. 14. § 11. D. quod met. causa (4. 2). L. 12. § 4. D. ad exhib. (10. 4). L. 12. § 3. L. 14. § 1. D. dep. (16. 3). As to personal actions, the debtor was responsible for all fault from the moment of the *litis contestatio,* even when the nature of the obligation had, previously, made him responsible only for the *culpa lata.* But he was not responsible for accident. [2] The

exclusively to the petition of hereditary right? According to Savigny, l. c., p. 94, No. — According to Windscheid, § 126, note 5, YES. — The opinion of Savigny appears to me to be correct. In fact, Ulpian bases his conclusions solely on the words: "*scire ad se non pertinere,*" contained in the senatus consultum. There would, moreover, be nothing surprising if, in this respect, as in many others the *petitio heriditatis* had been made the object of more rigorous dispositions than the *actiones speciales in rem.* In support of *his* opinion, Windscheid erroneously cites § 2, I. de off. jud. Vis: "*post inchoatam petitionem.*" These words are simply synonymous with "*litis contestatio*;" — as, is shown by the paraphrase of Theophilus "μειά γὰρ

[1] Windscheid § 124, note 9. Heidelb. Krit. Zeitschr. III, p. 261—263. Modern legislation adopts a more practical system, by taking account of only the first of these circumstances. Pr. L R. P. I., Tit. 7. § 241. Aust. Code, § 338; Neth. Code, art. 634, n°. 3.

[2] Founding upon the L. 82. § 1. D. de V. O. (45. 1). — "Et hic moram videtur fecisse, qui litigare maluit, quam restituere," the dominant opinion was, formerly, that every judicial summons constituted *per se* the creation of a *mora,* or culpable delay; — but the Glossa should have served to prevent this error; for it thus interpreted the word "litigare," in the L. 40. pr. D. de her. pet.: — "*unjust,* alias secus." Compare, also, L. 21. L. 22. L. 24. pr. D. de usuris, (22. 1). The Aust. Code § 1334, to consider only its words, seems, also to regard every summons as establishing a culpable delay. See, however, Unger, § 128, note 39. As to French and Dutch Law, see the dissertation of Mr. Knottenbelt "Over de mora van den schuldenaar," (Of the arrearage of the debtor). Leiden, 1864, p. 6. The author of that treatise has not sufficiently remarked that the French and Dutch legislators have intended to adopt, —

reason was, that the arrear (*mora*) presumed a delay which was legally condemnable; whereas the debtor, though he were condemned in the end, might have had substantial reasons for disputing a demand which he considered unfounded. L. 63. D. de R. J. (50, 17). "Qui sine dolo malo ad judicium provocat, non videtur moram facere."

V. If the action was brought against a possessor, as such, he was required to account, from the moment of the *litis contestatio*, for all that was produced by the property and every thing that was added to it; — especially fruits, natural and civil; but as to the extent of this obligation, a distinction was made: — fruits already present, were required to be restored by every possessor; — for those no longer existing, the possessor *mala fide* was bound to account, if the plaintiff might have profited by them, either by consuming or selling them, if the claim had not been resisted; but, on the contrary, the bona fide possessor had to account, only in case he had alienated them by fraud or fault. As to neglected fruits, *percipiendi*), the possessor in bad faith had to account for them, if the plaintiff could have taken them; the possessor in good faith, if he might have taken them himself. [1] L. 2. I. de off. jud. (4. 17). L. 17. § 1. L. 20. L. 62. § 1. D. de R. V. (6. 1). L. 9. § 6. D. ad exhib. (10. 4.) L. 39. § 1. D. de leg. I. (30). L. 4. C. unde vi (8. 4). L. 12. pr. D. quod met. causa (4. 2). L. 1. § 41. D. de vi (43. 16).

Finally, when the debt was in money *in genere*, [2] whether in personal actions, or in the *petitio hereditatis* the defendant

both as to the *mora* and as to bad faith, — the ideas which passed, at the time of the framing of the codes, for those of the Roman jurists. Art. 588, 630, 1273, 1274, 1480, Dutch Code. See Pothier, — "Traité des obligations, Part I. Chap. 2, n°. 133 —144. — We can but say: "*Lex dura, sed ita scripta.*"

[1] Sav. Syst. VI. p. 113, is wrong to deny this distinction. When the possessor was of bad faith, the plaintiff was entitled to be completely indemnified. See Vangerow, I. § 333; Unger, I. § 36, note 27; Windscheid, § 124, note 6.

[2] Not *in specie*. In that case, the defendant could not, during the suit, place the money, but at his peril. It follows that he was not liable for interest. —

was bound to pay interest only from the time of the *litis contestatio*, provided that he was not previously in fault. [1]

VI. It might happen, that a real action was instituted against a person as possessor, who really did *not* possess the thing. If, nevertheless, that person wilfully accepted the suit, he was, from the moment of the *litis contestatio*, treated as if actually in possession; and it was as possessor (if at all) that he would be eventually condemned. [2] L. 13. § 13. D. de her. pet. (5. 2). "Omnem qui se offert petitioni quasi possidentem teneri." L. 45. D. eod. L. 25. D. de R. V. (6. 1). "Ceterum ante judicium acceptum non decipit actorem qui se negat possidere, cum vere non possideret; nec videtur se liti obtulisse qui discessit."

VII. In the case where an alternative obligation gave a choice among several different things, the *litis contestatio* deprived the party to whom the choice was given, of the faculty of withdrawing from a choice which he had made. L. 112, pr. D. de V. O. (45. 1). "Donec judicium dictet, mutandi potestatem habebit." If several persons had to choose between a thing and its value, the litis contestatio established by one of them settled irrevocably the fate of the obligation. L. 33. D. de leg. I. (30). If there were several joint creditors, the litis contestatio, established by one

[1] L. 20. § 11. D. L. 51. § 1. D. de her. pet. (5. 3). L. 1. § 1. C. eod. (3. 31). L. 34. D. de usuris (22. 1). "Usurae Vicem fructuum obtinent et merito non debent a fructibus separari." Besides, the question, in so far as the *condictiones* were concerned, was already in dispute in the time of the Glossarists. See Hänel, Dissens. dom. § 56. p. 72; Sav. l. c. § 268, etc. As to Austrian and Prussian Law, See Sav. l. c., p. 162; and Unger, § 128, note 43. The French and Dutch legislators, have not been consistent with themselves. If an extra judicial demand suffices to put the debtor in default, it is difficult to understand why interest does not accrue from the moment of such demand! Art. 1153, Code Nap., Art. 1286, Dutch Code. It may be supposed that the ancient prejudice against interest (usury) was not without influence upon these enactments.

[2] Similar provisions exist in Prussian Law, P. I. Tit. 15. § § 12. 14; in the Austrian Code, § 377; and in the Dutch Project of 1820, art. 993; — not in the Dutch and French Codes. See, moreover, Vangerow, I. § 332, obs. 3. Windscheid, § 125, note 1, says that there is here no modification of the legal relations already existing between the parties, but that new relations are created. He forgets that the litis contestatio changed the relations, in this sense that a condemnation, from being impossible, became possible, as against him *qui non discessit*.

of them, bound the debtor towards him, in such a manner that he could not liberate himself by paying to another of them. [1] L. 16. D. de duob. reis (4. § 2). L. 57. § 1. D. de sol. (46. 3).

VIII. After the litis contestatio, the thing which was the object of an action concerning the right of ownership, or of an action for partition, could neither be alienated nor pledged. The same with a litigious action. Any alienation, effected in disregard of this prohibition, was null. [2] The defendant had nothing to do with the new purchaser, and the plaintiff could require that the thing alienated should be restored to his original adversary. This rule did not, however, extend to alienations, legally necessary, nor to certain alienations specially excepted. Gaj. IV. 117a. Fragm. de jur. Fisc. § 8. L. 25. § 6. D. fam. erc. (10. 2). L. 1. C. comm. div. (3. 37). L. 3. C. de comm. rer. alien. (4. 52). L. 2, 3, 4. C. de litig. (8. 37). Nov. 112. Cap. 1.

IX. It was, again, the moment of the litis contestatio which formed the basis of certain calculations and valuations. For example, the question to what point a person might be said to have enriched himself, (*locupletior factus*) by such or such an act. It was so, again, in actions *stricti juris*, [3] for fixing the price

[1] Vangerow, III. § 569; 2. Sav. Obl. I. p. 392. Here, the rule was applicable: Finem dandi alteri fore quoad judicium acciperetur et ideo occupantis fore actionem." L. 9. pr. D. de V. O. (45. 1). The same principle is adopted in the French and Dutch codes. — Art. 1198, Code Nap. — "The debtor has the choice of paying one or another of the joint creditors so long as he has not been restricted by proceedings on the part of one of them." Art. 1215, Neth. Code. For the case of several joint *debtors*, see p. 244, note 1.

[2] L. I. § 2. D. quae res pign., (20. 3). L. 27. § 1. D. ad Sctum Vellej. (16. 1). — As to the history of this prohibition, see Zimmermann, Arch. für Civ. Prax. XXXV, p. 431 et seq. Vangerow, I. § 163, n0. 5. In Prussian Law, P. I. Tit. II. § 383, the cession of a thing in litigation is formally authorised. The Austrian Code has also suppressed the prohibition. Unger, § 128, note 24. The Code Nap., arts. 1699, 1702, maintains the Lex Anastasiana. In Dutch Law, certain persons connected with or attached to the judicial class are deprived of the faculty of acquiring rights and actions as to which *a suit is pending* before the tribunal in which they exercise their functions. Art. 1504, Dutch Code. Art. 1597, Code Nap.

[3] See Sav. Syst. VI, 205; — who calls attention to the difference between the formula of the Lex Aquilia: "quanti ea res *fuit*," and that of the actiones bonae fidei:

of a thing in litigation; provided that the time for the fulfilment of the obligation had not been fixed, or that the debtor was not already in arrear before the litis contestatio. L. 34. pr. D. de min. (4. 4). L. 7. pr. et § 3. D. de don. i. v. et ux. (24. 1). L. 47. pr. D. de sol. (46. 3). L. 4. D. de exc. (44. 1). L. 37. pr. D. de neg. gest. (3. 5). L. 22. D. de R. C. (12. 1). L. 4. D. de cond. trit. (13. 3). L. 3. § 2. D. comm. (13. 6.) "In hac actione, sicut in ceteris b. f. judiciis, similiter in litem jurabitur: et rei judicandae tempus, quanti res sit observature, quamvis in stricti, litis contestatae tempus spectatur.

X. Finally, the litis contestatio marked the end of the time, within which, if so desired, it was possible to retract a declaration made before the judge. L. 26. § 5. D. de nox. act. (9. 4).

"quanti ea res *erit*" Gaius, IV. 47—50. L. 2. pr. et L. 27. § 5. D. ad Leg. Aq. (9. 2). As to the L. 3. D. de cond. trit. See Sav. l. c. p. 216; and Vangerow, § 160, n^{0}. 4, obs. 3. — In modern law we follow the principle which governed the actions bonae fidei; — and consequently it is the moment of the judgment which is regarded.

·] Sav. Syst. VII, p. 32.

SECTION VIII.

Of Proof.

§ 104. OF PROOF IN GENERAL. [1]

Those means were called *proofs*, which were employed by parties, in order to fix the convictions of the judge in reference to their rights: — and *proving* was the act by which a party rendered evident, conformably to legal rules, the truth [2] of the allegations which he advanced.

Proof appertains partly to the civil law, and partly to the forms of procedure. It is to procedure that it belongs, to show in what manner, at what moment, and with what formalities, the parties may make use, before the tribunal, of their means of proof. But the civil law regulates and determines — who must prove, what is the object of proof, what means of proof are admitted or excluded, and what is the force of each.

[2] By "truth," we must understand, here, that which is accepted as such, according to certain legal rules. It may be termed: — *legal* truth; — *veritas juridica, forensis*; formelle Wahrheit; relative certainty. Truth natural or material, —i. e. that which excludes the possibility of the contrary—is not to be attained in the immense majority of cases; and if it were exacted, the judge would too often be compelled to say "*non liquet.*" From the fact that "proof" can procure only legal certainty, it results that proof to the contrary must be regarded as admissible in all cases where it is not expressly interdicted. Puchta, Vorles., § 97; Unger, § 129, note 2. Jordan, Weiskes R. L., II, p. 110. — The art. 3313 of the Dutch Project of 1820 is worth citing: — none of the means of proof enumerated in art. 3311, has such force that it may not be weakened by proof to the contrary." The same rule obtains under our (Dutch) present Code, although this provision is not reproduced. Opzoomer, (upon art. 1919, n°. 1, Dutch

A. *Facts alone* could form the object of proof. The examination and the application of the *law*, — written or unwritten, — belonged to the Judge [1] Pr. I. de off. jud. (4. 17). "Inprimis illud observare debet judex, ne aliter judicet quam legibus aut constitutionibus aut moribus proditum est." L. un. C. ut quae desunt adv. (2. 11). "Non dubitandum est, si quid a litigatoribus vel ab his qui negotiis adsistunt, minus fuerit dictum, id supplere et proferre quod sciat legibus et juri publico convenire." Hence the proverb, curia jus novit.

But facts were not *all*, indistinctly, susceptible of proof. They were required to be contestable, contested, and relevant. "Frustra probantur, quae probata non relevant." L. 30. D. de prob. (22. 3). L. 6. 10, 17, 22. C. eod. (4. 19).

Those facts were termed *incontestable* which were universally known and recognized; so that he who contradicted them, was considered as actuated by mere chicanery. L. 3. § 22. D. de test. (22. 5). "Alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama, confirmat rei de qua quaeritur fidem." [2]

Those facts were considered *uncontested* which had been admitted in judicature, [3] by the parties, or by one of them; and

Code), neglecting the distinction between legal truth and material truth, must necessarily arrive at different conclusions. —

[1] This does not interfere with the utility of indicating or showing to the judge, laws affecting the matter; especially if there be question of sources with which he cannot reasonably be expected to be familiar; — as for instance, foreign laws or customs. But this exposition of a law, or of a custom, differed completely from the proof of facts, which was subject to the rules of procedure and to prescribed formalities. — Sav. Syst. I, p. 187. Windscheid, § 133, note 2. Opzoomer, annotation upon art. 3 of the Dutch Code. — See *ante* p. 36.

[2] See Gensler, Arch. für Civ. Prax. I, p. 269, who interprets this passage erroneously, as if general notoriety "alone could become the basis, in fact, of a syllogism in support of proof." Moreover, there has been a dispute, since the time of the Glossarists, as to the word "confirmare." "Non quod per se fama non sufficiat, sed respectu assertionis partis, quam assertionem fama confirmat; ergo per se. Alii dicunt: quando consonat naturae ut B. mortuum — sed regulariter non sufficit famam probare."

[3] According to the ordo jud. priv., a confession *in jure* was equivalent to a judgment, when it related to a specified sum of money. Execution could, therefore, issue immediately. "Confessus pro judicato est, qui quodammodo sua sententia damnatur."

which were, for that reason, exempt from being proved. [1] — B. Upon whom did the onus of proof devolve? [2] In general,

(L. 1.) D. de conf. (42. 2). L. 31. 56. D. de R. J. (42. 1). L. 9. C. de exc. rei jud. (7. 53). L. Un. C. de conf. (7. 53). It was otherwise when the confession was made only *in judicio*; — in which case there remained, always, a point to be decided upon by the judge, who was, nevertheless, bound by the purport of the confession. After the suppression of the *ordo judiciorum*, this second rule became general.

[1] Puchta, Paud. § 96. "Thus the judicial confession of a fact places it above the sphere of proofs. In order to render it again susceptible of proof, the confession must have been first combated and annulled." By Prussian Law, a confession is not followed by a judgment, properly so called, but by a declaration of the confession, called "*Agnitions-Resolut*," and susceptible of execution. — By Austrian Law, the judge pronounces a judgment, which, nevertheless, is not regarded as the decision of a litigation which no longer exists, but as a decree preparatory to execution. Sav. Syst. VII, p. 46; Unger, § 27, note 8. — Savigny, l. c. p. 41, also regards a confession, not as a motive which determines the judge to pronounce one way or the other, but rather as a fixing of the limits of the suit, — or as an indication of the facts as to which there is no more dispute, and which, therefore, no longer require the decision of the judge. See Unger, § 127. Windscheid, § 133, note 3, and Arndts. § 114.

The French Code (art. 1856) and the Dutch (art. 1962) consider confession as an ordinary proof. Zachariae, IV, § 749, note 7, criticizes this as contrary to the rules of logic. Marcadé, in his turn, (on the art. 1354, n°. I), seeks to justify it by the following argument: — "When I have produced witnesses whose testimony clearly establishes my allegation, am I not thenceforward dispensed from proving it otherwise? When I produce a document combining all the requisite conditions, and which plainly proves the justice of my claims, can the judge ask me for farther proof? Can it be said, as to this, that testimony is not proof and that documents are not proof?" But the answer is easy. — In the true sense of the word, there can be no litigation, except when the parties advance contradictory allegations. From the moment that one of the parties admits a point in question, all dispute is impossible, or rather it ceases on the instant, and there can no longer be any question of a decision upon a matter *in contest*, unless that designation is given to the judgment which simply states the confession and renders it executory. I have recourse to witnesses and to documents, when my right is contested and I am forced to prove my pretensions; but after confession there remains nothing to be proved; my adversary having, so to speak, pronounced judgment against himself: "sua sententia damnatur." These observations apply also to Opzoomer's remarks upon the art. 1960, Dutch Civ. Code.

[2] The result of a suit often depends upon the decision of this question. — "Non jus deficit, sed probatio." L 33. D. de test. tut. (26. 2). Hence the expression "*onus* petitoris" and "*commodum* possessoris", § 4. I. de interd. (5. 15). L. 20. D. de prob. (20. 3); and "*possessorem facere*" the last to signify that a party is dispensed from furnishing proof. L. 1. § 6. L. 5. § 10. D. de O. N. N. (39. 1).

it might be said: — "Each party must prove the facts which form the basis of the attack against his adversary; — whether of his relative denial, or of the independent defence which he opposes to the attack.

It was, then, the first duty of the plaintiff to prove the facts upon which he founded the rights that he asserted. [1] "Semper necessitas probandi incumbit illi qui agit." L. 21. i. f. D. de prob. (22. 3). L. 2. 3, 20, 23. D. L. 8. C. eod. It mattered little, whether the facts were positive or negative. He who advanced a negative, was not the less called upon to prove it, if this negation constituted the substance of an independent claim, on which he founded his action. [2] But, on the other hand, it sufficed for the plaintiff to prove that he had legally acquired the right in question, and he was not compelled to show that he had preserved it up to that moment. [3] On the contrary, it was for him who alleged that a right legally acquired had been subsequently lost, to furnish proof of his allegation. (L. 12. L. 25. § 2. D. L. 1. C. eod.) — It sufficed also, if the plaintiff established *particular* facts, which must necessarily have created his right in the absence of circumstances which do not occur in the ordinary course of

[1] The following picturesque expressions are used by Unger, § 129, note 4: — "The plaintiff seeks to effect a change in the present situation. To this end he must attack his adversary; and, to expel him from his position, he must use more force than the latter, who seeks only to maintain himself in the enjoyment of the *status quo*."

[2] The maxim was formerly, pretty generally accepted, that he who alleged a negative fact was not required to prove it: — "negativa non sunt probanda." — This idea was founded upon a mis-interpretation of the L. 2. D. h. t.: "Ei incumbit probatio qui dicit, non qui negat." The denial of the claim advanced by the opposite party was confounded with the production of a negative fact. Thus, for example, the art. 3308 of the Project of 1820 said: — "He who denies something has nothing to prove." See L. 15. and L. 25. D. h. t.; L. 10 et 99, § 1. D. de V. O. (45. 1). Unger, § 129, note 20. Windscheid, § 133, note 4.

[3] Thus he who claims something as his property, must prove that he has acquired it *a vero domino*; but need not prove that he has retained the ownership until now. Thus a creditor proves the creation of the obligation, but he need not prove that it has not ceased to exist. It is otherwise, when the right that is asserted depends *in concreto* upon the duration of certain circumstances; — for example, that of the life of a certain person. Wächter, II, p. 443, 454, note 39.

things ; — and consequently he was not required to prove either the presence *in specie* of all the *general* conditions necessary to the validity of legal acts, nor the absence of all *exceptional* obstacles which might have prevented his right from accruing. [1]

If the plaintiff did not succeed in convincing the judge, he was necessarily defeated, (non-suited), without the defendant being required to produce any proof in support of his denial. "*actore non probante, absolvitur reus.*" [2] If, on the contrary the plaintiff had proved his allegations, so far as the law required, it then devolved upon the defendant, in his turn, either to prove facts which established the extinction of the right (otherwise undisputed) of the plaintiff, or to show the existence, in his own person, of an independent right, the effect of which was to destroy or neutralise that of his adversary. L. 19. D. h. t. "In exceptionibus dicendum est, reum partibus actoris fungi oportere ipsumque exceptionem velut intentionem implere." § 2 et § 3. l. t. et L. 1. C. eod.

The rule concerning the onus of proof, as to its object, suffers derogation, when, instead of establishing the principal and decisive fact in the cause, one or other of the parties is permitted

[1] Thus the plaintiff had no need to prove the legal capacity, nor the capacity to act, of him with whom he had contracted ; nor was he bound to prove that the volition of the latter was in accord with the declaration of it that he had made ; nor yet, that the thing which was the object of the obligation was in commerce. L. 5. D, de prob. ; L. 5. C. de cod. (6. 36). Unger, l. c., pp. 451. 455. We must then censure the Dutch legislator, for having imposed upon the creditor the obligation of proving the existence of the cause of the engagement which he asserts, when this cause is not indicated in the contract. See art. 1372, Dutch Code, and Asser, § 705. A point warmly disputed, is whether the burden of proof falls upon the plaintiff or upon the defendant, when the latter alleges that the obligation upon which he is sued was contracted only on condition. If it is admitted (in accordance with our view) that a condition has no independent existence as apart from the obligation, but, on the contrary forms an integral part of it, (See supra, p. 149, note 1), it is evident that it is the creditor, who should prove that the obligation is unconditional. See, especially, Unger, § 129, obs. p. 572, et seq. v. Scheurl. Die Lehre von den Nebenbestimmungen. p. 51, seq.

[2] This is the true sense of the words *qui dicit* and *qui negat*. L. 23. C. h. t. "Actor, quod adseverat probare se non posse profitendo, reum necessitate monstrandi contrarium non adstringit, cum per rerum naturam factum negantis probatio nulla sit." L. 10. C. de non num. pec (4. 10).

to refer to other facts, from which may be deduced the truth of that which it is sought to prove : — in other terms, when the allegations of one of the parties are sustained by a legal presumption.

In such case, the relative positions, with respect to the onus of proof, are not transposed ; — there is a change only as to the *object* of proof. [1]

Legal presumptions were of two kinds. The force of some was so great that they excluded all proof to the contrary. *Praesumtiones juris et de jure ;* absolute, irrefutable presumptions.) [2] Others, (*praesumtiones juris tantum*), admitted the adversary to prove that, in the particular case and despite appearances, the inference deduced from the known fact to the unknown, was not justified. (*Refutable presumptions*). [3]

The Romans had not, on this subject, any theory, properly so called. Every thing was left to the discretion of the judge, not only in the earlier times, [4] but even at later periods. [5] L. 3.

[1] Unger, § 130, note 12. This is why the language of the art. 1598 of the Dutch Code : — " legal presumption dispenses with all *other* proof," is more exact than that of the art, 1352 of the French Code : — " legal presumption dispenses with *all* proof." Bijphuis, IX, § 345. The Project of 1820 did not class legal presumption among proofs.

[2] The Germans say : — " Qualificirte, unbedingte, unwiderlegbare Rechtsvermuthungen" : — legal presumptions, qualified, absolute, which permit no contradiction. Art. 3406, Project of 1820 : — "absolute legal presumptions" opposed to non-absolute. Example : L. 3. § 11. D. de suis et leg. hered. (38. 16).

[3] In German : widerlegbare, einfache." (presumptions which may be contradicted ; — simple presumptions). — Examples : L. 12. D. de stat. hom. (1. 5). L. 6. D. de his qui sui vel alieni jur. sunt (1. 6). L. 51. D. de don. i. v. et ux. (24. 1). L. 3. C. de apoch. publ. (10. 22). Art. 1430. Cod. Néerl.

[4] There is an example in Gellius Noct. Att. (14. 2).

[5] Zimmern, Gesch. des Röm. Priv. R. III. p. 401. Keller, Röm. civ. Proc. § 66. Bethmann-Hollweg, der Civ. Proc. II. p. 608.

§ 2. D. de test. (22. 5). "Quae argumenta [1] ad quem modum probandae cuique rei sufficiant, nullo certo modo satis definiri potest. Sicut non semper, ita saepe sine publicis monumentis, cujusque rei veritas deprehenditur; alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei de qua quaeritur, fidem. Hoc ergo solum tibi rescribere possum summatim, non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui te aestimare oportere, quid aut credas aut parum probatum tibi opinaris." L. 79. § 1. D. de jud. (5. 1). "De facto consulentibus non debent Praesides consilium impertire, verum jubere eos, prout religio suggerit sententiam proferre." Naturally, the following presented themselves as the principal means of proof: — Witnesses; — Written documents; — Affirmation on oath. [2]

With respect to witnesses, the judge was at liberty to limit the number, [3] and to appreciate the degree of credit to which they were entitled. [4] Before being heard, — (which was done, if possible, in presence of the parties), — they were bound to make oath; [5] — their depositions were then recorded. Objection could be taken to their depositions; — and also as to their impartiality. [6] anciently, the general *obligation* to give

[1] Glossa, ad. h. l., has: "i. e. quae genera probandi vel per testes, et quales, et quot, vel per instrumenta vel alia argumenta."

[2] Gellius, l. c.: "Probari apud me debere pecuniam datam consuetis modis: expensilatione, mensae rationibus, chirographi exhibitione, tabularum obsignatione, testium intercessione."

[3] L. 1. D. de test. (22. 5). "Ne effrenata potestate ad vexandos homines, superflua multitudo testium protrahatur."

[4] From the time of Constantine, the testimony of a single witness, whoever he might be, was insufficient. L. 9. § 1. C. eod. (4. 20). The rescript of Adrian, reproduced in L. 3. § 1. D. de test., is marked by a true knowledge of human nature. "Tu magis scire potes, quanta fides habenda sit testibus, qui, et cujus dignitatis, et cujus aestimationis sint, et qui simpliciter visi sint dicere, utrum unum *eundempue meditatum sermonem* attulerint, an ad ea quae interrogaveras, ex tempore verisimilia responderint." In certain cases, proof by witnesses was entirely prohibited; — in others it required to be corroborated by other proof. L. 1. C. de test. (restit.) L. 2. C. eod.

L. 9. pr. C. eod.

Zimmern, l. c. p. 450.

evidence in judicature did not exist. [1] It was introduced by Justinian; but excepting Infidels, Jews and Pagans, whose testimony was excluded either absolutely, or only as affecting believers in the true religion; — i. e. the religion recognized by the State. [2]

Documentary proof (*tabulae, instrumenta*) was subject to the following rules. Original public acts and those assimilated thereto (*instrumenta publice confecta*) were of greater force, as proof, than the verbal testimony of witnesses, or private documents; (ἰδιοχειρα); [3] — although the latter also constituted proof, not in favour of, but against him who had written or signed them. [4] Generally, no proof by witnesses could be received, in opposition to written papers of which the writing was not disavowed. [5] If the writing was denied, its authenticity had to be proved according to the ordinary rules; and, if needful, by comparison or verification of hand-writing. [6]

Every written paper, intended to be used before the judge, had

[1] Zeno imposed it upon those who had participated in the preparation of a document, as witnesses, — or who had already deposed. L. 15, C. eod.

[2] L. 16. C. eod. L. 21. C. de haeret. (1. 5). "Inter se autem haereticis, vel Judaeis, ubi litigandum existimaverint, concedimus foedus permixtum et *dignos litigatoribus* etiam testes introducere." The capacity of testifying in judicature was also forfeited by conviction of certain crimes. L. 14. L. 15. D. de test. See, also, on proof by witnesses Bethmann-Hollweg, Gerichtsverf. und Proc. p. 266.

[3] L. 11. C. qui pot. in pign. (8. 18). L. 10. D. de prob. (22. 3). "Census et monumenta publica potiora testibus esse senatus censuit." L. 2. D. de fid. instr. (22. 4). No 119. Cap. 3.

[4] L. 5. 6. C. de proc. L. 7. C. eod. "Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisquo sibi adnotatione propria debitorem constituit. Unde neque fiscum, neque alium quemlibet ex suis subnotationibus debiti probationem praebere posse oportet." L. 26 § 2, D. dep. (16. 3).

[5] § 12. I. de inut. stip. (3. 20). L. 14. C. de contr. et comm. stip. (8. 38). Paul. V. 15. 4. "Testes cum de fide tabularum nihil dicitur, adversus scripturam interrogari non possunt." It is in error that Huschke rejects these words as doubtful. Jurisprud. Ante-just. p. 432.

[6] L. 24 C. ad leg. Corn. de fals (9. 22). Nov. 18, Cap. 8. Nov. 73. Cap. 7. Nov. 49, Cap. 2. L. 20. C. de fid. instr. (4. 21).

to be communicated (at least by copy) from the time of the Editio actionis. [1] If the matter were the demand of a sum of money, the defendant might require the plaintiff [2] to produce his books or his accounts, (*rationes* L. 5, 6, C. de edendo, (2. 1 ;)) — and both might, under certain conditions, demand inspection of public acts ; [3] — and sometimes might require the production of papers in third hands. L. 22. C. de fid. instr. (restituta). [4]

The oath, — that is a solemn declaration, made by each person according to his religious convictions, [5] — was also available to establish the allegations of parties, whether as to a fact, a condition of things, or a legal relation. [6]

An oath, when it was not purely and simply an assurance or promise for the future, (*jusjur. assertorium*), was sometimes decisive, sometimes corroborative.

L. 1. § 3. D. de ed. (2. 13). "Edenda sunt omnia quae quis apud judicem editurus est : non tamen ut et instrumenta, quibus quis usurus non est, compellatur edere."

[2] The converse is not true : "Quando non oportet originem petitionis ex instrumentis ejus qui convenitur fundari." L. 8. C. de ed. (2. 1).

[3] L. 2. C. eod.

[4] Zimmern, l. c., p. 451. As to the obligation of the argentarii and the nummularii to produce their books. See L. 4. L. 6. L. 9. § 2. L. 10. § 1. D. de ed. (2. 13).

[5] L. 5. § 1. et § 3. D. de jurejur. (12. 2). "Jurejurando quod propria superstitione juratum est, standum rescripsit." But they did not admit a "jusjurandum improbatae publice religionis." l. cit.

[6] L. 9. § 7. L. 11. pr. et § 1. D. eod. "Rem suam esse," — "rem petitoris non esse." L. 3. § 2. L. 13. pr. et § 2. L. 30. § 4. D. eod. "In potestate mea te non esse, se libertum ejus non esse, furtum se non fecisse." In so far as its sole object was not the proof of simple facts, the oath had a certain apparent analogy with the compromise. L. 2. D. eod. "Jusjurandum speciem habet transactionis majoremque habet auctoritatem, quam res judicata." L. 31. L. 35. § 1. D. eod. "Sive pro pacto convento, sive pro solutione, sive pro judicio — jusjurandum cedit." A party declared, in advance, that, instead of requiring other proof, he would rely upon the solemn declaration of the adverse party, and would accept his affirmation on oath, whatever its purport, as the formal expression of the truth. (relative truth.) Nevertheless, Donean (XXIV, 17. 5), justly observes: — "Non dicitur jusjurandum *speciem esse transactionis*, sed *transactionis speciem continere*, id est : similitudinem et instar transactionis in se habere, quia scilicet consensu a lite discedituir in jurejurando similiter, ut in transactione, et hactenus jusjurandum transactionis vim habet. — Commodius

I. The decisive oath (*decisorium*) was that which a party enjoying the free control of his property, [1] tendered to the adverse party; and the effect of which was, if made as it was tendered [2], to cause the fact which it established to be considered as a truth (relative, or legal) which could no longer be contested. On the other hand, he to whom the oath was tendered, was obliged either to take it, or to refer it to his adversary. [3] If he did neither, he was assumed to have admitted his wrong, and he consequently failed in his demand or his exception. [4] If he who had authority for the purpose, dispensed from the oath the party to whom it was tendered, this dispensation produced the same effect as the oath itself. [5]

II. The supplementary (suppletorium) or corroborative oath was that which the judge might impose upon one or other of the parties, in cases where proof was not altogether wanting, but where, nevertheless, the evidence produced before him was not, of itself, sufficient to convince him. [6] L. 31. D. h. t. "Solent videatur fortasse jusjurandum ad probationes referre. Ideo enim vim illam obtinet, quae ei tributa est jure, quia pro legitima probatione est, cum hujus recusatio, tum ejus susceptio." L. 5. § 2. D. de jurejur. "Dato jurejurando non aliud quaeritur, quam an juratum sit, remissa qfiaestione an debeatur, quasi satis probatum sit jurejurando." In modern law, the oath is permitted as to facts only, and is merely a means of proof. Sav. Syst. VII. p. 49, 86. Opzoomer, sur l'art. 1967, al. 1. du Code Néerl.

[1] L. 9. § 4. § 5. L. 17. § 1. L. 34. § 1. L. 35. pr. et § 1. D. de jurej. (12. 2).

[2] L. 5. § 2. laud. L. 3. § 4. D. h. t. "jurare autem oportet, ut delatum est jusjurandum."

[3] L. 34. § 6. D. h. t. "Ait Praetor, eum a quo jusjurandum petetur, solvere aut jurare cogam. Alterum itaque eligat reus, aut solvat, aut juret. Si non jurat, solvere cogendus erit a Praetore."

[4] L. 38. D. h. t. "Magnifestae turpitudinis et confessionis est nolle nec jurare nec jusjurandum referre."

[5] L. 6. L. 9. §. 1. L. 32. D. h. t.

[6] Doneau (XXIV, 19), considers that the words *dubiae causae*, like those *inopia probationum*, in L. 3. C. de R. C. (4. 1), designate simply the case where the proofs of the opposing parties were balanced. This author, as also Heinneccius "de lubricitate jurisjurandi suppletorii," § 15, combats, vigorously, the doctrine of the Glossarists as to the *semiplena probatio* and the supplementary oath attached thereto. I do not consider this criticism just. By Roman Law, the supplementary oath agreed perfectly with the system of the absolute conviction which enjoined the judge to pronounce "Ex animi sui

enim saepe judices *in dubiis causis*, exacto jure jurando, secundum eum judicare, qui juraverit." This oath could not be referred.

It was also permitted, in certain cases, to determine by means of an oath which we may term "estimative," the amount of damage that had been caused by an illegal act. (Jusjurandum in litem; serment au plaid; Schätzungs; Würdigungs-Eid.) This oath is met with, in those actiones arbitrariae and bonae fidei, which tend to re-establish an anterior situation, (restituere), or to compel the production of a thing, in case of fraud or of refusal to comply with a judicial decree ad restituendum or ad exhibendum. [1] In actions stricti juris, this oath could be administered, only when there existed no other means of valuation. [2] It was always the judge who tendered it, — and he was at liberty, according to circumstances, either to fix, in advance, a maximum, to the extent of which the plaintiff's oath should be believed, — or to reduce, after the oath, an exaggerated estimate. (Taxatione jusjurandum refrenare, opp. in infinitum jurare). [3]

sententia;" — a system afterwards modified, but never replaced by any other. However it might be, it is certain that this doctrine, propagated in the common law, has also passed into those legislations in which a formal theory of evidence is respected. See Art. 1367. C. N. art. 1978. B. W.

[1] This oath was, originally, in accord with the principle that every condemnation might be resolved into a sum of money. Gaj. IV. 48. Schröter, Zeitschrift für Civ. R. und Pr. VII. 11. Sav. Syst. V. § 221, and Vangerow, I, § 171. See also: L. 2. § 1. L. 5. pr. and § 3. L. 8. D. de in lit. jur. (12. 3). L. 18. pr. D. de dol. mal. (4. 3). L. 68. D. de R. V. (6. 1). L. 7. D. si serv. vind. (8. 5). L. 3. § 2. D. ad exhib. (10. 4). L. 16. § 3. D. de pign. (20. 1). L. 25. § 1. D. sol. matrim. (24. 3). L. 48. § 1. D. loc. (19. 2). L. 1. § 26. D. dep. (16. 3). L. 3. § 2. D. comm. (13. 6).

[2] L. 5. § 4. L. 6. D. de lit. jur. The same necessary oath is permitted by the French Code (art. 1369) and the Dutch (art. 1979).

[3] The opposition of the phrases *quanti rest est* and *quanti actor in litem juraverit* formerly led jurists to recognize two kinds of oaths in litem, — the one *affectionis*, the other *veritatis*, — according as it was question of an action stricti juris or bonae fidei; of a fraud or of a fault. More recent authors have, with reason, rejected the jusjurandum affectionis. The plaintiff never obtains more than the available value of his property; — he obtains only that this value be calculated upon a subjective basis, less impartial than if an objective valuation could be had; so that the oath in litem might,

A particular kind of "estimative" oath, was that of a possessor violently ejected. It was also tendered, in default of other means of proof, and limited by the previous fixing of a maximum by the judge. This was the oath called "jusjurandum Zenonianum." L. 9. C. unde vi. (8. 4).

in effect, procure a profit for the plaintiff and prejudice the defendant. — L. 8. D. de in lit. jur. (12. 3). "Cum et contumacia punienda sit et arbitrio potius domini, *rei pretium statuendum* sit, potestate petitori in litem jurandi concessa," L. 2. C. h. t. (5. 53). "Sin vero neque dolus, neque lata culpa, neque fraus heredis convincitur, omissa jurisjurandi facultate de veritate cognoscit, quae etiam argumentis liquidis investigari potest." See Schröter and Vangerow, l. c. Arndts, § 115, note 3. [*]

[*] It would seem that Law, as well as History, "repeats itself." — In both England and America we have come back to the point, where not only a plaintiff or a defendant may sometimes be *allowed* to be a witness in his own cause, but where both may be *compelled* to testify on oath.

THE TRANSLATOR.

SECTION IX.

Of the Judgment.

§ 106. ITS GENERAL EFFECT.

If even the commencement of the judicial contest exercises an influence upon the relations of the parties, that which is exercised by the decision by which the judge puts an end to the suit is far more potent. It is not, however, that, as a rule, the judge either creates or destroys rights; — that is not his mission; [1] but his decision, (when there exists no legal mode of appeal against it), [2] fixes, as certain and irrevocable, for the present

[1] L. 8. § 4. D. Si servitus vind. (8. 5). "Et siquidem is obtinuerit, qui servitutem sibi defendit, non debet ei servitus cedi, sive recte pronuntiatum est, quia habet, sive perperam, quia per sententiam non debet servitus constitui, sed quae est *declarari*." Keller, Pand. § 96. — "In general the mission of the judge is not to confer or to withdraw rights, — to create, to overthrow, or to change them; — he should limit himself, strictly, to discerning, recognising, proclaiming and protecting rights which exist independently of his intervention; — and, on the other hand, to throwing back into nothingness pretensions which falsely usurp the form of rights, and rejecting demands founded upon such pretentions."

[2] This is what happened, when all the means of contention were exhausted, or all delays expired; or again when the losing party had, expressly or tacitly, renounced the faculty of appeal. — In all these cases, there was the *res judicata*, in a restricted sense. The Romans, however, employed this expression, more generally, (*res judicata*) to designate any judicial decision whatever. L. 11. L. 7. pr. D. de transact. (2. 15). "Et post rem judicatam transactio valet, si vel appellatio intercesserit vel appellare potueris." To indicate a judgment that had acquired the force of the *res judicata*

and the future, the legal relations which were lately doubted and contested, and the position of which was, consequently, unstable. [1] Whether he grants the demand and condemns the defendant, — or rejects the pretentions of the plaintiff, as unfounded, and dismisses the defendant from the suit, — in neither case can either of the parties be again permitted to say, that that which the judge has pronounced *for law* is not conformable to law and to truth. [2] This is, no doubt, a rule which may lead, sometimes, to injustice; but, in the interest of social order, it must be regarded as salutary, and even indispensable. [3]

we find, in one single instance, the periphrasis : — " sententia indubitata, quae nullo remedio ademptari potest." L. 23. § 1. D. de cond. ind. (12. 6). Sav, Syst. VI. p. 298. Windscheid, § 127, note 1.

[1] L. 1. D. de R. J. (42. 1). "Res judicata dicitur, quae finem controversiarum pronuntiatione judicis accipit, quod vel absolutione, vel condemnatione obtingit." It is because there is no longer any uncertainty, that compromise is impossible from the moment that there is the *res judicata*. L. 23. § 1. D. de cond. indeb. (12. 6). L. 32. C. de transact. (2. 3). "Super judicato frustra transigi, non est opinionis incertae." See art. 2056, C. N. and art. 1899 Cod. Néerl.

[2] " Res judicata pro veritate accipitur." L. 25. D. de stat. hom. (1. 5), L. 1. § 16. L. 2. L. 3. D. de agn. et al. lib. (25. 3). L. 65. § 2. D. ad Sctum Trebell. (36, 1). L. 12. § 3. D. de bon. lib. (38. 2). The judgment contains a relative or formal certainty ; — it establishes a relative or formal right. See Kierulff, p. 43 et seq. Since Savigny (Syst. VI. p. 271, in the contrary sense, the same author, VII, p. 97), it is generally repeated that the authority of the judgment rests upon " *a fiction of truth.*" Unger, § 132, note 8, justly criticises this expression. In fact, the decision rendered by the judge is not *taken as true* although it may not be *conformable* to the truth, but it is considered to be true *because* to all appearance it really *is* so. The same author, for this reason, censures the French Code, for having classed the authority of the *res judicata* among "legal presumptions." Art. 1350, 1351, Code Nap. The same provisions in art. 1953, Dutch Code, and art. 3407 of the project of 1820.

[3] Sav. Syst. VI, p. 260. L. 6. D. de exc. rei jud. (44. 2). " Singulis controversiis singulas actiones, unumque judicati finem sufficere, probabili ratione placuit, ne aliter modus litium multiplicatus summam atque inextricabilem faciat difficultatem, maxime si diversa pronuntiarentur: parere ergo exceptionem rei judicatae frequens est." Savigny (p. 262 proposes, without necessity, a correction of the closing words of this passage. The subject of the verb. *parere* is *judicatum.* (judicati finem).

§ 107. OF THE CONDEMNATION OR THE ABSOLUTION OF THE DEFENDANT.

The condemnation, pronounced by the judge, furnished to the plaintiff a new and independent basis for obtaining the satisfaction of his right. He was no longer required to invoke his original right or his ordinary capacity; and still less had he, in the future, to tolerate any denial of his pretensions. He was strong in the support given him by the possession of a judicial right, thenceforth assured, to which the defendant owed submission and obedience. [1] It might be said, in this sense, that a new right [2] was acquired, but a right which, far from having destroyed the former one, [3] had, on the contrary, confirmed, fortified and guaranteed it, in favour of him who had, at the commencement of the suit, asserted it, in the character of plaintiff.

[1] The judgment created an *actio judicati*, which, nevertheless, did not lead to a new suit which might be prolonged, but directly to the execution of the judgment. L. 4. § 3. L. 41. § 2. L. 43. 44. 61. D. de R. I. (42. 1). The limit for prescription of this action differed, also, from that of the litis contestatio. Sav. Syst. V., p. 324.

[2] "Obligatio quae ex causa judicati descendit." L. 4. § 7. D. eod. L. 3. § 11. L. 9. § 8. D. de pec. (15. 1). "Coepit judicati teneri."

[3] The guarantors of the original obligation remained bound; the stipulated interest continued to accrue, without interruption, until payment of the capital; and the arrear (*mora*) of the debtor was maintained. L. 8. § 3. D. de fidei. (46. 1). L. 3. pr. D. de usuris, (22. 1) "Ceterum si antequam ad judicem perveniretur, in mora heres fuit, exinde fructuum praestandorum necessitate adstrictus, qua tandem ratione, quoniam et sententia victus est, legitimi temporis spatio fructibus liberabitur, cum ea temporis intercapedo judicato dilationem dare, non luernm adferre debeat?" L. 1. C. de sent quae sine quant. (7. 46). These are applications of the rule: "nec deteriorem causam nostram facimus actiones exercentes sed meliorem." There is dispute, whether the judgment produced a novation, properly so called. It has been so assumed, on the authority of Gaius, III, 80, and the L. 3. C. de usur. rei jud. (7, 54), verbis: "novatur judicati actione prior conractus." But it is justly that most modern authors have declared against this opinion, (Sav. Syst. VI, § 258. f, Windscheid, Actio § 12, Unger, § 133, note 4), although it is incontestable that the original legal relations did undergo some change. It is for this reason that the following observations of Windscheid are very just. "We have to do, here, with a legal relation of a special nature. There may be found, between this and a novation, comparisons and resemblances; but it cannot be included in the same designation, except by the improper and inexact application of the term. In a novation, the identity as to the basis, between the

On the other hand, the judgment in favour of the defendant created in his behalf the *exceptio rei judicatae,* to repel the action in which this judgment had just been pronounced, — in case the plaintiff thought fit to institute the action a second time. The question whether such a judgment left in existence a natural obligation on the part of a defendant who (despite the decision in his favour) was really a debtor, so that the payment which he might afterward make, in error, could not be again demanded by means of the *condictio indebiti,* — this question is one of the most doubtful, and therefore one of the most disputed. [1]

new right and the old, is entirely absorbed in the difference of form; while in the case of a judgment the one is maintained without being merged in the other." See Salpius Novation p. 139 seqq. Again: — By the Justinian law, did the judgment consume the original action, so that the plaintiff could, thereafter, avail himself only of the *actio judicati?* Savigny (Syst. VI. p. 305) teaches the negatives; but his opinion is in opposition to various texts. L. 5. I. de Exc., (4. 12). L. 3. C. de fruct. et lit. exp. (7. 51). L. 4. C. depos, "Condemnatione facta iterata actio rei judicatae exceptione repellitur." L. 6. D. de exc. rei jud. See Wetzell, Syst. des Ord. Civ. Proc. p. 421. notes 14, 15; and Buchka, l. c., T. II, pp. 33, 212. By Dutch Law, a judgment which *condemns* the defendant does not prevent the primitive action from being again instituted. We know the *exceptio rei judicatae* only in its positive effect. The party cited cannot avail himself of the thing *adjudged generally,* but only of the thing *adjudged in* HIS *favour.* This is judiciously observed by Mr. Faber, in the Nederl. Jaarb. T. XI, p. 338; but he adds, erroneously, that the defendant might always repel the action, by means of the adage: — "no interest, no action." But, how could he avail himself of this maxim, if the plaintiff claimed interest which he had neglected to claim on the previous occasion? Every one will admit, however, that such a renewal of the same action is contrary to the end which should be attained; that of deciding the right with certainty: — therefore the law should not permit such a proceeding. The Roman Emperors expressed themselves, in this sense, in energetic terms, in the L. 3. C. de fruct. I. "Post absolutum dimissumque judicium, nefas est litem alteram consurgere ex litis primae materia." —

[1] Numerous dissertations upon this question have recently appeared. See Vangerow, I, § 173, obs. n°. 1. Windscheid, § 129, note 7. The most vigorous defender of the natural obligation is Fein, in the Archiv. für Civ. Prax. XXVI, p. 161 et seq. I feel bound to concur in his view. In treating this question, sufficient attention has not been given to the fact that the *exceptio rei judicatae* had, originally, in all probability, only a negative effect, founded on the principle "*ne de eadem re bis sit actio*;" and that it was only little by little, and even in some sense reluctantly, that Roman science and practice were led by experience and urged by necessity to recognize the positive domination of the *res judicata,* beyond the limits of the formal action. There is, then nothing surprizing, — nothing contrary to the uniform course of the development of

§ 108. OF THE EXCEPTIO REI JUDICATAE. [*]

In order that the *exceptio rei judicatae* should produce its effect, the concurrence of the two following conditions was indispensable.

Roman law, — in the admission that, in this as in most other cases, only what was rigidly necessary was done, — and that it was thought amply sufficient if the debtor was protected against a renewal of the same *action*. The Romans, imbued with their old republican spirit, had not habituated themselves to elevate that which the organ of the State had declared to be law, to the height of a certain and indisputable truth, placed above all chances and all possible contingencies, and guaranteed against every species of contestation. (See a very important note by Kierulff, p. 43). This is the true point of view. If proof is desired, it suffices to remark these feeble expressions: — "*probabili ratione placuit*" and "*parere exceptionem rei judicatae frequens est*," — which are found in the L. 6. D. de exc. rei jud. It follows most convincingly, that the inviolability of the thing adjudged was not regarded as the natural consequence of some organic institution of the Roman State, but rather as an inevitable sacrifice upon the altar of peace and security. But that which seems decisive for our thesis, is the L. 60. D. de cond. indeb: — "Licet enim absolutus sit, natura tamen — debitor permanet." This text, upon which interpretations each more far-fetched than the other, have been grafted, admits in fact but one: — i. e. that the debtor judicially absolved still lies under a *natural* obligation.

The contrary opinion is based upon the following arguments: —

I. The principle is invoked, that from the moment of a decision no judge is any longer competent to examine, as to its basis, whether such decision is right or wrong. This argument is but a begging of the question; for it is precisely on this point that the discussion turns. — The question is, most especially, if it be only the *action* of the plaintiff which is for ever barred, or if the same barrier is opposed to *every* judicial investigation of the grounds and the absolute truth of his claim. The L. 56. de R. J. (42. 1); "Post rem judicatam vel jurejurando decisam, vel confessionem in jure factam — nihil quaeritur," proves nothing; first, because it speaks only of a judgment of condemnation; and secondly, because the question, — as is shown by the assimilation of the res judicata to a confession, — is only of its effect upon the suit, to which the judgment puts an end.

II. There is invoked the analogy of the oath, which, the moment it is pronounced, destroys every species of obligation, — even natural obligation. L. 39. 40. 42. pr. D. de jurej. (12. 1). L. 43. D. de cond. indeb. But, if it be true that the oath is assimilated, in more than one particular, to the *res judicata*, we still cannot ignore the fact that the administering and taking of the oath formed a sort of convention, "ut ab *omni contentione* discedatur," (compare the fragments cited), the effect of which, like that of a pactum de *non petendo*, was to extinguish for ever, by the mutual consent of the parties, the obligation which might have existed. Fein, l. c. p. 368.

I. It was necessary that the new action should present for decision the same question as had been already determined by the first suit.

III. The L. 13. D. quib. mod. pign. solv. (20. 6), is advanced, as proving that the right of pledge (hypotheck), — to maintain which a natural obligation was sufficient, — was annulled by a judgment of absolution. It is true that this fact is somewhat embarrassing for our doctrine. To remove the difficulty, it must either be assumed, with Dernburg, (Pfandrecht, II, p. 586) that the Roman jurists themselves were not agreed on this point, or we must admit the explanation of Buchka (Einfluss, II, p. 234), although denied by Vangerow, — which assumes that the right of pledge was lost by the mere fact that the *actio hypothecaria*, if it could be instituted after a judgment which absolved the debtor, would be a new, though indirect, endeavour, to compel him to pay: — which would be in opposition to the decision of the judge.

Whether any other consequences of the natural obligations remain, as for instance, compensation, the possibility of a constitutum, or of a guarantee is doubtful, as no consequence can be drawn from one of the effects of the natural obligation to another. See Sav. Oblig. p. 91, Keller, Jahrb. der Gem. Deuts. R. IV ibique Bekker. Schwanert, Nat. Oblig. p. 363, and p. 443.

Quid in modern law? It seems absurd, in view of modern principles, to admit that it should be permitted to question that which had been proclaimed *in concreto* as LAW, by the legal organ of the State; and every one will recognize the utility and the necessity of maintaining, in all its rigour, the rule:—"*post rem judicatam nil quaeritur.*" Despite this, however, I do not find, either in the French or the Dutch Code, any provision which forbids that the same claim should be made, repeatedly, the subject of judicial contention, with the exception of the case where *the same demand* is again advanced. The French Code, and that which governs us, (Holland), have not even, like the Project of 1820, art. 3407, placed the authority of the *res judicata* in the category, of absolute presumptions. (*juris et de jure*). By his silence the legislator has thus compromised a very salutary principle, and jurisprudence has been diverted into the wrong path. A double right is, in fact, thus reserved, even after the judge has decided the dispute! — Dalloz v⁰ Chose jugée, Chap. II. See 3. § 1: — "The effects of the thing adjudged, an institution of the civil law, leave *their full power* to natural law; thus it is held, that the obligation of him who has been unjustly declared released, does not cease to exist naturally. And, for the same reason, if the debtor unjustly discharged by a judgment which has acquired the force of the *res judicata*, had afterwards paid his debt, he could bring no action for reimbursement." To this French verbiage, let us oppose the language of a philosophic jurist, — the German Kierulff. — "According to the practical principles of our time, the *res judicata* has an absolute authority. It is the State that speaks, by the mouth of the Judge. It suffices to reject a certain ignorant affectation of wisdom, which seeks to intrude every where; and which, sheltering itself behind the sonorous terms of equity and humanity, tends in fact to

II. That the suit should be between the same parties as before, or their legal representatives. (Objective and Subjective identity).

destroy the sanctity of the thing adjudged and to inaugurate the reign of arbitrary authority. The reasoners who speak of a right the existence of which would be possible outside of right legally recognized, should reflect that a decision pronounced by their small selves, — so insignificant in opposition to the State, — has nothing about it worthy to be called "law." Individual volition cannot constitute law." By the Austrian Code, a judgment of absolution leaves no natural obligation in existence. (Unger § 133, note 122). The Project of 1820, art. 3427, recognised sound doctrines, which it thus formulated: "Apart from the execution, the force of the thing adjudged consists in the fact that the decision comprised in the judgment is held to be the expression of the law and the truth." This excellent precept deserved to be reproduced.

[*] Originally, the particular nature of this exception consisted in its being founded, not upon the *contents* (or *purport*) of the anterior judgment concerning the same thing, but solely upon the fact of the mere *existence* of such a judgment. The rule was :— "qua de re semel actum erat, de ea postea agi non potest ;" — and, following this rule, it was not asked *how* the matter had been adjudged, but *if* it had been so ! This is what Keller calls "the negative function of the exception." Soon, however, cases arose, where the plaintiff who had obtained a judgment, but whose right had not received full satisfaction, found himself compelled to fall back upon his original claim, which had already been the object of a judicial decision. — He was aided, against the exception, by means of the "replicatio rei secundum se judicatae." L. 16. § 5. D. de pign (20. 1). L. 9. § 1. D. de exc. rei jud. (44. 2). Finally, it was discovered that the authority of the judgment might be assailed indirectly ; for the plaintiff might renew his original attack, by disguising it under the form of a different action. Thus, for example, he who had commenced by instituting a confessory action, but who had been non-suited in default of having established his right of ownership to the property alleged to be dominant, might, nevertheless, in a second suit, assert the same right of ownership, by bringing an action in revindication : — since upon this latter, there had, in fact, been no formal decision pronounced. Must the second suit, be, therefore, permitted ? "No," it was said ; — "the first judgment had, by implication, rejected the claim now sought to be asserted afresh. To reopen *that question*, (*eadem questio*) in an indirect manner, was, in reality, to destroy the force of the *res judicata*." In this way, the *positive* effects of the *exceptio rei judicatae* were developed : — that is to say, it was no longer permitted only for the *thing adjudged*, but also for the *claim rejected*. The discovery and the explanation of these two operations of the *exceptio rei judicatae* constitute the brilliant merit of Keller's work upon the *litis Contestatio*. (Zurich, 1827). Savigny renders him the same homage. It is true, that, more recently, the theory of Keller has been combated by Bekker, (Die Process. Consumtio im class. Röm. Recht, Berlin, 1853), who gives to this exception, even in Justinian law, only a negative operation ; but, independently of considerations suggested by the very nature of things, it suffices to read (without any preconceived theory) the title of the

L. 7. § 4. D. de exc. rei jud. (44. 2). "Exceptio rei judicatae obstat, quoties inter easdem personas eadem quaestio revocatur, vel alio genere judicii." L. 3. D. eod.

When the question was not the same, the exception could not be advanced, even though there might exist other points of contact between the two suits. [1] But, from the moment that the question was the same, it mattered not that the means invoked were different, or that the action was presented under another form; [2] and, in the same way, it mattered little whether the new action was contrary to the terms of a judgment which rejected an anterior demand, or even to the facts which that judgment had recognized as established, and upon which the judge had founded his decision. [3] L. 5. D. h. t. "De eadem

"De Exceptione rei judicatae," and especially the L. 1. 3. 19. 22. and the L. 7 § 4, to be convinced that Bekker, (as is said by Windscheid), "must content himself with the honor of having produced a book well written, and containing excellent views upon more than one point of detail, but the fundamental idea of which is untenable." See Windscheid, Actio, p. 87 and Pand., § 130, note 23. Vangerow, I. § 173. Bethmann-Hollweg, der Civ. Proc., p. 636. Unger, § 132, note 25. Krüger, Proc. Consumption, § 20. Arndts, § 116, obs. 4.

[1] Similar points of contact existed, when the same thing gave rise to claims for several different rights; such, for example, as possession and ownership; the right of way on foot and with horse and carriage over the same property; the *rei vindicatio* and the *condictio*. L. 11. § 6. L. 14. § 3. L. 31. D. h. t. Opzoomer, on art. 1954, Dutch Code, has perfectly demonstrated that the same rule must be observed under this Code, although the principle is not therein very clearly enunciated;—which, however, may also be said as to the Roman laws themselves!

[2] L. 7. § 4. D. h. t. "Et ideo si hereditate petita singulas res petat, vel singulis rebus petitis hereditatem petat, exceptione summovebitur." The reason of it is, that the two actions raise the same question, — whether the plaintiff has the quality of heir. The same principle is discovered, also, in matters of oath and of agreement. L, 28. § 4. D. de jurejur. (12. 2). "Exceptio jurisjurandi, non tantum si ea actione quis utatur, cujus nomine exegit jusjurandum, opponi debet, sed etiam si alia, si modo eadem quaestio in judicium deducatur." L. 27. § 8. D. de pact. (2. 14). Comp. besides L. 8. L. 11. § 3. D. de exc. rei jud. L. 7. § 1. D. de comp. (16. 2). L. 8. § 2. D. de neg. gest. (3. 5). L. 1. § 4. D. de contr. tut act. (27. 4).

[3] Certain authors assert that the judgment only determined the rights of the parties, and had no material proving power as to facts which the judge had admitted to be true or to be false. It would thence result, for example, that a plaintiff who had failed in

re agere videtur, et qui non eadem actione agat, qua ab initio agebat, sed etiam si alia experiatur, de eadem tamen re."

an *actio furti*, because the defendant had not committed a theft, could, nevertheless, institute, afresh, the *condictio furtiva*. See, among others, Unger, § 132. notes 16, 17. I can, in no manner, accept this view. It is directly contrary to the principle *eadem questio*. — I cannot bring myself to understand how the same judge who has absolved the defendant in the *actio furti*, by reason of his conviction that the latter has not committed the theft of which he is accused, could, afterward, on the ground of the same alleged theft, adjudge to the plaintiff the *condictio furtiva*. Is not this a case for application of the rule, "ne modus litium multiplicatus, summam atque inexplicabilem faciat difficultatem maxime si diversa pronuntiarentur?" Some persons deny the analogy, which here appears, between the *res judicata* and the oath. (L. 13. § 2; L. 28. § 5. D. de jurejur. (12. 2.) They say that the latter bears only upon facts. If it affected legal relations (so reasons Unger), it would present no obstacle to the founding of a new action, upon the same facts, but having a different object. But, first, the words *videri de toto jurasse*, in L. 13. § 2. D., sufficiently indicate that every thing depended upon whether the offence had been committed, or not. In the second place, moreover, the oath was permitted only in reference to a specific claim or demand. The oath of him who said he had been robbed, had no other immediate purpose than to decide whether the defendant should pay the double or the quadruple; yet it had the effect of preventing any fresh suit founded upon the theft, *quia videtur de toto jurasse*. Why would it not be equally true to say, *videtur de toto judicatum?* Or can it be pretended that the oath, being a kind of compromise, put an end to any examination whatever? "Quasi convenerit ut ab omni contentione discederetur?" But it is to be remarked that a compromise itself, whatever force might be attributed to it, affected only the dispute to which it had reference; while the supreme importance attached in the matter of an oath to the identity of the fact, appeared from the circumstance that it was no longer available, from the moment that the slightest difference was perceived between the two cases. L. 28. § 5. D. de jurejur. — Finally, the L. 30. § 4. D. de eod. also proves that the oath *se libertum non esse*, which certainly affected a legal relation, excluded (equally with the *res judicata*) every ulterior claim founded on the right of patronage. (Compare the L. 8. § 1. D. de in jus voc. (2. 4). Keller is, therefore, right, when he says: — "The effect of the thing adjudged is limited, in respect that it was necessary, in order to make it available, that the cases should present *eandem rem, eandem questionem;* i. e. that it prohibits, every action, or exception, or other proceeding, which contradicts the thesis of fact or of law which is the result of the previous suit, and the purport of the judgment." The habitual sagacity of the author of the Dutch Project of 1820 did not fail him on this subject. See art. 3427. § 2. "Consequently, it is no more permitted, henceforth, to question the facts and circumstances, as to which the judgment states that they have been admitted or proved, or upon which the judge has visibly founded his decision, nor to contest the rights which his declaration has attributed to the parties."

Finally, the exception might be advanced, when a certain point had been decided, not as the principal question, but incidentally; whether because it formed the basis, or essential condition of some other claim, or came within the terms of legitimation ad causam. [1] L. 7. § § 4, 5. L. 8. L. 11. § § 3, 10. L. 18. L. 26. § 1. D. h. t. L. 25. § 8. D. fam. ercisc. (10. 2).

[1] For example, the question of relationship, considered as a necessary condition of the obligation to provide aliments, or for the exercise of hereditary rights; a decision respecting capital preliminary to one concerning interest; a question of ownership in connection with the *actio communi dividundo*. This matter is, however, also, in dispute. See the Glossa ad L. 1. C. de ord. jud (3. 8). Our opinion is that of Savigny Syst. VI, p. 429, et seq., and of Windscheid. actio, p. 87, and Pand. § 130, notes 15 and 16; and of Vangerow, I. § 173, note 3. The contrary opinion is taught by Buchka, Einf. I, p. 300 et seq., — by Pfeiffer, Arch. für Civ. Prax. XXXVII, p. 261, and by Unger, § 132, who advance the following arguments. I. That it would be illogical to concede such an influence upon future proceedings, to questions which have not been discussed and settled separately, but only when another question was under discussion. II. They invoke the L. 1. C. de ord. jud. (3. 8) L. 3. C. de jud. (3. 1). L. 5. § 8. 9. 18. D. de agn. et al. lib. (25. 3), and L. 10. D. de his qui sui vel al. jur. (1. 6). III. That to give to the *res judicata* a force so great, is to carry it to a point beyond what the litigant parties could ever have intended. — I answer to the first argument, that it is utterly indifferent whether a question is decided by the judge for itself, or with reference to another. The only thing to consider, is what he has decided and what he was bound to decide. If it be evident that he could not put aside the incidental question, — that he was bound to decide it in order to render his judgment final, precise, and complete, — thenceforth the decision that he has pronounced is the immediate and necessary result of the investigation which he has made, or of the duty which he had to perform as a judge; and thenceforth, also, his decision must exercise its effect in the future, no less than the judgment which decided the principal point in litigation. — As to the second argument, it is founded upon a false interpretation of the passage cited. The L. 1. C. de ord. jud. (3. 8). does not say that the judge who would be incompetent to pronounce upon the incidental question, if that had been the special object of the action, could not decide that question irrevocably;—but, that his decison on that point, although only mediate, is not, for that reason, any less necessary and inevitable, since it was upon that point that the hereditary right of the plaintiff depended, — which without such decision would have remained in doubt, "Pertinet enim ad officium judicis, qui de hereditate cognoscit, universam incidentum quaestionem, *quae in judicium devocatur* examinare." The L. 3. C. de jud. (3. 1) says: "Quoties quaestio status, bonorum disceptationi concurrit, nihil prohibet, quo magis aqud eum quoque, qui alioquin super causa status cognoscere non possit, disceptatio terminetur." In order to appropriate this disposition, our adversaries interpret the words: "*disceptatio terminetur*," which indicate a final judgment, as if the text were

The objective identity ceased, and thereafter there was no room for the *exceptio rei judicatae,* in the following cases: — I. If the purport (contents) of the actions was not the same. —

"disceptatio *bonorum* terminetur." But then the phrase would be in violation of all logic. "Nothing forbids the judge who is incompetent to decide the question of *status* to give judgment upon a discussion as to *hereditary right.* The Glossa had, already, given the preferable explanation:—'Disceptatio scil. *utraque bonorum et etiam status.*' The L. 5. D. de agn. et al. lib., and the L. 10. D. de his qui sui vel al. jur., (1. 6), regard cases where the urgency of the circumstances prevents the judge from entering, at the time, upon a thorough examination of the points in dispute, and compels him, in simple justice, to reserve to himself the power of subsequent examination; after which he will deliver a final judgment. See L. 7. D. eod. — Finally, as to the third argument, respecting the intention of the parties, it must first be remarked, that even if the judicial decision should go beyond the original intention of the parties, that circumstance could not affect the nature of things. The possible effects of the *res judicata* may be very remote and may over-step the narrow limits of our horizon: — does it follow that it is in our power to escape their accomplishment? But, we are entitled, moreover, to presume thet they who submit to the decision of the judge a question which they know depends upon the previous decision of another question, have also desired a final decision of the latter. On the other side, the following example is cited: — A, as owner of certain lands, institutes a confessory action against B. The latter, who intends, perhaps, to reclaim, hereafter, against A, the ownership of the same lands, allows himself to be comdemned by default, in the action respecting the servitude. It would be very hard for him, it is said, to learn, at a later period, that, at the hearing of this confessory action, the question of ownership had been irrevocably settled to his prejudice! — I confess that I see, in this, nothing inhuman or unjust. B neglects to use either of the two means at his disposal. He could avail himself of the *exceptio quod praejudicium ne fiat,* which would have permitted him to prevent the incidental decision; or he could, secondly, have contested the action, at the hearing of which, he might well foresee, that his adversary would assert his right of ownership. The same may be said to the heir, who, summoned for payment of the interest upon a capital lent, allows himself to be condemned by default. Is it not unpardonable negligence, or gross ignorance, not to foresee that a question of capital may be raised? In the example cited by Windscheid; (Paud. § 130, note 21), I see no objection to granting to the defendant, — although he should have gained his cause as to the predial servitude, the right of appeal; for the plaintiff, whom the judgment has recognized as owner, might, at a later period, place the defendant in difficulty, either by again bringing against him a confessory action, by reason of a *causa superveniens,* or by means of a revindication. I see a far greater objection to allowing, and even compelling, the parties, to bring several times before the judge points which have already — (even though but incidentally) — formed the object of judicial examination and decision. The provisions of Arts. 3434 and 3437 of the Project of 1820 were conceived in the sense of the doctrine that we have set forth.

II. If their cause or their origin was different. There was a difference of purport (contents) when, (for example) it had previously been a real action and subsequently a personal one; [1] or, where the new demand referred to a real right different from that which formed the object of the former action; [2] or, again, when the latter referred to possession, while the former regarded a question of ownership. [3] In all these cases, the judge was asked to decide questions which differred from those which he had already decided, even though they might, substantially, refer to the same material object.

Usually, the identity of the object coincided with that of the question. [4] But the contrary might happen; and it was then only the latter which was to be considered. [5] Thus, if the thing, object of the second action, was to the object of the first action as a part is to the whole, the judgment which had rejected the claim of the plaintiff to the whole, was equally applicable to the part. [6] If the claim rejected by an anterior judgment, consti-

[1] L. 31. D. h. t. L. 21. § 3. D. eod. In this text there is question of the usufruct termed *causalis*.

[2] L. 11. § 6. D. h. t.

[3] L. 14. § 3. D. h. t. "Si quis interdicto egrit de possessione, postea in rem agens non repellitur per exceptionem, quoniam in interdicto possessio, in actione proprietas vertitur."

[4] Hence the expressions, — too general and consequently inexact, — "*eadem res*," — "*idem corpus*," — "*quantitas eadem*." L. 12. 13. 5. D. h t.

[5] Hence the influence exercised by a decision respecting the ownership of a female slave, upon the ownership of the child whom she had conceived after the first *litis contestatio*. L. 7. § 1. D. h. t. "Toties eandem rem agi, quoties apud judicem posteriorem id quaeritur, quod apud priorem quaesitum est." L. 26. § 1. D. eod. As to the contradiction apparent between s. 1 and 3 of the L. 7, see Vangerow, l. c., p. 283. Windscheid, § 130, note 16.

[6] L. 7. pr. D. h. t. "Si quis cum totum petiisset, partem petat, exceptio rei judicatae nocet, nam pars in toto est: eadem enim res accipitur, etsi pars petatur ejus, quod totum petitum est; nec interest, utrum in corpore hoc quaeratur, an in quantitate vel in jure." L. 14. pr. L. 21. § 1. D. h. t. L. 27. § 8 D. de pact. (2. 4). The reason is, that it was the right and the duty of the judge to grant to the plaintiff, within the limits of his complaint, that which really belonged to him; — and in not doing so he was regarded as having decided that he had no claim whatever. (Sav. Syst. VI, p. 302, 447. As to the L. 7. § 2. D. h. t. and the ingenious but useless conjecture of Savigny, see Vangerow, l. c., p. 282, and Unger § 132, note 96. This law concerns the case where the subsequent demand is founded upon a different title.)

tuted the indispensable condition of right that the new action had in view, this judgment might be opposed by the defendant; [1] and, reciprocally, if the plaintiff had obtained in the first suit the declaration of an absolute right, the judgment was considered as refusing the same right to the adverse party: — and if the latter, — defendant in the suit, — chose subsequently to assert his right in the character of plaintiff, he would be repulsed by the *exceptio rei judicatae*. L. 40. § 2. D. de Proc. (3. 3). "Cum judicatur rem meam esse, simul judicatur illius non esse." L. 15. L. 30. § 1. D. de exc. rei jud. "Quoniam de ejus quoque jure quaesitum videtur, cum actor petitionem implet."

But was to be said where the judge had rejected a first action which claimed but a part, and subsequently the party claimed the whole? The exceptio rei judicatae might again be pleaded if the decision given as to the part implied also a decision as to the whole: — otherwise the action would be admissible, except as to that part which the judge had previously rejected. L. 26. pr. D. h. t. — If a party failed in an action which sought to obtain certain specified objects, belonging to an inheritance, and the judgment had been based upon the ground that he did not possess the quality of heir, the exceptio rei judicatae would suffice to repulse the petition of hereditary right that he might seek, afterwards, to institute. On the contrary, it is evident that it would be quite otherwise, if the judgment which had refused him the objects claimed, had proceeded upon the ground, that those objects formed no part of the inheritance. L. 7. § 4. 5. D. h. t. Thus, also, in the case where, after having failed in a demand for payment of a year's interest, a party should seek either to claim the capital or again to assert his right to the interest. In these several cases, the *eadem questio* is the sole criterion. Savigny, l. c. p. 451. Vangerow, l. c. and Windscheid, § 180, note 12. Buchka, I. p, 307, and Unger, II, p. 657, all teach the contrary, because they have formed a different idea of the *eadem questio*.

[1] L. 8; L. 11, § 3; L. 26. § 1. D. h. t; L. 33. § 1. D. de usuf. (7. 1); L. 13. D. quib. mod. pign. solv. (20. 6). L. 1. § 4. D. de lib. exhib. (43. 30).

[2] What must we say, again, where the judge had rejected the revindicatory action instituted by the plaintiff, giving as his reason, that, in his opinion, the right of ownership really belonged to the defendant? I think, that in this case, the defendant, finding himself afterwards involved in a new suit, with the same adversary, would no longer have any need to establish his right of ownership. It is true, that, *directly*, the judge only has rejected the claim of the plaintiff, and that the terms of his judgment had not declared the right of the defendant; but, nevertheless, the question upon which the contest hinged, was, which of the two, (A or B) was owner. — This contest was decided in favour of B; — therefore "de ejus quoque jure quaesitum, eadem questio, eadem res." The contrary opinion, (see, for example, Unger, II, p. 636), restricts itself too closely to the narrow point of view of the *formula*, and especially *intentio*, without reflectiug that, during the course of the suit, there might arise

Even in case of identity of object and of tenour of the suit, the question to be judged might be different, by reason of a difference in the origin of the right which was the basis of the suit. This was the case when the actions in question were founded upon obligations. In fact, obligations take their distinctive character and their individuality from the mode of their creation, and cannot be separated therefrom. It follows that a difference between the circumstances which created the obligation involves another as to the action for which it may give grounds. [1] It is otherwise with

questions which it would be the duty of the judge to decide. Now nothing would forbid the defendant, — instead of restricting himself to a simple denial of the plaintiff's right, — to go one step farther, and profit by the occasion, in order to irrevocably establish, (at least as against his immediate adversary) his own right of ownership. It is clear that the reasoning of Unger (l. c. p. 263), is a veritable *petitio principii*. "The recognition," says he, "of the ownership in the person of the defendant, is but the motive, and not the substance of the judgment;" but it would be more accurate to say that it constitutes at once the motive of the decision and the decision itself. Besides, it would be an anomaly, and a favour accorded to the plaintiff and difficult to justify, to admit, on one hand, that the recognition of *his* right of ownership annihilates irrevocably, as towards him, the right of the defendant, while, on the other hand, the recognition of the right of the defendant, made by the judge as against the plaintiff, should be without influence in the future! Thus, he who should have repulsed the Publician action by means of the *exceptio justi dominii*, would be obliged, afterwards, to again prove his right, against the same plaintiff; while if the exception had been declared unfounded, the plaintiff would have found in the *res judicata*, a protection thenceforward irrevocable, as against the same defendant! Why this inequality? "Because," says some one, "the only thing submitted to the judge was the pretended right of the plaintiff." To which, I reply, that this is a question of fact. Every thing depends upon the attitude of the parties during the progress of the suit; and Unger himself (§ 132, note 27), supposes it possible "that the defendant should avail himself of a superior right which belongs to him, and that thus the question of the superiority of this right might become also implicated in the suit." This sufficiently proves that this author feels, with us, that it is not in the power of the plaintiff to circumscribe, at his pleasure, the extent and scope of the contention which he has initiated. The defects of Unger's reasoning have been also indicated by Windscheid, § 131, note 6. Moreover, this question is closely allied to that whether the *motives* (grounds) of a judgment have the force of the res judicata. The affirmative is taught by Savigny, Syst. VI, § 291; — in which opinion I concur. —

[1] "Initio ita constiterint hae duae obligationes, ut altera in judicium deducta, altera nihilominus integra remaneret." L. 18. D. de O. et A. (44. 7). L. 159. D. de R. I. "Non ut ex pluribus causis deberi nobis idem potest, ita ex pluribus causis idem possit nostrum esse."

respect to absolute or real rights, which are independent of the manner in which they may have been acquired; — so that a difference in this particular effects no change in either their nature or their character. If then, a claim to the ownership of a thing had been rejected by the judge, and the same plaintiff returned to the charge, alleging another mode of acquisition, he would be repulsed by the exceptio rei judicatae; unless, indeed, he could invoke facts and circumstances posterior to the judgment pronounced in the first suit; [1] (*causa nova superveniens*); or that he had, on the previous occasion, limited the question submitted to the judge, to one sole mode of acquisition; (*causa adjecta, expressa*); in which case the effect of the res judicata would, necessarily, be confined within the same limits. L. 14. § 2. D. h. t. "Actiones in personam ab actionibus in rem hoc differunt: quod cum eadem res ab eodem mihi debeatur, singulas obligationes singulae causae sequuntur, nec ulla earum alterius petitione vitiatur; at cum in rem ago non expressa causa, ex qua rem meam esse dico, omnes causae una petitione apprehenduntur, neque enim amplius quam semel res mea esse potest; saepius autem deberi potest." L. 11. § 1 et § 2. D. h. t. "Denique et Celsus scribit: si hominem petiero, quem ob eam rem meum esse *existimavi*, quod mihi traditus ab alio est, cum is ex hereditaria causa meus esset: rursus petenti mihi obstaturam exceptionem. Si quis autem petat fundum suum esse, eo quod Titius eum sibi tradiderit: si postea alia ex causa petat, causa adjecta non debet summoveri exceptione." [2] L. 93. § 1. D. de leg. III. (32). L. 3. § 4. D. de acq. vel omitt. poss. (41. 2).

[1] The convictions of the judge could be derived only from circumstances existing at the time. L. 11. § 5. "Itaque acquisitum quidem postea dominium aliam causam facit, mutata autem opinio petitoris non facit." Vide § 4. h. l. L. 14. § 1. L. 21. § 3. L. 25. pr. D. h. t. L. 42. D. de lib. causa (40. 13). Art. 3439 of Project Neth. of 1820; "The authority of the *res judicata* is not applicable to facts or circumstances occurring subsequently to the judgment."

[2] The L. 7. § 2. D. de her. pet., cited by Dernburg (Ueber das Verhältniss der H. P. zu den erbschaftlichen Singularklagen, § 3, p. 28 et seq.) does not seem to me decisive. It contains only an instruction to the judge, not to occupy himself with the

The second condition indispensable to constitute the *res judicata*, was that the judgment should have been pronounced between the same parties. Judgments could neither benefit nor injure third parties; nor was there any distinction, in this respect, between judgments which affected absolute rights and those which referred to obligations. L. 2. C. quib. res jud. (7. 56). L. 1. L. 3. L. 29. L. 22. D. de exc. rei jud. "Etsi eadem quaestio in omnibus judiciis vertitur, tamen personarum mutatio, cum quibus singulis suo nomine agitur, aliam atque aliam rem facit." L. 7. § 4. D. h. t. L. 63. D. de R. I. (42. 1). "Saepe constitutum est, res inter alios judicatas, aliis non praejudicare." L. 11. § 3. D. de jurej. (12. 2). The identity of the parties did not, however, require, that the suit should be by and against precisely the same persons who had been parties to the former proceeding; — the character of identity extended also, to their respective successors, universal or particular, provided that the quality of successor had been

testamentary question, and has nothing in common with prescription properly so called. We know, moreover, with what energy Puchta, (in the Rhein. Mus. II, p. 251, and III, p. 467) has argued against the faculty of restricting the real action to one sole title of acquisition, and the influence of this restriction upon the authority of the *res judicata*. Savigny has, on the contrary, defended it: Syst. VI, p. 465, and appendix 17, p. 514 and seq. See the list of authors who have taken part in this controversy, in Unger, § 132, note 79, and Arndts, § 116, obs. 5. — I think, with Bekker, (Proc. Cons., p. 249,) that "the discussion provoked by Puchta, upon the interpretation of the fragments in question, should be regarded as ended by the dissertatiqu of Savigny." This is also the opinion of Brinz, Paud. p, 157; who nevertheless, does not underestimate the importance of the objections of Puchta to the principle of this restriction. One thing, apparently overlooked, is that the Glossa had already commented the L. 11, § 1, verb. "quod mihi traditus ab alio est", by the annotation: "hoc non expresso, alias contra est, infra prox. §0." In Dutch law, I incline to admit that the real action rejected by the judge can never be recommenced; unless it be in the case where the plaintiff has expressly declared, in some manner, his intention to restrict the contest to one sole title of acquisition. (The mere mention of this title, as a means, in the summons, is not sufficient). If he has not made this formal declaration, the only thing to be decided is whether he *is* the owner, and not *how he became so*; — and the rule may be applied: "nec interest, qua ratione quis eam causam (proximam) actionis competere sibi existimasset." L. 27. D. h. t. — Among the Romans, the restriction was probably expressed by means of a praescriptio pro actore. See Sav. l. c.

acquired subsequently to the judgment in question. L. 11. § 3. 9. 10. L. 28. L. 29. § 1. L. 9. § 2. D. de exc. rei jud. "Julianus scribit: exc. rei judicatae a persona auctoris ad emtorem transire solere, retro autem ab emtore ad auctorem reverti non debere, quare, si hereditariam rem vendideris, ego eandem ab emtore petiero et vicero, petenti tibi non opponam exceptionem: *at si ea res judicata non sit inter me et eum cui vendidisti.*" L. 3. § 1. D. de pign. (20. 1). In the same way, if a person called to appear prominently, as a party to a suit, had abandoned his position, in favor of him from whom he held his rights, judgment could be asked, for or against that person, exactly as if he had himself maintained the suit. [1] L. 63. D. de re jud. (42. 1). "Scientibus sententia, quae inter alios data est, obest, cum quis de ea re cujus actio vel defensio primum sibi competit, sequenti agere patiatur, — quia ex voluntate ejus de jure, quod ex persona agentis habuit, judicatum est."

Exceptionally, and in certain special cases, the authority of the judgment extended to others than those who had been parties to the former suit. (Pronuntiatio sive sententia jus facit). —

It was thus: —

I. In some contests respecting hereditary right. [2]

II. In confessory and negatory actions, when one of the co-

[1] This, in Roman Law, included mediate representation. L. 4. D. h. t. "Rei judicatae exceptio tacite continere videtur omnes personas, quae rem in judicium deducere solent." L. 11. § 7. "Hoc jure utimur, ut ex parte actoris in exc. rei jud. hae personae continerentur, quae rem in judicium deducunt, inter hos erunt procurator cui mandatum est, cet." L. 25. § 2. D. h. t. L. 56. D. de jud. (5. 1). L. 27. L. 66. D. de proc. (3. 3). Keller, L. C. § 39—44. Windscheid, § 132, note 2.

[2] It was notably thus, that a judgment pronounced in a suit by an heir-at-law against a testamentary legatee, respecting the validity of a testament, extended its effects to legatees and to creditors, provided that it had not been pronounced by default, and that it was not the result of collusion between the heir and the legatee. L. 8. pr. D. de pign., (20. 1). L. 14. D. de appell, (49. 1). L. 50. § 1. D. de leg. I. (30). L. 17. § 1. D. de inoff. test. (5. 2). L. 12. § 1. C. de her. pet. (3. 31). If any one, not himself a necessary heir, had, by means of the *querela*, obtained the annulment of a testament, as *inofficiosum*, the judgment of annulment operated to the advantage of the necessary heirs. L. 6. § 1. D. de inoff. test.

proprietors of the dominant or of the subservient property had already been concerned in a suit as to the existence or non-existence of a predial servitude. L. 4. § 3. 4. D. si serv. vind. (8. 5). "Itaque de jure quidem ipso singuli experientur, et victoria et aliis proderit — et quisquis defendit, solidum debet restituere : quia divisionem haec res non recipit."

III. In decisions as to the status of persons and as to family rights, if they concerned paternity or patronage ; but with this modification, — that the *res judicata* could not be opposed to him who claimed to be the true owner of the right previously contested and adjudged between other persons. [1] L. 1. § 16. L. 2. L. 3. pr. D. de agnosc. et al. lib. (23. 5). L. 1. § 4. D. de lib. exhib. (43. 30). L. 14. D. de jur. patr. (37. 14). L. 42. de lib. causa (40. 12). L. 5. D. si ingen. esse dic. (40. 14).

Finally, it must be observed, that the principle which declares that a demand already rejected by the judge should not be re-asserted, was applicable, in the same manner and within the same limits, to the case where it was sought to contest a right which had been adjudged to the plaintiff in a previous suit. The judge, called upon to decide in a fresh contest, was bound to take the anterior judgment as the basis of his own decison, — in order that the principle "*res judicata pro veritate accipitur,*" (L. 207. D. de R. J.), might be realised to its full extent. [2] (See L. 11.

[1] See Syst. VI, p. 473. Wächter, II. § 73, note 83. As to Dutch Law, See art. 1957. Civ. Code (Asser, § 899, and Diephuis, IX, § 383). The operation of this provisiqn extends farther than that of the art. 3446 of the Project of 1820.

[2] Windscheid, actio, pp. 109—111. Unger, § 132, p. 670. — The contrary opinion is maintained, as to Justinian law, by Pfeiffer, Arch. für Civ. Prax. XXXVII, 4 ; and as to classic law, by Dernburg. Pf. Recht, I. p. 458. The latter considers that the purpose of the *exceptio rei judicatae,* — which is simply to put an end to the suit, — should cease to operate, in a case like this, where the judgment would present matter for a new suit. But, to judge thus is to ignore that, in this case, it is only the existence of the judgment which requires to be proved ; — which, assuredly, cannot give rise to a suit, or, at least, not to a suit of any complication. Windscheid is, therefore, right, in saying, (Pand. § 131, note 1) : — "This rule, which is deduced directly from the essence of the *res judicata,* is no less certain than the inverse rule, — although the sources put it less prominently in view."

§ 3. L. 12. D. de jurej. "Quia et si petissem a te hereditatem et probassem meam, nihilominus *ab altero petendo*, id ipsum probari necesse haberem." L. 50. § 1. D. de leg. 1.) To this hypothesis must also be applied the rule, that the adjudication of the whole includes that of a part; and that the recognition of a right implies the recognition of all that immediately and necessarily accompanies it. [1] L. 18. i. f. D. de exc. (44. 1).

[1] Windscheid, § 131, i. f.

SECTION X.

Of entire Restitution. (In integrum Restitutio.)

§ 109. MEANING.

By *in integrum restitutio,* [2] in the proper and restricted sense, [3] was understood the re-establishment of an anterior legal situation, (state of things,) — effected by judicial authority, [4]

[1] The phrase "*restitutio in integrum,*" — (instead of "in integrum restitutio") — is to be found but once! Sav. Syst. VIII § 315*a*.

[2] Paulus, I. 7. 1. "Integri restitutio est redintegrandae rei, vel causae actio." As there is question here of judicial succour, although of a special nature, the place which we give it, in our system, is justified. See, to the contrary, Windscheid, Arndts, § 117, ann. 1. Savigny, l. c., § 316, calls it "a judgment of higher power."

[3] In a broader acceptation, this expression serves to designate every kind of re-establishment of an anterior legal position or relation; whether effected by agreement, — by ordinary operation of law, — or even *ipso jure*. L. 58. D. de pact. (2. 14). "In integrum restitutis his, quae ego tibi praestitissem, consentiremus, ne quid tu mihi eo nomine praestares." L. 23. § 7. D. de Aed. Ed. "Judicium redhibitoriae actionis utrumque, id est, venditorem et emtorem quodammodo in integrum restituere debere." L. 3. § 4. D. de alien. jud. mut. causa (3. 7). L. 10. § 22. D. quae in fraud. cred. (42. 8). L. 19. pr. D. de capt. et postl. (49. 15). L. 10. C. de resc. vind. (4. 44). L. 10. C. de post. (8. 51).

[4] It is this direct action of judicial authority which constitutes the essence and the distinctive feature, by which restitution differs,—as to its nature and its effects,— from the other and ordinary means designed, also, to protect equity against strict law. See, especially, Wächter, II, § 124, note 1a. Unger, l. c. Keller, Civ. Proc. § 79, says, "It is true that the ordinary system of actions (*Jus actionum* beside *officium Judicis*) had partially provided for this, but not to the extent demanded by justice in its highest

and as a special, or an extraordinary measure, [1] in favour of a person, who, by the operation of strict law, had suffered an injurious change in his legal relations; — redress for which was demanded by a sense of equity and of supreme justice. [2]

§ 110. REQUISITE CONDITIONS.

A primary condition of restitution was that the claimant should have sustained some injury, (Laesio, damnum, captio." "Praetor hominibus vel lapsis, vel circumscriptis subvenit, sive metu, sive calliditate, sive aetate, sive absentia inciderunt in captionem." L. 1. D. de int. rest. 4. 1.) either in his estate, or in some

sense; — to which the established rule does not always give satisfaction. It was in this sense that the restitution *in integrum* was introduced, as an instrument of completion and restoration; — and it was confided to the hands of the magistrate, who was, in effect, the representative of supreme justice." —

[1] Extraordinarium auxilium, — (distinguished from commune auxilium, or merum jus. L. 16. pr. D. de min.), — thus named, because, originally, there had been left to the magistrate who ordained the restitution, an almost unlimited discretion. — L. 3. D. de in int. rest., (4. 1.) L. 1, § 1. D. de min. (4. 4). "Uti quaeque res erit, animadvertam." Little by little, the Praetors established, in their edicts, fixed conditions for granting restitution in certain cases; while, for other cases, they granted, instead of restitution, ordinary actions and exceptions. Dig. Lib. 4. Tit. 2, 3, 7. On the other hand, both science and practice contributed to assure to this institution a more precise application, and to govern it by certain general rules. The result was, — (especially when procedure had been changed and the task of the judge modified) — that the difference between ordinary means and the restitutio in integrum became gradually less and less, until at length the latter really had no motive for existence under the Justinian law. Sav. Syst. VII, p. 113. Unger, II, appendix § 134, p. 692. Windscheid, § 114, note 5. It is not then surprising, that it should have completely disappeared from modern legislation, or at least have left there but very slight traces. See § 1450 of the Austrian Code. — As to Prussian Law, See Sav. l. c., p. 113, and as to Dutch Law, the art. 1484, of the Civil Code. — The Project of 1820 still recognised it, under the name of *relief*, — apparently for the same reason which had caused its introduction into Roman law: — i. e. in order to give to the judge, in cases to which it was applicable, greater latitude in his appreciation of circumstances. See art. 3500, i. f.

[2] In this, the restitutio in integrum is analogous to the pardon granted to a criminal. The difference is only in the object of the restitution. Sav. l. c. p. 98.

other interest; [1] — but it was indifferent whether the injury consisted in a loss suffered, or a gain prevented; [2] provided, in the latter case, that the restitution did not involve attaint to rights of property acquired by third parties. [3] But every kind of injury did not give occasion for restitution. It was necessary that it should be of a certain gravity, — considering the damage that restitution, when ordained, might cause to the party compelled to make it. [4] Moreover, it was always necessary to see if the common-law did not afford some ordinary means, sufficient to atone or remedy the injury inflicted; — although, even if such ordinary means did exist, it was not an inevitable consequence that restitution was unattainable. [5] Com-

[1] L. 6. D. de min. (44). "Minoribus viginti quinque annis subvenitur per in int. rest. non solum cum de bonis eorum aliquid minuitur, sed etiam cum intersit ipsorum litibus et sumtibus non vexari." L. 35. D. eod. L. 41. D. de rec. (4. 8). L. 2. C. si adv. rem jud. (2. 27). L. 8. C. quando provoc. non est necesse (7. 64).

[2] L. 7. § 6. L. 44. D. de min. L. 17. § 1. L. 27. D. ex. quib. causis maj. (4. 6). "Et sive quid amiserit vel lucratus non sit, restitutio facienda est, etiamsi non ex bonis ejus quid amissum est." L. 41. D. eod. L. 17. § 3. D. de usuris (22. 1). L. 1, 2. C. si ut omiss hered. (2. 40).

[3] Thus, for example, in case of acquisitive prescription. L. 18. L. 20. D. ex. quib. causis maj. (4. 6) "Cum sit iniquissimum auferre domino, quod usus non abstulit; neque enim intelligitur amissum, quod alteri ablatum non est." L. 37. pr. D. de min. Voy. Sav. Syst. VII. p. 121 et s., et Cujas, qu'il cite.

[4] L. 4. D. de i. i. r. "Scio illud a quibusbam observatum, ne propter satis minimam rem, vel summam, si majori rei vel summae praejudicetur; audiatur is, qui in integrum restitui postulat." L. 9. pr. L. 49. D. de min. L. 1. C. si adv. vend. pign. (2. 29). Vangerow, I. § 176. Windscheid, § 115, note 6. Arndts, § 118, note 2. On this point the Romans established no fixed rule; — preferring to leave all to the wisdom and prudence of the magistrate empowered to ordain restitution. It is, therefore, natural, that it should not have been granted, except for some serious injury in cases where the interests of many persons were involved; — as for example in matters of inheritance. (§ 6, I. de her. qual. et diff. (2. 19)). "Non omnia quae minores viginti quinque annis gerunt, irrita sunt, sed ea tantum quae *causa cognita* ejusmodi deprehensa sunt." L. 44. D. de min. The art. 3499 of the project of 1820 was not wanting in accuracy: "In order to invoke the injury suffered as a ground for relief, it is necessary that it should be of a certain importance, both in itself and with reference to the act in which it is alleged to have occurred. A trifling injury, even if it can be proved, does not entitle to relief."

Here again, writers have not paid sufficient attention to the discretionary powers

plete restitution, moreover, was applicable to the most diverse forms of legal relations; and it mattered not whether the injury, in atonement for which it was demanded, was caused by an act or by an omission. L. 44. D. de min., (4. 4); L. 1. § 1. D. ex quib. causis maj., (4. 6); — Cod. lib. 2. tit. 27—40.

The second condition for a demand of restitution, was that it should be founded upon a just or adequate cause; (*justa causa*); — that is, that the injured person should be in a position sufficiently peculiar to justify the employment of extraordinary means to annul the effects produced by mere law. It was, moreover, necessary, in every case, to ascertain if the restitution would be equitable and useful. L, 3. D. h. t. "Omnes i. i. r. causa cognita a Praetore promittuntur, scilicet ut justitiam earum causarum examinet, an verae sint, [1] quarum nomine singulis subvenit." This means was not considered equitable, unless the injury sustained had been the immediate consequence of the peculiar position or of the Praetor, who had only to ascertain in what manner he could give to the injured party relief which should be at once the most appropriate to his case and the least prejudicial to others. L. 13. p. D. de min. "In summa perpendendum erit Praetori." L. 16. pr. eod. "In causae cognitione etiam hoc versabitur, num *forte alia* actio possit competere citra in int. rest." L. 45. § 1. D, eod. L. 25. D. de adm. et per. tut. (26. 7). L. 3. 5. C. si tutor (2. 25). L. 9. § 4. L. 21. § 6. D. quod met. causa (4. 2). L. 7. § 1. D. de i. i. r. (4. 1). L. 1. § 6. D. de dol. (4. 3). L. 3. C. de vi (2. 20). L. 5. 10. C. de resc. vend. (4. 44). All that we can assume as certain, — and it is also the only meaning of L. 16. pr. D. de min., — is that restitution was not obtainable as against acts void in law, — because there could have been no damage. The § 2 of the same Law, admits but one reasonable interpretation, — which is that Pomponius confirms the opinion of Aristo, who in addition to the *condictio* gave the *in integrum restitutio*. In fact, the latter is excluded in § 1, for the reason that he who has contracted the partnership "*ipso jure* munitus est;" and these expressions find their antithesis, in § 2. vis: — "*non* ipso jure, sed per condictionem, munitus est." The contrary interpretation, — according to which Pomponius would combat the opinion of Aristo, — gives no rational significance to these expressions. Moreover, the interpretation of this law had already divided the Glossarists. The annotation upon the words "et illud Pomponius adjicit" bears: — "Proprie et non corrigit secundum M, sed secundum Joann. scil. corrigendo dictum auctoris." — The question is also in controversy among modern authors. Sav. l. c. p. 143—145. Vangerow, I, § 1 8, obs. 1, Brinz I. p. 112. Windscheid, I, § 115, note 1. Steinberger, Weiske's R. L. IX, p. 301 et seq.

Sav. Syst. § 320, a; Puchta, Vorles. § 100, note 1.

the special circumstances of the party. In case of a purely accidental loss, which might as readily have befallen any other person, restitution would not be granted. [1] As to its utility, it was requisite to ascertain if restitution, by placing (in a given case) a person in safety from a trifling injury, would not cause him far more serious prejudice, by ruining his credit and virtually excluding him from commerce. [2]

The various grounds of restitution, the existence of which, in Roman Law, can be positively affirmed, [3] are: — I. Minority; — II. Certain omissions; principally those caused by absence; — III. Violence; — IV. Error; — V. Fraud; — VI. The capitis diminutio minima of the debtor; (Gaius. III, 84; IV, 38; L. 2, § 1. D. de cap. dim. (4. 5). — VII. The alienatio judicii mutandi causâ. (Digest, 4. 7).

But, even where the two conditions above named (laesio and justa causa) were combined, restitution was refused in the following cases: —

I. Against the consequences of an offence maliciously committed, or of a fraud effected in connection with an agreement. L. 9. § 2—6. L. 37. § 1. D. de min. (4. 4). L. 26. § 6. D. ex quib. causis maj. (4. 6). [4] L. 1. 2. C. si. adv. del. (2. 35). L. 2. 3. C. si min. se maj. (2. 43).

[1] "Non enim eventus damni restitutionem indulget, sed inconsulta facilitas. — Etquod fato contingit, cuivis patrifamilias, quamvis diligentissimo, possit contingere." L. 11. § 4 et § 5. D. de min. L. 44. D. ex. quib. causis maj. (4. 6). L. 1. C. qui et adv. quos (2. 42). "From pure commiseration, the Praetor grants no restitution." Bethmann-Hollweg," Civ. Proc. p. 745.

[2] Ulpian was careful to recommend not to accord too readily the restitution which was abused in his day. L. 7. § 8. D. eod. "Non semper autem ea quae cum minoribus geruntur, rescindenda sunt, sed ad bonum et aequum redigenda sunt ne magno incommodo hujus aetatis homines afficiantur, nemine cum his contrahente, et quodammodo commercio eis interdicetur."

[3] Disputed by some. Vangerow, § 177, obs.; — Windscheid, § 116, note 2.

[4] "In criminibus quidem aetatis suffragio minores non juvantur; etenim malorum mores infirmitas animi non excusat. Si tamen delictum, non ex animo, sed *extra* venit, noxia non committitur." The Glossa interprets *extra* by "puta tantum ex culpa, non dolo." Haloander and Cujas propose to substitute *ex contractu* for *extra*; but this conjecture, although sustained by the Basilica, does not appear to me admissible.

II. Against the affranchisement of a slave, [1] unless it were beneficio principis. L. 9. § 6. L. 48. § 1. D. de min. L. 7. pr. D. dol. (4. 3). L. 9. D. de appell. (49. 1). Tit. C. si. adv. lib. (2. 31).

III. Against the sale by the State of the goods of its debtors. L. 5. C. de fid et jur. hast. (10. 3). L. 3. C. si adv. fisc. (2. 37).

IV. Against the prescription of 30 or of 40 years. [2]

V. Against a consummated marriage. [3]

VI. When a person had approved, expressly or tacitly, — after cessation of the ground for restitution, — the act against which this remedy might have been granted. [4] L. 3. § 1. L. 20. § 1. L. 30. D. de min. Tit. C. ti maj, fact. (2. 46).

§ 111. OF RESTITUTION BY REASON OF MINORITY.

A minor [5] was entitled to restitution against every injury that he might sustain, [6] whether by reason of his own

[1] Restitution might be obtained against an act by which liberty might still be granted. L. 11. § 1. L. 33. D. de min.

[2] L. 5. C. in quibus causis i. i. r. non est necesse (2. 41). L. 3. C. de praescr. XXX ann. (7. 39). "Non sexus fragilitate, non absentia, non militia contra hanc legem defendenda, sed pupillari aetate duntaxat huic eximenda sanctione." See in refutation of Burchhardi, who admits the restitution, Sav. Syst. III, p. 427, and especially Unterholzner, Verjähr. I. § 136, and the annotation of Schirmer.

[3] Sav. Syst. VII, p. 142. Vangerow, 1. § 178, obs 2, note 11. Arndts, § 125. See also art. 3511 of Project of 1820.

[4] Sav. l. c. p. 239—241.

[5] L. 1. § 1. D. de min. "quod cum minore natu gestum erit, uti quaeque res erit animadvertam."

[6] It was not so as to injury which others suffered by the act of the minor. L. 3. § 11, et § 4. D. h. t. "Praetor minoribus auxilium promisit, non majoribus." L. 23 D. eod. The question whether a surety could avail himself of the right to restitution granted to the minor, is matter of controversy. It is however, generally answered: "Yes," provided that the surety had not been taken solely for the purpose of protecting the creditor against the effects of the minority of his debtor. This solution furnishes an explanation of several fragments apparently contradictory. L. 51. pr. D. de proc. (3. 3).

acts [1] or omissions, [2] or of those of his legal representatives; [3] — in so far as such injury was not the result of mere accident, and that the common law gave no remedy equally prompt and efficacious.

Restitution was *not* granted: —

When the minor had, voluntarily and solemnly, bound himself by oath not to make any opposition to the act. L. 1. C. si adv. vend. (2. 28).

II. Nor in respect of a payment made to the guardian of the minor, in virtue of a judicial decision. L. 7. § 2. D. de min. (4. 4). L. 25. C. de adm. tut. (5. 37). § 2. I. quib. alien. lic. (2. 7). "Sequatur hujusmodi solutionem plenissima securitas." [4]

III. Nor when the minor, having obtained restitution against the acceptance or refusal of an inheritance by his father on his behalf, sought, afterwards, to obtain restitution anew. L. 8 § 6. C. de bon. quae lib. (6. 61). "Ne ludibrio leges ei fiant, saepius eandem et amplecti et respuere hereditatem cupienti."

IV. Nor when he had borrowed money, by order of his father, and while under his control. L. 3. § 4. de min. [5] L. 2. C. de filiofam. min. (4. 23).

L. 1. 2. C. de fidej. min. (2. 24). L. 7. § 1. D. de exc. (44. 1), L. 95. § 3. D. de sol. (46. 3). Paul. Sent. I. 9. § 6. "Qui sciens prudensque se pro minore obligavit, si id consulto consilio fecit, licet minori succuratur, ipsi tamen non succurritur." See L. 13. pr. D. de min. Sav. Syst. VII, p. 217 et s. Steinberger, l. c. p. 331. Vangerow, I. § 183, obs. 1. Keller, § 104, note 2, et *supra*, (p. 29 *a*).

[1] Of whatever nature. Gestum sic accipimus, qualiter sive contractus sit, sive quid aliud contigit." L. 7. pr. seqq. D. de min.

[2] L. 7. § 11. § 12. L. 9. § 2. L. 88. § 1. D. h. t.

[3] L. 29. pr. D. h. t. L. 2. 3. C. si tut. vel cur. interv. (2. 25). L. 4. C. si adv. rem jud. (2. 29). Even when the act was done by the intervention of the public authority, restitution might be demanded. L. 11. C. de praed. et aliis reb. min. (5. 71) L. 2. C. de fidej. min. (2. 24).

[4] According to Savigny, l. c. p. 151, it would not be the process of restitution which would be excluded in this case, but only the ground upon which it might be demanded. This opinion is contrary to the terms of the text which we quote. See Vangerow, I. § 183, obs. 2. Windscheid, § 117, note 6.

[5] Savigny, (l. c. p. 155, and appendix XVIII), finding no reason to justify this exception, has endeavoured to advance a modification of the text of the law in question.

V. Nor in respect of an arrangement between near relatives, for settlement of rights which would devolve upon the one after the death of the other. L. 11. C. de transact. (2. 4). "Cum fratrum concordia, remoto captandae mortis alterius voto improbabili retinetur."

VI. Nor when the minor, — provided he was more than eighteen years of age, — had borrowed money to ransom the person whose heir-presumptive he was, and who had been made prisoner of war. Novella 115, Cap. 3. § 13.

VII. Nor when a minor found himself injured, because a suit which concerned him had remained undecided for more than three years: — a case in which restitution was granted only on the ground of absolute necessity. L. 13. § 11. C. de jud. (3. 1). [1]

If a minor demanded restitution as against another minor, equally injured by the act in question, the *statu quo* was maintained. L. 11. § 6. L. 34. pr. D. de min. L. 128. pr. D. de R. J. (50. 17). "In pari causa possessor potior haberi debet."

Finally: if the minor had obtained dispensation as to his age, (*venia aetatis*), he could no longer demand restitution. L. I. C. de his qui veniam aetatis impetrav. (2. 45). [2]

After the example of minors, [3] municipal corporations were, also,

Vangerow, l. c., and Windscheid, l. c., reject this modification, although both admitting that they can find no reason for the exception. For my part, I think I see in it, simply a desire not to enfeeble the bases of credit, (especially with reference to loans of money), unless in case of absolute necessity. This is what was already indicated in the Glossa, by way of hypothesis: "vel hoc speciale in pecunia;"— which appears there in reference to this passage, in the train of some other erroneous observations.

[1] As to certain apparent exceptions, see Windscheid, l. c.

[2] Could a minor demand restitution against the venia aetatis itself? Savigny, l. c. p. 158, and Vangerow l. c. n⁰. 8, allege the affirmative; but the matter appears to me at least doubtful. It is a question of a status acquired "principali auctoritate causa cognita." The Law 1. C. l., invoked by these writers, proves rather against than for their reasoning.

[3] With reference to restitution in favor of minors in general, Savigny, l. c. p. 148, has proved, most incontestably, that the Roman Law had already exceeded its original purpose, in still maintaining it, after the introduction of the *cura perpetua*; and there no longer exists any reason for its use in modern law. See, in the same sense, Windscheid, § 117, note 3; Unger § 134, appendix-note 13.—The question is

eventually, invested with the right of demanding the *in integrum restitutio*. L. 4. C. quib. ex causis maj, (2. 54). " Respublica minorum jure uti solet, ideoque auxilium restitutionis implorare potest." L. 3. C. de jur. reip. (11. 29.) " Rempublicam ut pupillam extra ordinarem juvari moris est." L. 1. C. de offic. ejus (1. 50).

§ 112. OF RESTITUTION BY REASON OF CERTAIN OMISSIONS.

Entire restitution was granted, as against the consequences of certain injurious omissions, in cases [1] where the party had omitted to act, only by reason of some external obstacle,—the force of which it rested with the judge to appreciate. —Such were :

asked by Brinz, Pand. p. 118. "Admitting that the injuries in question can now present themselves very rarely,—if however they *do* occur, is their rarity a reason for suppressing the remedy ?" and this question finds an answer in this phrase of the Roman jurist : " ne magno incommodo afficiantur hujus aetatis homines, nemine cum his contrahente." When Brinz adds : " In the interest of the system of law, we should prefer the ancient entire restitution to the modern nullity," he forgets that the safety of commerce is less endangered by the " absolute nullity" than by the uncertainties and the doubtful results of annulability. It must not, however, be disguised, that the abolition of entire restitution has diminished the protection given to minors ; and that this imposes upon modern legislators a heavier responsibility with reference to seeking and establishing other guarantees, which, without too great interference with commerce and credit, shall be sufficient to protect minors against the unfaithfulness or the bad management of those who represent them. It is a matter in which the legislation of many countries leaves ample room for improvement !

[1] L. I. § 1. L. 15. § 2. L. 17. L. 41. L. 43. D. ex quib. causis maj. In the Edict of the Praetor, the enumeration of divers cases, among which absence occupies the prominent place, is followed by the general provision, *clausula generalis*) :—" Item si qua alia causa justa esse videbitur, in integrum restituam." This "clausula" was formerly interpreted as if the Praetor had possessed the power of granting restitution in every possible case,—even against positive acts—from the moment that such a proceeding seemed to him equitable. This opinion,—contradicted by the various fragments in which the jurisconsults have minutely specified the limits of the ground for restitution, — is moreover, opposed to the examples given in illustration of the " clausula," by the Law 26. § 9. D. h. t. vis ; " *multi enim casis evenire potuerunt*" —

I. Certain obstacles inherent in the person of him who had omitted to assert his rights; — and principally compulsory absence, or absence justified by some other well founded motive. [1] (De causa probabili. L. 2. §. 1. L. 3. L. 4—7. L. 26. § 9. L. 28. pr. L. 33. § 2. L. 35. L. 45. D. ex quib. causis maj. (4. 6). Tit C. de ux. mil. (2. 52)). To absence was assimilated the situation of persons who were deprived of their liberty, or were in the power of the enemy; — ("in vinculis, servitute, hostiumque potestate esset,") — or who, from other causes had not the right or the means of going forth from a certain place. L. 1. § 1. L. 9. 10. L. 28. § 1. D. h. t. In these several cases, it generally mattered little, that the absent person was or was not represented; [2] but he who had an opportunity of being represented, and had not availed himself of it, could not afterwards obtain restitution. L. 20. pr. D. de min. (4. 4). L. 26. § 1. L. 28. pr. D. ex. quib. causis maj. (4. 6).

where the Glossa (and that deserves to be remarked) annotates: "et sunt isti casus ut hic subjecti." See, also, L. 7. D. de i. i. rest. (4. 1). L. 28. L. 33. D. ex quib. causis maj. L. 5. c. de app. (7. 62). On the other hand, the clausula was by no means restricted to the case of absence only; its application was extended, by analogy, to other cases where inaction had been the necessary result of a superior force; — and the Glossa had already indicated, in this respect, the L. § 9. D. de itin. actuque priv. (43, 19), "Si quis propter inundationem usus non sit itinere actuque hoc anno, cum superiore sit usus, potest repetita die, hoc interdicto uti per i. i. r. ex illa parte, si qua mihi justa causa esse videbitur. See Savigny. Syst. VII, p. 466. Puchta, Vorles. 191. Wächter, II, p. 845. Vangerow, I, § 188, obs. 1. n⁰. 3 Windscheid, § 119, note 3 Arndts, § 120, obs. 2.

[1] Savigny. l. c. p. 175, gives to the words "*causa probabilis*" an erroneous signification. Windscheid, l. c., note 5, addresses to him the very just observation: It is not permissible to translate *causa probabilis* by "praiseworthy cause", in order to have the satisfaction, afterward, of criticising this condition."

[2] This matter, also, is controverted by reason of the apparent contradiction between L. 26. § 9. coll. L. 15. pr. and L. 30. D. ex quibus causis maj. (4. 6), coll. 1. 8. D. de i. i. r. (4. 1). I agree with those who see in the L. 39. 1. only a variation relative to the *res judicata*. Windscheid l. c. note 8. — To suppose, with the Glossarists and many modern authors, (Vangerow, I, § 188, obs. 3) that the Roman Law had made a special exception in favor of the *legati civitatis*, seems to me impossible. "Non debet esse," Baldus had already said, "minus privilegiata absentia reip. causa, quam municipiorum." See, moreover, Savigny, l. c. p. 178 et s. et Arndts, l. c. note 3.

II. Certain obstacles inherent in the person of him against whom a right was to be asserted; — for example if he was absent, no matter for what reason; — if he was deprived of his liberty, or if any other cause prevented his being sued, — whether by reason of some privilege, or of his age, or of mental malady; and finally if the adversary was only a legal or fictitious person. — L. 1. § 1. L. 21. § 1. L. 22. § 2. L. 23. § 3. L. 25. § 26. § 2. D. h. t. But in those cases, it was necessary that he against whom action should have been taken had not been regularly represented. L. 21. § 2. and § 3. L. 22. pr. L. 26. § 3. D. h. t. L. 2. C. de ann. exc. (7. 40). [1]

III. Certain obstacles caused by the authorities or by the judge, (per magistratus actio exemta); — whether the judge had intentionally created an obstacle, by his tardiness or his negligence, to the timely exercise of a right, or that the occurrence of an extraordinary vacation (suspension of the sittings) of the tribunals [2] had prevented the claimant of the right from asserting it. L. 1. § 1. L. 26. pr. § § 4. 7. D. ex quib. causis maj.

IV. Certain natural obstacles. L. 34. § 1. L. 35. D. de S. P. R. (8. 3). L. 14. pr. D. quemadm. serv. amitt. (8. 6). L. 1. § 9. D. de itin. actuque (43. 19).

§ 113. OF RESTITUTION BY REASON OF VIOLENCE.

species of restitution had, relatively, less importance, because it was not the only means of obtaining the neutralization of an injury consequent upon an act vitiated by violence; there were also [3] an ordinary action and an exception, tending to

This constitution rendered the legal process of restitution unnecessary, without abolishing it. Sav. l. c. p. 185. § 106, note 6.

[2] It was otherwise as to the ordinary vacations "quia prospicere eas potuerit actor, ne in eas incideret." L. 26. § 7. D. ex quib. causis maj.

It is a question which of the two, — the *actio quod metus causa*, or the

the same end. L. 1. D. quod met. causa (4. 2). "Quod metus causa gestum erit, ratum non habebo." But we can imagine cases in which the ordinary means were either inadequate or too complicated, [1] and for which the exceptional help of the Praetor was unquestionably desirable. Paulus, I. 7. § 2 and § 4. L. 9. § 3 and § 4. D. h. t. "Ut sive perfecta, sive imperfecta res sit, et actio et exceptio detur, — volenti autum datur et in rem actio et in personam, rescissa acceptilatione vel alia liberatione." L. 21. § 5. D. eod. "Si coactus hereditatem repudiem: duplici via mihi Praetor succurrit: aut utiles actiones quasi heredi dando, aut actionem metus causa praestando: ut quam viam ego elegerim, haec mihi pateat."

§ 114. OF RESTITUTION BY REASON OF ERROR.

Error is, also, expressly mentioned as one of the grounds for restitution. L. 2. D. de i. i. r. "Sive per status mutationem aut jestum errorem." Paul. I. 7. § 2. It appears, nevertheless, to be restricted, here, to a few special cases; — which, however, is in accord with the general principle, in virtue of which error in

restitutio ob metum, is the more ancient. For the antiquity of the *restitutio*, see Sav. l. c. p. 192. Bethmann-Hollweg, Civ. proc. p. 746. — On the contrary, Vangerow, I. § 185. obs. 1. Steinberger, l. c. p. 320. and Schlieman, die Lehre vom. Zwang, pp. 7—12. Savigny considers that the edict made use, for the *restitutio*, of the same terms which were afterward employed for the *actio quod metus causa*; but the provision "omnes i. i. r. *causa cognita* a Praetore restituuntur" argues the contrary; and it is, precisely thereupon that Savigny rests, in denying to the restitutio against the cap. dim. the character of the restitutio properly so called! Sav. Syst. II, p. 96.

[2] The advantage offered by restitution, and which distinguishes it from the actio quod metus causa, consists, first, in a more expeditious procedure, but also in the immediate re-establishment, in its primitive condition, of the lost ownership, or the extinguished obligation, and the consequent protection of the party injured against the danger of encountering an insolvent adversary. It was, moreover, preferable, in all cases where an indefinite number of different parties were interested; — as in case of the acceptance or refusal of an inheritance. Sav. Syst. VII. p. 195. Windscheid § 120, note 4. Keller, Pand. § 105.

legal acts is not taken into consideration, or, at any rate, only to a very limited extent. [1] This cause of restitution was applicable in civil law, only to the following cases. [2]

I. When the creditors of an estate (succession) had demanded and obtained the separation of the goods of that estate from the property of the heirs, they might claim restitution as against the prejudice which they had suffered from this separation, if they could prove that they had demanded it only by reason of an excusable error. (Justissima ignorantiae causa allegata.")

II. When heirs, fearing the application of the Senatus consultum Silanianum, had not, within the time fixed by the testament, fulfilled the conditions imposed upon them. L. 3. § 31. D. de. Scto Silan. (29. 5).

But the proper domain of this restitution was in procedure, — because, there, the narrow formalism which reigned, (especially in the earlier time) gave room for errors, and consequently for rigorous and unjust results. When procedure had been reformed, restitution no longer had much practical importance. [3]

[1] Wächter, II, p. 843. It is, doubtless, for this reason that this form of restitution had no separate place in the Edict, nor special Title in the Pandects. Keller, § 105. i. f.

[2] Windscheid, § 119 note 7.

[3] The Digest has preserved for us a fragment of the Edict, by the terms of which the Praetor came to the aid, by means of restitution, of him who had had a suit against a child assisted by a *falsus tutor*; — that is by a person pretending to be a guardian without being so in reality. In that case, restitution was no less just than necessary, by reason of the *litis consumtio*. L. 1. § 1. and § 6. D. quod falso tut. auct, 26. 6. Restitution is found again: I. In case of *plurispetitio*, when the error was of such a nature ut constantissimus quisque labi possett". Gaj IV; 53, 57. § 33. I de act. (4. 6). II. In a case where the creditor of an estate (succession) had sued for payment of an entire debt a person who had fraudulently presented himself as sole heir. In this case the action against the other heirs was consumed; — but if the person sued was insolvent, the Praetor restored the right of action to the creditor by means of the *restitutio*. L. 18. D. de interr, in jure. (11. 1). III. When one of the litigant parties who had the right to demand security, had, by mistake, accepted as such an incapable person, — for example, a slave. L. 8. § 2. D. qui satisd. cog. (2. 8). IV. We find, also, this case: Every declaration made before the Praetor, — whether voluntarily or upon interrogation by the adverse party, (*confessio*, *responsio*), — was

§ 115. OF RESTITUTION BY REASON OF FRAUD.

Besides the *actio* and the *exceptio doli*, there is no doubt that the *in integrum restitutio* served equally to protect from injury those who had been entrapped by fraudulent manoeuvres. L. 1. D. de i. i. r. rest. (4. 1). "Sub hoc titulo plurifariam hominibus vel lapsis vel circumscriptis subvenit, sive metu, sive calliditate inciderunt in captionem." Paul, l. c. "Integri restitutionem Praetor tribuit ex his causis, quae per metum, dolum — gesta esse dicuntur." It is, however, hardly probable that fraud was a common ground of restitution, or that restitution was accorded in every instance where other recourse against the person committing the fraud had not been successful. This doctrine (sustained by some writers), [1] is contrary to the nature of things, and finds no support in the sources. It would, surely, be more reasonable, to assume that the cases of fraud to which restitution was applicable were excessively rare, and connected, for the most part, with procedure. [2]

as a general rule, binding upon him by whom it was made, and irrevocable; but the Praetor might come to his assistance, if he could prove that his declaration was the result of an excusable error of fact; or if subsequently the error had become manifest, by the actual impossibility of the fact alleged in the declaration. L. 11. § 8 § 10. L. 13. pr. D. de interr. in jure. (11. 1.). Sav. Syst. III. p. 386.

[1] It is also the opinon of Savigny, l. c. p. 200—202, who argues specially from the analogy between fraud and violence. — Violence, however, has a peculiar character, differing greatly from that of fraud; and besides, such an extension would have been exceedingly dangerous for the general course of business. Wächter, II, p. 760, note 9. Another testimony against this doctrine is the fact that entire restitution excluded the brand of infamy which otherwise attached to fraud; (L. 7. § 1. D. de i. i. r., and L. 7. pr. D. de dol. (4. 3).); so that all the passages where it is shown that this brand was affixed, prove, by that fact alone, against the application of the *in integrum restitutio*. L. 18. L. 38. L. 40. D. de dol. — The Glossa seems to have preferred the restrictive interpretation, as shown by the commentary upon the L. 7. already cited: "decepti sine culpa sua, maxime si fraus ab adversario intervenerit;" — a passage as to which the Glossa remarks: — "quamquam non semper in omni causa, vel contractu, vel qualibet re." Savigny is combated by Vangerow, I. § 185, obs. 1; Windscheid, l. c., note 6. Sintenis, I, § 36, note 86.

[2] It was to procedure that referred the L. 7. § 1, "boni Praetoris est potius *restituere litem*;" the L. 33. D. de R. J. (42. 1); the L. 18. D. de interr. in jure. In the latter, Windscheid mistakes, in seeing a case of error.

§ 116. OF RESTITUTION BY REASON OF CAP. DIM. MIN., AND OF ALIENATIO JUDICII MUTANDI CAUSA.

At one time, the *capitis diminutio minima* of a debtor, (by adoption, arrogation, or emancipation), had the effect of annulling, with rare exceptions, all obligations which he had previously contracted. The consequence was a flagrant injustice to his creditors, [1] strangers to this change of *status;* and the Praetor, therefore, came to their assistance, by granting them the *in integrum restitutio,* which at once, revived their extinguished claims. Gaj IV, 38. III. 84. L. 1. D. de i. i. r. (4. 1). Paul. l. c. L. 2. § 1. D. Cap. dim. (4. 5). "Qui quaeve, posteaquam quid cum his actum contractumve sit, capite dimunuti diminutaeve esse dicuntur, in eos easve perinde quasi id factum non sit, judicium dabo." This kind of restitution, however, had nothing in common with other proceedings so called; — because, first, it was granted without any thorough investigation of the particular circumstances of the case; and, secondly, was not subject to short prescription. It was therefore, in reality, an abrogation of the ancient rule of strict law; — and already in the Justinian law, there was no thought of its practical use as an extraordinary remedy. [2] —

The *alienatio judicii mutandi causa* did, certainly, figure in the

Bethmann-Hollweg, (Civ. Proc. p. 750) observes that, originally, the publicity of the *comitia* and the formalities which accompanied it, as well as the surveillance exercised by the Pontiffs, furnished sufficient guarantees against this injustice; and that the extraordinary remedy granted by the Praetor became necessary only when the mode of forming and dissolving family ties had been left, in larger measure than formerly, to the free action of individuals.

[2] Sav. Syst. VII., p. 211. In the contrary sense, Vangerow, I, § 34, obs. 2, and § 187, i. f.; and Schrader, in his "Addit. ad Inst." p. 792. But the rule itself is not even mentioned in the compilation of Justinian; — and, moreover, if the law had not been changed, it is impossible to conjecture why Justinian should in § 3, I, de acq. per arrog. (3. 9), make, in the passage of Gaius III, 84, such changes, that it is only by the most forced interpretation that the traces of the *restitutio* can be found. Vangerow is refuted by Keller, § 107. Arndts, § 121, note 2, and Bethmann-Hollweg, l. c.

Edict of the Praetor, as a ground for restitution. [1] It took place, when the possessor of something belonging to another, finding himself threatened with an action in revindication, intentionally transferred the possession to a third person, in order to render the position of his adversary less favorable. By means of the *auxilium extraordinarium* the Praetor gave to the owner the faculty of instituting an action against the first possessor as if the thing were still in his possession. Subsequently, this remedy was rendered substantially superfluous by the rule of law: "*pro possessione dolus est*;" first introduced in the case of the petition of hereditary right, and afterward extended to revindication. L. 27. § 3. D. de e. V. (6. 1). L. 36. § 3. D. de her. pet. (5. 3). L. 131. L. 157. § 1 D. de R. J. (50. 17).

§ 117. OF THE AUTHORITY COMPETENT TO GRANT RESTITUTION.

At first, to the Praetor alone, in Rome and throughout Italy, and to the Presidents or Proconsuls in the Provinces, was it competent to grant restitution. Neither the magistratus municipalis nor the Judex pedaneus had this power. L. 26. § 1. D. ad mun. (50. 1). — This was due to the peculiar nature of the proceeding, — far less subject to fixed and invariable rules, than to the empire of the circumstances of each case, the examination of which often required a great deal of tact. [2] Under

Hence its place in the fourth book of the Digest, and in the L. 3. § 4. D. de alien jud. mut. causa: "Ex quibus apparet, quod Proconsul in integrum restituturum se pollicetur." Besides the restitution, the person injured had a personal action for damages,"— ut hac actione officio judicis tantum consequatur actor, quantum ejus intersit, alium adversarium non habuisse." See Sav. l. c. p. 104 and 212. Bethmann-Hollweg, p. 752.

[2] Sav., l. c. p. 110. Restitution against a judgment could be granted only by a judge at least equal in rank to him who had pronounced the sentence. L. 18. pr. D. de min. "Minor magistratus contra sententiam majorum non restituet." L. 42. D eod. L. 3. C. si adv. rem jud. (2. 27).

Emperors, restitution was still reserved to the superior authorities; but a Constitution of Justinian permitted them to grant it by the intervention of judges named by themselves. L. 16. § 5. L. 17. D. de min. L. 2. C. si adv. Fisc. (2. 37). L. 9. C. de prob. (44. 19). L. 3. C. ubi et apud quem (2. 47).

§ 118. OF THE PARTIES IN THE SUIT FOR RESTITUTION.

Restitution might be demanded by the injured person, or by his successors, either in person, or by some one empowered by special procuration; who might, also, be procurator in rem suam. L. 6. D. de i. i. r. (4. 1). L. 3. § 9. § 10. L. 18. § 5. D. de min. L. 24. pr. L. 25. § 1. L. 26. L. 27. pr. D. eod. L. 25. D. de adm. tut. (26. 7). L. 20. § 1. D. de tut. et rat. distr. (27. 3). L. un. C. etiam per procur. causam i. i. r. agi. posse (2. 49). As to the person against whom restitution was sought, there was a distinction, according to the nature of the relations of law, or of right, which formed its object. If the right was of an absolute nature, the in integrum restitutio was also impersonal. (in rem). If, on the contrary, there was question of an obligation created by an agreement, restitution was granted, first against him who had contracted the obligation, or his successor; and it was only when the recourse against them was fruitless, that it was granted against those to whom the thing reclaimed had been transferred; being then so granted, even though the latter had no connection with the ground of restitution [ ]. If it was demanded

Paul. I. 7. § 4. "Integri restitutio aut in rem competit, aut in personam." L. 13. § 1. D. de min. "Interdum autem restitutio et in rem datur minori, id est adversus rei ejus possessorem licet cum eo non sit contractum." L. 17. pr. L. 30. § 1. D. ex. quib. causis maj. (4. 6). L. 1. C. si adv. vend. pign. (2. 29). L. 39. pr. D. de evict. (21. 2). Sav. Syst. VII, p. 270. Puchta, Vorles. § 106. Arndts. § 123. obs. Windscheid, § 120, note 3, asserts, as a rule, that restitution was never granted against a particular successor, unless he had been privy to the situation which had given ground for the demand, or that the damage could not be repaired in any other manner. This doctrine

by reason of error, it was always in rem, as in the actio quod metus causa.

§ 119. OF THE TIME WITHIN WHICH THE IN INTEGRUM RESTITUTIO COULD BE DEMANDED.

From the first, the exercise of this extraordinary and thorough remedy had been restricted within narrow limits as to time. Under the ancient law, the limit was one available year. L. 19. D. de min. L. 1. § 1. L. 28. § 3. D. ex quib. causis maj. (4. 6). L. 7. pr. C. de temp. i. i. r. (2. 53). Constantine established different rules for Rome, Italy and the Provinces. L. 2. C. Theod. de in int. restit. (2. 16). Justinian replaced the available year by a general term of four consecutive years: — "quadriennium continuum". [1] L. 7. C. de temp. i. i. r. (2. 53). This time ran, in case of minority, from the day of attaining majority; or if the minor had obtained the *venia aetatis*, from the day when this had been granted. [2] L. 7. pr. L. 5. pr. C. h. t. In case of absence or other analagous obstacle, it ran from the moment when the obstacle was removed. L. 1. § 1. D. ex quib causis maj. (4. 6). [3] L. 7. § 1. C. de temp. i. i. r. In case of violence, it commenced from the day when the party had recovered his liberty; and finally, in case of error or of fraud, from the moment when the special situation which gave cause for

is contradicted by the L. 17, already cited, which contains no restriction, any more than does the L. 39. pr. De evict; but, above all, by the L. 30. § 1. D., which would be futile unless it had in view restitution by a third person. — The Glossa had already given the following commentary upon the words restitutio facienda: — "Non aperit adversus quem: dic ergo adversus utrumque ut arg. L. 13. § 1. D. de min. — sed an primo eligi debet absens, sicut venditor ut in dicta lege? Ru non forte, quia ibi contraxit ille qui vendidit cum minore ideo fuit plus gravandus: hic autem non fuit contractum cum absente ab eo qui petit restitui."

[1] Sav. Syst. VII. p. 256. Vangerow, I. § 180, obs.

[2] But, in this case, the time could not end before the period of the natural majority.

[3] "Intra annum quo primum de ea re experiundi potestas erit."

restitution had ceased. [1] It must be observed, however, that the prescription of restitution might, in its turn, form the object of restitution, if there existed a just ground for asking it. [2]

The right to demand restitution passed to heirs; but if the prescribed time had begun to run in the lifetime of their predecessor, they had only the remainder, within which to make their claims; — unless, indeed, they had some special ground of their own, for claiming restitution [3].

Moreover, it did not suffice that the demand of restitution had been made within the prescribed time; it was also requisite that the suit to that end should be terminated. [4] L. 39. pr. D. de min. L. 5. pr. L. 7. pr. C. de temp. i. i. t. "Ut et hic pro anno utili memorata continuatio observatur ad interponendam contestationem finiendamque litem."

§ 120. OF PROCEDURE IN RESTITUTION.

The in integrum restitutio was never granted as the spontaneous act of the judge, but only on the demand of the injured party; [5] the adverse party being first heard, or at least duly summoned; [6]

[1] The contrary opinion is taught, as to violence, fraud and error, by Vangerow, I, § 180, obs. 2. This writer invokes, among others, the prescription of the action for fraud. L. 8. C. de dolo (2. 21). See, in answer, Sav. l. l. p. 257. Vangerow (I. p. 310) admits that despite the restrictive terms of the L. 7. § 1. c. l., the generality of the provisions of the same law, shows that the same limit of time (four years) relates, alike, to fraud, violence and error; — but from this point he sins against logic in seeking, notwithstanding, to exclude the application of the same provision to that which concerns the starting point of the prescription. The analogy is incontestable. See Wächter, II, p. 849. Windscheid, § 120, note 11. Arndts, § 122.

[2] This point has been contested, on the strength of L. 20. pr. D. de min.; but erroneously. See L. 1. L. 3. C. de temp. i. i. r. Sav. l. c. p. 258. Arndts l. c., note 3.

[3] L. 12. de min. (4. 4). L. 5. § 1—3. C. de temp. f. i. r.

[4] Sav. l. c., p. 253.

[5] "Postulata cognitio." L. 39. D. de proc. (3. 3). "Impetrat cognitionem." L. 39. pr. D. de evict. (21. 2).

L. 13. pr. D. de min. "causa enim cognita, et praesentibus procuratoribus, vel

and after the ground for restitution, as well as the damage suffered, had been proved. [1] From the moment when the demand was made, every thing that concerned the object of the demand was required to be left *in statu quo*, until the end of the proceeding. L. 1. C. de i. i. r. post, (2. 50). "Postulata i. i. r. omnia in suo statu esse debere, donec res finiatur, perspicui juris est" L. 32. C. de transact. (2. 4). The decision given upon a demand for restitution admitted an appeal. If the judgment which refused restitution had acquired the force of the *res judicata*, [2] the demand could not be renewed, unless upon the ground of a subsequent change of circumstances. (novae defensiones). [3]. L. 1. L. 2. C. si saepe. i. i. r. postul. (2. 44).

According to the nature of the case, the purpose of restitution could be attained in two ways.

1. By a simple decree of the magistrate, which decided and ended the affair, leaving nothing to be examined or judged. This mode of procedure was adopted in various cases; [4] but, above all, when there was a question of the omission of certain formalities in connection with a suit; and the consequence was

si per contumaciam desint, i. i. r. perpendendae sunt." L. 29. § 2. D. eod. "cum non evocatis creditoribus, in integrum restitutionis decretum interpositum proponatur, minime id creditoribus praejudicasse." L. Un. C. si adv. dot. (2. 24). L. 2. C. si adv. fisc. (2, 37). Nov. 119, cap. 6.

[1] L. 39. pr. 43. D. de min. L. 1. C. de off. praet (1. 39). L. 4. C. de i. i. r. min. (2. 22). L. 1. 3. 4. C. si min. se maj. dix. (2. 43). L. 9. C. de prod (4. 19). L. 2. C. de praed. vel aliis reb. min. (5. 71).

[2] L. 1. C. si saepius (2. 44). L. 41. D. de min. "quasi ex causa judicati."

[3] There is disagreement as to the meaning of these words. See the Glossa. Azo summa C. ad h. t. "Novae autem non tantum quae de novo quaeruntur, sed et quae tempore prioris causae minori competebant, tamen recitatae et exhibitae non fuerunt." If this explanation had been adopted, proceedings in restitution would never have ended. We must, therefore, prefer that of Duarenusc who elucidated the rule by means of an example, Comm. ad. h. t. Opera, p. 116) — "nisi ex nova causa restitutio postuletur." It is thus an application of the principle, "nova causa superveniens novam facit petitionem."

[4] L. 24. § 4. de min. "Itaque si in vendendo fundo circumscriptus restituitur, jubeat Praetor emtorem fundum cum fructibus reddere et pretium recipere." L. 39. pr. D. de evict. (21. 2). "Fundus Praetoria cognitione ablatus."

that the injured party was at once re-established in the position in which he *would* have been, if negligence had not occurred. L. 36. D. de min. (4. 4). "Minor XXV annis omissam allegationem per integrum restitutionis auxilium repetere potest." L. 7. § 11. D. eod. L. 8. i. f. D. de i. i. r. (4. 1). L. 1. C. si ut omiss. hered. (2. 40);

II. Or restitution tended solely to remove an obstacle which prevented the exercise of some independent right; so that there were two distinct questions to be decided; — first, whether there was ground for restitution, *(admitting, by hypothesis, the anterior existence of a right)*; and secondly whether the right had really existed. In such cases, restitution afforded only a conditional remedy. [1]

Ulpian indicates these two modes of procedure, when he says that there are two ways of giving relief to a minor injured by the effect of a sale: "Vel cognitione Praetoria, vel rescissa alienatione dato in rem judicio," L. 13. § 1. D. de min. (4. 4). Under the later Emperors, the magistrates began, little by little, to judge affairs themselves; [2] and they thus, often, it would seem, arrogated to themselves the decision of the second question above mentioned, — which should have formed the subject of a separate proceeding, termed *judicium rescissorium*; [3] — until, at

The preliminary proceeding for restitution itself was generally called "*judicium rescindens*;" — the proceeding which followed, *judicium rescissorium*, *actio rescissoria* or *restitutoria*." L. 28. § 5. and § 6. D. ex quib. causis maj. L. 24. C. de r. V. (3. 32). L. 18. C. de jure post. (8. 51). L. 3. § 1. D. de eo per quem (2. 10). L. 46. § 3. D. de proc. (3. 3). L. 7. § 3. D. quod fals. tut. (27. 6). See, for the rest, Sav. Syst. VII. p. 231. and s. Wächter, II. p. 841. Windscheid, § 120, note 6.

[2] Bethmann-Hollweg, civ. Proc. p. 781 et seq. "At the commencement of the third century, the two forms, — the *ordo judiciorum* and the *cognitio Praetoria*, — still existed, side by side; but amidst the growing despotism of functionaries and the ruins of the ancient communal life, the *ordo judicioruum*, (founded upon a constitution which upheld the trial by jury) was, in truth, an anomaly and it already showed symptoms of decadence."

[3] It appears that this proceeding was the rule, in cases of restitution by reason of omission. L. 2. pr. D. ev quib. causis maj. (4. 6). "Hoc edictum, quod ad eos pertinet, qui eo continentur, minus in usu frequentatur, hujusmodi enim personis extra ordinem jus dicitur ex Senatusconsultis et principalibus constitutionibus." Sav. Syst. VII. p. 234. et seq.

length, the abolition of the ancient *ordo judiciorum* caused the whole process of restitution to be treated *extra ordinem*.

§ 121. OF THE EFFECTS OF THE RESTITUTIO IN INTEGRUM.

The effect of the *restitutio in integrum*, — if the person in whose favour it was decreed availed himself of it, — was, conformably to the literal sense of the words, and to the nature of things, to re-establish every thing in its original state; neither more nor less than if the act which had occasioned the damage had never happened. [1] Thus the person injured is released from the obligations which he had contracted, and he recovers (with all their accessories) the things of which he had been deprived and the rights or capacities which he had lost. L. 9. § 7. D. quod met. causa (4. 2). L. 87. § 1. D. de acq vel omitt. her. (29. 2). L. 27. § 1. 2. 3. L. 33. L. 40. pr. L. 47. § 1. L. 48. § 2. L. 50. D. de min. L. 23. § 2. L. 26. § 7. L. 28. § 6. D. ex. quib. causis maj. (4. 6). L. 38. § 4. [2] et § 6. D. de usuris (22. 1). L. 81. D. de V. S. (50. 16).

But, on the other hand, also, it was sought as far as possible, to re-establish the adverse party, equitably, in his position; — whence it followed that he who obtained restitution, was bound to restore all that he had acquired, or might acquire, by means of the legal relation that was annulled, in so far as it was in his power so to do, or as he had in his possession the things acquired. [3] 2. 24. § 4. D. de min. (4. 4). "Restitutio autem

[1] L 26. § 7. § 8. D. ex quib. causis maj. L. 50. D. de min. See, for the application of the principle to divers hypotheses, Sav. l. c. § 342 et seq.

[2] "Nam et verbum restituas, quod in hac re Praetor dixit, plenam habet significationem ut fructus quoque restituantur."

[3] L. 7. § 5. l. "Plane qui post aditam hereditatem restitnitur, debet praestare, si quid ex hereditate in rem ejus pervenit, nec periit per aetatis imbecillitatem." 1. 27. § 1. D. eod. "Si pecuniam, quam mutuam minor accepit, dissipavit, denegare debet Proconsul creditori adversus eum actionem. Quod si egenti minor crediderit, ulterius

ita facienda est, ut unusquisque in integrum jus suum recipiat." L. 40. § 1. D. eod, "Ad suam aequitatem per in integrum restitutionem revocanda res est." L. t. 39. § 1. D. eod. L. 1. C. pr. de reputat. (2. 48). "Qui restituitur in integrum, sicut in damno morari non debet, ita nec in lucro." L. 1. § 2. D. de coll. (37. 6). L. 2. C. si ut omiss. hered. (2. 40). L. 1. L. 2. C. si adv. cred. (2. 38). Care was also taken, that the restitution should not too palpably disturb or injure the interests of others; and it was for this reason that it was refused, if things had undergone such changes that the injury which would be caused by restitution, to those whom it affected, would not be compensated by the advantage it would give to the party originally injured. L. 22. L. 24. § 2. de min. [1] L. 47. § 1. D. eod. L. 61. D. de acq. vel omitt. hered. (29. 2). In this matter, the Roman magistracy once more manifested their eminently practical spirit, by taking for their guide the rule: "ne propter satis minimam rem vel summam, majori rei vel summae praejudicetur." L. 4. D. de i. i. r. (4. 1).

procedendum non est, quam ut jubeatur juvenis actionibus suis, quas habet adversus eum, cui ipse credidisset, cedere creditori suo."—"Reciprocity is of the essence of the veritable right which it is here sought to realise." Bethmann-Hollweg, l. c. p. 754.

[3] "Si quis juvenili levitate ductus omiserit vel repudiaverit hereditatem vel bonorum possessionem, si quidem omnia in integro sunt, omnimodo audiendus est. Si vero jam distracta heriditate et negotiis finitis ad paratam pecuniam laboribus substituti veniat, repellendus est, multoque parcius, ex hac causa heredem minoris restituendum esse."

SECTION XI.

Of the protection of rights, otherwise than by judicial means.

§ 122. OF THE PROPER MEANS OF ASSURING SUCH PROTECTION.

Independently of recourse to legal proceedings, the Law authorized other measures, for the purpose of assuring the realization or the maintenance of a situation conformable to law. [1] These measures may be brought within three principal categories.

I. They tended to protect a right from the possibility of eventual dispute. Such were, for instance 1st. The means of proof with which parties were careful to provide themselves in advance; (cautiones); 2nd. [2] The amalgamation of one obligation with another which defined and fixed its purport and extent, in every respect, and rendered it, as far as possible, independent of the

[1] The German writers include them in the general appellation of "*Cautionen* Windscheid. § 134. Arndts. § 93. Keller. Pand. § 109. observes, very justly, that among the Romans these measures of precaution were so much the more necessary, because their system of actions was vigorously circumscribed within narrow limits, and presented numerous chasms; — whence it was that where the immediate employment of direct means of constraint would, to us, appear natural, they were sometimes compelled to have recourse to voluntary preparatory acts.

[2] L. 2. § 1. D. de pact. (2. 14). "Si debitori meo reddidero *cautionem*," L. 47. § 1. eod. "Omnes *cautiones* ex quocunque contractu vanae et pro cancellato ut haberentur." L. 25. § 4. D. de prob. (22. 1). "Cautio iudebite exposita."

material causes which had produced it. [1] (Remember, here, the process of Stipulation).

II. They tended to bind more efficaciously the will of the debtor. For example, the oath, (*cautio juratoria*) [2] and the stipulation of a penalty.

III. They tended, finally, to protect the realization of a right against certain incidents, and especially against the insolvency of the debtor. Such were: Bail or surety; [3] Pledge; [4] Sequestration; [5] and the taking possession of the goods or of the thing in question. (missio in possessionem bonorum aut rei). This last means procured to the creditor, so long as it continued, possession in fact, [6] and furnished him with a species of interdict, for maintaining his position against all interference or trouble.

L. I. § 4. D. de Stip. Pract (46. 5). "Et sciendum est, omnes stipulationes natura sui cautionales esse; hoc enim agitur in stipulationibus, ut quis cautior sit, et securior interpositia stipulatione." This is why stipulation is also called *cautio*, (guarantee or surety) as well as the document which attests it. — L. 40. D. de R. C. (12. 1). L. 11. § 2. D. de duob. reis (45. 2). L. 2. C. de V. S. (6. 38).

[2] § 2. I. de interd. (4. 15).

[3] L. 1. D. qui satisd. cog. (2. 8). "Satisdare dicimur adversario nostro, qui pro eo, quod a nobis petiit, ita cavit, ut eum hoc nomine securum faciamus datis fidejussoribus." The Fisc and the Communes were not required to furnish sureties. L. 1. § 18. L. 6. § 1. D. ut leg. (36. 3). L. 3. § 5. D. si cui plus. (35. 3). L. 2. § 1. D. de fund. dot. (23. 5). "Fiscus semper idoneus successor et solvendo."

[4] L. 4. § 8. D. de fideic. lib. (40. 5).

[5] Whether in virtue of an agreement, or of a decree of the Judge. L. 17. D. dep. (16. 3). L. 110. D. de V. S. (50. 16). L. 22. § 8. D. sol. matrim. (24. 3). Sequestration was applicable not only to things, but to persons. L. 3. § 6. D. de lib. exhib. (43. 30).

[6] Dig. Tit. quib. ex causis in poss. (42. 4). L. 12. D. eod. "Cum legatorum vel fideicommissi servandi causa, vel quia damni infecti nobis non caveatur, bona possidere Praetor permittit, vel ventris nomine in possessionem nos mittit, non possidemus, sed magis custodiam rerum et observationem nobis concedit." Dig. Tit. ne vis fiat ei qui in poss. miss. (43. 4).

FINIS.