CIVIL LAW

IN ITS NATURAL ORDER.

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IN TWO VOLUMES.

VOLUME I.
CONTAINING THE TREATISE OF LAWS, PRELIMINARY BOOK, AND
PART 1. OF ENGAGEMENT.

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THE CIVIL LAW.

PRELIMINARY BOOK.

OF THE RULES OF LAW IN GENERAL, PERSONS, AND THINGS.

1. The Subject-Matter of this Book.—We have given the name of Preliminary to this book, because it contains three kinds of matters, which, being common to all the others treated of in this work, and necessary for understanding them aforesaid, ought to be placed first in order. And, indeed, the matters contained in this book are, as it were, the first elements of the law; for, before we descend to a particular inquiry into the rules of the law, it is necessary, in the first place, to know, in general, the nature and several kinds of these laws, and the ways of understanding and applying them justly. And this shall be the subject-matter of the first title of this book.

2. And because in the examination of the several matters treated of in the body of the law; and in particular laws, we must always consider the persons whom the said matters and laws relate to; and because there are in all persons certain qualities, with respect to which they are considered and distinguished by the laws, and which have a particular relation to all the matters treated of in the body of the law; these qualities, and these distinctions of persons, shall be considered in the second title of this book.

3. And the third title shall contain the ways in which the laws consider and distinguish the several kinds of things, by the qualities which fit them for the use and commerce of persons; and according as these uses and this commerce of things enter into the order established by the laws.
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7. It is not necessary, after what has been said of laws and rules in the Treatise of Laws, to define anew in this title what a law is, and what a rule: it will be sufficient here to give an idea of the rules of law, in the sense which comprehends the written rules; because it is in the knowledge of all the written rules, that the whole science and study of the law consist.

ARTICLE I.

8. Definition of Rules.—The rules of law are short and clear expressions of that which justice requires, in the respective cases. And each rule hath its peculiar use for those whom its provision may concern. Thus, for example, it may happen, through several accidents, that the buyer is dispossessed of what he has bought, or molested in his possession, by those who pretend to be owners of it, or to have some right to it; and the justice that is common to all these kinds of accidents, which requires the seller to put a stop to all evictions, and other troubles, is contained in the expression of this rule, that every seller ought to warrant that thing which he has sold.\(^a\)

II.

9. Two Sorts of Rules, Natural and Arbitrary.—Laws, or rules, are of two sorts; one is of those which flow from the law of nature and equity; and the other is of such as derive their origin from the positive law, which are otherwise called human and arbitrary laws, because they have been established by men.\(^b\) Thus, it is a rule of the law of nature, that a donation may be revoked, because of the ingratitude of the donee; and it is a rule of the positive law, that donations which are to have their effect in the lifetime of the donor and donee ought to be enrolled.

III.

10. Which are the Natural Rules.—The rules of the law of nature are those which God himself hath established, and which he communicates to mankind by the light of reason. These are the laws which have in them a justice that cannot be changed, which is the same at all times and in all places; and whether

\(^a\) L. 1, D. de reg. jur.; — l. 20, D. de verb. sign.
\(^b\) L. 3, D. de just. et jur.; — l. 11, D. de just. et jur. See the eleventh chapter of the Treatise of Laws.
they are set down in writing or not, no human authority can abolish them, or make any alteration in them. Thus, the rule which obliges the depository to preserve and to restore the thing committed to his keeping, that which obliges one to take care of the thing he has borrowed, and other rules of this kind, are all of them natural and immutable rules, which are observed in all places.\footnote{11, Inst. de jur. nat. gent. et civ.; \textit{L. 9, D. de just. et jur.}; \textit{L. 11, cod.}; \textit{L. 8, D. de cap. min.}}

IV.

11. \textit{Which are the Arbitrary Rules.} — Arbitrary rules are all those that have been established by men, and which are such, that, without offending natural equity, they may either prescribe one thing, or a thing quite different. Thus, for instance, it was free for men to establish or not to establish the use of fiefs. Thus, a longer or shorter term of years might have been fixed for prescriptions; and a greater or lesser number of witnesses to a testament. And this diversity, which is not fixed by nature, makes these laws to derive their authority from the arbitrary regulation made by the lawgiver who has established them; and consequently renders them liable to changes.\footnote{11, Inst. de jur. nat. gent. et civ.}

V.

12. \textit{Another Division of Rules.} — The rules of law, whether natural or arbitrary, are of three kinds. Some of them are general, which agree to all matters; others are common to several matters, but not to all; and many are peculiar only to one matter, and have no relation to others. For example, these rules of natural equity, \textit{that we must do wrong to no man, that we ought to render to every one what is his due}, are general, and belong to all sorts of matters. This rule, \textit{that agreements made between parties are to them in the place of laws}, is common to several matters; for it agrees to all kinds of contracts, covenants, or pacts; but it has no relation to testaments, nor to severals other matters. And the rule for making void a sale, in which any one of the parties is damaged more than half of the just price, is a rule peculiar only to the contract of sale.\footnote{Example of general rules: \textit{Jus quisque suum habe, honeste vivere, alterum non lædere, suum cuique tribuere}. \textit{L. 10, § 1, D. de just. et jur.}; \textit{§ 3, Inst. cod. Ex-}}

VI.

13. \textit{Two Ways of abusing the Rules.} — All these rules cease to have their effect, not only when they are drawn beyond their limits, and applied to matters to which they have no manner of relation, but likewise when, in the application of them to the matters to which they belong, they are either falsely or wrongfully applied, contrary to the true intent of them. Thus, the rule for making void all sales, in which any one of the parties is damaged above the half of the just price, would be ill applied to a sale made by way of accommodation in a transaction.\footnote{1 L. 1, in f. D. de reg. jur.}

VII.

14. \textit{Exceptions are Rules.} — Exceptions are rules which limit the extent of other rules; and they prescribe contrary to the general rule, out of a particular view, which renders either just or unjust that which the general rule, being understood without any manner of exception, would on the contrary have rendered either unjust or just. Thus, for example, the general rule, that we may make all manner of contracts, is limited by the rule which forbids those that are contrary to equity and good manners. Thus, the prohibition to alienate things that are sacred is limited by the rule which allows them to be sold for necessary causes, certain formalities being observed in the sale.\footnote{5 L. 1, D. de pact.; \textit{§ 4}, C. de inst. stip.; \textit{§ 7}, D. de pact.; \textit{§ 6, Cod. cod.}; \textit{§ 7}, C. de comp. not. eod.; \textit{v. 14, et al. in jur. cod.}}

VIII.

15. \textit{Two Sorts of Exceptions.} — Exceptions, as well as rules, are of two kinds. Some of them are of the law of nature, and others of the positive law; as appears by the examples in the foregoing article, and by all the other exceptions, every one of which may be reduced to one or other of these two kinds.\footnote{\textit{This is a consequence of the preceding and second articles of this section.}}
IX.

16. Laws ought to be known.—All laws ought either to be known, or at least laid open to the knowledge of all the world, in such a manner, that no one may with impunity offend against them, under pretence of ignorance. Thus, the natural rules being truths that are unchangeable, the knowledge of which is essential to reason, nobody can pretend ignorance of them, since they cannot say that they are destitute of common reason, which makes these rules known. But arbitrary laws have not their effect, till the lawgiver has done all that is possible to make them known; and this is done by the ways that are commonly practised for the publication of these kinds of laws; and after they are promulged in due form, it is presumed that they are known to every body, and they oblige as well those who pretend ignorance of them, as those who know them.1

X.

17. Two Sorts of Arbitrary Laws, Written Laws and Customs.—Arbitrary rules are of two sorts. The one is of those that have been originally enacted, written, and promulged, by those that had the legislative authority; and such are, in France, the edicts and ordinances of the kings. The other is of such laws, of whose origin and first establishment there is nothing appears, but which are received by universal approbation, and by the constant use that the people have made of them time out of mind; and these are the laws or rules to which we give the name of customs.2

XI.

18. The Foundation of the Authority of Customs.—Customs derive their authority from the universal consent of the people who have received them, when it is the people that have the power of making laws, as in commonwealths. But in kingdoms that are subject to a sovereign prince, no customs received by the people come to have the force of laws, but by the authority of the prince. Thus, in France, the kings have caused to be fixed, and reduced into writing, and established into laws, all the customs, reserving to the respective provinces the laws which

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they have, either by the ancient consent of the inhabitants of the said provinces, or of the princes who governed them.1

XII.

19. Natural Laws regulate what is Past, and what is to come.—The laws of nature being highly just, and their authority always the same, they determine equally all that is to come, and all that is past, which remains undecided.2

XIII.

20. Arbitrary Laws regulate only what is to come.—Although the justice of arbitrary laws is founded upon the public good, and upon the equity of the motives which give rise to them; yet seeing they derive their authority only from the power of the lawgiver, who determines us to what he prescribes, and since they have not their effect till after they have been made known to the people by publication, they regulate only what is to come, and have nothing to do with what is past.3

XIV.

21. The Effect of New Laws with respect to what is Past.—The affairs which happen to be depending, and undecided, at the time when new laws are enacted, are judged by the tenor of the preceding laws; unless, for some particular reasons, the new laws mark expressly that they shall take place even in things that are past. Or that, without any such expression, the new laws be such as ought to serve for a rule to what is past; as if the new laws serve only to revive a former law, or a rule of natural equity, which had been altered by some abuse; or that they

1 Id custodi et opertet, quod moribus et consuetudine inductum est. L. 32, D. de legib. Invenietur consuetudo pro lege non immerso custodiatur. Nam cum ipsa leges multa a saecula saeculari saecula nascantur, quacuod judicio populi receptae sunt, merito et fin. quacuod nulla scripta populo probatur, tenebant omnes. Nam quis judice invenire debeatur, nos saecula miti consuetudo, non nos saecula, sed consuetudo a saeculo saeculorumisset. L. inst.; § 1, Cod. de jure. et fact. ign.; § 1, inst. in fin. in process. Inst.; — § 2, C. de jure. et fact. ign.; § 2, cod.
2 § 3, Inst. de jure. et fact. ign.; § 3, Cod. de jure. et fact. ign.; § 3, Cod. de jure. et fact. ign.
regulate questions, for the deciding of which there was no law nor any custom in being. Thus, for instance, when the king ordained that the price of offices should be distributed according to the order of mortgages, that law served as a rule for the causes that were undecided in the provinces, where they had no custom to the contrary, to serve them as a rule.  

XV.

22. Another Effect of New Laws, as to what is Past. — As new laws regulate what is to come, so they may, as occasion requires, change the consequences that former laws would have had. But this is always without prejudice to the right that any persons had already acquired. Thus, for example, before the ordinance of Orleans, one might have made substitutions in several degrees, without any bounds, and that ordinance did limit the substitutions that should be made thereafter to two degrees besides the institution. But whereas that ordinance did not for the future hinder the effect of the substitutions which had been made before, the ordinance of Moulins did reduce to the fourth degree, besides the institution, the substitutions which had been made before the ordinance of Orleans. And at the same time, it excepted the substitutions of which the right was already fallen and acquired, although it was beyond the fourth degree.  

XVI.

23. Of the Time when New Laws begin to be in Force. — Arbitrary laws begin to have their effect for the time to come, either from the day of their publication, or only after the delay which they appoint. Thus, some laws that make changes which would be attended with great inconveniences, were they suddenly put in execution, — such as the prohibition of some commerce, the augmentation or diminution of the value of the current coin, and the like, — leave for some time things in the same condition in which they were, and fix the time at which they shall begin to be put in execution.  

† L. 7, C. de legib. See the ordinance of Orleans, Art. 59, and that of Moulins, Art. 57.  
‡ This is a consequence of the foregoing rules, and a natural effect of the authority and prudence of the lawgiver.

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XVII.

24. Two Ways by which Laws are repealed. — Arbitrary laws, whether they are established by the authority of a lawgiver, or by custom, may be abolished or changed two ways; either by an express law, which repeals them, or makes some alteration in them; or by a long disuse, which changes or abolishes them.  

XVIII.

25. Several Effects of Laws. — The use and authority of all laws, whether natural or arbitrary, consists in commanding, forbidding, permitting, and punishing.  

XIX.

26. Laws restrain whatever is done in Fraud of them. — Laws restrain and punish, not only what is evidently contrary to the sense of their words, but likewise every thing that is directly or indirectly against their intent, although it seem to have nothing contrary to the terms of the law, and also every thing that is done in fraud of the law, and to evade it. Thus, the laws which forbid the giving or bequeathing any thing to certain persons annul the donations or bequests made to other persons interposed, that they may transmit the bounty to those who are capable of receiving it in their own names.

XX.

27. Laws annul or restrain what is done contrary to their Prohibition. — If a law forbids, either in general to all persons, or in particular to some sort of persons, certain contracts, or a certain commerce, or contains other prohibitions, of what kind soever; whatever shall be done contrary to these prohibitions, with all its consequences, shall either be annulled or restrained, according to the quality of the prohibition and that of the contravention; and that even although the law make no mention of the nullity, and that it leave the other penalties undetermined.  

† L. 7, D. de legib.  
‡ L. 5, C. de legib.; — t. 29, D. cod.; — t. 30, eod.  
§ L. 5, C. de legib. The law would be very imperfect, if it should not annul what is done contrary to its prohibitions, and if it should let the contravention of them go unpunished. Uph. t. 1, § 2; — v. t. 63, D. de vit. sup.
XXI.

28. Laws are General, and not made for One Case or One Person.—Laws are never made for one particular person, nor limited to one single case; but they are made for the common good, and prescribe, in general, what is most useful in the ordinary occurrences of human life.\(^1\)

XXII.

29. Sequel of the foregoing Rule.—Seeing the laws embrace, in general, all the cases to which their intention may be applied, they do not express in particular the several cases to which they may have relation. For this particular enumeration, as it is impossible, so it would be to no purpose. But they comprehend in general all the cases to which their Intention may serve as a rule.\(^2\)

XXIII.

30. Equity is the Universal Law.—If any case could happen that were not regulated by some express and written law, it would have for a law the natural principles of equity, which is the universal law that extends to every thing.\(^3\)

SECTION II.

OF THE USE AND INTERPRETATION OF RULES.

31. Reasons why it is necessary to interpret Laws.—By the use of rules is meant here the manner of applying them to the questions that are to be decided; and the application of the rules does often require their interpretation.

It happens in two sorts of cases, that it is necessary to interpret the laws. One is, when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law, in order to discover its true mean-

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\(^1\) L. 1, D. de legib.; — l. 8, D. cod.; — l. 3 et seq. D. cod.; — Nowl. 39, cap. 1. See the following article.
\(^2\) L. 10, D. de legib.; — l. 12, cod.; — l. 9, cod.; — l. 27, cod.; — l. 12, C. cod.; — l. 32, D. ad legem Aquilam.
\(^3\) L. 2, § 5, in fine, D. de aqua et aquam plus. arc.; — l. 7, D. de bon. damnat.; — l. 13, § 7, D. de excus. tut.
partner, unless he were approved of by the other partners, and they likewise approved of by him. Thus, this second rule obliges us to interpret the sense of the other, and to restrain it. And we see in this second example, that it is not so easy in it as in the first to discover the principle upon which this interpretation is grounded, and which gives to each of these rules its just effect, by limiting the sense of the first.

34. It appears by these examples, and will appear likewise in all the others, where it is necessary to interpret the sense of a law, that this interpretation, which gives to the law its just effect, is always founded upon some other rule, which requires another thing than what appeared to be regulated by the sense of the law not rightly understood.

35. The View of Equity is the First Way to interpret the Laws. — It follows from this remark, that, for the right understanding of a rule, it is not enough to apprehend the apparent sense of the words, and to view it by itself; but it is necessary likewise to consider if there are not other rules that limit it. For it is certain that, every rule having its proper justice, which cannot be contrary to that of any other rule, each rule hath its own justice within its proper bounds. And it is only the connection of all the rules together that constitutes their justice, and limits their use. Or rather, it is natural equity, which, being the universal spirit of justice, makes all the rules, and assigns to every one its proper use. From whence we must infer, that it is the knowledge of this equity, and the general view of this spirit of the laws, that is the first foundation of the use and particular interpretation of all rules.

36. The Intention of the Lawgiver, in Arbitrary Laws, fixes the Temperament of Equity. — This principle of interpreting the laws by equity does not only respect the laws of nature, but reaches likewise to the arbitrary laws, they being all of them founded upon the laws of nature, as has been observed in the eleventh chapter of the Treatise of Laws. But to this principle of equity we must add, in so far as concerns the interpretation of arbitrary laws, another principle, which is peculiar to them, and that is, the intention of the lawgiver, which determines how far the arbitrary laws regulate the use and interpretation of this equity. For, in this kind of laws, the temperament of equity is restrained to what is agreeable to the intention of the lawgiver, and is not extended to whatever might have appeared to be equita-

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table, before the arbitrary law was enacted. Thus, for instance, it is just and equitable, that he who has courteously lent his money, without taking a note for it, should be admitted to prove the loan, if he has other proofs than a note which he omitted to take, and the debtor denies that he borrowed the money. And the same equity requires also the same usage in the other kinds of covenants. But because it is for the public good, and agreeable to equity, not to leave room for too great a faculty of bringing false proofs, and because it is sufficient to advertise those who lend, or who make other agreements, to take a note in writing, the ordinance of Moulins, and that of 1667, which have forbid the proofs of covenants without writing, when they exceed the sum of one hundred livres, have by that regulation set just bounds to the liberty of receiving proofs of covenants. And if some proofs are received contrary to the letter of that ordinance, as in the case of a necessary deposit, such as that which is made in the case of fire, it is because the intention of the ordinance doth not extend to this case, where it has been necessary to make the deposit, and impossible to take a receipt in writing.

37. Another Example. — Thus, for another instance of the effect of the will of the lawgiver, in what relates to the interpretation of arbitrary laws by natural equity, the same equity requires, that a buyer should not take any advantage of the necessity of a seller, to purchase a thing at too low a price. And upon this principle, it would seem to be just to annul all sales in which the price falls short of the true value of the thing, either a third or fourth part, or even less, according to the circumstances. But the inconveniences that would attend the making void all sales in which the parties should be found to sustain such damages, gave occasion to a law which restrains the liberty of annulling sales on account of the lowness of the price to the sales of immovables, in which the damage sustained should exceed the half of the just value of the thing sold. And this law puts a stop to all other use and all other application of equity, as to any damage sustained in the price of any thing sold.

38. Several Views necessary for the Interpretation of Laws. — In order to make a right use of this fundamental principle for the interpretation of laws, which is equity, it is not enough to observe in each rule what the light of reason finds to be equita-
ble in its expression, and in the extent which it seems to have; but we must join to this a general view of universal equity, that we may discern in the cases which are to be regulated, whether there are not other rules that demand a justice altogether different, to the end we may not pervert any rule from its true use, and that we may apply to the matters of fact, and to their circumstances, the rules that agree to them. And if they are natural laws, we are to reconcile them by the extent and limits of their truth; or if they are arbitrary laws, we are to fix their equity by the intention of the lawmaker.

39. The reader must take heed that he do not confound these kinds of interpreting laws, which we have been just now speaking of, with those interpretations that are reserved to the sovereign, of which mention shall be made in the twelfth article of this section. And it will be easy to perceive the difference between these two kinds of interpretations, by the rules which shall be explained in this section.

Art. I.

40. The Spirit of Laws. — All rules, whether natural or arbitrary, have their use, such as it is assigned to every one of them by universal justice, which is the spirit of them all. Thus, the application of the laws is to be made, by discerning what it is that this spirit demands; which in natural laws is equity; and in arbitrary laws is the intention of the lawmaker. And it is in this discerning faculty that the science of the law does chiefly consist.\(^a\)

II.

41. Natural Laws are misapplied, when Consequences are drawn from them contrary to Equity. — If it happens, that a natural rule being applied to some case which it seems to include, there follows from such application a decision contrary to equity, we must from thence conclude, that the rule is not rightly applied, and that it is by some other rule that this case ought to be judged. Thus, for instance, the rule which directs that the person who has lent any thing to another for some use may take it back again whenever he pleases, would produce a consequence contrary to equity, if the lender were allowed to take back the thing lent during the time that the borrower is actually employing it to the use for which he borrowed it, and from whence it cannot be taken without some damage to the borrower. For this rule ceases to take place in this case, because of another rule, which requires that the lender should suffer the borrower to reap the advantage of the favor he bestows on him, and that he ought not to turn his kindness into an injury.\(^b\)

III.

42. Arbitrary Laws are misapplied, when Consequences are drawn from them contrary to the Intention of the Lawgiver. — If an arbitrary law being applied to a case which it seems to include, there follows a consequence contrary to the intention of the lawgiver, the rule ought not to be extended to that case. Thus, for example, the ordinance of Moulin, which annuls indifferently all substitutions for the want of publication, without specifying the persons with respect to whom they are to be null, does not render them such with respect to the executor who is burdened with the substitution; because the executor was obliged by another rule to cause publication of it to be made, as being charged with the execution of the dispositions of the testator; and he ought not to reap any benefit by his own negligence, or his dishonesty.\(^c\)

IV.

43. Of the Rigor of the Law. — We must not take for inju-
tices contrary to equity, or to the intention of the lawgiver, those decisions which seem to have some hardship in them, which is called the rigor of the law, when it is evident that such rigor is essential to the law from which it flows, and that no temperance can be applied to the said law without annulling it. Thus, for example, if a testator, having indited his testament, and having read it over in the presence of witnesses, takes the pen in his hand to sign it, and dies in the very instant; or if after the testator has signed it, he forgets to get it signed by one of the witnesses; or if there is wanting to the testament any one of the formalities


\(^b\) L. 183, D. de reg. jur.; 90, nul.; 17, § 3, D. de commod. See art. 1 of sect. 3, of the Laws of Things to be restored in Specie.

\(^c\) L. 13, § 9, D. de execr. tut. See the ordinance of Moulin, art. 57, and that of Henry II. in the year 1583, art. 4; v. l. 12, § 3, C. de adff. prae.

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required by law or by custom; this testament will be absolutely null, whatever certainty we may have of the will of the testator, and however favorable the contents of his testament may be; because these formalities are the only way which the law allows of for proving the will of a testator. Thus the rigor which annuls all testaments, in which the formalities required by law are wanting, is essential to those very laws; and to mitigate the rigor of them would be to annul them quite.  

V.

44. The Mitigation of the Rigor of the Law.—If the hardship or rigor of a law be not a necessary consequence of the law, and inseparable from it, but the law may have its effect by an interpretation which mitigates the said rigor, and by some temperament, which equity, that is, the spirit of the law, requires; we must in this case prefer equity to the rigor which the letter of the law seems to demand, and follow rather the spirit and intentment of the law, than the strict and rigid way of interpreting it. Thus, in the case of a testator, who devises his estate in this manner, that if his wife, whom he leaves big with child, be brought to bed of a son, he shall have two thirds of his estate, and his wife one third; and if the child in the mother’s womb happen to be a daughter, the mother and the daughter shall divide the estate equally between them; if the mother happens to bring forth both a son and a daughter, the rigor of the law seems to exclude the mother, because she is not called to any part of the succession, in the case that has happened. However, the father having declared his will that the mother should have a share of his estate, whether she were brought to bed of a son or a daughter, and having given her the half of what he left to his son, and as much as he left to his daughter, it is equitable that the will of the testator should be executed in the best manner it can; and therefore the son ought to have the half of the estate, and the mother and daughter each of them a fourth part.  

Thus, for another instance, if a father and  

a L. 12, § 1, D. qui et a quib. man.  
b L. 9, § 1, D. de rob. adh.  It is to be remarked, as to this second instance, that it is to be understood only of such estates as mothers have a right to succeed to, pursuant to the ordinance of Charles IX, commonly called the Edict of Mothers.  
c L. 9, § 1, D. de rob. adh.  This article is a consequence of the foregoing rules.
differently, and without injustice. But in every fact we must determine ourselves either to the one or to the other, according to the circumstances, and to what the spirit of the law requires. Thus, we must judge according to the rigor of the law, if the law admits of no mitigation; or according to the temperament of equity, if the law will bear it.\(^1\)

VIII.

47. The Rigor of the Law, when it is necessary to be followed, hath its Equity. — Although the rigor of the law seems to be distinct from equity, and to be even opposite to it, it is nevertheless true that, in the cases in which this rigor ought to be followed, another view of equity makes it just. And as it never happens that what is equitable is contrary to justice, so likewise it never happens that what is just is contrary to equity. Thus, in the example of the fourth article, it is just to annul the testament in which the formalities required by law are wanting; because an act of such consequence ought to be accompanied with serious circumstances, and sure proofs of its truth. And this justice hath its equity in the public good, and in the interest which even testators themselves have, especially such as are sick, that that may not be easily taken for their will which it is not very certain that they have declared so to be.\(^1\)

IX.

48. Interpretation of Obscurities and Ambiguities in a Law. — The obscurities, ambiguities, and other defects of expression which may render the sense of a law dubious, and all the other difficulties of understanding aright and applying justly the laws, ought to be resolved by the sense that is most natural, that has the greatest relation to the subject, that is most conformable to the intention of the lawgiver, and most agreeable to equity. And this is discovered by the several views of the nature of the law, of its motive, of the relation it has to other laws, of the exceptions that may limit it, and by other reflections of this kind, which may discover the spirit and sense of the law.\(^2\)

\(^1\) This article is also a consequence of the preceding rules.

\(^1\) This article is likewise a consequence of the foregoing rules.

\(^2\) L. 19, D. de logh. ; 1. 67, D. de reg. jur. ; 1. 7, in D. de suppr. leg., 1. 18, D. de logh. ; 1. 17, cod. See art. 1, 2, and 3, of this section, and those which follow.

X.

49. A Law to be interpreted by its Motives, and the Tenor of it. — For understanding aright the sense of a law, we ought to consider well all the words of it and its preamble, if there be any, that we may judge of the meaning of the law by its motives, and by the whole tenor of what it prescribes; and not to limit its sense to what may appear different from its intention, either in one part of the law taken separately, or by a defect in the expression. But we must prefer to this foreign sense of a defective expression, that which appears otherwise to be evident by the spirit of the whole law. Thus, it is to transgress against the rules and spirit of laws, to make use, either in giving judgment or counsel, of any one part of a law taken separately from the rest, and wrested to another sense than what it has when it is united to the whole.\(^3\)

XI.

50. How an Omission in a Law may be supplied. — If there happens to be omitted in a law anything that is essential to it, or that is a necessary consequence of its disposition, and that tends to give to the law its entire effect, according to its motive; we may in this case supply what is wanting in the expression, and extend the dispossession of the law to what is included within its intention, although not expressed in the words.\(^4\)

XII.

51. In what Cases we must have Recourse to the Prince for the Interpretation of a Law. — If the words of a law express clearly the sense and intention of the law, we must hold to that. But if the true sense of the law cannot be sufficiently understood by the interpretation that may be made of it, according to the rules that have been just now explained, or the sense of the law being clear, there arise from it inconveniences to the public good; we must in this case have recourse to the prince, to learn of him his intention, as to what is liable to interpretation, explanation, or mili-

\(^3\) L. 24, D. de logh. ; 1. 6, § 1, D. de verb. sign. ; 1. 13, § 9, D. de exeq. tut. See the preceding articles. See upon the word preamble, the 134th law, § 1, D. de verb. ol.

\(^4\) L. 13, D. de testib. ; 1. 11, D. de prescr. verb. ; 1. 17, C. de exeq. tut. ; 1. 7, § 2, D. de jurid. See in this section the 21st, 22nd, and 23d articles, which serve as examples of this.
XIII.

52. We must follow the Law, although its Motive be unknown.—If, the true meaning of a law being well known, although we are ignorant of its motive, there seems to arise from it some inconvenience that cannot be avoided by a reasonable interpretation, we must presume that the law has nevertheless its usefulness, and its equity, founded upon some view of the public good, which ought to make us prefer the sense and authority of the law to the reasonings that may be brought against it. For, otherwise, many laws very useful and well established would be overthrown, either by some other views of equity, or by subtlety of reasoning.\(^5\)

XIV.

53. Laws which are favorably extended. — The laws which are in favor of that which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives render favorable, and those which are made in favor of any persons, are to be interpreted in as large an extent as the favor of these motives, joined with equity, is able to give them; and they ought not to be interpreted strictly, nor applied in such a manner as to be turned to the prejudice of those persons in whose favor they were made.\(^5\)

\(^5\) L. 9, C. de legib. ; — L. 1, cod. ; — l. ult. cod. ; — Num. 143 ; — l. 11, D. cod. Thus the parliament made remonstrances to Charles the Seventh, touching the declarations, interpretations, modifications, which were to be made to the ancient ordinances, upon which followed that of 1446. Thus the ordinance of Moulins, art. 1, and that of 1667, tit. 1, art. 3 and art. 7, enjoin the parliaments, and the other courts, to make their remonstrances to the king, touching what appeared in the ordinances to be contrary to the advantage or convenience of the public, or to want interpretation, declaration, or mitigation. See the 33d article of the ordinance of Philip VI, in the year 1349, empowering the council, and the chamber of accounts, to make the declarations and interpretations that should be wanted on the said ordinance. De interpretatione canonum ecclesiasticorum, si quid dubia aut emerserit. V. t. 6, C. de sacrorum. eccl. De dubitatione, quam in canonibus emerserit. V. t. 6, C. de sacrorum. eccl.

\(^6\) L. 20, D. de legib. ; — l. 21, cod. ; — l. 3, C. de crim. auxil. ; — l. 31, § 2, D. ad l. Aquil.

\(^7\) L. 55, D. de legib. ; — l. 19, D. de lib. et post. ; — l. 45, D. de relig. et sumpt. funerum ; l. 6, C. de legib. ; — l. 64, § 1, D. de condit. et dem. See an example of the last part of this rule in the ninth article of the third section of the Contract of Sale; and another in the third law, § 5, D. de carb. ed. The rest needs no example.

XV.

54. Laws which are restrained. — The laws which restrain our natural liberty, such as those that forbid any thing that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offences, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disincoritum, and others like, are to be interpreted in such a manner as not to be applied, beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.\(^6\)

XVI.

55. Laws which are not to be extended beyond what their Words expressly contain. — If any law or custom happens to be established upon particular considerations, contrary to other rules, or to the general law, it ought not to be drawn to any consequence beyond the cases which the words of the law mark expressly. Thus, the ordinance which forbids the receiving proof of contracts exceeding the value of one hundred livres, and the proof of facts different from what appears to have been agreed on, does not extend to facts of another nature, where a contract does not come into question.\(^7\)

XVII.

56. The Grants of Princes are favorably interpreted. — The favors and grants of princes are to be favorably interpreted, and ought to have all the reasonable extent that the presumption of the liberality that is natural to princes can give them; provided that they are not extended in such a manner as to cause prejudice to other persons.\(^8\)

\(^6\) This is a consequence of the preceding rules. L. 42, D. de pen.; — l. 155, § ult. D. de reg. jur.; — l. 11, D. de pen.; — vid. l. 32, cod.; — l. 19, D. de lib. et post.; — l. 10, § 1, D. de reg. deb.; — l. 14, D. de legib.; — l. 91, D. de pigs. Although the example of this slave be quoted in this law 10, § 1, D. de reg. deb., upon the subject of testamentum, yet it may be also applied here.

\(^7\) L. 141, D. de reg. jur.; — l. 14, D. de legib.; — v. l. 30, cod.

\(^8\) L. 8, D. de const. princip.; — l. 2, § 16, L. ne quis in loco publ. iust.; — v. l. 2, C. de bon. sec.
XVIII.

57. **Laws are interpreted one by another.** — If the laws in which there is some doubt, or other difficulty, have any relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other laws. Thus, when new laws have reference to old ones, or to ancient customs, or ancient laws to modern ones, they are interpreted one by the other, according to their common intention, in so far as the latter laws have not abrogated the former.

XIX.

58. **Laws are interpreted by the Practice.** — If the difficulties which may happen in the interpretation of a law, or custom, are explained by an ancient usage, which has fixed the sense of the law, and which is confirmed by a constant series of uniform decrees, we must stick to the sense declared by the constant practice, which is the best interpreter of laws.

XX.

59. **In what Cases the Customs of Neighbouring Places, and of the Chief Towns, serve as Rules to the other Places.** — If any provinces or other places want certain rules for solving difficulties in matters that are there in use, and the said difficulties are not regulated by the law of nature, or by any written law, but depend on custom and use, they ought in this case to regulate themselves by the principles that follow from the customs of those very places. And if that does not determine the difficulty, they ought to follow what is regulated in such matters by the customs of the neighbouring places, and especially by those of the principal towns.

XXI.

60. **Laws are extended to whatever is essential to their Intention.** — All laws extend to every thing that is essential to their intention. Thus, the laws allowing males to marry at the age of fourteen years complete, and females at the age of twelve, it is a consequence of these laws, that those who marry can bind themselves, although minors, to the performance of the articles agreed on in marriage, which relate to the wife's portion, her jointure, the community of goods, and other matters of the like nature. Thus, judges being established to administer justice, their authority extends to every thing that is necessary for the exercise of their functions; such as the right of inflicting penalties on those who contravene the orders of justice; and it is the same thing as to all the other consequences of their ministry.

XXII.

61. **The Laws which permit any Thing are extended from More to Less.** — In the laws which permit any thing, we draw the consequence from the greater to the lesser. Thus, those who have a right to give away their goods for nothing, have much more a right to sell them. And, in like manner, those who have a right to appoint executors by a testament, have with much greater reason a right to bequeath the particular legacies.

XXIII.

62. **The Laws which forbid extend from the Lesser to the Greater.** — In the laws which forbid any thing, we draw the consequence from the lesser to the greater. Thus, prodigals, who are not allowed to have the management of their own estate, are with much greater reason rendered incapable of alienating it. Thus, those who are declared to be unworthy of some office, or some honor, are much more unworthy of a greater office, and of a more considerable honor.

XXIV.

63. **An Exception to the two preceding Rules.** — This extension of laws from the lesser to the greater, and from the greater to the lesser, is limited to the things which are of the same kind with those that are mentioned in the law, or which are such that its motive ought to be extended to them, as in the examples of the foregoing articles. But we must not draw the consequence either from the greater to the lesser, or from the lesser to the greater, when they are things of a different kind, or such as the spirit of

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1 L. 26, D. de legib.; — l. 28, cod.
2 L. 37, D. de legib.; — l. 38, cod.
3 L. 32, D. de legib.
5 L. 21, D. de reg. jur.; — l. 163, cod.; — l. 26, cod. See the two following articles.
6 L. 4, D. de sensib.; — l. 7, § ult. D. de intell. et pop.; — l. 5, D. de serv. export. See the following article.
the law is not applicable to.* Thus, the law which permits persons who have attained to the years of marriage, although minors, to bind themselves by contracts of marriage, and to engage their estates for the performance of the covenants that are consequences of the marriage, would be wrongfully applied to other sorts of contracts, although of less importance. Thus, the liberty which an adult person has in his minority, to divide his whole estate by will, would not be rightly extended to the liberty of making over any part of it by a deed of gift that should take effect in his lifetime. Thus, the power which belongs to a lord of a manor, who has a royalty, or ample jurisdiction for the administration of justice within his own lordship, by a special grant of the sovereign, would be wrongfully applied to such as have grants only of an inferior jurisdiction, and in causes of lesser moment. Thus, it would be improper to extend the power of the highest judicial tribunal to a court of subordinate or inferior jurisdiction. Thus, the laws which brand persons with infamy would not be rightly extended to the confiscation of goods, although honor is much more valuable than any goods.

XXV.

64. Tact. Prohibitions.—If any law should put a stop to the inquiry into any abuse, by pardoning it for the time past, this would be in effect to forbid it for the time to come.*

XXVI.

65. How Persons acquire Rights by the Effect of Laws.—When

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* Thus, in the ancient Roman law, the license which fathers had to take away the lives of their children did not extend to the license of depriving them of their liberty, and making them slaves. Libertati a maioribus tantum imperium est, et potest, quibus quisvis in libero necisio potestas olim erat permissa, libertatem ejusdem non iercet. L. ubi. C. de patre potentat. Thus, in the same Roman law, it was lawful for a man to give to his concubine, but not to his wife. V. l. 58, et tot. tit. D. de domo, inter vir et uxor. Thus, by the same law, a husband was allowed to sell the lands which he got with his wife in marriage, if she consented to it; but he could not mortgage them, not even with her consent. Lex Julia fundi dediti Italicum hanc actionem prohibebat nisi a matrice non consentiente muliere: hypotheacon autem, nec si mulier consentiret. L. ubi. § 13, C. de relinqu. act.

† Cum lex in prxtetim quid indulget, in futurum vetat. L. 22, D. de legibus. The law would be very imperfect, if, when it forgiven what is past, it should not prohibit it for the time to come. Thus, the edict of 1866, which put a stop to the inquiry after those who had taken interest for money lent, and converted it into rents, did not fail to forbid the taking of all such interest for the future. V. Nov. 154.

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66. How One may renounce a Right acquired by a Law.—It is free for persons that are capable of using their rights, to renounce what the laws have established in their favor. Thus, one that is of age, and under no incapacity, such as madness, or interdiction, may renounce a succession which falls to him by law. Thus, persons who have privileges granted them, either by law or by particular favor, are at liberty not to make use of them. But this liberty of renouncing one's right does not extend to the cases in which third persons have an interest, nor to those where the right comes to any person by the disposition of a law, this right is acquired by the effect of the law, whether the person knows or does not know the law; and likewise whether he knows or is ignorant of the fact on which depends the right which the law gives him. Thus, the creditor whose debtor happens to die acquires a right against the heir, or executor, although he knows nothing of the death of his debtor, and even although he is ignorant that the law binds the heirs, or executors, or administrators, for the payment of the debts of the persons to whom they succeed. Thus, the son is heir to his father, although he is ignorant of his right to succeed, and knows nothing of the death of his father. And it is a consequence of this rule, that the rights of this nature, which persons acquire by the effect of the law, pass to their heirs, executors, or administrators, if they themselves happen to die before they have used or known their right.

XXVII.

66. How One may renounce a Right acquired by a Law.—It is free for persons that are capable of using their rights, to renounce what the laws have established in their favor. Thus, one that is of age, and under no incapacity, such as madness, or interdiction, may renounce a succession which falls to him by law. Thus, persons who have privileges granted them, either by law or by particular favor, are at liberty not to make use of them. But this liberty of renouncing one's right does not extend to the cases in which third persons have an interest, nor to those where the right comes to any person by the disposition of a law, this right is acquired by the effect of the law, whether the person knows or does not know the law; and likewise whether he knows or is ignorant of the fact on which depends the right which the law gives him. Thus, the creditor whose debtor happens to die acquires a right against the heir, or executor, although he knows nothing of the death of his debtor, and even although he is ignorant that the law binds the heirs, or executors, or administrators, for the payment of the debts of the persons to whom they succeed. Thus, the son is heir to his father, although he is ignorant of his right to succeed, and knows nothing of the death of his father. And it is a consequence of this rule, that the rights of this nature, which persons acquire by the effect of the law, pass to their heirs, executors, or administrators, if they themselves happen to die before they have used or known their right. See the next article, and the second article of the fourth section of the 1st of Codices.
nouncing of one's right would be contrary to equity, or good manners, or prohibited by some law.

XXVIII.

67. The Dispositions of particular Persons cannot hinder the Effect of the Law.—The laws have their effect independently of the will of particular persons. And no person can hinder, either by contracts, or by testament, or otherwise, the laws from regulating what concerns such things. Thus, a testator cannot hinder, by any provision whatever, the laws from having their effect against any disposition he may make in his testament contrary to law. Thus, contracts that are made against law have no manner of effect. 1

XXIX.

68. Discernment necessary for the Right Use of the Rules.—From all the rules which have been explained under this title, we may infer this as a last rule; that there is great danger of misapplying the rules of law, if we have not a very ample knowledge of all the particular rules, and of the several views that are necessary for interpreting and applying them aright. 1

TIT. II.

OF PERSONS.

69. In what Manner the Civil Law distinguishes Persons.—Although the Roman laws own a sort of equality which the law 1

1 L. 38, D. de pact.; — l. 20, D. de rei religiosa; — l. 43, § 1, D. de reg. jur.; — l. 15, § 1, D. ad leg. Falc.; — l. 5, C. de legis. The first Novel, chap. 2, towards the close, permits testators to deprive their executors of the Falcidian portion, but this very permission implies that, without it, such a disposition would have been of no force, as being contrary to the law, which requires that the executor should have at least the Falcidian portion, which is the fourth part of the estate. We must not give to the rule explained in this article an extent which may have any thing in it contrary to the preceding article.

1 Omnis definition in jure civilis periculum est. Parum est enim, ut non subverti posset. l. 202, D. de reg. jur. Thus, we ought to take care never to apply a rule beyond its just extent, nor to matters to which it has no manner of relation. Thus, we ought to be apprised of the exceptions which limit the rules. Thus, we ought either to keep to the letter of the law, or interpret it according to the rules explained under this title, and to observe the other remarks that have been made in it.

* Quod ad jus naturale attinet, omnes homines aequales sunt. L. 32, D. de reg. jur. VOL. I. 12
may be said, that the state of persons consists in this capacity, or incapacity, which it is easy to discern by these qualities; for they are of such a nature, that every one of them is, as it were, in a parallel line to another that is its opposite; and there is always one of the two opposites to be met with in every person. Thus there is nobody but who is a major or a minor; legitimate, or illegitimate. And it is the same thing with respect to all the other qualities, as will appear in the sequel of this title.

71. Two Sorts of Qualities which make the State of Persons. — The distinctions made among persons by the qualities which regulate their state are of two sorts. The first is of such as are natural, and regulated by the qualities which nature itself marks, and distinguishes in every person. Thus, it is nature that distinguishes the two sexes and those who are called hermaphrodites. The second sort is of such distinctions as are established by human laws. Thus, slavery is a state that is not natural, but which men have established. And, according to the different distinctions of these two kinds, every person has his state regulated by the order of nature, and that of the law.

72. A Remark on the State of Persons, with Respect to the Roman Law, and our Practice. — The reader must observe that we have inserted in this title some distinctions of persons, that are not mentioned in the Roman law, among those which make up the state of persons. For example, it is said in the Roman law, that madness does not change the state of the person; and we see likewise there, that in the title of the State of Persons, no mention is made of majority and minority. But, nevertheless, madness and minority are qualities that belong to the state of persons, even according to the principles of the Roman law itself. For in the first book of the Institutes, where distinctions are made between freemen and slaves, between fathers and sons, minors are there likewise considered, as also those who are in a state of madness. And in effect, these persons are under an incapacity, which makes it necessary for them to be placed under the guardianship of a tutor, or curator. Thus, that rule among the Romans, that madness does not change the state of the person, signifies that it does not change the state which is made up

by the other qualities, and that it does not hinder, for example, a madman from being a freeman and a father. And, in fine, according to the usage among us, if it were made a question, with respect to our practice, whether a person were mad or not, we should call that question a case relating to the state of the person; as we give this name to all the lawsuits in which the chief matter in debate is concerning the state of persons.

SECTION I.

OF THE STATE OF PERSONS BY NATURE.

73. Distinctions of Persons by Nature. — The distinctions which make the state of persons by nature are founded upon the sex, the birth, and the age of every person; including under the distinctions made by the birth those which depend on certain defects and imperfections in the conformation of the parts of the body, which some persons have from their birth; such as that of both sexes in hermaphrodites, the incapacity of begetting children, and some others. And although some of these defects may happen by accident, after the birth, yet, in what manner soever we consider them, the distinctions which these defects make of persons do still belong to the order of distinctions made by nature, and they have their place in this section.

ART. I.

74. Distinction of Persons by the Sex. — The sex, which distinguishes the man from the woman, makes this difference between them, with respect to their state, that men are capable of all manner of engagements and functions, unless it happen that any one is excluded from them by particular obstacles; and women are incapable, upon the bare account of their sex, of several sorts of engagements and functions. Thus, women cannot exercise the office of a magistrate, nor be witnesses to a testament, nor plead at the bar, nor be guardians, except to their own children. And this makes their condition in many things less advantageous, and likewise in others less burdensome, than that of men.
75. Distinctions by Birth, and of the Paternal Authority. — Birth puts children under the power of those of whom they are born. 

II.

76. Lawful Issue, and Bastards. — Children lawfully begotten are those who are born of a marriage lawfully contracted. And bastards are such as are born out of lawful wedlock.

IV.

77. Stillborn Children. — Children that are born dead are considered as if they had never been born, or conceived.

The natural effects of this power are settled by nature, and the divine law, which mark out the duties of children to their parents. But there are some effects which the civil law gives to the power of parents over their lawful children. And these effects make a particular character of the paternal power, which constitutes the state of sons that are subject to the father's authority; the distinction of which shall be explained in the second section.
V.

78. Abortive Children.—Abortive children are such as by an untimely birth are born either dead, or incapable of living.\(^6\)

VI.

79. Children Unborn.—Children who are still in their mother's womb have not yet their state determined; neither ought it to be, but by the birth. And till they are born they cannot be reckoned in the number of children; not even for the benefit of their fathers, in order to procure to them the rights and advantages which accrue to parents by the number of their children.\(^6\) But the hopes that they will be born alive make them to be considered, in whatever concerns themselves, as if they were already born. Thus, the inheritances which fell to them before their birth, and which belong to them, are kept for them; and curators are assigned to them, to take care of these inheritances for their behoof. Thus, the mother who procures her own abortion is punished as a murderer.\(^1\)

VII.

80. Posthumous Children.—Posthumous children are those that are born after the death of their father, and who by this birth are distinguished from those who are born during the father's lifetime, in that posthumous children are never under the power of their father, and are not of the number of sons subject to the father's authority; of whom mention will be made in the fifth article of the second section.\(^8\)

81. Children born after their Mother's Death.—Children that are born after the death of their mothers, and who are taken out of the mother's womb after she is dead, are of the same condition with other children.\(^8\)

82. Hermaphrodite.—Hermaphrodite are those who have the marks of both sexes; and they are reputed to be of that sex in which nature most prevails in them.\(^9\)

83. Eunuchs.—Eunuchs are those whom a defect of conformation of their members, whether it proceed from their birth, or any other cause, renders incapable of begetting children.\(^8\)

X.

84. Madmen.—Madmen are those who are deprived of the use of reason, after they have attained the age in which they ought to have it; whether it be that this defect is natural to them from their birth, or has happened by some accident. And seeing this condition renders them incapable of all manner of engagements, and of the management of their estate, they are put under the tuition of a guardian.\(^3\)

XII.

85. Persons that are Deaf and Dumb, and others laboring under the like Infirmities.—Persons that are both deaf and dumb, or those who by other infirmities are rendered incapable of managing
their affairs, are in such a condition that guardians are appointed to them, as well as to madmen, to take care of their affairs, and of their persons, as occasion requires. 7

XIII.

86. How Madness, or Imbecility, does not change the State of Persons. — Those who labor under madness, or under any of the other infirmities above mentioned, do not lose the state which their other qualities give them. And they retain their dignities, their privileges, the capacity of inheriting, their right to their estates, and likewise such effects of the paternal power as are consistent with that condition. 8

XIV.

87. Monsters. — Monsters, who have not human shape, are not reputed in the number of persons, and are not reckoned as children to their parents. 4 But such as have what is essential to human shape, and have only some excess, or some defect, in the conformation of their members, are ranked with the other children. 9

XV.

88. A Case in which Monsters are reckoned among the other Children. — Although monsters who have not human shape are not placed in the number of persons, and are not considered as children, yet they are reckoned as such, when it is for the behoof of the parents, and are allowed to fill up the number of children, to entitle their parents to any privilege or exemption which belongs to fathers or mothers having a certain number of children. 10

XVI.

89. Distinction made by Age. — Age distinguishes among persons those who have not reason or experience enough to govern themselves, from those to whom age has given such a maturity of reason. 4

90. Distinction of Persons by the Civil Law. — The distinctions which the civil law makes of the state of persons are those that are established by arbitrary laws; whether it be that these distinctions have no foundation in nature, as that of freemen and slaves; or that some natural qualities have given rise to the said distinctions, such as majority and minority of age.

91. The Principal Distinctions of Persons in the Roman Law. — The Roman law considered chiefly three things in every person; that is, liberty, country, and family; and under these three views it made three distinctions of persons. The first, of freemen and slaves; the second, of citizens of Rome, and strangers, or of such as had lost the right of citizen by a civil death; and the third, of fathers of a family, and of sons subject to the father's authority. 6 These last two distinctions are in use with us, although the rules we observe in them are different from those of the Roman law. And as to the state of slavery, although there are no slaves in France, yet it is necessary to know the nature of that state. For this reason, we shall set down under this title these three distinctions, together with the others which we have in common with the Roman law.

92. Some Distinctions in Use with us. — The Nobility. — We have in France a distinction of persons, which is not in the Roman law, or which is very different from any thing that is to be found there. And since for this reason it is not to be set down in
the articles of this section, and yet it being considered as belonging to the state of persons, this distinction shall be explained here in a few words. It is that which nobility makes between gentlemen, and those who are not, whom the French call Roturiers. Nobility gives to those who are of that order divers privileges and exemptions, and a capacity of holding certain offices and benefices appropriated to gentlemen, and of which those who are not of noble extraction are incapable. Nobility makes likewise in some customs a difference as to successions. This nobility is acquired either by birth, which ennobles all the children of those who are noble; or by certain offices, which ennable the descendants of those who have enjoyed them; or lastly, by letters of nobility, which are obtained from the king, as a recompense for some signal services.

93. Burgesses.—We distinguish in France between the inhabitants of towns, who have certain rights, exemptions, and privileges annexed to the right of citizenship of those towns, with a capacity of bearing offices in them; and the people who live in the country, and in little villages, who have not the same privileges nor the same rights.

94. Vassal, Subjection to the Court of a Lord of a Manor or Perpetual Lessee.—To these distinctions we must add those, which are made by some customs, of persons of a servile condition, which distinguishes them from those who are of a free condition, in that they are bound by the said customs to some personal servitudes, which relate to marriages, testaments, and successions. But these servitudes being differently regulated by the said customs, and being unknown in the other provinces, it is not necessary to say any more of them here, and it is enough that we have made this bare remark. To which we must add, that this distinction of these persons of servile condition is not founded on any personal qualities, but barely upon the domicile of the said persons, and the quality of their estates, which are subject to these servile conditions; in the same manner as the qualities of vassal, subjectation to the courts of a lord of a manor, a perpetual lessee, who is styled in the Roman law Emphyteuta, are not, properly speaking, personal qualities, but consequences either of one's domicile, or of the nature of the lands which he possesses.

b V. I. 7, § ult. D. de Senator.

95. Distinction of Persons in Britain.—Nobility.—Commoners.—It may not be improper to add one word here touching the distinction of persons in Great Britain. The nobility, strictly taken, is what makes up the peage of Great Britain, and consists of lords spiritual and temporal, who have a seat and vote in parliament, and are divided into five ranks, or degrees, viz. duke, marquis, earl, viscount, and baron. All who are not peers of the kingdom come under the general name of commoners, who may be distinguished into two classes. The first takes in all the gentry, of what denomination soever they be; whether baronets, knights, esquires, or gentlemen. Baronets and knights are made by creation. The honor of baronet is hereditary, and descends to the male issue. That of a knight-batchelor is only personal, and dies with the person on whom the said honor is conferred. The titles of esquire and gentleman are acquired either by birth, by profession, or by certain offices, which ennable those who have served in them, and their descendants. Under the other class may be comprehended the yeomanry, or freeholders, who have lands and tenements of their own, to the value of at least forty shillings a year, all citizens, tradesmen, and day-laborers.

96. Persons of a Servile Condition.—To these distinctions we must add another, which is mentioned in our books of the common law, and that is of persons of a servile condition, who are called villains, from the Latin word villa, a country farm, where they were appointed to do service. Of these bondmen, or villains, there were two sorts in England, one termed a villain in gross, who was immediately bound to the person of his lord and his heirs; the other was a villain belonging to a manor, who in the Roman law is called glebae adscritpitalis, being bound to his lord as a member belonging and annexed to a manor, whereof the lord was owner. There are not, properly speaking, any villains now in England; and therefore it is not necessary to say any more concerning the state of villainage, it being enough barely to have mentioned it.”

Art. I.

97. Slaves.—A slave is one who is in the power of a master, and who belongs to him in such a manner, that the master may sell him, dispose of his person, his industry, and his labor; and

* This and the preceding paragraph were added by the translator.
who can do nothing, have nothing, or acquire any thing, but what must belong to his master.*

II.

98. Freemen.—Freemen are all those who are not slaves, and who have preserved their natural liberty; which consists in a right to do whatever we please, except in so far as we are restrained by law, or hindered by some outward violence.b

III.

99. Causes of Slavery.—Men become slaves by captivity in time of war, among nations where it is the custom that the conqueror, by saving the life of the person conquered, becomes his master, and makes him his slave. And it is a consequence of the slavery of women, that their children are slaves by their birth.c

IV.

100. Manumitted Persons.—Manumitted persons are those who, having been slaves, are made free.d

V.

101. Who are Fathers of a Family, and who Sons of a Family. —The sons and daughters of a family are persons who are subject to the father's authority; and the fathers or mothers of a family, whom we call likewise heads of a family, are the persons who are not subject to the father's authority;* whether they have children of their own, or not, and whether they have been freed from the father's authority by emancipation,1 or by the natural* or civil death of the father.b And however young these persons

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* L. 4, § 1, D. de stat. hom.; — § 2, Inst. de jur. pers.; — § 3, Inst. per quos pers. eique acq.; — l. 1, § 1, D. de his qui sui vel al. jur. sunt.

b L. 5, § 1, D. de stat. hom.; — § 1, Inst. de jur. pers.;

c L. 5, § 1, D. de stat. hom.; — § 4, Inst. de jur. pers. If one who was past twenty years of age suffered himself to be sold, that he might have the price of his liberty, he became a slave by the Roman law, although that law did not allow him at that age to have the power of selling his estate. Jure civilis, e qui se major viginti annis, ad primum participandum, venire passus est (servus sit). L. 5, § 1, D. de stat. hom.

a L. 6, D. de stat. hom., — Inst. de libert.

f L. 4, D. de his qui sui vel al. jur. sunt.

Inst. quod mod. jur. pati pot. solv.

Inst. cod.

h § 1, cod. § 3, cod. Concerning the civil death, see art. 12, below.

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may happen to be, yet they are considered as heads of a family; so that the several children of one father are so many heads of a family after the father's death.1

VI.

102. Emancipation does not alter the Natural Right of the Paternal Power.—Emancipation, and the other ways which set the son or daughter free from under the father's authority, regard only the effects which the civil laws give to the paternal power, but change nothing in those that are of natural right.1

VII.

103. Who are those that are said to be Masters of their own Rights. —According to these two distinctions of freemen and slaves, of fathers and sons, there is no person who is not either under the power of another, or in his own; that is to say, master of his own rights.2 And this does no way hinder the son that is emancipated from being subject to the authority which the law of nature gives his father over him; nor a minor, who happens to be father of a family, from being under the conduct and authority of a tutor or guardian.

1 L. 195, § 2, D. de verb. signif. The paternal power is the foundation of several incapacities in sons; but which are different in the Roman law and in our customs. Thus, in the Roman law, sons who lived in subjection to the father's authority were first of all incapable of acquiring anything. But all that they did acquire by any way whatsoever belonged to their fathers, excepting the peculium, if the father thought fit to let them have it. And afterwards they had the power of acquiring, and the fathers had the usufruct of all that their sons acquired. And then some exceptions were made, and the fathers had not any longer the usufruct of certain goods. But it is not necessary to explain here all these changes, nor the different kinds of usufruct which fathers have of the goods of their children in the provinces of this kingdom, whether it be under the name of usufruct, or under the name of wardship.

Thus, likewise, in the Roman law, sons who were still under the father's jurisdiction, could not oblige themselves by borrowing money. Non tit. est tenen. Matrem. Thus, in France, sons subject to the paternal authority cannot marry, without the consent of their fathers and mothers, unless they are upwards of thirty years of age, and daughters after they are past twenty-five years, according to the ordinances of 1556 of Blois, and of 1590.

Thus, in France, marriage emancipates children from the paternal jurisdiction. Whereas under the Roman law the son and daughter that were married remained, nevertheless, under the power of the father, unless he emancipated them when he married them. L. 5, Cod. de cons. invent. tom. in leg. quos in fidei cons. — l. 7, Cod. de nupt.; — l. 1, Cod. de bon. quaes. lib.

1 L. 8, D. de rep. mina.

2 Estat. de his qui sui vel al. jur. sunt; — l. 1, D. cod.; — l. 3, D. de stat. hom.
VIII.

104. Who are of Ripe Age, and who of Unripe Age. — Males who have not attained the age of fourteen years complete, and females who are under twelve, are said to be of an unripe age, and are called in the Roman law Impubesces. And sons who have attained the age of fourteen years complete, and daughters who are of the age of twelve, are reckoned to be of ripe age, and are distinguished in the Roman law by the name of Adulti.

IX.

105. Majors and Minors. — Minors are those of both sexes who are not as yet five-and-twenty years complete; and they are under tutelage till that age. When they have completed the last moment of the five-and-twentieth year, they are then said to be of full age, or majors.

X.

106. Prodigals. — We ought to place in the rank of minors, those persons who are forbid the management of their own affairs, as being prodigals, although they be of full age; because their bad conduct renders them incapable of managing their own estate, and of entering into engagements, which is the consequence of the former. And therefore the care of all their concerns is committed to a guardian.

XI.

107. Natural-born Subjects, and Strangers. — We call natural-born subjects those that are born within the king's dominion, and we reckon those to be strangers who are subjects of another prince, or another state. And strangers of this kind, who have

\* Inst. quib. mod. int. fin.; — l. 11. Cod. grace. int. vol. 26, p. 576. It is the puberty, or ripeness of age, that removes the incapacity for marriage, which proceeded from want of years. But the Romans distinguished between this puberty, that is sufficient to make the marriage lawful, and full puberty, which renders it more decent. This full puberty in males is eighteen years complete, and in females fourteen. — I. 40, § 1, D. de adopt.: — § 4, Inst. cod. As to the other effects of full puberty, vid. l. 14, § 1, D. de aliis. leg.: — l. 40, D. de pu. jux 1, § 3, G. de feu.

\* L. 3, § 3, D. de min. We have thought fit to make use here of the word tutelage, although by the Roman law adults were out of tutelage, and had curators assigned them, as shall be explained under the title of Tutors. But according to our usage in France, tutelage does not expire till the five-and-twentieth year, except in some customs which fix a shorter period of time for minority.


not been naturalized by letters patent of the prince, are under the incapacities which are regulated by the ordinances, and by our customs.

XII.

108. Civil Death. — Civil death is the state of those persons who are condemned to death, or to other punishments which are attended with the confiscation of goods. And therefore this state is compared to natural death, because it cuts off from the civil life those persons who fall under it, and renders them, as it were, slaves to the punishment which is inflicted on them.

XIII.

109. Professed Monks and Nuns. — Professed monks, or nuns, are under another kind of civil death, which is voluntary; into which state they enter by their vows, which render them incapable of marriage, or of having any property in temporal goods, or entering into any engagements which are consequences of the same.

XIV.

110. Clergymen. — Clergymen are those who are set apart for the ministry of God's worship; such as bishops, priests, deacons, sub-deacons, and those who are called to other orders. And this state, which distinguishes them from laymen, renders them incapable of marriage, in such as are in holy orders, and worketh also other incapacities in the matters of commerce prohibited to the clergy, and entitles them to the privileges and exemptions which


In France, strangers, who are called aliens, alihi natu, are incapable of successeions, and of making a testament. They are not capable of enjoying offices or benefices; and they are under the other incapacities regulated by the ordinances, and by our usage. See the ordinance of 1388, that of 1431, and that of 1461, art. 4. We must except from these incapacities some strangers to whom our kings have granted the rights and privileges of natives, and natural-born French.


\* Auth. inreg., ex Nov. 5, cap. 5.; — C. de Sacris. Eccles.; — Nov. 76. In France, the estates of persons who are professed religious, do not go to the monastery, but to their heirs, or those to whom they are pleased to give them. And they cannot dispose of them for the use of the monastery.
have been granted to them by the canons of the church, by the ordinances, and by the custom of the kingdom.\(^1\)

XV.

111. Communities. — Communities, ecclesiastical and secular, are assemblies of many persons united into one body, that is, formed with the prince's consent, without which these kinds of assemblies would be unlawful.\(^2\) And these bodies, and corporations, such as chapters of churches, universities, monasteries, towns, companies of trade, and others, are established for the forming of societies that may be useful either to church,\(^3\) or state;\(^7\) and they are accounted as persons,\(^8\) having their own proper goods, their rights, and their privileges. And among other differences which distinguish them from particular persons, these societies are under some incapacities, which are accessory, and natural to this state: as particularly that of being incapable of alienating their stock without just cause.\(^9\)

### Title III.

#### Of Things.

112. In what Manner the Laws consider Things. — The civil laws extend the distinctions which they make of things to every

\(^1\) L. 6, C. de Episc. et Cler.; — Ordinance of St. Louis, 1228; — Ordinance of Blois, art. 59; — v. l, 1 et seq. et l. 2, d. tit. C. de Episc. et Cler.


\(^3\) L. 1, § 1, D. de coll. et corp.; — tot. tit. C. de Episc. et Cler.

\(^7\) L. 1, D. quod cujusque univ. As to town corporations, v. l. 3, D. quod cujusque univ.; — tot. tit. D. ad Munic.

\(^9\) L. 22, D. de fidjus.

\(^9\) Ecclesiastical and lay communities being established for a public good, and with an intent that they should last always, they are forbidden to alienate their goods without just cause. L. 14, C. de Serr. Eccl. And it is because of this perpetuity, and of these prohibitions to alienate, that lands which come into the possession of communities are said to be in mortmain, that is, in a dead hand; because what they once acquire, remaining always in their possession, the king and lords of manors lose their services, and the profits due to them upon the change of their vassals, and upon alienation of the lands. It is for this reason that they are not permitted to acquire immovables, without paying to the king a consideration for a license of mortmain, and some acknowledgment to the

Thing that God hath created for the use of man. And as it is for our use that he hath made the whole world, and that he destinates for the supplying of our wants every thing that is here on the earth below, or in the heavens above; it is this destination of all things to our different wants which is the foundation of the different manners in which the laws consider and distinguish the different kinds of things, in order to regulate the several uses and commerce which men make of them.

113. The Foundations of the Distinctions of Things. — The divine providence, which forms a universal society of mankind, and which divides it into kingdoms, towns, and other places, and settles in every one the families and the particular persons who compose them, does likewise distinguish and dispose in such a manner all the things that are for the use of man, that many things are common to all mankind; others common to one kingdom; come to a town, or some other place; and other things enter into the possession and commerce of particular persons.

114. It is these distinctions of things, and the other different ways in which they have relation to the use and commerce of men, that shall be the subject-matter of this title. And because there are some distinctions of things, which are altogether natural, and others which have been established by laws, we shall explain in the first section of this title the distinctions made by nature, and in the second, those that are made by the laws of men.

### Section 1.

#### Distinctions of Things by Nature.

Art. I.

115. Things common to all. — The heaven, the stars, the light, the air, and the sea, are all of them things belonging so much in common to the whole society of mankind, that no one person can make himself master of them, nor deprive others of the use of them. And likewise the nature and situation of all these things is entirely proportioned to this common use for all men.\(^*\)

\(^*\) Deut. xvii. 10, — Wind. of Sel. 13, 2.

\(^{13}\) Deut. iv. 19; § 1, Inst. de rer. div.; — l. 2, § 1, D. cod. It is to be remarked on this
II.

118. Distinction of Immovables and Movable. — The earth being given to men for their habitation, and for the production of all things necessary for supplying all their wants; we distinguish in it the portions of the surface of the earth which every one occupies, from the things that may be separated from it, for our use.

article, and the two following, that our laws differ from the Roman law in regulating the use of the seas, except in so far as concerns that natural use of them, in the communiaation which all nations have with one another, by a free navigation over all the seas. Thus, whereas the Roman law allowed every one individually to fish, both in the sea, and in the rivers, § 2. Inst. de rer. div.; in the same manner as it allowed hunting, § 12. ed. coll., our laws prohibit them. And our ordinances have made several regulations concerning them; the origin of which is owing, among other causes, to the necessity of preventing the inconveniences of allowing a liberty of hunting and fishing to all sorts of persons. And we must observe in general, touching the use of the seas, seaports, rivers, highways, the walls and ditches of towns, and of other things of the like nature, that several regulations have been made in them by our ordinances; such as those that concern the admiralty, rivers, forests, hunting, fishing, and others of the like nature, which do not belong to the matters that come within the compass of this design.

119. Immovables. — Immovables are all the parts of the surface of the earth, in what manner soever they are distinguished; whether into places for buildings, or into woods, meadows, arable land, vineyards, orchards, or otherwise, and to whomsoever they belong.

VI.

120. Trees and Buildings. — We comprehend likewise under the name of immovables every thing that is adherent to the surface of the earth, either by nature, as trees; or by the hand of man, as houses, and other buildings; although these kinds of things may be separated from the earth, and become movable.

VII.

121. The Hanging Fruits are a Part of the Ground. — The fruits hanging by the root, that is, such as are not as yet gathered, nor fallen, but which stick to the tree, are part of the ground.

VIII.

122. Accessories to Buildings. — Whatever sticks to houses, and other buildings, such as any thing that is fastened with iron, lead, plaster, or any other manner of way, to the intent that it may always continue so, is reputed to be immovable.

IX.

123. Movable. — Movable are all things that are disjoined from the earth and the waters; whether it be that they have been separated from it, as trees that are fallen, or cut down, fruits that are gathered, stones taken out of a quarry; or that they
are by nature distinct and separate from the earth, and from the water, as living creatures.\footnote{L. 1, D. de æqual. ed. See the fourth article of this section.}

X.

124. Movable, living and dead — Movable things are of two sorts. There are some which live, and move themselves, as animals; and the things that are inanimate are called dead moveables.\footnote{L. 1, D. de ord. ed.; – I. 39, C. de jur. ed.; – I. 93, D. de verb. signif.}

XI.

125. Animals, wild and tame. — Animals are of two sorts. One is of those that are tame, and serve for the ordinary use of men, and are in their power; such as horses, oxen, sheep, and others. The other sort is of those animals that live in their natural liberty, out of the power of man; such as the wild beasts, fowls, and fishes. And the animals of this second sort are applied to the use, and come into the power of men, by hunting and fishing, according as the use of these sports is permitted by the laws.\footnote{§ 19, Inst. de rer. div. We must understand this according to the ordinances which relate to hunting and fishing.}

XII.

126. Movable Things that are consumed by Use. — In movable things we distinguish those that may be used, and yet kept entire; such as a horse, a suit of hangings, tables, beds, and other things of this kind; from such as we cannot use without consuming them, such as fruits, corn, wine, oil, and the like.\footnote{L. 1, D. de usufr. ear. rer. qua us. cons. v. min.}

SECTION II.

DISTINCTIONS OF THINGS BY THE CIVIL LAWS.

127. Difference between the Distinctions of the foregoing Section, and those in this. — Although the distinctions of things which have been explained in the foregoing section have been made by the civil laws, yet it was proper to separate them from the distinctions that are treated of in this section. For those in the preceding section are formed by nature, and the laws have only taken notice of them, or added something to them; as, for example, what has been explained in the third and eighth articles. But these treated of in this section owe their chief establishment to the laws.

ART. I.

128. Distinction of Things that enter into Commerce, and those that do not. — The laws reduce all things to two kinds. One is of those that do not enter into commerce, and which cannot belong to any one in particular; such as those that have been explained in the first three articles of the preceding section. The other sort is of such as enter into commerce, and of which any one may become master.\footnote{Inst. de rer. div.; – I. 1, D. ed.}

II.

129. Things consecrated and set apart for Divine Worship. — Religion, and the civil laws, which are conformable to it, distinguish the things which are destined to divine worship from all others. And among those which are made use of in this worship, we distinguish between things that are consecrated, such as churches and the communion cups, and things that are religions and holy, such as church-yards, the ornaments, oblations, and other things dedicated to the service of God. And all these kinds of things are out of commerce, while they continue under this destination to the divine service.\footnote{L. 1, D. de div. rer.; – § 8, Inst. de rer. div. See the sixth article of the eighth section of the Contract of Sale, concerning the sale of things consecrated.}

III.

130. Things corporeal and incorporeal. — The civil laws make another general distinction of things, into those that are sensible and corporeal, and those which we call incorporeal, in order to distinguish from every thing that is sensible certain things which owe their nature and their existence wholly to the laws; such as an inheritance, an obligation, a mortgage, a usufruct, a service; and, in general, every thing that consists only in a certain right.\footnote{Inst. de rob. corp. et incorp.; – § ult. cod.; – I. 1, § 1, D. de div. rer.}

IV.

131. Allodial Lands, and Lands burdened with Quitrents or
other Duties. — Among the immoveables that are in commerce, and serve for the common use of men, there are some which particular persons may possess fully in their own right, without any burden. And there are other immoveables, which are burdened with certain duties and services, that are inseparable from them. Thus, we have in this kingdom lands which are called alodial, or free lands, which pay neither quitrent, nor any other such acknowledgment.4 And there are other lands, which, having been given away originally with the charge of paying a quitrent irredeemable,5 or upon other conditions, such as those of fiefs, descend to all sorts of possessors, with the burdens annexed to them.

V.

132. Mines. — We may reckon among lands which particular persons cannot possess fully in their own right, those in which there are mines of gold, silver, and other metals, or matters in which the prince has a right.6

VI.

133. Coin. — We may place among things distinguished by the laws, the public coin, which is a piece of gold, silver, or other metal; the form, weight, and value of which are regulated by the prince, in order to make it the price of all things that are in commerce.5

1 L. auct. § 7, D. de cernab.
2 De tributis, stipendio, censibus, et prædico juris italic. V. tit. 19, Ulp. de dom. et acq. rer.; § 40, Inst. de rer. div.; § 13, D. de imposibus in rer. deb.; § 97, § 1, D. de vend. signif.; § 1, 1. C. de usus. transform.; § 100 tit. D. de cernab.; § 100 tit. C. si propt. publ. genu. The origin of those burdens upon estates in the Roman law was a consequence of the conquests of provinces made by the Romans, of which they distributed the lands to such persons as they thought would remain faithful to the Roman empire; but upon condition that the possessors should pay a certain tribute, to which the lands of Italy were not subject, nor those likewise of some other provinces, which were distinguished by exemptions from such tribute. d. tit. de cernab.

There are some provinces in France, in which all the lands are reputed alodial, free from all burden of quitrent, or other, unless they are subjected to it by some title; and others, where they have no such thing as alodial lands.

We must not reckon in the number of estates clogged with burdens, those which are liable to pay tithes to the church. For this is a burden of another nature, and from which the possessors of alodial lands are not exempt.

4 L. 3, C. de metalleris. See the ordinance of Charles IX. of 1563, and others concerning mines.
5 L. 1, D. de contr. empt.
scends to us from our mother, or other ascendants or collateral relations of the mother's side."

* L. 1. C. de bon. mot.; 1. 3. C. de bon. que lib. Although the texts which are quoted on these last four articles have relation to these several sorts of estates, yet this distinction hath not the same use in the Roman law as it hath in our custom; which make different heirs of estates of purchase, estates of inheritance, paternal estates, and maternal estates. This distinction hath likewise place in the matter concerning the power of redemption.

THE

CIVIL LAW IN ITS NATURAL ORDER.

PART I.

OF ENGAGEMENTS.