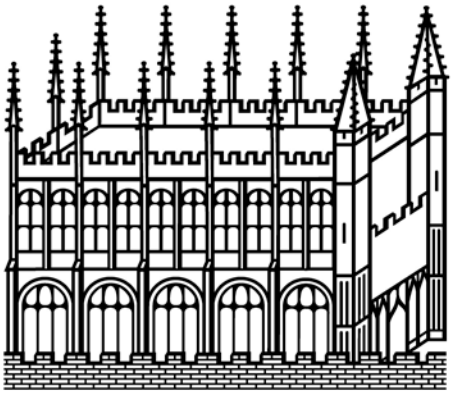


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INSTITUTES

OF THE

CIVIL LAW OF SPAIN,

BY

DOCTORS D. IGNATIUS JORDAN DE ASSO Y DEL RIO,

AND

D. MIGUEL DE MANUEL Y RODRIGUEZ.

(THE SIXTH EDITION, MATERIALLY CORRECTED. MADRID. 1805.)

TRANSLATED FROM THE SPANISH,

WITH NOTES, AN APPENDIX, AND INDEX,

BY

LEWIS F. C. JOHNSTON, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW;
JUDGE OF CRIMINAL INQUIRY, AND ONE OF THE JUDGES OF THE
COURT OF FIRST INSTANCE OF CIVIL JURISDICTION,
OF THE ISLAND OF TRINIDAD.

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1825.

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TO

HIS EXCELLENCY

SIR RALPH JAMES WOODFORD, BART.

GOVERNOR AND COMMANDER-IN-CHIEF OF THE

ISLAND OF TRINIDAD,

&c. &c. &c.

SIR,

THE encouragement which Your Excellency, kindly, bestowed on my labours in their progress, the interest which you took towards their accomplishment, and the goodness which you, obligingly, manifested in permitting me to bring them before the public, under the sanction and authority of your name, demand my grateful acknowledgments.

The task of directing the whole financial, legislative, and executive machinery of an extensive colony, composed of all nations and classes, ex-

perience has exemplified, is one of no ordinary difficulty: the steady, vigorous, statesmanlike, and successful execution of this task affords the best proof of the merits of Your Excellency's administration. That the benefits derived under it's able sway may be long continued, to the advancement of your own honour and of the public interest, is the sincere wish of

Your Excellency's obliged

and faithful servant,

LEWIS F. C. JOHNSTON.

London, 1*st June*, 1825.

TRANSLATOR'S PREFACE.

In offering to the public an English version of a Spanish law work, under, what may be considered a self-acquired knowledge of the Spanish language, and in adding his own imperfect comments on the production of the foreign doctors of law, whose work he has ventured to translate, the Editor is apprehensive that he subjects himself to the charge of presumption.

It is necessary, therefore, to state that this work was commenced with a view to personal instruction and advantage; and was, in chief part, executed, under the anxiety of professional engagements, in a climate ill-calculated either to promote exercise of the mind, or to impart strength to the execution of its design; and that it has been brought to its present state, under frequent interruption, and without that directing light, and that encouraging assistance, which the recorded wisdom of a profound bench, and the enlightened liberality of an experienced bar, afford to facilitate and perfect similar undertakings in Great Britain.

Whatever may be the reception of the work, the writer may be permitted to observe, that his labours have not been trifling: a bare reference to the number

of the statutory quotations in the text, composing, it may be said, the statutes at large of Spain, which, with the comments thereon by learned commentators, have undergone his attentive consideration, will be some proof of the nature of his labours. These have been often extended to research, as some of the notes to the translation will show, into the elaborate works of other writers on the Spanish and Roman laws, almost uniformly published in Latin.

The island of Trinidad, from its extent, the variety and fertility of its soil, peculiarly adapted to all kinds and purposes of tropical culture and industry, — its forests of valuable wood, convertible to every sort of building use, and its contiguity to the continent of South America, visible from its shores, has long been rendered an object of consideration.

The capture of it, by His Majesty's arms, in February 1797, was, in some few years, followed by the happy triumph humanity accomplished in the abolition of the Slave Trade. The number of slaves found in the island, at its conquest, was very limited: these, it is known to persons conversant with the political and domestic history of the West Indies, are the only available means of cultivating the soil. The effects of the climate on the constitutions of Europeans, preclude the hope of ever procuring a supply of labourers, for this end, from that part of the world. However numerous the class of natives, denominated free black and coloured persons, may be, — whatever substitutes a native free population may be expected to furnish for such a purpose, — certain it is, that the substitution or application of such means is not attainable, at least to any useful extent. Whether the indisposition to agricultural labour, on the part of this class of persons, arises from a habit of indolence, or from any feeling

produced, in some cases, by the recollection of the former servile state of themselves; or connected, in others, wlth the history of that of their progenitors; or from the exclusive occupation of slaves in such a species of labour; or from what other circumstance, it is difficult to say: *sed ita est.* This question, however important in its bearings to the colonists, it is not within the province or intention of the translator to pursue.

The atonement which British legislation offered, in the abolition of the Slave Trade, for the inhumanity of its former positive enactments, and tacit sanctions with respect to this traffic, has prevented that accession to the slave agricultural strength in Trinidad, which, it may be concluded, would have attended the absence of this act of justice to Africa.

The civil war which, for so many years, waged, with depopulating horror, on the vicinal continent of Spanish South America, for some time, materially, diminished, and, at last, put a stop to the lucrative commercial intercourse which had, previously, subsisted between it and Trinidad. This last source of prosperity, it is hoped, from the actual possession of independence by the South Americans, and its recognition by the British government, will return with accumulated benefit.

It has been thought fit, by the British government, to continue the Spanish laws in force in Trinidad, subject to such occasional alterations and modifications, by orders in council, and by proclamations of the colonial government, as circumstances seemed to require.

It appears that, in the first years of British possession of this valuable colony, the administration of justice was very defective; and that, until the appointment, in October 1808, of George Smith, Esq., now deceased,

formerly His Majesty's Chief Judge of the Island of Grenada, and late Chief Judge of the Mauritius, no lawyer had filled the office of judge.

Mr. Smith left the island, it is believed, in 1811.

In 1813, his Excellency Sir Ralph James Woodford, Bart. was nominated by His Majesty's Ministers, to the situation of Governor and Commander in Chief of Trinidad; and his appointment was followed by that of John Thomas Bigge, Esq., of the Inner Temple, Barrister at Law, and late Commissioner on the affairs of New South Wales, to the office of Chief Judge, both civil and criminal.

The departure of Mr. Bigge from the island, in 1818, was succeeded by the appointment of another learned British barrister, Ashton Warner, Esq., who now ably fills the situation of Chief Judge.

In the early period of the government of Sir Ralph Woodford, a very material improvement, in respect to the administration of justice, was carried into full effect, by the exclusive use of the English language in all judicial proceedings and records. But the laws, with the exception of the orders in council and proclamations which have been made since the conquest, and which govern these proceedings, continue in the Spanish language.

The advantage, not to say necessity, of a medium of acquiring a knowledge of the system of laws which are to be the guardians of a man's natural rights, and the rules of his civil conduct, is too obvious to require illustration: such an advantage was wanting to the British inhabitants of Trinidad. This *desideratum* it has been the wish and the endeavour of the Translator of the following pages to supply. For their benefit, principally, this publication is intended; and, of all the works of Spanish jurisprudence which have come un-

der the view of the Editor, and he is not aware of any one of note that has escaped it, the Institutes of the Law of Spain by Doctors Asso and Manuel, appeared the best adapted for the attainment of the object in view.

The work is divided into three books: the first treats of persons; the second of things, including crimes and punishments; the third, comprises the doctrine of actions, civil and criminal.

This arrangement, in conformity with the plan of the admirable Commentaries on the Laws of England, seemed calculated to predispose an English reader to a perusal, in his own language, of the Institutes of the Law of Spain: they will be found to contain the substance of the statute and common law of that country. No position is laid down, and no rule advanced by the learned authors of the text, without a reference to a statute in support of the one, or to some respectable law writer, in illustration of the other. To every one of the statutory enactments cited in the text, the Translator has made it his duty to refer; not with the view alone to ascertain the mere correctness of the citation, but with the object of giving the law so quoted the best consideration his humble ability would permit, in order to determine, in how far the doctrine advanced, position laid down, or exposition of the law made by the text, was borne out or supported by the law itself. Where the Editor has found any mistake in reference, or has considered the view of the text, in any particular, erroneous, he has undertaken, with due deference, to point out the error, or variance.

The writer, on a visit which he made to Madrid, in 1820, was fortunate enough to meet with the edition of the Institutes of the Law of Spain by Doctor Joaquin Maria Palacios, the learned professor of law in the Uni-

versity of Huesca; and he, afterwards, most gladly availed himself of the observations of the learned professor, where he saw fit, in adding to his own notes on the text: whenever the Editor has so availed himself, he has scrupulously and invariably stated his obligation and authority.

Another task which has been performed in the translation, for the convenience of reference, it may be permitted, also, to mention. The compilation of the modern statutes of Spain was published in 1775, under the title of '*Leyes de Recopilacion;*' to which compilation the Text, and, indeed, all other Spanish law works refer, except, perhaps, any published very recently, such as the last edition of '*Febrero Adicionado,*' published in 1817 and 1818: a more modern arrangement of these laws, in twelve books, has been since published, entitled, '*Novisima Recopilacion de las Leyes de España:*' some of the enactments contained in the ancient compilation are left out of the more recent one; and by a '*nota*' subjoined to the table of laws in the first volume of the *Novisima Recopilacion*, it is stated that the enactments of the *Recopilacion*, which are not inserted in the said table, are left out of it as being repealed. The Translator has given the laws of the *Recopilacion* in the body of the text, as there quoted; and, in the margin, he has added the corresponding laws of the *Novisima Recopilacion;* and where the laws of the *Recopilacion*, cited in the text, are not found in the table of the *Novisima Recopilacion*, he has noticed the omission in a note; so that a facility of reference, and an immediate medium of information, as to the force or repeal of the law, is afforded.

The Editor has also added an index, which was wanting to the edition of the text, the 6th in one volume, published at Madrid, in 1805, from which the

translation was made. It must be, however, observed, that this, with some alterations and additions, is a translation of a short index to the edition of the work, in two volumes, by Dr. Palacios, published at Madrid in 1806, with the necessary adaptation of the references in the latter edition to the pages of the other.

Whatever estimate may be formed of the present attempt, justice to the authors, whose work is thus presented to the public, requires the Editor to entreat that the imperfections which may be observable in the translation of the text, be not attributed to the latter; of the esteemed excellence of which, in Spain, he can offer no better proof than the statement, that, by a modern statutory enactment, published so late as Nov. 1802, (Law 7. title 4. book 8. *Novisima Recopilacion de las Leyes de España)* daily lectures, of an hour and a half, for the space of two years, on these Institutes, are directed to be given by the professors of law in the Universities of Spain.

Although it has been stated that the present undertaking is published with a view to the benefit, principally, of the British inhabitants of Trinidad, it is confidently hoped that the use will not be so partial; but that British merchants and others, residing in Great Britain, and holding mortgages or securities on valuable properties, and otherwise interested, in that island, will derive advantage from the opportunity of forming their own conclusions on the laws and rules by which their rights and interests are governed.

Recent events, too, have extended the expectation of general consideration in favour of the present work.

The independence of new and vast states, governed by the laws forming the subject of the text, in which the spirit of British enterprize has embarked and invested an immense amount of wealth, and a large portion of industry, has been, officially, recognised by the Bri-

tish government. Whatever changes have been adopted, or may be contemplated, in those countries, in reference to the liberty of the subject, the creation of a legislative assembly and the formation of an executive establishment, it is apprehended that the principles and rules which regulate and determine the settlement and enforcement of civil rights, questions of property, and matters of juridical proceeding in those extensive regions, to be found in the work now offered to public attention, and which more materially affect the interests of British subjects, and other persons who have, there, embarked their wealth in schemes of pecuniary advancement, will be preserved, or, at least, subjected to very partial modifications.

Some expectation, also, is indulged by the Editor that his labours will not be thought unworthy the attention of the members of those particular courts in Great Britain, in which the civil law furnishes the rule of practice and decision, and whose learning and attainments add lustre to the courts and country in which they practise and live.

More especially does he anticipate a favourable consideration towards his endeavours by the British inhabitants of the various and valuable colonies which British valour conquered, and British policy retained, in the West and in the East; viz. Demerara, Berbice, St. Lucia, the Cape of Good Hope, Ceylon, and the Mauritius, where the laws are, mainly, superstructures raised on one common basis, the Civil Law.

In the cases of appeal to England from decisions in the courts of those colonies, as well as of Trinidad, the Editor will not, it is trusted, be deemed presumptuous or vain if he hazard an expectation that the work will be found useful to those noble and learned members of His Majesty's Privy Council, whose province it is to determine questions in the last resort.

Under all these circumstances, the Editor indulges the most sanguine hope, that his labours will be considered of more general utility than, from the title of the work, may be, at first view, anticipated.

In conclusion, it must be added that, since the work was translated, some material and beneficial alterations, under the recommendation of the present able governor of Trinidad, Sir Ralph Woodford, have been made in the judicial establishment, and in the form of proceeding in the courts of that island.

These alterations will be found in two orders in council, of the 16th September, 1822; the one in reference to the administration of criminal justice, and the other to the trial of civil causes.

The united administration of criminal and civil justice, from the preliminary or precognitory process and pleadings to the trial and termination of the proceeding, was, originally centered in one and the same judge: — the examination or confession of the accused was, theretofore, compulsory on oath, and in secret; and the examination of witnesses was, theretofore, in private on written interrogatories, previously, prepared by the opposing advocates in their closets.

By these orders in council these judicial powers have been separated; another professional judge, under the title of Judge of Criminal Inquiry, has been appointed, exercising, in criminal cases, powers like unto those of a grand jury, and forming, in civil cases, a member of the court, for their investigation and decision.

To the Court of Criminal Trial, to assist the chief judge, who presides, have been added a Spanish gentleman, who holds the responsible situation of assessor, or legal adviser to His Excellency the Governor, in his Court of Appeal in Civil Cases; and two mem-

bers, having each a voice in the decision, who are annually chosen, under the denomination of Alcaldes in ordinary of the first and second election, by the municipal council or corporation, from that body, composed of respectable merchants of the island; and who may be considered to form, in some degree, a sort of limited petty jury. These two latter gentlemen, also, with the chief judge, and the judge of criminal inquiry, constitute the civil court, termed the Court of First Instance of Civil Jurisdiction.

The right of appeal, in criminal cases, has been limited to cases of condemnation to death; in which the condemned has this remedy to a court of appeal, composed of the governor, or officer administering the government, assisted by the council of the island; who decide on the same evidence on which the conviction or condemnation of the court of trial was pronounced. The compulsory confession of the accused has been abolished: the examination of witnesses is oral and public, as is likewise the trial, both in criminal and civil cases.

The civil court constitutes a court of law and of equity, to all useful purposes, by the possession of the power of examination or discovery, on oath, of a party, plaintiff or defendant; and by jurisdiction over matters which, in England, form, peculiarly, the subject of cognizance by a court of equity.

Other minor alterations have been also adopted, calculated to shorten and simplify judicial proceedings, and to render the remedy of creditors more effectual, and less expensive. The whole will be seen in the Appendix.

These alterations might be extended, and rendered yet more satisfactory, perhaps, by substituting the municipal body or corporation, elected, annually, by the retiring members, from among the resident re-

spectable merchants, as a sort of permanent grand jury, to meet once in every alternate or second month, in the place of the professional judge, exercising, at present, this power; whose labours might, in such case, be given in the court of criminal trial, before whom the bills to be found by this grand jury might be tried, to the relief of the two alcaldes, in respect to their attendance there, as well as in the civil court; — by extending the powers of the criminal courts in respect to bail and commitment; by granting such power, under qualification or limitation, to the local and police magistrates; by giving to the county or district magistrates, called commandants of quarters, summary jurisdiction in the country, over petty and police offences, — such as by the present order in council, in relation to criminal justice, is vested in the two alcaldes in ordinary, in the capital or principal town, and suburbs; and by substituting a new scale or gradation of punishments, more suited to local circumstances and means of enforcement.

It does appear to the humble conception of the writer, that neither the common law and statute book of Great Britain, nor of Spain, furnish a scale or description of punishments suited to the localities, or to the population of a West Indian colony.

Expediency suggests, that the power to investigate and determine piratical offences, should be also extended to the criminal courts of the island of Trinidad, instead of the present ineffectual, dilatory, and expensive mode of proceeding and trial, as directed by the 46 *G.* 3. *c.* 54; more particularly, as no commission, under this act, exists in Trinidad.

An improvement, too, it is thought, might be made in respect to the trial of revenue cases, as they are termed, or cases of forfeitures and penalties, incurred

by breach of Acts of Parliament relating to trade and revenue in the colonies; and by violation of those in reference to the abolition of the Slave Trade. Cases, in England, relating to the breach of the revenue laws, are triable in the Court of Exchequer; but, in Trinidad, are solely cognisable in the Court of Vice-Admiralty. At present, the examination of witnesses in these cases, as well as in causes purely maritime, is, according to the course of the civil law, on written interrogatories, previously prepared by the advocates, who are not permitted to be present at the examination of the witnesses. It would reduce the expense, and expedite the trial, if the examination of witnesses were "*ore tenus*" at the trial; not to mention the decided advantage which, in all other respects, this mode of examination possesses over that observed in civil law practice.

These, however, are points adverted to with diffidence by the writer; and he leaves their consideration to those, whose abler judgment, and more immediate province, better qualify and entitle them to determine upon their expediency.

LEWIS F. C. JOHNSTON.

London, June 1, 1825.

AUTHORS' PREFACE.

THE Institutes of the Civil Law of Spain, which we offer to the public, are the fruits of our labour, directed to the only end of conforming, as far as possible, with the wishes of the judicious part of our nation; who, lamenting the want of a work of this description, look upon the understanding and practice of our laws as a matter of difficulty and arduousness. In truth, it is not easy to comprehend the first ground-works of our jurisprudence, with the painful and almost insurmountable labour produced by the very extensive reading of so many and so various collections as those which compose the laws of these kingdoms. It discourages the most determined, to see, that, without the help of some elements, in a science so vast, they must go on forming a conception of it with only the study of the increased accumulation of its parts. The most sagacious and studious become confounded, if they recur for assistance to the expositions of its commentators, because they have pretended, with what intent or utility we know not, to discover the first reason of our laws in the principles of the Roman law; whereas, our legislators, who were imitated by their successors, not only founded them on others very different, but disliked the Roman laws, and expressly drove them from their tribunals.

The Visigoths prohibited, under certain penalties, the use and allegation of the Roman laws, as appears from Ll. 8. & 9. tit. 1. Lib. 2. *del Fuero Juzgo*: this prohibi-

tion is repeated in L. 5. tit. 6. Lib. 1. *del Fuero Real.* And although King Alonzo the Wise incorporated into the *Partidas* many Roman laws, declaring, in L. 15. tit. 1. P. 1., *That all those who are subject to the maker of the laws, which he prescribes for them, are obliged to obey and to observe them, and to be judged by them, and not by what is written in any other law, made in any manner whatsoever;* and in L. 6. tit. 4. P. 3., speaking of judges, that they shall decide the suits which shall come before them, properly and faithfully, as promptly as they shall be able, and by the laws of this book, and not by other laws, he wished it to be understood that he banished the Roman laws from his dominions, in the same manner as his predecessors had done.

L. 15. tit. 1. P. 1.

Law 3. tit. 1. Lib. 2. Rec., which is the first of *Toro*, declares expressly the order of allegation, proof, and validity, which must be observed with respect to the laws of the different codes of the kingdom; and directs that suits be determined, in the first place, by the laws of the *Nueva Recopilacion*, and in default of them, by the common law or customs (*fueros*) which may be in force, and the laws of the *Partidas*.

L. 3. t. 2. Lib. 3. Nov. Rec.

The same is found confirmed by the royal ordinance (*pragmática sancion*) of King Philip, of 14th March, 1567, at the beginning of the *Nueva Recopilacion:* and it is worthy of notice that in none of these *Partidas* is mention made of the laws of the Romans.

The Aut. 1. tit. 1. Lib. 2. Rec. treats of the abuse of citing foreign authors in preference to our own, and the error in alleging or quoting the civil, or Roman and canon laws, which among us have no force by themselves.* The same Aut. 1. tit. 1. Lib. 2. Rec., & L. 3.

Nota 2. tit. 2. Lib. 3. Nov. Rec.

Nota 2. tit. 2. Lib. 3. Nov. Rec. & L. 3. tit. 2. Lib. 3. Nov. Rec.

* The reader who has any previous acquaintance with the laws of those masters of jurisprudence, the Romans, disposed as he will be to give every credit to the authors of these Institutes for their admirable arrangement and compression, into so small a compass, of the substance of such extensive mat-

tit. 1. Lib. 2. Rec. referred to, declare, that in case of any doubt occurring with respect to the interpretation of any royal law, or in the absence of such law, recourse may be had to the prince, in order that he may interpret and decide; which law is very ancient in this kingdom, as it agrees with L. 11. tit. 1. Lib. 2. *Fuero Juzgo:* and this is repeated in L. 1. tit. 7. Lib. 1. *del Fuero Real;* observing that the above-mentioned L. 3. tit. 1. Lib. 2. Rec. directs the non-use of the law of Madrid, which allowed the opinion of *Baldo*, and other foreign writers, to be followed. L. 3. t. 2. Lib. 3. Nov. Rec.

In consequence of this, the opinion of some of our countrymen, who pretend that in default or in the

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ter as composes the whole body of the Common and Statute Law of Spain, will entertain, on a perusal of this part of the preface, a feeling of somewhat more than surprise; a feeling, calculated, perhaps, to induce a subtraction from the wisdom and merit of the authors of the work, which the Translator, with a far less perfect knowledge than he could wish to possess of the language, has ventured to convert into that of his own country, for the desired benefit of those whose interests or pursuits may have rendered an insight into the jurisprudence of Spain an object of attainment.

The truth is, that almost every civilised European nation, which may wish to assume credit for the originality and perfection of the principles of its jurisprudence, proclaims its plagiary in the very promulgation of those principles; and it appears something like an act of imbecile ingratitude, to wish to diminish the debt, more or less, due to their great prototype, Rome. To no nation more than Spain does this charge attach for the disavowal of this obligation. A reference to her statutory compilation, called "*Siete Partidas*," the vaunted production of the wise *Alonzo*, will afford more than a sufficient refutation of any pretensions to originality; and the authors themselves of these Institutes, in the course of their work, appear, by their admissions, to have forgotten what they had written in their introduction.

By some Spanish law writers, the Roman, or civil, law is considered as the common law. See the note (94) of the Translation in p. 142., also *Castro, Discur. Crit. sobre las leyes*, Lib. 1. Disc. 2. p. 30., Lib. 2. Disc. 1. p. 88. 90. 98. 151. 156. tom. 1., and Lib. 4. Disc. 7. p. 324. tom. 2.; *Mesa arte Histor. y legal*, p. 181. 184. & 361.; and *Don A. F. Prieto y Sotelo Histor. del derecho Real de Espan.*, Lib. 3. c. 16. p. 262. n. 4., and c. 18. p. 269. & 270. n. 3. *Palacios*, the learned annotator on these Institutes, strongly recommends the study of the Roman law; being, as he is pleased to express himself, fully convinced by reason and experience, that, in proportion to the knowledge which the professors of Spanish jurisprudence possess of the Roman law, so much the more proficient they are in the knowledge of the Spanish law.

absence of any royal law, recourse must be had to the Roman law, falls to the ground.*

L. 5. t. 2. Lib. 3. Nov. Rec.

L. 4. tit. 1. Lib. 2. Rec. directs the professors of law (*Letrados*) to apply themselves, principally, to the study of the royal laws. The decree of King Philip V., of 1713, & Aut. 3. tit. 1. Lib. 2. Rec., † command the Spanish law to be taught in our universities, where it had been customary only to permit the study of the Roman law, for the better illustration and knowledge of that which should be studied, as King Alonzo XI. directs in L. 1. cap. 28. *del Ordenamiento de Alcala de* 1348, inserted in the said L. 3. tit. 1. Lib. 2. Rec.

Nota 3. tit. 2. Lib. 3. Nov. Rec.

L. 3. t. 2. Lib. 3. Nov. Rec.

Finally, many learned men of Spain have been convinced of the prejudice of this abuse, and how advantageous it would be to banish from these kingdoms the Roman laws; but chiefly the celebrated *Gaspar de Criales* and *Arce*, the Archbishop of Rhegio in Calabria, hath shewn this with weighty reasons in his letter (*carta*) addressed to Philip IV. in the year 1646, p. 304. & seq.

The object, therefore, of these Institutes is to present the maxims and principles of the Spanish law, conformable to its laws, and not to the abuses which, perhaps, practice hath introduced. This hath obliged us to abstain from citing the laws of the Roman code, proving every proposition by only our own suppletory law, and supporting those propositions which our laws do not express, and the knowledge of which is neces-

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* Such does not appear to be the case, for this opinion seems to be strictly supported by *nota* 2. tit. 2. Lib. 3. Nov. Rec., which see.

† There can be no better proof of the estimation in which these Institutes are held in Spain, than the direction contained in a statutory enactment, that they should be read by the professors of law in the chief universities of Spain. *Vide* also the translation of the *History of Spain*, by *Laborde*, 1st vol. p. 327.: and it may not be improper here to point out the authority with which another work, often quoted in these Institutes, *viz. Curia Filipica*, is stamped, by its being also directed, by the same enactment, to be read in these universities. *Vide* L. 7. tit. 4. Lib. 8. Nov. Rec.

sary, by the authority of only our native and classic authors.

The definitions are laid down in the very words of the law, in order that they may not lose the force and energy with which our legislators expressed them. To this end, our consideration has been directed to those dispositions of law, which have had their origin amongst us, and which, therefore, are deserving of our principal care. The whole work is divided into three books, conformable to the three objects of justice, Persons, Things, and Actions. These are subdivided into titles, each of which we have disposed into chapters and sections, noting, in the margin thereof, for greater clearness, the parts or heads which distinguish the principal matter, and have not servilely followed Justinian in his Institutes, as some of our authors have done, without utility or advantage. Each of these parts or heads is there particularly treated with order and geometrical method, which has appeared to us the only one proper to render intelligible the principles of our jurisprudence, and to undeceive those, who have pretended to consider this science incapable of mathematical demonstration.

To the whole of this work there appears necessary an introduction *; in which we have given a clear knowledge of the four states or conditions of our legislation, composed of laws of councils (*conciliares*), of customs or the common law (*fueros*), of laws solely of the *Córtes* or assemblies of the states, and of decrees (*decretos*), royal ordinances (*pragmáticas*), orders (*cédu-*

* The authors allude to a valuable historical introduction of Spanish legislation, which they have prefixed to the text; and which the Translator regrets his occupations have prevented his presenting, with the translation of the work, to the English reader. It may be observed, as some additional excuse for this omission, that this introduction relates, more particularly to Spanish parliamentary history, or the history of the different Cortes of Spain, than to information connected with jurisprudence.

las), and letters from superior to inferior courts (*cartas acordadas*). To avoid all confusion in a subject so obscure, we have determined to treat it by parts, chronologically; giving, opportunely, information of the origin of the collections of our laws which are printed, and from which these Institutes have been formed; of their authors; of the parts of which they are composed; their force; their principal commentators, and of the best edition of each. Under this plan are set forth the national councils, that, having been at the same time general assemblies of the states (*Córtes generales*), gave civil laws to Spain.

Mention is made of many general and municipal charters (*fueros*) of the nation, which have not escaped our research, and an idea given of the most remarkable, of their exercise (*uso*), and of their confirmations, their quotations being conformable to the manuscripts, the greater part of which are in our possession. The general *Cortes* that have been held for the purpose of establishing or improving our jurisprudence are set forth, of which we point out the petitions or acts that, from being of particular note, useful, or copied into the collections of the statutes (*Recopilaciones*), we are of opinion ought not to be passed over in silence; but we omit those *Cortes* which were not suited to our object, and which would only here cause prolixity and confusion. Lastly, from this legal and historical information is formed the perfect idea of the legislation of Spain; the definition of justice is given; what law is amongst us is explained; who may establish it; on whom and when it is obligatory; and what force it has; and in what the three kinds of it, *use*, *custom*, and *common law* (*uso, custombre, y fuero*), differ.

In continuation of the historical information, with respect to the Spanish legislation, we give that of the

customs (*fueros*) and legal constitution of Aragon *, to render a particular service to that province which gave birth and instruction to one of us. And in pursuance of this design, at the end of each title, we separately expound that part of jurisprudence peculiar to that kingdom by authority of its customs or charters (*fueros*), without enlarging on others of which the practice is conformable with the common law. The benefit which, according to our humble opinion, it is inferred must hence result to all the nation, is what has supported us with firmness in our labour; and although, perhaps, it will not be a work perfect in all its parts, we shall ever experience the satisfaction of having opened a path, until now obstructed, by which the learned of our country, being enabled to penetrate with more facility and spirit, may arrive at rendering it perfectly even. This we should desire to see obtained in our time, and to this end we address to them our entreaties, that each, with the good sense and science with which he is endowed, may give to the picture which we present the fulness of light of which it shall stand in need.

Now, therefore, for the support and confirmation of some things, which, perhaps, the readers will observe in this work, we beg them to bear in mind the information which follows.

1st, That in page 55. of the introduction, we quote the memorandum of *Brotherhood* (*quaderno de hermandad*), which the noblemen (*hijosdalgo*) of *Burgos* formed in the *Cortes* of 1315, according to the manuscript copy which we keep in our possession; but we are not ignorant that it is printed in the Book of *Privilegios de Cáceres*, from page 145. and part of it in

* The Translator has not considered it necessary to embody the local or peculiar customs of Aragon into the translation which he has the honour to submit to the British reader.

the *Relaciones genealógicas* of the Marquis of Trocifal, *App. Escrit.* 75.

2d, Of the *Cortes*, whose journals or proceedings (*quadernos*) have been printed, the editions are not laid down; for although we have seen copies of all of them, and from them cite the petitions or acts (*peticiones*), both useful and useless, yet as we have not accurately ascertained the periods at which they were delivered (*repetidos*), we have thought that we ought not to venture an incomplete information, which we hope to give hereafter more enlarged.

3d, We do not treat of the privileged trials (*juicios*) of *Aragon*, because we should never be able to give in this compendium so perfect a knowledge as that which is found in the well-known manuscript of the Marquis de la Corona, and particularly in the *Ilustracion de los quatro procesos*, which Doctor John Francis Laripa published in the year 1774.

4th, We should henceforth incur the charge of ingratitude, if, with a knowledge of the particular value which the public hath set upon this work, we did not here offer the testimony of our acknowledgment. Some of the general or public seminaries of Spain have judged it well adapted for instruction in the elements of our jurisprudence. The new method or course of study of those established in the university of Granada, and the statutes or *by laws* of the college of *San Fulgencio de Murcia*, expressly prefer these Institutes to any that have been published to the present time in the kingdom; and direct that, by them, the laws and Spanish code may be taught by their professors.

5th, Various well-intentioned persons have been ingenious correctors of this edition. Whenever they may correct us with equal foundation and wisdom, we shall show ourselves grateful; because our whole care is directed solely to effect, and not to controversy and

provocation, from which there never results instruction to youth.

6th, Finally, let the public be informed, that at the instance of these same persons, a considerable addition has been made to the introduction, to form the instructive and historical part of our jurisprudence; and because, in some manner, the want, which there is, of its maxims or truths may be supplied, whilst one of us publishes the History of the Civil Legislation of Spain, which is in preparation.

END OF THE AUTHORS' PREFACE.

Addition to the Historical Introduction mentioned in the preceding Preface.

This legal and historical information, which we have brought down to this period, upon the four states or conditions of our jurisprudence, we believe will suffice to form some idea of what Spanish legislation is; conceiving our kings, by means of such solid ground-works, have been, at all times, very solicitous and careful of the right administration of justice, without there being observable the least neglect or inattention to this object, so interesting to a monarchy, happy from those early years, which, having sprung up amongst wars, confusion and turbulence, hath nourished itself, and grown with them, until it hath attained to rendering itself robust and vigorous in the pacific days of our always unconquerable catholic monarch, Charles the Third (whom God prosper). Happy days, in which we hope, through divine favour, and the affectionate love of so beneficent a

sovereign towards his people, to see Spanish jurisprudence acquiring all the fulness of its lustre, by which, in a short time, that dark cloud of ignorance and confusion must be dispersed, that, with so much self-injury, conceals it from our sight and knowledge. Let us see, therefore, upon what certain principles justice is found established among us, and the lawful consequences which ought to be deduced from them, according to our laws, in order that, being prepared with these means, we may proceed to the study of the elements of our law.

The only object of law is justice, which is "*Rooted virtue* (raigada virtud), *which always lasts in the wills of just men, and gives and distributes to every one equally his due or right.*" L. 1. tit. 1. P. 3. All law is divided into written and unwritten. Of written law we only know one kind, which is law; "*that is, the reading* (leyenda), *in which there exists* (yace) *written instruction and chastisement; which binds and restrains the life of man, that it may not commit evil, and points out and teaches the good which man ought to do and practise.*" L. 4. tit. 1. P. 1.

L. 1. tit. 1. P. 3.

L. 4. tit. 1. P. 1.

From this definition these four principles are extracted; 1st, That the law is a general precept to all the kingdom. 2d. That no one can establish nor publish it but the king, L. 12. tit. 1. Part 1. 3d, That all those who live under the dominion of the king are bound to obey it, L. 15. tit. 1. Part 1. 4th, That its virtues or maxims are seven; to *believe*, to *ordain*, to *command*, to *unite*, to *reward*, to *forbid* or *prohibit*, and to *punish*, as expressed by L. 5. tit. 1. Part 1.

L. 12. tit. 1. P. 1.

L. 15. tit. 1. P. 1.

L. 5. tit. 1. P. 1.

From the first principle it follows, 1st, That the law is not obligatory, unless published by proclamation (*pregon*). or edict, executed by order of the magistrate, according to *Auto acordado*, 1st April, 1767. 2d, That immediately on being published, it binds,

L. 12. t. 2. Lib. 3. Nov. Rec.

without any excuse or exemption being admitted under pretence of ignorance; because all, without distinction of person or quality, are bound to know and to study it, L. 20. tit. 1. Part. 1., and L. 1. tit. 1. Lib. 2. Rec., which clearly repeals the limitation of this rule, which L. 21. tit. 1. Part. 1. draws. 3d, That the law ought to conform itself to that which commonly, and not that which rarely, happens, L. 8. tit. 1. Part. 1. 4th, That it ought to be clear and intelligible, so that all may understand it, Ll. 8. & 13. tit. 1. Part. 1.

L. 20. tit. 1. P. 1.
L. 1. t. 2. Lib. 3. Nov. Rec.
L. 21. tit. 1. P. 1.
L. 8. tit. 1. P. 1.
Ll. 8. & 13. tit. 1. P. 1.

From the second principle it is inferred; 1st, That the lords of vassals cannot make a law without having the royal permission for the purpose, neither can any other person, L. 12. tit. 1. Part. 1. 2d, That the laws, statutes, and ordinances, which a corporation (*concejo*), an assembly (*junta*), or college (*collegio*), establishes for its government, have no force, and are not binding, if they want the royal approbation, L. 8. tit. 1. Lib. 7. Rec. 3d, That the king alone can annul in part or in whole, and interpret the law, according to Ll. 14. & 17. tit. 1. Part. 1., with other laws. 4th, That he may exempt any one from its penalties and obligation, as the exceptions of Ll. 3. tit. 8. Part. 7. and 31. tit. 4. Part. 5. and others of this tenor, prove. 5th, That only the civil laws of the kingdom. and not other foreign laws, are binding, L. 8. tit. 2. Lib. 1. *Fuero Juzgo* *, and those agreeing with it.

L. 12. tit. 1. P. 1.
L. 2. t. 3. Lib. 7. Nov. Rec.
Ll. 14. & 17. t. 1. P. 1.
L. 3. tit. 8. P. 7.
L. 31. tit. 4. P. 5.

From the third principle it is inferred, 1st That those who shall live for any time in the kingdom of the lawgiver, are bound to contract and litigate according to the laws of the country, unless they should contract with respect to real property, situate in other countries†,

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* *Quære*, if the laws of the *Fuero Juzgo* are in force? *Vide* p. 7. Introduction of this work, where it is said that they are out of use in Spain; and *vide* L. 2. tit. 2. Lib. 3. Nov. Rec.

† The law quoted does not itself make this exception.

L.15.tit.1.P.1. L. 15. tit. 1. Part. 1. 2d, That offenders ought to be punished according to the law of the dominion in which L.15.tit.1.P.1. they transgressed or contravened it, L. 15. tit. 1. Part. 1. 3d, That the law does not cease to bind by its non-use, it being necessary for it to be repealed in order not to L.11.t.2.Lib.3. Nov. Rec. be in force, Auto 2. tit. 1. Lib. 2. Rec.

Finally, conformable to the seven virtues or maxims of law, it is evident, 1st, That its precepts ought to be respecting things good, reasonable, just, and not opposed Ll.1-4.t.1.P.1. to the law of God, Ll. 1. & 4. tit. 1. Part. 1. 2d, That the time and place when and where the law is published ought to be suitable, L. 4. tit. 2. Lib. 1. *del Fuero Juzgo*. 3d, That the laws should reward and punish according L.3.tit.1.P.1. to the merit or desert of each one, L. 3. tit. 1. Part. 1. 4th, That the laws should unite men by love and friend- L.7.tit.1.P.1. ship, L. 6. tit. 2. Lib. 1. *Fuero Juzgo*, and L. 7. tit. 1. Part. 1. 5th, That the prince ought to observe the law, although he cannot be compelled to do so*, Ll. 15. L.15-16.tit.1. P.1. & 16. tit. 1. Part. 1. 6th, That the law ought to be made by wise, learned, faithful, and upright men, L. 9. L.9.tit.1.P.1. tit. 1. Part. 1.

Under the name or term of unwritten law, we distinguish three kinds; those are use, custom, and the common law† (*uso, costumbre y fuero*). Use is that which arises from those things which a man says and does, and is of long continuance, and without any in-

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* L. 15. tit. 1. P. 1., quoted in the text, *ad fin.*, would seem to go the full length of the civil law maxim, "*Princeps legibus solutus est.*" *Vide Browne, Civ. L.*, p. 19. & 20. c. 1. introd.; and *Halifax's Analysis Civ. Law*, preface, p. 4. *ad fin.*, and note (*s*) therein: but certainly the language of L. 16. tit. 1. P. 1., also quoted in the text, does not recognise such doctrine: "and for the above-mentioned reasons, kings are bound to observe the laws, and all others of the land in common." *E por estas razones sobredichos son los reyes tenudos de las guardar é todos los otros de la tierra communalmente*, L. 16. tit. 1. P. 1.

† I can find no appropriate term for this word (*fuero*); that which I have applied, embraces more its meaning than any other I am acquainted with: for particular information respecting the meaning, difference, &c. of these three terms, *vide Arte Historica y legal por Mesa*, Lib. 2. c. 3. 5. & 6. commencing p. 126.

terruption, L. 1. tit. 2. Part. 1. In order that a *use* be valid, five things ought to concur, 1st, That it be of a thing from which good may follow. 2d, That it be public. 3d, That there intervene the general consent. 4th, That it be not opposed to any written law. 5th, That it have the consent or order of the king, Ll. 2. & 3. tit. 2. Part. 1. L.1.tit.2.P.1. Ll.2.3.t.2.P.1.

Custom (costumbre) *is, the law* (derecho), *or rule* (fuero), *which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it,* L. 4. tit. 2. Part. 1. L.4.tit.2.P.1.

On this definition are founded three axioms, 1st, That custom is introduced by the people, under which name we understand the union or assemblage of persons of all descriptions of that country where they are collected, L. 5. tit. 2. Part. 1. 2d, That it receives its authority from the express or tacit consent of the king, L. 5. tit. 2. Part. 1. 3d, That once introduced, it has the force of law, L. 5. tit. 2. Part. 1. L.5.tit.2.P.1. L.5.tit.2.P.1. L.5.tit.2.P.1.

From the first axiom it is inferred, 1st, That in order to establish a custom, the whole or greater part of the people ought to concur in it, L. 5. tit. 2. Part. 1. 2d, That ten years must have elapsed amongst persons present, and twenty, at least, amongst persons absent, in order to its being introduced, L. 5. tit. 2. Part. 1. 3d, That in default of this continuance, it shall be proved by two sentences of judges, or judgments given upon, or according to it, L. 5. tit. 2. P. 1. 4th, That for the same proof, one sentence alone shall be sufficient, when this was given upon a question, whether that which was alleged to be was or was not a custom, and the judge determined that it was, L. 5. tit. 2. Part. 1. L.5.tit.2.P.1.

From the second axiom it follows, 1st, That tacit consent cannot be supposed or presumed, when the custom is opposed to the law of God, to good reason,

L.5.tit.2.P.1. to the law of the kingdom, and to natural law, L. 5. Ll.3.&11.tit.2. Lib.3.Nov. Rec. tit. 2. Part. 1., L. 3. tit. 1. Lib. 2. Rec. and Aut. 2. tit. 1. Lib. 2. Rec. 2d, That the custom introduced by error, stealth, or with force, and opposition of some, is L.6.tit.2.P.1. of no validity, L. 5. tit. 2. Part. 1.

From the third axiom it proceeds, 1st, That custom ought to possess the virtues of Law. 2d, That it L.6.tit.2.P.1. ought to be a good interpreter of it, L. 6. tit. 2. Part. 1. 3d, That being general and immemorial, it may repeal or alter the anterior law, by the approbation of the prince being supposed or presumed, L. 6. tit. 2. Part. 1. *vide Berni apuntam.* on L. 4. tit. 2. Part. 1. 4th, That it is itself destroyed and repealed by a new law, or by the revocation of the ancient custom, L. 6. tit. 2. Part. 1.

There are two kinds of custom, one general and the L.4.tit.2.P.1. other special or particular, L. 4. tit. 2. Part. 1. The special or particular custom is of two sorts, either with respect to a specific or determinate thing, *ex. gr.* with respect to a particular place or person, or with presect to the whole of certain persons or places. The general is with respect to specific acts of all the inhabitants of the kingdom. Hence it arises, that a custom generally introduced by all the kingdom may destroy the law; but a particular custom in any province or seignory, has only this effect in that district or part L.6.tit.2.P.1. where it hath been exercised, L. 6. tit. 2. Part. 1.

*Fuero** (*forum*) is a use and custom combined, as L.7.tit.2.P.1. appears from, L. 7. tit. 2. Part. 1. By this definition it is certain, that a *fuero* has the force of law, L. 7. tit. 2. Part. 1. 2d, And consequently it must possess the circumstances which a use and custom require, in order L.8.tit.2.P.1. to be valid, L. 8. tit. 2. Part. 1.

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* I cannot find an appropriate term for this word in our language, except that of the *common law*; it ranks in authority above the *Partidas*, and follows the *Novisima Recop.*: the laws of the *Partidas* have authority in default of a law of the *Nov. Rec.* and a "*fuero.*" *Vide* L. 3. tit. 2. Lib. 3. Nov. Rec.

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INSTITUTES

OF THE

CIVIL LAW OF SPAIN.

BOOK I.

TITLE I. [1]

OF PERSONS IN THEIR NATURAL STATE OR CONDITION.

Cap. 1. Of the state or condition of men in general and its divisions.

It being necessary to divide this work into three books, in conformity with the order of the three objects of law, which are persons, things, and actions, we must, in this first book, which relates to persons, treat, before all things, of their state or condition. A person is man, considered with reference to his state; wherefore it is said that there cannot be a person, unless he be considered in one state or the other.

State is the condition or manner in which men live, or exist, L. 1. t. 23. P. 4. The variety of conditions arises from the nature or from the will of men: hence the state of men is divided into natural and civil. L. 1. tit. 23. P 4.

§ 1. Of the first division of the natural state of men into that of those unborn, and of those actually born.

According to their natural state, men are either to be born [1], or are actually born. With respect to the former, through humanity, it is established that when what is done is in their favour [2] it availeth or advantageth them as though they were born, L. 3. tit. 23. P. 4.

From this principle of law it follows, 1st, That those to be born (or in ventre) may retain or preserve all their rights with- L. 3. t. 23. P. 4

[1] *i. e.* in ventre of the mother.

[2] On the contrary, what is said or done to the injury of their persons, or property, shall not prejudice them. *Vide* L. 3. tit. 23. P. 4.

out any damage or prejudice until the time of their birth, *Lara*, [2] *Compendium Vitæ Hominis*, c. 1. n. 4. 2d, That this privilege of law takes effect only when the person to be born shall come forth from the womb of his mother alive and perfect, L. 2. tit. 8. L. 2. t. 5. Lib. 10. Nov. Rec. L. 5. Rec. 3d, That the person not yet born is considered part of the mother, in as far as it produces benefit to it: wherefore, 4th. Any capital punishment, torment, or other punishment to which a pregnant woman is condemned, is deferred until she L. 3. tit. 23. P. 4. bring forth, L. 3. tit. 23. P. 4. 5th, That if any one is interested in the inheritance or succession of a person not born, he may place a watch [3] or guard on the pregnant woman, and the birth or delivery ought to be made known to the party so in- L. 17. tit. 6. P. 6. terested, L. 17. tit. 6. P. 6. 6th, That if the king die and the queen be left pregnant, homage or service is to be done in the name of the unborn successor, *Gregorio Lopez on Law 5. tit. 15. P. 2.* L. 5. t. 15 P. 2. Gl. 1. *P.* 2. Gl. 1. Finally, many are the effects or purposes for which persons are considered born, who are still in ventre of their mother, but being foreign to the subject of this chapter, reference may be had to *Lara*, c. 4. before quoted.

Persons actually born, are those who have come forth from the womb (*ventre*) of their mother alive. Hence, it is inferred, 1st, That those deserve not this name who are born or taken from the womb (*ventre*) of their mother without human shape L. 5. tit. 23. P. 4. or form, called monsters. L. 5. tit. 23. P. 4. 2d, These monsters are not ranked in the number of children, but are considered as L. 5. tit. 23. P. 4. dead, L. 5. tit. 23. P. 4. 3d, That those who are born with a human form, although they may have a defect in some limb or L. 5. tit. 23. P. 4. part of the body, are considered as persons, L. 5. tit. 23. P. 4. 4th, That of two born at the same time, the male is presumed born before the female; and if both are males, and it does not appear who is first born, the inheritance is equally divided L. 12. t. 33. P. 7. between them, L. 12. tit. 33. P. 7. 5th, That in order for the child (*feto*) to be considered natural and capable of inheriting, and for other legal purposes, it is required that when it is born, it be altogether alive; that it be born in lawful time, which is L. 4. tit. 23. P. 4. declared by L. 4. tit. 23. P. 4. to be the seventh, ninth, or tenth month, and not the eighth [4] or eleventh; that it live twenty-four L. 2. t. 5. Lib. 10. Nov. Rec. hours, and that it be baptized, L. 2. tit. 8. L. 5. Rec. The post-

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[3] See the further restraints, &c. which may be imposed on a woman in this situation, under L. 17. tit. 6. P. 6.; and *vide* 1 *Blac. Com. Laws of Eng.* p. 456. 15th Ed.

[4] *Palacios* justly observes, that L. 4. tit. 23. P. 4. implies legitimacy of birth also in the 8th month. *Vide Greg. Lop.* Gl. 2. *ibid.*

humous [5] child is that born after the death of the father, L. 20. tit. 1. P. 6. L. 20. tit. 1. P. 6.

[3]

§ 2. of the second division of this state into males and females.

Mankind in the second place are born either males or females; and though in case of doubt their rights are equal, yet, as our laws conform themselves to that which generally happens, wisdom being possessed in a greater degree by men, and women being by nature more frail, it hence follows, that the condition of the former is better than that of the latter with respect to many things, [6] L. 2. tit. 23. P. 4. *Vela, disert.* 4. n. 4. y n. 88. L. 2. tit. 23. P. 4.

From this axiom, we deduce 1st, That men only, to the exclusion of women, can obtain public employments and offices, as is inferred from the reason given by L. 4. tit. 4. P. 3. for excluding the latter from the office of judge, unless they have the seignory over vassals. [7] 2d, That ignorance of law does not, in many instances, prejudice women, [8] Ll. 31. tit. 14. P. 5. and 21 tit. 1. P. 1. 3d, That the hermaphrodite enjoys the rights belonging to that sex which shall most prevail. L. 4. tit. 4. P. 3. L. 31. t. 14. P. 5. 21. tit. 1. P. 1.

§ 3. of the third division of this state into majors and minors.

In the third place, men are of full age, *i. e.* above the age of twenty-five years, or minors. The latter are so considered with respect to the period preceding and succeeding puberty, which, with regard to males, begins at the age of fourteen, and with respect to females at the age of twelve, Ll. 12. and 21. tit. 16. P. 6. Before the age of puberty, they are called pupils, L. 4. tit. 11. P. 5.; and in this age, a distinction must be made with respect to infancy, which continues until seven, L. 1. tit. 7. P. 2.; L. 4. tit. 16. P. 4. From this age to ten and a half, both males and females are said to be near infancy, and then they are not subject to punishment, L. 8. tit. 31. P. 7. and L. 8. tit. 9. P. 7. From this period (ten and a half) to that of puberty [9], they are said to be near or approaching to puberty, and are considered Ll. 12. 21. t. 16. P. 6. L. 4. tit. 11. P. 5. L. 1. tit. 7. P. 2. & L. 4. t. 16. P. 4. L. 8. tit. 31. P. 7. & L. 8. tit. 9. P. 7.

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[5] This term is also extended to the child born after the father has made his last will. *Vide* L. 20. tit. 1. P. 6.

[6] The law quoted in the text, L. 2. tit. 23. P. 4. does not specify or particularize them.

[7] The queen, &c. may; but then such women must exercise the office by a council of wise men, as stated in the law quoted in the text.

[8] L. 3. tit. 14. P. 5. Women come under the benefit of the exception of this law, which deprives others of the right to recover back a legacy paid under an invalid will, on the alleged plea of ignorance of the legal imperfection, or defect of the will. But L. 21. tit. 1. P. 1. limits the benefit of the plea of ignorance of law to simple countrywomen. And *Greg. Lop.* Gl. 10. on this law, says, that regularly this plea does not excuse women. And see in support of this dictum of the learned commentator, L. 1. tit. 2. lib. 3. Nov. Rec. (L. 1. tit. 1. lib. 2. Rec.)

[9] Near puberty, is 6 months therefrom. *Vide Greg. Lop.* Gl. 5. L. 9. tit. 1. p. 7.

L.6.t.5.P.6.; L.2.t.7. & L.4. tit.19.P.6.; L.17.t.14.P.7.

capable of dole (*dolo*) and malice, and consequently are subject or liable to punishment,[10] L.6. tit.5.; L.2. tit.7.; and L.4. tit.19. P.6.; and L.17. tit.14. P.7., and other laws.

Aliment to children,—upon whom, and for how long, &c. the obligation of providing devolves. Ll.2&3. tit.19. [4] P.6.tit.19.P.4.

The obligation of providing aliment[11] for the issue attaches, for the first three years of childhood, to the mother. From this period to twenty-five years of age, this duty devolves upon the father, who is also obliged to afford them suitable education,[12] Ll.2. and 3. tit.19. P.4., except they prove ungrateful to their father, or have sufficient means of their own, L.6. tit.19. P.4. But if the mother be poor, the father is obliged to provide necessaries to rear the children.[13]

To whom duty attaches in case of divorce.

In case of lawful divorce, the party on whose account it took place, must provide aliment out of his or her particular means for the children; and the care or charge of them devolves to the parent whose conduct did not give rise to the divorce,[14] L.3. tit.19. P.4.

L.3.t.19.P.4.

Poverty furnishes an exemption or excuse to the parents from providing aliment for their children, in which case the obligation attaches to the grand parents, provided they have the means,[15] L.4. tit.19. P.4.

L.4.tit.19.P.4

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[10] But to a lesser punishment than persons exceeding 17 years; for until this age, the punishment is mitigated in proportion to the age and malice of the offender. *Palacios*, N.1. referring to L.8. tit.31. P.7.; and L.9. tit.11. Lib.8.; and auto 19, tit.11. Lib.8. Rec. [Ll.2. and 3. tit.14. Lib.12. Nov. Rec.]

The concluding part of L.8. tit.31. P.7. gives rather a wide discretion to the judge—the power, on mature consideration of the circumstances of the case, of augmenting, diminishing, or remitting the punishment.

[11] This word aliment includes all sorts of necessaries and education suitable to property and rank. *Vide Teatro de la Leg.* tit. *Alimentos.*

[12] *Palacios* says, that the father is not bound to furnish aliment to his child until the age of 25, and that the laws cited in the text do not determine this, nor any other age; but that, on the contrary, L.6. tit.19. P.4., as also the text, states that the father is released from this obligation when the son has wherewithal to maintain himself; or is able to earn, decently, his livelihood; or affords grounds of its discharge on the part of his father, as in the case of ingratitude.

[13] And equally so is the mother, in case the father be poor. *Palacios*, referring to L.4. tit.19. p.4.

[14] But if the mother, having the guardianship of the children on such account, should marry again, she is no longer entitled to have the care of them; nor is the father bound to make her any allowance on this account, but should then take the children under his charge, and provide for their support, &c. if he has the means. And with reference to the rule in the text, it must be observed, that if that parent whose conduct gave cause to the divorce be poor, and the other be rich, the latter must provide for the support of the children. *Palacios*, who cites L.4. tit.19. P.4.

[15] Children and grand-children are equally obliged to maintain their parents and grand-parents, if they should be reduced to poverty, inasmuch as this is a natural and reciprocal obligation between ascendants and descendants. *Palacios*, referring to the beginning of tit.19. p.4.

This obligation extends or applies to the case of natural children, with some limitation as to those begotten in adultery and incest; the charge of bringing up whom attaches alone to the relations by the mother's side [16], as being evidently hers, and not the father's, L. 5. tit. 19. P. 4.

L. 5. tit. 19. P. 4.

Lastly, the minority of both males and females continues from puberty to the age of twenty-five, Ll. 4. and 5. tit. 11. P. 5.; L. 2. tit. 19. P. 6.

Ll. 4 & 5. tit. 11. P. 5. & L. 2. tit. 19. P. 6.

It must be observed, that persons under eighteen cannot exercise any office in towns [17], nor till then are they liable to serve in the militia [18] according to the *Ordenanzas de Quintas de* 16 *de Noviembre de* 1761.

In the fourth place persons above twenty-five years of age are either young or old. Youth begins at twenty-five, and continues to fifty in men, and forty in women, according to a decision of *Narbona Annales Juris* an. 50. quæst. 1. At the ages of fifty and forty, according to the respective sexes, old age begins, an age to which respect is due, and many privileges belong, which are fully treated of in *Lara*, c. 30. [19], and which shall be noticed in their proper places, it being enough to observe in this place, that the age of forty exempts from military service according to the *Ordenanza* de 1761, before cited.

§ 4. The fourth division of this state into young and old men.

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[16] By relations, (observes *Palacios*) must be understood here the ascendants by the right or direct line. L. 5. tit. 19. P 4.

[17] It must not be hence inferred, that at 18 years of age persons are eligible to all public offices or employments. A person must be above 20, who is appointed to the situation of an ordinary judge (*juez ordinario*) L. 3. tit. 9. lib. 3. Rec. (L. 3. tit. 1. lib. 11. Nov. Rec.); and advocates (*letrados*) cannot exercise any judicial office or employment, nor that of coroner (*pesquisidor*) nor of relator, until the age of 26, L. 2. tit. 9. Lib. 3. Rec. [L. 6. tit. 1. Lib. 11. Nov. Rec.] No one can be an escribano, until he hath completed 25 years, L. 30. tit. 25. Lib. 4. Rec. [L. 2. tit. 15. Lib. 7. Nov. Rec.] nor can one be an attorney at law, or judicial attorney (*procurador a pleytos*) until 25, L. 5. tit. 4. P. 3. *Palacios* (1).

[18] The ordinance of 27th October, 1800, for recruiting the army, declares them fit from the completion of 17, to the completion of 36 years. But in respect to the ballotting for every fifth man (*quintas*), the ordinance or rule which is made or published on the occasion, must be the guide in such case. The general ordinances of the army make persons liable to serve from 16 to 40 years of age, in time of peace; and, in time of war, from 18 to 40. *Palacios* (2).

[19] Cap. 31. according to *Palacios*.

[5]

TITLE II.

OF THE GUARDIANSHIP OR TUTELAGE AND CURATORSHIP.

THE third division which we have made of persons, according to their natural state, into minors and majors, leads us here to treat of guardianship and curatorship, as peculiar or belonging to these ages.

Cap. 1. Guardianship or tutelage. (Tutela.) L. 1. tit. 16. P. 6.

Guardianship is the protection which is given and afforded to the free male orphan under fourteen years of age, and female under twelve, who cannot protect themselves, L. 1. tit. 16. P. 6. Whence it follows that guardianship or tutelage is the same as protection, and tutor the same as guardian of an orphan. By orphan is understood, one who has no father, with the difference that, formerly, this appellation was given only to those who were without father or mother until they reached the age of fourteen, as laid down in L. 1. tit. 3. Lib. 4. *Fuero Juzgo.*

§ 1. The guardianship or care of orphans belongs to the king and his magistrates. L. 14. t. 18. P. 3. L. 20. t. 23. P. 3.

It is certain that the supreme guardianship, or care of orphans, is centered in our kings, and their magistrates, who have wished to take them under their favour, care, and protection, as appears clearly from L. 14. tit. 18. P. 3., and from L. 20. tit. 23. P. 3. Hence arises, no doubt, their so great vigilance and intervention in the nomination, approval, and removal of guardians; the power being vested in the magistrate, who supplies the place of the sovereign, of removing from the guardianship the negligent, suspected, and bad guardian, merely by virtue of his office, and private inquiry, although no accusation shall have been made against the guardian by the party interested, L. 3. tit. 18. P. 6. Hence it also follows, that their causes are privileged, and are cases of court *(casos de corte)*, L. 8. tit. 3. L. 4. Rec.

[6]

L. 3. tit. 18. P. 6.

L. 9. tit. 4. Lib. 11. Nov. Rec.

From which we must not suppose that guardians possess that power and absolute dominion which the laws of Rome gave them[1]; by reason of guardianship not being, among us, a form

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[1] The Roman laws did not grant this absolute dominion to guardians; but, on the contrary, the want of it was what more distinguished the power of guardian from that of the lord or master and of the father. The end of guardianship, and the office of the guardian, was among the Romans, as amongst us, to defend or protect the ward. For his benefit was the guardianship only established, and to his advantage was it only to be

and imitation of the lofty description or character of the *Patria Potestas*, which fathers enjoyed with respect to their children, but rather a protection of the minor, exercised by guardians in the name of the sovereign, or magistrate, to whom is committed the care of orphans.

§ 2. Consequences of this principle.

The privileges of guardianship among us are founded on the laws quoted, which place it in a somewhat different light from that in which the Romans considered it according to their laws. This clear conception in conformity with our laws, causes us to understand, 1st, The reason that no guardian, with the exception of the one named or appointed by the father, can exercise the office of guardian without the intervention of the decree of a judge for that purpose, Ll. 6. and 8. tit. 16. P. 6. 2d, Why the confirmation of the guardianship only serves to approve of, and give authority to the guardian, and not to supply his defects. 3d, Why the orphan is obliged to reverence the guardian, as a person who represents the magistrate, in whose name he exercises the guardianship. 4th, Why the office of guardianship is a manly, public, and personal employment. 5th, Why, in the nomination or appointment of guardian, attention is only had to the benefit and advantage of the ward.

Ll. 6 & 8. tit. 16. P. 6.

§ 3. The purpose and end of guardianship or tutelage.

From the definition of guardianship it follows, 1st, That the guardian is given principally for the protection or care of the person of the orphan, and consequently for that of his property, L. 1. tit. 16. P. 6. 2d, That the guardian is only given to the male minor of fourteen years, and female of twelve. Same law. 3d, That these minors may have a guardian appointed, although they may not pray for nor wish it. Same law. 4th, That guardian is only given to the orphan or fatherless minor. Same law.

L. 1. tit. 16. P. 6.

[7]

§ 4. Who may be guardians.

Guardianship being a manly, public, and personal employment, 1st, Persons under twenty-five years cannot be guardians,[2] L. 4. tit. 16. P. 6. Since L. 1. tit. 7. lib. 3. del *Fuero Real*,

L. 4. tit. 16. P. 6.

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directed. *Vinnius Com.* § 1. *Inst. de Tut.* The very words of the definition of the Roman guardianship, which are conformable in every respect to ours, L. 1. tit. 16. P. 6. declare sufficiently what was the office, and what the power of the Roman guardians; to *defend* or *protect* the *ward*, says § 1. cited. The power of the father (*patria potestad*) was established for the benefit of the father; and that of the lord (*dominica*) for the benefit of the lord; and for this the one was as great as the other. In fine, it may be said that our laws, in the matter of guardianship, as in many others, did no more than copy the laws of the Romans. *Palacios* (1).

[2] It should be observed, that persons under 25 years of age can be appointed by testament, guardians, although they cannot exercise the office of guardian until they attain that age. *Palacios* (1) referring to L. 7. tit. 16. p. 6.

which mentions twenty years, does not govern in this case. 2d, Nor can the dumb, deaf, idiots, persons deprived of memory, (*desmemoriados*) prodigals, bishops, monks, and religious persons (*religiosos*) be guardians, Ll. 4. and 14. tit. 16. P. 6. But if the clergy are relations of the pupil or minor, and pray the appointment within four months, they are eligible, L. 14. tit. 16. P. 6. 3d, Women are also excluded from this office, except those whose great affection for the minor may supply the vice or defect of their sex, such as the mother and grandmother, [3] L. 4. tit. 16. P. 6.

Ll 4 & 14. t. 16. P. 6.

L. 14. t. 16. P. 6.

L. 4. tit. 16. P. 6.

Cap. 2. Of the kinds of guardianship or tutelage.

The advantage and benefit of the minor being looked to in the nomination of guardian, our legislators considered it right that the express will or desire of a testator in the nomination of a guardian for the minor, whom he instituted or appointed his heir, should have the force of law [4]; because they naturally concluded that no one would have greater consideration for the minor, and the property he bequeathed to him, than the testator himself. But as it often happens that these testamentary nominations or appointments are wanting, they determined that in this case the nearest relation had a right to be the guardian of the minor, supposing him to possess all that affection which is more natural in a relation than in a stranger. Lastly, in the absence of such parental testamentary nomination, and of relations, it rests in the discretion of the magistrate to nominate a stranger to be guardian, being a good trust-worthy man. Hence, therefore, arise the three kinds of guardians known among the Romans, and adopted by our laws, viz. testamentary, lawful, and dative, or judicially assigned (*dativo*), spoken of by L. 12. tit. 16. P. 6.

L. 12. t. 16. P. 6.

§ 1. Of testamentary guardianship or tutelage.

As the foundation of testamentary guardianship, is that affection which is supposed to actuate the testator, it is inferred — 1st, That the father can appoint a guardian, not only for the child already born, but also for that to be born, L. 3. tit. 16. P. 6. And it is astonishing that in the teeth of a law so clear, *Vela, disert.* 1. n. 48., should assert the contrary, founding his

L. tit. 16. P. 6.

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[3] If they remain widows, or do not marry again, *vide* p. 8. post of the text, and 9. of the translation; as also Ll. 4. and 5. tit. 16. P. 6.

[4] In this sense, *Palacios* observes, — the text gives us to understand that the express will of the testator would not constitute law, unless the father should institute him heir. But he adds, that if a father should appoint a guardian to his son, the appointment would be valid, although he should disinherit his son, § fin. Inst. de tut.; for that this nomination does not depend upon the fact of institution, or disinherison, but on the power of the father (*patria potestad*), and he refers to L. 3. tit. 16. p. 6.

allegation on texts of Roman law[5] which are of no force in these kingdoms. 2d, That the grandfather may also appoint a guardian for his grandson, provided that the latter does not fall under the power of the father,[6] L. 3. tit. 16. P. 6. 3d, That the mother may also do the same when her children are without father, and she appoints them her heirs, but not otherwise; however if she does name a guardian, he shall be considered and admitted as a testamentary guardian, if the judge will confirm the appointment,[7] L. 6. tit. 16. P. 6. 4th, That the father may appoint a guardian for his natural child[8], who must, however, be confirmed or approved of by the judge, L. 8. tit. 16. P. 6. 5th, That the testamentary guardian must be named with certainty and individuality of person; because, 6th, If a person be named as a guardian, whose name is common to another, unless there be certain proof which of them the testator intended, neither shall be guardian, L. 7. tit. 16. P. 6. 7th, That the testamentary guardian may be appointed conditionally, for a certain or specified time, and simply or absolutely; in which cases the will of the testator must be invariably complied with, L. 8. tit. 16. P. 6.

[8]

L. 3. tit. 16. P. 6.

L. 6. tit. 16. P. 6.

L. 8. tit. 16. P. 6.

L. 7. tit. 16. P. 6.

L. 8. tit. 16. P. 6.

As testamentary guardianship in so much or so far subsists as it is beneficial and useful to the minor, it follows that if the mother or grandmother be named guardian, by will of the father, they may act, provided they do not marry a second time, and that they renounce whatever rights may be favourable to them and prejudicial to the orphan, which is founded on the presump-

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[5] By the Roman Law, a guardian might be appointed to a posthumous son, as well as to one already in existence; and to such a degree does the Roman law agree with ours in this respect, that it may be said our law is taken from § 4. *Inst. de Tut.*, and from L. 1. *de Testament. Tut. Palacios* (3).

[6] One of the conditions requisite to authorize the nomination of a guardian by testament is, that the ward (*pupilo*) be in the power of him who appoints, L. 3. tit. 16. P. 6. And as the married son passes by the act of marriage from the power of the father, L. 8. tit. 1. Lib. 5. Rec. [L. 3. tit. 5. Lib. 10. Nov. Rec.] the grandfather, therefore, cannot appoint a guardian by testament to his grandchild, except in the case where his father shall not have been married (*velado*). *Palacios* (4). This exception does not appear very intelligible. The word '*velado*' may, however, have some other meaning than the sense in which it is here translated.

[7] As well, (says *Palacios*), in the case in which she may institute them her heirs, as that in which she may not, although she might leave them part of her property, would the mother's nomination require the confirmation of the judge; but with this difference, that in the first case, the judge must, necessarily, confirm; but in the second not, L. 6. tit. 16. P. 6. He adds, that the confirmation of the judge is necessary in either case, because the mother is not invested with the power of the father (*patria potestad*) over her children, from which, as has been observed, arises the right to appoint a testamentary guardian.

[8] If he institute him heir, the same, as we shall say, in the case in which any other person should institute a stranger his heir, and appoint a guardian for him, L. 8. tit. 16. p. 6. *Palacios* (6).

tion that the woman, in desiring another marriage, has placed her affection on the husband and not on her child, on account of her love of whom, she was admitted to the guardianship, Ll. 4. and 5. tit. 16. P. 6.

Ll. 4 & 5. t. 16. P. 6.

§ 2. Of lawful guardianship or tutelage.

We have said that in default of a testamentary guardian the nearest relations of the minor succeed by law to the guardianship, which forms the second species of guardianship, called lawful: whence it arises, 1st, That this right proceeds from the nearest degree of consanguinity with the orphan; and thus the nearest of kin (*parentesco*) ought to be preferred; and in default of such, he who immediately succeeds him in this consanguinity, L. 9. tit. 16. P. 6.; because, 2d, Lawful guardianship follows the laws of succession or inheritance, which will be hereinafter set forth. Hence it is that 3d, The mother is the first entitled to this right, and in default of her, the grandmother; and in default of both, or in case of their unwillingness to accept, the nearest relation (*pariente*) L. 9. tit. 16. P. 6. with this difference, that by L. 3. tit. 3. lib. 4. del *Fuero Juzgo*, the mother was first entitled, and in case she married, then the elder brother of the minor, on his attaining the age of twenty, in default of whom the paternal uncle entered on the guardianship, from whom it passed to his son, finishing with those related by blood to the minor.

L. 9. tit. 16. P. 6.

[9]

L. 9. tit. 16. P. 6.

The above L. 9. tit. 16. P. 6. having given the preference of lawful guardianship to the mother and grandmother, it is clear that there was no foundation for the establishment by *Gutierrez* of a fourth species of guardianship as exercised by the mother and grandmother.[9] See his treatise *De Tutelis and Curis*, Part 1. cap. 8. 4th, If there be many or several relations of the minor in the same degree of consanguinity, all shall be guardians, L. 11. tit. 16. P. 6., and shall administer, as will be spoken of in the following chapter.

L. 9. tit. 16. P. 6.

L. 11. t. 16. P. 6.

The lawful guardianship of patrons is not now recognised or known.

§ 3. Of dative guardianship or tutelage, or that judicially assigned.

In order that the judge may proceed to the appointment of a *dative* guardian with due cognizance (*conocimiento*,) and may have regard to the best interest of the minor, it has been established, 1st. That regularly a petition shall precede this appointment.

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[9] The mother and grandmother cannot be compelled to take upon themselves this guardianship; with the difference, that the collateral relations may be according to their greater proximity. For this reason, the guardianship of the mother and grandmother is termed *irregular*, *anonymous*, and *extraordinary*, as hath been already observed by *Febrero* (*Reformado*), P. 2. Lib. 1. cap. 1. § 2. num. 54. *Palacios* (1).

2d, That not every judge can make it. 3d, That the appointment of this description of guardian takes place only in default of a testamentary or lawful guardian, Ll. 2. and 12. tit. 16. P. 6. Ll. 2 & 12. t. 16. P. 6.

The presentation of a petition to the judge for the nomination of a guardian being previously required, it results, 1st, that the nearest relations ought, in the first place, to petition for it; and failing to do it they lose the right of succession or inheritance, which they may possess, to the property of the minor, L. 12. tit. 16. P. 6. 2d. That in default of these, the friends of the minor shall petition; and in default of all such, any inhabitant of the place, L. 12. tit. 16. P. 6. 3d, That when no one shall do this, and the judge have information that the minor is without protection, he ought officially, and in virtue of the power committed to him, to appoint a guardian. As every judge cannot appoint a guardian, it must be observed: 1st, That competent judges only can do so, such as those who reside or have jurisdiction in the domicile of the minor, or in the birth-place of himself or his father, or in the place where the greatest part of the real property of the minor is, L. 12. tit. 16. P. 6.; and except these, no judge can appoint a guardian, *Gutierrez de Tut. et Cur.* Part. 1. cap. 16. 2d, That if it shall happen that the three above-mentioned judges shall appoint a guardian, the first named shall act; but if the appointment has taken place in the same day, and the precedence cannot be ascertained, then the appointment by the judge of the domicile of the minor shall take effect or be valid.[10] This is conjectured from the order in which these judges are named in L. 12. tit. 16. P. 6. quoted. See *Gregorio Lopez* in his comment 13 on this law[11]. 3d, That this nomination belongs to the senior or superior judge who may delegate it to the inferior judge when the property of the minor does not exceed in value five hundred maravedis,[12] L. 12. tit. 16. P. 6. 4th, That the nomination of guardian for the orphan of a grandee or nobleman (*grande*) belongs to the king, or the magistrate, to whom he shall grant a particular commission for the purpose, L. 14. tit. 5. Lib. 2. Rec. L. 12. t. 16. P. 6. [10] L. 12. t. 16. P. 6. L. 12. t. 16. P. 6. L. 12. t. 16. P. 6. L. 17. t. 1. lib. 6. Nov. Rec.

The administrative or judicially nominated guardian being

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[10] But the practice is, for the appointment of the guardian to be made in the place where the execution or the administration of the testament (testamentaria) is established. *Febrero* (*Reformado*) P. 2. Lib. 1. c. 1. § 2. num. 57. *Palacios* (2).

[11] *Gregorio Lopez* says there, the judge of the minor's birth-place; but I am of opinion, that the judge of the minor's domicile is preferred. *Palacios* (3).

[12] 'Of gold' is understood. *Palacios* (4).

the one appointed in default of the testamentary or lawful, it follows, 1st, That by reason of the temporary absence or incapacity alone of the testamentary or lawful guardian, a curator or administrator, and not a guardian, is so appointed,

L.13.t.16.P.6. L.13. tit.16. P.6. ad fin.: and 2d, That his appointment only continues until the age of fourteen of a male and twelve of a

L.12.t.16.P.6. female minor, L.12. tit.16. P.6. See the formule of this appoint-

L.94.t.18.P.3. ment in L.94. tit.18. P.3.

The confirmation or decree of the judge for the administration and care of the person of the minor (*pupilo*) is necessary to the exercise of the office by either of these three kinds of guardians, as

Ll.4.6&8.t.16. P.6. appears by Ll.4.6.and 8. tit.16. P.6. and if L.3. tit.16. P.6.

L.3.tit.16.P.6. seems to except from this general rule the guardian named by the father, by making no mention of such decree, it is to be presumed that a father will select a fit and qualified person, to whom he commits the charge of the person and property of his lawful child.

Cap. 3. Of curatorship. Curator is he who is appointed as guardian of those above fourteen and under twenty-five years of age, being of sane mind, and even of those above twenty-five, who are insane or deprived

L.13.t.16.P.6. of sense (*desmemoriados*), L.13. tit.16. P.6., which definition

[11] ought to be extended to prodigals or spendthrifts, who are considered insane or foolish by reason of their bad conduct.

Many of the things which we have before mentioned with respect to guardians, must be understood to apply to curators; we shall therefore proceed to notice the following differences. 1st, That males above fourteen and females above twelve years of age cannot be compelled to receive a curator against their

L.13.t.16.P.6. will, except it be with respect to law suits, L.13. tit.16. P.6. 2d. That a curator ought not to be appointed by last will or testament; and if he be, his confirmation by the judge will be

L.13.t 16.P.6. necessary, L.13. tit.16. P.6. 3d, That there is no *lawful* (*legitima*), curatorship with respect to madmen [15], according to

L.2.t.16.P.6. Gl.2. *Lopez* in his *Gl.* 2. on *L.2. tit.16. P.6.* 4th, That the curator is appointed in the first place for the care of the property, and consequently of the person of the minor, *Lopez, Gl.2. on*

L.13.t.16.P.6. Gl.2. *L.13. tit.16. P.6.*

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[15] That there is no *lawful* curatorship, except it is with regard to madmen, is what is stated by *Gregorio Lopez.* But if in this case it is valid, as is to be supposed, from the Roman Law, he should have said, that the same species of curatorship, for the same reason, exists with regard to prodigals. *Palacios* (1).

Guardianship ending at fourteen in males, and twelve in females, curatorship commences at those respective ages of the respective sexes; although the nomination of a curator will take place always when guardianship is put an end to, for any of the causes which we shall specify in Title IV., when we treat of this subject.

[12]

TITLE III.

OF THE OBLIGATIONS OF GUARDIANS AND CURATORS.

Cap 1. Of the obligations of guardians and curators in as far as relates to their admission and administration of their duties.

In order to the due discharge by the guardian or curator of the duties of the office, it is necessary, not only that the guardianship or curatorship be admitted according to the laws of the kingdom, but that it be also exercised according thereto. 1st, The guardianship is admitted according to these laws, when the guardian, on his admission, places in security the minor and his property.[1] 2d. It is duly exercised when the guardian takes care in the first place of the person of the minor, and consequently of his property and effects.

§ 1. As to their admission.

That the undertaking the office of guardian consists in placing in security the person and property of the minor, is evident. 1st, Because our laws direct in the first place that the guardian

L.9.t.16.P.6.

shall give security on oath, L.9. tit.16. P.6. And if he does not give security[2] his acts are invalid, and it even affords ground for the judge's depriving him of the administration; in this case, however, of a mother or grandmother being lawful guardian,

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[1] The literal translation is here given; but perhaps the better translation would be, "gives security for the property of the minor."

[2] It would seem, that the testamentary guardian only was excepted from giving security, by the civil law. This is stated in a manuscript course of the Lectures of *Dr. Halifax*, in my possession, although this exception is not stated in the printed analysis of these lectures. *Browne* would seem to infer this exception in p.134. 1st vol. 2d edit. of his lectures. He says, the legitime and dative tutor took an oath nearly resembling that of our executors and administrators, to administer faithfully, and to render a just account when required. They also were obliged to give security, &c. *Wood*, in his *Inst. Civ. L.* p.129, 130. 4th fol. edit., speaking of the administration of tutelage and curatorship, says: —"That this security is to be constantly given by those guardians which the law only does assign; for it is not required from guardians appointed by testament, or by the magistrate upon inquisition; for the testator and the magistrate, by such a designation, have already approved of their honesty. But these two may sometimes be forced to give security," &c. Since the foregoing note was written, the translator has obtained the edition of the text, with notes by *Palacios*, who observes on this point, "that when L.9. tit.18. P.6., & L.94. tit.18. P.3., which also treats of this matter, say that guardians ought to give security, they only speak of *lawful* guardians; but that they make no mention of testamentary guardians, nor of those judicially appointed (*dativos*), nor is there any law which imposes on them such an obligation." He adds, however, that practice has nevertheless established the giving security also by guardians judicially appointed; and that *Greg. Lop.* Gl.5. L.9. tit.16. P.6. stated it was the case in his time.

they are only obliged to make the renunciations we have before mentioned[3], L. 9. tit. 16. P. 6. 2d. Because guardians and curators are obliged to make an inventory; and if they do not, may be removed, unless there be just cause for their not making it; but even in this case it ought immediately to be ordered to be done[4], L. 15. tit. 16. P. 6. And this inventory must be made with the permission of the judge before a public Escribano, and with a specification of moveables or personal effects, of real property, and other things prescribed by L. 99. tit. 18. P. 3., this inventory being of such force and effect, that no opposition can be made to its correctness by the guardian, although he may have therein enumerated more property than the minor possessed, L. 120. tit. 18. P. 3. But when there is no property the guardian ought to make a solemn declaration to the effect before the judge, in order that this declaration or protest may serve him by way of inventory, or discharge with regard to accounts, *Lopez on L. 99. tit. 18. P. 3.* Gl. 3. 3d, Because the property of the guardian is pledged, or bound to the minor, and his heirs from the day on which he began to exercise his guardianship, until that of his rendering an account thereof, L. 23. tit. 13. P. 5.

L. 9. tit. 16. P. 6.

L. 15. t. 16. P. 4.

L. 99. t. 18. P. 3.

[13]

L. 120. tit. 18. P. 3.

L. 99. t. 18. P. 3. Gl. 3.

L. 23. t. 13. P. 5.

§ 2. As to their administration.

The guardianship being entered on under these solemnities, it ought to be faithfully and lawfully administered. For which reason, as it often happens that this administration is committed to many, either because the testator appoints them, or because they happen to stand in the same degree of consanguinity to the minor, and the magistrate assigns this charge equally to all which always produces disputes among the co-guardians, and bad consequences to the minor; they may agree upon one among themselvs to discharge the duties of the administration with the approbation of the judge; who in case they should disagree as

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[3] *Palacios* (2) here observes, that he finds a law which obliges *lawful* guardians to give security; and that he does not discover any which exempts from this obligation the mother nor grandmother; and that he does not, on this account, feel himself warranted in saying that they are released therefrom; that if authority, besides reason, avails any thing in this case, *Gregorio Lopez*, (and many other authors) in Gl. 8. L. 9. tit. 16. P. 6. says, that they ought to give security.

[4] The guardianship or curatorship being appointed, that is to say, being committed by the judge to the guardian or curator respectively, the practice is "to deliver the property to him by inventory, before he enters on the exercise of his office, for the responsibility of which he binds himself in the instrument which he executes, in order to avoid all fraud and suspicion of occultation." *Palacios.* (3).

to the nomination, may name, as administrator, him who shall offer
L.11.t.16.P.6. the best security, L.11. tit.16. P.6.

In order to this good or faithful administration two obligations are necessary; one which regards the care of the person of the minor, and the other which relates to the care of his property. The first is the principal, and it follows, in the first place, 1st, That the guardian can in no case leave the minor defenceless: wherefore, 2d, He ought to prosecute or defend the suit commenced by, or instituted against him; in which case if there be two or more guardians, either of them may do it alone, if the others be not present: but this must be understood when the minor is under seven years of age; because if he be older, he may himself prosecute and defend with the consent and presence of
L.17.t.16.P.6. his guardian, L.17. tit.16. P.6. 3d, The guardian ought to
L.17.t.16.P.6. appear in person in these suits, and not by attorney, L.17. tit. 16. P.6. and 4th, If he find himself prevented from doing so, he may name an attorney for a particular suit, which must be
[14] expressed in the power, the form of which will be seen in L.96.
L.96.t.18.P.3. tit.18. P.3. but always under the obligation of being subject to, or liable for the injury or damage which may result from this ap-
L.96.t.18.P.3. pointment, L.96. tit. 18. P.3. 5th, If sentence or final judgment be given against the guardian, in such suits, levy must not be made upon his property, but upon that of the minor, L.17.
L.17.t.16.P.6. tit.16. P.6. 6th, He ought to interpose his authority in the affairs and contracts of the minor; because otherwise the minor shall not be bound to the performance of the contract, or to those with whom he makes it, unless the obligation or covenant
L.17.t.16.P.6. be beneficial to the minor, as laid down in L.17. tit.16. P.6. 7th, He ought to provide for him education and instruction in those sciences or arts suited to his family, birth, and property,
L.16.t.16.P.6. L.16. tit.16. P.6. 8th, He ought to provide him with aliment from his personal property (*caudales*) according to the direction of the judge, leaving always the real property (*finca*[5]) untouched; but when it is not fit to make known the state of his riches or poverty, the guardian may furnish it from his own means, and afterwards
L.20.t.16.P.6. have recourse for remuneration to the property of the minor, L.20. tit.16. P.6. 9th. He must provide him with a house or dwelling, which shall be the one that his father shall have pointed

[5] I have translated "*caudales*" personal property, and "*finca*" real property; but I apprehend the meaning of the text, as gathered from L. 20. tit. 16. P. 6. is, that the interest of money, before the capital and personal property, such as money, and the rents or produce of real, shall be applied for the purposes mentioned, before recourse is had to the real property of the minor.

out in his will; and in case of no such direction, he shall be brought up in the house of his mother; [6] but should the minor have no mother, or should she marry a second time, he must be brought up in the house which the judge shall determine upon, who must take care of the minor, and attend to his welfare; but by no means shall he be brought up in the house of the person who may inherit the property of the minor, L. 19. tit. 16. P. 6. L.19.t.16.P.6.

The second obligation, which relates to the care of the property of the minor, is comprehended under the following rules. 1st. That the guardian cannot alienate or dispose of any of the moveable goods or chattels (*muebles*) [7] of the ward without the permission of the judge of his domicile, which shall not be granted without cognizance of the cause of such alienation or sale, and of its utility to the minor, L. 4. tit. 5. P. 5; however he L.4.tit.5.P.5. may make such sale without the knowledge of the judge, when it is done for the purpose of providing a marriage portion (*dote*) for a female ward, [8] L. 14. tit. 11. P. 4. 2d, Much less can L.14.t.11.P.4. he dispose of the real property of the minor, unless it be to enable him to pay debts due by the father, or to marry the brother of the minor; [9] but then he must obtain the approbation of the judge for the purpose, L. 18. tit. 6. P. 6. and L. 14. tit. 11. P. 4. L.18.t.6.P.6.& 3d, And even in these cases, which furnish just causes for the L.14.t.11.P.4. alienation of the real property, the judge shall not consent to the sale of the house of the father or grandfather of the minor [10]

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[6] Being of good fame. *Vide* L. 19. tit. 16. P. 6.

[7] *i. e.* Personal property. The text makes use of "*muebles*," but the law quoted uses the word "*cosas*," which implies property in general, without distinction; whereas "*muebles*," in its fullest sense, only comprehends all sorts of personal property. *Greg. Lop.* Gl. 2. L. 4. tit. 5. P. 5. seems to think, that personal property is not understood by this law; and he appears to be supported in this opinion, from what may be inferred from L. 14. tit. 11. P. 4. ad fin. "mas si quisiesse dar la dote de las cosas muebles," &c. *Vide* also L. 18. tit. 16. P. 6. Since this was written, the possession of the edition of the text by *Palacios*, enables me to add, that the guardian may dispose of the personalty (*cosas muebles*) not of a precious kind, without the authority of the judge, according to the more commonly received opinion.

[8] *Palacios* (2) observes, that what L. 14. tit. 11. P. 4. cited, says, is, that a femme coverte under 25 years of age, may assign to her husband, with the authority of her curator, (*dote*) out of her personal property; but that she cannot out of her real property, without the authority of the judge. He adds, that without the knowledge and consent of the judge, and without cognizance of the cause, the guardian cannot alienate the property of his ward, neither for the purpose of giving a marriage portion, (*de dotar*) to his female ward, or her sister, nor for any other purpose; and he refers to L. 18. tit. 16. P. 6. and others.

[9] The sister of the minor, or the minor himself, and for other necessary, just, or lawful reason. *Vide* L. 18. tit. 16. P. 6., quoted in the text.

[10] Nor the old servants of ditto. *Vide* the law quoted, L. 18. tit. 16. P. 6. *ad fin.*

in which it appears he was born, unless it cannot be possibly
L.18.t.16.P.6. avoided, L. 18. tit. 16. P. 6. 4th. Neither can the guardian mortgage or pledge the real property without the authority of the judge, but he may the personal,[11] provided manifest advantage result therefrom to the minor; for which purpose he may[12] lay out the money so taken or borrowed on mortgage
.8.tit.13.P.5. or pledge for the minor's profit and gain, L. 8. tit. 13. P. 5. 5th. That the guardian cannot purchase any thing belonging to the minor without the express permission of the judge[13]
L.1.t.12. Lib.10. Nov. Rec. and the consent of his co guardians, L. 23. tit. 11. Lib. 5. Rec. L. 4. tit. 5. P. 5.; and even in this case it must be for the manifest advantage and utility of the minor, for if it be not, the minor has his remedy of restitution against the injury, the demand for which he must make judicially within four years after coming of
L.4.tit.5.P.5. age, L. 4. tit. 5. P. 5. 6th, But notwithstanding the guardian may, of his own authority, incur all necessary expences; which the law allows, such as for the payment of schoolmasters, debts, marriage portions (*dotes*) &c., for the repayment of which all the property of the minor remains bound to the guardian. *Greg.*
L.23.t.13.P.5. Ll.4. *Lop.* on L. 23. tit. 13. P. 5. Glo. 4. *ad fin*[14].

§ 3. Of the decima, or ten per cent. allowed to guardians.

The administration of guardianship being weighty or burthensome, it would be difficult to find guardians who would discharge this obligation gratuitously; upon which principle is founded the provision made by L. 2. tit. 7. Lib. 3. *del Fuero Real*, which assigns to the guardian for his trouble the tenth (*decima*) of the rents or produce of the property of the minor, after deducting the expenses[15], from the day the guardian accepted the office,

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[11] It is the opinion of *Palacois* (4) that L. 8. tit. 13. P. 5. must be understood only to mean such personal property as is not precious or valuable.

[12] *Palacios* observes, that it would be more correct to say, 'ought to lay out or invest,' inasmuch as L. 8. tit. 13. P. 5., cited in the text, directs it to be done.

[13] L. 1. tit. 12. Lib. 10. *Nov. Rec.* (L. 23. tit. 11. Lib. 5. *Rec.*) makes no such exception; and see *Azevedo* on this law. N. 5 and 6.

[14] This is not the opinion of *Greg. Lop.* himself: but he refers to another author, *Alberic*; whose opinion seems to be, that the guardian has not a tacit lien on, or right of retention of, the property of the minor in such cases, except the demand be clear, or settled (*debitum liquidum*).

[15] See L. 4. tit. 14. P. 6. *Ayora, de Partit.* p. 125, n. 9., says: "*Deductis expensis quærendorum colligendorum conservatorumque gratiâ factis.*"

Palacios (1), here, observes, that the *decima* does not belong to the guardian, nor curator of the king, or of noblemen (*magnates*), and powerful or opulent persons (*poderosas*), who have large rents or incomes; nor to the curator of the property of absent, captive, or deceased persons, because he is compared to an attorney who is not entitled to the *decima;* and therefore to all such a moderate salary, proportioned to their labour, is allowed. He refers to (*Fobr. Reformado*) P. 2. lib. 1. cap. 1. § 2. num. 88.

took the necessary oath, and gave the requisite security. The origin of this allowance of the *decima* is to be found in the laws of the Goths, as appears by L. 3. tit. 3. lib. 4. *Fuero Juzgo.* This subject is fully treated of by *Gaspar Balsa*, in his work *de Decima Tutori, Hispano jure præstanda*, to which we refer.

§ 4. Application of the same doctrine to curators.

These principles apply to the curators or administrators of minors under twenty-five years of age; and in order to determine whether the contracts which they celebrate or enter into without the authority of their curator be valid or not, it must be ascertained or seen whether they be useful or prejudicial to them; which rule is laid down in L. 17. tit. 16. P. 6., and which is confirmed with respect to different kinds of obligations or contracts by Ll. 3, 4, and 5. tit. 1. P. 5.; L. 4. tit. 12. P. 5.; L. 47. tit. 13. P. 5., and by other laws. Not only is the contract which is prejudicial to the minor null, but he may also recover damages for loss (*menoscabos*) sustained thereby according to Ll. 2, 3. 5. and 7. tit. 19. P. 6., unless there be fraud or deceit (*engaño*) on the part of the minor; for the law protects or favours the person cheated or deceived, L. 6. tit. 19. P. 6.[16]

L. 17. t. 16. P. 6.

Ll. 3, 4, 5. 1. P. 5.; L. 4. tit. 12. P. 5., L. 47. tit. 13. P. 5.

[16]

Ll. 2, 3. 5. 7. tit. 19. P. 6.

P. 6. tit. 19. P. 6.

[16] In Trinidad the rights and properties of minors are further protected, in the appointment of a public officer, under the denomination of Father General of Minors, and in the registration of the accounts of all guardianships and curatorships, and of the securities entered into for the faithful discharge, by guardians and curators, of their duties. See Appendix A.

TITLE IV.

OF THE EXCUSES OR EXEMPTIONS (EXCUSAS) OF GUARDIANS AND CURATORS, AND OF THE COMPLETION OF GUARDIANSHIP AND CURATORSHIP.

Cap. 1. Of the excuses or exemptions from office of guardian and curator in general.

As a guardian or curator appointed by either of the before-mentioned ways may renounce or refuse this appointment, alleging in due time before the judge the excuse or cause, it is considered or determined that his office is personal and public, because the same things which generally excuse or exempt from a public personal office, also exempt from guardianship. Excuse or exemption is to shew judicially some lawful reason for which one who is appointed guardian of any minor is not obliged to undertake the guardianship of his person or property, L. 1. tit. 17. P. 6.

L. 1. tit. 17. P. 6.

§ 1. Of the two kinds of excuses, voluntary or necessary.

The excuses are either voluntary or necessary. Voluntary excuses are judicially admitted by reason of privilege, of inability, (*impotencia*) or of delicacy, (*honestidad.*) By reason of privilege are excused, 1st, Those who have five lawful and natural sons born alive, although they may have lost some of them in war in the service of the king, L. 2. tit. 17. P. 6. 2d, Collectors of the royal rents, L. 2. tit. 17. P. 6. 3d, Ambassadors, L. 2. tit. 17. P. 6. 4th, Judges actually employed, (*en actual residencia*), L. 2. tit. 17. P. 6. Which four excuses are only admitted if proved before entering on the guardianship, but do not avail after, L. 2. tit. 17. P. 6. 5th, Professors of grammar, rhetoric, logic, and medicine, if they are in the actual exercise of their callings in their country, or if out of it by royal command or permission, L. 3. tit. 17. P. 6. 6th, Doctors of law who are judges or counsellors; professors of philosophy and knights who are about the court of the king, L. 3. tit. 17. P. 6. 7th, He that is absent or abroad by order of the king, being appointed guardian provisionally by the judge; but after he returns to his country, the charge of guardianship again devolves to him, and he cannot be appointed to another guardianship within a year, unless by his own consent, L. 2. tit. 17. P. 6.

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L. 2. tit. 17. P. 6.

L. 2. tit. 17. P. 6.

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L. 3. tit. 17. P. 6.

L. 2. tit. 17. P. 6.

Those who are exempted from the office of guardians by reason of inability or incapacity, are 1st, He who is already burthened with three guardianships, L. 2. tit. 17. P. 6. 2d, The poor person (*pordiosero*) who only subsists upon what he obtains or

L 2. tit. 17. P. 6.

earns daily, L.2. tit.17. P.6. 3d, He who is continually sick and unable to attend to his own affairs, L.2. tit. 17. P.6. 4th, He who can neither read nor write, and dare not, for such reason, attempt to perform the duty, L.2. tit.17. P.6. 5th, The person above seventy years of age, L.2. tit.17.P.6. But these exemptions do not belong to the person paying tax (*pechero*) to the king, as observed by L.12. tit.14.; L.6. Rec. [1]

L.2.tit.17.P.6. L.2.tit.17.P.6. L.2.tit.17.P.6. L.2.tit.17.P.6. L.12. tit 14. Lib. Rec.

Lastly, those entitled to voluntary excuses by reason of delicacy, or courtesy, (*honestidad*), are, 1st, He who has entertained capital enmity towards the father of the minor, or was his actual enemy, L.2. tit.17. P.6. 2d, He who has or expects to have a law suit with the minor, L.2. tit.17. P.6. 3d, The husband appointed guardian of the property of his minor wife, because, to avoid all suspicion with respect to himself, he ought to pray for the appointment, by the judge, of another guardian [2], L.3. tit.17. P.6.

L.2.tit.17.P.6. L.2.tit.17 P.6. L.3.tit.17.P.6.

Necessary excuses are those for which a person appointed guardian cannot, although he might wish it, take upon himself the charge of the administration, and are referred to in Title II.

[18]

§ 2. Of the process claiming exemption.

The guardians who wish to be excused from the burthen, ought to set forth their claim before a competent judge, for which purpose it is necessary, 1st, That a petition be presented within fifty days after the party knew of his appointment. 2d, That this process be instituted in the tribunal of the judge of the place in which the guardian resides who claims to be excused. 3d, That if he should be absent at a distance of more than 100 miles, he shall be allowed a day for every twenty miles of such excess, in addition to the thirty days which he is entitled to by reason of the 100 miles, in order to come to allege his excuse. 4th, That within four months [3] the suit to determine the validity of the allegation of excuse shall be concluded. 5th, That if the party claiming to be excused shall feel himself

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[1] Omitted in *Novisima Rec.* — See Nota, p.26. *Table of Laws in Novisima Rec.* edit. 1805; also L.21. tit.14.; Lib.6. *Rec.*; or L.12. tit.18. Lib.6. *Nov. Rec.*

[2] But it should be remembered, that by the last law (14) of tit.1. Lib.5. *Rec.* [L.7. tit.2. Lib.10. *Nov. Rec.*] a married man, who has attained 18 years of age, may administer his own property, and that of his wife, without the necessity of praying for, nor of obtaining royal licence (*venia*) for the purpose. *Palacios* (1).

[3] To be counted from the day on which the fifty days began to run. L.4. tit.17. P.6. *Palacios* (3).

aggrieved by the sentence of the judge, he may appeal to the superior court, L. 4. tit. 17. P. 6.

.4.tit.17.P.6.

Cap. 2. How these offices terminate.

Guardianship and curatorship end in many ways. 1st, By the age of the ward, which is fourteen in males, and twelve in females [4], as is inferred from the definition of guardianship and curatorship, L. 21. tit. 16. P. 6.; and thus curatorship is terminated at twenty-five years. 2d, By the death or banishment of the guardian or ward, L. 21. tit. 16. P. 6. 3d, By the fulfilment or completion of the condition and time, which is peculiar to testamentary guardianship; because, as we have before said, the testator alone can impose a condition on the guardian, or fix the duration of his appointment. 4th, By adoption. [5] 5th, By removal.

L.21.t.16.P.6.

L.21.t.16.P.6.

§ 1. Of the removal of the suspected guardian. (Sospechoso.)

The last mode by which we have said that guardianship is ended, is the removal of the suspected guardian, which takes its rise from that certain or established principle by which the guardian is obliged to administer, with the utmost fidelity and care, the property of the minor, wherefore those are called or considered suspected who practise or are guilty of fraud, undue conduct, or injury in the discharge of the office of guardian; or who by their habits or conduct cause themselves to be suspected, although otherwise they have wherewithal to pay, Princip. tit. 18. Part. 6.; whence are deduced these three axioms. 1st, That whoever manifests bad management or improper conduct is suspected. 2d, That he is deserving of removal and punishment who shall produce any remarkable injury to the ward. 3d, That the accusation or charge in this case is public [6] by reason of its object, end, and form.

[19]

From the first axiom it results, 1st, That poverty alone does not cause a guardian to be suspected, if he be in other respects of good character; and therefore although poverty may produce his removal from the administration, because the property of the minor is in danger, the guardian shall not be accounted as suspected; but if he should have lavished or misspent the property of another ward, or have been guilty of improper conduct, this will give room for suspicion, L. 1. tit. 18. P. 6. 2d. That if once the guardian be accused or suspected, he shall not be absolved from the accusation on giving security. Wherefore,

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[4] That is, with respect to the first, when guardianship or tutelage ends, then curatorship begins.

[5] Of the ward, not of the guardian. *Palacios* (1).

[6] This implies no more, according to *Palacios* (1), than that the right of accusation, or action, belongs to all the people, *i. e.* is popular.

3d, although he be rich, and promise or bind himself to make good the damage sustained, he ought not to be allowed to continue in the administration of the guardianship, L. 1. tit. 18. P. 6. L.1.tit.18.P.6.

From the second axiom it is inferred, 1st, That if the guardian be accused, he ought to be deprived of the administration pending the suit or trial, and a provisional curator appointed, L. 3. tit. 18. P. 6. 2d, That if it appear upon this trial that L.3.tit.18.P.6. he has caused very great injury (*daño notable*)[7] to the ward, he shall be rendered infamous, and shall pay the damages, L. 4. tit. 18. P. 6.; provided, however, he shall not be considered L.4.tit.18.P.6 infamous if he be only accused as an indolent and negligent or inattentive man, L. 4. tit. 18. P. 6. L.4.tit.18.P.6.

From the third axiom it is inferred, 1st, That the mother, grandmother, sister, or nurse of the minor are obliged to bring forward this accusation by reason of that greater interest they take in his welfare, L. 2. tit. 18. P. 6. 2d, That any of the L.2.tit.18.P.6. neighbours or inhabitants of the place, although they be women, may prefer the accusation, except wards under fourteen, L. 2. tit. 18. P. 6. 3d, But minors above fourteen may accuse L.2.tit.18.P.6. their curators with the consent or advice of their relations, L. 2. tit. 18. P. 6. 4th, That this accusation may be preferred L.2.tit.18.P.6. against any description of guardian, L. 2. tit. 18. P. 6. 5th, L.2.tit.18.P.6. That it ought to be instituted before the judge of the place where the property of the ward is situate, L. 2. tit. 18. P. 6. L.2.tit.18.P.6. 6th, That there being no person who will undertake the accusation, and the indications of his bad conduct being manifest, the judge may, of his own authority, remove him, citing him before him, and appointing a curator ad interim, L. 3. tit. 18. P. 6. L.3.tit.18.P.6.

Cap. 3. Of the manifestation or production of accounts by guardians and curators.

The guardianship being ended for or by any of the before-mentioned reasons or ways, the guardian ought to render an account to the curator of the pupillary guardianship, if it shall be completed, by the ward having attained the age which frees him from subjection to the guardian. But if the latter shall have been removed as suspected before the completion of the pupillary age, he must then render an account to the guardian appointed by the judge. And the curator upon the termination of the curatorship, by reason of the young person having completed the age of twenty-five, shall give an account to the ward personally, L. 21. tit. 16. P. 6. For which reason or purpose L.21.t.16.P.6. not only the property of the guardian and curator, but also of

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[7] That is to say, if he has been guilty of wilful fraud. See L. 4. tit. 18. P. 6. quoted in the text.

their sureties and heirs, is bound to the minor and his heirs, L. 21. tit. 16. P. 6. *ad fin.* The charge or burthen to which guardian and curatorare subject in this proceeding may be well inferred from the obligations they are under, and which are referred to in the third title.

L. 21. t. 16. P. 6. ad fin.

Finally, the doctrine contained in this chapter may be applied to a curator, bearing in mind the points of difference between his office and that of guardian.

We do not treat upon the guardianship of the sons of our kings, because this belongs more to the public law of Spain. Upon this subject, L. 3. tit. 15. P. 2. [8], and *Gutierrez de Tutel. & Curis*, P. 1. c. 18. may be consulted.

L. 3. tit. 15. P. 2.

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[8] The constitution of the Spanish monarchy of 19th March, 1812, now re-established in Spain, makes some little alteration in the law quoted in the text. L. 3. tit. 15. P. 2. directs, that the persons whom the deceased king may have appointed in his will, &c. shall be guardians to the king minor; that in default, the grandees (*mayorales*) of the kingdom, also the prelates, and the *ricos homes*, and other good and honourable men of the towns shall assemble, and after having taken prescribed oaths, shall choose one, three, or five, but not more, fit persons to be guardians of the minor monarch; but in case the queen-mother should be alive, and being a widow, she shall be the principal, or chief guardian. The minority of a king continued by this law to twenty; and that of a queen, or female, until her marriage or puberty. The requisites for the appointment of guardian to the minor monarch were eight: those which deserve mention were, being natural-born subjects, and not entitled to the succession after the death of the king. The 198th article of the constitution directs "The person whom the deceased king may have appointed in his will, shall be guardian to the king minor. If he should not have appointed one, the queen-mother shall be guardian while she remains a widow. In default of the queen-mother, the guardian shall be nominated by the Cortes. In the first and third case, the guardian must be a native of the kingdom." And the minority of the king is limited by it to eighteen; and it provides, that during his minority or other incapacity, the kingdom shall be governed by a regency; and that if his immediate successor have attained 18 years, if the incapacity of the king should exceed two years, the Cortes may nominate him regent. *Vide* on this subject chap. 3. commencing Art. 185 of the Constitution. — N. B. Since the above note was written, a sad change has taken place in the affairs of Spain. The Cortes no longer exists.

TITLE V.

OF PERSONS IN THEIR CIVIL STATE OR CAPACITY.

Cap. 1. Of the civil state of persons, and its divisions.

[21]

HAVING explained the natural state of persons, its divisions and properties, or qualities, we will proceed to do the same with respect to their civil state or capacity, which is the second branch of the first division we made at the commencement of this work.

With regard to their civil state or capacity, men are considered, 1st, as natural-born subjects of these kingdoms, and as aliens or foreigners. 2d, As nobles, persons entitled to the rights of nobility, (*hidalgos*), knights, (*caballeros*), and plebeians. 3d, As laymen and ecclesiastics. The distinction into freemen and slaves, which is found in our law in P. 4. tit. 21 and 22, is not now observed or acknowledged, unless it be with respect to the negroes employed in the Indies in working the mines, or held in slavery by private individuals; but even as regards this circumstance, it is foreign to this treatise [1].

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[1] To the resident of a West Indian colony, where the system of slavery exists, and the laws referred to in the text form part of its legal establishment, it must be matter of regret that the learned authors have acted on this opinion, and abstained from giving the substance of those laws, and of others to be found on this important subject, in the Spanish codes. It is an object of concern to the Translator, that want of time will not allow him, at present, to supply this omission to its fully desired extent. He has, however, considered it necessary to furnish the reader, in the Appendix, with those regulations and enactments which the British government, since the conquest of Trinidad, have thought fit to engraft in the old legislative provisions of Spain.

Among the latter may be noticed the *Royal Cedula* of the King of Spain, of the 31st May 1789, containing instructions or regulations to be observed by the owners and possessors of slaves, in respect to their education, food, clothing, employment, diversion, habitation, care, medical treatment, and marriage; as also those to be attended to by the slaves in regard to their duties towards their owners; and others in respect to the correctional punishment of the slaves for domestic offences, extending to that by magisterial authority for criminal excesses; also in regard to the annual written return, with specification of sexes, births, deaths, &c. of the slaves, on oath, by the owners or possessors, before the judge or magistrate of the town or district, with the view to registry, by the escribano or clerk of the *ayuntamiento*, or town council or corporation, in a record book to be kept for the purpose; and in reference to the violation of these regulations by the owners, and to the trial and punishment of them and of other persons for excess, ill-treatment, or cruelty towards the slaves. Although this *cedula* was officially acted upon *in Trinidad*, in respect to the feeding, clothing, treatment, protection under the especial appointment of the Syndic Procurator-General, held, until recently, by His Majesty's Attorney-General of Trinidad; and the correctional

Cap. 2. First division into natural born subjects and aliens.

The state of a natural born subject (*la naturaleza*) signifies or imports the duty imposed upon men with respect to one another

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punishment of the slaves, and in respect to their annual return or registry on oath, as above-mentioned, it does not appear to have been legally in force in the island, unless in so far as it was afterwards confirmed by an order in council of his late Majesty of the 26th March 1812, and referred to by a proclamation of the present Governor of Trinidad, Sir Ralph Woodford, bart. containing orders and regulations respecting the public gaol of the island.

This supposition is supported by a note in a Spanish law work, of great utility and repute, entitled "*Teatro de la Legislacion Universal dé Espana é Indias*," which contains the *cedula* in question. In this note it is stated, that by a royal order, posterior to the *cedula*, the fulfilment or enforcement of the latter was directed to be suspended until the further-to-be-expressed pleasure or direction of the king of Spain. No such subsequent expression of the royal will appears to have emanated from his Spanish majesty. In further corroboration of the opinion hereinbefore hazarded, it may be added, that this *royal cedula* is not incorporated in the edition of the laws of Spain, entitled *Novisima Recopilacion de las Leyes de España*, and that by a notice to the title of laws in this compilation, it is declared, that the laws and ordinances in the previous edition, entitled "*Nueva Recopilacion de las Leyes de Espana*," not inserted in the *Novisima*, are purposely omitted by reason of being obsolete, repealed, or useless.

The first British enactment on the subject, in point of time, is an ordinance of the late General Sir Thomas Picton, then governor of Trinidad, dated June 30, 1800, about two years and a-half after its conquest by the British arms. This ordinance evinces, in its provisions, much practical humanity and solid advantage in regard to the slaves.

Subsequently to this ordinance, appeared the order in council of the 26th of March, 1812, establishing a public registry for the registration and enrolment of the names and descriptions of all persons then being, and thereafter to be held in a state of slavery within the island of Trinidad, and of the deaths and births of all such slaves. The period of registry directed to be annual by this order in council, was made triennial by a subsequent one of the 18th September, 1816. Further effect was given to the order in council of the 26th of March, 1812, by an act of the British Parliament, 59 *G.3. c.*120.

More recent regulations and changes with respect to slaves have been made by the order in council of the 16th September, 1822, providing for the administration of criminal justice, by which the discretionary admission by the court of their testimony in criminal cases was first legalized; by an order in council of the 10th March, 1824, and by a proclamation of the colonial government founded on the latter. Some modifications, or explanations, in regard to the order in council of the 10th March, 1824, have been made or given, in a circular issued on the subject by Sir R. Woodford, governor, in conformity with instructions from Earl Bathurst, His Majesty's Secretary of State for the Colonies. This circular, which has been taken from the Times newspaper of the 18th November, 1824, will be found in the Appendix, with the several British orders in council, and enactments hereinbefore adverted to, vide Appendix, B. C. D. E. F. G. H. I.

To those who take an interest in questions connected with this subject, it may prove a source of satisfaction to be informed, that by the laws in force and practice in Trinidad, and which existed previously to the promulgation of any of the British enactments, before noticed, *omnes liberi præsumuntur nisi constet de servitute*, that although the owners of slaves, and the managers, or *mayordomos*, appointed by the owners, to whom the power was by those laws restricted, could inflict on the slaves correctional punishment to the limited extent permitted, for domestic offences, if they exceeded in this, by causing grievous contusion, effusion of blood, or mutilation of member, in addition to the pecuniary penalties provided, they, as also all other persons who ill-treated or injured a slave, were subject to a criminal prosecution before the ordinary

by some right or lawful reason of loving and cherishing each other, L. 1. tit. 24. P. 4. According to this definition, which comprehends, generally, the obligation which natural-born subjects are under towards those to whom they are bound by some lawful cause or motive, the ten modes of acquiring the rights of a natural-born subject, expressed in L. 2. tit. 24. P. 4., take place; but all of them not being within the scope of our present consideration, on account of some of them appertaining to the laws of nations, and by reason of others being subject to the jurisdiction of the magistrate, we will preserve an entire silence as to the first; and with respect to the last, will treat of them in their respective places, contenting ourselves, at present, with describing as a natural-born subject of these kingdoms 'the person who is a native of them, or born of parents both of whom were, or at least the father was, born therein, or had obtained a domicile in them, and had besides lived at least ten years therein [2], according to the suppletory law, L. 19. tit. 3. lib. 1. *Rec.*

L. 1. tit. 24. P. 4.

L. 2. tit. 24. P. 4.

L. 7. tit. 14. Lib. 1. Nov. Rec.

§ 1. Modes of acquiring rights of natural-born subjects.

Hence it follows, 1st, That there are two modes of acquiring the rights of a natural-born subject, either by having been born in these kingdoms, or by being the child of a father, a native thereof; or of parents who have resided therein ten years, with the intention of domiciliating there, L. 19. tit. 3. lib. 1. *Rec.* 2d, That if the father shall have been absent, or abroad in the service, or by order of the king, and during such absence shall have had a child born out of the kingdoms, it shall, notwithstanding, be a natural-born subject, as being considered as though born in Spain, L. 19. tit. 3. lib. 1. *Rec.* 3d, That this is understood as with respect to natural and lawful children; for with respect to spurious children, (*espurios*) [3], it is necessary that both their father and mother shall have been born, or have domiciled in the kingdom for ten years, in order to their acquiring the rights of natural-born subjects, L. 19. tit. 3. lib. 1. *Rec.*

L. 7. tit. 14. Lib. 1. Nov. Rec.

L. 7. tit. 14. Lib. 1. Nov. Rec.

[22]

L. 7. tit. 14. Lib. 1. Nov. Rec.

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tribunals of the colony, at the instance of the Syndic Procurator General, the official protector of slaves, and liable to the punishment, corresponding to the injury or offence, as though the slave were a free person: besides which, that in the case of the owner being the offender, the slave was directed to be confiscated and sold to another owner, if able to work, and his value or proceeds applied to a public purpose: and if the slave was incapable, or unfit to be sold, the owner, without having the slave returned to him, or to his manager, guilty of the excess or injury, was bound to furnish or advance for the daily sustenance and clothing of the slave, during life, a sufficient sum to be fixed by the judge.

[2] *Vide* L. 1. tit. 11. Lib. 6. *Nov Rec.*

[3] Begotten on a woman who has promiscuous intercourse with many men. *Vide* L. 1. tit. 15. P. 4.

By reason of this state, (*naturalidad*), there arise between the king and his natural-born subjects certain obligations which belong to public law. See P. 2. from tit. 2. to tit. 21.

§ 2. Of the privileges and of the obligations of natural-born subjects.

The rights of a natural-born subject having been acquired, 1st, The person so acquiring them is capable of holding public employments and posts. 2d, He is obliged to do or grant to the king all that is enjoined by P. 2. from tit. 12. to tit. 31 [4]. 3d, He cannot be sued out of the kingdom, Aut. 3. tit. 8. Lib. 1. *Rec.* He is prohibited, under pain of loss of property and perpetual banishment, from going out of the kingdom for the purpose of study, excepting in the universities of Bolgna, Coimbra, Rome, and Naples, L. 25. tit. 7. Lib. 1. *Rec.* But the reasons for this enactment having ceased, we apprehend it is not now observed. 5th. Natural-born subjects cannot wear other clothes than those manufactured in the kingdom, Aut. 7. tit. 2. lib. 5. *Rec.* [5] A most excellent law, but totally unobserved.

Nota 3. tit. 29. Lib. 4. Nov. Rec.

L. 1. t. 4. Lib. 8. Nov. Rec.

§ 3. Of the modes of losing the rights of a natural-born subject.

The rights of a natural born subject may be lost or renounced, 1st. by five[6] modes or ways. 1st, By treason against the king; and this includes the forfeiture of property and honours, or titles, (*mercedes*) L. 5. tit. 24. P. 4. 2d, If the king machinates the death of a natural born subject without justice or law. 3d, If he denies him justice, 4th, If he dishonours his wife, L. 5. tit. 24. P. 4. These three last may have given rise to the 5th, which consists in the denaturalization, (*desnaturalizacion*), or voluntary renunciation of his rights and allegiance by the natural born subject. [7] By which all reciprocal obligations between the sovereign or lord and the subject cease; because denaturalization signifies or implies, as it were, the relinquishment of or separation from that natural tie or obligation which links the subject with, or binds him to his sovereign or lord, or the land in which he lived, L. 5. tit. 24. P. 4.

L. 5. tit. 24. P. 4.

L. 5. tit. 24. P. 4.

L. 5. tit. 24. P. 4.

§ 4. Of aliens.

Powerful or weighty reasons were not wanting for the exclusion, by our legislators, of alien or foreigners from public and ecclesiastical employments, and the obliging them to the performance of, or compliance with, certain things which were necessary to their good government. Therefore it hath been

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[4] These duties are too numerous for the subject of a note; and I must refer the reader, who is desirous of more particular information, to the reference in the text.

[5] Omitted in *Novisima Rec.*

[6] The law referred to, L. 5. tit. 24. P. 4. in the text, specifies only four, as does the text itself.

[7] This is not consonant with the notions entertained respecting the duties of allegiance in Great Britain. *Vide* 1 *Blac. Com.* p. 369. 15 ed.

determined, 1st, That they cannot obtain the appointment of alcalde or magistrate, the government of cities or towns, nor be sworn regidors. Ll. 2. & 27. tit. 3. Lib. 7. *Rec.* 2d, That they cannot obtain ecclesiastical benefices nor pensions relating or annexed to them, Ll. 14. 15. 17. 18. and 25. tit. 3. Lib. 1. *Rec.* 3d, That no gifts nor transfers of towns, castles, or jurisdictions, or manors, may be made in their favours, Ll. 1. & 2. tit. 10. Lib. 5. *Rec.* 4th, That they shall not be put in possession of any commandery (*encomienda*), Auto. 6. tit. 3. Lib. 1. Rec.[8] 5th, And in order that these laws should be inviolable, it is prohibited to grant the rights of naturalization to foreigners, and the nation (*el reyno*) is commanded not to consent thereto, L. 36. tit. 3. Lib. 1. *Rec.* 6th, That they cannot be exchange nor mercantile brokers, L. 7. tit. 16. Lib. 5. *Rec.* 7th, That ignorance of the royal cedulas, proclamations, and edicts, &c. with respect to the exportation and importation of articles forbidden or prohibited, custom house fees or duties, &c. will not excuse or avail them, *Bobadilla Polit.* L. 4. C. 5. N. 71. See L. 15. tit. 1. P. 1. 8th. That they shall only use the clothes which they bring, contrary to the ordinance respecting clothes, for the space of six months after they enter Spain, L. 1. Cap. 17. tit. 12. Lib. 7. *Rec.* 9th. That foreign pedlars shall not walk the streets for the purpose of selling, &c. Aut. 1. tit. 20. Lib. 7. *Rec.* 10th. That they cannot have shambles nor bakers' shops, nor fish markets, in the towns, L. 2. tit. 3. Lib. 7. *Rec.* 11th. But they shall not pay tribute money (*moneda forera*) if it appear that they have dwelt at least three years out of the kingdom, L. 7. tit. 33. Lib. 9. *Rec.*[9]

L. 2. t. 5. Lib. 7. Nov. Rec.

Ll. 1 & 2. tit. 14. note 2. tit. 14. & L. 1. tit. 13. Lib. 1. Nov. Rec.

[23]

Ll. 6 & 7. tit. 5. Lib. 3. Nov. Rec.

L. 4. tit. 14. Lib. 1. Nov. Rec.

L. 15. tit. 1. P. 1.

L. 1. tit. 13. Lib. 6. § 17. Nov. Rec.

L. 11. tit. 5. Lib. 9. Nov. Rec.

L. 2. tit. 5. Lib. 7. Nov. Rec.

Under another more confined signification we understand by the foreigners of a province those who are not born in it; and under this meaning the charters or particular laws of Arragon prohibited any foreigner from obtaining employments or places of dignity in the kingdom. But king Philip V. by a decree of 7th July, 1723, which is embodied in Auto 30. tit. 2. Lib. 3. *Rec.* commanded that all persons born in the other dominions of Castille should be admitted equally to these offices or employments in his kingdom, leaving in force the law of Mallorca, (*Majorca*) which directs that no one except a Mallorquin (*native*

L. 5. t. 14. Lib. 1. Nov. Rec.

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[8] I suppose this law is obsolete, as it is not to be found in the *Nov. Rec.*; and by Nota 1. tit. 32. Lib. 11. *Nova. Rec.* this law is stated to be obsolete.

[9] Obsolete.

[10] Omitted in *Novisima Recop.*

L.5.t.14.Lib.1. Nov. Rec.

of Majorca,) can obtain any dignity or place of profit in their church, Aut. 30. tit. 2. Lib. 3. *Rec.*

Cap. 3. Of the second division of the civil state into nobles, and knights, persons descended from nobility (hidalgos, and plebeians.)

The second division of men, according to their civil state or capacity, is into nobles, knights, gentry, or persons descended from nobility, (*hidalgos*), and plebeians. Our laws clearly distinguish these four classes, as will be seen in the course of this chapter.

§ 1. Of nobles, their degrees or kinds, and their privileges.

[24]

We may define nobility, a union of good actions, to which our ancestors gave the denomination of gentility, (*gentilidad*); which shews as it were a nobleness of temper or goodness. This is inferred from L. 2. tit. 21. P. 2. which distinguishes three sorts of nobility or nobleness, that by lineage, by wisdom, and actions. The nobleness of actions joined with that of lineage is accounted the most distinguished or the best, L. 2. tit. 21. P. 2. and the latter without the former loses much of its value or consideration, L. 6. tit. 9. P. 2.[11] There is another sort of nobility by possession, which is acquired by title of twenty years, L. 8. tit. 11. Lib. 2. *Rec.* which alters L. 1. tit. 7. Lib. 5. *Rec.*[12] which required forty years. The class of nobles most respected or valued, is that which is noble by birth, actions, or wisdom; and it will be found that the nobles of this class are and ought to be preferred to the great offices of state, L. 2. tit. 9. P. 2.; having been held in such estimation from the beginning of our monarchy, that when the crown was given by election to any of the Goths, nobility was necessary to his election as king, L. 8. *Prol. del Fuero Juzgo.*

L.2.tit.21.P.2.

L.2.tit.21.P.2.

L.4.tit.27. Lib.11. Nov. Rec.

L.1.tit.17. Lib.10. Nov. Rec.

L.2.tit.9.P.2.

For which reason the nobles enjoy many privileges and exemptions, which may be reduced to three kinds, 1st. Exemption from payment of common tributes, or taxes. 2d. Exemption from torture[13] and imprisonment for civil debt.[14] 3d. The exemption from being obliged to retract any insult which they had offered.

The first who exempted the nobles from the payment of taxes was Count Don Sancho, *Garcia de Nobilit.* Glos. 6. n. 8. This privilege will be found confirmed by Ll. 7. 9. tit. 11. Lib. 2. and 10. tit. 2. Lib. 6. *Rec.*; although L. 19. tit. 14. Lib. 6. *Rec.* directs that they shall contribute to public works. This

L.3.t.2.Lib.6. & L.2.t.27. Lib.11. Nov. Rec. & L.1. tit.2.Lib.6. Nov. Rec.

L.5.t.18.Lib.6. Nov. Rec.

[11] See in this law the distinction and qualities of a *Rico ome.*

[12] *Palacios* observes, that this law does not treat of nobility, but of some of the various modes of proof in respect to entailed property.

[13] See also Ll. 13 & 14. tit. 2. Lib. 6. *Nov. Rec.*

[14] Except for dues to the crown. *Vide* Ll. 2. & 15. tit. 2. Lib. 6. *Nov. Rec.* In respect to arrest and imprisonment for civil debt, or in civil cases, as regards persons residing in Trinidad, *vide* Order in Council, 16th September, 1822. Appendix J.

exemption from the payment of taxes extends to the widow of the noble, because she ought to be honoured as her husband was, L. 9. tit. 11. Lib. 2.; and L. 25. tit. 11. Lib. 5. *Rec.*; and it ceases upon her marrying one who is liable to pay taxes, but reverts upon her on again becoming a widow, L. 9. tit. 11. Lib. 2. *Rec.* The ancient solemnity must be observed to which *Villadiego* refers in L. 8. *Prol. del Fuero Juzgo*, n. 52., as necessary to restore her to the enjoyment of this privilege.

L. 2. tit. 27. Lib. 11. Nov. Rec. & L. 8. tit. 5. Lib. 9. Nov. Rec. L. 2. tit. 27. Lib. 11. Nov. Rec.

The exemption from imprisonment contained in L. 4. tit. 2. Lib. 6. Rec. [15] ceases, 1st, If the noble renounces it with a solemn oath, [16] *Villadiego a* L. 8. *Prol. del Fuero Juezgo*, n. 64. 2d. If at the time of contracting the civil debt, he concealed [17] the fact of his nobility from the contracting party, *Gomez* on L. 79. of *Toro*, n. 4. 3d. If the noble is made collector of royal tributes or taxes, Ll. 14. 4 tit. 2. Lib. 6. *Rec.* 4th. If the debt proceeds from crime or quasi crime, L. 2. tit. 10. Lib. 6. *Rec.*; in which case a better prison is allotted to the noble than the common one for the people, L. 11. tit. 2. Lib. 6. *Rec.* As recanting or giving oneself the lie was always accounted a disgraceful thing, the law was desirous of excepting the nobles from such punishment, L. 2. tit. 10. lib. 8. *Rec.* *Villadiego on L.* 6. tit. 3. Lib. 12. *del Fuero Juzgo*, n. 16. Another very particular privilege of the nobles is, that the officers of justice cannot break open [18] their house, L. 61. tit. 4. Lib. 2. *Rec.*

L. 2. tit. 2. Lib. 6. Nov. Rec.

[25]

Ll. 15 & 2. tit. 2. Lib. 6. Nov. Rec. L. 10. tit. 2. Lib. 6. Nov. Rec. L. 11. tit. 2. Lib. 6. Nov. Rec. L. 7. tit. 27. Lib. 7. Nov. Rec.

As doctors compose the second class of nobles treated of by L. 2. tit. 21. P. 2., it is not surprising that they should also enjoy an exemption from taxes, Ll. 8. 9. tit. 6. Lib. 1. Rec. [19] But this does not extend to bachelors, L. 2. tit. 14. lib. 6. Rec., nor to the illegitimate or natural children of nobles and descendants

L. 14. tit. 2. Lib. 6. Nov. Rec.

L. 2. tit. 21. P. 2. L. 2. tit. 17. Lib. 6. & L. 7 tit. 5. Lib. 1. Nov. Rec. L. 10. tit. 18. Lib. 6. Nov. Rec.

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[15] Read, as pointed out by *Palacios*, L. 14. *ibid.* [L. 15. tit. 2. Lib. 6. *Nov. Rec.*]

[16] *Palacios* observes, that the noble cannot renounce this privilege, since he is forbidden by L. 14. tit. 2. Lib. 6. Rec. [L. 15. tit. 2. Lib. 6. *Nov. Rec.*] under pain of such renunciations being null: that, consequently, the oath cannot confirm a thing which does not exist, for that, as enacted by L. 28. tit. 11. P. 5. no covenant which is against law shall be binding or enforced; although made under a penalty or oath.

[17] Or rather, if he denied the fact: but it was otherwise if the creditor was aware of the fact of nobility, or the party contracting was himself ignorant of it. *Vide* the reference in the text.

[18] *Palacios*, properly, here observes, that the law cited in the text, [L. 61. tit. 4. Lib. 2. Rec.; or L. 14. tit. 2. Lib. 6. *Nov. Rec.*] makes use of the word 'executar:' the correct translation therefore is, that the officers of justice cannot take in execution or levy upon the dwelling-house of a noble; but vide order in council, 16th September, 1822 — Appendix J.

[19] These laws, L. 2. tit. 17. Lib. 6. & L. 7. tit. 5. Lib. 1. *Nov. Rec.* do not appear to apply.

L.6.tit.5. Lib.10. & L.1. tit.5.Lib.10. Nov. Rec.

of nobility (*hijosdalgo*), L.20. tit.11. Lib.2.; L.9. tit.8. Lib.5. Rec.[20]

§ 2. Of the degrees of nobility.

Having explained the meaning or nature of nobility in general, we now are about to point out its particular degrees, treated of by our laws. In the first place, we will distinguish the landed (*de solar*) from the titled (*titulada*) nobility, although the latter includes the former. By land (solar) is understood the demesne with a house situate in a strong or fortified place (*tierra*) in the mountain, according to *Garcia de Nobil.* Gloss. 18. n.35. This class of nobility, possessed of a mansion house and land, has been always held in much estimation.

Titled nobility is distinguished by the titles of duke, marquis, count, and viscount. The Goths introduced into Spain the title of duke, appropriated to the greater generals of the army,

L.11.tit.1.P.2. named by the emperor, and wherefore L.11. tit.1. P.2. observes, that duke is as the chief, or leader of an army, who received this command formerly from the hand of the emperor, *Hernan de Mexia*, in Lib.1. c.75. of his peerage, (*Nobiliario*), treats of his privileges, which were numerous, and were annulled

L.15.tit.1. Lib.6. Nov. Rec. by L.8. tit.1. Lib.4. Rec.

The title of marquis for some time maintained precedence over that of count, *Salazar de Mendoza, Origen de las Dignid.*

L.11.tit.1.P.2. *segl. de Castilla*, Lib.3. c.14., according to L.11. tit.1. P.2.

[26] A marquis was lord of some extensive territory on the borders of the kingdoms. It is said that this word is derived from the German *Marchgraph*, which signifies captain of a frontier. Alluding to this Don Bernardo, Count of Barcelona, in a charter of 794, is called duke, count, and marquis of the Spains. *Mendoza*, same work. *Mexia*, Lib.1. c.76. treats of its pre-eminence.

Count is the companion who attends the emperor, or king, daily performing for him some particular or distinguished ser-

L.11.tit.1.P.2. vice, L.11. tit.1. P.2.

This title is more ancient in Spain than those of duke and marquis. *Mexia*, Lib.1. c.77. In the time of the Roman dominion or government, the governors of Spain were distinguished by the title of counts; and thus Dioclesian and Maximilian in L.14. Cod. de Fid. instrum., called Severus, Count of Spain. In the time of the Goths, the title of count was given to the governors and magistrates of provinces, as also to the principal officers of the royal household; and for this reason the title of

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[20] L.1. tit.5. Lib.10. *Nov. Rec.* does not seem to apply, but L.6. tit.5. Lib.10. *Nov. Rec.* does apply, and supports the position in the text.

count was held in greater estimation than that of duke. *Mendoza*, same work, lib. 3. c. 5. At present, counts and dukes are appointed to the council of the king, L. 4. tit. 4. lib. 2. *Rec.* which points out the reason. L. 9. t. 3. Lib. 4. Nov. Rec.

Viscounts were the elder sons of counts (*Mexia*, same work, lib. 1. c. 78.); and they were so called because, according to L. 11. tit. 1. P. 2., the viscount is the officer who supplies the place of count. L. 11. tit. 1. P. 2.

By the ordinance respecting the styles of address, which is L. 16. tit. 1. lib. 4. Rec. c. 14., the grandees, marquises, and counts are alone entitled to the address of my lord (*señoria*): wherefore it is out of mere courtesy that of excellency is now given. [21] L. 1. tit. 12. Lib. 6. Nov. Rec.

All these nobles administer justice in their estates and seignories by privilege and custom, and in no other way, [22] L. 12. tit. 1. P. 2. This jurisdiction does not extend to the making laws, nor to the granting the privileges of lawful birth, L. 12. tit. 1. P. 2. L. 12. tit. 1. P. 2. L. 12. tit. 1. P. 2.

The title of "*infanzon*" was also introduced into Castille, which corresponds with the *catanes* and *varvasores* of Italy. The infanzon cannot exercise authority and jurisdiction without special privilege, L. 13. tit. 1. P. 2. [27] L. 13. tit. 1. P. 2.

§3. Of knights: who may be such, and what obligations they are subject to.

Knights constitute another class of nobility. They owe their institution to the Gothic kings, who being such warriors and chieftains (*caudillosos*), rewarded the desert of valour and arms. In the beginning knights were chosen one out of every thousand, and, commonly, men of the greatest strength and courage, such as huntsmen, smiths, and butchers, &c. were selected for this post, L. 2. tit. 21. P. 2. But these being found to conduct themselves without any sense or impulse of honour, on account of the meanness of their birth, afterwards knights were chosen from among persons of honourable and respectable lineage; who, as they were people of worth (*de bien*), which is the same as pro- L. 2. tit. 21. P. 2.

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[21] *Palacios* (1) remarks, that by a royal decree of the 5th January, 1786, and by another of the 16th May, 1788, the grandees (*grandes*) are not only entitled to the address of "excellency," but of "most excellent lord" (*excelentisimo señor*), which should be used to designate them in letters or writings; that they long previously received the address of "excellency" by unwritten law, or, which is the same, by custom. That the same law [L. 16. tit. 1. Lib. 4. Rec.; L. 1. tit. 12. Lib. 6. Nov. Rec.] points out something of this in these words, "nor excellency to any person who is not a grandee." The learned professor means the prohibition in the law to address any other but a grandee by this style.

[22] They cannot make laws, nor establish new customs, without the consent of the people (*pueblo*).

L.2.tit.21.P.2. perty (*algo*), were called *hijosdalgo*, L.2. tit.21. P.2. To these species of knights was given the appellation of the gilded spur. *Garcia de Nobil.* Gl.1. N.52. They then began to be more respected; and to this situation, or state, is the definition L.1.tit.21.P.2. of knighthood adapted by L.1. tit.21. P.2. when it says that it is the association of noble men, who were appointed, or formed, to defend the country. They were more respected than other military men, and were called knights (*caballeros*), on account of its being more honourable to go on horseback L.1.tit.21.P.2. (*á caballo*), than on any other beast, L.1. tit.21. P.2.

To distinguish more particularly this noble class, the laws laid down certain ceremonies for the investiture of a knight who possessed the requisite qualifications. He was obliged, the day before he was invested, to keep watch in the church, and to prepare by washing, cleaning, and clothing himself in the best L.13.t.21.P.2. possible manner, L.13. tit.21. P.2. After hearing mass, the person who was arming him, asked him if he wished to be a knight, and having answered in the affirmative, he put on his spur, and girthed on his sword upon his waist, with his head uncovered; and unsheathing his sword, he swore to be faithful [23] to God, to his king, and to his country. Immediately the knights L.14.t.21.P.2. who were assembled gave him a slap on the neck and a kiss, L.14. tit.21. P.2. The sponsor ungirthed his sword, and he was L.15.t.21.P.2. accounted either a true lord knight, or honourable man, L.15. tit.21. P.2. The new knight was marked with a brand on the left [24] arm, and his name and lineage were inscribed, with that of others, in a book of the place where he was born, in order to L.21.t.21.P.2. know when he was wanting in his duties or obligations, L.21. tit.21. P.2. And it is natural to conclude that on this is founded

28] the modern enactment of L.17. tit.1. Lib.6. Rec. [25]; according to which, the *audiencias* and *chanceries* ought to take an inventory of knights.

In addition to this degree of nobility (*hidalguía*), in order to being made knights were requisite good conduct, prudence, wisdom, grace, dexterity, and sagacity, loyalty, and skill in arms Ll.4, 5, 6, 7, 8, and horses, Ll.4. 5. 6. 7. 8. 9. and 10. tit.21. P.2. A woman 9, 10.t.21.P.2. was excluded from conferring knighthood, although she were

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[23] L.14. tit.21. P.2., quoted in the text, says, the knight swore to die, if necessary, in defence of his laws, his king, and his country.

[24] L.21. tit.21. P.2., quoted in the text, says, the right arm.

[25] Omitted in *Nov. Rec.*

queen[26], as also were the insane, the clergy and religious persons, of a regular and not of a military order, L. 11. tit. 21. P. 2.: L.11.t.21.P.2. neither could a poor man, one deformed, the merchant, the traitor, and person condemned to death be armed knights, L. 12. tit. 21. P. 2.; nor he who had received knighthood unlawfully L.12.t.21.P.2. or in mockery (*por escarnio*), in these three cases: 1st. If the person who armed him had not authority to do so. 2d, If he were unqualified, and, knowing it, received knighthood. 3d, If he purchased or received it through interest, L. 12. tit. 21. P. 2.; L.12.t.21.P.2. and by a modern law persons liable to pay taxes are also prohibited to be armed or created knights, L. 4. tit. 1. Lib. 6. Rec.[27]

The obligations of newly created knights, who were called nobles (*nobles*), were, 1st. to respect, honour, assist, and defend him who conferred on them knighthood; except in the cases[28] declared by L. 16. tit. 21. P. 2., and also their sponsors of the sword L.16.t.21.P.2. (*padrinos de Espada*) for three years, L. 16. tit. 21. P. 2. 2d, To ride L.16.t.21.P.2. on horseback, carrying no one behind them. 3d, To succour other poor knights, and to defend what was committed to their charge, L. 21. tit. 21. P. 2. 4th, To take care of their arms L.21.t.21.P.2. and horses, keeping a full suit of armour and besides a mule or pony, L. 21. tit. 21. P. 2. and L. 1. tit. 1. Lib. 6. Rec.[29] 5th, L.21.t.21.P.2. To keep their word, not to tell a lie, and to weigh their expressions in speaking, L. 22. tit. 21. P. 2. 6th. They ought to go L.22.t.21.P.2. to the wars or to send another in their stead if they have completed seventy years, L. 1. tit. 1. Lib. 6. Rec.[30]

In addition to these obligations, knights ought to distinguish themselves above other people in their dress, eating, drinking, and sleeping. Their clothes ought to be fine, their cloak wide, reaching down to their feet, and they must put it on when in the cities or partaking of dinner with others, Ll. 17. Ll.17&18. t.21.P.2. and 18. tit. 21. P. 2. Their food consisted solely of substantial [29] flesh eaten at night, it being permitted them to take something in the morning in time of war. Their drink was water mixed with vinegar, the better to quench their thirst, or wine and water. They slept little and on a hard bed, L. 19. tit. 21. P. 2. While they ate they had read to them the histories of great actions, or

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[26] But as queen she might command others to do it. *Vide* L. 11. tit. 21. P. 2. quoted in the text.

[27] Omitted in *Nov. Rec.*

[28] The knowledge of the excepted cases alluded to, is of so little use in the present day, that the Translator is contented to refer the curious to the law quoted in the text.

[29] Omitted in *Nov. Rec.* [30] Omitted in *Nov. Rec.*

called upon some of the elders to relate them, and they did the same when they could not sleep, L. 20. tit. 21. P. 2. L. 20. t. 21. P. 2.

They enjoyed many privileges, and the chief consisted, 1st. In being honored even by the kings. 2d, That of sitting down the first in the churches after the king and prebendaries. 3d, Of being allowed to give the embrace of peace (*adorar la paz*).[31] 4th, Of not having any others seated with them at their table. 5th, Of having their houses privileged from being broken open by the officers of justice, as also their arms and horses from being taken from them, L. 23. tit. 21. P. 2.[32] L. 9. tit. 1. Lib. 8. Rec.[33] 6th, Of being exempted from the payment of taxes, although they may have been liable to pay them, except with respect to things for which nobles (*hijosdalgo*) are bound to pay taxes, L. 1. tit. 1. Lib. 8. Rec.[34], and from exercising inferior offices, L. 3. tit. 1. Lib. 8. Rec.[35]; but by L. 1. tit. 1. Lib. 8.[36] Rec. they were obliged to pay those which they were accustomed to do before being made knights, as also their sons. 7th, The privilege of not being subject to being tortured except in the case of treason. 8th, Of not suffering an ignominious death; but in cases of crime which deserved it, they had their heads cut off, or were starved to death; but for the crime of robbery they were thrown into the sea.[37] 9th, That of prescription not running against them when absent in the service of the king.[38] 10th, That of being permitted to make their testaments or last wills without the solemnities of law. All which are treated of by L. 24. tit. 21. P. 2. Many of these privileges subsist to this day.

L. 23. t. 21. P. 2. L. 12. tit. 34. Lib. 12. Nov. Rec.[31] L. 7. tit. 34. Lib. 12. Nov. Rec.[32] L. 3. tit. 34. Lib. 12. Nov. Rec.[33] L. 1. t. 34. Lib. 12. Nov. Rec.[34] L. 24. t. 21. P. 2.

By L. 1. tit. 1. Lib. 6. Rec.[39] It is ordained that these privileges shall not descend to the sons of knights, unless they were born before their fathers were armed or ordained knights.

They forfeited these privileges, 1st, By losing their arms at play or giving them away to women.[40] 2d, By arming one as knight who was not entitled to such honor. 3d, By being a mer-

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[31] A ceremony used, it is believed, in the high mass in the Romish church.
[32] This L. 23. tit. 21. P. 2. also extends to them the benefit of restitution.
[33] This L. 12. tit. 34. Lib. 12. Nov. Rec. does not seem to apply.
[34] Nor does this L. 7. tit. 34. Lib. 12. Nov. Rec.
[35] Nor L. 3. tit. 34. Lib. 12. Nov. Rec.
[36] Nor L. 1. tit. 34. Lib. 12. Nov. Rec.
[37] Or were thrown to wild beasts, to be torn to pieces, or devoured. The reader will probably think these no very enviable substitutes for the plebeian mode of capital punishment.
[38] Being allowed the benefit of restitution, as stated in note (32).
[39] Omitted in *Nov. Rec*
[40] Or staking, or pledging them at taverns.

chant or exercising an inferior office or calling. 4th, By flying from battle. 5th, By surrendering the castle; and, 6th, By not succouring the king if it were possible. In these cases, in order to disarm or degrade the knight, the squire or shield bearer (*escudero*), cut the sword from his side and untied the leather of his spurs, which rendered him unfit for holding civil offices, as explained by L. 25. tit. 21. P. 2. L. 25. t. 21. P. 2.

These ceremonies ceased from the period that Don John II. [30] reserved to the king alone the right of arming or installing a knight, ordaining that it should be done by his hand, and not by commission, L. 5. tit. 1. Lib. 6. Rec.[41]; but afterwards the Catholic kings made it common to both king and queen, L. 6. tit. 1. Lib. 6. Rec.[42]

Formerly challenges, duels, and combats were very common among the knights and Moors; as well as between themselves, when occasion required them to vindicate their honour and character. This is mentioned in tit. 3. and 4. part 7. tit. 12. *del* lib. 4. *del Fuero real*; and tit. 9. Lib. 7. *del Ordenamiento.*

In modern times duels are prohibited under heavy punishments by the decree of Don Philip V. of 1716 which is Auto. 1. tit. 8. Lib. 8. Rec.[43] L. 2. tit. 20. Lib. 12. Nov. Rec.

From this class of knights sprung the orders of knighthood so celebrated in our history; and although they remain to this day, the greatest part of the formalities and solemnities of their institution have ceased, as also the proofs and other things which were required to invest them with the insignia.

Our laws make mention of the knights who were obliged to keep arms and a horse in readiness for war (*caballeros de premia*), those of review and war (*alarde*[44] *y de guerra*), those by virtue of military service (*pardos*), and knights of Andalusia, who were obliged to keep a horse and arms ready to go and defend the coasts against the attacks or incursions of the Moors (*quantiosos*). By knights of *premia*, *alarde* and *guerra*, it appears were understood the other knights of this class, who were obliged to hold themselves in readiness to go to war; who had

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41 Omitted in *Nov. Rec.*

42 Also omitted.

43 See also on this subject Ll. 1 & 3., and Notes 1 & 2. tit. 20. Lib. 12. Nov. Rec.

44 A review which took place on the 1st of March in each year, by persons deputed by the king, of all dukes, counts, grandees (*ricos homes*), knights, or squires, and other vassals who held lands, or received pay, at which they appeared well armed and properly mounted, to shew themselves ready for a campaign, if called together. *Vide Cornejo Diccionario real de España*, tom. 1. verb. *Alarde.*

their privileges, uses, and customs, which they were ordered to observe by L. 10. tit. 1. Lib. 6. Rec. [45]

From what circumstance they took the denomination of knights *pardos* is not a point ascertained, and still less so when they had their beginning; it only appears that, by a charter of Leon, they were allowed an exemption from taxes if they maintained arms and horses; and it further appears, that this description of military association was composed of persons who paid taxes (*pecheros*). *Garcia de Nobilit.* Gloss. 1. § 1. n. 56. Doña Juana and Don Carlos abolished in 1518 the regiment of knights *pardos*, which Cardinal Ximenes of Cisneros had armed, L. 16. tit. 1. Lib. 6. Rec. [46]

The knights *quantiosos* were so called from the fixed rent which they were obliged to possess to maintain a horse and
[31] arms, and to serve in war. This for some time was a thousand ducats (*ducados*) of gold, which were equal to three hundred and seventy-five thousand *maravedis*; and once being made knights of *quantia*, they were obliged to maintain arms and a horse, and to pass in review twice[47] a-year, L. 12. tit. 1. Lib. 6. Rec. [48] Being only freed from this obligation when their patrimony was diminished to one hundred thousand *maravedis*. Same law quoted. — But afterwards the sum or quantity of two thousand ducats was required for such knights, and they were relieved from the obligation when their rental fell below two thousand ducats, L. 18. same title and book. On the 28th June, 1613, these knights *quantiosos*, which Philip II. established, were re-
L. 1. t. 3. Lib. 6. Nov. Rec. formed, Aut. 1. tit. 1. Lib. 6. Rec. But in 1734, a regiment of knights *quantiosos* was armed in Andalusia with various privileges, noticed in Auto 2. tit. 1. Lib. 6. Rec. [49]

§ 4. Of noblemen called hidalgos; their classes and privileges.

Hidalguía is nobility by descent or lineage, L. 3. tit. 21. P. 2. One of the things which distinguishes nobility from *hidalguía* is [50], that the latter is acquired on the part of the father alone;
L. 3. tit. 21. P. 2. for instance, the son of a father who was an *hidalgo*, and of a mother, villein, or plebeian, will be an *hidalgo* [51], but not a noble. [52]

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[45] Omitted in *Nov. Rec.*
[46] Omitted in *Nov. Rec.*
[47] *Vide* Note 44., page *ante*.
[48] Omitted in *Nov. Rec.*
[49] Omitted in *Nov. Rec.*
[50] At the present time, says *Palacios* (1), the one is commonly confounded with the other, and the same is understood by the word "*hidalgo*" as by the word "*noble*."
[51] But not *vice versa*. So that this is an exception to the general rule, that *partus sequitur ventrem*. *Vide* L. 3. tit. 21. P. 2. *Greg. Lop.* Gl. 3. on this law, says, that with respect to honours and dignities, the son follows the condition of his father.
[52] *Hidalguía* was therefore an inferior class of nobility.

L. 3. tit. 21. P. 2. By *hidalgos* are understood men chosen from good situations in life (*de buenos lugares*), and possessed of property (*algo*), this word so signifying in Spanish, for which reason they were called *hijosdalgo*, which means as much as a son of wealth or property, L. 2. tit. 21. P. 2. L. 3. tit. 21. P. 2. L. 2. t. 21. P. 2.

The wise *Otalora*, in his book, entitled *Summa nobilitatis Hispanicæ*, P. 2. c. 4. n. 2. says, that he never read how nor when the *hijosdalgo* had their commencement in Spain. The above quoted, L. 2. tit. 21. P. 2. gives us the etymology of the word *hijodalgo*; but it is to be remarked, that the poor person, if he be of good lineage, does not lose his quality or rank, for it is sufficient for him if the person from whom he descends had property (*algo*), because the nobility of *hidalguía* does not proceed from the *hidalgo* himself, but from the first of his family chosen as such, L. 2. tit. 21. P. 2. L. 2. tit. 21. P. 2. And the *hidalguía* being inherited, it is certain that the manufacturers of cloths, cloth and other woven things will not lose it, as set forth in Aut. 2. and 6. tit. 12. Lib. 5. Rec. [53] L. 1 & 3. tit. 24. Lib. 8. Nov Rec.

This property, or *algo*, which consisted most frequently of the seigniory or dominion (*el señorío*) of vassals, was of three kinds, 1st, The dominion of the inheritance or patrimony (*devisa*), which is the inheritance that devolves to a man on the part of his father, or mother, or grandfathers, or others from whom he descends, which is divided among them. 2d, Dominion, or right of habitation (*señorío de solar*), which species of property consisted in the right of inhabiting or dwelling on another's lands (*suelo*). 3d, The dominion over a town, the inhabitants of which were invested with a right of electing their own magistrates (*señorío de behetría*), which means an inheritance belonging to one independently of or free from the person who lives on it, and who may receive as lord whoever may be of most service to him [54], L. 3. tit. 25. P. 4. [55] L. 3. tit. 25. P. 4. [32]

[53] But it would appear by L. 1. tit. 24. Lib. 8. Nov. Rec., referred to in the text, that *hidalgos* are not permitted to engage in any personal employment or service with respect to such manufactures, but must employ others for the purpose, otherwise they will forfeit their nobility.

[54] The subject of *Behetrías* is a matter which, to this present day, has not been treated of in a masterly way by historians and lawyers. It is worthy of our attention; and therefore, in the publication we have made of the *Fuero viejo de Castilla*, we have endeavoured to satisfy, as much as possible, the curious and lovers of our antiquities by means of a dissertation therein inserted, upon the origin, duration, and exemptions of this kind of seigniory and its dependencies. There will be seen the information which would here, perhaps, be prolix, upon the tributes of *behetría* and vassals inhabiting the soil, or having the right of habitation upon it." [Note in the text.]

[55] I have endeavoured to explain, as well as I could, these different terms

By reason of these seigniories the *hijosdalgo* were called noblemen (*ricoshomes*).[56] *Garcia de Nobil.* Gl. 18. n. 20. and also barons, L. 10. tit. 24. P. 4. These noblemen or grandees, if they were driven from the kingdom by the king, might be followed by their vassals, and who under their orders might serve another king; and even, in case of war, against him who expelled them, L. 11. tit. 25. P. 4.[57] It is true the vassals were not obliged to follow them, and indeed ought not to do so, if the grandee or (*ricohome*) went into the dominions of the Moors, Ll. 12. and 13. tit. 25. P. 4.

L. 10. t. 25. P. 4.

L. 11. t. 25. P. 4.

Ll. 12 & 13. t. 25. P. 4.

Besides this species of *hidalguía* by lineage, there was another at will (*por merced*), of which such an abuse was made that the Catholic kings not only thought fit to revoke those granted by Don Henry, L. 7. tit. 2. Lib. 6. Rec., but also Don Juan IId, and Don Carlos, and Doña Juana revoked those they had given without just cause, and it was absolutely forbidden to grant charters or privileges of *hidalguía*, L. 8. tit. 2. Lib. 6. Rec.

L. 7. t. 2. Lib. 6. Nov. Rec.

L. 5. t. 2. Lib. 6. Nov. Rec.

Many are the privileges and liberties of the *hijosdalgo*, which ought to be preserved to them inviolate, according to Ll. 13. and 14. tit. 2. Lib. 6. Rec. The *hijosdalgo* by lineage were not compelled or obliged to go to the war, as were those *at will*, or by privilege (*de merced ó privilegio*), *Otalora*, Part. 3. c. 4. n. 2., nor could their horses or arms be taken for debt or for security that did not regard the crown, L. 9. tit. 1. Lib. 6. Rec.[58] They ought to have a separate prison, L. 11. tit. 2. Lib. 6. Rec. They do not pay duties or taxes for the goods or property which they may have bought from persons liable to pay them, L. 14. tit. 14. Lib. 6. Rec. These privileges cannot be renounced, L. 14. tit. 2. Lib. 6. Rec., although formerly they might, according to the rule laid down by *Villadiego* on L. 8. *Prol. del Fuero Juzgo.* n. 61. and then in use.

Ll. 13 & 15. t. 2. Lib. 6. Nov. Rec.

L. 1. t. 2. Lib. 6. Nov. Rec.

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L. 11. tit. 2. Lib. 6. Nov. Rec.

L. 3. tit. 18. Lib. 6. Nov. Rec.

L. 15. tit. 2. Lib. 6. Nov. Rec.

With respect to the proofs of nobility and *hidalguía* we defer speaking until the 3d book, where we are of opinion it will be more suitable to treat of them.

§ 6. Of plebeians.

Under the name or term plebeians (*plebeyos*) we understand

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in the text, of *devisa*, *solariego*, and *behetría*, but fear I have not succeeded in making the subject very intelligible; however, I think it is one in which very few of my readers will take any interest.

[56] This word, *ricohome*, according to L. 10. tit. 25. P. 4., referred to in the text, is equivalent to that of count or baron in other countries.

[57] *Vide* also L. 10. tit. 25. P. 4.

[58] *Vide* also Ll. 13. 14. & 15. tit. 2. Lib. 6. Nov. Rec.

all those who exercise any trade (*arte*) or who cultivate the soil [59]; which two kinds the Partidas explain by the expressions of work (*obra*) and labour (*labor*). Works or trades (*obras*) are those which men carry on in houses or covered places. Labours (*labores*) are all those things which men do by reason of the mode of labour (*de fechura*), or of the time in which they receive the work, having to traverse the mountains or the fields, and being obliged to suffer cold and heat according as the weather is. The latter are called labourers (*labradores*), and the former mechanics or handicraftsmen (*menestrales*), because they seek their means of support (*su menester*) in the trade or art, L. 5. tit. 20. P. 2. L. 5. tit. 20. P. 2.

Conforming to the laws which are at this day in force, we will only observe that this definition of labour makes us well understand how anxious Don Alonso the Wise was to represent to us the labour, suffering, and toil with which labourers procured us all that was necessary to maintain and preserve our lives; constituting them, for this reason, a more noble class than mere mechanics. Hence, without doubt, proceed the privileges and exemptions of labourers, among which the following are the principal, 1st, That they may not be comprehended in those drawn to serve in the army (*en quintas*), which was granted them on the petition of seven of the Cortes of Burgos in 1429 and 1430. 2d. That execution cannot go against them [60] in harvest time, except for debts due to the crown, or proceeding from crime. Ll. 25. and 26. tit. 21. lib. 4. Rec. The ordinance of 28th August 1603, makes mention of this privilege, which it extends to the L. 15. tit. 31. Lib. 11., & L. 6. tit. 11. Lib. 10. Nov. Rec.

[59] This word may be more properly translated "commons." Palacios says, that by the term "*plebeyos*" is merely understood those who are not "*nobles*," and that the mere exercise of any art, trade, or calling, does not constitute a plebeian, nor deprive one of the privileges, &c. of nobility, which he may possess. He refers to a royal *cédula* of 1783, which he states repeals Ll. 6 & 9. tit. 1. Lib. 4. *del Orden real*, and Ll. 2 & 3. tit. 1. Lib. 6. Rec. (Nota 5. tit. 23. Lib. 8. Nov. Rec.)

[60] This must mean with respect to their persons merely, and then only for debt arising from, or imposed in consequence of the commission of crime; for there is no exception from arrest in favour of the crown in the harvest time, which is from July to the end of December. See the second section of the act or L. 15. tit. 31. Lib. 11. Nov. Rec.; and L. 16. tit. 31. Lib. 11. Nov. Rec. extends this privilege from arrest to the whole period of the year, except in the case of crime, or where the debt was contracted before the party became a labourer or husbandman. The first section of this Law 15. tit. 31. Lib. 11. Nov. Rec. exempts from execution or levy at any period of the year, except for debts to the crown, for rent to the landlord or owner of the land, or for money lent by him to assist the labourer in his cultivation, the oxen, mules, or other beasts of the plough, and the agricultural implements of the labourer or husbandman, as also his fields sown with grain, or ploughed in order to be sown (*sembrados y barbechos*); and even in the three above excepted cases, one pair of oxen, mules, or other beasts of the plough, must be left to him.—*Vide* Appendix J.

farmers of wine and vinegar, upon which articles was imposed
34] the grant of the eighteen millions which had been given to the king in the previous cortes. 3d, That their implements of agriculture, beasts of labour, and the bread they bake, are exempt from being taken for civil debt or in an executive suit, except for a debt due to the crown, or for the payment of the ten per cent. to the king (*diezmos*) and ecclesiastical or seignorial rents[61], L. 25. 26. and 28. tit. 21. Lib. 4. Rec.

L. 15. tit. 31. Lib. 11., L. 6. tit. 11. Lib. 10.

Our laws have not been less attentive to forming regulations respecting trades, which, formerly, were divided according to their nature or kind into associations, corporations, or companies: their by-laws (*estatutos*), which varied in each of them, constituted the form of their government, the admission of journeymen to be masters, and other things which belonged to their interior and exterior employments; but the royal approbation was always necessary to their validity. There are, however, some general laws on the subject; 1st, That no person shall hold or exercise two employments or callings at the same time, L. 12. tit. 13. Lib. 5. Rec.[62]; not even those which had a certain connexion or dependence upon one another, by reason of the goods or articles they made use of; an example of which is given in L. 1. tit. 11. Lib. 7. Rec. 2d, Every journeyman or mechanic must work within the place where hired or employed from sun rise to sun set; and if without or beyond it, until such hour as will allow for his return by its setting, under penalty of loss of one-fourth of his day's wages, L. 2. tit. 11. Lib. 7. Rec. 3d, That the town councils (*los concejos* or *cabildos*) shall fix their wages according to the price of provisions in the district (*comarca*), L. 3. tit. 11. Lib. 7. Rec., 4th, That every journeyman or day labourer shall be paid on the night of the day of his work, if he wishes it; and that no such person can be elected to a public office in the town (*por oficio del comun*) under penalty of twice the amount (*pena del doblo*) and that no master workman may employ more than twelve each day, L. 4. tit. 11. and L. 10.[63] tit. 3.. Lib. 7. Rec. Upon the various handicraft works, see tit. 13. 14. 15. 16. 17. 18. 19. 20. and 23. Lib. 7. Rec.[64]

L. 15. tit. 31. Lib. 11., L. 7. tit. 11. Lib. 10., & L. 8. tit. 19. Lib. 7. Nov. Rec.

Note 7. tit. 23. Lib. 8. Nov. Rec.

L. 1. tit. 26. Lib. 8. Nov. Rec.

L. 4. tit. 26. Lib. 8. Nov. Rec.

L. 2. t. 26. Lib. 8., & L. 4. tit. 9. Lib. 7. Nov. Rec.

Cap. 4. Of the third division of the civil state into laymen and ecclesiasticks.

L. 2. tit. 23. P. 4.

The third division of men, according to the civil state of persons, into lay and ecclesiastick, will be found supported by L. 2. tit. 23. P. 4. Ecclesiasticks are those who compose the hierarchical

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61 *Vide* Appendix J.

62 Omitted in *Nov. Rec.*

63 L. 10. tit. 3. Lib. 7., nor its corresponding Law in the Nov. Rec., does not seem to apply.

64 Few of these are inserted in the *Nov. Rec.*

state of the church. They are called clergy (*clerigos*), which means men chosen for the service of God, L. 1. tit. 6. P. 1. L. 1. tit. 6. P. 1.

§ 1. Of the ecclesiasticks, their kinds, royal privileges, and the limitation of the latter.

The ecclesiasticks are regular or secular. The regular are those who leave or abandon all earthly things, and adopt some rule of religion to serve God, promising to observe it, L. 1. tit. 7.* P. 1. To the first kind belong monks, friars, and regular canons, whom our laws call canons of the cloyster (*de claustro*), L. 1. tit. 7. P. 1. which in the present day scarcely subsists. L. 1. tit. 7. P. 1.

The ecclesiastical privileges are confined to the peculiar jurisdiction (*á su fuero*), immunities, and exemptions, which they enjoy immediately by royal grant, L. 50. tit. 6. P. 1. Of their jurisdiction, or judicial power, we shall say something in its place in the third book. We shall say nothing of their immunities, conceiving that they belong to the canon, or ecclesiastical law of Spain. With respect to their exemptions, we must observe that the exemption from payment of excise duties (*alcabalas*) is granted them by L. 6. tit. 18. lib. 9. Rec.; and this is understood with respect to the sale of their property, and the fruits or products of their estates; but not the produce which they may derive from lands rented, nor their traffic, or gains of any kind, according to the decree of the *Presidents*, which is L. 1. tit. 18. lib. 9. Rec. [65] which is ordered to be observed by *cédula* of 20th July, 1763, which directs depositions on oath to be taken of the rents of ecclesiasticks; and if they should be false, that the judges proceed to verify and value the property by experienced or competent persons on oath. This exception from the payment of excise, or duty on sales of articles (*alcabala*), is not extended to the clergy of the minor orders, L. 2. tit. 4. lib. 1. Rec.

* [35]

L. 1. tit. 7. P. 1.

L. 50. tit. 6. P. 1.

L. 8. t. 9. Lib. 1. Nov. Rec.

L. 7. t. 10. Lib. 1 Nov. Rec.

According to the instructions and royal decrees of 1745, 1751, and 1760, which declare the art. 8. of the *concordate* of 1737, all property belonging to ecclesiastical foundations antecedent to that period is exempt from tributes; but that acquired subsequently to the said year 1737 shall be subject to contribution; and thus the clergy shall be obliged to contribute and to assist the laity in what is paid or furnished for the quartering of soldiers (*via de utensilios, quarteles*), brandy (*aguardiente*), (*mejoras de fundos,*) (*censos*), [66] &c. They shall equally be obliged to contribute to public works for the public or common benefit, L. 12. tit. 3. lib. 1. Rec.; and to pay the duties of export on what they shall send out of the kingdom. Aut. 4.

L. 7. tit. 9. Lib. 1. Nov. Rec.

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[65] Not in *Nov. Rec.*

[66] I cannot find appropriate terms in English for these words.

L. 14. tit. 9. Lib. 1. Nov. Rec.

tit. 18. lib. 9. Rec. With regard to the benevolence or subsidy to assist in carrying on the war against infidels (*gracia del Escusado ó Casa dezmera*), of apostolic grant, see the decree of

[36]

January 1761, and *Martinez* in his *Librería de Jueces*, tom. 2. c. 2. n. 84. to 92.

It is to be observed that the regular clergy cannot be agents or attornies, except in causes and affairs of their chapters and societies, presenting first the licence of their superiors, Aut. 1. and 2. tit. 3. lib. 1. Rec.; and the royal *cédula* of 25th November, 1764.

L. 1. tit. 27. Lib. 1. Nov. Rec.

The regular clergy are also forbidden to live out of their convents under any pretext, *cédula* of 4th August 1767; and to ask alms with poor's boxes without permission of the town council (*del consejo*), decree of 16th September 1766.

Lastly, They are not considered as inhabitants of the towns, according to the royal *cédula* of 21 December 1766; all which remarks we have made here, considering that these points could not be treated of with more method in another place.

TITLE VI.

OF PROMISE OF MARRIAGE OR ESPOUSALS (*DESPOSORIO*) AND MARRIAGE (*MATRIMONIO*).

MEN in the third place are considered with respect to their state as a family; and in this point of view, are either married or single. To this division belongs matrimony, which is accompanied commonly by marriage portions (*dotes*) and donations *propter nuptias*, which we term jointure (*arras*): wherefore, proceeding immediately to explain espousals or mutual promise of future marriage (*el desposorio*), as antecedent to marriage we will treat of both in the present chapter, leaving for the following the explanation of the marriage portion of the wife (*dote*) and jointure (*arras*).

Cap. 1. Capacity of persons with respect to their state as a family, and considerations relating thereto.

We consider matrimony as a contract which is celebrated between those who have contracted espousals (*los desposados*), and from which it derives its force and efficacy; but authorised by the church, which gives it a worthy place among its sacraments by reason of its dignity, mystical signification, and its ends, L. 5. tit. 1. P. 4. Ll. 3. and 4. tit. 2. P. 4.

L. 5. tit. 1. P. 4. Ll. 3 & 4. tit. 2. P. 4.

Under the consideration of contract, as we shall treat it here, leaving for the canonists all that it contains with respect to the sacrament and the church [1], a solemnity testifying the will of the contracting parties ought to precede marriage, which we call mutual promise of future marriage or *espousals* [2] (*desposorio*); and that is the verbal promise which men make when they wish to marry, L. 1. tit. 1. P. 4. We must except from this general definition the dumb, who by means of evident and clear signs, supply the place or pronunciation of words, L. 5. tit. 2. P. 4.

§ 1. Of promise of marriage.

L. 1. tit. 1. P. 4.

L. 5. tit. 2. P. 4.

From this definition we deduce the following axioms: — 1st. That promise of future marriage is a consent which those who are betrothed give with the desire of being married.

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[1] "Following in Spain the rules of the church in what appertains to the efficacy or validity of matrimony, and treating of the impediments of marriage, we cannot lay aside what it possesses in relation to the church." *Palacios* (1).

[2] *Vide* Wood, C. L. Book 1. ch. 2. p. 118. fo. ed. (*Palacios* here observes, that it is true espousals ought to precede matrimony when they are contracted; but that no one can infer from this that marriage cannot be celebrated without having previously contracted espousals.)

2d. That it ought to precede matrimony. 3d. That it is a mere pact celebrated without the solemnity of law [3]; but of such force, that by reason of it the persons who are betrothed are bound to contract matrimony afterwards.

Promise of future marriage being a consent given by those who are betrothed, it is evident. 1st. That only they can celebrate it who are of an age to consent; and therefore the male or female above seven years of age may celebrate it, or even under that age, if, after completing it, they ratify their consent, L. 6. tit. 1. P. 4. 2d. But not persons of non sane mind; unless after recovering their reason they renew their promise, L. 6. tit. 2. P. 4. 3d. That the father cannot betroth his daughters unless they be present and consent, L. 10. tit. 1. P. 4. But if the father should swear and promise to marry one of his daughters with another person, and they shall consent, the election of the particular daughter is left to the will of the father, if he have not specified the object of his promise; provided that in this case, if only one of the daughters remains alive, he would be obliged to give her in marriage, and if, after the promise, he should particularize one of his daughters, and the man does not wish to have her for a wife, the father is absolved from the obligation; but if the man, before the selection shall have been made, shall have enjoyed or had connection with any one of the daughters, he shall be obliged to take her for a wife and no other, L. 11. tit. 1. P. 4. 4th. That it may be also provided that the espousals may take effect at the discretion of the father, if any of the contracting parties say, "I will take you for my husband or wife, if it please my father, L. 3. tit. 1. P. 4.

L. 6. tit. 1. P. 4.
L. 6. tit. 2. P. 4.
L. 10. tit. 1. P. 4.
L. 11. t. 1. P. 4.
L. 3. tit. 1. P. 4.

This consent being precedent to matrimony, it follows, 1st. That mutual promises of marriage may be either *de presenti* or *de futuro*[4], Ll. 2. and 3. tit. 1. P. 4., the difference of which is

Ll. 2 & 3. tit. 1. P. 4.

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[3] "Promise of future marriage (*desposorio*) is not a mere pact, it is a contract with its proper nomination, which ought not to be celebrated without the solemnities which the law prescribes." *Palacios* (2).

[4] Properly, espousals, or mutual promises of marriage (*desposorio*) are, by words, *de futuro*; espousals by words, *de præsenti*, are considered in the light of marriage (*casamiento*), *Vide* L. 2., as also L. 3. tit 1. P. 4.; and if when a man contract espousals with one woman by words *de futuro*, and afterwards contract them by words *de præsenti* with another woman, the last shall be valid, or take effect in preference to the first, unless the man should have had connection with the woman with whom he contracted by words *de futuro*, before he contracted espousals with the second woman by words *de presenti*. And if a man contract espousals by words *de futuro* with two women, he may elect to marry either of them he pleases, unless he hath had connection with one of them; for in such case, he shall be obliged to marry her with whom he has had connection. *Vide* L. 9. tit. 1. P. 4. *Palacios* observes on this part of the text, "It is certain, that as well in the civil as in the canon and statute

explained by L. 9. tit. 1. P. 4. 2d, That they may be celebrated in four ways, by condition, cause, manner, or demonstration, Ll. 1. and 2. tit. 4. P. 4. Condition is, an agreement or covenant, which is made dependent on another covenant; for example, when a person says, "I promise to marry you if you should be at Rome." Cause is, when a person says, "I promise to marry you, because you have done such a thing." Manner is when a person says, "I give you a hundred maravedis to build me a house." Demonstration is, when one says "I promise to give you such a thing, which I bought of such an one," naming both particularly, L. 2. tit. 4. P. 4. The conditions ought to be just or decent (*honestos*), and conformable to the nature of espousals or mutual promise of future marriage (*desposorio*), Ll. 3, 4, and 5. tit. 4. P. 4. 4th, Indecorous and impossible conditions do not vitiate or annul the promise or contract of marriage, but are considered as not to exist, L. 6. tit. 4. P. 4.

L. 9. tit. 1. P. 4.
Ll. 1 & 2. tit. 4. P. 4.
[44]
L. 2. tit. 4. P. 4.
Ll. 3, 4, & 5. t. 4. P. 4.
L. 6. tit. 4. P. 4.

Promise of marriage being a mere pact (*pacto*), it may be celebrated with or without oath, L. 10. tit. 1. P. 4., and between absent persons by attorney or by power (*carta*), L. 1. tit. 1. P. 4. The effect of this promise is, the mutual obligation which arises between the parties to contract matrimony; and hence it is, 1st. That those betrothed are prohibited to marry with another, unless the second promise be made under an oath, and the first without it [5], L. 8. tit. 1. P. 4. 2d. That the canonical and civil impediments which hinder and dissolve marriage, also hinder and dissolve espousals, Ll. 8. and 12. tit. 1. P. 4. compared with Ll. 11, 12, 13, 14, 15, 16, and 17. tit. 2. P. 4. 3d. That their causes are of ecclesiastical cognizance, L. 7. tit. 1. P. 4. 4th, That espousals celebrated in any of the lawful ways which we have mentioned, do not bind, unless the condition, cause, de-

L. 10. tit. 1. P. 4
L. 1. tit. 1. P. 4.
L. 8. tit. 1. P. 4
Ll. 8 & 12. t. 1. P. 4.
Ll. 11, 12, 13, 14, 15, 16, 17. tit. 2. P. 4.
L. 7. tit. 1. P. 4.

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law, this difference and improper division of espousals, *de præsenti* and *de futuro*, are to be met with, by espousals *de præsenti* marriage itself being understood; but that, therefore, it must not be said, that because the consent or agreement of *espousals* precedes matrimony, it follows, that *espousals* are *de presenti* or *de futuro;* because, if it precedes, they cannot be *de præsenti.*

[5] The law referred to, appears to me to declare the reverse, and to say, that an oath taken in the face of the previous promise, as in violation of law (*sin derecho*) is not binding. *Vide* L. 8. tit. 1. P. 4. The foregoing opinion has been since confirmed by the observations of Palacios on this part of the text. He adds, that "espousals are also an impediment to matrimony, but that they are an impediment of an impedient nature (*impediente*), commonly so termed; which means, that if, in defiance of this impediment, marriage should be contracted, it would be contracted unlawfully, but it would not be annulled."

L.3.tit.4.P.4. monstration, or manner, with which the promise was made be fulfilled, L.3. tit.4. P.4.

§ 2. Of marriage. Marriage is the conjunction of man and woman, made with the intention to live always together, and not to separate; observing chastity one to the other, and not cohabiting with any other

L.1.tit.2.P.4. woman or man, living both together, L.1. tit.2. P.4.[6]

Upon this definition are founded the following principles, 1st, That no one who is impotent can contract marriage, procreation being the end of matrimony. 2d, That this perpetual union cannot be dissolved, if marriage be lawfully contracted. 3d. That to render the marriage valid, will and consent must concur in the pronunciation of the promise. 4th, That it be not done clandestinely. 5th, That in order that there may be no separation of marriage, fidelity be observed between man

[45] and wife. 6th, That marriage cannot take place if there exist any canonical or civil impediment.

From the first principle these consequences are deduced, 1st, That the male under fourteen, and the female under twelve, cannot contract marriage, although, if before this age they should

L.6.tit.1.P.4. possess capacity, they may marry[7], L.6. tit.1. P.4. 2nd, Nor the person castrated, unless there arise capacity in him afterwards to

L.4.tit.8.P.4. procreate[8], L.4. tit.8. P.4. 3rd. Nor the impotent from injury or bodily defect, frigidity, weakness, narrowness, and other im-

Tit.8.P.4. pediments treated of in tit.8. P.4.

From the second principle it arises, 1st, That no infirmity or disease which happens after the consummation of matrimony can

L.7.tit.2.P.4. dissolve it, L.7. tit.2. P.4., although the parties may live separate if the disease be contagious, or the church shall adjudge separation[9],

L.7.tit.2.P.4. L.7. tit.2. P.4. 2d. That the wife shall enjoy the same condition, state, and dignity, as the husband, although, before marriage, they may have been unequal in situation. L.7. tit.2. P.4.

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[6] See by this law a person who, after celebration of marriage without consummation or carnal connection, if desirous, is allowed to enter into religious or holy orders; and the woman is permitted to marry another man. Secus, if the marriage hath been consummated *concubitu*.

[7] "But for this," says *Palacios*, "the previous decision (*juicio*) of the church is requisite, which belongs to the bishop." He cites *Benedict* XIV. *Bul. magnæ nobis*, LI. tom.2. bullar."

[8] "This exception," observes *Palacios*, "cannot take place; because, for this capacity to supervene on castration, is repugnant; and that, therefore, L.4. tit.8. P.4., cited in the text, does not make any exception."

[9] *Palacios* states, that separation in respect to cohabitation, from whatever cause it may proceed, must always be effected by the sentence of the church, and not by the mere authority of the parties: he cites *Caval. Inst. jur. can.* part.2. cap.30. § 14. *Berard.* cit. tom.3. disert.7. cap.1.

3d, That the marriage consummated, but not that which is only duly solemnized (*rato*), is indissoluble as to the tie or chain (*al vinculo*), but not with regard to cohabitation, L. 4. tit. 1. P. 4. L. 4. tit. 1. P. 4.

From the third principle it is inferred, 1st, That the consent will not be sufficient without the will to marry [10], L. 5. tit. 2. P. 4. L. 5. tit. 2. P. 4. 2d, That the order of the king for a widow or virgin to marry against her will is not valid, L. 10. tit. 1. Lib. 5. Rec. 3d, That the lord cannot compel his vassal or tenant to marry, L. 11. tit. 1. Lib. 5. Rec. 4th, That this will may be expressed by words, or by signs by those who may be dumb, L. 5. tit. 2. P. 4. 5th, That this consent may be effectuated by a relation or stranger marrying in the name of the party, having a special power for that purpose, L. 5. tit. 2. P. 4. 6th, That this consent is considered wanting if there be an error as to the person, but not with respect to the quality or rank [11], L. 10. tit. 2. P. 4.

L. 2. tit. 2. Lib. 10. Nov. Rec. L. 3. tit. 2. Lib. 10. Nov. Rec. L. 5. tit. 2. P. 4. L. 5. tit. 2. P. 4. L. 10. tit. 2. P. 4.

From the 4th principle we deduce 1st, That secret marriages are forbidden for the just reasons set forth in Ll. 1. and 5. tit. 3. P. 4. as are also those which are celebrated without witnesses, without the permission of the father, mother, or relations to whose charge the woman betrothed is committed [12]; or without giving notice of it in the parish church of which the contracting parties are parishioners [13], L. 1. tit. 3. P. 4. 2d, That besides the ecclesiastical penalties those who marry clandestinely will be also liable to civil ones; and thus not only their children will be illegitimate, L. 3. tit. 3. P. 4., but thus incur the penalty of confiscation of property, banishment [14], and just cause of being disinherited, L. 1. tit. 1. Lib. 5. Rec., which explains what is expressed in Ll. 1. 2. 5. and 6. tit. 1. Lib. 3. *del Fuero real;* which treat of disinheritance in these cases. 3d, That if he

Ll. 1 & 5. tit. 3. P. 4. [46] L. 1. tit. 3. P. 4. L. 3. tit. 3. P. 4. L. 5 t. 2. Lib. 10 Nov. Rec.

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[10] Perhaps, remarks *Palacios*, something else was intended to be said, because there cannot be consent without the will.

[11] And sometimes, also, if there should be an error with respect to the quality or rank, as if believing to contract with the daughter of the prince, it should be afterwards discovered that she were not so, or believing the person to be free, who should afterwards be found to be a slave. Such mistakes show that the consent was wanting. *Palacios* (2).

[12] The want of such permission, observes *Palacios*, would not render the marriage null or clandestine. Clandestine marriage, according to the Council of Trent, is only considered that which is celebrated without the presence of the priest (*parroco*) and two witnesses, sess. 24. *De Reform. Matrim.* cap. 1.

In respect to the necessity of paternal consent in regard to minors, or persons under particular ages in cases of matrimony, the learned professor refers to L. 18. tit. 2. Lib. 10. Nov. Rec.

[13] Publication of banns.

[14] And this punishment extends to the witnesses of such clandestine marriage, *Vide* L. 5. tit. 2. Lib. 10. Nov. Rec.

who lives with his lord marries his daughter [15] without his command, he incurs the punishment of banishment, and she
L.1.t.2.Lib.10. Nov. Rec. that of disinherison [16], L.2. tit.1. Lib.5. Rec.

Fidelity (*lealtad*) is broken, when 1st, Adultery is committed, the punishment whereof is canonical [17], and is treated of with
Ll.8 &19.tit.2., L.2.tit.9.P.4. its form of trial (*su juicio*) in Ll.8. and 19. tit.2. and L.2. tit.9. P.4. 2d, Much more is it broken when either of the married parties shall marry again during the life of the other, which crime is visited by the civil laws with the penalties which we will explain in the last title of our 2d book, and which are
Ll.6, 7, 8.t.28. Lib.12.Nov. Rec. expressed in Ll.5. 6. and 7. tit.1. Lib.5. Rec. [18].

According to the 6th principle the canonical impediments to marriage are comprised under the following [19]; 1st, Carnal or
Ll.12 & 17.t.2. P.4., & tit.6, 7. P.4. spiritual kindred (*parentesco*) [20], Ll.12. and 17. tit.2. P.4. and titles 6. and 7. P.4. [21] 2d, The crime of incest, L.13. tit.2. P.4.
L.13.tit.2.P.4. The death of either of the consorts occasioned or perpetrated
L.14.tit.2.P.4. by the other [22], L.14. tit.2. P.4. 4th, Difference of law or
L.15.tit.2.P.4. religion [23], L.15. tit.2. P.4. 5th, The sacred order, L.16.
L.16.tit.2.P.4. tit.2. P.4. 6th, The solemn vow of religion or chastity,
L.11.tit.2.P.4. L.11. tit.2. P.4. [24]

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[15] Or his female relation (*pariente*) living in the lord's house. *Vide* L.1. tit.2. Lib.10. Nov. Rec.

[16] And her property goes to her nearest relations. *Vide* L.1. tit.2. Lib10. Nov. Rec.

[17] And also civil, adds *Palacios*.

[18] By the first law referred to, the bigamist is to be branded in the forehead with a hot iron, with the letter Q. By the 2d, He is to be condemned to the punishment of treachery (alive), and to be visited with a loss of half his or her property: and by the 3d, To be condemned to the gallies for five years.

[19] But, observes *Palacios*, the canonical impediments are not limited to these alone. For a due understanding of all the impediments, whether natural, canonical, or civil, he adds, that it is absolutely necessary to consult some of the authors on the subject cited. He particularly refers, for what respects civil impediments, to *Selvag. Inst. can. disciplinæ legibus et consuetudinibus Hispan. accomodat.* Tom.2. Lib.2. tit.9.; and to the royal orders posterior thereto.

[20] To the fourth degree, and this impediment holds with respect to adopted relations. By spiritual kindred is meant god-fathers and god-daughters, &c.

[21] Another impediment to matrimony is also noticed by Ll.12. and 17. tit.2. P.4. from motives of public honesty or decency.

[22] Impedes a second marriage on the part of the survivor, it is presumed.

[23] That is as regards a person not Christian. L.15. tit.2. P.4. forbids the marriage of a Christian with a Jew, Moor, or person who is not a Christian; but it allows a Christian to contract espousals with such person, on the condition or covenant, that such infidel will become a convert to Christianity before actual marriage.

[24] L.11. tit.2. P.4. mentions another impediment which, perhaps, ought not to be classed under canonical disabilities: the impediment I allude to, is the marriage of a free person with a slave, unless the party free be cognizant of the condition of the other, and consent to the marriage, or have carnal connection with ditto. *Vide* the law referred to.

The civil impediments are those which proceed from want of understanding [25]; and for this reason madmen, fools, or idiots, &c., cannot contract marriage, L. 6. tit. 2. P. 4. L. 6. tit. 2. P. 4.

The civil laws also prohibit marriage in the direct line, and also in the collateral to the fourth degree. [26] But as relationship or kindred embraces two considerations [27], one with reference to the laws of the laity or common law, and the other with reference to the ecclesiastical law, L. 3. tit. 6. P. 4.; and as in L. 3. tit. 6. P. 4. respect of marriage the rules of the canon law are followed, leaving those of the civil or common law to govern the cases of successions *ab intestato*, it has appeared to us more regular to defer the explanation of the degrees of consanguinity and [47] affinity until we come to speak of these successions.

Matrimonial causes are exclusively of ecclesiastical cognizance [28], and therefore it is not within the province of our institute to touch upon them. See titles 9. and 10. P. 4. Tit. 9 & 10. P. 4.

Marriage being so advantageous to the welfare of the state, our laws favour it in various ways, and thus 1st, The L. 5. tit. 1. lib. 3. Rec. [29] annuls entirely L. 13. tit. 1. lib. 3. *del Fuero real*, and L. 3. tit. 12. P. 4., which prohibited widows from marrying within a year after the death of their husbands, and the civil penalties which they incurred thereby; and L. 4. tit. 1. lib. 5. Rec., reserves to the children of the first marriage the dominion of the property which the wife shall have belonging to the first husband, which reservation is also understood to apply to the husband. 2d, All married persons are exempted from cor- L. 26. tit. 2. Lib. 5. Nov. Rec. L. 3. tit. 12. P. 4. L. 7. tit. 4. Lib. 10. Nov. Rec.

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[25] Palacios says these impediments are natural.

[26] In the direct line they prohibit it, *in infinitum*, *Palacios* (1).

[27] That is in respect of the modes of computation adopted by the civil and canon laws, which differ in respect to transversal or collaterals, but agree in respect of direct ascendants or descendants. *Vide* L. 3. tit. 6. P. 4.

[28] This proposition appears rather too generally expressed; for it would seem from the Proem to the 10th Title of the 4th Partida, that there is an exception, where, after making the general statement in the text, which is also supported by the 9th Title of the 4th Partida referred to, it is said, "unless (*fueras ende*) the impediment concern a matter which belongs to lay jurisdiction or decision, such, for instance, as one with regard to adultery." *Vide* Proem tit. 10. P. 4. On this part of the text, it is observed by *Palacios*, that the causes or trials of those who contract a second marriage during the life of the first wife, are, by a royal cedula of 5th February 1770 (L. 10. tit. 28. Lib. 12. Nov. Rec.), declared exclusively of royal, or lay, and military jurisdiction, according to the persons who offend; but that by the royal decree of 10th December, 1781, [which does not, however, appear in the *Nov. Rec.*], the ecclesiastical jurisdiction may also take cognizance of the mode, and for the reason expressed by the same decree.

[29] L. 5. tit. 1. Lib. 3. Rec., which is L. 26. tit. 2. Lib. 5. Nov. Rec., does not apply; the reference, it is presumed, should be L. 3. tit. 1. Lib. 5. Rec.; or L. 4. tit. 2. Lib. 10. Nov. Rec. which see.

poration or city burthens and offices [30] (*cargas concegiles*) the first four years of their marriage; and, the first two, from royal [31] taxes (*pechos reales*) and tribute money [32] (*moneda forera*), which exemption they will enjoy for life if they come to have six sons, L. 14. tit. 1. lib. 3. Rec. 3d, If they marry before eighteen they may administer their own property when they arrive at that age, L. 14. tit. 1. lib. 3. Rec. 4th, Sons married or [33] betrothed (*velados*) have the usufruct of adventitious [34] property (*adventicios*), Ll. 8. and 9. tit. 1. lib. 5. Rec.

L. 7. tit. 2. Lib. 10. Nov. Rec.

L. 7. tit. 2. Lib. 10. Nov. Rec.

L. 3. tit. 5. Lib. 10. Nov. Rec.

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[30] See Law 7. tit. 2. Lib. 10. Nov. Rec.

[31] Also corporate or city imposts, same Law.

[32] A tribute or tax paid in Spain to the king every seven years, in token or acknowledgment of sovereignty or vassalage. *Vide Cornejo Diccionario Real de España*, Tom. 1. pal. "*moneda forera*."

[33] "and," according to the law cited (L. 9. tit 1. Lib. 5. Rec.; L. 3. tit. 5. Lib. 10. Nov. Rec.) *Palacios* (2).

[34] Property acquired by industry or right of inheritance, independent of paternal fortune. By marriage, a son is emancipated from paternal power. *Vide* L. 3. tit. 5. Lib. 10. Nov. Rec., referred to in the text.

TITLE VII.

OF MARRIAGE PORTIONS (*DOTES*), JOINTURES (*ARRAS*), GIFTS OF HUSBANDS (*DONADIOS DE ESPOSOS*), AND GAINS DURING MARRIAGE, (*GANANCIAS ENTRE MARIDO Y MUGER.*)

Cap. 1. of marriage portions, jointures, &c.

As we have explained in the preceding chapter what mutual promise of marriage is, as being necessary to the understanding what marriage is, in the same way it is necessary here to explain what is marriage portion (*dote*), jointure (*arras*), what donation of husband (*donadio de esposo*), and finally, what are gains (*ganancias*) between man and wife, because they are things which have their proper place, where they serve to complete the due understanding of matrimony.

Dotes and *arras* are given before and after [1] the celebration of matrimony, their ends or objects being, that those who marry may have wherewithal to live and to support matrimony properly and faithfully, *Princip.* tit. 11. P. 4.

§ 1. Of dote and its first division into profecticia and adventicia, L. 1. tit. 11. P. 4.

Dote is the property which the wife gives to the husband on account of marriage, L. 1. tit. 11. P. 4. It is divided first into *profecticia* and *adventicia*. The latter (*adventicia*) is that which the wife herself gives, of what belongs to her, to her husband, or that which her mother gives for her, or any other of her relations, provided they be not those of the right descending or ascending line, but others [2], as uncle, cousin, or other relation, or a stranger. *Profecticia* is the *dote* which the father or grandfather, or other of the ascendants [3] in the direct line give of their own property to the husband, L. 2. tit. 11. P. 4. L. 2. tit. 11. P. 4.

Hence it is in the first place, that if the father owes any thing to his daughter, and gives it as *dote* to the husband, although he pay it from his own property, it will be "*dote adventicia*," because he does not give it as a father, but as a stranger would, L. 2. tit. 11. P. 4. In the second place, for the same reason, that L. 2. tit. 11. P. 4. will be *dote adventicia* which is assigned by a stranger and given to the father, in order that he may deliver it to the daughter, L. 2. tit. 11. P. 4. L. 2. tit. 11. P. 4.

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[1] But *vide* order in council, 16th September 1822, on this subject, Appendix K.

[2] Collaterals.

[3] In the right paternal line.

§2. Of the second division of dote into necessary and voluntary.

Dote is divided in the second place into necessary and voluntary. The first is that which the father is obliged [4] to give to his daughter who is under his power. Voluntary is that which the wife gives of her own accord, or any other person in her name, L. 8. tit. 11. P. 4.

L. 8. tit. 11. P. 4.

§ 3. Of the modes in which DOTE may be established.

Dote may be established in many ways. 1st, By solemn promise, which is called in Latin *Stipulatio*; as, for instance, if a man should say to the woman with whom he would marry, "Do you promise to give me in *dote* such a vineyard belonging to you, or such an estate, or so many maravedis which such a man has to give you?" and she should answer "I promise." 2d, By mere or simple promise, or *pollicitatio.* [5] 3d, By promising to give it to the husband, or to any other in his name, for in this case it is the same as if the husband were to receive it, and he is bound to make it good if he accepted and approved the promise, Ll. 10. and 13. tit. 11. P. 4. 4th, *Dote* may be constituted purely, or absolutely and conditionally; and it is to be observed, that the condition, "*if the marriage be fulfilled,*" although it may not be expressed, must be always understood. 5th, *Dote* may be given immediately, after being promised, or at a stipulated time (*á plazo*). The former is called giving *dote* in hand or down (*dar la dote á mano*), and of this species is that which at the time or act of promising is delivered to the husband, or to some other in his name appointed or approved by him. Of this description also is the *dote* which the husband gives to the wife of a debt she owed him, saying to her, "Do you acknowledge or agree that you give me in *dote* so many maravedis, or such a thing that I was to have paid you?" and she answers, "I acknowledge or agree and consider it as firm, and that I am paid as though I had received the money." The same holds if the husband were a debtor to another, and his creditor should assign as dote to the wife the debts due to him by the husband, L. 13. tit. 11. P. 4. To give *dote* at a stipulated or future time (*á plazo*), is to assign a day and time certain by which it is to be given. A day certain is, when the *dote* is promised on a day appointed; and time certain is, when it is promised to be given, for instance, within the year; and when

Ll. 10 & 13. tit. 11. P. 4.

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L. 13. t. 11. P. 4.

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[4] That is, I apprehend, if she hath no property of her own for the purpose, and he hath the means of giving her a portion. See L. 8. tit. 11. P. 4. referred to in the text.

[5] A gratuitous promise, or *nudum pactum*, and here means a promise, accompanied with delivery of the *dote*, or gift. See L. 10. tit. 11. P. 4. referred to in the text.

promised in a time certain, as within the year, this must begin to run, or be counted from the day of the wedding[6], L. 12. tit. 11. P. 4. L.12.t.11.P.4.

§ 4. Of the things which are given in dote or by way of portion.

The things which are assigned or given in *dote* are real[7] or personal (*raices ó muebles*), L. 14. tit. 11. P. 4. *Dote* may also consist of a debt in favour of the wife, and in order that this species of *dote* may be valid, it is necessary that the debtor acknowledge the debt, and promise to pay it to the husband, L. 15. tit. 11. P. 4. These things are either valued, or are not valued. *Dote* will be valued, when he who gives it says, "I give you such a thing in *dote*, and I value it at so many maravedis." It will be not valued when he only says, "I give you such an estate or property in *dote*." *Dote* that is valued possesses this privilege, that restitution or relief against injury suffered by error in its valuation may be obtained at all times, as well by him who gives, as by him who receives it, L. 16. tit. 11. P. 4. L.14.t.11.P.4. L.15.t.11.P.4. L.16.t.11.P.4.

§ 5. Of the axioms upon which dote is founded.

From all that has been said, the following axioms may be deduced, 1st, The father and grandfather are bound to portion (*dotar*) their daughter and granddaughter according to their means. 2d, *Dote* is assigned in order the more easily to support the charge or burthen of matrimony. 3d, The husband is owner of the *dote* during marriage, L. 7. tit. 11. P. 4. 4th, On the dissolution of marriage it ought to return to the wife, or to whomsoever it may belong[8], L. 7. tit. 11. P. 4. L.7.t.11.P.4. L.7.t.11.P.4.

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From the first axiom it results, 1st, That the father, when he marries his daughter, must portion her whether she have property of her own or not, L. 8. tit. 11. P. 4. 2d, That if the father do not, he may be compelled thereto by the judge of the place in which he may be, L. 9. tit. 11. P. 4. 3d, That the grandfather is not obliged to portion his granddaughter, who is under his power or protection (*en su poder*), if she have property of her own for the purpose, L. 8. tit. 11. P. 4. 4th, That under the like circumstances, the great-grandfather ought to portion his great granddaughter under his power or care[9], L.8.tit.11.P.4. L.9.tit.11.P.4. L.8.tit.11.P

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[6] And not from the period of the promise. *Vide* law referred to in the text.

[7] It may be here added, that in the case of a female minor, she is not allowed to assign or deliver to husband, *dote*, in regard of real property, without judicial knowledge and consent, in addition to the authority or consent of her guardian; but she is permitted to do so, in respect of personal property, having only the consent of her guardian.

[8] This applies equally to *arras* or jointure, or *donatio propter nuptias*, which will go to the husband, or his heirs, on the dissolution of the marriage.

[9] *Palacios* here observes, that the father and grandfather are bound to portion their grand, or great grand-daughter, whom they shall have under

L.8.tit.11.P.4. L. 8. tit. 11. P. 4. 5th, That the mother cannot be compelled to portion her daughter when the father has wherewith to do it [10], but she is not deprived of the power of doing so voluntarily,

L.9.tit.11.P.4. L. 9. tit. 11. P. 4. 6th, If the mother is a heretic, Jewess, or Moor, she shall be compelled to portion her Christian daughter,

L.9.tit.11.P.4. L. 9. tit. 11. P. 4. 7th, The same obligation is imposed on the guardian, or person who may have under his power (*en su poder*) any woman; and he shall be compelled to portion her in proportion to her means, and the condition or rank of the person with whom she marries; in which case, if the guardian should give a greater portion of what the woman possesses, the

L.9.tit.11.P.4. excess will not be valid, L. 9. tit. 11. P. 4.

The excess (of *dote* &c.) which was observed to be given on the marriage of daughters, rendered it necessary to establish, 1st, That he who may have from two hundred to five hundred *thousand* maravedis of *rent* or *income* can only assign to each of his daughters a portion of a million of maravedis: he who may have less, only six hundred thousand: he whose income should exceed five hundred thousand up to one million and four hundred thousand maravedis, may only give a million and a half, and he who may have a rent or income of a million and a half maravedis or more may assign as a portion to each of his daughters one year's rent or income and not more; so that

L.6.t.3.Lib.10. Nov. Rec. it cannot exceed two millions maravedis, L. 1. tit. 2. Lib. 5. Rec. 2d, This is so firmly established that Philip the 4th declared null the dispensations which the council might make or grant

L.7.t.3.Lib.10. Nov. Rec. contrary to the tenor of this law, L. 5. tit. 2. Lib. 5. Rec. and

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their power, if she be poor, according to L. 8. tit. 11. p. 4. cited in the text; but that as, at present, the *patria potestad*, in respect to the grand and great-grand children, no longer exists in the grand and great-grandfather, by reason of their sons having withdrawn from the paternal power, in consequence of having married (L. 8. tit. 1. Lib. 5. Rec. L. 3. tit. 5. Lib. 10. Nov. Rec.), the obligation to portion them no longer exists; unless we adopt the opinion of those who hold that the fathers, and in default of them, the paternal grandfathers, are bound to portion their daughters or grand-daughters, although they may not be under their power, on the ground that this is more a natural than a civil obligation. The learned professor refers to *Covarrub.* P. 2. *de matrim.* cap 8. § 6. n. 15.

[10] The law (9. tit. 11. P. 4.) referred to in the text, makes no such distinction; but states generally, that the mother cannot be compelled to portion her daughter. L. 4. tit. 3. Lib. 10. Nov. Rec. which is L. 8. tit. 9. Lib. 5. Rec. does say, that if the father alone shall, during marriage, give a portion, or make a donation, *propter nuptias*, to a common child of such marriage, such portion or donation shall be paid out of that particular species of property called *gananciales*, which will be explained hereafter, provided there shall exist such *gains*; but that if there be no such description of property of the marriage, then such portion or donation shall be paid out of the particular or exclusive property of the husband, and not of the wife. See the law here referred to.

its observance hath been repeated in the ordinance respecting the dresses of women, *de trages* de 1723, al cap. 24. and 25. 3d, That the ladies of honour cannot have more than a million of maravedis[11] *en dote*, L. 5. tit. 2. Lib. 5. Rec. 4th, That a third or fifth of one's property cannot be promised in dote. L. 1. tit. 2. Lib. 5. Rec.

L. 7. t. 3. Lib. 10. Nov. Rec.

L. 6. tit. 3. Lib. 10. Nov. Rec.

From the second axiom it follows, 1st, That every thing may be given in *dote* which can be useful to the husband, Ll. 14. 15. 21. and 22. tit. 11. P. 4. 2d, and therefore the promise of dote to be given at the death of the husband will not be valid, L. 12. tit. 11. P. 4. 3d, But if any other except the wife promise the *dote* at a time uncertain it will be valid, as the person promising it may happen to die during the marriage, and the *dote* may be useful[12], L. 12. tit. 11. P. 4. 4th, That *dote* must be proportioned to the riches of the wife, and the condition or rank of the husband, L. 9. tit. 11. P. 4.

Ll. 14, 15. 21, 22. tit. 11. P. 4.

L. 12. tit. 11. P. 4.

[51]

L. 12. t. 11. P. 4.

L. 9. tit. 11. P. 4.

From the third axiom it arises, 1st, That the husband acquires and gains the fruits or produce of *dote*, when once the marriage has taken place[13], Ll. 18. and 25. tit. 11. P. 4. 2d, That the decrease or increase of *dote valued*, caused *after* and not *before* the wedding, appertains to the husband, L. 18. tit. 11. P. 4. 3d, That the fruits or produce enjoyed before the wedding are considered an increase of *dote*, although equity directs that the husband who maintains and watches over the wife during the time that he is waiting, by reason of her imperfect age, to marry her, is not bound to consider or reckon as an increase of *dote* the *fruits* which he may have received before marriage, L. 28. tit. 11. P. 4. 4th, That the increase or decrease also of all the *dotal* property which has been counted, weighed, and measured,

Ll. 18 & 25. tit. 11. P. 4.

L. 18. t. 11. P. 4.

L. 28. t. 11. P. 4.

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[11] And a certain sum of money which the queen of Spain gives her maids when they marry (*y la saya*). *Vide* L. 7. tit. 3. Lib. 10. Nov. Rec.

[12] *i. e.* to the husband. The example put in the law referred to in the text, is of a person promising *dote* to be paid at the time of the promiser's death; for his death may take place before that of the husband. This possibility makes the promised portion, or *dote*, valid.

[13] And possession of the *dote* hath been delivered to him. See L. 25. tit. 11. p. 4. referred to in the text, which law qualifies, in regard to the produce or increase of slaves, the position laid down in the text. *Palacios* adds to the requisite already mentioned, that the marriage must have been celebrated, and that the husband must sustain the burthens of the marriage, as laid down in L. 25. tit. 11. P. 4. He observes, that this must be understood without prejudice to what will be afterwards said in this title, and with attention to Ll. 4 & 5. tit. 9. Lib. 5. Rec. (Ll. 3 & 5. tit. 4. lib. 10. Nov. Rec.), which enact, that the fruits (*frutos*) received during marriage, whether arising from property belonging to the husband, or to the wife, are divided, or appertain, in equal portions, to both.

L.21.t.11.P.4. appertains to the husband, L.21. tit.11. P.4. 5th, But of that not valued, which is received as equivalent in kind, as cattle, &c., the loss or the increase appertains to the wife [14]; although the husband is obliged to supply the number of those that may die from those that shall be born, Ll.18. & 21 tit.11. P.4. 6th, That if the election be given to the husband of returning the *dote*, or its value, the injury or improvement shall be the wife's, if the husband shall elect to return the thing [15]; and the same if the election be left to the wife, L.18. tit.11. P.4. 7th, That the increase of a quarry, not valued, is excepted, which appertains to the husband, L.27. tit.11. P.4. 8th, That if *dotal* property, not valued, were lost by judgment at law, and the wife hath bound herself to warranty (*salio á eviccion*), she ought to be responsible for the loss; but if she gave it in good faith, without making herself responsible for it, the loss or injury will appertain to the hushand [16]: and in regard to *dote* that is valued, the wife must give him another thing equal in value, L.22. tit.11. P.4. 9th, That it is the duty of the husband to recover the *dote* [17], L.15. tit.11. P.4. 10th, Except that it be a debt due by the wife's father, grandfather, or great grandfather [18]; in which case, the husband is not responsible for the risk which might ensue, if any of them should arrive at a state of poverty, on account of his not being able to enforce the recovery of it from them [19], L.15. tit.11. P.4. 11th, But if it were the debt of a stranger, and the husband were able to compel the payment of it in time,

Ll.18 & 21. tit.11.P.4.

L.18.t.11.P.4.

L.27.t.11.P.4.

L.22.t.11.P.4.

L.15.t.11.P.4.

L.15.t.11.P.4.

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[14] The law (L. 21. tit. 11. P.4.) referred to in the text, says, that the husband shall enjoy the fruits or increase of the cattle, subject to the condition of supplying the numbers which may die, from those which may be born. *Palacios*, on this part of the text, observes, that the increase or decrease, improvement or deterioration of *dotal* property appertains to the husband when it has been delivered to him valued, or when it is delivered in any of those things which consist in weight, number, or measure; and that the same appertains to the wife, when such property hath not been delivered to the husband valued, or under appraisement. The learned professor adds the substance of what is stated in the first part of this note.

[15] *Ex. gr.* a house. Unless, says *Palacios*, referring to L.18. tit.11. P.4. it should be proved that the loss had arisen by the fault of the husband.

[16] The loss or risk, according to L.22. tit.11. P.4., would belong to the wife; because, although she may not be bound, in this case, to the warranty of the *dote*, the injury which she suffers in its loss, is greater than that which the husband suffers; and what is more, without this explanation, it would, perhaps, be supposed, that the husband was bound to the warranty (*saneamiento*) of the *dote; Palacios* (5).

[17] That is, *dote* which consists of the assignment of a debt that was due to the wife. See L.15. tit.11. P.4. quoted in the text.

[18] *Palacios* states, that in this case, also, it is competent to the husband to recover the *dote*, although it is true, that if he does not recover it, he is not responsible, for the reason assigned by the text. He refers to L.15. tit.11.P.

[19] On account of the relationship of such persons.

he will be responsible, although the stranger should be reduced to poverty; and the wife shall be entitled to her action against the husband for it, if he should not recover it, L.15. tit.11. P.4. 12th, This is understood if the debt due by the stranger were an onerous debt (*de apremia*); because, if it arose from mere voluntary obligation; as, for instance, if any one should have promised the wife to give her any certain thing, and the husband neglected to ask for it at a time when the stranger was able to pay it, then the prejudice or injury shall belong to the husband; and if it is a thing not certain or specific, the husband is not obliged to recover it; and, consequently, is not responsible for the damage which may result, L.15. tit.11. P.4. *ad fin.* L.15.t.11.P.4. L.15.t.11.P.4. *ad fin.*

From the fourth axiom it follows, 1st, That the husband cannot alienate, sell [20], nor mispend the *dote*, L.7. tit.11. P.4. 2d, But if he should, and the wife fear that he may be reduced to poverty, she will have a right to require security from him, and an allowance of aliment, [21] L.29. tit. 11. P.4. L.7.tit.11.P.4. L.29.t.11.P.4.

§ 6. Of the restitution of *dote*.

The restitution of *dote* takes place in three cases, 1st, By the death of the wife. 2d, By reason of the existence of an impediment, which may dissolve the marriage. 3d, By divorce. In the first case, if the wife dies without children, the *dote* called *profecticia* is restored to the father; and if it is *dote* called *adventicia*, to the heirs of the wife; observing, in this case, the covenants of the deed of *dote*, or marriage articles (*escritura de dote*), L.30. tit.11. P.4.; but if she leaves children, the husband [22] re- L.30.t.11.P.4.

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[20] He can dispose of *dote* in money, &c., but the amount must be returned out of his property, after the dissolution of the marriage. See L.7. tit.11. Part 4.; and also L. 21. *ibid. Palacios* has a note (1) here to the above effect. He says, that when the *dote* is comprised of things consisting of weight, number, or measure, and when it is valued under an appraisement which produces sale or transfer, the husband may aliene it; for in such cases, an irrevocable dominion in the *dote* is transferred to him, with the obligation of restoring its value, or the quantity, if they are things which consist of weight, number, or measure, after the dissolution of the marriage. He refers to Ll. 7–18. & 21. tit.11. P.4.

[21] This Law (29. tit.11. P.4.) goes further, and says, that if the husband badly administers the *dotal* property, or be a gamester, &c., and the wife fears he will dissipate it, she may judicially require that he be compelled to deliver it up to her, or to give security that he will not dispose of it; or to deliver it into the possession of a third person, to take care of, and to apply the profits to their support or maintenance; but it seems she cannot demand the *dote*, being thus taken out of the possession of her husband, if his poverty or distress were occasioned by mere misfortune, and not by culpability or improper conduct. See the law referred to.

[22] Or the wife, as to *donatio propter nuptias* and *arras*, if she is the survivor. See L.23. tit.11. P.4. *Palacios* observes in respect to this enjoyment by the husband of the usufruct of *dotal* property after the death of the wife,

mains in the enjoyment of the usufruct, and the dominion (*la propriedad*), passes to them. If the wife dies without making a testament, and without father or relation who may inherit from her, the *dote* escheats to the crown (*a la real camara*), L.12. tit.8. Lib.5. Rec. which annuls or alters [23] L.23. tit.11. P.4. In the second case, if the *dote* is "*profecticia*," it is delivered to the father [24]; and if "*adventicia*," to both [25]; and if the father be dead, to the daughter, whether she has children or not, L.30. tit.11. P.4. In the third case, if the *dote* is *adventicia*, it is given to the daughter, and not to her father, although he may be living, L.30. tit.11. P.4.

L.1.tit.22. Lib.10. Nov. Rec.

L.23.t.11.P.4.

L.30.t.11.P.4.

L.30.t.11.P.4.

Dote consisting of real property is restored immediately on the dissolution of marriage; and if it consists of personal property (*muebles*) restitution shall be made of it within a year, unless there be minor children [26] when the surviving consort is not obliged to deliver up the *dote* until the children arrive at the age of majority; but he or she shall be bound to maintain and educate them, and not to alienate nor mispend the *dote*, L.31. tit.11. P.4.

L.31.t.11.P.4.

[53] At the time of this restitution, the husband may require to be reimbursed the expenses which he has laid out on the *dotal* property which have proved beneficial; but not those which shall serve for mere ornament, L.32. tit.11. P.4. which is un-

L.32.t.11.P.4.

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leaving issue, or this species of tenancy by the *curtesy*, that it only lasts while the children are under the paternal power, L.5. t.17. P.4.; for that by going, or being absolved, from it, they acquire the property and the usufruct of *adventitious* property, L.9. tit.1. Lib.5. Rec. [L.3. tit.5. Lib.10. Nov. Rec.] *Greg. Lopez.* gl.6. L.15. tit.18. P.4.; but that if the release be by emancipation, the father may retain the half of the usufruct, L.15. tit.18. P.4.

[23] Only in this last respect, L.23. tit.11. P.4., having, in the case of husband or wife dying intestate, and without heirs, given the survivor of them the *dotal* &c., property of the other. *Palacios* says, some authors are of opinion that L.12. tit.8. Lib.5. Rec. [L.1. tit.22. Lib.10. Nov. Rec.], does not repeal or alter L.23. tit.11. P.4., and that, therefore, in default of relations, the wife and the husband ought to inherit from each other according to the survivorship respectively. The learned Professor adds, that he dares not go this length, but he will remark, that L.23. tit.11. P.4., directly, positively, and expressly calls the surviving consort to the inheritance of the property of the one deceased, in default of heirs or relations; and that neither L.12. tit.8. Lib.5. Rec., nor the royal order (Reglamento), of 1788, in regard to escheats, excludes husband and wife from this benefit of reciprocal inheritance. Among those authors who entertain the foregoing opinion, the learned Professor might have mentioned the respectable authority of Azevedo. *Vide* his Com. on the Law of the Rec. under consideration.

[24] *i. e.* to the father of the wife.

[25] *i. e.* to the wife and to her father. *Palacios* says, if *adventitious*, it is delivered to the daughter alone; if *profectitious*, to the father and daughter jointly. He refers to L.30. tit.11. P.4.

[26] Of the marriage.

derstood to regard *dote not valued*; for with respect to that which is valued, restitution is made by the return of its value, L. 26. tit. 11. P. 4. And if the *dote* was of things numbered, weighed and measured, the same quantity ought to be returned, L. 25. tit. 11. P. 4. L. 26. t. 11. P. 4. L. 25. t. 11. P. 4.

In this restitution is also discounted, in favor of the husband, the part of the [27] fruits or produce collected, or to be gathered of the *dotal* property in the last year of the dissolution of marriage in proportion to the months and days that it continued, L. 26. tit. 11. P. 4. and never shall the husband or his heirs be compelled to restore this *dote*, but in as far as they are able, and they shall not be deprived of aliment thereby [28]; although the judge ought to secure its restitution at stipulated periods of payment, or by some other way, L. 32. tit. 11. P. 4. But in no case shall the action to recover the *dote* be extinguished or destroyed, although the capital of it be lost and [29] the property and estate of the husband, as observed by *Ayora de Partitionibus*, part 1. cap. 7. n. 5. L. 26. t. 11. P. 4. L. 32. t. 11. P. 4.

The husband is not bound to restore the *dote* if he shall gain it by any of those three modes, viz.: — by covenant or compact[30], by adultery, or by custom of the place where the marriage took place, L. 23. tit. 11. P. 4.; and this custom shall be of such force and effect, that although the married couple may go to live in another country where it does not prevail, it shall be, nevertheless, observed, This is understood, provided there be no children [31], L. 24. tit. 11. P. 4. L. 23. t. 11. P. 4. L. 24. t. 11. P. 4.

The woman is accustomed to bring, beside her portion (*dote*), other property which is called *paraphernalia*[32], and which is or

Cap. 2. Of the paraphernalia.

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[27] *Emblements.*

[28] This, observes *Palacios*, is not understood in respect to all the heirs of the husband, but only in regard to the children when they have to deliver the *dote* to their mother on account of their father. He refers to L. 32. tit. 11. P. 4.

[29] This conjunction is introduced to make the sense complete, although it is not found in the text.

[30] This covenant must be reciprocal as to its effects on husband and wife, with respect to *dote*, and *arras*, or donation of the husband.

[31] And L. 23. tit. 11. P. 4. *Palacios* adds, that if there be children of the marriage, they, in the cases mentioned in the text, will have the property; and the father, or the mother, who shall survive, &c., will have the usufruct of it for life.

[32] The meaning attached to this word, which is of Greek origin, παρα præter, and φερνα, dos: *i. e.* all things which a woman brings to her husband besides her dowry or portion, by English law is much more limited. See the observation on this word, as regards the laws of England, in *Wood's Inst. Civ. Law*, b. 1. ch. 2. p. 123., fol. edit. 1730. The Translator, from the fear of making his notes too extended, has refrained from more frequent quotations from the learned Civilian in the progress of this translation: he here begs to

are, the property and things whether personal (*muebles*) or real (*raices*) which wives retain for their separate use, and which are
L.17.t.11.P.4. not accounted part of the portion or *dote*, L.17. tit.11. P.4. From this definition it follows, 1st, That if the wife gives to the husband this property, with the intention that he may have the dominion (*señorio*) of it, he shall possess it during marriage; and if she should not do this expressly in writing[33], the dominion of
L.17.t.11.P.4. such property will be always in the wife, L.17. tit.11. P.4.
[54] 2d, That if this property should be sold with the approbation of the wife, its price or value shall not be deducted at the time of separation; but otherwise when it hath been converted to the particular benefit of the husband, although the wife should consent, unless the husband be so poor, that it be necessary to sell it to maintain himself. *Ayora*, part. 1. cap. 8. nn. 2, 3, and 4. 3d. That if it be sold without the assent of the wife, she will have her action or remedy against the purchaser, and if not, she shall take the value from the fund of property (*cuerpo de los bienes*) before partition be made. *Ayora*, part. 1. cap. 8. n. 5. 4th, That the property of the husband is always bound or liable for the prejudices and injury which he shall cause to the *paraphernalia*
L.17.t.11.P.4. [34] of the wife, L.17. tit.11. P.4.

Cap. 3. Of jointure (arras). By jointure [35] (*arras*) is understood the donation which the

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make a general reference to this excellent elementary work on the civil law; and, without presuming to pronounce a judgment on the comparative merits of the several learned works of this kind, he may venture to state, that the English student of the laws of Spain, will find his course of study of those laws, at least of those which form the compilation called *Las siete Partidas*, facilitated by a previous attentive perusal of *Wood's Institutes of the Civil Law*. *The Analysis of the Roman Civil Law*, by *Dr. Halifax*, and a *Compendious View of the Civil Law*, by *Dr. Browne*, may be also read with advantage.

[33] *Palacios* observes, that L. 17. tit. 11. P. 4. (cited in the text), does not say, that a written instrument is necessary to transfer the dominion, or fee simple, of property called *paraphernalia*, during marriage. That in whatever way, therefore, it duly appears the gift was made by the wife, with this intention, the transfer would be complete; and that this is what is inferred from the law cited.

[34] Equally with respect to *dote; bienes parafernales* being entitled to the same privilege as *dote:* and the tacit obligation or lien which the law gives the wife on the property of her husband, for her *dote* and *parafernales*, attached the moment of their receipt by the husband. See L. 17. tit. 11. P. 4.

[35] This word seems more nearly to express the meaning of *arras*, than any other that can be substituted. *Lord Coke*, 1st Inst. 36, defines jointure, "a competent livelihood of freehold, for the wife, of lands and tenements, to take effect in profit and possession, presently after the death of the husband, for the life of the wife at least." *Arras*, may be defined, "a dowry assigned to or settled upon a wife, by her husband, for her maintenance after his death, which cannot exceed, in value or amount, the tenth part of his fortune or property. Jointure before marriage, in England, is in lieu and exclusion of dower at common law; and *arras*, excepting in so far as its promise or settle-

husband makes to the wife, by reason or on account of marriage, L. 1. tit. 11. P. 4. and also in consideration of the *dote* which he L. 1. tit. 11. P. 4.

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ment seems optional or voluntary with the husband, more resembles the English dower than any other description of right appertaining to the wife, in regard of the property of her husband, under the laws of Spain; even more so than does her right in regard of that species of property called *ganancial*, which will be explained, in course, in the text; to one-half of which last-mentioned property, subject to the payment of one moiety of the debts contracted *during* marriage by husband and wife, the wife is entitled, independently, however, of her *arras*, at the death of the husband, if she survives him: the *ganancial* property may, nevertheless, be disposed of by sale, or other onerous transfer, by the husband, during marriage, without the consent of the wife; except, indeed, it be done *con malicia y en fraude* of her *ganancial* rights. Such rights, it is to be observed, only attach on property acquired by husband and wife during marriage, by purchase, in the vulgar acceptation of the word, or by other onerous title; but not on property brought into marriage by either party, nor on that acquired, by either consort, by inheritance or succession, devise or gift. On reference to the laws of the 11th Title, 4th Partida (Ll. 1–7–23, &c.), which treat of the subject, the reader would suppose, that *donatio propter nuptias*, and *arras*, implied one and the same thing; and that the amount of *dote* brought by the wife into marriage, was, of necessity, met by a corresponding assignment to her of property on the part of her husband, in recompense of, and as a security for, the *dote* of the wife; he having the usufruct of both, but without power of alienation of either, during marriage, for the support of the marriage, or the maintenance of both consorts, and the children of the marriage; such donation to revert to the husband, or to go to his heirs according to the rules of succession, in the same way as the *dote* was to revert to the wife, or to go to her heirs, according to the like rules of succession, after the dissolution of marriage. This supposition is, however, removed on reference to the laws of the *Fuero Real*, and of the *Recopilacion*, or the *Novisima Recopilacion* of the Laws of Castille, and to able commentators on the laws of Spain. It is matter, it must be confessed, of laborious concern to the student, or practical professor of these laws, whose anxiety for the best illustration of his subject, is apt to induce a reference to these very learned and ingenious commentators, to find the great number, or vast variety of their elaborate works, often equalled by the diversity of conflicting opinions they offer with respect to the same points; which, if they do not perplex and mislead, just leave the enquirer, after a laborious research, where he was before he looked into them. The learned *Antonio Gomez*, in his annotations on Ll. 50, 51, 52 & 53, *Tauri*, speaking of these matrimonial donations, *arras*, &c., says, n. 1. "in jure nostro diversis modis fit mentio de his quæ dantur ab uno conjugum alteri, inter quæ est maxima diversitas et difficultas," &c.: he divides these gifts into six sorts. "1. Donatio quæ vocatur *sponsalitia largitas*. 2. Donatio quæ vocatur *propter nuptias vel ante nuptias*. 3. Donatio quæ vocatur *arrha*. 4. Donatio quæ vocatur *dos*. 5. Donatio pura et simplex quæ vocatur *donatio* inter virum et uxorem. 6. Donatio reciproca ab ipsa lege, medietatis lucrorum acquisitorum constante matrimonio." With respect to the second sort, *donatio propter*, or *ante nuptias*, he says, n. 9.: "Et certe materia hujus donationis est satis dubia et incognita, et vix potest ejus virtus et effectus intelligi: et in ea aliquantulum insudavi, &c." It is to be regretted, that the modern laws of the *Rec.* or *Nov. Rec.* have not more clearly solved or removed the difficulty. The 3d Title of the 10th Book of the Nov. Rec. embraces "*Arras, dotes, y donaciones propter nuptias:*" but does not seem to contain any laws strictly applicable to donation *propter nuptias*, let alone to point out any difference between it and *arra*. Law 4th of the title cited, does certainly make a regulation as to the property of husband and wife, out of which shall be paid the *dote*, and *donatio propter nuptias*, assigned by them to daughters and sons of the marriage; but there is no statutory provision, that I have been able to discover, which marks, or points out, the separation or difference between the two descriptions of gifts, called *donationes propter nuptias*, and *arras:* they

L. 2. tit. 11. P. 4. receives, L. 2. tit. 11. P. 4. Hence it follows, 1st, That as the *dote* may be given before or after [36] marriage so may also *arras*,

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were confounded or described as one and the same thing, as has been beforementioned, by the laws of the 11th Title of the 4th Partida. The laws of the *Fuero Juzgo* would seem to confound them also; the 4th law, art. *Donac.* of which says; the property which the husband promised to the wife in *arras*, shall go, after her death, to the sons or children (of the marriage); and if there should be none, to the heirs of the husband. L. 1. tit. 2. Book 3, of the *Fuero Real*, limits the amount to be given by the husband to the wife, in *arras*, to the tenth part of his property; and seems, for the first time, to deprive the husband of his dominion in and to *arras*, by extending to the wife both an alienable (if the word may be allowed) and a testamentary disposition, over it, to his prejudice; although it directs such property, or *arras*, to revert to the husband, or to go to his heirs, in case the wife should die intestate, without children of the marriage: but this may be called an alteration in the law, without any distinction, as between *arra*, and *donatio propter nuptias*. The 5th law of the same Title and Book of the *Fuero Real*, gives the woman, *espoused* with respect to *arras*, "*ó donacion*," (to use its own words,) an advantage over the man affianced, in case of death, before consummation of the marriage: and lastly, L. 2. tit. 3. Lib. 10. Nov. Rec., completely divests the husband of all right of property, or dominion, in or to the *arras*, which he himself hath promised or given to the wife; he still being allowed to enjoy the usufruct of it, in common with that of *dote:* but even here the reader sees no declaration, nor specification, as to any separation or difference of meaning having taken place between donations, *propter nuptias*, and those formerly expressed by the synonymous term *arras*. The difference between them is noticed by the able commentator, *Gregorio Lopez*, on the Laws of the *Partidas*, Gl. 4. L. 1.; Gl. 6. L. 7.; Gl. 2. L. 23. tit. 11. Part 4.; & Gl. 2. L. 87. tit. 18. P. 3.: who, however, says, that *arras* have succeeded in the place of donations *propter nuptias*, and that the latter are now called in Spain *arras*. It has been before stated, in this note, that *donatio propter nuptias*, and *arra*, are synonymously used in the Laws of the 11th Title of the 4th Partida. Law 87. tit. 18. Part 3, gives the form of an instrument of settlement of *arra e donacion*, from husband to wife. The settlement is upon the wife, and the children of the marriage; but no provision is made in regard of the property, in the event of there being no such children at the death of the wife. The 86th law of the same title and partida, gives the form of an instrument of *dote*, which is conformable with the rules respecting *dote*, laid down in the laws of the 11th title of the 4th Partida. But the form of the instrument respecting *arra*, in L. 87. before mentioned, seems silently to depart from the rules of reciprocity or equality between *dote* and *arra*, or *donatio propter nuptias*, as before recognised in the laws of the 11th title of the 4th Partida. The difference between *donatio propter nuptias* and *arra*, is also noticed by *Antonio Gomez*, in his Commentary on Ll. 50, 51, 52. & 53. *Tauri*, before mentioned, n. 9, 10, 11, 12, 13, 14., and see also n. 15. 16. *ibid.;* and also by the learned *Azevedo* on Ll. 2, 3, & 4., tit. 2. Lib. 5., *Recopilacion;* and likewise by the not less learned *Covarrubias*, in his most able work, Tom. 1. Pars 2. *De Matrimonio*, cap. 3. § 7. p. 188, n. 14, & 15.; and it is stated by the three last authors, that the gift called *donatio propter nuptias*, is in disuse, or obsolete in Spain. This note has been extended much beyond its desired length, and the Translator must beg to refer the reader, who is disposed further to investigate the subject, to the learned authors whom he has consulted and cited.

[36] I should apprehend, from the now existing difference between *arra* and *donatio propter nuptias*, that the promise, or settlement of *arra*, to be valid, must be made before marriage, although it may take effect on property (not exceeding the tenth of its value, at the time demanded by the wife) to be acquired after marriage. *Vide Gr. Lopez.* Gl. 4. L. 1. tit. 11. p. 4. & L. 2. tit. 2. Lib. 3. *Fuero Real. Ayora*, P. 1. chap 7. n. 18. quoted in the text. Since this note was written an order in council, 16th September 1822, bearing on the subject, has been passed: *vide* Appendix K.

L. 1. tit. 11. P. 4. 2d, That the express covenant[36] in the deed of *dote* or marriage articles is understood, also with respect to *arras*, L. 23. tit. 11. P. 4. 3d, That in order to prevent an excess in the assignment of *arras*, the husband is prohibited from giving more than a tenth of his property, L. 1. tit. 2. Lib. 3. *Fuero Real;* so that if more be given, it will not be valid, and the relations may demand or sue for the surplus, L. 1. tit. 2. Lib. 3, *Fuero Real.* 4th, That this law cannot be renounced, L. 2. tit. 2. Lib. 5. Rec. 5th, That if *arras* be promised from the present and future property of the husband, the gift of *arras*, or the settlement will be valid although it may not comprise the tenth of the present property, if at the time of the separation or dissolution of marriage, *ganancial* property, or property that was inherited is found which may suffice to authorise the said tenth, L. 2. tit. 2. Lib. 3, *Fuero Real: Ayora*, Part 1. Cap. 7. n. 18. 6th, That if the husband promises *arras* out of property he has in possession, which should afterwards turn out not to be all his, but which was possessed by him with good faith, he shall only be obliged to pay the tenth of the property which may be really his, *Ayora*, part 1. cap. 7. N. 23. 7th, That if the husband is imposed upon (*padece engaño*) with respect to the *dote*, he may repair the fraud and indemnify himself for it out of the *arras*[37], *Ayora*, part 1. cap. 7. N. 34. 8th, That the wife dying without children, may dispose of the *arras* as she pleases[38], L. 1. tit 2. Lib. 3. *Fuero Real.* 9th, That the wife has a right to exact the *arras* only promised, L. 1. tit. 2. Lib. 3. *Fuero Real.* 10th, That if the wife dies leaving children by the husband, she may dispose of one-fourth of the *arras*, and the remaining three-fourths shall go to the children[39], L. 1. tit. 2. Lib. 3. *Fuero Real.* 11th, But that if she dies without children, and making any express dispo-

L. 1. tit. 11. P. 4.

L. 23. t. 11. P. 4.

L. 1. t. 3. Lib. 10. Nov. Rec.

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[36] Relative to the survivor taking the property after the death of the other, which the law only permits in the absence of necessary heirs of the party deceased. The term, necessary heirs, will be in due course explained. *Vide* p. 109 of the text, tit. 3. §. 3. post.

[37] That is, I presume, may reduce the property which he had assigned for *arras* to the wife, in so much or to the amount of the imposition practised on him in regard of the value of the *dote*.

[38] Provided she have no ascending heirs (*ascendientes*); for if she should, all the property, of whatever nature it may be, of the wife, belongs to her ascending heirs, without her being able to dispose of more than one-third part, L. 1. tit. 8. Lib. 5. Rec. [L. 1. tit. 20. Lib. 10. Nov. Rec.] *Palacios* (1).

[9] She may, observes *Palacios*, according to the law of the *Fuero Real* cited, dispose of one-fourth part for the benefit of her soul (*por su alma*); but it should be remembered, that by L. 12. tit. 6. Lib. 5. Rec., L. 8. t. 20. Lib. 10. Nov. Rec., all the property of the parents belongs of right (*legitima*) to their children, with the exception of one-fifth (*el quinto*), of which the parents may freely dispose.

L. 2. t. 3. Lib 10. Nov. Rec.

sition of her *arras*, such property shall pass to her heirs, L. 3. tit. 2. Lib. 5. Rec. 12th, That if the husband dies leaving children, the wife shall have the usufruct of the *arras*, and the children the dominion or property (*propriedad*) if she marries a second time, *Ayora*, Part 1. Cap. 7. n. 21. 13th, That the *arras* is considered the particular or exclusive property of the wife; and therefore if the marriage is dissolved, and the *arras* hath been expended during it, the amount or value shall be deducted or taken out of the general fund (*cuerpo de los bienes*); but, if it hath been promised at the period of separation by the consorts, it shall then be taken out of the particular property of the husband; because it would be an injury to the wife to take it out of the *ganancial* property, of which she is entitled to a share, unless she should renounce *gananciales*, *Ayora*, Part 1. Cap. 7. n. 16. 14th, That the husband cannot alienate the *arras*, although the wife consent to it, by reason of the right of restitution, L. 4. tit. 2. Lib. 3. *Fuero Real.* 15th, That if the husband had connection with the wife, after the marriage was dissolved, the *arras* shall be hers, but if not, it shall return to the husband or to his heirs, L. 5. tit. 2. Lib. 3. *Fuero Real.* 16th, That the wife forfeits arras by adultery, or if she quits or elopes from her husband's house (*se va de casa*) of her own accord [40], L. 6. tit. 2. Lib. 3. *Fuero Real.*

Cap. 4. Of marriage gifts, (donadios.) L. 3. tit. 11. P. 4.

A marriage gift (*donadio*) [41] is the gift which the suitor makes to the spouse, or she to him freely, without condition, before the marriage be completed by words of the present, L. 3. tit. 11. P. 4.

Thus as means have been adopted by our laws to restrain the excess of *dotes* and *arras*, in the same manner the excess of these gratuitous gifts has been moderated; wherefore, it is established 1st, That the suitor or husband cannot give to his spouse by way of gift in clothes, jewels, &c., more than shall amount to the eighth part of her *dote*, L. 1. tit. 2. Lib. 3. Rec. 2d, That if the jewels exceed this eighth part, the wife shall not have as her own more of them than may amount to that value, L. 1. tit. 2. Lib. 5. Rec.; which is ordered to be observed

L. 6. t. 3. Lib. 10. Nov. Rec.

L. 6. t. 3. Lib. 10. Nov. Rec.

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[40] The wife, says *Palacios*, forfeits the *arras*, if she commits adultery, provided it be proved, and the husband desires it. And if she should go from her house to commit it, she forfeits the *arras*, although it is not proved that she effected her purpose, by reason of some obstacle; that this is what is stated by L. 6. tit. 2. Lib. 3., *Fuero Real.* The learned Professor adds, that it will be understood, the wife went from her house for the purpose of committing adultery, when, against her husband's will, she visits suspected houses.

[41] *Or Sponsalitia largitas.*

by the before mentioned royal ordinance (*pragmatica real*) of 1723. [56]

This gift, in respect of its effect, has certain limitations. 1st, If it should happen that by the fault of one of the betrothed parties the marriage do not take place, the party in fault must return to the other the gift received, L. 3. tit. 11. P. 4. L. 3. t. 11. P. 4. 2d, But if this should happen by the death of one of the couple, a distinction must be made in observing, that if the man dies before kissing the woman, the gift ought to return to the heirs of the deceased suitor; but if he should have kissed her, she will gain the half; and if this gift should have been made to the man by the woman, and she should die before marriage, whether they have kissed or not, the jewels and other things devolve to the heirs of the woman, L. 3. tit. 11. P. 4. See also L. 4. tit. 2. L. 3. tit. 11. P. 4. Lib. 5. Rec. 3d, If there be only a gift, and no *arras*, it shall L. 3. t. 3. Lib. 10. Nov. Rec. be the woman's, and be restored to her or her heirs upon the separation of marriage, under the same laws we have mentioned with respect to *arras*; and if there be both, she or her heirs may elect to take either of them they should prefer, and this election is to be made within the term of 20 days [42], L. 4. L. 3. t. 3. Lib. 10. Nov. Rec. tit. 2. Lib. 5. Rec.

The right to *ganancias* [43] is founded on the partnership or Cap. 5. Of ganancial property. society which is supposed to exist between the husband and wife, because she bringing her fortune (*capitales*) in *dote*, gift, and *paraphernalia*, and he his in the estates and property which he possesses, it is directed that the gains (*ganancias*) which result from the joint employment of this mass of property or capital, be equally divided between both partners. Hence we might have found a reason for treating of *ganancias* between

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[42] And if the woman or her heirs should refuse or fail to elect within this term, then the heirs of the man may elect which of the two he or they shall take: this is provided by L. 3. tit. 3. Lib. 10. Nov. Rec. referred to in the text.

[43] The establishment of the right of *ganancias* would seem to be one of the few institutions for the suggestion of which Spain is not indebted to Roman jurisprudence, although this declaration is not supported by the unanimous assent of writers; for by some it is stated that, amongst the ancient Romans, so far back as the time of Romulus and Numa Pompilius, all property acquired during marriage was common or *ganancial:* but be this as it may, no mention as far as the research of the Translator enables him to speak (and it is, believed his assertion will be found correct), is made of *gananciales* as between husband and wife, in the laws of the *Partidas*. It would appear that custom gave rise to the establishment, in Spain, of this right, and that the first recognition with which it was honoured by the *lex scripta*, was the notice taken of it by L. 17. tit. 2. Lib. 4. *Del Fuero Juzgo;* and the rule was adopted and extended by the *Fuero Viejo*, *Fuero Real*, *Ordenamiento Real*, and the *Recopilacion*, and will be found explained in the text. See the *Teatro de la Legislacion Universal de España é Indias*, 5th vol. tit. *Bienes Gananciales*.

husband and wife, when we should treat of the contract of partnership; because, in this sense, *Ayora* and others explain it but it has appeared more proper to us to treat of this matter in this place, both because it must derive much light from what we have just said respecting *dote*, *arras*, &c.; and also because it will contribute to form a perfect idea of marriage, which, as we have allowed, we only consider here in its light of a contract.

§ 1. What property is ganancial. L. 10. tit. 4. Lib. 10. Nov. Rec.

Ganancial property (*bienes de ganancias*) is all that which is increased or multiplied during marriage, L. 10. tit. 9. Lib. 5. Rec. By multiplied, is understood all that is increased by *onerous* cause or title, and not that which is acquired by a lucrative one, as inheritance, donation[44], &c. L. 12. tit. 3. Lib. 3. *Fuero Real.* And property is supposed to be common, except that which each shall prove to be their own separate property [45], L. 1. tit. 9. Lib. 5. Rec.

[57]

L. 4. t. 4. Lib. 10. Nov. Rec.

§ 2. Under what principles the right to matrimonial gains is established.

From all which it is inferred, 1st, That what the husband or wife bring into marriage as their own peculiar property, or acquire during it by lucrative cause or title, does not come into partition. 2d, But that the property acquired during marriage by purchase, sale, or other onerous cause or title, does. 3d, That immediately upon a division being made of this *ganancial* property, each acquires an absolute dominion as to their respective moieties or proportions. 4th, That as the gains (*ganancias*) are common, so also are the injuries or damage which shall happen to them, unless they arise by the fault of only one of the partners.

From the first principle it is inferred, 1st, That *dote*, *arras*, marriage gift (*donadio de esposo*) and *paraphernalia*, are not *ganancial* property, or property subject to partition or division. 2d. Nor the inheritance from the father, nor the gift of a stranger to one of the consorts, L. 2. tit. 3. Lib. 3. *Fuero Real.* Ll. 2. & 3. tit. 9. Lib. 5. Rec.[46] 3d, Nor the gift made by the re-

Ll. 1. & 2. tit. 4. Lib. 10. Nov. Rec.

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[44] *Palacios* observes, that all the property which husband and wife acquire during marriage, and while they live together, by a common title, whether onerous or lucrative, will be common; and that which each acquires, particularly by a lucrative title, as by gift, or by testament, or *ab intestato*, will be the property, exclusively, of the consort who so acquires it. He refers to L. 1. tit. 3. Lib. 3., *Fuero Real*; Ll. 1-2 & 3. tit. 9. Lib. 5. Rec. [Ll. 4. 1 & 2. tit. 4. Lib. 10. Nov. Rec.]

[45] All property of husband and wife is presumed common or *ganancial*, until it be proved to be the separate property of either. See L. 4. tit. 4. Lib. 10. Nov. Rec.

[46] And prize money obtained in war by the husband is not *ganancial*, unless his outfit, as a soldier for the campaign, was at the joint expense of both him and wife. *Vide* L. 2. tit. 4. Lib. 10. Nov. Rec.

lations (*parientes*) of the wife to the husband; or *vice versa*, because it is always accounted the fortune or property (*capital*) of the person to whom it is made, *Ayora* P.1. Cap.8. n.18, & 19. 4th. Nor the usufruct which the Father enjoys of the property of his child; and, wherefore, all these sums or descriptions of property (*capitales*), ought to be separated at the time of the dissolution of marriage, from the total mass, before making a division of property, *Ayora* P.1. Cap.7. n.1. ad 15 & Cap.8. n.19. 20 & 21.

From the second principle it is deduced, 1st, That the fruits (*frutos*) produced from all these sums (*capitales*) gained and improved during marriage, come into partition [47], L.5. tit.9. Lib.5. Rec. 2d, also the fruits or produce not gathered which shall appear on the vines, trees, &c., or those not yet apparent if the labour bestowed is on land sown [48], L.18. tit.14. Lib.3. *Fuero Real.* 3d, That these fruits or products are always common, although one of the consorts may have more property or means than the other, L.4. tit.9. Lib.5. Rec. 4th, That the improvements (*mejoras*) made of plantation, building, &c., are divided [49], with the difference that if the planting should be done in the particular land of either of the consorts, it shall be divided, deducting first the value the land was of before it was planted and giving or allowing that to the owner; but if a house hath been built, or an oven or a mill hath been erected on the land of one of them, the person on whose land the building or erection is made, shall have the benefit of it, and shall pay to the other the moiety of what the building cost [50], L.9. tit.4. Lib.3. *Fuero Real.* 5th, That the value of a company or co-partnership, or of an office purchased by husband and wife shall be divided according to its worth at the time of partition, *Ayora*, Part.1. Cap.9. n.16. 6th, That the rents of the estate or inheritance leased out are also to be divided in proportion to the time the marriage continued, for that year. *Ayora*, Part.1. Cap.9. n.5. 7th, But that the crops of grain, (*mieses*) or ripe fruits of the estate which either of the consorts

L.5.t.4.Lib.10. Nov. Rec.

L.3.t.4.Lib.10. Nov. Rec.

[58]

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[47] That is, the fruits, proceeds, or rents of every description of property belonging to both the wife and husband, are considered *gananciales*. See L.5. tit.4. Lib.10. Nov. Rec.

[48] That is, the *emblements* are considered *gananciales*.

[49] *i.e.* are *gananciales*.

[50] *Palacios* says, that *Febrero* is of opinion, that this rule holds also with respect to improvements in plantation: that is, that the owner of the field or land retains it, paying to the other party the moiety of what the planting or improvement cost.

brings into marriage, which were not sown during marriage, do not come into partition; wherefore they shall be deducted from the mass of property [51], *Ayora*, Part. 1. Cap. 9. n. 3.; 8th, nor shall the improvements made on entailed property (*mayorazgo*) be divided, L. 6. tit. 7. Lib. 5. Rec.

L. 6. tit. 17. Lib. 10. Nov. Rec.

From the third principle it arises, 1st, That the marriage being dissolved, the survivor may dispose of his proportion of the property encreased (*multiplicados*) without being obliged to reserve the property or dominion [52] (*propiedad*) to his children, L. 6. tit. 9. Lib. 5. Rec. 2d, That what the husband might leave to his wife by his will, shall not be understood as coming out of that part of the *gananciales* which belongs to her [53], L. 7. tit. 9. Lib. 5. Rec. 3d, That the husband cannot alienate his property maliciously (*con malicia*), and in fraudulent diminution (*en fraude*) of the *gananciας* [54], L. 5. tit. 9. Lib. 5. Rec. 4th, That neither of them shall forfeit his, or her property, nor half of the *gananciας* by the crime of the other, L. 10. tit. 9. Lib. 5. Rec. [55] 5th, That if the widow lives luxuriously and by crime (*por delito*), she shall lose her moiety of the *gananciales* [56], Ll. 5. and 11. tit. 9. Lib. 5. Rec.

L. 6. t. 4. Lib. 10. Nov. Rec.

L. 8. t. 4. Lib. 10. Nov. Rec.

L. 5. t. 4. Lib. 10. Nov. Rec.

L. 10. tit. 4. Lib. 10. Nov. Rce.

Ll. 5. & 11. tit. 4. Lib. 10. Nov. Rec.

From the fourth principle it follows, 1st, That the gains and losses being common, the debts which are contracted during marriage are to be paid out of the common property; but not those contracted before marriage or after its dissolution, L. 14. tit. 20. Lib. 3. *Fuero Real.* 2d, That the wife shall not pay half the debts if she should renounce the *gananciας*, L. 9. tit. 9. Lib. 5. Rec. 3d, That the loss or injury caused to the real estate (*hacienda*) by reason of the husband having rented it out at a low rate or price, or having paid annuities (*censos*) or debts contracted for an illicit cause ought not to prejudice [57] the wife;

L. 9. t. 4. Lib. 10. Nov. Rec.

[59]

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[51] Not being considered *gananciales*. See 2d. *Blac. Com.* respecting the doctrine of emblements in England, p. 122-123., 145 & 403., 15 Ed.

[52] Nor the *usufruct*, L. 6. tit. 4. Lib. 10. Nov. Rec.

[53] She shall have the legacy, bequest, or devise, exclusive of and in addition to her *gananciales*, L. 8. tit. 4. Lib. 10. Nov. Rec.

[54] To damnify the wife, L. 3. tit. 5. Lib. 10., Nov. Rec. *Palacios* says, that the reason why the husband can dispose, during marriage, of *ganancial* or common property, without the consent of the wife, is, to use the expression of *Covarrubias*, because the husband has the dominion and possession of it *in actu et habitu*, during the marriage; and the wife only *in habitu*, until the marriage is dissolved, when she acquires it equally with her husband.

[55] Forfeiture of property, where in cases that by law it attaches, does not take effect, until sentence (*judicial*) be passed, declaratory thereof. *Vide* L. 10. tit. 4. Lib. 10 Nov. Rec.

[56] For the first cause, the *gananciales* will devolve to the heirs of the husband, L. 5. tit. 4. Lib. 10. Nov. Rec.

[57] *Palacios* observes, that L. 5. tit. 9. Lib. 5. Rec. [L. 5. tit. 4. Lib. 10. Nov.

and therefore in these cases the loss or injury must be deducted from the mass of property, and given to the wife before dividing it, *Ayora*, Part. 1. Cap. 8. n. 14. and 15. 4th, That if the children are many, and they are promised *dote*, it shall be paid from the *ganancial* property; and if there be none, from other property [58]; and if the father alone should promise the *dote*, it shall be paid from the *ganancial* property; and in default of that, from his own particular property, L. 8. tit. 9. Lib. 5. Rec. L. 4. t. 3. Lib. 10. Nov. Rec.

Rec.] only annuls the alienations of the husband made advisedly to defraud or prejudice the wife. But in the absence of this purpose, although by the alienations of the husband the wife may find herself prejudiced, there is no law which exempts her from suffering such prejudice.

[58] Each parent's separate property, in the absence of *gananciales*, being chargeable with a moiety of such *dote*, supposing the promise of *dote* should be made by both father and mother, L. 4. tit. 3. Lib. 10. Nov. Rec.

[66]

TITLE VIII.

OF THE DIFFERENCE WITH RESPECT TO CHILDREN (*DIFFERENCIA DE HIJOS*), AND THE POWER OF THE FATHER (*PATRIA POTESTAD*).

UNDER the third division of mankind with respect to their state or capacity as a family, is comprehended the difference with respect to children, and the power which the father has over them, which we call *patria potestad.*

Cap. 1. Of the division of children into natural and legitimate.

Children are either legitimate or natural. Legitimate children are those who are born of father and mother that are truly married according to the precept of our holy church, L. 1. tit. 13. P. 4. Hence it follows, 1st, That the child of those who marry openly in the face of the church, although there may afterwards appear an impediment to cause their separation, shall be legitimate, provided both were or one of them was ignorant of the impediment, L. 1. tit. 13. P. 4. 2d, That likewise the child who should be conceived during the judicial agitation of the question respecting the impediment, will be legitimate, L. 1. tit. 13. P. 4. 3d, That those are not legitimate who are born of persons who marry clandestinely, or of those who have married, being aware of an impediment to their marrying, although they should marry in the face of the church, L. 2. tit. 15. P. 4. 4th, That those are not legitimate who are born of parents not married according to the precept or ordinance of the church, L. 2. tit. 15. P. 4. 5th, That neither are the children of a concubine (*barragana*) legitimate, although the father should marry her [1], L. 2. tit. 15. P. 4. Legitimate children enjoy and inherit the honours of their fathers, grandfathers, &c., are able or competent to receive dignities, and succeed to their fathers and other relations, L. 2. tit. 13. P. 4.

L. 1. t. 13. P. 4.

L. 1. t. 13. P. 4.

L. 1. t. 13. P. 4.

L. 2. t. 15. P. 4.

L. 2. t. 15. P. 4.

L. 2. tit. 15. P. 4.

L. 2. tit. 13. P. 4.

§ 1. Of natural children.

Natural children are those who are not born in wedlock according to L. 1. tit. 15. P. 4. These comprehend bastards (*fornecinos*), or the illegitimate children (*nothos*) who are born

L. 1. tit. 15. P. 4.

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[1] This must be understood with respect to children begotten on a concubine by a man during the life of his lawful wife, who should, after the death of his said wife, marry the former. See L. 2. tit. 15. P. 4. *ad. fin.*

from adulterous intercourse [2]; the children of prostitutes (*manceres*); the spurious (*espurios*), that is, children born of a concubine [3]; and those begotten on a relation, or on a religious woman (*religiosa*), who are called incestuous, L. 1. tit. 15. P. 4. And such do not enjoy the advantages of legitimate children, L. 3. tit. 15. P. 4.

L. 1. tit. 15. P. 4.
L. 3. tit. 15. P. 4.

§ 2. Modes of legitimating natural children.

Natural children are legitimated by many ways. 1st, By the favour (*merced*) of the king or the pope, L. 4. tit. 15. P. 4. 2d, By testament or last will confirmed by the king, L. 6. tit. 15. P. 4. 3d, By public deed, or instrument of writing, L. 7. tit. 15. P. 4. 4th, By the marriage of a natural daughter with a person of distinction [5], (*hombre ilustre*). L. 8. tit. 15. P. 4. 5th, By the father offering his natural son for the service of the king, or to the municipal council, Ll. 5. & 8. tit. 15. P. 4.

L. 4. tit. 15. P. 4.
L. 6. tit. 15. P. 4.
L. 7. tit. 15. P. 4.
[67]
L. 8. tit. 15. P. 4.
Ll. 5 & 8. t. 15. P. 4.

The effects of these legitimations have in view two ends: 1st, That the son legitimated may be rendered capable of the honour which we have before said belonged exclusively to lawful children, with respect to which we have now to observe, that as the grant of legitimation by the crown does not render the person legitimated capable of enjoying or holding ecclesiastical dignities and employments (*beneficios*), so neither does that of the pope render him competent to obtain secular honours; and that even with respect to ecclesiastical, the grantee cannot obtain any other kind (*pieza*) than that expressed in the dispensation, L. 4. tit. 15. P. 4. The other end or object of legitimation is to qualify the persons legitimated to succeed to the property of their fathers in default of legitimate children. See Ll. 4, 5, 6, 7 & 8. tit. 15. P. 4. [6], in which will be found the forms of each of these modes of legitimation (*de estos actos.*)

L. 4. tit. 15. P. 4.
Ll. 4. 5. 6. 7. & 8. tit. 15. P. 4.

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[2] *Palacios* says, that so far from L. 1. tit. 15. P. 4., including under the term "natural children" such as are the offspring of adultery, incest, and the rest, mentioned in this part of the text, it says, they are not [considered] natural children, because they are begotten contrary to law, and contrary to natural reason. The learned Professor adds that, properly speaking, those are natural children who were born or conceived when their parents could marry without a dispensation, provided the father acknowledge them for his, or had in his house the woman on whom he begot them, L. 9. tit. 8. Lib. 5. Rec.; L. 1. tit. 5. Lib. 10. Nov. Rec. That in respect to children born from an incestuous or an adulterous intercourse, and the others mentioned, they can only be called natural in the improper and general understanding of the word.

[3] The law [L. 1. tit. 15. P. 4.] adds, who lives out of the house of the father

[4] The first with respect to temporal, and the second with respect to spiritual concerns. See L. 4. tit. 15. P. 4.

[5] Or superior municipal magistrate. See L. 8. tit. 15. P. 4. And L. 7. tit. 20. Lib. 10. Nov. Rec.

Cap. 2. Of the father's power (patriapotestad)

L. 1. tit. 17. P. 4.

L. 2. tit. 17. P. 4.

Patria potestad is the power which fathers have over their children [7], L. 1. tit. 17. P. 4. This definition declares that this power belongs exclusively to the father, and is not possessed by the mother nor her relations, L. 2. tit. 17. P. 4. We must consider this power very far short of that right of life and death which the laws of Rome allowed over children, particularly if we reflect that our customs and laws had their rise from Christianity which comprises all that is just and humane; wherefore this power must be considered as useful to the child, since it consists properly of a protecting or economical (*economico*) dominion which the father exercises over his legitimate child. From this principle it proceeds, 1st, That fathers are bound to rear, give aliment to, and educate their children who are under their power, Ll. 3. and 5. tit. 19. P. 4. [8] 2d, That they are allowed to chastise them with moderation, L. 18. tit. 18. P. 4. [9] 3d, That they are bound to direct and advise them properly, L. 18. tit. 19. P. 4. [10] 4th, To administer, take care of, and defend, as well judicially as otherwise, the *adventitious* property (*bienes adventicios*) of their children, enjoying the usufruct of it [11], and the dominion of their *profectitious* property (*bienes profecticios*), L. 5. tit. 17. P. 4. although the *peculium* [12] or stock (*pegujar*), that is the property which the sons acquire in the army or in the service of the king at court, belongs in entire dominion to them, Ll. 6. and 7. tit. 17. P. 4. 5th, They are bound to appear for them in suits at law, whether as defendants or plaintiffs [13], L. 11. tit. 17. P. 4. except in the two cases pointed out by L. 12. tit. 17. P. 4. 6th, Children may be compelled by the judge to return to their father's protection or guardianship, and power if they are vagrants, L. 10. tit 17. P. 4.

Ll. 3 & 5. t. 19. P. 4.

L. 18. t. 18. P. 4.

L. 18. t. 19. P. 4.

L. 5. t. 17. P. 4.

Ll. 6 & 7. tit. 17. P. 4.

[68]

L. 11. t. 17. P. 4.

L. 12. t. 17. P. 4.

L. 10. t. 17. P. 4.

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[7] Born in lawful wedlock. See Ll. 1 & 2. tit. 17. P. 4.

[8] See also L. 2. tit 19. P. 4.

[9] See also L. 9. tit. 8. P. 7.

[10] This quotation is erroneous. There is no such law in the title of the *Partida* referred to. *Palacios* cites the beginning, and Ll. 1 & 2., of tit. 19. P. 4. as confirming this doctrine.

[11] This the fathers lose on the marriage of their children; by marriage the latter are emancipated. See L. 3. tit. 5. Lib. 10. Nov. Rec.

[12] And the property or fee simple of every other sort, except that which is *profectitious*, is in the sons; but of the *peculium* mentioned in the text, the father is not entitled to the usufruct, as he is to that of the other adventitious property of his son, and this is expressed by the term, *con toda propiedad*, made use of in the text. See Gl. 8. Greg. Lop. on L. 6. tit. 17. P. 4.

[13] *Palacios* remarks, that what L. 11. tit. 17. P. 4. says, is, that the child under the paternal power, cannot sue or be sued without the authority or consent of the father, unless in the two excepted cases alluded to in the text.

§ 1. Modes of acquiring the patria potestad.

There are four modes by which this power is acquired or established. 1st, By lawful marriage. 2d, By sentence or decree of the judge declaring the child to be legitimate, respecting which there was a doubt. 3d, By the crime which the child should commit against the father who freed or emancipated it. [68] 4th, By adoption, L. 4. tit. 17. P. 4. L.4.tit.17.P.4.

From the first mode it follows, 1st. That those who are under the *patria potestad* shall be legitimate children, L. 2. tit. 17. P. 4. L.2.tit.17.P.4. 2d, Those legitimated, by reason of being regarded as legitimate, L. 4. tit. 15. P. 4. L.4.tit.15.P.4. 3d, But not natural children and others who are found comprehended under this title, L. 2. tit. 15. P. 4. L.2.tit.15.P.4. The second mode of acquiring this power is evident.

The ingratitude of the son towards the father who emancipated him, causes his return a second time under his power; and this crime must be proved to have been committed [14] by word or by deed which has produced dishonor or discredit to the father, L. 19. tit. 18. P. 4. L.19.t.18.P.4.

The fourth mode consists in adoption; which is a way by which the laws have established that men may become the sons of another although they may be not so naturally, L. 1. tit. 16. P. 4.

This adoption is in two ways, 1st, When children are adopted who are not under the power of any other person: [15] 2d, When children are adopted who are under the power of their lawful father, [16] L. 1. tit. 16. P. 4. In order that either of these modes L.1.tit.16.P.4. of adoption may be valid, the consent of the person to be adopted is requisite; in the first mode manifestly or expressly, and in the second tacitly, L. 1. tit. 16. P. 4. The first mode of adoption L.1.tit.16.P.4. is done only under the authority of the king, and is called *arrogatio*, L. 8. tit. 16. P. 4. and the second with the consent of the L.8.tit.16.P.4. judge, and is called *adoptio*, L. 8. tit. 16. P. 4. The forms of L.8.tit.16.P.4. both are found in L. 7. tit. 7. P. 4. L.7.tit.7.P.4.

Adoption is founded on this principle, "that it ought to imitate nature." Whence it follows, 1st, That only the person can adopt who is not under the power of another, L. 2. tit. 16. P. 4. [69] 2d, That the person to be adopted must be above 18 years of L.2.tit.16.P.4. age, L. 2. tit. 16. P. 4. 3d, That there must not exist any na- L.2.tit.16.P.4. tural impediment to his having children, L. 2. tit. 16. P. 4. L.2.tit.16.P.4. Wherefore, 4th, If this impediment has arisen from disease or

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[14] *Voluntarily*; for if the child hath been driven to such ingratitude by the conduct of the father, in the cases set forth in L. 18. tit. 18. P. 4. it does not produce the effect mentioned in the law 19. tit. 18. P. 4. quoted in the text. See Gl. 1. *Greg. Lop.* on L. 19. tit. 18. P. 4.

[15] *Sui juris* [16] *Alieni juris.*

misfortune he may adopt, L. 3. tit. 16. P. 4. 5th, That a woman cannot adopt, unless it be for her alleviation and consolation, having lost a son in the service of the king or of some council or corporation; but then she must have the royal sanction for it, L. 2. tit. 16. P. 4.

L.3.tit.16.P.4.

L.2.t.16.P.4.

As with respect to adoption, the express or tacit consent, and the evident advantage of the person adopted are considered necessary, it has been established, 1st, That the fatherless minor of seven years cannot be adopted, nor can the youth above seven and under fourteen be adopted, unless by the intervention of the royal will, under the cognition of the advantage which will result to the person adopted, and the obligation of the adopter to restore the property of the young person to his legitimate successors or heirs, if he should die before fourteen years of age, L. 4. tit. 16. P. 4. 2d, That the guardian cannot adopt his ward by reason of the suspicion under which he might fall; and he can only do it when the ward has attained 25 years of age, and with the royal permission, L. 6. tit. 16. P. 4.

L.4.tit.16.P.4.

L.6.tit.16.P.4.

Adoption produces the effect of subjecting the adopted to the power of the adopter [17], although with some difference in what relates to the succession as expressed by Ll. 7, 8, and 9, tit. 16. P. 4. [18]

Ll.7. 8. & 9. tit.16. P.4.

§ 2. Of the modes by which the patria potestad is put an end to.

The father's power is put an end to by four causes or modes, 1st, By natural death. 2d, By perpetual banishment, which is called civil death. 3d, By the exaltation of the child to dignity or office. 4th, By emancipation, *Princip. del.* tit. 18. P. 4.

The first mode is understood to take place, if the father who died was not, at the time of his death, under the power of his own father; because in this case the son whom he left would fall under the power of his grandfather according to L. 1. tit. 18. P. 4.; although by the law of the *Recopilacion* another consequence would result as we shall see.

L.1.tit.18.P.4.

To the second mode belongs, 1st, Perpetual banishment of the father to an island or other certain place, which is the *deportatio* of the Romans. 2d, Perpetual condemnation to the public works, mines, &c. L. 2. tit. 18. P. 4. 3d, Those outlawed or proscribed for ever, L. 4. tit. 18. P. 4. 4th, But not

L.2.tit.18.P.4.

[70]

L.4.tit.18.P.4.

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[17] *Palacios* says, that in *adopcion en especie*, the adopted is not subject to the power of the adopter, unless the latter be his ascending relative. He refers to Ll. 9 & 10. t. 16. p. 4.

[18] These laws also point out the different effects of *arrogatio* and *adoptio*; and see also L. 7. tit. 7. P. 4. *Palacios* refers, for an elucidation of this subject, to L. 5. tit. 6. Lib. 3. L. 1. tit. 22. Lib. 4. *Fuero Real.* L. 1 & 10. tit. 8. Lib. 5. Rec. [L. 11. tit. 20. Lib. 10. Nov. Rec.] to *Greg. Lopez.* Gl. 5. Lib. 8. tit. 16. P. 4. & *Azevedo*, on L. 1. tit. 8. Lib. 5. Rec.

those transported for a determinate time, or for ever, without confiscation of their property, who are called "*relegados*," L.3. tit.18. P.4. 5th, nor those outlawed for a certain time, L.4. tit.18. P.4.[19] L.3.tit.18.P.4. L.4.tit.18.P.4.

The greater part of the twelve dignities, of which mention is made in the 18th Title, 4th Partida, from L.7. to L.15, are not recognized at this day; but, arguing from them, we may say, that generally every dignity or office (*dignidad*) which may have jurisdiction annexed to it, and every ecclesiastical dignity[20], is sufficient to withdraw the child from the power of the father; because, it is not regular that he who judges others, or is in the exercise of any office or employment, should be governed by another. L.7. ad 15. tit.8. P.4.

With regard to emancipation, it is laid down, 1st, That this may be done before an ordinary judge[21], L.15. tit.18. P.4. And on his previously giving information of it to the council, Aut.20. tit.9. Lib.3. Rec. 2d, That the father and the son declare before the judge their desire or will, the one of emancipating, and the other of being emancipated, L.17. tit.18.P.4.[22], 3d, That the child being under seven, the father must petition the king for his license to emancipate it; and, without this permission, the judge of the place where the father is shall not be able to proceed to the act or decree of emancipation, the which, in the above case, may be done in the absence of the child; but if the child should be above seven, in addition to the royal authority, it is required that the child consent, or express his desire before the judge to be emancipated, L.16. tit.18. P.4. 4th, That children who are married are considered emancipated, L.8. tit.1. Lib.5. Rec. In virtue of which their children shall not fall under the power of the grandfather on the death of their father; because, by the act of marriage, the latter was freed L.15.t.18.P.4. L.4.t 5.Lib.10. Nov. Rec. L.17.t.18.P.4. L.16.t.18.P.4. L.3.t.5.Lib.10. Nov. Rec.

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[19] *Palacios* says, those condemned to transportation, or banishment for life, to any place or public work, with confiscation of property, forfeit the paternal power; but not so in the absence of confiscation of property: that the same right and distinction are observed in respect to persons outlawed: that those are so termed, who have been cited and summoned for any crime which they have committed and, not having chosen to obey, are banished *desterrados*) for this reason, from the place where they reside, or are prevented to enter their country.

[20] *Palacios*, in a note, here remarks, that children married (*casados y velados*) are released from the paternal power, L.8. tit.1. Lib.5. [L.3. tit.5. Lib.10. Nov. Rec.]

[21] And with the consent of the son. See Ll.15 & 17. tit.18. P.4.

[22] The L.17. tit.18. P.4. quoted, adds, the emancipation must be by *carta*, or written instrument.

from his father's power. The judge may, by his office, oblige fathers to emancipate their children for four causes. 1st, For cruelly chastising the child. 2d, For prostituting his daughters. 3d, For possessing that which was bequeathed them, under condition of emancipating the child. 4th, For misspending the property of, or misconducting themselves towards the adopted child, L.18. tit.18. P.4.

L.18.t.18.P.4.

BOOK II.

[72]

OF THINGS.

TITLE I.

OF THE DIVISION OF THINGS.

Cap. 1. Of the first general division of things.

We have treated hitherto of the first object of law, which relates to persons; we proceed now to treat of the second, which relates to things. The term thing is applied to whatever is of such a condition, that it may be counted among our property.

The first general division of things is that which is made into things of divine right, and those of human right. The first are divided into things sacred and religious. The latter into things common, public, of a corporation or a university, and private.

Cap. 2. Of sacred things.

Every sacred thing is established for the service of God; and therefore the dominion of such is not in any person and cannot be counted as property, Ll. 12. and 2, tit. 28. Part. 3., as are churches, altars, chalices, &c., L. 13. tit. 28. P. 3.

Ll. 12 & 2. t. 28. P. 3.

L. 13. t. 28. P. 3.

Cap. 3. Of religious things.

We term religious, that place where any one is buried in order never to be removed thence, and if all his body or at least his head lies there [1], L. 14. tit. 28. P. 3.

L. 14. t. 28. P. 3.

Although our laws may have borrowed these divisions from paganism, nevertheless, since the solemn consecration of churches and cemetries has been established, we are of opinion that immediately upon being consecrated, religion occupies them and cannot be separated from them at any time. The consequences therefore which result from this principle ought to be explained by the canon law.

[73]

Cap. 4. Of things common.

Things common, are those which belong to the birds, to the beasts, and to all other living creatures as being able to make use of them as well as men, L. 2. tit. 28. P. 3. such are the air,

L. 2. tit. 28. P. 3.

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[1] *Palacios* says, that in Spain no place is considered religious, unless made so by the authority of the church. *Can. in Eccles.* c. 13. 9. 2. cap. 4. *De Relig. dom.* *Selvag. Inst. can.* tit. 14. Lib. 2.

L.3.tit.28.P.3. the waters from Heaven, the sea and its shore, L.3. tit.28. P.3. By shore of the sea we understand whatever part of it is covered
L.4.tit.28.P.3. with water, whether in winter or summer, L.4. tit.28. P.3. Hence it arises that any one may fish or navigate on the sea and on its shore, where also he may build a cottage or house for
Ll.3 & 4.t.28. P.3. shelter [2], Ll.3, and 4. tit.28. P.3.

Cap. 5. Of things public. Things public are those which belong only to mankind, L.2. tit.28. P.3. Hence it is, 1st, That rivers, ports, or har-
L.2.tit.28.P.3. bours, and high roads (*caminos*), are things public, L.6. tit.28. P.3. 2d, The walls and gates of towns or cities according to
L.20.t.32.P.3 L.5.t.1.Lib.7. & L.2.tit.18. Lib.6. Nov. Rec. L.20. tit.32. P.3. and L.3. tit.5. Lib.6. and L.3. tit.6. Lib.7. Rec., are public in their benefits to all; wherefore the obligation to repair them is common to all, although
L.15.t.28.P.3. L.15. tit.28. P.3. classes them among things holy, adopting in this the doctrine of the Romans. 3d, That not only may the natives or inhabitants of a place make use of things that are public, but also strangers,
L.6.tit.28.P.3. L.6. tit.28. P.3. 4th, That although the banks of rivers may belong to persons on whose estates they are situate, nevertheless they cannot prevent any one from making fast his boats or vessels (*sus embarcaciones*) to the trees or posts in them, and doing all that may be convenient for the free use of the things which belong to the art, calling, or industry, by which he
L.6.tit.28.P.3. makes his livelihood, L.6. tit.28. P.3. 5th, That notwithstanding he whose grounds are planted on the bank of the river, may be the proprietor of the trees, he cannot cut that to which any boat or vessel hath been moored or to which a person
L.7.tit.28.P.3. may be desirous to moor one, L.7. tit.28. P.3. 6th, That no new mill nor any other thing can be built on the part of the river by which its navigation may be impeded, and any old building may be destroyed or pulled down which obstructs the
L.8.tit.28.P.3. common use of these things, L.8. tit.28. P.3. 7th, That neither can any building or thing be erected by which the
[74] common use of high roads, squares, or market places (*plazas*), any threshing grounds for corn, &c. (*exidos*), churches, &c. may
Ll.22, 23, 24. tit.32.P.3. be obstructed, Ll.22, 23, and 24. tit.32. P.3.

Cap. 6. Of things belonging to a municipal council or corporation (concejo) or a university.[3] Things belonging to a corporation or university, are those

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[2] The 6th condition on which lands are declared to be granted by the crown in Trinidad is, that three chains on the sea coast, comprehending fifty paces from the height of the spring tides, be held reserved for the use of his Majesty and the public service. See proclamation 5th December, 1815. Appendix L.

[3] A Memoir on the advancement of Agriculture, and on Agrarian Laws in Spain, addressed to the Supreme Council of Castille, by the Patriotic Society

which belong exclusively to the inhabitants (*al comun*) of any city, town, or castle, or any other place where men reside, L. 2. tit. 28. P. 3.: of these some may be used by any inhabitant of that city, town, or place, and others are for the particular use of the corporation (*concejo*), which ought to apply the fruits, produce, or rents, to the common benefit of the city or town, Ll. 9 and 10. tit. 28. P. 3.

L. 2. tit. 28. P. 3.

Ll. 9 & 10. t. 28. P. 3.

Of the first description are fountains or springs, places where they hold markets, and fairs, and places where the corporation meet, sandy beaches or grounds (*arenales*), which are on the banks of rivers, and, finally, commons or pasture grounds (*dehesas*), L. 9. tit. 28. P. 3. Of the second kind are flocks, fields, vineyards, olive plantations and lands, which produce fruit and rent, L. 10. tit. 28. P. 3. The great variation which is observed in this principal part of our jurisprudence renders its comprehension very difficult; and therefore for greater clearness it is necessary to treat of each thing separately.

L. 9. tit. 28. P. 3.

L. 10. t. 28. P. 3.

§ 1. Of forests, (montes,) and the commonable districts of corporation or municipal bodies (terminos de concejo); as to the use thereof.

With respect to what relates to the use of forests or woods (*montes*) and the commonable lands [4] of a corporation or municipal body (*terminos de concejo*), it is to be observed, that the abuse arising from their occupancy by many private individuals without the royal license gave rise to the following orders or provisions, 1st, That every common (*termino*) or forest (*monte*) occupied should be restored to the corporation or municipal body to which it belonged; and when once restored, should not be transferred or sold, nor the pastures ploughed or converted (*ni romper sus exidos*) into arable lands, L. 1. tit. 7. Lib. 7. Rec. 2d, That from this restitution the clerk or officer (*oficial*) of the corporation shall not be excepted, under pain of loss of office, and of being rendered unfit to hold it, L. 2. tit. 7. Lib. 7. Rec. The process and mode which are to be observed by the judges in such restitution are prescribed by L. 3. tit. 7. Lib. 7. Rec., conformable (*arreglada*) to L. 18. of *Toro* [5], and the modifications laid down in Ll. 4. and 5. tit. 7. Lib. 7. Rec. 3d, Those commons (*terminos*) occupied or sold without the royal license, ten years previous to the year 1551, in which the law of king Charles I. was published, were required to be reconverted into pasture ground, giving information to the council of what part might

L. 2. tit. 21. Lib. 7. Nov. Rec.

L. 4. t. 21. Lib. 7. Nov. Rec.

L. 5. t. 21. Lib. 7. Nov. Rec.

Ll. 6 & 7. t. 21. Lib. 7. Nov. Rec.

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of Madrid, and drawn up by one of its members, *Don Gaspar Melchor de Jovellanos*, points out as obstacles to the progress of agriculture in Spain, the regulations and enactments treated of in the sequel of this title: this memoir is inserted in *Laborde's View of Spain*, 4th vol. Translation, p. 111.

[4] Perhaps the best English term for *termino*, is, *common because of vicinage*.

[5] L. 18 of *Toro* does not apply.

have been worked or cultivated by the permission of the municipality (*pueblo,*) L. 6. tit. 7. Lib. 7. Rec. 4th, That vineyards, orchards, or buildings made on common (*termino*) belonging to the king or a corporation, with the license of the council possessed for twenty years, shall not be destroyed or pulled down, but the person who possesses it shall pay an annual tax or rent (*censo*) at the rate of five maravedis for every acre of vineyard; and so proportionally, L. 3. tit. 7. Lib. 7. Rec.[6] 5th, That the buildings given up on account of improper occupation, shall not be destroyed, nor the forests or woods (*montes*) already planted, be felled or laid waste, except they should be so extensively planted, that the people can cut estovers (*leña*)[7], which shall be done, so as to leave the two principal boughs on the trees (*dexando horca y pendon*), that they may grow again, and never to cut the trees at the trunk or foot, allowing the smaller branches (*montes*) to remain for pasturage[8], L. 7. tit. 7. Lib. 7. Rec., all which hath been extended to the forests or woods belonging to private individuals, L. 28. tit. 7. Lib. 7. Rec. 6th, That no grants (*mercedes*) may be made of commons (*terminos*) by the king, corporation, nor judges, L. 10. tit. 7. Lib. 7. Rec. 7th, Nor may justices grant commonable lands without royal license, L. 11. tit. 7. Lib. 7. Rec.

L. 4. tit. 25. Lib. 7. Nov. Rec.

[75]

L. 5. tit. 21. Lib. 7. Nov. Rec.

L. 1. tit. 24. Lib. 7. Nov. Rec.

Nota 1. tit. 24. Lib. 7. Nov. Rec.

L. 8. tit. 21. Lib. 7. Nov. Rec.

Also, in consideration of the utility of these public forests or woods (*montes*), it hath been ordered, 1st, That the planting of trees should be attended to according to the quality of the soil, the old forests (*montes*) being preserved, and watches (*guardas*) placed thereover; for which purpose the justices shall visit every year the said forests, and take care that the penalties expressed in the ordinance be carried into effect, L. 15. tit. 7. Lib. 7. which must be confirmed by the council, L. 13. tit. 1. Lib. 7. Rec. 2d, That the corregidors, or magistrates, who should be remiss in the fulfilment of these laws, shall lose a third of their salary, L. 16. tit. 17. Lib. 7. Rec.[9] all which hath

L. 9. tit. 21. Lib. 7. Nov. Rec.

L. 2. tit. 24. Lib. 7. Nov. Rec.

L. 16. tit. 3. Lib. 7. Nov. Rec.

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[6] This law does not seem to apply.

[7] The Translator trusts he will not be considered as taking too great a liberty in the translation of the text, by the application of English law terms to express what he may conceive its meaning. The comprehension of this part of Spanish jurisprudence is asserted in the text to be very difficult, and it may be truly added, of little or no interest; and to an English reader, it is therefore hoped, that an allowance will be made for the adoption of terms which, perhaps, will be generally found to convey the correct meaning of the original.

[8] Or rather for the purpose of furnishing acorns, and for the support or protection of the cattle in winter. See L. 1. tit. 24. Lib. 7. Nov. Rec., quoted.

[9] Not noticed in *Nov. Rec.*

been expressed more fully in the ordinances of the 7th and 12th December, 1748 [10], which direct, that no trees shall be cut without permission of the justice; and that for every old tree cut, five young ones shall be planted: all felling or burning of public groves (*alamedas*), with walks, mountains, woods, &c., is forbidden; and it is ordered, that each inhabitant shall plant every year five trees in the situations which should appear best to the corregidor; and not having them, acorns (*bellota*) may be planted at his discretion. That the justices may take cognizance of this, and not the audienceas nor chanceries, with appeal to the board (*junta*) of works and woods. This ordinance was extended to the forests of private individuals by the *cédula* of 18th October, 1763. [11]

It is to be observed here, that for the preservation of trees and forests (*montes*), and their appropriation to the building of vessels, the most excellent regulations or provisions have been enacted in our Spain, Autos 4, 5, & 6. tit. 7. Lib. 7. Rec., and Auto 6. tit. 7. Lib. 7. Rec. [12], and the very full *Cédula* of January, 1748 [13], regard this object; the latter of which treats, as fully as can be wished, upon the proper care of the trees, the mode of bringing them to the ports, and other things with which the intendants of marine in particular ought to be acquainted. [76]

Ll. 12 & 13. t. 24. Lib. 7. Nov. Rec.

§ 3. Of the pastures of corporations or towns (dehesas de universidad).

Not less useful are the pastures (*dehesas*) for the common support of flocks. Thus, therefore, L. 27. tit. 7. Lib. 7. Rec., published in 1623, gives instructions respecting the preservation of the pastures of the kingdom, and orders, 1st, That the pastures be examined and measured by the justices, with two persons commissioned, one by the council or corporation, and the other by the council of the Mesta. 2d, That they fix or measure the quantity, point out the owners of the said pastures, and the quantity of stock the pastures can support or feed. 3d, That with the assistance of the fiscal, named by the Mesta of the officiating alcalde (*alcalde entregador*), and of the Escribano, the quantity of pasture that shall have been approved [14] or broken up (*de lo que se hubiere rompido*), be ascertained by actual inspection. 4th, That the pastures of each town be inserted in their books, and reports of them transmitted

L. 9. tit. 25. Lib. 7. Nov. Rec.

[10] Forming L. 16. tit. 24. Lib. 7. Nov. Rec.
[11] *Nota* 18. tit. 24. Lib. 7. Nov. Rec.
[12] Not noticed in *Nov. Rec.*
[13] L. 22. tit. 24. Lib. 7. Nov. Rec.
[14] Approved, is an old English law expression, signifying to enclose or improve, on the part of the lord of the manor, waste or common.

to the respective chanceries; and the general report be kept in the council, or corporation, and a corresponding one in the council of the Mesta. 5th, That the pastures broken up, or approved without permission since the year 1590, and those broken up since the conclusion of the term allowed, be re-converted into pasture, the which provision in this respect is conformable with the spirit of Ll. 22 & 23. tit. 7. Lib. 7. Rec., in which the same hath been established; and the last law explains, that by pasture broken up must not be understood *that which has been broken up in one part only.* But, in order to prevent these approvements, or these conversions of pastures into arable lands (*rompimientos,*) it is ordered by the royal cedulas of 30th December, 1748, and 13th January, 1749, that positively no permission may be given to break up pastures, and that those broken up twenty years before be restored to their former state, (*a pastos*).

Ll. 5 & 8. t. 25. Lib. 7. Nov. Rec.

§ 4. Of pastures, lands (pastos), and right of common.

With respect to the matter of pastures (*pastos*), regard is chiefly had to immemorial custom; wherefore, 1st, Although L. 7. tit. 29. P. 3. says, that things public, as pastures (*dehesas*), grounds for threshing corn, (*exidos*), &c., are not prescribed, this must not be understood with respect to immemorial prescription [15], as, says *Otero de pascuis*, cap. 17., and he takes his dictum from L. 1. tit. 15. Lib. 4. Rec. 2d, That whether the waste lands (*los baldios* [16]) belong to the lord of the place, or manor, or to the corporation (*concejo*), shall depend upon immemorial possession, *Otero*, same work, c. 9. n. 18. 3d, That although the acts of particular persons may not prejudice the university or community (*universidad*), the right of pasture (*pasto*) may, notwithstanding, be acquired by the acts of the inhabitants, *Otero*, c. 20., who treats of the interruption of these acts in c. 21. 4th, That the pastures (*pastos*) and commons (*terminos*) of desert and uninhabited places be adjudged to the immediate or neighbouring places, *Otero*, c. 23. a. n. 14. ad. 18.

L. 7. t. 29. P. 3.

[77]

L. 4. t. 8. Lib. 11. Nov. Rec.

Besides this immemorial possession, the right of pasturage is common to every inhabitant of the place, that is, who may have houses or possessions in the town, L. 9. tit. 28. P. 3.; *Otero*, c. 4. n. 33.; so that the establishment of pasture cannot be impeded, Ll. 1 & 2. tit. 7. Lib. 7. Rec. In the number of the inhabitants are included the villagers (*los aldeanos*) attached to

L. 9. tit. 28. P. 3.

Ll. 2 & 4. tit. 21. Lib. 7. Nov. Rec.

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[15] Immemorial prescription or custom, would seem to comprise a period of forty years. See L. 1. tit. 17.; Lib. 10. Nov. Rec.

[16] *Baldio* is land that is neither arable nor pasture.

the city or town, L. 3. tit. 6. Lib. 7. Rec. Hence it results, 1st, That persons not inhabitants cannot make use of the pastures [17] (*pastos*), L. 9. tit. 28. P. 3. 2d, That the pasture keeper, although he has no jurisdiction, may seize the cattle which shall not belong to the place, L. 7. tit. 4. Lib. 4. *Fuero Real.* 3d, That the cattle so seized must not be ill-treated, withheld, nor impounded, only unless it shall be to oblige the party to whom the cattle may belong, to pay the damage assessed by appraisers, and proved by witnesses, *Otero*, c. 15., and the penalty which the town or municipality (*el pueblo*) shall impose, which privilege or power is given to it by L. 15. tit. 7. Lib. 7. Rec. 4th, That the forests (*montes*) which shall be burnt, may not be depastured on until the council or corporation be informed, and give what order may seem fit to it on the occasion, L. 21. tit. 7. Lib. 7. Rec. 5th, That the action to recover the penalty (*á penar*) is popular; and thus every inhabitant may institute a suit for it, L. 10. tit. 11. P. 3., and the expenses of the suit shall be paid from the property or funds of the municipality (*pueblo*), L. 3. tit. 7. Lib. 7. Rec. See *Otero*, c. 29. 6th, The town, however, which may have plenty of pasturage, ought to concede, from its superabundance, to the neighbouring town, which is deficient, *Otero*, c. 29. 7th, That cartmen may depasture their oxen and mules by the way on the public commons (*terminos*), and even cut wood [18], Ll. 3 & 4. tit. 19. Lib. 6. Rec.

L. 2. tit. 18. Lib. 6. Nov. Rec.

L. 9. tit. 28. P. 3.

L. 2. t. 4. Lib. 7. Nov. Rec.

L. 7. t. 2 4. L. Nov. Rec.

L. 10. t. 11. P. 3.

L. 5. t. 21. Lib. 7. Nov. Rec.

Ll. 3 & 4. t. 28. Lib. 7. Nov. Rec.

The right of common granted to a municipality (*pueblo*) is perpetual, *Otero*, cap. 23. n. 3.; and is considered as *realty* on which rent or revenue (*censo*) may be raised, *Otero*, cap. 27. n. 8 & 9.; and if the pasture (*pasto*) is granted to any particular person, it is only understood to be for the number or head of stock (*para cabezas*) that he possesses at the time of the grant, *Otero*, cap. 24. The town may also rent or farm out the grass, in which case it must pay a tax or duty (*alcabala*), as partaking somewhat of the contract of sale, *Otero*. cap. 36.; and such can only be rented by a person who shall keep cattle, and on the condition only of profiting by the quantity of grass necessary for his own use and of one-third part more, L. 24. tit. 7. Lib. 7. Rec. [19]

[78]

L. 6. tit. 25. Lib. 7. Nov. Rec.

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[17] Are not entitled to a right of common.

[18] For *cartbote* and *firebote*.

[19] An English reader would doubtless feel more than astonishment at being told that, by this law, a person not possessing any cattle or stock, who should

§ 5. Of what relates to the conservation of pasture grounds (pastos).

Titles 21. 24, 25. 32. Lib. 7. Nov. Rec.

L. 55. t. 5. P. 5.

Ll. 2 & 3. t. 25. Lib. 7. Nov. Rec.

L. 3. tit. 10. Lib. 10. Nov. Rec.

The following regulations or orders have in view the increase and conservation of pasture grounds (*pastos.*) 1st, That the corregidor must visit the districts (*terminos*) to mark the limits of the commons, with citation to the party interested, *Otero*, cap. 28. n. 2 & 3.; the 3d and following laws of tit. 7. Lib. 7. Rec. enacting penalties against those who confuse or remove the boundaries. 2d, That if the commons or waste lands of a town are sold, the preference of purchase must be given to the corporation, L. 55. tit. 5. P. 5.[20] 3d, That the commons (*terminos*) of Avila, and of the cities, towns, and places of the kingdom of Granada, may not be converted into arable lands[21], Ll. 13 & 14. tit. 7. Lib. 7. Rec.; which provision *Lagunez de Fruct.* Part. 1. cap. 7. n. 82., believes to be general with respect to the whole kingdom. 4th, The cedula of 26th May, 1770, which was an advised (*acordada*) correction of that of 18th March 1768,[22] has in view also the conservation of the pastures (*dehesas*), by which the instruction issued in the preceding year with respect to the division of the lands for husbandry, and the commons (*pastos*) of Estremadura was made general for all Spain; and therefore attention must be paid to it, and not the other two which are anterior. It must also be mentioned here, 5th, That for every thousand ewes and rams, there must be five breeding cows kept; and that every person who works two pairs of oxen, or one of mules, may bring to the common of the corporation, which is appropriated only for cattle of labour, one untamed (*cerril*) breeding cow, L. 25. tit. 7. Lib. 7. Rec.

L. 7. tit. 25. Lib. 7. Nov. Rec

§ 6. Of the honourable council of the Mesta.

[79]

To complete the understanding, as to what relates to commons (*pastos*) and the use of public pasture grounds, (*dehesas publicas,*) we will explain, although briefly, the constitution of the noble council or corporation of the Mesta[23], which has under its jurisdiction and laws the graziers of the kingdom of Castille, in order that their cattle may be preserved, and

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farm or hire the herbage of a pasture (*dehesa*), shall forfeit half his property, and not having any property, shall receive corporal punishment of one hundred stripes (*azotes*).

[20] The law 55. tit. 5. P. 5., quoted in the text, does not particularly apply. It relates to the preference of purchase given to copartners, or joint tenants, over third persons, in regard of the partnership or joint property.

[21] The word in the text is *adehesar;* but a reference to the laws 2. & 3. quoted, has induced the translator to suppose it a typographical error, and to substitute the word *dehesar*, which is the opposite of *adehesar*.

[22] See *nota* 11. tit. 25. Lib. 7. Nov. Rec.

[23] For an account of the *Mesta* and its privileges, the reader is referred to the translation of *Laborde's View of Spain*, 4th vol. p. 19. & 51, &c.

that the state may derive the advantages which are experienced from its proper dispositions.

§ 7. Of its law, de su quaderno.

In the *Fuero Juzgo* are found various regulations for the increase and benefit of the cattle, upon which must have been formed this celebrated council, its laws, and privileges. Both were found dispersed, until they were ordered to be collected, (*recopilar*) in the last century. The most modern edition of this body of laws is that published in 1731, by *Don Andres Diez Navarro*, fiscal of the council, entitled "A Memorandum, (*Quaderno*), of the Laws and Privileges of the Honourable Council of the Mesta." It is divided into three parts. In the first are set forth sixty-four privileges in favour of the council. In the second are contained the existing laws and ordinances. In the third is an index of the opinions or judgments (*proposiciones*), shewing their agreement with the royal laws.

§ 8. Of its antiquity.

The assembly or council of the Mesta is very ancient in Spain; for Alonzo the Wise makes mention of it in the first grant, (*privilegio*), which is that of the 2d September, 1311. It appears that it had alcaldes (*entregadores*) [24], and a fixed place for holding general meetings, and also migratory or travelling, (*transhumantes*), flocks according to *Privil.* 3.

§ 9. Of its government.

At present it is governed by the following laws: 1st, In each year it must hold two councils, one in Estremadura on the 4th of March, and the other in the *Sierras*, on the 4th of September, according to the resolution (*acuerdo*) of 8th March 1631, which rescinds L.1. tit.1. of the *Quad.* by which they were ordered to meet on the 8th February and 20th August. 2d, In these councils or meetings only the members (*hermanos*) of the four principal divisions (*quadrillas*), which form this body, have votes; those are Soria, Cuença, Segovia, and Leon, L.6. tit.1. *del Quad.* To this council belongs exclusively jurisdiction in all matters relating to the Mesta, which its judges and alcaldes exercise, without the ordinary judges, chanceries, or audiencias, being able to interfere with or prevent its exercise, not even in a question as to its competency, which is referred to the council for its determination, *Priv.* 39. tit. 52. §4. 4th, The affairs of the Mesta, with the exception of the election to offices, are determined by

[24] "Judges who decide all questions relative to all the violations of the privileges annexed to the *Mesta*. The number is twelve, who are justices in eyre, forming an itinerant court."—*Laborde's View of Spain*, Translation, 4th vol. p. 140, note †.

[80] sixteen attornies or agents (*apoderados*), of whom each division (*quadrilla*) names four, or more, if it should appear fit to the council, L. 24. tit. 1. *del. Quad.* 5th, Each division (*quadrilla*) also elects four members, one as an accountant, another as a super-accountant (*sobre contador*), another as an alcalde, or judge of appeal; and as procurador fiscal, or attorney general, each appoints three, who are qualified to possess two hundred head of sheep, Ll. 4, 5, & 6. tit 2. *del Quad.* These ordinary alcaldes have jurisdiction, in civil cases, between the members during the period of the council, L. 1. tit. 12. *del Quad.* 6th, There are also alcaldes of divisions (*quadrillas*), who are named by a plurality of votes by the subaltern divisions (*quadrillas*), or junctions of graziers of certain towns. Their office continues four years. Some are for the level, and others for the mountainous lands. Their number is limited to one for every ten leagues (*leguas*); and they take cognizance of the causes which arise between the members of the Mesta and their servants relating to the meeting (*á cabaña real*), and the flocks. And if the members are present (*estantes*), they only have cognizance of the three cases relating to the holding meetings (*hacer mestas*), the appointing lands for sick flocks, and deciding questions of abandonment of possession among the members of the Mesta (*despojos de posesiones*). The alcaldes of the mountains (*de sierra*) have not so limited a jurisdiction.—See tit. 5. *del Quad.* & L. 3. tit. 14. Lib. 3. Rec. From the sentence or judgment of these alcaldes of division, an appeal lies to the alcaldes of appeals (*de alzadas*), of whom there are eight, two for each principal division (*quadrilla*), before whom all allegations and proofs must be made and had, in order that the alcaldes of appeal (*de apelaciones*), who determine processes of this nature may not be detained, Ll. 1 & 3. tit. 10. & L. 1. tit. 11. *del Quad.*

L. 4. tit. 27. Lib. 7. Nov. Rec.

7th, There are also alcaldes (*entregadores*)[25], whose institution is for the protection of the flocks and shepherds of the Mesta, (*cabaña*), to redress injuries and to preserve the sheep walks and passages, tit. 52. §. 9. *del Quad.* and L. 4. tit. 14. Lib. 3. Rec.; the first section of which law limits their number to four, who, according to the royal cedula of 10th July, 1721[26], ought to be appointed upon the proposal or advice of the chamber (*camara*). They have no jurisdiction over members (*hermanos*), nor ought they

L. 5. t. 27. Lib. 7. Nov. Rec.

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[25] See note 24 *ante.*

[26] Not inserted in the Chronological Index to the *Nov. Rec.*; but see note 7. tit. 27. Lib. 7. Nov. Rec.

to entertain demands or suits, but in the cases excepted by L. 21. tit. 1. and L. 26. tit. 6. *del Quad.*; but they have cognizance of all the new imposts respecting the flocks of the Mesta, L. 4. § 20. tit. 14. Lib. 3. Rec. respecting the approvement or conversion of the pastures (*dehesas*) into arable lands, same law, § 27, and against those who shall be in possession of strayed (*mostrencos*) flocks, § 30. same law. 8th, Finally, the fiscal of the council is the person who is charged (*se informa*) with the fulfilment of these duties, L. 1. tit. 4. *del Quad.* and all of them must perform *residencia*[27] before the president, L. 1. § 4. tit. 14. Lib. 3. Rec. who by *cédula* of the 11th January, 1500[28], it is commanded by the catholic kings, shall be a minister of the council of Castille § 5. *del Cap.* 1. *del Quad.* With regard to the other offices, see tit. 1. *del Quad.*

L. 5. t. 27. Lb. 7. Nov. Rec. [81]

L. 2. § 4. tit. 27. Lib. 7. Nov. Rec.

§ 10. Of the right which the members of the mesta possess with respect to pastures (dehesas) for the feeding their flocks (ganados).

In order to form some idea of the right which the members of the Mesta possess, with respect to the pastures (*dehesas*) where their flocks are to graze, it is necessary to observe, 1st, That for the conservation of these pastures, it is ordered that they be not purchased for the purpose of being cultivated, L. 4. tit. 8. *del Quad.* 2d, That the members of the Mesta acquired possession of them or the commons (*ó en los pastos comunes*), by grazing their cattle in them for a winter or summer, or putting a value on them which they do not forfeit but by the loss or failure of their flocks, or for other causes which are mentioned in the 6th. tit. *del Quad.* Ll. 1, 2, and 23, tit. 6. *del Quad.* But he who shall hire pastures (*dehesas*) only at the rate of so much a-head for stock (*por cabezas*), does not acquire possession, L. 13. tit. 6. *del Quad.* nor the shepherd against his master, L. 14. tit. 6. *del Quad.* 3d, That no one can bid for any one of these pastures (*dehesas*), which may be possessed by a member of the Mesta (*hermano*), L. 15. tit. 6. *del Quad.* 4th, The owners of pastures (*dehesas*) cannot stock with their own cattle more pasture than the necessary quantity, and a third besides; and if they should change the feeding-ground the surplus shall remain for the cattle keeper who has acquired possession (*posesionero*), *Céd. de* 7. *de abril de* 1674.[28] 5th, If the owner and the cattle keeper are not agreed upon the price, each shall name an appraiser; and if they disagree, the justice in whose

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[27] The account which judges or official persons were called upon to render, in Spain, on the expiration of their office or appointment, of their conduct during its exercise or administration.

[28] Not inserted in the Chronological Index of the *Nov. Rec.*

jurisdiction the pasture is, names a third; and if the owner have the jurisdiction the nomination devolves upon the judge of the nearest royal place, but never on the justice of the place of which the owner is a native, L. 3. § 3. tit. 14. Lib. 3. Rec. For fuller information reference may be had to the *adiciones to* tit. 6. *of the Quad.* and to what is said respecting pastures.

L. 4. t. 27. Lib. 7. Nov. Rec.

§ 11. Of the privileges of the flocks of the mesta.

With respect to what relates to the flocks of the *Mesta* it is laid down, 1st, That those of the kingdom of Castille are of the *cabaña real*, which is under the protection of his majesty, *Priv.* 2. so that no corporation or community (*comunidad*) can form another association (*cabaña*), nor any sheep owner separate himself from the royal one, L. 11. tit. 27. Lib. 9. Rec. 2d, They do not pay ferryage nor pontage, *Priv.* 42. 3d, The lost flocks which are called strayed (*mostrencos*) are the council's of the Mesta by privilege, and the declaration of the commissaries of the *crusade*, *Priv.* 28. § 2 and 7. and L. 4. § 30. tit. 14. Lib. 3. Rec. 4th, This *cabaña real* includes the kinds of woolly (*lanar*) flocks, goats, cows, mares, colts, and hogs, *Priv.* 20. 5th, These same privileges belonging to the *cabaña real* were extended to the city and corporation of *Albarracin*, by *Cedula* of 16th December 1693. [29]

[82]

L. 1. tit. 27. Lib. 7. Nov. Rec.

L. 5. tit. 27. Lib. 7. Nov. Rec.

§ 12. Of the kinds of flocks of the Mesta, and their laws.

The flocks generally are distinguished into those which are migratory (*transhumantes*), those which traverse the limits of their pasture (*travesios*), and stationary (*estantes*). The migratory flocks are those which traverse the royal pass (*puerto*) to go to feed where they paid the toll *de montazgo*, [30] the docket of which is set forth in tit. 17. *del Quad.*, but hath been done away with by *Cedula* of 17 July, 1758 [31]; as an equivalent for it, a duty was established on the exportation (*de extraccion*) of wool from the kingdom. These flocks may travel freely through all the commons (*terminos*) to graze and drink water, provided they do no injury to the corn (*panes*), the vineyards and gardens, nor to the meadows which are mowed annually (*prados de guadaña*) in the pastures inclosed and marked out for oxen (*dehesas de bueyes coteadas y autenticas*), *Priv.* 21; and if they should do damage, it shall be paid for according to the estimation of two honest men, but without their being ill-treated, *Priv.* 21 and 57. § 2. It is to be observed that no penalty can be exacted for

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[29] Not inserted in the Chronological Index to the *Nov. Rec.*

[30] Toll or duty paid in favour of the crown of Spain, for the passing of flocks from one province to the other.

[31] Not inserted in the Chronological Index to the *Nov. Rec.*

grazing flocks in the waste lands (*baldios*), and pastures for oxen, L. 14. tit. 23. *del Quad.*

The flocks *travesios* leave their pastures, and on the contrary those called *estantes* remain in them. The mode by which the flocks must travel through the sheep walks, passes, and over the bridges, and from one pasture (*dehesa*) to another, is explained by tit. 20. and 42. and L. 14. § 6 & 22. tit. 14. Lib. 3. Rec. [32]. These descriptions of flocks, 1st, Must be wandering, and marked as prescribed by L. 1. tit. 39. *del Quad.* 2d, They are prohibited from being carried out of the kingdom, Ll. 21. [33] 23. and 24. tit. 18. Lib. 6. Rec. 3d, They cannot be sold without having been held in possession four months before, *Priv.* 10. § 2. 4th, They may enter the kingdoms of Aragon, Valencia, and Navarre to graze, without paying fees, *Priv.* 29.; and into Portugal, on giving security to bring back the same flocks, *Priv.* 29. § 5. L. 22. tit. 18. Lib. 5. Rec. [34] 5th, The number of sheep to feed on the commons cannot be limited by the laws (*estatutos*) of the municipalities (*pueblos*) to the prejudice of the members of the *Mesta*, L. 10. tit. 24. *del Quad.*, nor can the sheep of the flock (*cabaña*) be obstructed in respect of their commons by new plantations of woods (*de montes*), *Priv.* de 29 April 1526. 6th, For the sick flocks, a separate piece of ground shall be set aside, tit. 21. *del Quad.* 7th, And from each flock sixty head may be sold without paying the toll (*portazgo.*) For a complete knowledge of this subject, it is necessary to inspect the *Quaderno*, & tit. 14. Lib. 3. Rec.

Ll. 1. & 2 tit. 15. Lib. 9. Nov. Rec.

[83]

Tit. 27 & 25. Lib. 7. Nov. Rec.

§ 13. Of the funds or property, and duty or taxes raised for the benefit of a corporation (propios y arbitrios de concejo.)

Among the things destined for the benefit of a corporation, we ought to place its funds or property, and the taxes raised on the inhabitants, (*los propios y arbitrios de los pueblos*), arising from various productions [35]; and we, therefore, according to our laws, will consider them in what regards their constitution, administration, and end.

§ 14. Of their constitution.

To their constitution belongs, 1st, That the suits with respect to the *proprios* and rents of the corporation shall be determined summarily; and two sentences confirmatory of each other shall be carried into execution, without an inhibition being allowed to ascertain if there be ground for an appeal, L. 5. tit. 5. Lib. 7. Rec. 2d, That the cities, towns, and places, shall not be dispossessed of

L. 3. tit. 16. Lib. 7. Nov. Rec.

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[32] Not noticed in *Nov. Rec.* [33] Ibid. [34] Ibid.

[35] *Palacios* says, that the *proprios* consist of rents or property (*fundos*) belonging to the towns; and the *arbitrios*, of certain imposts on provisions (*abastos*) or marketable goods.

L.1.t.21.Llb.7. Nov. Rec. their commons (*terminos*), without being heard, L.6. tit.5. Lib.7. Rec. 3d, That the *regidors* shall not obstruct the corporation in the prosecution of suits with respect to *proprios*, L.3.t.21.Lib.7. Nov. Rec. L.7. tit.5. Lib.7. Rec. 4th, That judges shall not be appointed to sell the public commons and waste lands, Ll.8. & 10. tit.5. L.1.t.23.Lib 7. Nov. Rec. Lib.7. Rec. 5th, That the waste lands, trees, and their fruits, shall not be sold by the king, unless it be for the benefit of his L.2. tit.23. Lib.7. Nov. Rec. subjects (*vasallos*), L.11. tit.5. Lib.7. Rec. 6th, That the price for the grazing on the pastures which were broken up before the year 1748, shall partake of the quality of *proprios*, *Ced. of 13th January*, 1749.[36] 7th, That the cognizance of *proprios* belongs to the council of Castille, *Decret. 12th May*, 1762. 8th, That duties or taxes (*arbitrios*) cannot be imposed, either in Aragon or Castille, without the royal authority, *Ced.21. June*, 1760.[37] 9th, That duties *de milicias*, and the tribute money in acknowledgment of seignory (*moneda forera*), ceased in 1724, *Aut.25.* tit.9. Lib.3. Rec.[38]

§ 15. Of its administration.

[84]

The great prejudices which have resulted to the towns, or corporations, from the improper administration of their '*proprios*,' have induced the necessity of enacting very proper regulations for its government: those which the vigilance of our Catholic King Charles the III. published in the years of his happy reign, which may God multiply for the good of the monarchy, occupying at present the principal place. Among these is now in force the instruction of 30th July, 1760.[39] By it there was created in every town an assembly or junta, (*junta de proprios y arbitrios*), composed of the superintendant and two regidors of the cabildo, (*ayuntamiento*); and it was ordered on the 24th July, 1762, that all the ancient *juntas de censalistas*[40] of the kingdom of Aragon should transmit to the former their resolutions, (*concordias*), and papers: at this *junta*, a deputy from the *censalistas* may assist, remaining responsible, as all the other individuals for the employment of the funds (*caudales*) of the "*proprios*," *Céd.* 18th October, 1764.[41]

This *junta*, 1st, ought to transmit its annual accounts to the council of superintendence of the province; the formulary of which was transmitted to the towns or municipalities (*á los*

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[36] Not inserted in the Chronological Index to the *Nov. Rec.*
[37] Ibid.
[38] Not in *Nov. Rec.*
[39] L.13. tit.16. Lib.7. Nov.Rec.
[40] Perhaps "annuitants" may be the suitable translation.
[41] Not inserted in the Chronological Index to the *Nov. Rec.*

pueblos) in the *Céd.* of 29*th March* 1764 [42], and was commanded to be observed by the order of the 16th March 1765. [43] 2d, It ought to rent each separate *propio* to the highest bidder at public outcry, according to the direction of L. 4. tit. 5. Lib. 7. Rec. the justices, regidors, or other officers of the corporation not being allowed to rent them, L. 3. tit. 5. Lib. 7. Rec. nor powerful persons, L. 23. tit. 6. Lib. 3. Rec. 3d, The regidors, jurats, and escribanos, must not borrow from the stewards (*mayordomos*) of the *propios* and of the public granaries, nor from the renters of them, under pain of loss of office, Aut. 5. tit. 4. Lib. 3. Rec. [44] Licenses to raise money or taxes (*tomar censos*) upon the *propios* cannot be applied for without expressing those to which they are subject. 5th, The cabildos (*ayuntamientos*) ought to administer the *propios*, *arbitrios*, and municipal taxes (*sisas*) without applying them to their own purposes, *Decre.* of 18th June and 14th July 1751. [45]

L. 4. t. 16. Lib. 7. Nov. Rec.

L. 7. tit. 9. Lib. 7. Nov. Rec.

L. 7. t. 16. Lib. 7. Nov. Rec.

The object of this property is to satisfy from its produce the burthens imposed upon the corporation. Wherefore it should be known, 1st, That the towns which may have not sufficient *propios* shall point out to the corporation those which may appear the most suitable objects of revenue, *Céd.* 9 *October* 1765. [46] 2d, That from the produce of the *propios* the king exacts the two *per cent.* for the expense "*de cuenta y razon*," which must be paid by thirds (*tercios*) and in preference to every other expense. 3d, After which shall be paid the expenses for administration, public works, holy days, proclamations, funerals of royal persons, the destruction of the locust (*matanza de la langosta*), the provision of the public granary, its own funds not being sufficient for the purpose, the salaries of physicians, surgeons, veterinarians, public assayers, masters, &c.; and the houses of the royal granaries shall be repaired, and the breeds of horses kept up; all which is better explained by the before mentioned instruction of 1760. 4th, By two *Cédulas* of 1766, it was ordered, that from the products of the *propios* the municipalities (*pueblos*) may go on collecting the taxes or duties which shall be due by them for one year, and in the other may pay the pensions in arrear (*pensiones atrasadas*) and so on successively. 5th, With respect to the assessments

§ 16. Of their object or end.

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[42] Not inserted in the Chronological Index to the *Nov. Rec.*
[43] Ibid.
[44] Not noticed in *Nov. Rec.*
[45] Not inserted in the Chronological Index to the *Nov. Rec.*
[46] Ibid.

Tit. 22. Lib. 6. Nov. Rec.

(*repartimientos*), of which tit. 6. Lib. 7. Rec. speaks, reference must be had to the *Cédulas* of 1751, which have fixed them with respect to matters in dispute appertaining to the *propios*: frequent doubts may occur whether they ought to be discussed in the audiencias or in the tribunals of the intendants, upon which it would be proper some declaration should be made.

§ 17. Of the granaries of corporations.

The public granaries (*positos*), which by their nature ought to be considered as public things, must be governed and administered according to the instruction of the 30th May, 1753[47], which explains and amends, L. 9. tit. 5. Lib. 7. Rec., which proves to us that granaries were already established in 1584. Thus we know, 1st, That the granaries are, some for the supply of the town, and others for assisting the labourers. 2d, That they are governed by the magistrates of each town, a judge, escribano, syndic, and *depositario*. 3d, That applications for redress (*recursos*) and appeals from them belong to the superintendant general. 4th, That they are obliged to be present at the delivery and sharing out of the grain; at the passing the accounts; at the general measuring of the stock (*fondos*), which is done at the end of June in every year; at the winnowing of the corn (*apaleos*), in order that the additional quantity to be paid in by the farmers (*creces*) may not be concealed; and at the inspection of memorials, at which two experienced labourers ought to be present to examine whether what each person sets forth as to the quantity of corn that will be necessary for his

L. 1. tit. 20. Lib. 7. Nov. Rec.

[86]

cultivation (*labores*) is correct; which division is usually made in October, an edict or notice being published fifteen days previously to present these memorials to the junta. 5th, This corn ought to be in a secure place, locked up under three keys of different locks, of which one must be in the possession of the justice, one of the mediating (*interventor*) *regidor*, and another in that of the *depositario*. 6th, The master keys (*sus caudales*) must be in the archives or chest of the cabildos, and, if there be none, in the public granary, or in the possession of the *depositario*, he giving security. 7th, Four books must be kept, one to insert the entries of grain, and the existing quantity of corn; another for inserting the issues of corn, and the other two to enter the money which is delivered or paid in and issued out. 8th, The orders in virtue of which the grain is delivered or taken out must be signed by the mediating

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[47] *Vide* note 24. tit. 20. Lib. 7. Nov. Rec.

judge (*interventor*), and escribano, the labourers giving security for what they take out. 9th, At the end of June the *depositario* presents his accounts, which must be passed to the syndic, in order that he may investigate them (*ponga reparos*); and if he should not find them correct he is to state that they ought not to be approved, and the judge shall determine (*substanciara*) upon it. 10th, When the granary is repaid what it advanced to the *labourers* or to the public, information of it is given to the judge of the district (*partido*), who ought to transmit it to the superintendant general with the accounts of each granary. 11th, The *depositario* is entitled for his trouble at the rate of a *maravedi* for each *fanega* which is received or issued, the syndic the same for what is received, and also the escribano; and the judge a *half maravedi* for what is received or issued out.

Cap. 7. Of private things.

Private things are those which belong in particular to every individual of which he may acquire or lose the dominion, L. 2. tit. 28. P. 3.

L. 2. tit. 28. P. 3.

Cap. 8. Of the second general division of things.

The second division of things is into corporeal and incorporeal. The first are those things which may be seen and touched, and are divided into moveable and immoveable. Things called moveable (*muebles*) are all those which men can move from one place to another, and all those which can move naturally by themselves, L. 4. tit. 29. P. 3. Things immoveable (*sitias*) are those which can neither be moved by men, nor by themselves naturally. Things incorporeal are those which can be neither seen nor touched; of this kind are all species of rights (*de derecho*) of which our jurisprudence treats, and which have their proper place in the following titles.

L. 4. tit. 29. P. 3.

[87]

Cap. 9. Of the subdivision of things incorporeal into the right in, and the right to the thing.

A right is either in the thing, or to the thing; a right in the thing is that which belongs to one over any thing without respect to another person; a right to the thing is that which belongs to any as against another person to oblige him to give or to do something: of the first kind are right of dominion, of inheritance, services (*servidumbres*), and pledge, and mortgage. Possession, as it is a momentaneous right, and is lost by the loss of the thing, is not a right in the thing. Of the second kind are all species of obligations which arise from contracts.

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TITLE II.

OF DOMINION, THE MODES OF ACQUIRING IT, AND ITS KINDS.

Cap. 1. Of dominion, and its kinds.

THE first species of right in the thing is that of dominion, which is a power that arises from the right every one has in the thing, by reason of which he may dispose of and derive from it every possible advantage, may exclude others from its use, and claim it (*vindicarla*) from any possessor, unless a contract, or the law, hinder it. It is from this inferred, that there are two kinds of dominion, one absolute or perfect, which consists both of the power of disposing of, and receiving the profit (*utilidad*); the other qualified, or less perfect, by which these two rights are divided between the direct or immediate proprietor, who may dispose of the thing; and the useful usufructuary (*util*) proprietor, who has the power of claiming (*vindicarla*), and of enjoying the use or profits of it. Of this last class are the feud or fee (*feudo*), and the *enfiteusis* (lease), which we proceed to explain before entering on the exposition of the modes of acquiring dominion.

Cap. 2. Of the feud.

Feud[1] is a grant which the lord makes to any man, on condition that he becomes his vassal, and does him homage to be faithful to him, L.1. tit.26. P.4. The origin of feuds must be ascribed to the ancient Franks or Germans; for it appears that their kings were accustomed to grant lands to their generals and nobles (*señores*), on the condition of their doing homage and performing military service; from them the Lombards adopted them, who introduced them into Italy in the sixth century, *Jorge Adam Struvio, Syntagma Juris Feudalis*, Cap.1. § 3. Feuds were not known in Spain until the ninth century; and the first notice that is taken of them is by the Emperor Charles the Bald having granted in fee Barcelona to Wifredo II. the Handsome (*belloso*), *Diago, Hist. de los Condes de Barcelona*, Lib.2. Cap.7. From Catalonia it is to be supposed that feuds would

L.1.tit.26.P.4.

[90]

[1] A feud, says *Palacios*, is a particular species of contract like, in part, to the *Emphyteusis*, in which the sovereign or lord grants to one the *dominium utile* to a thing or property, real or honourable, on the promise, by the latter, of fealty, and some personal service by him and his successors: that its origin must be attributed to those who sallied from the north to conquer the empire.

be introduced into Castille; and, in truth, the *Behetrías*[2], such as they are described by *Pedro Lopez de Ayalo* in his *Crón. del Rey Don Pedro*, Año. 2. Cap. 14., and the *dominio solariego* partook much of the nature of feuds; to which were annexed homage and military service, until the duty paid in lieu of military service (*lanza*) and the *annats* of the half year (*media annata*)[3], were introduced as equivalent to them. This is confirmed by L. 68. tit. 18. P. 3. which, referring to the solemnities of investiture, says, that the grandees (*ricoshomes*) granted feuds: and that there existed feuds, strictly so called, in Castille, is proved by tit. 26. P. 4.; the laws of which upon the constitution, dissolution, and recognition, or acknowledgment of the feud, and the obligations of the feudatory, agree with the feudal laws of the Lombards contained in the *Consuetudines Feudorum*. We only observe one remarkable difference in point of succession or descent; for L. 6. tit. 26. P. 4. says, that the succession does not descend beyond grandsons, but returns to the lord; and it is clear, that, by the feudal common law, the succession was extended *in infinitum*; but this gives us to understand, that such a law, enactment, or provision, was made in favour of lords, to afford them, by this mean, the greater liberty of disposal. See tit. 25. P. 4., upon the reciprocal obligations of vassals and lords, and the cases in which the former might abandon the feudal dominion (*señorío*) of the latter.

L. 68. t. 18. P. 3.

Tit. 26. P. 4.

L. 6. t. 26. P. 4.

Tit. 25. P. 4.

L. 5. tit. 30. P. 3.[4] makes a clear distinction between the feud, usufruct, and emphyteusis.[5] The last is a contract or agreement which is made respecting real property granted for the whole life of the tenant, or his heirs, on condition of the payment of an annual rent, or as shall be agreed on, L. 28. tit. 8. P. 5. Whence it follows, 1st, That it is a contract partly between sale

Cap. 3. Of the emphyteusis.

L. 28. tit. 8. P. 5.

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[2] *Behetrías*, or *benefactrias*, from *benefactoria*: towns, the inhabitants of which were invested with the right of choosing their own lord or señor. *Behetría* was one of the ancient kinds of seignory in Spain: for its further definition and its origin, as well as of the other kind of seignory called *dominio solariego*, mentioned in the text, the reader, who may be desirous of more information on the subject, is referred, in addition to the author there cited, to Law 3. tit. 25. P. 4. L. 2. &c. tit. 1. Lib. 6. Nov. Rec. *Cornejo Diccionario del derecho real de España*, vol. 1. word *Behetría*: and to *Teatro de la Legislacion Universal de España é Indias*, 5th vol. same word.

[3] *Palacios* says, *lanzas* consist of a certain service in money, which the grandees and nobles pay to the king every year, and *media annata*, the sum which is paid for the title and honour (*per el titulo y honorifico*).

[4] L. 5. tit. 30. P. 5., is cited in the text; but there is no such title in the 5th Part., and the 3d Part. is supposed to be meant.

[5] See *Wood's Inst. C.L.*, p. 238, book 3. c. 5., for the definition, &c. of this contract, also *Hal. Annal. C.L.* p. 3. ch. 18.; 1 *Browne C.L.* p. 192. n. 7. Book 2. ch. 3.

L.3.tit.14.P.1. and lease, L.3. tit.14. P.1. 2d, That the terms set forth in the
L.28.tit.8.P.5. deed, must be fulfilled, L.28. tit.8. P.5. 3d, That if the thing or property be lost or destroyed by fire, earthquake, or inundation, the tenant (*enfiteuta*) shall not be obliged, from that time forward, to pay the rent (*pension*); but if the whole be not destroyed, so that there should remain at least an eighth part,
[91] he shall be obliged to pay, L.28. tit.8. P.5. 4th, If the tenant
L.28.tit.8.P.5. hath allowed three years to go by without paying the rent to a lay lord, the property becomes forfeited (*cae en comiso*), without its being necessary to have recourse to the authority of the judge; provided, however, that if within ten days after the expiration of the above time, he should wish to pay the rent, the
L.28.tit.8.P.5. lord must allow him to retain the thing or property, L.28. tit.8. P.5. 5th, That if the direct or immediate lord be an ecclesiastick, an omission to pay the rent for two years is sufficient to
L.28.tit.8.P.5. work the forfeiture of the property, L.28. tit.8. P.5. 6th, That the tenant may aliene the land, acquainting the Lord who has the right of pre-emption (*tanteo*), with the price that another has offered; and he not giving that price, or being silent with respect thereto, for two months, the tenant may sell, but to a person from whom the lord may recover the rent, in order that he shall execute a new deed of lease, and for which he is entitled to a relief (*laudemio*)[6], which is the fiftieth part of the price or
L.29.tit.8.P.5. value, L.29. tit.8. P.5. 7th, That by alienating is understood selling, exchanging, pledging, or mortgaging, imposing services, or assigning to one, without such power of alienation, L.10.
L.10.t.23.P.7. tit. 23. P.7. And thus the tenant (*el enfiteuta*) shall be able to rent the land or thing, notwithstanding *Lopez, á* L.29. tit.23. P.7. Gl.3. says the contrary.[7] 8th, That if a sale thereof was made without the permission of the lord, and he knew and consented to it, no forfeiture is incurred, *Lopez, á* L.29. tit.8. P.5. Gl. 6. Quæst.4.

Cap. 4. Of the modes of acquiring full or absolute dominion according to the laws of nations.

The modes of acquiring full or absolute dominion are either by the laws of nations, or by the civil or municipal law. The natural modes are original or derivative. The first are so called, because by them that thing which was not in the power or possession of another, commences to be under the dominion of some one: and derivative modes are so called, because by them the dominion is transferred from one to another. Of the original some put us in possession of (*entregan*) the body or sub

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[6] See Wood's Inst. Civ. Law, Lib.3. C.5. P.239.
[7] It does not so appear. *Vide* the reference in the text.

stance of the thing, as occupancy or *invention*; others produce a certain augmentation to the thing already ours, such does accession. Tradition or delivery (*entrega*) is the derivative mode.

Cap. 5. Of occupancy.

Occupancy is the taking corporeal things which do not belong to another, with the intention of retaining them for one's self. Things are said to be no one's property, which, by their nature, are not under the dominion of any one, or were thrown away by the owner, with the intention of parting with them in future, Ll.49. & 50. tit.28. P.3.

Ll.49, 50. t.28. P.3.

Hence it arises, 1st, That wild beasts, birds, and fishes, immediately upon being taken, are the property of him who takes them, L.17. tit.28. P.3.; and they can be taken not only on one's own property, but on that of another person, unless the owner forbid, or do not permit the entry thereon, Ll.17. & 22. tit.28, P.3. 2d, That bees gathered in hives cannot be taken; because he who has them in hives, has already made them his own, L.22. tit.28.P.3., unless they have flown from the hive, so that the owner is unable to see or to take them, L.22. tit.28. P.3. 3d, For the same reason, no one can take domestic animals, such as hens, capons, &c., L.24. tit.28. P.3. 4th, That if beasts wild by nature, although domesticated, fly away, and lose the habit or *animum* of returning, they shall belong to the first taker, L.23. tit.28. P.3. 5th, That it is not sufficient to wound the game, but it is necessary to seize or lay hold of it [8], in order to acquire the dominion, L.21. tit.28. P.3.

[92]

L.17.t.28.P.3.

Ll.17. 22. t.28. P.3.

L.22.t.28.P.3.

L.22.t.28.P.3.

L.24.t.28.P.3.

L.23.t.28.P.3.

L.21.t.28.P.3.

The liberty of fishing and hunting is limited or restrained by the laws of the kingdom for the public benefit. The latest ordinance (*pragmatica*) of 3d March, 1769 [9], subsequent to that of tit. 8. Lib. 7. Rec. and other *cedulas* or orders issued upon the same point, contains and explains fully every thing connected with this subject, and, therefore, in the desire to conform to it as a suppletory law, and to confine ourselves within the limit of our institute, we have to observe, 1st, That it prohibits fishing and hunting from the beginning of March to the end of July, and in the remaining months, on snowy or tempestuous days (*dias*

[8] And this effectually; for it appears by the law referred to in the text, that if game be caught in snares set by one, yet it shall be the first taker's, notwithstanding he be not the setter or owner of the snares or traps; unless a custom to the contrary should be in force. *Query*, if the land on which the snare was set belonged also to the owner of the snare.

[9] See *nota* 5. tit.30. Lib.7. Nov. Rec.: the last regulations on this subject, it is believed, are contained in L.11. tit.30. Lib.7. Nov. Rec., which see.

de nieve ó de fortuna). 2d, That during the period forbidden fowling is also prohibited except for the purpose of killing sparrows; and the use of instruments of fishing, except the hook and nets with meshes. 3d, That it is not allowed to use quick lime for fishing, nor poison nor other prejudicial things. 4th, That it declares, that no hunters by profession shall be permitted, as being an idle set of persons. 5th, That wild bulls (*urones*), decoy birds, snares, traps, and other unlawful instruments are for ever prohibited. 6th, That only nobles and persons of property and of distinction may employ greyhounds, with permission of the council, which is restricted to the time the vintage is finished, until the month of March. 7th, That the owners or renters of thickets (*sotos*) and pasture grounds (*cotos*) may begin
[93] their hunting from St. John the Baptist's day. 8th, That the penalty for transgressors, if nobles, is the loss of the instruments, twenty thousand maravedis fine, and two years' military service for the first offence; for the second, double the fine; and for the third, triple. If plebeians, they are condemned to the loss of the instruments, ten thousand maravedis fine, and two years' banishment for the first offence; for the second, the fine is doubled; and for the third, they shall pay twenty thousand maravedis, and suffer four years imprisonment (*de presidio*). 9th, That the intendants, corregidors, and justices shall take cognizance of these causes in the first instance, no person of whatever class being excepted from their jurisdiction, with respect to matters relating to fishing and hunting.

Cap. 6. Of finding.

Invention or finding, is the mode by which we acquire the dominion of things which have no owner by their nature, or which heve been relinquished by them, with the intention or *cum animo* of not returning to take them, such as gold, pearls, and precious stones, which are met with on the sea-shore, which by
L. 5. tit. 28. P. 3. the law of nature belong to the first occupant, L. 5. tit. 28. P. 3. as also money thrown to the people on days of public rejoicing,
L. 48. t. 28. P. 3. and other holidays, L. 48. tit. 28. P. 3.

With this class should be joined strayed goods (*mostrencos*); that is, *which have lost the owner;* but in Spain they are not considered as such, because they belong to the crown (*real camara*), and the cognizance of them appertains to the ordinary justices, and not as was formerly the case to the subdelegates of the *cruzade*, according to the last provision of 9th Oct. 1766 [10],

[10] N. 1. tit. 22. Lib. 10. Nov. Rec.

which, without doubt, annuls the former laws which treated of *mostrencos*, and particularly aut. un. tit. 9. lib. 1. Rec. [11]

Mines of gold, silver, quicksilver, &c. ponds of salt and other salt pits belong also to the royal patrimony, Ll. 2 & 4. tit. 13. Lib. 6. Rec., and L. 19. tit. 8. Lib. 9. Rec. Wherefore Philip II. by an ordinance of 1584, which is L. 9. tit. 13. Lib. 6. Rec., grants permission to his native subjects, and to foreigners to work and improve mines, and concedes various rewards (*mercedes*) and privileges to the discoverers of them, ordering that care should be taken not to do any injury to the estates of individuals; and that there be paid to the king the fifth [12] of the product and other duties therein expressed: and he renews L. 4. tit 13. Lib. 6. Rec. and L. 5. tit. 13. Lib. 6. Rec. [13] in as far as they are not contrary thereto. This law hath been limited in some things by L. 10. tit. 13. Lib. 6. Rec.

Ll. 1 & 3. tit. 18 Lib. 9., L. 1. tit. 19. Lib. 9. Nov. Rec. L. 4. t. 18. Lib. 9. Nov. Rec.

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L. 3. tit. 18. & Nota 1. tit. 20. Lib. 9. Nov. Rec. Nota 1 & 2. tit. 18. Lib. 9. Nov. Rec.

The treasure which is found upon the earth or concealed in it by any one, is applied to the benefit of the Exchequer (*al fisco*), with a reservation of the fourth part for the finder, who ought to communicate the discovery to the justice, L. 1. tit. 13. Lib. 6. Rec., which alters L. 45. tit. 28. P. 3. See *Lagunez de fruct.* part 1. cap. 11.

L. 3. t. 22. Lib. 10. Nov. Rec. L. 45. t. 28. P. 3.

The other natural original mode is accession, or the right of acquiring the augmentation or improvement which any thing belonging to us receives. It is divided into that caused by nature, and that produced by industry. The natural kinds of accession are, 1st, The young of animals which belong to those whose property the females are, L. 25. tit. 28. P. 3. [14] 2d, The island that rises in a river which belongs proportionally to the estates which border on the bank to which it is nearest or most immediate, Ll. 27, 28, & 29. tit. 28. P. 3. 3d, The increase which rivers cause by degrees to an estate, will belong to the proprietor

Cap. 7. Of the accession to, or natural augmentation or improvement of the thing, and the kinds thereof.

L. 25. t. 28. P. 3.

Ll. 27, 28, 29. t. 28. P. 3.

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[11] *Nota* 2. tit. 3. Lib. 10. Nov. Rec.: but a year and two months were allowed for the owner to reclaim his goods after their delivery to the justice or *alcalde*, as directed by Ll. 1, 2. & 4. tit. 22. Lib. 10. Nov. Rec.: during which time, the finder or person asserting his privilege to the *bienes mostrencos*, was to cause them to be publicly proclaimed once a month, on a market day, in order to afford the owner the opportunity to claim restitution of his property.

[12] See the Law 4. tit. 18. Lib. 9. Nov. Rec., referred to in the text: and *notas* 1 & 2. *ibid.*

[13] See *Nota a.* L. 3. tit. 18. Lib. 9. Nov. Rec.

[14] Except, says the law quoted in conclusion, there should exist a custom in the particular place, or an agreement between the proprietors of the male and female to the contrary.

L. 26. t. 28. P. 3. of it; but not that caused by a sudden overflow, L. 26. tit. 28. P. 3. 4th, The land which is left dry by the change of the current of a river, is divided between the owners of the estates on that bank; and the proprietors on the bank where it takes its new course, lose the dominion of the land so engrossed, and the new course assumes the nature of the first or original channel, L. 31. t. 28. P. 3. L. 31. tit. 28. P. 3. But if lands should remain covered by an L. 32. t. 28. P. 3. inundation, the proprietors shall not lose the dominion, L. 32. tit. 28. P. 3. 5th, If a tree planted on one estate should extend its principal roots [15] to the land of another, the owner of the latter shall also be the owner of its fruit; and if it throws out principal roots in both, the proprietors of both the estates shall L. 43. t. 28. P. 3. equally divide its fruit, L. 43. tit. 28. P. 3.

Cap. 8. Of industrial accession or increase, and its kinds.

To industrial accession belongs the union or addition of another person's property to one's own, *ex. gr.* a foot to a statue of the same metal; the writing to the paper; a tablet to the painting; and a house to the soil. In these cases the accessory or addition belongs to the owner of the principal; the foot, in respect of the statue, the writing in respect of the paper, the [95] tablet in respect of the painting, the buildings and fruits in respect of the *land* on which they were planted or sown, and the materials in respect of the building, being considered as accessories; but he who united or added another's property with or to his own, or worked on it with good faith [16] (*con buena fe*), shall be entitled to remuneration for the expenses and improvements from him who acquires them by reason of the accession; and if he proceeded with bad faith (*mala fe*) he loses the whole, as Ll. 35, 36, 37, 38. 42, 43. t. 28. P. 3. explained with a variety of examples [17] by Ll. 35, 36, 37, 38, 42 & 43. tit. 28. P. 3., which have copied all that the Roman laws say upon the subject.

A species of industrial accession is the specification or formation of a new kind of thing, with the material of another, as if from grapes wine be made, a vase from silver, &c. If the materials of which the thing is constructed cannot be reduced to their original state, they shall belong to him who made it in good faith, on paying the value of the materials to the owner. And if it be possible to reduce them to their original state,

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[15] The law quoted in the text, L. 43. tit. 28. P. 3., says, those from which it derives nourishment. There would, perhaps, be some difficulty in ascertaining this fact.

[16] *i. e.* supposing it to be his own.

[17] And some qualifications.

the thing shall be given to the original owner of the materials, who shall satisfy the party for the expense occasioned in forming the new thing; but in case of acting in bad faith, the workman shall lose his labour and expenses, L. 33. tit. 28. P. 3. L. 33. t. 28 P. 3.

Mixtion (*mixtion*) results from the mixture of materials of one kind with those of another, and therefore he who mixes his own gold with that of another, never makes it his, although he may have done it with good faith, L. 34. tit. 28. P. 3. and if they L. 33. t. 28. P. 3. should be mixed by chance or by the will of the owners, they shall be common, they being such as can be separated; and if this be not possible, each shall preserve his property in his share, L. 34. tit. 28. P. 3. L. 34. t. 28. P. 3.

Tradition or delivery (*tradicion*), which is the derivative mode of acquiring dominion, is made when men give possession of their property to others for some lawful reason, L. 46. tit. 28. P. 3. It is corporal, as if delivery be made of the thing into the hands of him who purchases it, &c., L. 46. tit. 28. P. 3. and also fictitious or feigned, as in the case where one should transfer or aliene a thing which he hath lent to another, L. 47. tit. 28. P. 3. This takes place in respect to things corporeal as well as incorporeal; and as demonstrated by the examples referred to in Ll. 46, and 47. tit. 28. P. 3.

Cap. 9. Of tradition and its kinds.

L. 46. t. 28. P. 3

L. 46. t. 28. P. 3.

L. 47. t. 28. P. 3.

Ll. 46 & 47. tit. 28. P. 3.

Symbolical tradition or delivery is when one thing is delivered in token or earnest (*señal*) of another, the dominion of which it is desired to transfer; *ex. gr.* if the keys of the granary be delivered, which contains the corn which is sold, see Ll. 6, 7, and 8. tit. 30. P. 3.

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Ll. 6. 7 & 8. t. 30. P. 3.

The modes of acquiring full dominion, according to the civil or municipal law, are prescription, donation, and other contracts of which we shall speak hereafter: we are now treating of prescription as having a very natural connection or affinity with possession, which we are to consider as accessary to dominion, although it may happen that it is sometimes found separate.

Cap. 10. Of the modes of acquiring full or complete dominion according to the civil or municipal law (derecho civil).

Prescription is to hold the property or thing of another for a certain time, and to make it thereby one's own, so that the right owner cannot afterwards deprive you of it. To constitute prescription, good faith (*buena fe*), just title, and capacity of the thing for the purpose, and of the person who prescribes, are necessary; as also continued or uninterrupted possession for a determinate time, L. 9. tit. 29. P. 3.

Cap. 11. Of prescription, and the things which are necessary to produce it.

L. 9. tit. 29. P. 3.

Good faith consists in the possessor's believing that the person from whom he received the thing, had right to aliene or transfer it, L. 9. tit. 29. P. 3. and therefore there will not exist

§ 1. Of good faith (buena fe).

L. 9. tit. 29. P. 3.

good faith, 1st, If the right owner of the thing sold warns or gives notice to the purchaser that it does not belong to the
L. 10. t. 29. P. 3. vendor, L. 10. tit. 29. P. 3. 2d, Nor if one purchases a thing from a minor, a madman, or the attorney of another, fraudulently
L. 11. t. 29. P. 3. or collusively inducing him to dispose of it[18], L. 11. tit. 29. P. 3. 3d, But there will exist good faith in one who, when he receives the thing, believes the person from whom he makes the purchase to be the right owner, and he ought to be in possession of it all the time necessary by law to acquire the right of prescription; so that if before the completion of this time bad faith intervenes
Ll. 12 & 14. tit. 29. P. 3. he cannot prescribe[19], Ll. 12. and 14. tit. 29. P. 3. unless he received the thing by way of gift, or exchange, in which cases
L. 12. t. 29. P. 3. good faith at the time of delivery is sufficient[20], L. 12. tit. 29. P. 3. 4th, In the same way if such possessor, knowing that the thing did not belong to the person who transferred it to him, should sell it to another before the expiration of the time necessary to complete his prescriptive right, the latter cannot take it by prescription, because there existed bad faith at the time of its
L. 12. t. 29. P. 3. passing to him[21], L. 12. tit. 29. P. 3., so that it follows that there must exist good faith at the commencement of the possession of
L. 12. t. 29. P. 3. the thing, L. 12. tit. 29. P. 3. 5th, If with respect to slaves or animals this bad faith supervenes before the females conceive

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[18] For a less price than its real value. See the law quoted in the text.

[19] In other words, if he is conscious that he derives his possession from a wrong doer, the right of prescription is at an end.

[20] The difference pointed out by L. 12. tit. 29. P. 3., between the possession acquired under a transfer by gift or exchange, and under that by sale, is not noticed in the text. It would appear from the law cited, that in the two first-mentioned cases of donation and exchange, *bona fides*, in the person prescribing was sufficient at the time of delivery to him of possession; and that the previous or after belief on his part of wrong, or *mala fides* in the person from whom he derived possession, would not interrupt or put an end to his prescription; but that, in the case of transfer by sale, *bona fides* in the possessor was essential, both at the time of his making the bargain, and of his receiving possession. There seems also to exist a variance between the canon and civil laws with respect to the interruption and destruction, or non ditto of the prescriptive right, in the case of a *bonâ fide* possessor arriving at the subsequent knowledge of the tortious title of the person from or through whom he derived possession; which is adverted to by *Wood, C. L.*, book 2. c. 4. p. 166. 1 *Browne's C. L.* ch. 8. p. 247.

[21] This appears a very extraordinary distinction, for, adverting to what was said in note 20, and referring to L. 12. tit. 29. P. 3., it would seem that a purchaser, in whom there existed *bona fides* at the time of bargain and delivery, regarding the contract or transfer as that of sale from a wrong doer, might perfect his title by his uninterrupted completion of the prescriptive term, though he should after such delivery to him, come to the knowledge of the tortious conduct of the vendor; but that if with such knowledge he should, before the expiration of the time required to complete his prescriptive possession, sell to a third person, the right of prescription would cease or be destroyed.

or are with young, he shall not acquire the young [22], L. 5. tit. 29. P. 3. 6th, There is not bad faith in one who acquires a thing through the medium of an attorney, if the latter informed his constituent that it was transferred to him by a just title, although it be false; because the error arises in respect of the principal by a lawful reason or way, L. 14. tit. 29. P. 3. L. 5. tit. 29. P. 3. [97] L. 14. t. 29. P. 3.

Just title consists in the cause or consideration by which possession of the thing is obtained, being one of those by reason of which dominion is acquired, as purchase, gift, inheritance, &c., Ll. 9, 14, and 15, tit. 29. P. 3. § 2. Of a just title. Ll. 9. 14 & 15. tit. 29. P. 3.

There is capacity in the thing if it is from its nature capable of prescription, and therefore sacred and religious things can't be acquired by time, nor civil jurisdiction [23], nor tributes and royal rights, L. 6. tit. 29. P. 3. § 3. Of the capacity of the thing. L. 6. tit. 29. P. 3.

In order that the person may be able to prescribe, it is necessary, 1st, That he be of sane mind; wherefore the madman and idiot (*desmemoriado*) cannot begin to prescribe; but if previously to becoming mad such a one began to acquire, the capacity of person will continue in and enure to him or his heirs, L. 2. tit. 29. P. 3. It will be sufficient that the capacity exists in the attorney who may prescribe for the principal; in which case the *bad faith* of the former does not prejudice the latter, as we have already said, Ll. 13, and 14. [24] tit. 29. P. 3. Mortgagee and lessee cannot prescribe, because they are in possession in the name of another, L. 4. tit. 15. Lib. 4. Recop. 4th, Nor can one joint heir or co-partner prescribe against another, L. 5. tit. 15. Lib. 4. Rec. § 4. Of the capacity of the person. L. 2. tit. 29. P. 3. Ll. 13 & 14. tit. 29. P. 3. Ll. t. 8. Lib. 11. Nov. Rec. L2. t. 8. Lib. 11. Nov. Rec.

Continued or uninterrupted possession is necessary to the acquiring the thing. By possession we understand the lawful possession (*tenencia derecha*) which a man has of things corporeal with the assistance of the body and mind, L. 1. tit. 30. P. 3. There are two sorts of possession; one natural, as when corporal possession is had of the thing, as of a house, an estate, &c., L. 2. tit. 30. P. 3., and the other civil, or by permission or sanction of law, as when a person goes out of or quits his house with an intention of not relinquishing it, then he is in possession by will (*de voluntad*), and this is as valid as though he were in corporal possession, L. 2. tit. 30. P. 3. The possession of things § 5. Of possession, and its kinds. L. 1. tit. 30. P. 3. L. 2. tit. 30. P. 3. L. 2. tit. 30. P. 3.

[22] No more, it is presumed, than he would acquire the mothers, in case they should have been obtained originally by theft or unlawful means. See L. 2. tit. 8. Lib. 11. Nov. Rec.: and *Azevedo*, on L. 5. tit. 15. Lib. 4. Rec. n. 17, 18.

[23] See L. 4. tit. 8. Lib. 11., Nov. Rec.

Superfluous; does not bear.

incorporeal, as services (*servidumbres*), rights (*derechos*), &c., is proved by use and the sufferance of the owner, L. 1. tit. 30. P. 3.

L. 1. tit. 30. P. 3.

§ 6. Who can acquire or gain possession of things.

Every person of sound mind may gain the possession of things by himself or by another, duly authorised or empowered by him. Hence it is, 1st, That children acquire or hold possession for their parents, and the attorney for his principal, Ll. 3, and 11. tit. 30. P. 3. 2d, The guardian or curator for the ward or minor, the madman, and the spendthrift (*degastador*), L. 4. tit. 30. P. 3. The officer of the corporation (*oficial del comun*) of any city or town for the corporation whose officer he is, L. 4. tit. 30. P. 3. 4th, Labourers and ploughmen who are tenants or lessees of any estate for the proprietor of it, Ll. 5, and 9. tit. 30. P. 3. 5th, He who should promise to hold possession of a thing for the person in whose name he promises to possess it, L. 3.[25] tit. 30. P. 3. 6th, The friend or inn-keeper (*huesped*), &c., for him in whose name he has possession, L. 12. tit. 30. P. 3. Possession is also gained by those modes which transfer dominion; of which various examples may be seen in Ll. 7, 8, 9, 10, 11, and 15. tit. 30. P. 3.

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Ll. 3 & 11. t. 30. P. 3.

L. 4. tit. 30. P. 3.

L. 4. tit. 30. P. 3.

Ll. 5 & 9. t. 30. P. 3.

L. 3. t. 30. P. 3.

Ll. 7, 8, 9, 10, 11. 15. t. 30. P. 3.

§ 7. Of the modes of losing it.

As possession consists in corporally or mentally possessing (*tenencia*) the thing, it follows that the possession of personal property (*muebles*) will be lost, 1st, Always when the thing is reduced to that state in which it cannot be possessed corporally, nor by will (*de voluntad*), of which examples are given in Ll. 14 and 17. tit. 30. P. 3.; but in those cases the owner, although he loses the possession, does not lose the dominion, and therefore may recover the thing from the possessor, L. 14. tit. 30. P. 3. 2d, The possession of real property (*cosas raices*) is lost, if the possessor is evicted by force; if when he is not present, another enters on it and prevents his re-entry; and if, seeing that another enters on his property, he submits to it and does not drive out the intruder, L. 17. tit. 30. P. 3.; but in neither of these cases does he lose the dominion.[26]

Ll. 14 & 17. tit. 30. P. 3.

L. 14. t. 30. P. 3.

L. 17. t. 30. P. 3.

§ 8. Of the privileges of one in possession.

No one ought to be dispossessed without a hearing, L. 2. tit. 15. Lib. 4. Rec., nor can the creditor of his own authority enter by force on the property of his debtor, but shall be obliged to pursue his remedy by another mode, as laid down by Ll. 5 & 6.

L. 9. t. 8. Lib. 11. Nov. Rec.

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[25] *Quære* L. 5., *ibid.*

[26] And he has his remedy at law, to expel the disturber or disseisor, and recover back possession. See L. 1. tit. 8. Lib. 11., Nov. Rec.; and L. 10. tit. 29. P. 3., as to possession obtained by violence or robbery: also L. 3. tit. 8. Lib. 11. Nov. Rec.; and L. 1. tit. 34. Lib. 11., *ibid.*

tit. 15. lib. 4. Rec.; neither can the property of the deceased be taken possession of without the will of the heirs, nor the inheritance of one who is in the service of the king, L. 3. tit. 15. Lib. 4. Rec.; but he who possesses the thing a year and a day in the face of the claimant or plaintiff, according to the custom of some cities, ought not to be compelled to answer with respect to the possession, provided he have it [27] with title and good faith L. 3. tit. 15. Lib. 4. Rec.

Ll. 2 & 5. tit. 8. Lib. 11. Nov. Rec.

L. 3. t. 8. Lib. 11. Nov. Rec.

L. 3. t. 8. Lib. 11. Nov. Rec.

Continued or uninterrupted possession for the time pointed out by the laws, causes prescription. Hence it follows, 1st, That possession being interrupted or impeded by any reason or cause, also interrupts or impedes prescription; so that in order to prescribe subsequently, the person must begin to possess anew, L. 29. tit. 29. P. 3. 2d, That prescription is interrupted by the interposition of a judicial demand, or even by a simple complaint (*querella*), and by a claim made before the neighbours of the place where the house or property is situate; and if the possessor be a minor before his guardian, L. 29 and 30. tit. 29. P. 3. 3d, That if the debtor wishes to gain by time or prescription what he owes, and renews the obligation, or makes an acknowledgment of the debt, in this case the prescription is interrupted, L. 29. tit. 29. P. 3.

§ 9. Consequences which result from continued or uninterrupted possession as constituting prescription.

L. 29. t. 29. P. 3.

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L. 29. t. 29. P. 3.

The time in which things are prescribed, is comprehended under the two kinds of prescription, immemorial and temporal. The first is proved by witnesses of good fame or character, who depose to having seen the person in possession of the thing or property for 40 years, and having heard their ancestors say that they never saw nor heard any thing to the contrary, L. 1. tit. 7. Lib. 5. Rec.[28] By immemorial possession, the seignory or dominion of cities, towns, and civil and criminal jurisdiction, are acquired; but not that which kings possess by their pre-eminence and prerogative, nor taxes, nor tributes, L. 1. tit. 15. Lib. 5. Rec., which ought to be taken as an exception to what we have before said. Neither by it are duties (*alcabalas*) prescribed, although the doing so may have been tolerated or permitted, L. 2. tit. 15. Lib. 4. Rec. Nor is the right to raise or levy taxes or impositions acquired, L. 8. tit. 15. Lib. 4. Rec. It may be remarked, that the right of prescription, as to dominion or property, is in-

§ 10. Of time immemorial as necessary to prescribe.

L. 1. tit. 17. Lib. 10. Nov. Rec.

L. 4. t. 8. Lib. 11. Nov. Rec.

L. 9. t. 8. Lib. 11. Nov. Rec.

L. 7. t. 8. Lib. 11. Nov. Rec.

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[27] See L. 3. tit. 8. Lib. 11., Nov. Rec., *ad fin.*

[28] See also L. 5. tit. 8. Lib. 11., Nov. Rec.

L.6.t.8.Lib.11. Nov. Rec.

terrupted by the interruption of possession, L.7. tit.15. Lib.4. Rec.

§ 11. Of the time necessary for temporal or limited prescription.

Temporal prescription is confined or limited to a certain number of years. To this sort belong, 1st, The limitation of a year, in which the claim to the penalty incurred by judicial bail for not producing the person bailed, is prescribed, L.10. tit.16. Lib.5. Rec. 2d, The prescription of three years, in which personal property is acquired [29], Ll.15. & 17. tit.29. P.3., and the salaries or wages of apothecaries, spice venders, and other tradesmen, or mechanics [30], in respect of their wares and work, L.9. tit.15. Lib.4. Rec.; and the fees (*salarios*) of advocates and solicitors are prescribed, L.32. tit.16. Lib.2. Rec. 3d, The prescription of ten years, in which real property (*las raices*) is acquired among persons present, L. 18. tit.29. P.3.; and in which the executive action is barred, L.6. tit.15. Lib.4. Rec. 4th, That of twenty years, which prescribes the right of absent persons to real property, L.18. tit.29. P.3., and the personal action and execution (*executoria*) granted thereon, L.6. tit.15. Lib.4. Rec.[31]

L.1.tit.11. Lib.10. Nov. Rec.

Ll.15 & 17. t.29.P.3.

L.10.t.11. Lib.10. Nov. Rec.

L.9.tit.11. Lib.10. Nov. Rec.

L.18.t.29.P.3.

L.5.t.8.Lib.11. Nov. Rec.

L.18.t.29. P.3.

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L.5.t.8.Lib.11. Nov. Rec.

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[29] See the exception in the case where such property is mortgaged or pledged, in L. 17. tit. 29. P.3.: and see also the cases in L. 1. tit. 8. Lib. 11., Nov. Rec. in which plea of prescription cannot be set up.

[30] Of any servants, adds *Palacios*, if they have not demanded from their employers their wages within three years after they quitted their service.

[31] Great doubt, and some obscurity, have been thrown upon the effect of this law, as it regards the prescription of personal actions, and the execution (*executoria*) granted thereon, in consequence of the conflicting speculations and opposite conclusions of the learned commentators. The first part of the law prescribes the right of execution, on a simple obligation, in ten years, and then proceeds to say, "*y la accion personal y la executoria dada sobre ella* se prescriba *por veinte años, y no menos*," but extends the period of prescription to thirty years in the case of a mortgage or hypothecary security, or in that where the obligation is mixed, being personal and real. The doubt started is, whether the right of execution granted on a sentence, declared a case adjudged "*cosa juzgada*," arising out of a personal action, is prescribed by ten years' silence, or whether it is entitled to the full extension of the twenty years allowed for the prescription of the original action itself, without reference to the time that may have elapsed between the date of the cause of action, and the obtaining the sentence; supposing, of course, it did not exceed the entire limited duration of the prescription. Supporters of both opinions are found amongst the most learned annotators on the laws of Spain, and it may perhaps be considered presumptuous in the translator of this work to pretend to solve the doubt raised on the occasion; but he hopes he may be permitted to offer some observations on the point, without subjecting himself to such a charge. The noble and learned Author of the Practical Institutes on Civil Actions, *el Conde de la Cañada*, P.2. ch.13. p.464. N.34., in referring to this dispute of commentators, has pronounced in favour of those who have advanced the second doctrine. With due submission, however, to so justly respected an authority, the opinion the noble writer has espoused, does not appear correct: but it would seem, the law meant the prescription of a personal action to begin to count from the time the cause of action itself arose, and to bar or limit the party's claim, including his right to proceed executively thereon, after the conclusion or adjudication of sentence in the ordinary pro-

5th, That of thirty years, in which property generally is acquired, even without good faith; with the difference, that in case of there being good faith, if another deprives the possessor by prescription of the property, he may sue for its recovery, unless it be the right owner who ousted him; but if he possessed it with bad faith, he cannot demand back the possession, except in cases where the property was stolen from him, or he was deprived of it by the judge for not answering on citation, and he should not demand it within the year, L. 21. tit. 29. P. 3. Actions real, hypothecary, and mixed, are also prescribed in thirty years, L. 6. tit. 15. Lib. 4. Rec.

L. 21. t. 29. P. 3.

L. 5. t. 8. Lib. 11. Nov. Rec.

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cess, in the prescribed term of twenty years. The law evidently intended to place a mortgage, or hypothecary convention or obligation, upon a higher footing than a mere personal action, unsupported by such a highly considered security; which, from its public nature, in the mode of registry required by the Spanish law for its validity, warned the public of the debt due by the debtor, and of the security possessed by the creditor. Now, if this were not the case, and it had been intended by the law under consideration to give this much favoured security no advantage over a mere personal action, as to its prescription, any provision or notice with regard to the time for prescribing a mortgage was superfluous. But if the opinion of the writers, to which the noble and learned author adverted to has given his high sanction, were to be adopted, a naked, silent, personal action would be on an equal footing with a public registered mortgage; for a party suing out an execution on a judgment confessed or awarded in a personal cause adjudicated, by the expiration of ten years, might claim the benefit of twenty more years of silence or inactivity, without the plea of prescription being available against him, and thereby secure to himself altogether as long a sanction for forbearance or negligence, as if his demand had been originally founded on mortgage. It is, however, to be observed, that the words of the law are "*y la accion personal, y la executoria dada sobre élla* se prescriba" (in the singular), and it may be thence urged that the conjunction is used disjunctively, and not copulatively. The reader may form his own conclusions upon the point, by referring to the noble compiler of the Practical Institutes in the Number quoted; and in those preceding it, to Number 29. inclusive. Also to *Carleval de Judiciis*, tit. 3. disput. 4. N. 6. et seq. *Azevedo* on L. 6. tit. 15. Lib. 4. de la Rec. No. 42. *Anton. Gomez.* on L. 63. *Toro; Parladorius rer. Quotidian.* Lib. 1. Cap. 1. § 14. p. 14, &c.

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TITLE III.

OF TESTAMENTS AND INHERITANCES.

THE second right in the thing is that by inheritance; which is no more than the right of succeeding to the property which a a deceased person had at the time of his death: an inheritance is gained by testament, or *ab intestato*, *Prolog.* tit.13. P.6.

Prol.tit.13,P.6.

Cap.1. § 1. Of testaments, and their kinds.

Testament is a testimonial in which is contained and set forth the will of him who makes it, establishing or appointing his heir, and disposing, as he thinks fit, of his property after his death, L.1. tit.1. P.6.

L.1.tit.1.P.6.

It is of two sorts, open (*abierto*) and closed (*cerrado*). The open, or nuncupative will, ought to be executed before a public *escribano* and three witnesses [1], inhabitants of the place; and if the testator is blind, five are necessary; and if there is no *escribano*, five witnesses of the place are requisite, unless they cannot be met with, and then three inhabitants of the place, or seven strangers or non-residents (*forasteros*) will be sufficient, L.1. tit.4. Lib.5. Rec. The closed, or written will [2], which is made in secret (*en poridad*), according to L.2. tit.1. P.6., is delivered to the *escribano*, signed on the outside by the testator and seven witnesses, with the attestation of the *escribano*, L.2. tit.4. Lib.5. Rec.

L.1.tit.18. Lib.10. Nov. Rec.

L.2.t.1.P.6.

L.2.tit.18. Lib.10. Nov. Rec.

§ 2. Who may make a testament.

All those whom the laws do not expressly prohibit, may make a testament, L.13. tit.1. P.6. Wherefore 1st, The child who is under the power of the father, if a male above fourteen, or if a female, above twelve years of age, may make a testament, L.4. tit.4. Lib.5. Rec., which alters [3] in this respect, L.13 tit.1.

L. 13.t.1.P.6.

L.4.tit.18. Lib.10. Nov. Rec.

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[1] By order of his Royal Highness the Prince Regent in Council, 8th June, 1816, proclaimed in Trinidad 9th August, 1816, all wills, testaments, and codicils made within the Island of Trinidad, shall be attested by three male witnesses, domiciliated inhabitants of the place and quarter wherein the same shall be made, or of two such witnesses, and the Commandant of such quarter. *Vide* Appendix M.

[2] Although an open or nuncupative will may also be in writing, according to L.1. tit.1. p.6.

[3] L.4. tit.18. Lib.10. Nov.Rec. does not alter L.13. tit.1. P.6., it only declares, that a son or daughter, although under parental power, may make a testament, if of legitimate or competent age to make such; which age is fixed by the law of the 6th *Partida* cited; and see *Azevedo* on L.4. tit.4. Lib.5. Rec. n.1.

P. 6. 2d, The madman cannot make a testament, nor the spendthrift (*degastador*), who shall be prohibited by the judge from aliening his property, L. 13. tit. 1. P. 6. 3d, Nor they who are deaf and dumb from birth [4], but those who should become so from sickness, are permitted to make a testament if written with their own hand, L. 13. tit. 1. P. 6. 4th, The person condemned [5] for crime may dispose by testament of his property, with the exception of that confiscated [6], L. 3. tit. 4. Lib. 5. Rec., which alters L. 15. tit. 1. P. 6. 5th, The heretic convict, or the adjudged traitor, cannot make a testament [7], L. 16. tit. 1. P. 6. 6th. They who embrace a religious order, may make a testament before they take the vow, but not after (*antes de la profesion*), &c., L. 17. tit. 1. P. 6. & L. 11. tit. 6. Lib. 3. *Fuero Real.* 7th, A clergyman may dispose of any of his property by way of last will, L. 3. tit. 21. P. 1. 8th, The pilgrim may freely dispose of his property by testament, L. 2. tit. 12. Lib. 1. Rec.

L. 13. tit. 1. P. 6.
L. 13. tit. 1. P. 6.
L. 3. tit. 18. Lib. 10. Nov. Rec.
L. 15. tit. 1. P. 6.
[105]
L. 16. tit. 1. P. 6.
L. 17. tit. 1. P. 6.
L. 3. tit. 21. P. 1.
L. 2. tit. 30. Lib. 1. Nov. Rec.

The persons who cannot make a testament, cannot be witnesses to one [8], nor can women, Ll. 9 & 10. tit. 1. P. 6.

§ 3. Who may be witnesses to a will.

As the will of man is of such a nature that it varies in many ways, L. 25. tit. 1. P. 6., the testator is at liberty to change his testament as often as he pleases up to his death, L. 25. tit. 1. P. 6. This may happen in two ways, either by making another testament, or by tearing up or destroying that already made.

Ll. 9 & 10. t. 1. P. 6.
§ 4. Of the liberty of varying one's testament.

Hence it is in order that the testament last made may revoke or annul antecedent ones, it must be complete; that is, with the same solemnities and requisites we have before spoken of, Ll. 21 & 23. tit. 1. P. 6. 2d, That if in the last testament the

L. 25. tit. 1. P. 6.
L. 25. tit. 1. P. 6.
Ll. 21 & 23. t. 1. P. 6.

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[4] That is, if such person be without understanding; otherwise he is not prohibited, it would seem. See *Gr. Lopez.* Gl. 11. on L. 13. tit. 1. P. 6.

[5] To natural or civil death; by which last is meant banishment or transportation.

[6] That is, so declared by law, as attaching to the commission of the crime; or shall be declared confiscated by the sentence of the Judge. See *Azevedo* on L. 4. tit. 4. Lib. 5. Rec.; and see L. 3. tit. 18. Lib. 10. Nov. Rec.

[7] Nor by L. 16. tit. 1. P. 6. cited, can persons convicted of libels charging others with infamous offences.

[8] Members of religious orders (*religiosos*), observes *Palacios*, cannot make a will, and yet there is no statute, or law, which prohibits them from being witnesses to one. There are others, also, on the contrary, who are prohibited from being witnesses, and are not prohibited from making a will. Such, in the first place, are women, those adjudged thieves or robbers, persons guilty of homicide, and those who have committed similar offences, L. 9. tit. 1. P. 6. Such persons labour under an absolute disability, differing from those who are subject to a relative disqualification. Such are children in respect of the will of their parents, &c. Ll. 14. tit. 16. P. 3.

Women are mentioned in the text as an exception; and the remaining persons set forth in the note of the learned professor, are incompetent as witnesses, by reason of infamy, relationship, interest, &c. See further Ll. 9, 10, & 11. tit. 1. P. 6.

heir is changed for a certain or assigned reason or motive which shall prove to be false, it shall not deprive the first heir of the inheritance, although the second or last testament may take
L.21.tit.1.P.6. effect as to the bequests or legacies, L.21. tit.1. P.6. 3d, That the cancellation of the testament ought to be made in-
L.24.tit.1.P.6. tentionally, and not accidentally, L.24. tit.1. P.6., which says, that it is enough to tear part of the writing in order to render it invalid. [9]

From the liberty which every one possesses to make a will, it follows that whoever shall impede or restrain it by fraud or force, shall be deprived of that part which he was entitled to inherit or take from the testator, and which shall be applied to
Ll.26 & 27.t.1. P.6. the exchequer (*camara*), Ll.26 & 27. tit.1. P.6.; and even if any injury results from his conduct, he shall be obliged to make
L.29.tit.1.P.6. satisfaction to the injured party in double the amount, L.29. tit.1. P.6.

§ 5. Of the testament made by the substitute (comisario).

Hence it also arises, that another person may be authorised to make a testament for the principal, L.6. tit.5. Lib.3. *Fuero Real*, who is called delegate or substitute (*comisario*), whose powers are established under these laws. 1st, That the dele-
[106] gate cannot meliorate (*mejorar*), substitute, nor name an heir
L.1.tit.19. Lib.10. Nov. Rec. without special power [10], L.5. tit.4. Lib.5. Rec. 2d, That having only a general power, he can merely discharge the conscientious duties of the testator; as paying debts, disposing of the fifth for the benefit of his soul, dividing the remnant between the heirs *ab intestato*, and if there be none, disposing of it for
L.2.tit.19. Lib.10. Nov. Rec. pious uses, L.6. tit.4. Lib.5. Rec. 3d, That without special power, he cannot revoke the testament, nor any disposition made
Ll.4 & 5. t.19. Lib.10. Nov. Rec. by it, Ll.8 & 9. tit.4. Lib.5. Rec. 4th, That the heir being appointed by the testator, the *comisario* can only dispose of the
L.6.tit.19. Lib.10. Nov. Rec. fifth [11], L.11. tit.4. Lib.5. Rec., and not doing it, the heirs [12]

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[9] Provided it be not proved to have been done accidentally, L. 24. tit.1. P.6. *ad fin.*

[10] "The testator," says *Palacios*, "naming therein the person whom he directs, the trustee, or *fidei* commissary, to institute heir, L.9. tit.19. Lib.10. Nov. Rec.

[11] "That is to say," observes *Palacios*, "that when the testator hath appointed an heir, and hath given power to another to complete his will, or the disposal of his property, the trustee (*comisario*) cannot dispose of, or bequeath, after payment or discharge of the debts and burthens of the testator, more than the fifth part of his property," unless, L.6. tit.19. Lib.10. Nov. Rec., cited by the learned professor, adds, the trustee is specially authorised to do more.—

[12] And not being necessary (*forzosos*) heirs. See L.13. tit.20. Lib.10. Nov. Rec. cited.

are to distribute the fifth for the benefit of the testator's soul, L. 10. tit. 4. Lib. 5. Rec. 5th, The time he has for making the necessary dispositions is four months; if he be out of the place, six months; and one year if he be absent from the kingdom, L. 7. tit. 4. Lib. 5. Rec. 6th, If there be many delegates (*comisarios*), and some die, the power remains entire to the survivor; and if there be a disagreement [13], they must have recourse to the judge to determine it, L. 12. tit. 4. Lib. 5. Rec. 7th, The power that is given to the delegate must contain or be executed with the same solemnity as the testament, L. 13. tit. 4. Lib. 5. Rec. 8th, The power of assigning the third and fifth by way of melioration (*mejora*), can never be delegated to another, L. 3. tit. 6. Lib. 5. Rec.

L. 13. t. 20. Lib. 10. Nov. Rec.

L. 3. tit. 19. Lib. 10. Nov. Rec.

L. 7. tit. 19. Lib. 10. Nov. Rec.

L. 8. tit. 19. Lib. 10. Nov. Rec.

L. 3. t. 9. Lib. 10. Nov. Rec.

The wills of soldiers who are on actual service (*en guerra actual*), do not require such solemnity, and it is sufficient that the will be proved by two witnesses, or by a simple writing under the hand (*de puño*) of the soldier, *Orden. Milit. trat.* 8. tit. 11. Art. 1, 2, 3, & 4.

§ 6. Of the military will or testament.

A codicil is also a species of will, that is, a short writing which some men make after or before their testaments are made, L. 1. tit. 12. P. 6. Codicils are made with the same solemnity as the open or nuncupative testament, L. 2. tit. 4. Lib. 5. Rec.; and are made use of to bequeath, to substitute an heir, [14] and to correct the testament, L. 1. tit. 12. P. 6.

§ 7. Of the codicil.

L. 1. t. 12. P. 6.

L. 2. tit. 18. Lib. 10. Nov. Rec.

L. 1. tit. 12. P. 6.

The most principal part of the will is the institution or appointment of an heir, the establishment of whom and other things relating thereto, we are about to explain.

Cap. 2. Of the institution or appointment of heir.

The institution of an heir is the establishment by one man of another as his heir, so that he remains proprietor after the testator's death of his property, or some part of it, in the place of the testator, L. 1. tit. 3. P. 6.

L. 1. tit. 3. P. 6.

To understand this, it is necessary to consider three things. 1st, Who may or may not be heirs. 2d, How and in what manner they ought to be established or appointed. 3d, How the testator may dispose of his property.

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[13] It must be determined by the majority; and if no majority, recourse must be had to the assistance of the judge or *alcalde*, who, forming one of the majority, will decide. See L. 7. tit. 19. Lib. 10. Nov. Rec. cited.

[14] An heir cannot be substituted directly, nor can a condition be imposed upon him by a codicil; neither can an inheritance be given or taken away directly by it, although it may indirectly by means of a *fidei-commissary*; not however, it is presumed, in the case of a necessary heir. See L. 2. tit. 12. P. 6. and L. 7. tit. 3. P. 6.

§ 1. Who may be heir.

As to what relates to the first point, we say, that every person, community, or corporate body, church, &c. may be heir, whom our laws do not prohibit from being so [15], L. 2. tit. 3. P. 6. They prohibit, 1st, apostates, renegados, persons condemned to the mines, and associations, or bodies of men which have been formed contrary to law, or without the permission (*voluntad*) of the prince, L. 4. tit. 3. P. 6. 2d, The incestuous children of the clergy, who are not only rendered incompetent to inherit, but cannot enjoy any bequest from their father nor their paternal relations, L. 4. tit. 3. P. 6. and L. 6. tit. 8. Lib. 5. Rec. 3d, Illegitimate children, if there be lawful children or ascendants of the father; but they shall be able to inherit from their mother in preference to ascendants, and this, notwithstanding they may be the offspring of an incestuous or a condemned intercourse [16] (*dañado ayuntamiento*) [17], L. 7. tit. 8. Lib. 5. Rec. which amends L. 11. [18], tit. 3. P. 6. 4th, Illegitimate children do not inherit, but in default of legitimate children; but they must be made legitimate by a subsequent marriage, or by the royal authority [19], L. 10. tit. 8. Lib. 5. Rec., and L. 9. tit. 15. P. 4.

L. 2. tit. 3. P. 6.

P. 4. tit. 3. P. 6.

L. 4. tit. 3. P. 6. L. 4. tit. 20. Lib. 10. Nov. Rec.

L. 5. tit. 20. Lib. 10. Nov. Rec.

L. 7. tit. 20. Lib. 10. Nov. Rec. L. 9. tit. 15. P. 4.

The establishment of heir ought to be made in a complete or finished testament (*acabado*) and not in any other writing [20], L. 7. tit. 3. P. 6., with his express nomination, absolutely or conditionally.

§ 2. How the heir should be established, and the different modes of doing it.

Hence it follows, 1st, That the institution of heir cannot be made in a codicil, unless it takes its force or effect from some clauses expressed in the testament; but if it be declared by the testament, that a part of the testator's property shall be assigned by the codicil to the heir named in the testament, and no expression or specification of this part is afterwards made in the codicil he shall be absolute heir of the testator's property, which is not devised or bequeathed to another, L. 9. tit. 3. P. 6., and if there

L. 7. tit. 3. P. 6.

L. 9. tit. 3. P. 6.

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[15] Confirmed by L. 5. *ibid.* which see.

[16] This is wrong. The law cited prohibits such from inheriting from their mothers, either *ex testamento*, or *ab intestato*; but permits the mother to give during life, or to bequeath to them, the 5th part of her property, and no more, which she is allowed to dispose of for the benefit of her soul.

[17] Such for which the mother is liable to suffer death. See L. 5. tit. 20 Lib. 10. Nov. Rec.

[18] The citation is erroneous; it is supposed L. 4. of the same title and part. is meant.

[19] If legitimated by royal authority, they are excluded from inheriting by the subsequent birth of legitimate children, or by the connubial legitimation of illegitimate ones, although they are on an equal footing with both the others, as to honours and pre-eminences, and other things in right of their parents. See L. 7. tit. 20. Lib. 10. Nov. Rec., cited.

[20] *i. e.* codicil. See the law cited.

were two persons so appointed, they shall inherit equal parts, L. 9, tit. 3. P. 6. 2d, The heir named or appointed by the will, L. 9. tit. 3. P. 6. cannot be set aside or deprived of the inheritance by the codicil [21], although a person may be substituted by it to succeed him, L. 7. L. 7. tit. 3. P. 6. tit. 3. P. 6. 3d, A person being once absolutely or unconditionally instituted heir by the testament, cannot be saddled with any condition by the codicil, L. 8. tit. 3. P. 6. 4th, If there be L. 8. tit. 3. P. 6. two persons of the same name, some particular circumstance should be expressed, in order that the intention of the testator [108] may be known and clearly understood, L. 10. tit. 3. P. 6. L. 10. tit. 3. P. 6. 5th, That this circumstance should not be defamatory (*infamatoria*) because it annuls the establishment of heir; although it will not produce such effect, if the testator only speaks ill of him generally, L. 10. tit. 3. P. 6. 6th, That the nomination or appointment is not valid, if a mistake be made in the person of the heir, L. 12. tit. 3. P. 6. 7th, That a person being established L. 12. tit. 3. P. 6. heir of a certain part of the testator's property, if no other heir is appointed, the first will be heir of the whole property [22] (provided there be no necessary (*forzosos*) heirs of the testator), and if in the same manner there be two persons appointed, they shall divide the inheritance in the above case; which rule is also understood to take place in the case of one person being named heir of one portion of the property, and two persons of the other proportion, L. 14. tit. 3. P. 6. 8th, That if the poor peo- L. 14. tit. 3. P. 6. ple of any city be left heirs, the appointment will be understood to regard those who may be found disabled in the hospitals, and not those who ask charity in the streets; and if no particular place or city is specified, the poor of the place where the will was made, will be the heirs, L. 20. tit. 3. P. 6. 9th, That if the esta- L. 20. tit. 3. P. 6. blishment of heir is made to take effect at or from a certain day, the time will be considered as not expressed [23], L. 15. tit. 3. P. 6. L. 15. tit. 3. P. 6. Condition is a sort of declaration which testators are wont to express in the establishment of heirs, for the purpose of extending to them the enjoyment of the inheritance, or of the bequest,

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[21] See note 14.

[22] It would seem that the testator's heir at law would, in this case, take or inherit the remainder, or undisposed part of the testator's property, under L. 1. tit. 18. Lib. 10. Nov. Rec.; which law directs this course in the case of there being no heir at all instituted or appointed under the testator's will.

[23] In other words, the appointment will take effect immediately on the death of the testator: but it is said by *Palacios*, in a note on this passage, that Law 1. tit. 18. Lib. 10. Nov. Rec., alters this provision in L. 15. tit. 3. p. 6.; and that such an appointment will take effect according to the testamentary direction, and the intention of the testator.

L 1.tit.4.P.6. until the condition be fulfilled, L. 1. tit. 4. P. 6. Conditions are express or tacit. Some relate to the time past, others to the present, and others to the future. Of these some are possible and others impossible. The impossible ones cannot be fulfilled, either as being contrary to nature, or to law, or to fact, or for being doubtful and obscure. Of the possible conditions some depend on the power of men, others on contingency, and others on both together, L. 1. tit. 4. P. 6.

The condition of time past, present, and future, is valid in
L.2.tit.4.P.6. the institution, L. 2. tit. 4. P. 6. Impossible conditions against nature do not vitiate the nomination of heir, and are considered
L.3.tit.4.P.6. as not expressed, L. 3. tit. 4. P. 6. The same we say as to the impossible conditions against law, under which title are com-
[109] prehended those that are immoral, and contrary to piety, good
Ll. 3 & 6. t. 4. P.6. manners, and the law of nature, Ll. 3 & 6. tit. 4. P. 6. Conditions contrary to fact, those which are doubtful and obscure, vitiate or
L.5.tit.4.P.6. invalidate the institution of heir, L. 5. tit. 4. P. 6.

Possible conditions must be first performed before the person named heir can obtain possession of the inheritance or bequest,
Ll.7, 8, 9.tit.4. P.6. Ll. 7, 8, and 9. tit. 4, P. 6. The tacit, or silent condition is that which is understood to be the will of the testator.—See L. 10.
L.10.tit.4.P.6. tit. 4. P. 6.[24]

But it is to be observed, 1st, That if two persons be established heirs, one conditionally, and the other purely, the first will not prevent the latter from immediately obtaining his proportion of
L.12.tit 4. P.6. the inheritance, L. 12. tit. 4. P. 6. 2d, That if there be many conditions together, or joint, all ought to be fulfilled, in order that the establishment may be valid; and if they are separate at the election of the heir, it will be sufficient that he fulfil one,
L.13.tit.4.P.6. L. 13. tit. 4. P. 6. 3d, That if the condition fails to be fulfilled by fault of him who imposed it, the nomination of heir is valid.
Ll.14, 15, 16. tit.4.P.6. —See Ll. 14, 15, & 16, tit. 4. P. 6.[25]

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[24] The case put is, if testator have two sons, and leave his property equally between both, with benefit of survivorship, and one son die, leaving issue, the law interprets the testator's will to be that the children shall take their father's share, and not their surviving uncle. The interpretation is different if the devisees be two strangers, and not the sons (or heirs *forzosos* of the testator), who would take according to the real meaning of the words of the devise.

[25] There is a case mentioned in L. 14. tit. 4. P. 6., in which, although the condition fails to be performed without the fault of him who imposed it, yet the establishment of heir does not take place; as if the condition should be that such a woman should be heir of testator, if she married with such a person; then, if either should die before the fulfilment of the condition, the appointment would not take place; and no condition can be imposed to the prejudice, or in regard, it is presumed, of the legitimate shares of the inheritance of necessary heirs.

§ 3. Of the manner in which the testator can dispose of his property.

With respect to the mode in which a testator may dispose of his property, it is an indisputable principle of the laws of Castille, that if he have children or grandchildren, &c, he must necessarily institute them heirs, and can only dispose in favour of strangers[26], or other persons, of the remnant of one-fifth of his property; because, out of this, before all things, are defrayed the expenses of interment, masses, &c.; and, in the second place, he has the privilege or liberty of bettering (*mejorar*), any of his children or grandchildren he shall please, by the addition of the third [27], (that is, the third part of his property, the fifth being deducted), L. 9. tit. 5. Lib. 3. *Fuero Real.* L. 13. tit. 6. Lib. 5. Rec. & L. 214. *de Estilo.* In default of children and grandchildren (*descendientes*), a testator must devise or bequeath in favour of his fathers and grandfathers, or ascendants, if he should have any, with the exception of the third [28], of which he can dispose freely; and this takes place if there be no custom to the contrary, L. 1. tit. 8. Lib. 5. Rec.

L. 9. tit. 20. Lib. 10. Nov. Rec.

L. 1. tit. 20. Lib. 10. Nov. Rec.

From this principle we conclude, 1st, That if the testator has no necessary (*Forzosos*) heirs who have been mentioned, he may leave his property to strangers, L. 3. tit. 5. Lib. 3. *Fuero Real;* which title includes relations who are not of the descending or ascending line, L. 21. tit. 3. P. 6.; and in such case may take place what is laid down in Ll. 16, 17, 18, & 19. tit. 3. P. 6. [29] 2d, That the agreement between husband and wife to inherit reciprocally the property of each other, if they have no children, is valid [30], L. 9. tit. 6. Lib. 3. *Fuero Real.* 3d. That he who has

L. 21. tit. 3. P. 6.

Ll. 16, 17, 18, 19. tit. 3. P. 6.

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[26] Collateral relations are so considered in this respect.

[27] *Palacios* (*nota* 2) on this passage says, that a parent may better (*mejorar*) any one of his children by the bequest or devise of the third and the remnant of the fifth (*en el tercio y remnante del quinto*) of his property, provided he should not dispose of the remnant of the fifth in favour of a stranger; and that what is said with respect to the *tercio* being the third part of the property after the fifth being deducted, is understood when both *mejoras* of third and fifth (*tercio y quinto*) have been granted; and the testator should not wish the *tercio* to be deducted before the *quinto:* and see L. 3. tit. 6. Lib. 10., Nov. Rec.

[28] It seems by L. 6. tit. 20. Lib. 10., Nov. Rec., that a testator may bequeath in entire prejudice, or exclusion of his parents or ascendants, in favour of his natural children, provided he has no lawful children or descendants. See this law.

[29] As to the division, into as many parts as the testator pleases, &c. of his property.

[30] *Palacios,* in note (1) on this passage, says that this agreement between husband and wife (*hermandad*), would not be valid, although they should leave no lawful descendants or children, if they should leave ascendants or parents, if it were in prejudice of the latter; because, by L. 1. tit. 20. Lib. 10. Nov. Rec., the property of the descendants is the inheritance and lawful right of their ascendants, excepting the third, if the former die without children or lawful descendants.

no natural children, may leave his adoptive child his heir, L. 5. tit. 6. Lib. 3. *Fuero Real.* 4th, That although the illegitimate children of the mother may not inherit her property, if she has legitimate ones, she may bequeath them a fifth, even though the offspring of condemned connection (*de dañado coito*), L. 7. tit. 8. Lib. 5. Rec. 5th, The father may also leave to his bastard and legitimated child the fifth of his property, L. 3. tit. 6. Lib. 3. *Fuero Real*; and L. 10. tit. 8. Lib. 5. Rec., and in this manner must be understood, L. 8. tit. 8. Lib. 5. Rec.[31] 6th, That neither during life nor at death, can a testator grant or bequeath in *mejora* more than one fifth [32], L. 12. tit. 6. Lib. 5. Rec.

L. 5. tit. 20. Lib. 10. Nov. Rec.

L. 7. tit. 20. Lib. 10. Nov. Rec.

L. 6. tit. 20. Lib. 10. Nov. Rec.

L. 8. tit 20. Lib. 10. Nov. Rec.

With respect to the third (*tercio*) of the inheritance, it is inferred from the aforesaid axiom, 1st, That in regard of the *mejora* of the third, conditions, burthens (*gravamenes*), entails (*mayorazgo*), trusts (*fideicomiso*), charges, &c. (*vinculos*), may be imposed or created [33] among the lawful descendants, and afterwards among the illegitimate; and in default of these, among the ascendants, and in default of these, among the collateral relations, and lastly among strangers, L. 11. tit. 6. Lib. 5. Rec. 2d, That the *mejora* of the third in favour of children and descendants may be revoked until the hour of death, except the possession hath been delivered, or the deed of writing executed before an *escribano*, or was made for an *onerous* cause, as marriage [34], L. 1. tit. 6. Lib. 5. Rec. 3d, That if fathers covenant by contract to meliorate (*mejorar*), or not to do so, they are bound to fulfil the covenant, L. 6. tit. 6. Lib. 5. Rec. 4th, That the melioration may be made in favour of the grandchild, although the father dies, L. 2. tit. 6. Lib. 5. Rec. 5th, That the faculty or power of meliorating (*mejorar*) by *tercio* and *quinto* cannot be committed to another [35], L. 3, tit. 6. Lib. 5. Rec. 6th, That the heir should pay the *mejora* out of the property pointed out by the testator, except it cannot be divided, in which case he shall pay the value in money, L. 4. tit. 6. Lib. 5. Rec. 7th, That the person meliorated may renounce the in-

L. 11. tit. 6. Lib. 10. Nov. Rec.

L. 1. t. 6. Lib. 10. Nov. Rec.

L. 6. t. 6. Lib. 10. Nov. Rec.

L. 2. tit. 6. Lib. 10. Nov. Rec.

L. 3. t. 3. Lib. 10. Nov. Rec.

L. 4. t. 6. Lib. 10 Nov. Rec.

[31] See Note [28]. p. 117. *ante.*

[32] See Note [27]. p. 117 *ante.*

[33] See L. 12. tit. 17. Lib. 10. Nov. Rec. Neither entails, charges, nor perpetual burthens, can be established or imposed without the royal permission.

[34] It is besides necessary that, in such cases, no power hath been reserved in the contract to revoke it, nor that there exist any of those causes which are considered just or sufficient in law to revoke donations. See L. 1. tit. 6. Lib. 10. Nov. Rec., cited in the text.

[35] Rather that the power of assignment of the *mejora* cannot be committed to another. See L. 3. tit. 6. Lib. 10. Nov. Rec. quoted; but L. 1. tit. 19. Lib. 10. Nov. Rec. says, that the *fidei-comisario* cannot *mejorar* without a special power for that purpose.

heritance, and accept the melioration (*mejora*), paying first the debts and deducting them *pro rata* from the said *mejora*, L. 5. tit. 6. Lib. 5. Rec. 8th, That the value of the *mejora* must be considered with reference to the period of the death of the testator, L. 7. tit. 6. Lib. 5. Rec. 9th, That the *mejoras* of the third and the fifth are not taken out of "*Dotes*," *donations propter nuptias*, and other donations which shall be brought into collation (*colacion*), L. 9. tit. 6. Lib. 5. Rec. 10th, That the *mejora* is valid, although the testament be set aside on account of preterition or disinherison, L. 8. tit. 6. Lib. 5. Rec. 11th, That if the parents by testament or by contract or deed make a donation to one child, such child is understood to be benefited (*mejorado*) in the amount of the third and fifth in addition to the lawful part or share (*legitima* [36]) of the parent's property, although they may not so express it, L. 10. tit. 6. Lib. 5. Rec.

L. 5. t. 6. Lib. 10. Nov. Rec.

L. 7 tit. 6. Lib. 10. Nov. Rec.

[111]

L. 9. t. 6. Lib. 10 Nov. Rec.

L. 8. t. 6 Lib. 10. Nov. Rec.

L. 10. tit. 6. Lib. 10. Nov. Rec.

From all that has been said, we draw one general conclusion, that all the property of the parents is the lawful portion or right (*la legitima*) of the children, with the exception of a fifth; and the property of the child, who dies without issue or descendants, belongs of right (*son legitima*) to the parents, with the exception of a third, for any regard to the Falcidian and Trebellian portions of the Romans, of which tit. 11. P. 6. speaks, is totally foreign from our law at this present.

Cap. 3. Of disinherison.

All that we have said with respect to necessary heirs (*herederos forzosos*) ceases if there intervene just cause of disinherison. To disinherit is to deprive a person of the right he had to inherit the property of his parent or grandparent, or of any other relations, L. 1. tit. 7. P. 6.

L. 1. tit. 7. P. 6.

§ 1. Of disinherison in general. L. 2. tit. 7. P. 6.

Every person who can make a testament, may disinherit, L. 2. tit. 7. P. 6.; and so all descendants and ascendants in the direct line may be disinherited by the persons from whom they descend or ascend, L. 2. tit. 7. P. 6., and L. 1. [37] tit. 6. Lib. 3. *Fuero Real.*

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[36] That is, such gift, with reference to its amount, shall be considered as though given to the child by way of the third and fifth, and its legitimate share of the parents' property; but if such donation should exceed in value the third and fifth, and *legitima*, it is presumed the excess would be void; and with respect to any gift from father to daughter, by way of *dote* or marriage portion, this would be reckoned as part of her *legitima* of her father's property; and if the amount or value of the *dote* should exceed her *legitima*, the excess would be invalid, and would not be considered as a *mejora* of *tercio y quinto*, according to *Azevedo*, whom see on L. 10. tit. 6. Lib. 5. Rec., n. 6. & 22.; which is L. 10. tit. 6. Lib. 10., Nov. Rec.

[37] This quotation from the *Fuero Real* seems erroneous; the law cited from the *Partidas*, however, fully supports the text.

The act of disinheriting ought to be made or expressed with the same clearness as the establishment of heir. Wherefore, 1st, The name or other exact designation must be expressed, which may show with certainty who it is that is disinherited; but if the testator shall only have one child, it is not necessary
L.3.tit.7.P.6. that he expressly name it, L.3. tit. 7. P.6. 2d, That the disinherison should be made of the whole inheritance, and without
L.3.tit.7.P.6. condition, L.3. tit.7. P.6. 3d, That some one of the causes of disinherison to be mentioned, must intervene and be expressed
L.10.tit.7.P.8. by the testator, and which the heirs [38] must prove, L.10. tit.7. P.6. 4th, That the disinherison may be set forth in any part
L.9.tit.7.P.6. of the testament, L.9. tit.7. P.6.

§ 2. Causes of disinherison with respect to descendants.

The causes for disinheriting descendants are, 1st, The way-
* laying or preparatives against the life of the parent; slander;
*[112] and an accusation from which infamy or dishonour may result to the parent, except it be for an offence against the king [39],
L.4.tit.7.P.6. L.4. tit.7. P.6. 2d, Practising witchcraft, sorcery, or keeping company with those who do (if it be that there are any persons of such description). 3d, Adultery of the son with the wife [40] of the father. 4th, Not giving bail or security for the father, if imprisoned for debt. 5th, Preventing a parent from making a
L.4.tit.7.P.6. testament, L.4. tit.7. P.6. 6th, Clandestine marriage of chil-
L.3.t.2.Lib.10 Nov. Rec. dren, L.1. tit.1. Lib.5. Rec. 7th, The daughter also who prostitutes herself may be disinherited; but not if she does it after twenty-five years of age, and in consequence of her father not
L.5.tit.7.P.6. having endeavoured to get her married, L.5. tit.7. P.6. 8th, The son also who does not take care of his insane or disabled father may be disinherited by the judge or by his father, if he
L.5.tit.7.P.6. returns to a sound state of mind, L.5. tit.7. P.6. It is to be observed, that these two cases do not include persons under
L.6.t.7.P.6. eighteen years of age, L.6. tit.7. P.6. 9th, So may the child and near relations who will not redeem the parent from captivity, whose property in this case ought to be sold by the diocesan for the redemption of captives. 10th, Finally [41], the person who abandons the catholic religion [42] may be disinherited,
L.7.t 7.P.6. L.7. tit.7. P.6.

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[38] Or, in English legal phraseology, more properly, devisees, or legatees.

[39] Or commonwealth.

[40] That is, the step-mother of the son, or any woman who is the concubine of his father. See L.4. tit.7. P.6.

[41] L.5. tit 7. P.6. mentions, as causes of disinherison by father, his son's fighting with another man, or with beasts, for money.

[42] Or becomes heretic. It is to be hoped that the severity of this law is not enforced, but that it is obsolete in practice, and will not, in the present

For the same causes, and under the same disposition of law, with the exception of the 2d, 4th, 6th, and 7th, may children disinherit their parents and other ascendants as expressed by L. 11. tit. 7. P. 6.

§ 3. Of the disinheritance of ascendants.

L. 11. t. 7. P. 6.

Brothers may disinherit expressly or tacitly; that is, naming their brothers and other relations of the collateral line with cause or without it; but there is this difference, that in disinheriting them without cause, if the testator appoint as heir a man of infamous or bad character [43], this appointment will not be valid, and the brother or relation shall inherit; but if there be a just cause expressed, the will cannot be set aside. These just causes are reduced to the attempting or the committing something against the life of the testator, or in deterioration of his property [44], L. 12. tit. 7. P. 6.

§ 4. Of the disinheritance of collaterals.

L. 12. tit. 7. P. 6.

Besides what has been mentioned, there are other causes for which generally an heir ought to lose the inheritance of the deceased, which are, 1st, If the heir should enter on the inheritance before preferring a charge or accusation (*querella*) to * the judge of the death of the deceased testator, caused by those of his family; or if it were committed by a stranger, and he should not prefer the charge within five years, L. 13. tit. 7. P. 6., and L. 11. tit. 8. Lib. 5. Rec. [45], which is not understood with regard to minors, L. 11. tit. 8. Lib. 5. Rec., nor as to the heir who, after having made the complaint or accusation, should desist from it, L. 15. tit. 7. P. 6. 2d, If it be evident who killed the testator, and the heir should open the will without accusing them, L. 13. tit. 7. P. 6. 3d, The alleging the will in which he was established heir to be a false instrument, whether he do it as party or advocate, unless it be in his quality of fiscal, or as the guardian of any minor, L. 13. tit. 7. P. 6. 4th, The deli-

§ 5. Of the causes by which the person appointed heir may lose the inheritance.

*[113]

L. 13. t. 7. P. 6.

L. 11. tit. 20. Lib. 10. Nov. Rec.

L. 11. tit. 20. Lib. 10. Nov. Rec.

L. 15. tit. 7. P. 6.

L. 13. tit. 7. P. 6

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state of liberal feeling in Spain be long allowed to remain on the statute book: the last part of the law gives the property of a lay person who is, and whose relations to the tenth degree are heretics, to the crown; and if such person be a *clerigo* to the church, if it should claim within a year after the person is declared a heretic, and on default of such claim by the church, the property goes to the crown. See L. 7. tit. 7. P. 6. N. B. This note was written during the existence of the Cortes in Spain.

[43] Or had been a slave of the testator, or one that he had emancipated; and it seems the difference mentioned, only takes place with respect to brothers of the testator, and not other collateral relations; for the latter cannot, in any case, prefer a complaint against the will. See L. 12. tit. 7. P. 6., cited, and L. 2. tit. 8. P. 6.

[44] That is to say, the greater part of it. See L. 12. tit. 7. P. 6., cited.

[45] Which last cited law requires, in order to produce such effect, the murderer to be known to the heir, and that he be in the country; and the heir to be able or wealthy enough (*poderoso*) to prosecute for the murder. See L. 11. tit. 20. Lib. 10. Nov. Rec.

vering the inheritance to one prohibited by law to receive it, although it be at the request of the testator, because he then loses the right which he may have, L. 13. tit. 7. P. 6.

L. 13. tit. 7. P. 6.

When for any of these causes the heir loses or forfeits the inheritance, it devolves to the exchequer (*camara*), L. 13. tit. 7. P. 6., and L. 11. tit. 8. Lib. 5. Rec., the collector (*recaudador*) of which shall be obliged to fulfil the will of the testator in regard of the other part of the will, reserving the fourth for the king, which must be paid out of the legacies (*mandas*) when the rest of the property shall not be sufficient, L. 16. tit. 7. P. 6.; see L. 17. tit. 7. P. 6. We are not aware that this is practised in the present day.

L. 13. tit. 7. P. 6. & L. 11. tit. 20. Lib. 10. Nov. Rec.

L. 16. t. 7. P. 6.

L. 17. tit. 7. P. 6.

Cap. 4. Of the complaint against the will as inofficious (querella inofficiosi testamenti).

As the persons who are established heirs are bound to prove the cause which intervened or existed to justify the disinherison, it follows; 1st, That the necessary (*forzosos*) heirs have a right to allege before the judge their complaint *inofficiosi testamenti;* which is nothing more than a complaint preferred against the testament made contrary to the duties of piety and affection, L. 1. tit. 8. P. 6. 2d, That parents may be wanting in their duty either by improperly disinheriting their necessary heirs or by omitting them in their will [46], L. 1. tit. 8. P. 6. 3d, That in either case all those whom we have mentioned may complain, L. 1. tit. 8. P. 6. 4th, That brothers can only do it when the person appointed heir is of bad character; although it will be sufficient to leave a legacy to collateral relations to prevent their being able to complain against such an appointment [47], L. 2. tit. 8. P. 6.

L. 1. tit. 8. P. 6.

L. 1. tit. 8. P. 6.

L. 2. tit. 8. P. 6.

[114] This complaint cannot be preferred, 1st, after the expiration of five years from the period the heir entered on the inheritance,

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[46] It may be well here to notice the difference between express and tacit disinherison or omission, which last is termed *præterition*, as clearly pointed out in L. 1. tit. 8. P. 6. here cited. It would appear by this law, and also by L. 10. tit. 7. P. 6, that it is not necessary for the heir *forzoso*, actually passed by, *præteritus*, to prefer the complaint *inofficiosi testamenti;* but that on account of such *preterition*, the will is, *ipso jure*, null and void in respect of the *legitima* of such necessary heir, although the bequests, &c. in the will would hold good, in so far as they did not trench on the *legitima* of the necessary heir, the institution of this complaint being only requisite on the part of the heir *forzoso*, who is expressly disinherited with or without cause. See *Gr. Lop.* Gl. 9 & 10. L. 1. tit. 8. P. 6.; & also *Gom. var. res.* Cap. 11. *de suc. cont. Test.* numb. 1. 35. 36, &c. L. 1. tit. 18. Lib. 10. Nov. Rec. *Azevedo* on L. 1. tit. 4. Lib. 5. Rec. numb. 94 to 97, & numb. 106. L. 7. tit. 8. P. 6. & Gl. 7. *Greg. Lop.* on said last law.

[47] This is not required by the law cited in the text, nor by any other that has come within my research; nor yet does it in any way affect the right of brothers to the advantage given them in the law cited, and in the case mentioned in the text.

unless the complainant be under twenty-five years of age, when he is allowed four years after his coming of age to prefer it, L. 4. tit. 8. P. 6. 2d, In the case where the necessary heir approves the testament by which he was disinherited, L. 6. tit. 8. P. 6.

L. 4. tit. 8. P. 6.

L. 6. tit. 8. P. 6.

The effect of this suit is to deprive the person established heir of the inheritance, and to give it to him who hath preferred a just complaint; unless the former be brother of or related in the same degree to the latter, who in such case must have his proportion, but in other respects the will remains valid, L. 7. tit. 8. P. 6. The reason of this last is, that the institution or appointment of an heir is not an indispensable circumstance to the validity of a will or testament, L. 1. tit. 4. Lib. 5. Rec. whence it arises that if the testator hath omitted any child or necessary heir, the testament is invalid or set aside in that part which may relate to such heir and subsists in regard to the other parts, L. 1. tit. 4. Lib. 5. Rec.

L. 7. tit. 8. P. 6.

L. 1. tit. 18. Lib. 10. Nov. Rec.

L. 1. tit. 18. Lib. 10. Nov. Rec.

[116]

TITLE IV.

OF THE DELIVERY AND DIVISION OF THE INHERITANCE, AND OF SUCCESSION *AB INTESTATO*.

In order to know to whom delivery of the inheritance is to be given, publication of the will is made, for which purpose those interested appear before the judge presenting a petition, praying, that the witnesses may be ordered to acknowledge their signatures: immediately the will is opened [1] by the *escribano*, and those who are found to be interested accept plainly with benefit of inventory, or reject the inheritance. [2] The testament or will must be presented before the judge within a month after the death of the testator, L. 14. tit. 4. Lib. 5. Rec. [3]; but if it was not executed before an *escribano*, and only before seven witnesses, as prescribed by Ll. 1 & 2. tit. 4. Lib. 5. Rec., the will or writing is presented to the judge; and the witnesses being examined it is ordered to be protocoled.

L. 5. tit. 18. Lib. 10. Nov. Rec.

Ll. 1 & 2. tit. 18. Lib. 10. Nov. Rec.

Cap. 1. Of the delivery (entrega) of the inheritance.

Delivery is the corporal seisin or possession which the heir receives of the property that belongs to him, L. 1. tit. 14. P. 6. The delivery of property or dominion (*propiedad*) is distinct from that of possession; and this last is never denied or refused, when it is demanded in virtue of the hereditary appointment, although there may be another who opposes it, unless the possessor shall desire to allege his reasons; or provided the other produces an equal hereditary appointment; in which case they ought to be heard, and the possession adjudged to him who has best right, Ll. 2 & 3. tit. 14. P. 6. The delivery of property or dominion comprehends not only the property which the

L. 1. tit. 14. P. 6. § 1. Of the delivery of possession and of property.

Ll. 2 & 3. t. 14. P. 6.

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[1] By the Judge, before the witnesses and the *escribano*, and read and published by the latter, according to *Palacios*. In regard to Trinidad, *vide* additional rules, Court of First Instance of Civil Jurisdiction on Testamentary Proceedings, March 22d, 1823; and as to testification of wills, *vide* Order in Council, 8th June, 1816, Append. N. & M.

[2] Or may demand time to consider and advise whether they will accept or reject it. See *Pre.* tit. 6. P. 6. & Ll. 1 & 2. *ibid.* which last points out the time allowed for such deliberation.

[3] And by this law, the executor who omits to do so, loses any bequest or legacy that may be bequeathed to him by the will. And in case of there not being any, he is liable in damages to the party injured by his neglect, and to the payment of 2,000 *maravedis* for the use of the crown (*camara*), L. 5. tit. 18. Lib. 10. Nov. Rec.

testator possessed when he died, but also the existing fruits or produce (*frutos*), which ought to be ordered to be restored to the heir, Ll. 4, 5, 6, & 7. tit. 14. P. 6 [4]

Ll. 4. 5. 6 & 7. tit. 14. P. 6.

The things belonging to the inheritance are verified by the inventory, which is an account in writing taken of the property of the deceased, L. 5. tit. 6. P. 6.; all those must make it who are obliged to give an account of the inheritance before an *escribano* and witnesses within thirty days [5] after notice hath been had of the inheritance, and must be finished within three months at most, if the property be in the same place; but if it should be at a distance the term may be prorogued to a year or more [6] according to the circumstances, L. 5. tit. 6. P. 6. & L. 100. tit. 18. P. 3.

§ 2. Of the inventory by force or virtue of which delivery is given.

L. 5. tit. 6. P. 6.

[117]

L. 5. tit. 6. P. 6. L. 100. tit. 18. P. 3.

This instrument, or account in writing, may be well termed a *benefit*, because many are the benefits which the heir derives from it; the most remarkable among them are, 1st, That the heir cannot be sued for more than the amount or value of the property which he inherits, Ll. 5. 7. & 10. tit. 6. P. 6. 2d, That no suit can be instituted during the time it is forming [7], L. 7. tit. 6. P. 6.

Ll. 5. 7 & 10. tit. 6. P. 6. L. 7. tit. 6. P. 6.

If the renunciation be made, the inheritance cannot be demanded; but if the heir were a minor, he has a term of three years to retract, Ll. 18. and 20. tit. 6. P. 6. [8]

Ll. 18 & 20. tit. 6. P. 6.

As there are oftentimes two or more persons appointed heirs by a testament, between whom a division of the inheritance must be made, it is necessary to know that partition is a division which men make among them of the things which they have in common by inheritance, or by any other cause, L. 1. tit. 15. P. 6.

Cap. 2. Of the partition of the property.

L. 1. tit. 15. P. 6.

This partition, 1st, Ought to be made between the heirs named in the will. 2d, Of the things which were the property of the testator. 3d, Before a competent judge.

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[4] The three first of these laws apply and point out the different consequences as to such restitution with regard to the person who possessed *bonâ fide*, and him who possessed *malâ fide*; the last cited law relates to prescription as against the heir entitled.

[5] That is, it must be begun within that time.

[6] Beyond or exclusive of the three months first allowed; and the inventory must be signed by the heir. L. 100. tit. 18. P. 3., cited, gives the form of such inventory, &c.

[7] It would seem *secus* for funeral expenses, &c. See *Greg. Lop.* Gl. 7, or L. 7. tit. 6. P. 6.

[8] *Quære*, if he be a minor, if he have not four years after he come of age. L. 20. tit. 6. P. 6., says, that he has three years allowed him to retract, if the renunciation be made after he is twenty-five, provided the property be not in the meantime alienated.

From the first it is deduced, 1st, That either of the heirs may
L.2.tit.15.P.6. require partition of the property, L.2. tit. 15. P.6. 2d, That all the property, except the fifth and the third, if there should be any, is divided between them in equal parts. This appears from
Tit.6 & 20. Lib.10. Nov. Rec. the whole of tit.6. Lib.5. Rec.[9] 3d, That the papers or deeds be in the possession of the principal heir, or of whomsoever the
Ll.7 & 8.tit.15. P.6. testator shall name, Ll.7. and 8. tit.15. P.6.

To the second principle belongs the collation or manifestation (*colacion*) of property; which the *Partidas* call *amojonamiento*[10],
L.3.tit.15.P.6. which takes place among brothers, L.3. tit.15. P.6. Into this collation are to be brought, 1st, The merchandise which either of the brothers may have gained with the property or money (*caudal*) of the father during the time he was under his father's power, L.3. tit.15. P.6. 2d, The *dote*, *arras*, and other donations which they may have received from the father, which are imputed or counted in the lawful share (*legitima*) or portion which should belong to such child of the inheritance of its father,
[118]
L.9.t.6.Lib.10 Nov. Rec. *Azev. á la* L.9. tit.6. Lib.5. Rec. n.1.; but these *dotes* and donations, if they are inofficious, that is, exceeding the fifth and third of melioration (*de mejoria*), and the said lawful share[11], ought to be returned to the heirs, in order to be divided
L.5.t.3.Lib.10. Nov. Rec. among them, L.3. tit.8. Lib.5. Rec.; which alters Ll.3, and 4.
Ll.9 & 10.t.6. Lib.10. Nov. Rec. tit.5. P.6. and explains Ll.9 and 10. tit.6. Lib.5. Rec. In order to prove *dote* inofficious, attention is had to the value of the property at the time of establishing or paying it, or at the time of the death of him who gave it, according to the election of the child to whom it was left; and in regard of other donations, consideration is had to the value of the property at the time of
L.5.t.3.Lib.10 Nov. Rec. of the death of him who made them, L.3. tit.8. Lib.5. Rec. 3d, The *dote* which any one might give to the father, in consideration of his child, is not brought into collation, but shall be
L.6.tit.15.P.6. the property of the child, L.6. tit.15. P.6. *Azevedo á la* L.3.
L.5.t.3.Lib.10. Nov. Rec. tit.8. Lib.5. Rec. n. 27.[12] 4th, The debts which the son contracted in the life of the father by his command, or which were

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[9] See Ll. tit. 21. Lib. 10. Nov. Rec.

[10] *Palacios* on this (*nota*,) says, that no where does he find that *amojonamiento* signifies *colacion de bienes:* but that the word is used in the *Partidas* to designate the boundaries or limits of estates by means of land-marks; and he refers to L.30. tit.14. P.7.: and also to tit.15. P.6.: I suppose L.20. of said title is particularly meant.

[11] See L.6. tit.3. Lib.10. Nov. Rec., which regulated, &c. the quantity or amount of *dote*, &c. allowed to be given by parents to their daughters by way of marriage portions, &c.

[12] This last quotation is incorrect.

converted to his use, are brought into *collation*, L. 6. tit. 15. P. 6. L. 6. tit. 15. P. 6. The property acquired in war (*bienes castrenses*), adventitious property, or that acquired by industry, are the particular property of the child who acquired them, and do not enter into the common mass of property which must be divided, L. 5. tit. 15. L. 5. tit. 15. P. 6. P. 6. 6th, Neither are the sums (*gastos*) which the father expended in the particular instruction or education (*enseñanza*) of each child included in this mass, L. 5. tit. 15. P. 6. 7th, The heir who may gather the fruits or products of the inheritance is obliged to bring them into *collation*, provided the improvements (*mejoras*) and expense he made or was at in the gathering the fruits shall be restored to him, L. 6. tit. 15. P. 6. 8th, The things L. 6. tit. 15. P. 6. which are unlawfully acquired do not enter into *collation*, and are to be restored to their owners; and if they are not to be found, shall be employed for the good of the soul of the testator, L. 2. L. 2. tit. 15. P. 6. tit. 15. P. 6.

According to the third principle, the judge, before whom this partition must be made, must be the judge of the place where the property to be divided is situate, L. 10. tit. 15. P. 6. Hence L. 10. t. 15. P. 6. it is, 1st, That the things which by their nature cannot be divided, ought to be valued and assigned to one of the heirs, so that the value in money may be divided equally among all, L. 10. L. 10. t. 15. P. 6. tit. 15. P. 6. 2d, The judge ought to determine causes which [119] may be agitated among the heirs respecting the boundaries of the estates, L. 10. tit. 15. P. 6. 3d, He ought, officially, after the partition is made, to oblige each heir to warrant (*dar eviccion*) to the other, the part of the inheritance which might be assigned him, to indemnify or make satisfaction to him in case he should be deprived of it at law; but if the testator shall assign to the heirs their particular parts or shares, they are not obliged to make this mutual warranty [13], L. 9. tit. 15. P. 6. L. 9. tit. 15. P. 6.

Whenever the intention of the deceased is not expressed or declared, by reason of his not having made a testament, or if the one made by him be not valid as explained by L. 1. tit. 13. L. 1. tit. 13. P. 6. P. 6. [14], the relations of preferable lineage and degree of kindred succeed. Cap. 3. Of the succession *ab intestato.*

Kindred (*grado*) is a body (*manera*) of different persons, who § 1. Of the difference of degrees of kindred.

[13] This, it is presumed, must be taken with some qualification: it might happen, that the heir to whom any particular part of the parent's estate was devised, might be evicted by reason of the defect of such ancestor's title, and be thus deprived of his *legitima* or legal share of the parent's property. See *Greg. Lop.* Gl. 2. on the law cited in the text.

[14] See also L. 1. tit. 18. Lib. 10. Nov. Rec.

are united by kin, L. 3. tit. 6. P. 4. Lineage (*linea*) is the ordained union of persons who hold one with the other, as chains descending from one root, and make among themselves different
L. 2. tit. 6. P. 4. or separate degrees of kindred, L. 2. tit. 6. P. 4.

There are three kinds; the right ascending line as father, grandfather, &c.; the right descending line as child, grandchild, &c., and the transversal or collateral line, which begins with brothers, and descends by their children.

By the civil law, there are as many degrees in the right line, as there are persons, taking away one, which is the root from whence they spring, and thus the grandson is in the second degree in respect of the grandfather, and in this our law agrees with the canon. In the collateral line there is a difference, for the law of the laity observes the same rule in the computation of degrees as in the right line; and the canon counts as many degrees between the collaterals as the person the most remote is removed or distant from the common root, which will be made evident from the following example. John is the father of James, and he the uncle by kindred (*tio carnal*) of Peter. James and Peter are distant from each other three degrees by the civil law, because three persons are reckoned, taking away the root from which they both spring, which is John; and by the canon law they are only distant two degrees, because Peter is distant so many from his grandfather John, in respect of whom he is more remote than James is. So one brother is in the second degree of kindred in respect of another brother by
*[120] the civil law, and in the first by the canon.

§ 2. Of the lineage of descendants in succession ab intestato.

*In successions *ab intestato*, the descendants hold the first place, and among them children, without regard to sex, inherit the property of the deceased[15], L. 3. tit. 13. P. 6. As in the
L. 3. tit. 13 P. 6. right line the right of representation[16] takes place, it hence arises, 1st, That if a person dies without testament, leaving a child, and a grandchild, the child of a deceased son or daughter, the child and the grandchild will succeed and inherit equally,
L. 3. t. 13. P. 6. because the grandchild represents the person of its father, L. 3.

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[15] L. 7. tit. 13. p. 6. says, a wife shall be entitled to a fourth of husband's property at his decease, not exceeding 100 *libras de oro*, provided she be poor, without *dote*, &c., not having wherewithal to live decently, although there are necessary heirs of deceased; and *Gr. Lop.* gl. 1. on this law says, the rule extends to a husband in like case: perhaps this may be considered in the light of an alimentary allowance to the party.

[16] *Palacios* (note 2) observes, that this is understood of the right descending line, for that in respect of the right ascending line there is no right of representation.

tit. 13. P. 6. 2d, That if there were many grandchildren as they represent only one person, they will succeed to one half of the inheritance, reserving the other half for their uncle, or the child of the deceased, which is called succession *in stirpem*. 3d, That if the person dying intestate shall leave a grandchild, the child of his son [17] who is dead, and three or more grandchildren of another son also deceased, the latter will succeed to one half of the property of their grandfather jointly with their cousin; because although they be many, they represent the sole person of their father, L. 3. tit. 13. P. 6. L. 3. tit. 13. P. 6.

§ 3. Of succession ab intestato of descendants, who are bastards (bastards) born from an incestuous and from a condemned intercourse (incestuosos y de dañado coito).

As it happens that there are bastards and children born from an incestuous and condemned (*danado*) intercourse of the same father with a different mother, or on the contrary, it must be observed, 1st, That no bastard inherits without being first legitimated, L. 17. tit. 6. Lib. 3. *Fuero Real*, *Azevedo á la* L. 7. tit. 8. Lib. 5. Rec. n. 7. 2d, That even after being legitimated, they cannot succeed, if there be lawful children, L. 10. tit. 8. Lib. 5. Rec. 3d, That illegitimate children succeed to their mother in default of lawful ones, and are preferred to ascendants, because the mother is clear or certain, but not the father. There is an exception with respect to children born from a condemned (*dañado*) intercourse, where the mother by such intercourse or connexion deserves the punishment of death [18], L. 7. tit. 8. Lib. 5. Rec.; by which Ll. 8, 9, 10, and 11. tit. 13. P. 6., are repealed, or cease. L. 5. tit. 20. Lib. 10. Nov. Rec. L. 7. tit. 20. Lib. 10. Nov. Rec. L. 5. tit. 20. Lib. 10. Nov. Rec. Ll. 8, 9, 10, 11. tit. 13. P. 6.

In default of descendants, ascendants succeed or inherit; and being those who ascend by the right or direct line, it follows, 1st, That if there are no children, grandchildren, &c., the parents succeed; and in default of them, grandparents, on the part of the father and of the mother, without distinction of paternal, maternal, and *ganancial* property [19], L. 4. tit. 13. P. 6, which is not in force, where L. 10. tit. 6. Lib. 3. *Fuero Real* is observed; according to which, the paternal ascendants alone inherit the property on the part of the father, and the maternal that on the part of the mother [20], *Lopez á la* L. 4. tit. 13. Part 6. Glos. 2. 2d, That in the grandparents there exists the right of represent- L. 4. tit. 13. P. 6.

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[17] It must be always kept in mind that, by the Spanish law of descents or succession of property, equal regard is had to both sexes.

[18] And also with respect to children of the clergy, friars, and professed nuns, where the mother does not incur such punishment.

[19] Equally, and see L. 1. tit. 20. Lib. 10. Nov. Rec.

[20] Equally with respect to *ganancial* property, by the law of the *Fuero Real*, cited.

ation from the fathers who were to inherit from their children, if they had lived; and, therefore, the grandchild dying, its grandparents will inherit its property, the father being dead [21].

L. 4. tit. 13. P. 6. L. 4. tit. 13. P. 6. 3d, That the brother does not succeed to the brother, if there be ascendants, L. 4. tit. 8. Lib. 5. Rec.; which repeals, as to this part, L. 4. tit. 13. P. 6. 4th, That ascendants succeed to their bastard children, when once legitimated. It appears from what has been said, that in default of descendants and ascendants, collaterals, or persons related by blood, begin to succeed. In this line are preferred brothers and their children, or the nephews and nieces of the deceased; so that the nephews [22] being many, succeed equally with their uncle, or *in stirpem*, L. 5. tit. 13. P. 6. and L. 5. tit. 8. Lib. 5. Rec.; but the nephews will divide among themselves *per capita*, the portion which belongs to them [23]. 2d, The brothers and nephews, on the part of the father alone, or of the mother, do not succeed, if there be brothers on both parts, L. 5. tit. 8. Lib. 5. Rec. 3d, The brothers of the father alone inherit the property on the part of the father; and so respectively, the brothers on the part of the mother; and they will inherit equally the property acquired by any other cause, L. 6. tit. 13. P. 6. In default of brothers of the deceased and of his lineage, the cousins of the deceased and their lineage are admitted to the succession, by reason of nearest relationship [24].

L. 2. tit. 20. Lib. 10. Nov. Rec.

§ 5. Of succession ab intestato of collaterals.

L. 2. tit. 20. Lib. 10. Nov. Rec.

L. 2. tit 20. Lib. 10. Nov. Rec.

L. 6. t. 13. P. 6.

In default of descendants, ascendants, and collaterals, the crown, or exchequer (*la real camara*), succeeds to the property of an intestate, L. 12. tit. 8. Lib. 5. Rec. [25]; if within a year, the parties interested do not appear [26]; so that the cognizance (*co-*

L. 1. tit. 22. Lib. 10. Nov. Rec.

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[21] See note 16. p. 128. *ante*. *Palacios* here adds, that the grandparents do not inherit from their grandchildren by right of representation, but as being nearest of kin; and instances that if a child were to die, with direct descendants, and without a father, but leaving a mother, she would inherit in exclusion of the paternal grandfather, though such were living.

[22] *Palacios* properly observes, if the fathers of such nephews be dead, but not otherwise.

[23] As representing their deceased father.

[24] That is, the nearest relation in such case succeeds.

[25] L. 6. tit. 13. P. 6. says, as does also L. 23. tit. 11. P. 4., that in default of such, husband and wife may succeed to one another; *vide* also *Paz. Prax.* 1 T. p. 125, n. 1. & 2.; but the law quoted in the text is later than the laws of the *Partidas* referred to, although it contains no express repeal of the provision in the laws of the *Partidas*.

[26] This does not form any part of L. 1. tit. 22. Lib. 10., Nov. Rec., as it would seem to do from the text, but is part of L. 2. *ibid.*; which directs *cosas mostrencas* to be delivered to the judge of the place or jurisdiction where found; and if unclaimed within a year, declares them forfeited to the crown (*camara*).

noicimiento) of the said property belongs to the ordinary judges, *Cédula of 9th October*, 1766. [27]

§ 6. Of the succession ab intestato of the exchequer (real camara).

In order to remedy the abuse, which was observed when the case of successions (*ab intestato*) happened, by the secular or ecclesiastical judges interfering to take possession of the property under the pretence of making an inventory, or of disposing of the fifth of it for the soul of the deceased, it was ordered by *Royal Ordin. of 2d February*, 1766 [28], that thenceforward no judge should take possession of the property of intestates, but that it should be delivered entire to the heirs, conformably with what is laid down in L.10. tit.4. lib. 5. Rec. [29], who are to dispose of the fifth for the above-mentioned purpose; and if they omit to do it within the year, they may be compelled thereto by the judges. It is also provided by Ll.2 and 3. tit.9. Lib.1. Rec., that the orders of "*Trinidad and Merced*" may not obtain the uncertain legacies (*mandas inciertas*), nor the fifths of the property of those who die *ab intestato*, leaving relations within the fourth degree.

L.14.tit.20. Lib.10. Nov. Rec.

[122]

L.13.tit.20. Lib.10. Nov. Rec.

L.3.tit.20. Lib.10. Nov. Rec.

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[27] *Nota* 1. tit.22. Lib. 10. Nov. Rec.
[28] See L.14. tit.20. Lib.10. Nov. Rec.
[29] *Ibid.*

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TITLE V.

OF SUBSTITUTIONS, INTAILS, AND LEGACIES.

THE succession *ab intestato* and that by testament being already known, it remains for us to explain here the other things which, as accessary thereto, testators are wont to express or declare in their last wills.

Cap. 1. Of substitution.

Substitute is another heir who is established by the maker of the will, in the second, third, fourth, &c., degree after the first heir, L. 1. tit. 5. P. 6.; this is established by substitution [1] *vulgar*, *pupillar*, *exemplar*, and *fidei commissary*. Vulgar substitution takes place when the substitute is appointed, in case the heir will not or cannot be such, L. 1. tit. 5. P. 6. Substitution (*pupillar*) is only appointed to the male minor under fourteen and the female under twelve years of age, being under the *patria potestad*, Ll. 1 & 5. tit. 5. P. 6. Similar to this is the substitution exemplary or quasi pupillar by which the father appoints an heir to his child if he dies mad, L. 1. tit. 5. P. 6. Substitution (*fidei commisaria*[2]) is made by giving it in trust (*poniendo en fe*) to some one appointed heir[3], to hold the inheritance for a given time, that he may deliver it afterwards to another, L. 14. tit. 5. P. 6.

L. 1. tit. 5. P. 6.

L. 1 tit. 5. P. 6.

Ll. 1 & 5. tit. 5. P. 6.

L. 1 tit. 5. P. 6.

L. 14. tit. 5. P. 6.

As the end or object of these substitutions is that the testator may not remain without heirs by the death or unwillingness to accept of the person named or instituted, it is understood that the first event being expressed in any substitution, the other is also considered as expressed, L. 2. tit. 5. P. 6.

L. 2. tit. 5 P. 6.

The substitution is to be subject to the rules which, according to our laws, testators ought to observe in establishing an heir; because the former not being at liberty to establish or institute whomsoever they please, neither can they appoint a substitute but to their immediate successor.

This idea being formed, the following consequences are drawn from it: 1st, That as there are necessary, and discretionary,

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[1] Or conditional institution. *Vide Halifax Roman Law*, p. 38, 39. 42 & 43. 1st *Browne, Civil Law*, c. 1. p. 331. note 109; and *Wood, Civil Law*, Book 2. ch. 4. p. 187 to 189.

[2] Has only place as to *herederos extranos; vide* 1st. vol. *Febr. ad.* p. 76. n. 111.: also L. 1. tit. 18. Lib. 10., Nov. Rec.

[3] Trustee.

or arbitrary (*arbitrarios*) heirs, so there are also necessary and discretionary substitutes. 2d, That necessary substitutions [127] ought always to be appointed when there are necessary heirs; and discretionary ones only in default of them, or as to the remnant of the fifth of the property, the free disposal of which is left to the testator; or rather as to a third of it if he substitutes from among his children, ascendants, &c. 3d, That for the creation of the first the rules only apply which we have pointed out for the appointment of heir, and many laws of the 5th tit. 6th *partida*, only take place in regard of the second, as having their rise from the Roman law which allowed to the testator more liberty as to the disposal of his property. 4th, That the substitution pupillar of the adopted child of which L. 9. tit. 5. P. 6. speaks, takes place in the case where he may succeed to his adoptive father. 5th, That although the male minor of fourteen, or female of twelve, enters into puberty or on the inheritance, in case of their death the substitute will succeed, provided he is next of kin; whence we may infer, that not only does the vulgar substitution comprehend the pupillar, as says L. 5. tit. 5. P. 6., but that also does the *pupillar* comprehend in this sense the *vulgar* [4]; and thus neither the puberty of the minor nor the possession (*incorporamiento*) of the inheritance ought to be counted among the modes of putting an end to the necessary substitution; but as well the vulgar as the *pupillar* is at an end by the death of the substitute, or the nearest relation of the heir being alive. 6th, The same ought to be applied to the *exemplary* or *quasi pupillar* substitution, with the difference that, with regard to that which puberty produces in the *pupillar*, the prudence or sanity of the person who was mad produces in the *exemplary* or *quasi pupillary*. Discretionary or arbitrary substitutions belong to intails [5] (*mayorazgos*) which being peculiar to our nation [6], form the principal object of this chapter.

L. 9. tit. 15. P. 6.

L. 5. tit. 5. P. 6.

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[4] *Vide Halifax, Rom. Law*, p. 38, notes.

[5] *Ibid*, p. 39. n. 67.

[6] Intails are as common, at least as well known, in England, &c. as in Spain. In the latter country, the future creation of them is prohibited; and the whole doctrine respecting their establishment rendered of little use or regard, by the alteration of the old rules, as applying to those now in existence in Spain, under a law recently passed by the Cortes on the subject. As regards Trinidad, the laws of Spain, in force in that island at its conquest by the British arms, are observed, except in so far as they have been since repealed or altered by his Majesty: but as respects the law of *Mayorazgos*, no change has taken place. The rules, therefore, in the text, fully apply in the case of property which may be in that situation in the island, although it is believed there is very little, if any, there so circumstanced.

N. B. This note was written in the commencement of 1821.

Cap. 2. Of intails (mayorazgos).

Intail (*mayorazgo*), is the right of succeeding to the property which is left, with the condition of its being perpetuated in the family, so that it may pass to each first born by reason of succession, *Molina de Hisp. primogen.* Lib. 1. cap. 1. n. 22.

§ 1. Of their utility and origin.

[128]

D. Gaspar de Criales, in the referred to order, or *carta*, of 1646. p. 30., proves that, in his time, the most ancient private intails did not exceed three hundred years in establishment; and shews, in his dissertation on it, how prejudicial their establishment has been to the state of husbandry or agriculture, and to population.

It is a common opinion, that the origin and rule of these intails must be looked for in the ancient succession of the kingdom, before it was altered by *Auto* 5. tit. 7. Lib. 5. Rec., and which is laid down in L. 2. tit. 15. P. 2. in these words: "The wise and enlightened considered it right, that no one should have the sovereignty of these kingdoms but the eldest son, after the death of his father. And, to prevent many evils which might happen, or be committed, they determined that those of the direct line should always inherit the dominion or sovereignty of the kingdom; and thence they established, that if there was a son, and he would not have it, the eldest daughter should inherit the kingdom. And they also ordered, that if the eldest son should die before he inherited, and should leave a son or daughter of his lawful wife, he or she should inherit, and no other. But if all these should fail or die, the nearest relation ought to inherit the kingdom, being a man fit for it (*seyendo home para ello*), and not having done any thing for which he deserved to lose it [7].

L. 5. t. 1. Lib. 3. Nov. Rec. L. 2. tit. 15. P. 2.

§ 2. Of the two kinds, regular and irregular.

Hence have resulted the two kinds of intails, *regular* and *irregular*. The *regular* is that in which the inheritance descends according to the ancient order of succession in the kingdom. The *irregular* is understood that in which the succession varies, *Roxas de Incomp.* Part. 1. c. 6. § 1. n. 21 & 22. *Molina* affirms, Lib. 2. c. 2. n. 19., that intails followed the order of the succession of the kingdom, until by L. 13. tit. 7. Lib. 5. Rec. it was ordained, that the females of nearest lineage and kindred (*de mejor linea y grado*) should not be considered excluded, and should be preferred to more remote males, unless the testator disposed otherwise, excluding females clearly and distinctly, without conjectures being sufficient for the purpose.

L. 8. tit. 17. Lib. 10. Nov. Rec.

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[7] This rule of descent or succession is conformable with the laws of England.

§ 3. Of the modes and solemnities which are required to found or establish an intail.

Intails are founded or established upon testament or by contract. The first must be reduced to writing; but this is not necessary with respect to the second [8], *Molina*, Lib. 2. c. 8. It follows from this, 1st, That the intail made by way of contract cannot be revoked, if possession of the property hath been delivered, or it hath been made for an onerous cause, or consideration, as marriage, &c., nor even that which is made by last will, if the writing hath been delivered (*si se entrego la escritura*); although under such circumstances both may be varied by the royal permission, L. 4. tit. 7. Lib. 5. Rec. 2d, That persons who cannot contract, nor make wills, cannot found or establish intails. 3d, That the son *de familias* (under the patria potestas), shall not be able to do it without the permission of his father, excepting it be of property acquired by him in war (*bienes castrenses*). With respect to the power of a person of a religious order to do so, see *Molina*, Lib. 4. c. 9. a num. 53. From what has been said in the antecedent title, with respect to the lawful share (*legitima*) of descendants and ascendants, it is understood that the royal permission is necessary to found or establish an intail of all a person's property by reason of the prejudice which ensues to the necessary (*forzosos*) heirs. Hence it is deduced, 1st, That the founder should assign to the rest of his children *dote* and competent aliment, *Molina*, Lib. 2. c. 1. n. 26.; and this obligation to furnish *dote* and aliment passes to the successors of the intail, as *Molina* explains L. 2. c. 15 & 16. 2d, That if all the children give their voluntary consent (*no forzado*), the entail may be founded without the royal permission, *Molina*, Lib. 2. c. 3. 3d, That the instruction or information [9] should precede the royal licence, unless the intail already founded is approved, L. 3. tit. 7. Lib. 5. Rec. 4th, That in order to found an intail of the remnant of the fifth and the third, the royal permission is not necessary, L. 11. tit. 6. Lib. 5. Rec. [10] 5th, That if the founder have only one son, as he

[129]

L. 4. tit. 17. Lib. 10. Nov. Rec.

L. 2. tit. 17. Lib. 10. Nov. Rec.

L. 11. tit. 6. Lib. 10. Nov. Rec.

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[8] *Palacios* on this (n. 1.) observes, that *Molina*, in the same chapter, 8, says, he had never seen any *mayorazgo* founded without writing or deed; and that, with respect to those founded with the royal permission, a writing or deed is necessary for the proof of this licence: that as at the present day no *mayorazgo* can be established without the royal licence, by L. 12. tit. 17. Lib. 10., Nov. Rec., it is seen that a writing or deed is necessary in all *mayorazgos* or intails.

[9] Required, it is presumed, by L. 12. tit. 17. Lib. 10., Nov. Rec. respecting the value of the property to be intailed, the rank or condition of the family of the intended founder, &c. See this law.

[10] See also L. 12. tit. 17. Lib. 10. Nov. Rec.

necessarily succeeds to the third, he shall not be able to burthen it (*gravarle*) without the royal permission, although this exception must be understood with some limitations, which may be seen in *Molina*, Lib. 2. c. 11. a. n. 4. al. 9. 6th, That husband and wife may institute an intail without licence, of that property of which they may freely dispose, *Molina*, Lib. 1. c. 7. 7th, That the priest (*prelado*) may found it of his patrimonial property, and of no other, *Molina*, Lib. 2. c. 10.

The founder is at liberty to impose any reasonable conditions
[130] which he may think fit. And thus, 1st, If any one is appointed on condition of doing a specific thing, and not otherwise, if he does not perform it, he is understood not to be appointed, and must restore the fruits of the estate. 2d, That a condition that the grantee shall marry such a one of such a family may be imposed. See *Molina*, Lib. 2. c. 12. *á* num. 34. and all c. 13.

§ 4. Of the principles and axioms upon which the doctrine of intails is founded.

On the similitude of private intails with the succession of the crown, are founded the following principles. 1st, That every intail be indivisible, passing from one first-born to another. 2d, That this indivisibility follow the certain order of succession. 3d, That the intails be perpetual in the family of the founder. From the first principle, which is found confirmed by *Molina*, Lib. 1. c. 11., it follows, that in the succession, or among the issue, the first-born is preferred, unless he be illegitimate (*espurio*), *Molina*, Lib. 3. c. 1.; but in case of doubt, as when it cannot be declared which of two sons was first born, a division [11] is admitted, L. 2. tit. 33. P. 7.

L. 2. tit. 33. P. 7.

This preference of primogeniture is wanting or omitted, 1st, When the first-born is legitimated, and there are lawful children [12], *Molina*, Lib. 3. c. 2. 2d, When he is a monk, clergyman [13], or friar, *Roxas*, Part. 7. c. 5. 3d, By the incompatibility of the family name and arms, if it be prohibited to have them mixed with others, *Molina*, Lib. 2. c. 14. num. 16. 4th, When two intails are incompatible by reason of their value, according to L. 7. tit. 7. Lib. 5. Rec., which enacts that if, by way or reason of marriage, two intails are united, the value of one of which is

L. 7. tit. 17. Lib. 10. Nov. Rec.

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[11] Of the estate tail.

[12] *Palacios* (note 1) says, that when the firstborn is legitimated by a subsequent marriage, and has been legitimated before the birth of the other legitimate children (of such marriage it is to be presumed), what is here stated by the text does not take place.

[13] The same learned Professor also observes, that a clergyman (*clerigo*) is not passed by, unless expressly excluded by the founder; for that there is no law, practice, or reason, which excludes the clergy from such intails.

above two millions maravedis, the eldest son may succeed only to one of the two at his election, and the other passes to the second son; and if there should be only one son, or a daughter, he or she may hold them both for life; and if either has two sons, or a son and a daughter, they are divided as above, notwithstanding any clauses and appointments whatsoever in the creation of the intails, upon the disposition of which, see *Roxas* throughout all Part. 8., who asserts, in cap. 1. num. 68., that the law in question takes effect when two intails of the above tenor are united by way of succession or inheritance. 5th, The first-born is excluded when he caused the death of the last possessor, *Molina*, Lib. 2. c. 2.

As the intail by reason of its indivisibility must devolve to only one person, it hence arises that the two rules invented by [131] the interpreters of the Roman law do not apply, namely, 1st, That two appointed jointly, E. G. John and James, succeed or inherit equally. 2d, That the disjunctive resolves itself into the copulative, E. G. Andrew *or* Peter is equivalent to Andrew and Peter, *Molina*, Lib. 1. c. 6. from num. 4. to 7.

According to the order of succession which ought to be followed under this indivisibility, the kinds of lineage, regard to which is had in intails, should be understood, and they are the following: 1st, The substantial line (*linea de substancia*) is that which comprehends ascendants, descendants, and collaterals, without distinction of males or females; the preference taking place between them according to kindred or age, *Roxas*, Part. 1. cap. 6. § 2. Hence it is, 1st, That the son born before the father acquired the entail, succeeds in preference to the son who was born after, *Roxas*, Part. 1. cap. 6. § 3. 2d, That the son legitimated by the subsequent marriage is counted of the substantial line to enable him to succeed to the intail, *Roxas*, ibid. § 5.; but not those legitimated by rescript, which does not take away the right that another might possess, *Roxas*, ibid. § 6.; to whom ought to be added *Molina*, Lib. 4. cap. 3. who refers to different opinions upon the subject. 3d, Natural children are not of this line, *Roxas*, Part. 1. cap. 6. § 9; where he lays down the limitations. 4th, That in the collateral line, the brother of the last possessor, on the part of the father and mother, although younger, is preferred to the elder brother, who is so only on the part of the father, by reason of the greater kindred or relationship, *Roxas*, ibid. § 17.

2d, The *actual*, or *effective* line, is that which the possessor of the intail occupies as lawful successor, *Roxas*, ibid. § 12.

3d, The *habitual*, or accustomed line, is that which the first-born constitutes or establishes, immediately as he is born, for his descendants, *Roxas*, ibid. § 13.; whence it is deduced, that although he die, if he leaves a son, or other descendants, they shall succeed as representing the father in preference to their uncle, unless the founder should make any other direction, L. 5. tit. 7. Lib. 5. Rec.; in which case it is necessary that the will of the testator be clear and distinct, L. 14. tit. 7. Lib. 5. Rec. Of this right of representation *Molina* speaks, Lib. 1. cap. 6, 7, & 8.

L. 5. tit. 17. Lib. 10. Nov. Rec.

[132]

L. 9. tit. 17. Lib. 10. Nov. Rec.

4th, The line of true and absolute consanguinity by the father's side [14] (*cognacion*) is that by which only males are called to the succession; E. G. male to male (*varon de varon*), or males succeed, and not females, &c.; and, in this case, every female is excluded, although she be first born, and male to male is preferred, although he may be of a more remote line or kindred, *Roxas*, Part. 1. cap. 6. § 22. Besides this, every female is understood to be excluded who might possibly impede or obstruct the succession of the *agnati*; and the woman related by the father's side (*agnada*) through whose means the succession would pass to the *cognati* [15] (*cognados*), *Molina*, Lib. 1. cap. 6. num. 38, 39 & 40. It is to be observed that by the insertion of the clause "*suceda por linea masculina*," the female daughter of the male is understood as appointed or entitled in the regular intail (*mayorazgo regular*), but not in that of tail male (*de agnacion*), *Roxas*, ibid. § 23.

5th, Tail male special (*linea de agnacion limitada*) is that in which the estate in tail male (*agnacion*) is limited to certain persons, degrees, &c. (*grados*), E. G. the descendants of Peter in tail male.

6th, The line of agnation artificial (*linea de artificiosa agnacion*) is composed of females, descendants of males.

7th, The line of quality (*linea de qualidad*) is composed of the persons who obtain the particular qualification required by the founder E. G. of *Doctor*, &c. *Roxas*, Part. 1. cap. 6. § 20.

8th, The line of simple masculinity is composed of males of any quality or condition, *Roxas*, ibid. § 22.

9th, The line elective comprehends the persons elected by whomsoever may have the power to elect, *Roxas*, ibid. § 21. This line takes place in elective intails, when the founder authorizes the last possessor or tenant to elect his successor. This

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[14] Estate in tail-male general.

[15] In the case, it is presumed, of an estate in tail female.

election ought not to be made of a bastard. 2d, It may be changed, if it has not taken effect. 3d, It ought to be made of only one person. 4th, And when he to whom it belongs to elect, does not make his election, the succession devolves to his first-born son and the rest of the family of the founder, *Molina*, Lib. 2. cap. 4., who, in cap. 5., treats whether this election must fall on the most worthy.

10th, The male line (*linea masculina*) is that which begins with the male and the tail female (*feminina*); that which begins with the female[16], *Roxas*, Part. I. cap. 6. § 23 & 24. [133]

From all that has been said, the consequence is, that, with respect to the intail constituted without rule or condition, the succession is regulated according to L. 2. tit. 15. P. 2.; and therefore, the females of the best line and degree are preferred to the more remote males, L. 13. tit. 7. Lib. 5. Rec. *Molina*, Lib. 1. cap. 3. L. 2. tit. 15. P. 2. L. 8. tit. 17. Lib. 10. Nov. Rec.

From the perpetuity of intails it is inferred, 1st, That the succession passes to all the descendants of the founder *in infinitum*, as determined by *Molina*, Lib. 1. cap. 4. 2d, That the first heir or grantee named (*llamado*), must be appointed purely, and the others under the condition of the first not succeeding, *Molina*, Lib. 2. cap. 12.; and therefore in the lifetime of the tenant or possessor no action can be brought, in order to its being declared who the lawful successor is, because an action will not lay for what is conditional, *Molina*, Lib. 3. cap. 14. 3d, That the children or issue conditionally named, are considered appointed, for otherwise the perpetuity would fail, *Molina*, Lib. 1. cap. 6. N. 2. & 3. 4th, That the word issue (*hijos*), comprehends the grandchildren and other descendants in *infinitum*, *Molina*, Lib. 1. cap. 6. n. 28. 5th, That in intails the issue, &c. succeed, by right of blood, and not by hereditary [17] right,

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[16] *Palacios* mentions others, viz. *linea contantiva*, *postergada*, *defectiva*, *femenina*, *paterna*, *materna*, and says there are more; which, however, he does not particularize; but he very properly adds, that the whole only serve to afford a knowledge of the nomenclature of terms, and an understanding of what others wish to say who attempt to explain them; and that, as for any thing else, he considers the subject somewhat confused, and of little or no utility. He concludes by observing, that the will of the founder, and the laws which regulate, &c. the establishment of *mayorazgos*, are to be consulted and attended to. The 17th tit. 10th book of the Nov. Rec. treats of *mayorazgos*, which see.

[17] *Palacios* says (note 1.) "that this is understood, when the successor to the last possessor, or tenant, is treated of; for, that if the founder is spoken of, all succeed in respect of him, by hereditary right, since they succeed by his will and appointment."

wherefore the possessor or tenant cannot deprive his child of the succession on account of ingratitude, *Molina*, Lib. 1. cap. 9. n. 2. 6th, That a person excluded once, is not considered perpetually excluded, but suspended, while those succeed who excluded him, *Molina*, Lib. 1. cap. 6. n. 22. 7th, That the proximity of relationship or kindred must be regarded with respect to the last possessor or tenant, and not the founder, *Molina*, Lib. 1. cap. 6. n. 46. 8th, That the condition requiring the successors to bear the arms and the name of the family of the founder is valid; from which the conjecture of *agnation* is not inferred, *Molina*, Lib. 2. cap. 14. n. 9. 9th, That all intails must be created out of, or with respect to real property, or personal, on the condition of its being sold, and real property purchased with the proceeds, *Molina*, Lib. 2. cap. 10. 10th, That the dominion (*propriedad*) of the intail, cannot be confiscated for the crime of the possessor, because that would be in prejudice of the successor and of the perpetuity, unless the enormity of the crime demands that the name or remembrance of the family should be obliterated; for which reason the property of those who, under
[134] the title of levellers (*comuneros*), rose against King Charles I. was confiscated; but the usufruct during the life of the possessor may be confiscated, which *Molina*, Lib. 4. cap. 11., points out. 11th, That when suspicion is entertained respecting bad conduct of the possessor, he ought to give security; and if he administers improperly, and destroys the property of the intail, he is bound to restore it to the successor, *Molina*, Lib. 1. cap. 15. and 16. 12th, That the possessor of the intail ought to make an inventory of the property, as being for the interest of the successors, *Molina*, Lib. 1. cap. 28. 13th, That upon the death of one possessor, the civil and natural possession passes instantly to the immediate successor by benefit of law, without any act or proceeding, although another may have taken possession [18], L. 8. tit. 7. lib. 5. Rec., as explained by *Molina*, Lib. 3. cap. 12., in which case if there arise suits for the provisional possession of the estate (*pleytos de tenuta y posesion*), the parties are to be heard within fifteen [19] days without its being admitted to prorogue this

L. 1. tit. 24. Lib. 11. Nov. Rec.

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[18] Whether, the law cited says, in the life time, or after the death of the last tenant, or whether such tenant may transfer the possession to such person.

[19] L. 2. tit. 24. Lib. 10. Nov. Rec. says fifty; and *Palacios* adds, that if regard be paid to L. 6. tit. 24. Lib. 10. Nov. Rec., 80 days are allowed instead of 50, and that no supplication is admitted, with the exclusion of any other remedy or recourse, the proceedings only being remitted to the *audiencias* to determine on the question of property, which is borne out by the last law referred to.

term, and, within it, they may make and prove their allegations, and the council decide; and the sentence being executed, a supplication (*suplicacion*), is received or allowed within forty days, the parties being bound or concluded by this last sentence, whether it be confirmatory or revocatory, L. 9. tit. 7. lib. 5. Rec.; for the supplication allowed, on giving security, &c. in fifteen hundred *doblas*, by L. 14. tit. 20. lib. 4. Rec. is not admitted. This sentence is understood to be to put the party in possession; for the question regarding only the property or dominion is referred to the audiencias, L. 10. tit. 7. lib. 5. Rec. According to what has been laid down, suits possessory and petitory are incompatible [20] *Roxas*, Part. 5. cap. 5.

L. 2. tit. 24. Lib. 11. Nov. Rec.

L. 16. tit. 22. Lib. 11. Nov. Rec.

L. 3. tit. 24. Lib. 11. Nov. Rec.

It also is a property of the perpetuity of intails, that no possessor can alienate the property; and this prohibition is understood, although the founder may not express it [21], *Molina*, Lib. 4. cap. 1. Hence it is deduced, 1st, That neither can the possessor hypothecate, or mortgage the property, *Molina*, Lib. 4. cap. 1. 2d, He cannot agree to an accord [22] (*transigir*), nor to an arbitration respecting it, nor grant it under lease (*en enfiteutis*), nor let it for a long time; for all this amounts to alienation, *Molina*, L. 4. cap. 9. & Lib. 1. cap. 21. n. 15. 3d, Although the possessor may not alienate this property, nevertheless he has the useful dominion (*dominio util*), *Molina*, L. 1. cap. 9. 4th, Obtaining the royal permission, the possessor may alienate this property. This permission is not granted without just causes; such as the establishment of *dote* in favour of the descendants of the founder, *Molina*, Lib. 4. cap. 3. n. 3. and from n. 10. to 25.; and it is lost by not making use of it during ten years, *Molina*, *ibid.* n. 49. The same author treats of this permission at length, in cap. 4, 5. & 7. of Lib. 4. 5th, The possessor may grant for his life, the *usufruct* to another, *Molina*, Lib. 1. cap. 20., as also let out the property, although the successor will not be bound to observe the covenant of lease which his predecessor made, *Molina*, Lib. 1. cap. 21., from n. 1. to 6. 6th, The possessor ought to pay the expenses, or costs of suits, respecting the intail, *Molina*, Lib. 1. cap. 27. n. 10. 7th, The improvements made in

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[20] This, according to the learned Professor, is understood of suits relating to *mayorazgos*; for in other cases, possessory and petitory causes may be joined.

[21] Subsequent enactments have determined the contrary, under certain limitations and conditions. See Ll. 16, 17, 18, 19 & 20., tit. 17. Lib. 10., Nov. Rec.

[22] *Vide Hal. Rom. Law*, p. 95., *compromissum*, arbitration; and *transactio*, accord.

the intailed property, are free property, if they can be separated, but not those that are inseparable, as houses, castles, &c., which are an accretion to the property; so that the successor ought to pay nothing for them to the heirs having a right under the maker or founder, L. 6. tit. 7. Lib. 5. Rec. *Molina*, Lib. 1. cap. 26. 8th, The existing, or ungathered fruits (*frudos pendientes*) must be divided between the successor and the heirs of the last possessor, *Molina*, Lib. 3. cap. 11., by reason that these heirs ought to repair and make good what has been deteriorated, or the injury done by the fault of the last possessor, *Molina*, Lib. 1. cap. 27. n. 1. to 5. 9th, The successor is bound for the debts which his predecessor contracted in utility of the intailed property, and with the royal permission: which rule, and its limitations, will be seen in *Molina*, Lib. 1. cap. 10. from n. 15. to 28. But, if they were contracted for the personal benefit of the last tenant in tail, his successor is not bound to satisfy them, unless he is his heir, *Molina*, ibid. *á* n. 28. *ad fin.*

L. 6. tit. 17. Lib. 10. Nov. Rec.

Cap. 3. Of legacies.

A legacy, or bequest, is a sort of gift which the testator leaves in his testament, or codicil, to some person, for the love of God or of his soul, or for the person to whom it is left to do something[23], L. 1. tit. 9. P. 6.

§ 1. Of the manner in which they should be left.

It having been before observed in the Third Title of this Book, that no one can bequeath, nor dispose, in favour of a stranger, or for the benefit of his soul, of more than the fifth of his property, if he have necessary (*forzosos*) heirs, it is evident, 1st, That if there be descendants, the legacies cannot exceed the fifth, or even the third, if it be among children, L. 11. tit. 6. Lib. 5. Rec. 2d, That if the necessary heirs are ascendants, the legacies may amount to the third of the property, L. 1. tit. 6. Lib. 5. Rec. Under these rules, the doctrine of legacies will be understood; which, being conformable to the Roman law, is found collected in the 9th Title, 6th Partida[24], without the necessity of repeating it here.

L. 11. tit. 6. Lib. 11. Nov. Rec.

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L. 1. t. 6. Lib. 10. Nov. Rec.

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[23] See *Febrero Adicionado*, 1 tom. part. 1. cap. 1. § 11 & 12. tit. *mandas*, from p. 113. ed. 6.; or *Febrero Reformado*, 1 tom. part. 1. c. 1. § 9 & 10.: same title, p. 141. ed. 4.

[24] Yet the citing the Roman Law is affected to be found fault with by the Spanish Law writers. See p. 3. in the preface to the text, and what is stated in p. 44. of the introduction to these Institutes, the translation of which, it is regretted, the want of time has prevented from being prefixed to the translation of the text. It is admitted that the Partidas, which are there said to be the most methodical, national, legal code known to the authors, are composed, in great part, of the Roman law. This admission was, however, quite superfluous, as the Partidas carry with them self-evident testimony of their debt to the great master code, from which they have so largely and generally borrowed.

§ 2. How they ought to be carried into execution by executors. L.1.t.10.P.6.

The carrying into effect the legacies, and the last will of the testator, is wont to remain at the charge of the executors (*cabezaleros ó albaceas*), L.1. tit.10. P.6., who ought to conform to the rules touched upon, when there are necessary heirs; and if the property of the testator shall not be sufficient for the payment or fulfilment of the legacies, each of the legatees must suffer a deduction, *pro rata*, L.4. tit.5. Lib.3. *Fuero Real.*

§ 3. Who may be executors, and their duties or obligations. L.2.tit.10. P.6.

Those who cannot be executors, are, 1st, The friar, L.7.[25] tit.5. Lib.3. *Fuero Real*, which differs from L.2. tit.10. P.6. 2d, Nor the woman[26], the madman, the minor[27], the heretic[28], the dumb, the naturally deaf, the traitor (*traidor alevoso*), nor the person condemned to death,[29] L.8. tit.5. Lib.3. *Fuero Real.*

The executors ought to publish the testament within a month, under the penalty of losing their legacy; and, if there was none left them, of paying the tenth[30] (*diezmo*), L.13. tit.5. Lib.3. *Fuero Real*; and, moreover, they are obliged to fulfil the will of the testator within a year, at furthest, countable from the death of the testator; the act of one, or more, in case the whole cannot be present (*personarlo*), being valid, L.5.[31] tit.10. P.6. L.5.tit.10.P.6.

If it should happen that the executors are neglectful in complying with their duty or obligation, they shall be compelled to it by the bishop; and not obeying, he shall appoint other executors[32], L.7. tit.10. P.6. In default of executors, the heir is charged with giving effect to the dispositions of the testator, L.7. tit.10. P.6. Lastly, if through improper conduct or neglect, the will of the deceased be not executed, the executors L.7.tit.10.P.6.

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[25] The quotation is erroneous, read L.8. *ibid.*

[26] Although L.8. tit.5. Lib.3. *Fuero Real*, cited, excludes women, an addition to it says that, by custom, which is the best interpreter of laws, they may be executrixes; and this seems the generally received opinion. See *Febrero* to this effect.

[27] Under twenty-five years of age; but again, by addition *c* to the law of the *Fuero Real*, cited, it is said that custom is, that those under twenty-five may be executors.

[28] This may carry a very extensive religious exclusion.

[29] Slaves, Moors, and Jews, complete the catalogue of those excluded from the office of executors by the same law.

[30] The law, which is L.14., and not L.13. tit.5. Lib.3., *Fuero Real*, intended to be cited, says, the tenth of the legacy: but it is difficult to discover how a man could be compelled to pay the tenth of nothing: the later enactment, however, L.5. tit.18. Lib.10. Nov.Rec., presents no such difficulty, and says that, the executor having no bequest by the will, shall pay the damage to the party injured by his omission or neglect, and 2000 maravedis to the crown (*camara*).

[31] Read L.6.

[32] Administrators would be more correct.

shall lose what the testator may have left them, unless it be his son; for he ought not to be deprived of the lawful share (*legitima*) to which he is entitled by nature, L. 8. tit. 10. P. 6.— See *Carpio de Executoribus Voluntatem Ultimatum.*[33]

L. 8. tit. 10. P. 6.

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[33] See also *Febrero Adicionado*, tom. 1. part 1. cap. 1. § 18. p. 145; or *Febrero Reformado*, tom. 1. part 1. cap. 1. § 13. p. 160., 4th edit.

Executors are of three classes: 1st, Lawful, or those entitled by law to fulfil the will of the testator. 2d, Testamentary, or those appointed by the will of the testator. 3d, *Dativos*, or those appointed by the judge or ordinary, in case of intestacy or absence of nomination by the testator, to discharge the duties of an executor, corresponding to the English administrator.

Testamentary executors are of two sorts: 1st, Universal or general, to execute entirely the testamentary dispositions, and to distribute the property of the deceased; and 2d, particular or special, appointed to carry into effect some special object or purpose of the will.

The office of executor is considered pious and private, and does not descend to the executor, or heir of a deceased executor, without express direction or leave of the appointing testator; and even then there are exceptions, especially when the executor has improperly executed his duty or trust. No person can be obliged to undertake the office of executor; but if one accepts or undertakes it expressly or tacitly, he may be compelled to discharge the duties.

According to *Febrero Adic.*, 1st vol. p. 152. n. 257., an executor is not entitled to *Salario* or remuneration for discharging his office, as a guardian is, except by the direction or declared consent of the testator; but it seems that an allowance of this nature, having reference to the trouble or duty performed by the executor, may be granted by the judge. *Vide Carpio de Exec.*, p. 81. n. 110. An executor cannot sell the real property of his testator, unless he be authorized by the will, and then it appears the sale must be by public auction. *Vide* L. 62. tit. 18. P. 3. It would also seem, that a bequest or legacy to an executor, is supposed to be made *contemplatione officii*, and that, therefore, if he renounce the burthen, he loses the legacy. If a legacy or bequest be left among executors, and one of them predecease the testator, or renounce the office, his share, *jure accrescendi*, is divided among the surviving or acting executors. The rule of *jus accrescendi* may seem strictly to apply to legatees. See L. 33. tit. 9. P. 6.: also *Ripia de Testam.* p. 37. n. 12.: but see also *Covarrubias*, 1 vol. c. 18. § 1. p. 125. n. 4.

In the case of there being only one executor appointed, and of his predeceasing the testator, or renouncing the office, it is to be supposed that the bequest or legacy would lapse, and go to the heir, or residuary legatee or devisee.

TITLE VI. [138]

OF SERVICES OR RIGHTS (*SERVIDUMBRES*).[1]

SERVICES (*servidumbres*) constitute the third right in the thing. They are either real or personal; a real right or use is, the right and use which a person has in the buildings and lands of another, to make use of them for the benefit or advantage of his own, L.1. tit.31. P.3. Personal service is, the right or use which a person gains in the things of another for the benefit or advantage of his person, and not especially of his lands or estate (*heredad*).

Of services or rights (servidumbres) in general, and their kinds, real and personal.

L.1.tit.31.P.3.

Of real services, some are peculiar to cities (*urbanas*), and others to the country (*rusticas*). The first, or city services, are those which some houses have in, or with respect to others, L.2. tit.31. P.3.; and the latter those which some estates have in, or with respect to other estates, L.3. tit.31. P.3. Of the first kind are, 1st, The right of placing a load or burthen upon the house of one's neighbour by means of a pillar, column, beam, or other thing, which may support the building. 2d, The right of boring holes in one's neighbour's wall to place beams, or to open the windows to give light[2]. 3d, The right to let the water fall from one's roof, by means of gutters or spouts, upon the house of another. 4th, The right to prevent one's neighbour from building his house higher than it was at the time the right or use was created or imposed, in order that he may not obstruct one's light, view, &c. 5th, The right to have a passage through the house or yard of one's neighbours, to one's own house, and other similar rights, L.2. tit.31. P.3. What relates to the height of buildings is governed by the municipal regulations (*estatutos*) of the towns.

§ 1. Of real rights or services divided into those peculiar to the country, and those peculiar to towns.

L.2.tit.31.P.3.
L.3.t.31.P.3.

L.2.tit.31.P.3.

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[1] *Vide Halifax, Rom. Law*, p. 25. cap. 3.; and *Wood's Inst. Civ. Law*, book 2. ch. 2. p. 145.

[2] *Palacios* observes upon this, what is mentioned by *Greg. Lop.* Gl. 2. L. 2. tit. 31. P. 3., that there is a difference between these two sorts of services; that in the first (*oneris ferendi*), the person benefiting by the use of his neighbour's wall, to support the burthen, is obliged to repair the wall; whereas, in the second (*tigni inimitendis*), he is not under such obligation.

Rural services are, 1st, The right of foot or horse path (*senda*), of way for narrow carts (*guia*)[3], and of road (*camino*). The *senda* is made use of only to go on foot or on horseback,
[139] without driving carts (*carros*) nor beasts of burthen; the *guia* to go on alone or accompanied with long narrow carts (*carretas*), &c.; and the *camino*, or road to carry these and any other things on. The breadth of the road (*camino*) ought to be regulated by the agreement[4], and not having been so regulated, ought to be only eight feet wide[5], and sixteen, if there be a turning, L. 3. tit. 31. P. 3. 2d, The right of conducting water through another's land for the purpose of irrigation, as for mills, &c.; in which case, the person who has this right, ought to keep up, at his cost, the aqueduct, drain, pipes, or spouts, and to avoid all injury to the land through which they shall pass,
L. 4. tit. 31. P. 3. L. 4. tit. 31. P. 3.; and the owner of the land from which the water shall be taken, cannot grant it to another, to the prejudice
L. 5. tit. 31. P. 3. of him who has the right[6], L. 5. tit. 31. P. 3. 3d, The right to drink out of the spring or well of another for one's self, labourers, and beasts of labour, or cattle, by which is also understood to be granted the right of ingress and egress to and from the land,
L. 6. t. 31. P. 3. L. 6. tit. 31. P. 3. 4th, The right of feeding one's beasts of labour on the meadow or pasture of another[7], L. 6. tit. 31. P. 6. 5th, The right of taking limestone, sand, stones, or other material, which may be found on the land of another, for the pur-
L. 7. tit. 31. P. 3. pose of building on one's own, L. 7. tit. 31. P. 3., and many others of this tenor.

§ 2. Of the axioms on which the doctrine of services is founded.

Every service ought to be charged or imposed upon or with respect to things which are ours, or which we possess as ours, in order that they may be of use or benefit to the posterity[8] of
L. 13. t. 31. P. 3. another, L. 13. tit. 31. P. 3. 2d, They ought to be established by testament, by contract, or be acquired by prescription, L. 14. tit. 31. P. 3. 3d, The service is always united or annexed[9] to the inheritance or building upon which it was laid, and the right of using it is accessory to the thing for the benefit of which

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[3] *Palacios* (note 1) says, there is no such service as that of *guia*; but that the rural services intended to be here treated of, are "*Lasenda ó derecho de senda, la carrera,*" which is called in the text *guia*, and "*La via ó camino,*" which correspond with the three rights of way of the Romans: *iter, actus, via.*

[4] Made at the time the right was granted.

[5] Straightways. See L. 3. tit. 31. Part. 3., cited.

[6] He may grant to another the like right if there be sufficient water for both. See the exception at the end of the law cited in the text.

[7] Right of common or pasture.

[8] Or person, in the case of personal services.

[9] *i. e.* Inseparable from, except by the consent or agreement of the party entitled.

it was established, Ll. 8. & 12. tit. 31. P. 3. 4th, They are indivisible [10], L. 9. tit. 31. P. 3. Ll. 18&12. t. 31. P. 3. L. 9. t. 31. P. 3.

From the first principle it follows, 1st, That every proprietor of a thing may establish a right on or with respect to it; and if there be many owners, all ought to agree either at the time of its establishment, or by subsequent approbation, L. 10. tit. 31. P. 3. 2d, That the tenant in fee (*feudatorio*) or for life (*poseedor á vida*) may impose a service, L. 11. tit. 31. P. 3. 3d, The purchaser may impose it upon the thing which he purchases, although it may not have passed into his possession with the consent of the seller, L. 11. tit. 31. P. 3. 4th, That things are not capable of services which are incapable of dominion, as sacred things, &c., L. 13. tit. 31. P. 3. 5th, That these services benefit the property of others, and not that of the person on which they are established, L. 13. tit. 31. P. 3. L. 10. t. 31. P. 3. L. 11. t. 31. P. 3. [140] L. 13. t. 3. P. 3.

From the second principle it follows, 1st, That every continued or uninterrupted service, that is, which is continually made use of, as is running water, &c., is acquired by ten years' use or enjoyment [11] among persons present, and twenty among those absent; and discontinued rights which are only made use of now and then, as right of way, of road, water which comes or flows once a week, &c., cannot be acquired but by use of time immemorial, L. 25. [12] tit. 31. P. 3. L. 25. t. 31. P. 3.

From the third principle it follows, 1st, That the service or right does not cease because the thing may change its owner and pass to another, L. 8. tit. 31. P. 3. 2d, That the owner of the service cannot sell nor aliene it without the thing or property to which it belongs or is attached, unless the owner of the thing which furnishes the service, or with respect to which it is exercised, should consent [13], L. 12. tit. 31. P. 3. L. 8. tit. 31. P. 3. L. 12. t. 31. P. 3.

From the fourth principle it follows, 1st, That if each of the heirs of the property which has the service in its favour, should wish to make use of it entirely, he can do it. 2d, That each of the heirs of the property from which the service is due, is obliged severally to render or allow it, L. 9. tit. 31. P. 3. L. 9. t. 31. P. 3.

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[10] See L. 9. tit. 31. P. 3., cited.

[11] With *buena fe*, without force, &c., on the part of him claiming, with knowledge, and without contradiction, &c., on the part of the proprietor against whom the prescription is set up. See L. 15. tit. 31. P. 3., intended to be referred to by the text, instead of L. 25., erroneously printed.

[12] Read L. 15.; and see L. 1. tit. 17. Lib. 10. Nov. Rec., as to proof, &c. of time immemorial.

[13] L. 12. tit. 31. P. 3., cited, mentions another exception with regard to water for irrigation; which, after brought from another's land to that of the owner of the service, may be, by the latter, granted to a third person.

§ 2. Of the modes by which these services may be lost.

The modes by which services are acquired being almost the same as those by which they may be lost, it follows, 1st, That the service is extinguished, by the owner of the thing to which it was granted, surrendering it to the estate or thing from which it was due, L. 17. tit. 31. P. 3. 2d, By the owner of the thing which is entitled to the service or right becoming owner of the thing which owes it; and if they are again separated, the service is not renewed by this event alone, L. 17. tit. 31. P. 3. 3d, By the owner of the service authorising the owner of the thing which renders it to do something which may impede the right, L. 9. [14] tit. 31. P. 3. 4th, By the use of the city service being impeded for ten years in the view or presence of him who possesses it, and for twenty years if he be absent [15], L. 16. tit. 31. P. 3. But if the service is rural, and a continued one, it will be lost by non-use for time immemorial; and if it be a discontinued one, its non-use for the space of twenty years will be sufficient to work a forfeiture of it, L. 16. tit. 31. P. 3. 5th, The non-use of a service common to many, if it is on the part of one, does not prejudice the others; and in case they should divide among them the thing to which the service is due, he alone shall lose his right who should not make use of it, L. 18. tit. 31. P. 3.

L. 17. t. 31. P. 3.

L. 16. t. 31. P. 3.

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L. 18. t. 31. P. 3.

Cap. 2. Of personal rights.

Personal services consist in usufruct and habitation. [16] Usufruct [17] is a right of using and enjoying all the fruits or profits of a thing [18] without impairing it. It is conventional, or legal, which is determined to be the usufruct the father has of the adventitious property of his child, and is explained by *Castillo de usufructu*, c. 3. The use is the right of making use of the fruits of a thing [19] with limitation, and without impairing it, L. 20. tit. 31. P. 3.

L. 20. t. 31. P. 3.

Hence it is, 1st, That the usufructuary acquires all the fruits and rents arising from the thing which was granted but the

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[14] Read L. 19.

[15] This obstruction must be done with *buena fe*.

[16] And *Palacios* adds *use;* and L. 20. tit. 31. P. 3., says, there are three sorts of personal services, although it specifies, in terms only, two, usufruct and use; and comprehends, as does also L. 21. *ibid.*, under the latter term, habitation: but L. 27., same title and Partida, adopts the term, and defines it. Common, or right of common, will perhaps convey a better idea to an English reader of an use, set forth in L. 20. tit. 31. P. 3., than any other description. See 2d *Black. Com.*, 2d. vol. p. 32. ch. 3.

[17] *Vide Halifax, R. L.*, p. 26. book 2. ch. 3.; and *Wood's C. L.*, book 2. ch. 2. p. 148 to 151.

[18] Belonging to another, is understood.

[19] Belonging to another is also understood.

user (*usuario*) only those things which are necessary for the support of himself and his family, L. 20. tit. 31. P. 3. 2d, That neither the usufructuary nor the person who enjovs the use, can impair or deteriorate the thing from which they deiive the usufruct or use, L. 22. tit. 31. P. 3., but the usufructuary is bound moreover to support and take care of it [20], L. 22. tit. 31. P. 3. L. 20. t. 31. P. 3. L. 22. t. 31. P. 3. L. 22. t. 31. P. 3.

To understand the first principle, it must be known that by fruit is understood any benefit which accrues immediately to the person, or mediately from the thing separating it from the substance, *Lagunez de fructibus*, Part. 1. cap. 2. n. 28. Thus, therefore under the name of fruit are reckoned all the productions of the earth, of which *Lagunez*, *ibid.* cap. 8. and Part. 2. cap. 1 & 2. speaks. The water which takes its rise in the estate or land (*fundo*), and that which runs through it, *Lagunez*, Part. 1. cap. 5. n. 29 & 30. 3d, The trees which are kept for the purpose of being lopped or cut, and which once cut may grow again; but not those which are not of this nature; which distinction, received among us, is explained by *Lagunez*, in cap. 6. Part. 1. and *Castillo de usufr.* cap. 25. 4th, The produce of cattle, the dung (*estiercol*), milk, cheese, wool, &c. Ll. 20. 21 & 23. tit. 31. Part. 3. 5th, Quarries when they contribute to the benefit of the farm or estate (*fundo*), L. 27. tit. 11. P. 4. 6th, The penalties, fines and confiscations which arise from jurisdiction, *Lagunez*, Part. 1. cap. 20. 7th, Annuities or rents (*censos*), *Castillo*, cap. 41. ibid. Ll. 20. 21. & 23. tit. 31. P. 3. L. 27. t. 11. P. 4.

Although he who has the use (*usuario*) receives all these fruits, it must be understood, subject to the before mentioned limitation; whence it is deduced, 1st, That the person who has the use cannot sell nor rent to others the fruits as the usufructuary may do, Ll. 20. & 21. tit. 31. P. 3. 2d, That the mere use of a house being granted, it can only be inhabited by the user, his family, and any guest, but may not be rented to another [21], L. 21. tit. 31. P. 3. [142]

§ 2. Of use and habitation.

Ll. 20 & 21. tit. 31. P. 3. L. 21. t. 31. P. 3.

This simple use of the house ought not to be confounded with the right of habitation or dwelling, which is wont often to be granted; for in this last case the person to whom this habit-

§ 3. Of the right of habitation different from the use of habitation.

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[20] And if the property of which the usufruct is granted should consist of cattle, &c., the usufructuary is bound, it seems, to supply the loss if any should die. See L. 22. tit. 31. P. 3., cited.

[21] *Wood*, in his *Institutes on the Civ. Law*, book 2. chap. 2. p. 150, says: "that if he who has the use of a house inhabits there himself, he may let out part of the house on a rent, which part would be otherwise useless to him, as being too large for his family; but this is not transferring his right, unless he too forsakes it;" and that he may receive a guest either for money or friendship.

ation is granted, may inhabit the house, or rent it to whom he
L.27.t.31.P.3. thinks proper [22], L.27. tit.31. P.3.

The regalia [23] of the house in which the king's household are lodged (*regalia de la Casa de aposento para la Corte*), which is very
L.15.t.9.P.2. antient in the kingdom, as appears from L.15. tit.9. P.2., and
Tit.14.Lib.3. Nov. Rec. from the whole of tit.15. Lib.3. Rec., and hath continued always under different forms, has relation to this species of habitation. King Philip III. transferred the court to Valladolid, in the year 1600, where it remained until 1610, when it was restored to Madrid, at the request of the city, and on account of the contribution or assessment (*por razon de aposentamiento*) of one sixth of the rent on houses there, which it offered for ten years,
L.24.tit.14. Lib.3. Nov. Rec. which was reduced to two hundred and fifty thousand ducados, Aut. 4. & 4. tit.15. Lib. 3. Rec.

At this day, this right is converted into a kind of annual tax (*censo*) amounting to the third part of the rents that the houses pay which are not privileged, or which have not redeemed this charge, and takes its origin from a similar assessment (*repartimiento*), to that which was made on houses of inconvenient partition (*de incomoda particion*), the owners of which laboured fraudulently to be exempted from the lodging or assessment
Nota 2. tit.15. Lib.3. Nov. Rec. (*aposentamiento*), according to the Cedula of 25th June, 1606.

From the second principle above established, it follows, 1st, That the usufruct and the use of the land ought to be according to the
L.20.t.31.P.3. custom of good husbandry (*de buen labrador*), L.20. [24] tit.31. P.3., so that the usufructuary shall pay for the injury (*perjuicios*) which by his fault may result to the property, *Castillo*, cap. 23. n. 11. 2d, That the usufructuary ought to bear all the regular or ordinary expences for the benefit of the thing, not those which are great and extraordinary, which he may claim from the pro-
[143] prietor, and thus it appears, L.22. tit.31. P.3. ought to be understood *Castillo*, cap. 56 & 57. 3d, That the usufructuary and the person who has the use, are to give security for the property, L.20. tit.31. P.3., *Castillo*, cap. 17 & 18. 4th, That they ought
L.22.t.31.P.3. to pay the tenths (*diezmos*), and other tributes, L.22. tit.31. P.3.

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[22] Which he who has only the use cannot do; but L.27. tit.31. P.3., says it must be to good neighbours. See the difference between usufruct and habitation in the civil law, *Wood's Inst.*, quoted note [21]. The usufructuary may employ the house to other purposes than to live in it; but he that has habitation can use it no otherwise than for a dwelling.

[23] See tit.15. Lib.3. Nov. Rec.

[24] I suppose L.22. *ibid.* is meant.

5th, These same obligations are extended to him who has the right of habitation in a house, L. 27. tit. 31. P. 3. L.27.t.31.P.3.

The usufruct is put an end to, and is united with the property, 1st, By the death of the usufructuary, L. 24. tit. 31. P. 3. 2d, For not making use of the usufruct for twenty years, if absent from the place; and for ten, if therein, L. 24. tit. 31. P. 3. 3d, By the usufructuary alienating the right of usufruct, L. 24. tit. 31. P. 3. 4th, By the property being destroyed, so that it cannot produce fruit or profit, L. 25. tit. 31. P. 3; in which case the usufructuary cannot renew it (*restaurarla*), without the power or authority of the proprietor. 5th, By the expiration of the period of the concession. § 4. Of the modes by which the usufruct, use, and habitation are at an end. L.24.t.31.P.3. L.24.t.31.P.3. L.25.t.31.P.3.

The usufruct being at an end, the fruits or profits, gathered or received, belong to the usufructuary; and those on the ground (*pendientes*) to the proprietor[25]; but if they consist of pensions or annuities (*en pensiones de censos*), they shall be divided, *pro rata*, between both; because these revenues (*reditos*), are proportioned and estimated by the extension of time, *Castillo*, cap. 78.

As the usufruct cannot be perpetual unless granted for the life of the usufructuary, or for a certain time, L. 20. tit. 31. P. 3., the same being granted, without any limitation of time, to the corporation of a city or town, it will only last 100 years; it having been considered that, by this time, those would be dead who were alive when it was granted. The usufruct will also be at an end if the place were laid waste; but not if the inhabitants or possessors should abandon it, and go to dwell in another part, L. 26. tit. 31. P. 3. By these modes[26], respectively, use and habitation[27] are at an end, Ll. 24 & 27. tit. 31. P. 3. L.20.t.31.P.3. L.26.t.31.P.3. Ll.24 & 27. t.31.P.3.

We have hitherto spoken of the charges to which houses or lands are subject by reason of service. We will now treat of the liberty or exemption which they enjoy, how another may be prevented by reason of it from making or doing any thing with respect to our houses, or rather their own, from which injury may arise to our things. Cap. 3. Of new and old works.

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[25] *Vide Hal. Rom. Law*, p. 26. n. 10.

[26] L. 24. tit. 31. P. 3., also mentions another for the completion or cessation of the usufruct, namely, the perpetual banishment or transportation of the person entitled to the usufruct.

[27] *Palacios* (*nota* 1) says, habitation, or the right of dwelling is not destroyed or put an end to by all these modes, in the same manner as an use; and refers to L. 27. tit. 31. P. 3., which says that, a person entitled to the right of habitation, can only lose it by his death; or its relinquishment, during his life-time, without force or violence.

§ 1. Of new labour or work, and its axioms.

This injury (*daño*), arises either from new work or labour, or from old. New labour is every work that is newly erected or undertaken, or that is begun anew upon any old foundation-wall, or other old building; by which labour or work, its ancient form or appearance is changed, L. 1. tit. 32. P. 3.; old labour or work is, that already built and completed, which by its antiquity threatens ruin, L. 10. tit. 32. P. 3.

L. 1. tit. 32. P. 3.

L. 10. t. 32. P. 3.

Upon the first definition are founded these axioms. 1st, That every person whose interest it is that the new work should not be done[28], may prevent it, L. 1. tit. 32. P. 3. 2d. That this prohibition may be made by public or private authority[29], L. 1. tit. 32. P. 3. 3d, That the person who builds contrary to the ancient form, may be denounced or informed against, L. 1. tit. 32. P. 3. 4th, That he must desist from the work, or give security to demolish what he has put up[30], Ll. 8 & 9. tit. 32. P. 3.

[144]

L. 1. tit. 32. P. 3.

L. 1. tit. 32. P. 3.

Ll. 8 & 9. t. 32. P. 3.

From the first axiom we deduce, 1st, That the owners or proprietors of the thing on or against which the new work is carried on, may obstruct the new work, L. 3. tit. 32. P. 3.[31]; and also those who are in the place of the proprietors, or receive particular injury in his right, as the usufructuary, the lessee (*enfiteuta*), the feudatory, and the mortgage creditor; but the usufructuary, although he cannot prevent the work, which the proprietor himself may carry on or do on the property, may

L. 3. tit. 32. P. 3.

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[28] Rather who may be damaged by its being done.

[29] "*Nuntiatio novi operis.*" It does not appear that the Spanish law gives the party aggrieved the self remedy of abatement which our law authorises, but restricts him to his remedy at law. The strongest word made use of in L. 1. tit. 32. P. 3. is "*estorbar,*" which means to hinder, impede, or obstruct; but does not reach the length of the English law definition of *abate.* With regard to public or common nuisances, the right of individual abatement, without the intervention of judicial authority, may be inferred from L. 1. tit. 32. Lib. 7. Nov. Rec. See 3d vol. *Blac. Com.* p. 5. ch. 1.; & ch. 13. p. 216.; and 4th vol. ch. 13. p. 166.

[30] In the event, is understood, of the right to erect, &c., being determined against him. The consequence, as denounced by L. 8. tit. 32. P. 3., quoted, of the party's proceeding in the work after having been admonished to desist is that, whether such forbiddance may have been made with right or without right on the part of him making it, all the work done or erected subsequently to the prohibition, shall be pulled down by the order of the judge, at the erector's own cost and expense: such a proceeding would seem harsh, if the forbiddance had been only extra-judicially made, and the right to build or do the work was in the erector; but if, as a punishment for the party's contempt, or refusal to attend to a judicial prohibition, on a complaint or *nuntiatio* judicially preferred, the step might be warranted.

[31] The law cited only gives the right to every inhabitant of a town or place, except women, or children under fourteen years of age, to forbid the progress of any new work commenced without royal or corporate authority, in a street, &c.

require indemnification from him for any injury caused to him by the proprietor, L. 4. tit. 32. P. 3. 2d, That one who has a service (*servidumbre*), may prevent the work which obstructs or hinders his right, L. 5. tit. 32. P. 3. 3d, As also in the names of all the above may the son, attorney, steward or manager, &c., L. 1. tit. 32. P. 3. 4th, So, likewise, may every inhabitant of a town prevent the work which is carried on or erected in any public place without the license of the corporation (*concejo*), Ll. 3. 22, 23 & 24. tit. 32. P. 3. L. 4. tit. 32. P. 3. L. 5. tit. 32. P. 3. L. 1. tit. 32. P. 3. Ll. 3. 22, 23, 24. tit. 32. P. 3.

5th, But if this labour or work should be done to repair or mend any thing which may be useful to the inhabitants, although some particular inconvenience may be experienced from it, it cannot be complained of[32], L. 7. tit. 32. P. 3. L. 7. tit. 32. P. 3.

From the second axiom it is known, 1st, That the new work may be denounced[33] by throwing a stone against it, L. 1. tit. 32. P. 3. 2d, That he who has a city service, can, of his own authority[34], prevent the work which may be injurious to his right; and if a rural service, the authority of the judge is necessary for the purpose, L. 5. tit. 32. P. 3. L. 1. tit. 32. P. 3. [145] L. 5. tit. 32. P. 3.

From the third axiom it is inferred, 1st, That the prohibition may take place against those who place on their roofs such gutters as throw the water upon the wall of their neighbour, L. 13. tit. 32. P. 3. 2d, Against those who raise any wall, make any inclosure, or other work on their estate or land, which impedes the current of the common water, or causes it to change its course, L. 13. tit. 32. P. 3. 3d, That if this injury arises from any natural event to which the act of man has not contributed; or even if the work which causes this injury has been done ten years back, with the knowledge and sufferance of the person interested, he being present; or for twenty years before, if he has been absent; or if it arises from service (*servidumbre*), the denunciation cannot, in these cases, be made, L. 14. tit. 32. P. 3. L. 13. t. 32. P. 3. L. 13. t. 32. P. 3. L. 14. t. 32. P. 3.

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[32] Such, in point of smell, &c., as may arise from the clearing or repairing drains, sewers, &c.

[33] Or interdicted, and that expressly *por palabras*, as pointed out by L. 1., cited.

[34] This, says *Palacios* (*nota* 2), means nothing more than that one possessed of a city service may forbid and prevent the obstruction of his right, by any of the three modes pointed out by law, L. 1. tit. 32. P. 3., which is all that L. 5., same title and Partida cited, authorizes; but that a person, having a *rural* service, cannot, in such case, take upon himself to forbid the work, but must prefer his complaint to the judge; who, if he finds it well-founded, will order the nuisance or obstruction to be abated or removed, and the offender to make good the damage, &c., occasioned thereby, to the complaining or injured party.

4th, That if water is stopped or damned up on any land, so that it ceases to flow and to benefit the neighbouring estates, although this may arise from a natural cause, the owner of the land ought to make the water flow where it was accustomed to do, or permit
L. 15. t. 32. P. 3. the neighbours who feel the injury to do so[35], L. 15. tit. 32. P. 3. 5th, The same rule is observed with respect to a person who purchases land on which a like detention of water shall have been formed or caused, although the vendor of such land ought to make good to the purchaser the expenses incurred by him[36],
L. 16. t. 32. P. 3. L. 16. tit. 32. P. 3. 6th, This prohibition will also hold good against a person who opens a spring or well, maliciously, to cut
L. 19. t. 32. P. 3. off the source of the water[37], L. 19. tit. 32. P. 3. 7th, Lastly, This new work or labour may be impeded in other cases, according as the regulations or ordinances (*estatutos*), of the towns or places may provide. This prohibition will be valid, if made to the proprietor of the work, to the superintendant of it, or to
Ll. 1, 2, & 8. tit. 32. P. 3. any of the workmen, Ll. 1, 2 & 8. tit. 32. P. 3.

According to the fourth axiom it is evident (*se manifesta*), 1st, Because the force of this prohibition is such that, whether made lawfully or not, the work ought to be desisted from, and
L. 8. tit. 32. P. 3. not prosecuted without the order of the judge, L. 8. tit. 32. P. 3. 2d, That prosecuting it, if the work is proceeded in without this authority, the whole of what has been done ought to be pulled
L. 8. tit. 32. P. 3. down at the cost of him who ordered it to be done, L. 8. tit. 32. P. 3. 3d, That the prohibition is to be made with the oath of calumny,
L. 9. tit. 32. P. 3. before the judge, by the party who prefers the complaint, L. 9.
[146] tit. 32. P. 3. 4th, That the parties are to be heard on proof within three months, the work being suspended in the meantime; and after the expiration of this time, the work may be permitted to be proceeded in by the party building, on his giving security to demolish it, if judgment should be given against
L. 9. tit. 32. P. 3. him, L. 9. tit. 32. P. 3. 5th, That the work may be continued, if he who preferred the complaint shall authorise it,
L. 9. tit. 32. P. 3. L. 9. tit. 32. P. 3.

§ 2. Of old labour or work. Thus, as the end or object of the prohibition of the new

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[35] The L. 15. tit. 32. P. 3., is more qualified, and speaks of an impediment or obstruction arising gradually, *poco á poco*, from a natural cause; but *quære*, whether the same remedy would be allowed to the party who might be injured in this way by a sudden or violent natural change of a stream. See L. 26., and other laws of the title 28., Partida 3., on natural accretions caused by rivers, &c.

[36] In the removal of the obstruction or injury.

[37] Of his neighbour's well, &c. See L. 19. tit. 32. P. 3., for which Ll. 17 & 18 are erroneously cited in the original.

work is that, it may not be carried on to the injury of the neighbours, in the same way, the old work is ordered to be demolished, or to be made secure, to prevent the injury which may threaten the neighbours, L. 10. tit. 32. P. 3. L. 10. t. 32. P. 3.

To this principle it relates, 1st, That the owners of houses, buildings, &c., are obliged to keep them up and repair them, Ll. 24 [38] & 25, tit. 32, P. 3. Ll. 24 & 25. tit. 32. P. 3. 2d, That the buildings be constructed with such security and firmness, that if, within fifteen days [39] the work be cracked naturally, it is considered unsound, or not faithfully done, and the artificer obliged to rebuild it at his cost, L. 21. tit. 32. P. 3. L. 21. t. 32. P. 3. 3d, That any inhabitant knowing that injury may result from the ruin of any old work, may warn the owner of it, who shall cause it to be recorded with the superintendants (*maestros*), of works [40], and to be demolished, if they declare that it threatens ruin; or to give security for any injury that may happen therefrom to any neighbour; and the owner complying with neither of these requisites, the work shall be given into the possession of the neighbour by the order of the judge, in order that he may repair it at the cost of the owner, L. 10. tit. 32. P. 3. L. 10. t. 32. P. 3. 4th, That this regulation (*providencia*), does not take place with respect to the ruin which proceeds from a supernatural cause; and if the building be destroyed before the neighbour hath preferred his complaint; but even in this case, the owner ought to remove the stones and other materials which shall have fallen on the house of his neighbour, Ll. 10 & 11. tit. 32. P. 3. Ll. 10 & 11. tit. 32. P. 3. 5th, That if several are joint owners of a building, and any one of them should rebuild it in his own name, and of his partners, with their approbation, they ought to indemnify him for the expenses within four months; and not doing so, the whole of the building shall be his exclusive property; but if the work was done without the permission of his co-proprietors, or in bad faith (*á mala fe*), he shall forfeit or lose what he hath laid out; and the building or work shall be the common property of all, L. 26. tit. 32. P. 3. L. 26. t. 32. P. 3.

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[38] L. 24., cited, does not seem to apply.

[39] Read years. See L. 21. tit. 32. P. 3.

[40] *Palacios* (*nota* 2) says, there is no law which imposes this obligation on the owner, although he is obliged to repair the building, or to pull it down if it is in danger of falling into ruin; or if he should not, the judge will order what is directed by L. 10. tit. 32. P. 3., according to the state of the building; and the learned Professor refers to this law for a proper explanation of this part of the text, and to *nota* 5. tit. 20. Lib. 7. Nov. Rec. which see.

[149]

TITLE VII.

OF PLEDGES, MORTGAGES, AND RENT CHARGES, OR ANNUITIES (*CENSOS*).

Of the pledge and hypotheca or mortgage (prenda é hipoteca), and in what they differ.

THE fourth right in the thing is pledge (*prenda*) or mortgage, (*hipoteca*). We commonly distinguish the one from the other, because the pledge (*prenda*) is of personal things [1], and the mortgage (*hipoteca*) of real property, which is not delivered to the creditor. Under either term we understand all that which one person pledges or binds (*empeña*) to another for the security of the debt which he contracts, L.1. tit.13. P.5.

L.1.tit.13.P.5.

§ 1. Of Mortgage (hipoteca), and its kinds.

The *hipoteca* is divided into general and particular, or special. The general comprehends all the real and personal property of the debtor or mortgagor, had and to be acquired [2], which may be freely mortgaged, with the exception of the things which serve in his house for daily use, and are necessary for his support (*para vivir*), L.5. tit.13. P.5 [3]. The particular, or special, only comprehends that which shall be expressed, in which case, it is necessary to specify or describe the thing mortgaged, so that it may be known with certainty, L.6. tit.13. P.5. *ad fin.* Mortgage (*hipoteca*) is also divided into voluntary, necessary [4], and tacit. The first is that which persons enter into among themselves of their own accord, mortgaging their property one to another, on account of something they ought to give or to do, L.1. tit.13. P.5.

[150]

L.5.tit.13.P.5.

L.6.t.13.P.5.

L.1.tit.13.P.5.

The second is that which the judges shall order to be delivered to any of the parties in litigation on the property of his adversary for want of answer, or on account of contumacy or judgment that is given with respect to it, or in order to fulfil the order of the king, L.1. tit.13. P.5.

L.1.tit.13.P.5.

The third is that which is contracted silently, although nothing

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[1] L. 1. tit. 13. P. 5. cited, defines *peño*, as synonymous with *prenda*, *pignus*, a thing which a man pledges (*empeña*) to another, by delivering to him possession of it; and chiefly consists of a thing, or property, moveable or personal; but in a large sense, is extended to things or property immoveable or real, unaccompanied with delivery of possession. See *Wood's Inst. Civ. Law.* Book 3. ch. 2. p. 219. and 1. *Browne's Civ. Law*, p. 201. Book 2. ch. 4.

[2] In other words, present and future property, of what nature or kind soever, with the exceptions which follow in the text.

[3] See the exception enumerated in this law.

[4] Or judicial. See the words of L. 1. tit. 13. P. 5. cited.

be said about it [5], L.1. tit.13. P.5. Of this last kind are, 1st, The mortgage which the husband has upon the property of the wife, or of the person who promised to endow her [6] (*dotarla*), L.23. tit.13. P.5. 2d, That which the wife acquires upon the property of the husband, by reason of the *dote* which she delivered to him [7], L.23. tit.13. P.5. 3d, That which minors have on the property of their guardians, L.23. tit.13. P.5. 4th, That which the king has on the property of those who manage or collect his royal revenue [8] (*hacienda*), Ll.23 & 25. tit.13. P.5. 5th, That which the children have on the property of the father, who is the administrator of their adventitious property, L.24. tit.13. P.5. 6th, That which the children of the first marriage have upon the property of the mother, by reason of the *arras*, or the donations given by their father to her, which she carries into the second marriage, L.26. tit.13. P.5. 7th, That which the legatee has on the property of the testator, [9], L.26. tit.13. P.5. 8th, That which the minor has on his own property, which may be sold until the price be paid him, L.25. tit.13. P.5. 9th, That which any one has, who lends another a certain sum upon the thing for the benefit of which it is destined [10], L.26. tit.13. P.5.

L.1.tit.13.P.5. L.23.t.13.P.5. L.23.t.13.P.5. L.23.t.23.P.5. Ll.23 & 25. tit.13.P.5. L.24.t.13.P.5. L.26.t.13.P.5. L.26.t.13.P.5. L.25.t.13.P.5.

§ 2. Of the mode of giving a mortgage (constituirse la hipoteca), and upon what principles.

The mortgage ought to be given or executed by the mortagor and mortgagee being present, although the thing or property mortgaged itself need not: but it may be also entered into or executed among persons absent by power of attorney, with or without public deed or instrument of writing (*escritura publica*) [11], L.6. tit.13. P.5.; and with various conditions which be not contrary to law [12], L.12. tit.13. P.5.

L.6.tit.13.P.5. L.12.t.13.P.5.

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[5] Called *tacit*.

[6] For the amount, and until payment of the *dote*, is understood. See L.1. tit.13. P.5.

[7] The law 23. tit.13. p.5. cited, says, which he received with her.

[8] And for the payment of tributes or taxes, &c.

[9] For the value and payment of his legacy.

[10] *e. g.* the repair, or building of a ship, house, &c. And see L.28. tit.13. p.5.

[11] In respect of Trinidad, the form, execution, and registry, &c. of all conveyances, deeds, mortgages, or contracts, regarding real property in that island, are regulated by the Proclamation of 5th February, 1814, and the Order in Council of 6th April, 1818. See Appendix, O & P.

[12] The covenant, or condition, that if the money borrowed should not be repaid by the mortgagor at the time agreed on, the mortgaged property shall be forfeited, or become the mortgagee's, for the amount advanced by the latter, is contrary to law, or invalid. But it is permitted to covenant, that on failure of payment of the debt at the time, the mortgagee may purchase, or have the mortgaged property at a fair valuation to be made by good men (*homes buenos;*) it being of course understood, that the difference, if the value should exceed the debt, shall be repaid to the mortgagor. See L.12. tit.13. P.5. cited; & L.41. tit.5. P.5.

[151] Every mortgage (*hipoteca*) therefore is, 1st, A right in the thing constituted for the security of the sum due. 2d, It is to be considered a species of alienation (*enagenacion*). 3d, The creditor may sell [13] the pledge (*prenda*) unless he be paid the
L.41.t.13.P.5. debt, L.41. tit.13. P.5.

From the first principle we infer, 1st, That in order to acquire a right in the thing mortgaged, it is necessary that the mortgage creditor proceed with good faith, because, if he knows that the property or dominion is not in the mortgagor it will not remain
L.7.tit.13.P.5. obligated to such creditor, L.7. tit.13. P.5. 2d, That in the voluntary or conventional mortgage (*prenda*) possession of the mortgagee is not necessary to create or establish the obligation, but it is otherwise with respect to the necessary or judicial
L.13.t.13.P.5. mortgage [14], L.13. tit.13. P.5. 3d, That the creditor may require from the debtor and his heirs delivery (*entrega*) [15] of the
L.14.t.13.P.5. thing mortgaged, L.14. tit.13. P.5. 4th, That if the thing which is obligated be transferred to another by the owner, before being delivered to the creditor, he may proceed against the debtor, not molesting the possessor if he be satisfied or paid, but not being so, he will have his action to recover the thing mortgaged from him who may possess it; unless this transfer has been made after the creditor has sued the debtor, for then it is at his discretion or option to sue the debtor or the possessor
L.14.t.13.P.5. of the thing mortgaged, L.14. tit.13. P.5. 5th, That the change of situation or state of the thing mortgaged, as might

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[13] This, it is apprehended, must in all cases be under regular judicial process and authority. The power of sale, on default of payment of the debt, is incident to, or rather inseparable from, a mortgage or pledge. See nota to the form of this obligation, p.117. Part 1. cap.7. § *final*; & p.32. n.34. §4. 2d vol. *Febr. adic.* Also L.1. tit.19. *Fuero real*, Lib. 3. L.42. tit.28. Part 5. & *Ferraris prompta Bibliotheca*, tit. *Hipotheca*, 4th vol. p.241. n.41.

[14] This must be understood of the *prætorian* mortgage, as *asentamiento*, the possession given by the judge to the plaintiff, of the defendant's property, to the amount or value of the former's demand, on account of the contumacy of the latter after citation on process; which forms the 8th Title of the 5d *Partida*, and the 5th Title, 11th book, of the *Novisima Rec.* thereon: but which, according to *Febrero, ad.* vol. 2. part 1. ch. 7. § 4. n. 56. p. 30., is not in use, although it is lawful, and may be resorted to; and which may, perhaps, be considered in the nature of a sequestration for contumacy, or may be understood of such right of possession as the plaintiff may be considered to have to the proceeds of the defendant's property, after levy thereon, in virtue of the writ of execution issued in satisfaction of the amount of his demand; and see *Cur. Philip*, lib.2. *Com. Ter.* ch. *Hipoteca*, n.35-37. p.364.; and the Order in Council, 6th April, 1818, Appendix P.

[15] See *Greg. Lopez*, Gl.3. L.14. tit.13. Part. 5., cited in the text; and see 2d vol. *Febr. ad.* part.1. ch.7. § 4. p.34. n.67.; and note 13. *ante*. The word *entrega*, in Spanish legal language, often means levy made on property in virtue of an execution.

happen by pulling down a house, or cultivating land, which was uncultivated, &c., does not alter the obligation of the mortgage, L. 15. tit. 13. P. 5. 6th, That the improvement or augmentation which the thing mortgaged receives passes together with it to the creditor if he be not satisfied; but upon being paid, he must restore the thing mortgaged with all its increase and benefit, L. 15. tit. 13. P. 5. 7th, That with the thing mortgaged its fruits or produce are also considered obligated; and if the creditor received them he must discount or deduct their value or amount from the capital of the debt [16], Ll. 2 & 16. tit. 13. P. 5. 8th, That although, in the conditional mortgage, or the payment of which is agreed to be at a day certain or fixed, the thing cannot be demanded until the condition be fulfilled, notwithstanding if a long absence of the debtor be apprehended, the creditor may require delivery of the thing or sureties to insure or become bound for (*que aseguren*) the mortgage or pledge, L. 17. tit. 13. P. 5. 9th, That the mortgage creditor has a right to assign to another the thing mortgaged to him; and upon the debt being paid, the second mortgagee will have no right in the thing, but may require the assignor of the mortgage to renew the mortgage upon another thing of equal value, L. 35. tit. 13. P. 5. 10th, That the creditor cannot make use of the pledge or pawn (*prenda*) without the consent of the owner, and if he obtain it, then with due care, L. 20. tit. 13. P. 5. 11th, That if the thing mortgaged (*empeñada*), be lost or impaired by the fault of the creditor, he is bound to make good the injury, L. 20. tit. 13. P. 5. 13th, That this injury or damage must be discounted or deducted from the capital of the debt, L. 36. tit. 13. P. 5.

L. 15. t. 13. P. 5.

L. 15. t. 13. P. 5.

Ll. 2 & 16. t. 13. P. 5.

L. 17. t. 13. P. 5.

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L. 35. t. 13. P. 5.

L. 20. t. 13. P. 5.

L. 20. t. 13. P. 5.

L. 36. t. 13. P. 5.

§ 3. Of the modes by which the mortgage may be extinguished.

From the nature and constitution of mortgage are equally deduced the modes by which it is extinguished, and they are, 1st, By the total ruin and extinction of the thing mortgaged, but not if any part of it should remain, L. 15. tit. 13. P. 5. [17] 2d, By the satisfaction or payment of the sum due, in which case the creditor must restore the pledge (*prenda*), and not doing so, he shall be compelled thereto by the judge, as also to the payment of the damages (*perjuicios*) caused by the detention,

L. 15. t. 13. P. 5.

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[16] *Palacios* (*nota* 2) says, unless the husband were the creditor, and should receive the fruits of the thing mortgaged as a security for the *dote* of wife, in which case, if he sustains the burthens or charges of the marriage, he makes the fruits his own, so that he is not bound to discount their value from the capital: and that this is the opinion of *Covarubias var.* cap. 1. num. 3.; and of other interpreters.

[17] This law does not bear out the position of the text; but perhaps the authors had in mind L. 28. tit. 8. P. 5. See *Merlini Trac. de Pig. & Hip.* Lib. 5. tit. 1. Quæst. 34. p. 602. n. 1, 2, &c.

Ll.21 & 38. tit.13. P.5. Ll.21 & 38. tit.13. P.5. 3d, If the second mortgagee shall pay the debt due to the first, he shall have possession of the pledge (*prenda*), L.22. tit.13. P.5. 4th, The right of mortgage is extinguished if one of two who mortgaged the thing satisfies the debt, or pays it to the surety [18], Ll.45 & 46. tit.13. P.5. 5th, By prescription; if for ten years, among persons present, and twenty among those absent, delivery of the thing mortgaged was not demanded from those in possession of it under a new mortgage [19] or sale executed in their favour by the owner or mortgagor, unless the latter have received it, knowing the property was already mortgaged, for then thirty years are necessary to prescribe it; and if this delivery be not demanded from the owners or mortgagor of the property, or his heirs, the mortgage will be prescribed in forty years, L.39. tit.13. P.5. 6th, The pledge (*prenda*), or mortgage (*hipoteca*), is extinguished by the debt being remitted, by parol or by writing; observing, that if the pledge is restored, the right with respect to it will be at an end, but not the debt; but if the debt is remitted, the right of mortgage is also considered remitted, L.40. tit.13. P.5. 7th, By being tacitly (*calladamente*) remitted, which is understood if the mortgage deed (*escritura guarentigia*), is returned to the debtor without force, fear, or fraud, or is torn or cancelled by the creditor, L.40. tit.13. P.5.

L.22.t.13.P.5. L.39.t.13.P.5. L.40.t.13.P.5. L.40.t.13.P.5.

[153] Conformably with the second principle; 1st, No person can pledge (*empeñar*) nor mortgage (*hipotecar*) the thing which is not his own, L.7. tit.13. P.5. 2d, But a person may mortgage the thing which he expects to acquire, L.7. tit.13. P.5. 3d, The attorney or the steward (*mayordomo*), &c., even without permission of their principal, may pledge (*empeñar*), in which case, if the pledge (*prenda*) was delivered to the creditor, and the money received converted to the benefit or utility of the principal, the thing pledged (*empeñada*) shall remain obligated to the creditor; but if it was not already delivered, although the creditor may demand the sum due to him, he cannot demand the pledge (*prenda*), L.8. tit.13. P.5. 4th, The thing belonging to one person may be mortgaged by another (*empeñarse*) if the owner consents [20],

L.7.tit.13.P.5. L.8.tit.13.P.5.

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[18] Who paid the debt for the mortgagors.

[19] *Palacios* observes, that the Law 39. tit. 13. P. 5., cited, does not say *under a new mortgage*, but by means of transfer (*enagenacion*), and that it is clear that, to aliene or transfer (*enagenar*), causes very different effects from to mortgage (*hipotecar*); mortgage or pledge, he adds, is not a competent cause or ground of transfer of dominion, nor, in consequence, of prescription, and refers to L. 1. tit. 11. Lib. 2., *Fuero Real*, and L. 1. tit. 8. Lib. 11. Nov. Rec.

[20] And afterwards confirms it; or, being present, was silent, and did not contradict or forbid it. See L. 9. tit. 15. P. 5., cited.

L. 9. tit. 13. P. 5. 5th, The thing being once mortgaged cannot be mortgaged a second time [21], except to the amount which it may exceed in value the first debt, L. 10. tit. 13. P. 5. 6th, He who mortgages the property already mortgaged, or does it in prejudice of a third person, shall be compelled by the judge to give a fresh or new mortgage [22], and shall be even fined if he proceeded or acted from bad faith, L. 10. tit. 13. P. 5. 7th, Things which are out of the commerce of men [23] cannot be mortgaged, L. 3. tit. 13. P. 5. 8th, Nor can beasts used for purposes of husbandry, and this is also understood with respect to the necessary mortgage, L. 4. tit. 13. P. 5.; and L. 25. tit. 21. Lib. 4. Rec. [24]

L. 9. tit. 13. P. 5.

L. 10. t. 13. P. 5.

L. 10. t. 13. P. 5.

L. 3. tit. 13. P. 5.

L. 4. t. 13. P. 5. L. 15. tit. 31. Lib. 11. Nov. Rec.

From the third principle it results, 1st, That if any one should mortgage a certain thing for a certain or specific time, on its expiration, the creditor or his heirs may, by giving previous notice to the debtor, and with the authority of the judge, sell the thing mortgaged [25], L. 41. tit. 13. P. 5. 2d, That if no time shall have been specified or appointed for the payment, the creditor may sell the property in nine [26] days after he has warned or required the debtor to pay the debt, if the property is personal, and in thirty days if it is real [27], L. 21. tit. 3. Lib. 6. Rec. which corrects L. 42. tit. 13. P. 5. 3d, He shall also be able to sell it, although an agreement for the non-alienation of the property mortgaged shall have been made, if after having warned the debtor three times before witnesses, two years shall expire without its redemption by the debtor, L. 42. tit. 13. P. 5. 4th, This sale must be made with the permission of the judge and at judicial public auction [28], which will be better explained when

L. 41. t. 13. P. 5.

L. 42. t. 13. P. 5.

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[21] Without the knowledge and permission of the first mortgagee. See L. 10. tit. 13. P 5., cited.

[22] On other or unincumbered property, to the second mortgagee, and shall also be fined, at the discretion of the judge, for the fraud committed: this is the understanding of the text. See L. 10. tit. 13. P. 5., cited.

[23] Such as holy, sacred, or religious things, &c. See L. 3. tit. 13. P. 5., quoted.

[24] See also L. 6. tit. 11. Lib. 10., Nov. Rec.

[25] See note 13. p. 158. *ante*.

[26] L. 42. tit. 13. P. 5. says twelve days.

[27] L. 21. tit. 13. Lib. 6. *Rec.*, is not in the *Nov. Rec.*; and, therefore, according to the *nota* to the table shewing the correspondence of the laws, &c., contained in the *Recopilacion* of 1775, with those in the *Nov. Rec.*, may be considered repealed or obsolete: but *Palacios* says that L. 21. n. 1. tit. 3. Lib. 6. *Rec.*, does not say that the property may, if moveable, be sold, in such cases, in nine days; nor, if real, in thirty days; nor does it correct the law of the *Partida*, cited, as stated in the text. See gl. 3. *Greg. Lopez*, on L. 42. tit. 13. P. 5. The sale, it is presumed, must be by the intervention of judicial authority. See note 13. p. 158. *ante*.

[28] See also note 13. p. 158. *ante*.

we come to speak of the executive process. 5th, This sale may be prevented by the owner of the property, if he should offer to
[154] pay without any delay, L. 48. tit. 13. P. 5. 6th, This sale will be null if the creditor has not permission or authority to make it, or if he make it out of time and without the solemnities mentioned; and then the owner of the property has his action to recover it from the purchaser, returning the price paid; and if it shall exceed the amount of the debt, the owner shall only have to return to the purchaser the exact amount or value of the sum that was due by him on the mortgage. This recovery of the property shall not take place, if the purchaser should prescribe it; in which circumstances the owner has his recourse against
L. 48. t. 13. P. 5. the mortgagee for the injury and damages, L. 48. tit. 13. P. 5. 7th, If the creditor acts with bad faith or fraud in this sale, even though he should have a right to sell the property, if the mortgagor of the thing shall prove this fraud (*engaño*), he shall have his action to recover the damages from the seller; and if he shall not be able to make them good, and the purchaser should have acted with equal bad faith, the mortgagor shall recover the property, together with the fruits or profits received, on returning the price, according to what has been said in the preceding section; and if there has been no bad faith on the part of the purchaser, this action against him ceases. 8th, This sale cannot be made of the real property of the *hijosdalgo* which may be mortgaged, but in this case the creditor shall be paid out of the fruits or rents, the property being adjudged to him by way of judicial or necessary pledge (*prenda*) *solutionis causâ*, L. 1. tit. 4. Lib. 3. *del fuero viejo de Castilla.*

With respect to the preference among mortgage creditors, we shall treat more opportunely in the 11*th Title of this Book.*

§ 4. Of annuities or annual pensions (censos).

As annuities (*censos*) are inseparable from mortgage, we have thought fit to add at the end of this Title what our laws lay down with respect to this subject.

Annuity (*censo*) is a contract, by which one person sells, and another purchases the right to receive an annual pension or sum [29],

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[29] This definition does not altogether please *Palacios*, who says, (n. 1), that if the contract is like that of purchase and sale, it also resembles that of rent or lease (*arrendamiento*), referring to L. 28. tit. 8. P. 5.; and he gives the following definition of it: "a right to receive a certain revenue or pension (*redito a pension*), annually, from any person, in virtue of the possession and dominion of any thing or sum which is given or transferred to him." For a fuller understanding of the subject or doctrine, he refers the reader, particularly, to *Molina de Just. et Jure, Tract.* 2.; to *Covaruvias, 3 var.*; *Res. Febrero, Reform.* ch. 20. § 1. tom. 2.; from the last of whom (n. 2. *ibid.*) he appears to have taken the above definition.

Solis de Censib. Lib. 1. Cap. 4. n. 8. For the security of this pension, the debtor obliges himself, in favour of the creditor, or of the purchaser, and gives him a mortgage on certain specified property, the general mortgage not being sufficient, *Avendaño de Censib.* Cap. 23 & 57.; whence arise two kinds of annuities (*censos*), (setting aside others improperly such), the "*reservativo*' and the "*consignativo.*" The "*reservativo*" is when an estate or a building is given with a covenant on the part of him who receives it, to pay a certain pension each year to the granter or giver. The "*consignativo*" is constituted by a person receiving a certain gross sum, for which he must have an annual sum or annuity, securing the capital, or sum received on real property of the same value, *Avendaño*, ibid. Cap. 51. These annuities may be [155] perpetual or redeemable, or for one or more lives.

As to what regards the constitution of these annuities, we are to observe, 1st, That the "*proprio motu*" of Pope Pius V. respecting annuities, is not received or observed in this kingdom, L. 10. tit. 15. Lib. 5. Rec. 2d, That the conditions inserted in contracts of annuity are to be observed, such as that of confiscation (*comiso*) given in case the debtor does not pay the annuity or pension, L. 1. tit. 15. Lib. 5. Rec.; which is understood both with respect to the annuity *reservativo* and *consignativo*, *Avendaño de Cens.* Cap. 90. 3d, That the capital, or price of the annuity, ought to bear a certain proportion to the *pension*, which has varied, according to the times, in the following order. In 1563 it was ordered that rents of tenants, or annuitants at will (*censos al quitar*) should not be imposed under the rate of fourteen thousand for a thousand [30] *millar*, and to this price or rate, the antecedent ones were reduced, L. 6. tit. 15. Lib. 5. Rec.; which was extended to the annuities arising from bread, wine, &c. established in the kingdom of Galicia, Leon, Asturias, in the province of the Bierzo, and marquisate of Villena, L. 7. tit. 15. Lib. 5. Rec. In 1583 it was enacted or established that the annuities for one or more lives (*censos de per vida*) could only be created for a single life, by paying the principal sum in effective money, and at the rate of seven thousand maravedis for the actual return of a thousand [31]; those for two lives that

L. 7. tit. 15. Lib. 10. Nov. Rec.

L. 1. tit. 15. Lib. 10. Nov. Rec.

Nota 1. tit. 15. Lib. 10. Nov. Rec.

L. 5. tit. 15. Lib. 10. Nov. Rec.

[30] I suppose it is meant that the annuitant should receive 1000 maravedis (for instance) annually, for every 14,000 maravedis of money or property to that value paid or transferred by him, in consideration of the *censo* to be paid to him; or in other words, that an annuity of 1000 maravedis might be purchased for the gross sum of 14,000 maravedis.

[31] See note [30], *ante*.

might be already created being permitted to remain reduced to the rate of eight thousand marevedis the thousand; and those that had been established for more lives were ordered to be reduced to only two lives, L. 8. tit. 15. Lib. 5. Rec., *Avendaño*, Cap. 33. In 1608 it was prohibited to impose a new reduction on any annuity under the rate of twenty thousand maravedis for the annual return of a thousand, and those for one life at ten thousand the thousand, and those for two lives at twelve thousand the thousand, Ll. 12 & 13. tit. 15. Lib. 5. Rec.; the same rule being extended to the antecedent ones by the *same nota*. In 1680 all were reduced equally to five per cent., *Auto* 4. tit. 15. Lib. 5. Rec.[32] Lastly, in 1705, the fixed price of rents or annuities at will (*censos al quitar*) was established at thirty-three thousand maravedis and a third the thousand, which is the rule at this day; by which law all the annuities have been reduced to three per cent., *Auto* 5. tit. 15. Lib. 5. Rec.; which provision was extended to the whole kingdom of Aragon by *Cedula*, *9th July*, 1750. All the rents (*reditos*) also which were accustomed to be paid in grain or corn, &c., were reduced to three per cent., *Pragmat.* *12th Feb.* 1705.[33] 4th, That the annuities, according to the style or custom of commerce, which is to give or lend money on interest at the rate of two and a half per cent (which we may call personal annuities) are lawful, according to the *Cedula*, *10th July*, 1764. That rents, or annuities at will, shall not be payable in bread, wine, and other things, except money, Ll. 4 & 5, tit. 15. Lib. 5. Rec.; which provision, *Avendaño*, Cap. 46., applies only to the annuity (*consignativo*). The same regulation was extended to annuities for one or more lives, L. 5. tit. 15. Lib. 5. Rec. 6th, That those who impose annuities on their property must declare those previously imposed, under pain of paying double the amount of the sum they shall receive from the person to whom they shall sell it, L. 2. tit. 15. Lib. 5. & *Aut.* 22. tit. 19. Lib. 2. Rec. 7th, That in the principal towns of the district a book is kept for the purpose of noting the mortgages situate in each town of the jurisdiction, with the butts and bounds described, and the names of the persons inscribed to whom they belong, an entry being made (*tomando razon*), by the escribano of the cabildo, within 24 hours, of each instrument which may be

L. 6. tit. 15. Lib. 10. Nov. Rec.

Nota 2. tit. 15. Lib. 10. Nov. Rec.

L. 8. tit. 15. Lib. 10. Nov. Rec.

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L. 9. tit. 15. Lib. 10. Nov. Rec.

L. 23. tit. 1. Lib. 10. Nov. Rec.

Ll. 3 & 4. tit. 15. Lib. 10. Nov. Rec.

L. 4. tit. 15. Lib. 10. Nov. Rec.

L. 2. Nota 6. tit. 15. Lib. 10. Nov. Rec.

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[32] Not in the *Nov. Rec.*

[33] No such is to be found in the Chronological Index of *Cedulas*, &c. to the *Nov. Rec.*

executed with respect to an annuity, *Cedula*, 31*st January*, 1768, where may be seen the judicious instructions to facilitate the execution of L. 3. tit. 15. Lib. 5. Rec., which regards the same object. 8th, That if the possessor or tenant of two intails obtained royal permission to impose an annuity on them, and they happen to be separated, the possessor of each shall be obliged to pay the pension (*pro rata*) to avoid frauds and law-suits; and if the permission is confined to only one intail, which may be ascertained by the tenor of it, it will be at the sole burthen of the tenant who may acquire it by right of succession, *Salgado Labyrint. Credit.* Part 2. Cap. 9. a n. 1. ad. 25. But if the second possessor acquired one of the intails by eviction (*eviccion*), he shall not be obliged to pay the pension or annuity (*la pension del censo*); because the first possessor or tenant, by the defect of the thing and of his person, could not impose the incumbrance or obligation (*gravamen*), *Salgado, ibid.* n. 59; nor shall that mortgage subsist, although the successor may approve of and ratify it, *Salgado, ibid.* cap. 10. n. 33.

L. 3. tit. 16. Lib. 10. Nov. Rec. [34]

L. 1. tit. 16. Lib. 10. Nov. Rec.

As to what regards the redemption of the annuity, 1st, It is certain that it ought to be made with effective money [35], in the same way as the imposition or charge. See *Avendaño*, c. 102. 106 & 107., by which the annuity creditor will not be considered as satisfied or paid if the debtor offer him voluntarily the capital in property or goods valued, which would not be the case in a concurso of creditors (*juicio de concurso*), *Salgado, ibid*, Part 1. c. 22. [36] 2d, That if the debtor should form a concurso of creditors, the annuity creditor may demand the *pensions* and the *capital*, because here the redemption of the annuity (*censo*) is treated of, *Salgado, ibid*, Part 1. c. 19 & 20. n. 5. 3d, That if the nobility (*grandes titulos*), and knights (*caballeros*) shall take annuities upon their states (*estados*) with the obligation of redeeming them within a certain time, they shall enjoy double if they shall live in any place of their states, L. 66. c. 4. tit. 4. Lib. 2. Rec. 4th, That the towns, if there are any annuities against them, must apply two parts of the surplus of their *propios* to the redemption of them, and the third part for the payment of the arrears (*atrasos*), Decree, 23d *May*, 1767. 5th, That if the

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L. 8. tit. 26. Lib. 7. Nov. Rec.

L. 14. t. 15. Lib. 10. Nov. Rec.

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[34] See Order in Council, 6th April, 1818, Appendix P.

[35] *Palacios* refers to Ll. 2. 22, 23, 24. *notas* 8 & 9. tit. 15. Lib. 10. Nov. Rec., on this subject.

[36] Tom. 1. p. 176. *ad.* 180. *Vide* n. 33, 36, &c., and *passim*, cap. 22.

annuity mortgage be destroyed, the annuity itself is extinguished [37], *Avendaño*, c. 6.

The annuities assigned upon the revenue of the crown (*juros ó censos reales*), were reduced in 1727 to three per cent., *Auto* 6. tit. 15. Lib. 5. Rec. In 1732 the amount of the difference from five to three per cent., was appropriated to pay (*dar cabimiento á*) the royal annuities, and the residue to purchase and pay the principals, *Auto* 7. tit. 15. Lib. 5. Rec.; and by decree of 21st March, 1739 [38], this difference was applied to pay the revenues (*reditos*) of the crown at the rate of three per cent.

L. 4. tit. 14. Lib. 10. Nov. Rec.

L. 5. tit. 14. Lib. 10. Nov. Rec.

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[37] See L. 28. tit. 8. P. 5., which says, this is not the case when one-eighth of the property is saved or left.

[38] Not in the Chronological Index of *Cedulas*, &c., of *Nov. Rec.*

TITLE VIII. [159]

OF CONTRACTS (*PACTOS*) AND OBLIGATIONS IN GENERAL.

Cap. 1. Of obligation, and its kinds.

HAVING treated of the right in the thing, it remains for us to treat of the right to the thing; which, according to what was declared in Title I., arises from different species of obligations. Obligation is a legal tie or bond (*vincúlo*) by which a person promises to do or to pay any thing. It is of two sorts, civil and natural. A civil obligation is, when he who contracts it remains bound by it in such a way, that although he should not be willing to comply with it, he may be thereby obliged and compelled to fulfil it.[1] A natural obligation is, when the person who enters into it is obliged to fulfil it naturally, although he cannot be compelled to its performance by a court of law (*en juicio*), L. 5. tit. 12. P. 5.

L. 5. tit. 12. P. 5.

Some obligations arise immediately from natural or from civil equity; and others, by means of an obligatory act. This is either lawful or unlawful: the first is called convention or contract; the second, crime.[2]

§ 1. Of promise (promesa) or parol agreement.

A covenant or promise is the undertaking which men enter into, one with another by words or parol, and with the intention of obliging themselves by agreeing upon some certain thing which they are to give or to do, to or with respect to one another, L. 1. tit. 11. P. 5. These covenants are divided into pacts, (*pactos*) and contracts.

L. 1. tit. 11. P. 5.

Contract is, every covenant which has a name and civil cause or consideration by its obligatory nature. Pact is every covenant destitute of a name and a determinate civil cause or consideration.[3]

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[1] *Palacios* says, this is called civil and natural, properly mixed, and he refers to L. 5. tit. 12. P. 5., for the definition; adding, that there are three sorts of obligations, the purely natural, purely civil, and mixed—of civil and natural, *Wood*, in his *Inst. Civ. Law*, book 3. ch. 1. p. 204., says, that a mixed obligation was the only sort that was defined by *Justinian;* which definition the learned Civilian has given in the page (203), *ante* the one cited.

[2] *Palacios* says, a better explanation is, that obligations arise from contract and *quasi* contract; from crime and *quasi* crime; and from deliberate or solemn agreement or covenant (see L. 1. tit. 1. Lib. 10. Nov. Rec.); and from some other irregular causes.

[3] A new covenant. *Palacios* says, "that a covenant (*convencion*), and promise (*promesa*), are not one and the same thing; and that the latter is the

At present pacts are confounded with the stipulations of the Romans, by reason of the solemnities used among them being laid aside, neither do we admit the difference between promises of which the Roman law speaks, because amongst us every pact derives its force from the agreement and consent of the parties, which, in whatever way a person may appear to bind himself, must be observed, L. 2. tit. 16. lib. 5. Rec.

L. 1. tit. 1. Lib. 10. Nov. Rec.

§ 2. Of the kinds of valid promise.

Every promise therefore, is either valid, or void.[4] A valid promise may be in three ways; pure, performable, at a certain day, or conditional, L. 12. tit. 11. P. 5. The pure promise ought to be fulfilled immediately, unless it is attended with such circumstance as may require time; as to which the judge shall determine, L. 13. tit. 11. P. 5.

L. 12. t. 11. P. 5.

[160]

L. 13. t. 11. P. 5.

Those promises which are made performable at a day certain do not impose an obligation until the day hath arrived; and if the person who promised it should die in the meantime, his heirs shall be obliged to fulfil it for him, L. 14. tit. 11. P. 5. When the promise is to give or to do a thing every year, the day on which it is to be performed is understood to be the last of each year, and the first days of each year when the promise is to give or to do it all the years of one's life, L. 15. tit. 11. P. 5. This certainty may consist in the day being expressly appointed or in its not being left to be verified[5]; in both cases the promise is valid, Ll. 12. tit. 11. P. 5. Conditional promises are not to be fulfilled, until the condition is performed, which if it precedes the promise, the fulfilment of the obligation is extended to the day of the death of the person who made the promise, L. 15. tit. 11. P. 5. *ad fin.*, excepting in the four cases mentioned in L. 16. tit. 11. P. 5. The promise accompanied with an impossible[6] condition, resolves itself into a pure one, and therefore is immediately obligatory; and the conditional one, which is con-

L. 14. t. 11. P. 5.

L. 15. t. 11. P. 5.

L. 12. t. 11. P. 5.

L. 16. t. 11. P. 5.

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stipulatio or verbal contract of the Romans; and that there may be a promise without a covenant or agreement; as when one should make a promise, and it should not have been accepted." The above may be considered a distinction without a difference, when reference is had to what immediately follows in the text; and to L. 1. tit. 1. Lib. 10. Nov. Rec.: to which last, the learned Professor, in the conclusion of his note upon this subject, also refers as the guide or governing law in Spain, in matters of covenant and pact.

[4] See the preceeding note.

[5] The example put in L. 12. tit. 11. P. 5., cited in the text, on this last point is, if a man should promise that a thing or sum of money should be done or paid by his heirs on the day of his death.

[6] *Palacios* says that, impossible conditions render contracts null, although testaments are not vitiated thereby, except by a certain sort of impossible condition. See *Wood's Inst. Civil Law*, respecting conditions impossible, &c., p. 109 to 111., book 1. ch. 1.; also p. 108., cited.

tracted to be performed at a day certain, must, as well as the former, be verified in point of time, in order that the promise may be binding, L. 17. tit. 11. P. 5. L. 17. t. 11. P. 5.

Any penalty may be annexed to promises or pacts in order that they may be more firm, which is called conventional if it is accessary to the agreement, and judicial if it is imposed in a suit at law (*en juicio*). The conventional penalty must be paid or satisfied if the promise is not fulfilled at the time; and this payment or satisfaction discharges from the obligation [7], L. 35. tit. 11. P. 5. L. 35. t. 11. P. 5. This penalty is due, although the promise may not be valid, unless it be contrary to law and good manners, L. 38. tit. 11. P. 5., or be to enforce the contract of matrimony, L. 38. t. 11. P. 5. L. 39. tit. 11. P. 5., or usurious, L. 40. tit. 11. P. 5., and that the promise is not valid by being extorted through fear, force, or fraud [8], L. 28. tit. 11. P. 5. The conventional penalty cannot comprehend all a person's property, nor exceed double the amount of the condition of the obligation or bond, L. 5. tit. 11. [9] Lib. 1. *Fuero Real*, and L. 247. *Est.* L. 39. t. 11. P. 5. L. 40. t. 11. P. 5. L. 28. t. 11. P. 5.

A promise will be void either by reason of the persons who make the promise, by reason of the things which are promised, or on account of the mode or form of agreement. Of a void or ineffectual promise (promesa inutil).

By reason of the persons, 1st, The promise that is made by the madman and the idiot (*desmemoriado*) is not valid, L. 4. tit. 11. P. 5., nor that by the minor of seven years, and even of fourteen; but if it should be advantageous to the latter (*á este*), it will be valid, L. 4. tit. 11. P. 5. L. 4. tit. 11. P. 5. 2d, Nor that made by the prodigal and the minor (*huerfano*) to their own injury, without authority of their curator [10], L. 5. tit. 11. P. 5. L. 4. tit. 11. P. 5. [161] 3d, Nor that which is made between father and son, unless it relate to property called *castrense*, or to the obligation of dote, L. 6. tit. 11. P. 5. L. 5. tit. 11. P. 5. L. 6. tit. 11. P. 5. 4th, Nor the promise which is made in the name or behalf of another to a third person who is not under the power or in the service of him in whose behalf such promise is made, except it be to the attorney, guardian, &c., Ll. 7 & 8. Ll. 7 & 8. tit. 11. P. 5.

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[7] L. 35. tit. 11. P. 5., says, that in such case, if the promise is not performed at the time stipulated, it is at the option of the stipulator, or person to whom the promise is made, to demand the penalty, or to require the performance of the covenant.

[8] But L. 28. tit. 11. P. 5., adds, that if the penalty has been willingly paid by the party under such circumstances, he shall not recover it back.

[9] Tit. 18. is erroneously cited in the text; and L. 10. tit. 5. Lib. 4. *Fuero Real*, contains this last provision.

[10] And even then the minor would, it is presumed, be entitled to his privilege or benefit of restitution, to set aside, within four years after coming of age, which is twenty-five years by the Spanish laws, such prejudicial contracts

tit. 11. P. 5., or except the debtor, in the name of his creditor, should receive a promise from any one to satisfy the debt due by the former, in which case although he who promises is bound to the fulfilment of his promise, the creditor has no authority to demand its performance, but the debtor, who obtained the promise or obligation, L. 10. tit. 11. P. 5.

L. 10. t. 11. P. 5.

By reason of the things promised, a promise is not valid. 1st, When that is promised which does not exist nor can exist, or is naturally impossible to be done, L. 21. tit. 11. P. 5.; but if the fruits of an estate, &c., are promised, which are yet to arise[11], they shall be payable the moment they are produced. And if any fraud shall be committed to impede the production, the obligation subsists or is binding by reason of the fraud, L. 20. tit. 11. P. 5. 2d, When holy or sacred things, &c., are promised or obliged, L. 22. tit. 11. P. 5., except those things which the canon law permits. 3d, When the performance of an act by another is promised, unless it be accompanied with the obligation of the person making the promise; in which case he who makes the promise is the person bound, and not he who it was stipulated to bind or oblige. [12] This obligation respecting the performance of another's act also subsists, if it were imposed by the testator on his heirs, or if judicially consented to; such as is the reciprocal promise of co-guardians for the security of the property of the ward, and by which one is surety for others.[13] 4th, The things prohibited by law and good manners, ought not to be performed or fulfilled, although they be promised [14], Ll. 38. & 40. tit. 11. P. 5. There will not be found among us any covenant or pact which is invalid by reason of the form or mode [15] in which the obligation is contracted, because L. 2. tit. 16. Lib. 5. Rec. says generally, that the obligation must be fulfilled in whatever way it appears to have been agreed upon, although neither stipulation nor promise may intervene. And

L. 21. t. 11. P. 5.

L. 20. t. 11. P. 5.

L. 22. t. 11. P. 5.

Ll. 38 & 40. t. 11. P. 5.

L. 1. t. 1. Lib. 10. Nov. Rec.

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[11] The examples put by the law cited in the text, are the future or expected crops of a vineyard, or estate, the issue of a female slave, or young of cattle, &c.

[12] See L. 11. tit. 11. P. 5., cited in the text; and L. 1. tit. 1. Lib. 10. Nov. Rec.

[13] In other words, the promise or undertaking of the testator or ancestor, descends to, or is obligatory on his heirs; and the bail or surety, according to his undertaking or promise, is bound for the appearance, &c. of his principal.

[14] *Pacta quæ turpem causam continent non sunt observanda.*

[15] *Palacios* says, that contracts celebrated with an impossible condition, are void or ineffectual by reason of the mode of celebrating them; that all those which may not have been celebrated with a serious and deliberate intention of producing an obligation, shall be void, on account of the mode, also, of celebrating them; and he refers to L. 1. tit. 1. Lib. 10. Nov. Rec.

therefore the exterior solemnities which the Romans required for the validity of promises of which some mention is made in the laws of tit. 11. P. 5., are not observed in our law by which we are enabled to say truly, that in Spain the obligation depends more on the good faith of the contracting parties, than on the solemnities of the obligatory pact which, although crude and without writing, produces an obligation, L. 1. [16] tit. 11. Lib. 1. *Fuero Real.* [162]

From this, other consequences very different from the Roman law may be drawn or deduced, amongst which we may remark, that where two persons are bound simply or severally (*simplemente*), each is only considered bound for the half, unless it shall be expressed that they have bound themselves in solidum, and each separately [17], for then each may be sued for the whole [18], L. 1. tit. 16. Lib. 5. Rec.

L. 10. tit. 1. Lib. 10. Nov. Rec.

From what has been said, the general modes by which an obligation arising from pure pact is extinguished, may be inferred, among which may be reckoned that which proceeds from the destruction and deterioration of the thing promised, which may happen without the fault of the obligor or person obliged [19], Ll. 18 & 19. tit. 11. P. 5.; and for what regards novation, solution, compensation, or set off, &c., as these modes of putting an end to the obligation are more particularly allied to loan (*mutuo*), we reserve it for Title 11. [20]

Ll. 10 & 19. tit. 11. P. 5.

Cap. 2. Of pacts nominate and innominate.

According to our law we are to consider contracts as either innominate or nominate [21], the former comprehend the four kinds of *do ut des*, &c., spoken of by L. 5. *and fin.* tit. 6. P. 5. Of the latter, some are from pure favor (*gracia*) and affection, and others are for the mutual benefit of both parties, *prol de la*, Part. 5.

Conformably to this division, we will treat first in this book of the contracts arising from favour, and which are advantageous to only one party, such as donations, loan (*prestamo*) [22], deposit (*deposito*), loan called (*mutuo*) [23], and a commission (*mandato*) [24], and afterwards of those which are advantageous and onerous to

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[16] L. 1. is erroneously placed in the text.
[17] Jointly and severally.
[18] The same holds in the Roman or civil. See *Wood's Inst. C. L.*, book 3. ch. 3. p. 226.
[19] This must be taken with some limitation. See L. 18. tit. 11. P. 5., cited.
[20] Of this book.
[21] See also *Wood's Inst. Civ. L.*, book 3. ch. 1. p. 206.
[22] *Commodatum.* See *Wood's Inst. Civ. Law*, ch. 1. book 3. p. 215.
[23] See *ibid.*, p. 212.
[24] *Mandatum.* See *ibid.*, ch. 5. p. 242.

both parties, such as sale and purchase, leases (*arrendamientos*), partnership (*sociedad*), and exchange (*cambio ó permuta*). To these we shall add a third kind arising from those contracts, the substance and fulfilment of which depend upon chance or contingency, such as insurance (*seguro*), maritime exchange (*cambio maritimo*), and wagers (*apuestas*).

TITLE IX. [163]

OF DONATIONS.

THE first beneficial contract to one party only is donation or the benevolent act, which arises from nobleness and goodness of heart, when it is made freely and without any compulsion, L. 1. tit. 4. P. 5. It is made in two ways, either in health or upon prospect of death; the latter is revocable, the former not, L. 7. tit. 10. Lib. 5. Rec. Donations, and their kinds. L. 1. tit. 4. P. 5. L. 1. tit. 7. Lib. 10. Nov. Rec.

Hence it is, 1st, That the donation made by a person in health is a lawful pact, by reason of which the dominion of the thing given is transferred to the donee. 2d, That the donation, causâ mortis, has much resemblance to bequests and legacies. § 1. Upon what principles donations may be established.

According to the first principle, 1st, The minor under twenty-five years of age cannot make a gift, L. 1. tit. 4. P. 5. 2d, Nor the madman, the ideot, nor the prodigal, L. 1. tit. 4. P. 5. 3d, Nor the son who is under the power of his father, without his permission or consent, except of property called *castrenses* and *adventitious* [1], L. 3. tit. 4. P. 5. 4th, Nor the person suspected [2] of the crime of high treason (*læsæ majestatis*), unless he commit the offence after the donation, L. 2. tit. 4. P. 5.; although persons condemned to death for other offences are considered capable of disposing of their property [3] which has not been confiscated, L. 3. tit. 4. Lib. 5. Rec. L. 1. tit. 4. P. 5. L. 3. tit. 4. P. 5. L. 2. tit. 4. P. 5. L. 3. tit. 18. Lib. 10. Nov. Rec.

From this principle it follows also, 5th, That the donation made between man and wife is not valid, by reason of their mutual affection, which would be an inducement for them to strip themselves of their property, L. 4. tit. 11. P. 4.; the exceptions to which will be seen in Ll. 5 & 6. tit. 11. P. 4. [4] 6th, That donations may be made simply or purely, with condition among persons present, and by power of attorney, among those absent; and until a certain day or for a limited period, Ll. 4 & 7. tit. 4. P. 5.; which simple obligation passes to the heirs when the donor hath not delivered the thing, L. 4. tit. 4. P. 5.; and the conditional one shall be fulfilled in whatever way the L. 4. tit. 11. P. 4. Ll. 5 & 6. t. 11. P. 4. [164] Ll. 4 & 7. tit. 4. P. 5. L. 4. tit. 4. P. 5.

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[1] And in what cases the property called *profectitious*, &c. See L. 3. tit. 4. P. 5.

[2] *Palacios* says, it is not sufficient that he be suspected, but it must be known that he committed the offence, and he refers to L. 2. tit. 4. P. 5. cited.

[3] See L. 2. tit. 4. P. 5.

[4] See also Order in Council, 16th September, 1822. Appendix K.

L.5.tit.4.P.5. condition may be fulfilled, L.5. tit.4. P.5.; but the donation made for a certain day or limited period will continue only for that time, the thing given then reverting to the donor or his
L.7.tit.4.P.5. heirs, L.7. tit.4. P.5.; and in the same mode the pecuniary gifts or rewards that the king shall bestow or confer are at an end [5], by the death and the relinquishment or resignation
L.12.tit.5. Lib.3. Nov. Rec. (*vacacion*) of the donees, L.20. tit.10. Lib.5. Rec.

As this liberality is often wont to degenerate into excess, it has been necessary to limit these donations, not only by prohibiting them when they are prejudicial to a third person but also when they are so to the donor himself. For the first reason, 1st, The donation made for want of children is revoked
L.8.tit.4.P.5. generally if the donor shall afterwards have them, L.8. tit.4. P.5. 2d, The donation which is made in prejudice of the lawful share
L.8.tit.4.P.5. (*legitima*) of children is prohibited, L.8. tit.4. P.5.; for which reason the gift made to the child who has brothers or sisters
L.3.tit.4.P.5. must come into partition (*en colacion*) [6], L.3. tit.4. P.5. 3d, Royal donations are also prohibited which are made in prejudice of the kingdom and of the crown [7], such as those mentioned in
Ll.8. 5. 13, 14. & 3.tit.5. Lib.3. Nov. Rec. Ll.3. 10. 14. & 18. tit.10. Lib.5. Rec.; although the king may give many other things by way of remuneration for services (*por via de merced*), such as offices, alms (*limosnas*), insignia or badges of distinction (*habitos*), pensions, &c., L.5. tit.10. Lib.5.
L.4.tit.5. Lib.3. Nov. Rec. Rec. [8] L.16. tit.10. Lib.5. Rec.; and in this last case the donees ought to obtain them from the hand of the king, L.16. tit.10.
L.4.tit.5. Lib.3. Nov. Rec. Lib.3. Rec. These are the donations ordered to be firm and valid by L.6. tit.10. Lib.5. Rec.; and which are moderated
L.1.t.5.Lib.3. Nov. Rec. according to the circumstances and state of the kingdom, L.15. tit.10. Lib.5. Rec. 4th, The donations made to the clergy and
L.10.tit.5. Lib.3. Nov. Rec. persons privileged in fraud of the revenue or payment of taxes (*en fraude de no pechar*), are prohibited as prejudicial to third
L.3.t.7.Lib.10. Nov. Rec. persons, L.11. tit.10. Lib.5. Rec.; to which the second *auto*
L.12.tit.5. Lib.1. Nov. Rec. tit.10. Lib.5. Rec. [9] & *auto* 1. tit.10. Lib.5. *Recop.* relate; where it is ordered that for donations made to monasteries, the clergy, &c., the fifth, besides the tax of *alcabala*, be paid, and that the

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[5] At the expiration of the period for which limited.

[6] This is understood in so far only as the gift should exceed the *mejora* of *tercio y quinto*, which parents are allowed to assign to a particular child, beyond such child's legitimate share of their property. See tit.6. Lib.10. Nov.Rec. on this subject; and p.117. ante, n.27.

[7] See L.9. tit.4. P.5.

[8] Not in the *Nov. Rec.*

[9] Not in the *Nov. Rec.*

ordenanza de Portugal, which prohibits the acquisition by ecclesiastics of real property be observed.[10] For the second reason, 1st, Every donation which leaves the donor without [165] sufficient to maintain himself is prohibited, L.4. tit.4. P.5. L.4.tit.4.P.5. 2d, Also, that which comprehends the whole of a person's property even present, L. 8. tit.10. Lib.5. Rec. To both objects L.2. tit.7. Lib.10. Nov. Rec. is L.9. tit.4. P.5. directed, which enacts, that no donation exceeding five hundred maravedis of gold[11], can be made without an authentic deed of writing: but the practice of the present day is for every donation to be made with the authority of the judge[12], or for his approbation to be prayed for (*se insta*) by the donee, as the person who is principally interested.

§ 3. For what reason a donation may be revoked.

We have said that this donation is irrevocable, because without a legitimate cause, it cannot be revoked; and this is to be the evident ingratitude of the donee towards the donor, as a motive which causes the cessation of that love which was the *mobile* (*movil*) of the donation. To this have reference the four causes expressed by L.10. tit.4. P.5., and others similar, which are in force by the *Rule* 36.[13] tit.34. P.7.

§ 4. Of the donation, causâ mortis.

According to the second principle, bequests (*mandas*) or donations made *causâ mortis*, may be revoked during the life of the giver, as also legacies; wherefore, 1st, L.11. tit.4, p.5., sets forth, principally, the following three causes of revocation: 1st, the death of the donee[14]; second, the recovery or escape of the donor from the danger of death, the reason of which induced him to make the donation; third, the changing or altering his will. 2d, No person incompetent to make a will is permitted to make this donation, except the child[15], with the consent or permission of his father, L.11. tit.4. P.5.[16] 3d, As these donations are L.11.tit.4.P.5.

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[10] See also n.6. tit.5. Lib.1. Nov. Rec.

[11] *Vide* the value of coin in note to original. A *maravedi* of gold is there said to be worth fifty reales, (suppose *de vellon*,) six *maravedis*, and something more of the then value of money, which make the sixth part of an ounce of gold.

[12] *Palacios* says, that the excess of any gift, above such sum, without judicial approval and authority, will be void; and he refers to *Febrero reformado*, tom.2. P.1. ch.21. §1. n.5 & 6. p.101. which see.

[13] This rule does not apply; perhaps rule 34, *ibid.* is meant.

[14] Add before the *donor*.

[15] In *patriâ potestate*.

[16] *Palacios* says, that it appears the authors infer, that a child under the father's power cannot make a testament; and although this may be the case by the civil law, and even by that of the *Partidas*, yet by the law of the *Recopilacion* a child may make a testament, if he be of competent age, which is that of puberty, as though he were free from the *patria potestad*. L.4. tit.18. Lib.10. Nov. Rec.

wont often to be made without the direction of that entire reason which is darkened by the fear of death, those gifts, therefore, which may have been extorted by, or may have proceeded from any *deadly* threat, will not be valid[17], L.11. tit.4. P.5.; nor those which shall be made, in last sickness, to confessors, or to their churches, or monasteries, *Auto* 3. tit.10. Lib.5. Rec.

L.11. tit.4.P.5.

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L.15.tit.20. Lib.10. Nov. Rec.

§ 5. Of other sorts of donations.

It may be observed that the other donations[18] made for a certain object or for a certain cause, into which number enter donations *propter nuptias*, remunerative donations, &c. are not valid, unless the object or cause for which they are made be certain, L.6. tit.4. P.5.

L.6.tit.6.P.5.

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[17] Or fear of being killed. See the L.11. tit.4. P.5. cited.
[18] *Sub modo.*

TITLE X.

OF DEPOSIT (*DEPOSITO*), AND LOAN (*PRESTAMO*).

THE second contract, useful or advantageous (*util*) to one party only, is deposit, by which the person who receives does an act of kindness and affection to the person who makes the deposit, *Prol.* tit. 3. P. 5., and thus every person may deposit what belongs to him with whomsoever he pleases, L. 3. tit. 3. P. 5., but not things stolen, even though the deposit be made with an escribano, L. 22.[1] tit. 1. Lib. 2. Rec., and L. 2. tit. 21. Lib. 2. Rec. It is called by the laws of the Partida, *condesijo*, from the old verb *condesar*, to guard or preserve, L. 1. tit. 3. P. 5. Deposit is when one man confides his property to the custody of another, L. 1. tit. 3. P. 5. It is of three sorts, 1st, When a person voluntarily and without necessity deposits the thing. 2d, When he does it through urgent necessity, in order to save the thing or property from any fire, shipwreck, &c. 3d, When the thing is deposited by the possessor to abide the event of a law suit, L. 1. tit. 3. P. 5. The first is called simple deposit; the second, miserable; and the third, sequestration.

Cap. 1. Of deposit and its kinds.

L. 3. tit. 3. P. 5.

L. 2. tit. 25. Lib. 5. Nov. Rec.

L. 1. tit. 3. P. 5.

L. 1. tit. 3. P. 5.

The simple and miserable deposit, 1st, Should be kept carefully, faithfully, and without any remuneration[2] (*sin interes alguno*). The depositary (*depositario*) ought to restore at its time[3] the same thing received[4] to the person who deposited it (*al deponente*), L. 5. tit. 3. P. 5. 3d, If this fidelity (*lealtad*) be wanting by the fault[5] of the *depositario*, he is obliged to pay double the amount of the thing in the case of a *miserable*, and the same price or value in that of a simple deposit. From the first principle it follows, 1st, That deposit from its nature is gratuitous, L. 2. tit. 3. P. 5., therefore it must not bear interest

L. 5. tit. 3. P. 5.

L. 2. tit. 3. P. 5

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[1] *Palacios* says, there is an error in the quotation of this law, (which is not in the *Nov. Rec.* and that L. 2. of tit. 21. of the same, which is L. 2. tit 25. Lib. 5. Nov. Rec. prohibits *escribanos* from receiving, in deposit, things stolen. It is presumed they would, so receiving knowingly, be punishable criminally.

[2] See L. 2. tit. 3 p. 5.

[3] That is, when it shall be demanded. See L. 5. cited, and L. 10. tit. 3. P. 5.

[4] The words of the text are, *en la misma especie*.

[5] That is, gross fault, or by fraud. See L. 2. tit. 3. P. 5. and *Gr. Lop.* Gl. 7. on ditto; also L. 8. tit. 3. P. 5.

even on account of gain ceasing[6] (*por razon del lucro cesante*), L. 15. tit. 18. Lib. 5. Rec. 2d, That a deposit made of any of those things which are measured, weighed, &c., on interest, is a contract which partakes more of the nature of mutuo[7] than that of deposit, L. 2. tit. 3. P. 5. 3d, That the depositario must be paid for the expenses which he shall incur for the benefit (*en utilidad*) of the thing deposited[8], L. 10. tit. 3. P. 5. 4th, That the depositario neither acquires dominion nor possession in the thing deposited[9], L. 2. tit. 3. P. 5. From the second principle it follows, 1st, That the *depositario* is obliged to return the thing whenever the person who deposited it, or his heirs, may require it, together with the fruits, rents, and improvements, without being able to retain it under pretence of set-off[10] (*compensacion*), or for expenses or charges[11] (*expensas*), &c., Ll. 5. & 10. tit. 3. P. 5., excepting in the four cases adduced by L. 6. tit. 3. P. 5. 2d, That the judicial depositary must not return the thing until sentence shall have been given, and the suit terminated[12], L. 5. tit. 3. P. 5. 3d, That if a thing be deposited in a church, monastery, &c., with the consent of the superior, the whole body remains bound to restore the deposit, L. 7. tit. 3. P. 5.

L. 21. tit. 1. Lib. 10. Nov. Rec.

L. 2. tit. 3. P. 5.

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L. 10. t. 3. P. 5.

L. 2. tit. 3. P. 5.

Ll. 5 & 10. tit. 3. P 5.

L. 6. tit. 3. P. 5.

L. 5. tit. 3. P. 5.

L. 7. tit. 3. P. 5.

Cap. 2. Of the various kinds of fault (culpa) from which damage may result.

In order to understand the third principle, and every thing relating to the obligation arising from damage or injury (*daño*), in other contracts we have thought fit to explain in this place

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[6] *Lucro cesante*, is the gain or interest which it is calculated money might produce during the time for which it is lent or unemployed. See *Curia Philipica*, Lib. 2. *Com. Ter.* ch. 2. n. 3. tit. *Intereses*, p. 353. ed. 1797.

[7] *Palacios* observes, that L. 2. tit. 3. P. 5. does not compare nor give the title of *mutuo*, to a deposit, in which the *depositario* might receive any reward for the custody of the property, but that of letting *loguero* or *locacion*.

[8] But he cannot retain the deposit as a pledge or security, for the payment of such expenses. See L. 10. tit. 3. P. 5. cited, and what follows in the text.

[9] Unless the deposit should be of things which may be counted, weighed, or measured, and should be delivered by reckoning, weight, or measure; for, in this case, the dominion would pass to the depositary; but he would be obliged to return the money, coin, &c. deposited, or the like quantity, &c. In other words, that he would not be obliged to return the identical pieces of money, or particles of corn, but their equivalent; but it seems it would be otherwise, if the money and other things were delivered, sealed, or locked up, which would amount to a tacit prohibition of its use, and a direction to preserve it unmixed with the depositary's property, L. 2. tit. 3. P. 5. & *Greg. Lop.* Gl. 4. on said law. The doctrine in this Law might give rise to important questions and the considerations it suggests are worthy of attention. See 7 tom. *Feb. Adic.* P. 2. Lib. 3. ch. 3. § 2. p. 101. n. 200 & 201.

[10] For a debt, &c. due to him by the person who deposited.

[11] See note 8.

[12] Or the parties may have agreed. See L. 5. tit. 3. P. 5., cited.

the various species of fault (*culpa*) whence this damage may result.

Damage or injury may be caused through malice [13] (*malicia*), or through negligence[14] and little care[15] (*poco cuidado*), or finally, by a supernatural event which we cannot prevent. To the first, the laws of the Partidas give the appellation of fraud (*engaño*), *Prol. del.* tit. 16. P. 7.; to the second that of fault (*culpa*), L. 3. tit. 3. P. 5.; and to the third, accident (*ocasion*) [16], L. 3. tit. 3. P. 5. L. 11. tit. 33. P. 7. vide *Prol.* tit. 15. P. 7. In all contracts, parties are first responsible for all damage caused to the thing, through malice or fraud (*maliciosamente*), it not being allowed to covenant to the contrary. 2d, In those contracts in which we look principally for integrity of intention (*la lealtad del animo*), this fraud ought to be visited with the punishment of infamy [17], L. 8. tit. 3. P. 5. L. 3. tit. 3. P. 5. L. 11. t. 33. P. 7. L. 8. tit. 3. P. 5.

Accident (*ocasion*) or *caso fortuitó*, which might cause any damage (*daño*), does not produce any obligation to pay or make good the damage, unless an agreement should have been made to the contrary [18], L. 3. tit. 2. P. 5., *ad fin*; and L. 4. tit. 3. P. 5. L. 3. t. 2. & L. 4. t. 3. P. 5.

Fault or negligence (*culpa*) is most small (*levissima*), small (*levis*), or great (*lata*): *culpa levissima*, means that a person did not observe that care in keeping (*aliñar*), and preserving the thing which another of good sense or understanding (*buen seso*) would have taken if he had charge of it, L. 11. tit. 33. P. 7. We say that the thing is lost or injured through *culpa leve* when the person who has it in custody does not take all that care of it which an attentive and discreet person would, L. 3. tit. 3. P. 5. *Culpa lata*, as it consists of a gross and as it were inexcusable negligence, for which reason it is called in L. 11. tit. 33. P. 7., great and manifest fault, is compared to fraud; and thus much is to be understood from L. 2. tit. 2. P. 5. *ad fin.*, when it makes use of these words, 'unless it were allowed to be injured through fraud (*enganosamente*).' [19] L. 11. t. 33. P. 7. [169] L. 3. tit. 3. P. 5. L. 11. t. 33. P. 4. L. 2. t. 2. P. 5.

In order to determine and estimate the obligation which arises

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[13] That is fraud. [14] *Lata culpa.* [15] *Levis culpa.* [16] *Casus fortuitus.*

[17] See in what case, by L. 8. tit. 3. P. 5. cited.

[18] See the other excepted cases mentioned in L. 4. tit. 3. P. 5., which are, if the *depositario* should have delayed or refused, on request, &c. is understood, to deliver the thing deposited; or should have, by his conduct, contributed to, or given cause for, the loss; or if the deposit should have been principally beneficial to the *depositario*. And see also L. 5. tit. 2. P. 5., cited; which last, however, is not applicable to the case of loan (*commodatum*).

[19] See *Greg. Lop.* Gl. 9. L. 2. tit. 2. P. 5.

from each of these kinds of fault, regard must be had to the advantage (*utilidad*) or injury (*perjuicio*) which each of the contracting parties receives from the thing by reason of the contract; which doctrine is founded on these two rules, 1st, That by the contract advantageous only to one party, the person to whom it is so advantageous, is liable or bound for '*culpa levissima*,' the other for only '*culpa lata, ó engaño.*' 2d, That if the advantage is equal to both parties, both are liable or bound for '*dolo y culpa leve.*' [20]

Taking this for granted, we deduce from the third principle, 1st, That, as the fidelity or integrity (*lealtad*) of the *depositario*, consists in his taking care (*guardar*) of the thing from which he derives no advantage, he is not liable to pay the damage if it should be lost or injured through '*culpa leve*' except the contrary was agreed on, or it was deposited at his own instance or request, or that he receives interest or remuneration [21] for the
L. 3. tit. 3. P. 5. custody or care of it, L. 3. tit. 3. P. 5. 2d, That much less will he be obliged to pay or make good the injury caused by *caso fortuito*, unless he should have fallen into delay or demurrage, by
L. 4. tit. 3. P. 5. deferring or withholding the delivery of the thing, L. 4. tit. 3. P. 5. 3d, That if a person to whose charge a thing should be committed by way of *miserable* deposit, should refuse to keep it, he must pay double its amount or value, upon the truth being proved; and the *depositario* of a *simple* [22] deposit will be rendered infamous, and shall be obliged to restore the deposit, and make good the loss (*perjuicios*), damage (*daños*), &c. to be estimated by the oath of the person depositing, and settled by the
L. 8. tit. 3. P. 5. authority of the judge, L. 8. tit. 3. P. 5.

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[20] *Palacios* observes on this, that fraud (*dolo*), is extended to all contracts; and also, *culpa lata*; when the advantage is only with him who gives or deposits the thing, the receiver is answerable for *culpa lata*; when the advantage is only with the receiver, he is answerable for *culpa levissima*; and when the advantage is mutual, the party blameable is answerable for *culpa leve*, and he refers to L. 2. tit. 6. P. 5., which does not apply; but it is supposed this law is erroneously cited for L. 2. tit. 2. P. 5. He adds that, accident or unforeseen events, commonly called *casos fortuitos*, do not extend to, or induce liability in, any contract. This general position, laid down by the learned Professor, does not exclude a party from protecting himself against the consequences of such accidents by special covenant, as mentioned in L. 4. tit. 3. P. 5., and as in the contract of insurance. On the subject and degrees of *culpa* or neglect, by the civil law, corresponding with what has been said in the text, and observed upon in this note by the learned Professor cited, see *Wood's Inst. Civ. Law*, book 1. ch. 1. P. 106, 107.

[21] See *Greg. Lop.* Gl. 12. L. 3. tit. 3. P. 5.

[22] The *Daños* here understood, observes *Palacios*, according to the same law cited in the text, are those which have arisen because the deposit was not returned when demanded, but not on account of what might have been gained by the thing or property deposited. See Gl. 9. *Greg. Lop.* on L. 8. tit. 3. P. 5., cited.

As to what relates to judicial deposit, it is to be observed, 1st, That in the *audiencias* and courts of justice (*juzgados*), there ought to be kept a book, in which deposits are to be enrolled, Lib. 23. tit. 2. Lib. 2. Rec.[23] 2d, That the *depositario* should render accounts annually to the judges, Aut. 21. tit. 14. Lib. 2. Rec.

Nota 8. tit. 14. Lib. 4. Nov. Rec. tit. 9. P. 3.

Sequestration (*el sequestro*) belongs to the subject of suits or actions (*al tratado de juicios*), as appears from tit. 9. P. 3.

* [170]

Cap. 8. Of loan (commodato or prestamo), of the first kind.

The third contract advantageous to only one party is loan (*prestamo*)[24], which is a sort of contract that men make with one another, some lending to others their property when they have occasion or necessity for it, L. 1. tit. 1. P. 5. This loan is either made gratuitously, or on the condition of a certain price being paid for its use.[25] That which is gratuitous, is either of things which are weighed, measured, or counted, which is called *mutuo*; or it is of things which cannot be weighed nor counted, for a certain use, and then it is called '*commodato*,' or of things to be used at the will or discretion (*al arbitrio*) of the person who lends, and then it is called *precarious* loan (*precario*).

L. 1. tit. 1. P. 5.

§ 1. Of the different purposes for which commodato is made.

Commodato[26] is a sort of loan that men make to one another, by which the receiver or borrower is to be benefited for a certain time, L. 1. tit. 2. P. 5. '*Commodato*' may be made, 1st, gratuitously, and for the advantage only of the receiver, as when a horse is lent, &c. 2d, For the utility or advantage equally of the lender, which will be always the case when the thing lent serves also the lender. 3d, When the thing is lent more for the honour and satisfaction of the lender than of the borrower, of which kind is the loan of a person's clothes or jewels to the wife, in order to appear more elegant, L. 2. tit. 2. P. 5.

L. 1. tit. 2. P. 5.

L. 2. tit. 2. P. 5.

Hence are deduced these three axioms, 1st, That '*commodato*' is made for a certain and determinate use. 2d, That the same thing which is lent must be returned.[27] 3d, That this contract

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[23] Not in the *Nov. Rec.*

[24] *Mutuum.* See *Wood's Inst. Civ. Law*, book 3. ch. 1. p. 212 & 213.

[25] *Palacios* says, that loan (*prestamo*), is by its nature gratuitous, and if a price should be introduced, it would not be a loan, but some other kind of contract; and refers to L. 1. tit. 2. P. 5.; and § 2. *Inst. quib. mod. re cont. oblig.*

[26] See *Wood's Inst. Civ. Law*, book 3. ch. 1. p. 215.

[27] The text says, the thing lent must be returned '*en la misma especie*': but it is thus translated, to convey what is thought to be the meaning of the text; for one of the differences between a *commodatum* and a *mutuum*, is, it is apprehended, that with regard to *commodatum*, the same thing is to be returned, and not the same quantity or quality as in a *mutuum*. See L. 2. tit. 1. P. 5.; and L. 9. tit. 2., *ibid.* See also the following title in the text; and such is the case by the civil law. See *Wood's Inst. C. L.*, p. 215., cited in the preceding n. 26.

is, from its nature, advantageous to the borrower. From the first axiom it results, 1st, That until the use or the time appointed for which it was lent be completed, the thing cannot be demanded; because until then the borrower is not obliged to return
L.9.tit.2.P.5. it, L.9. tit.2. P.5. 2d, That the time or the use for which it was intended having been completed, it ought to be restored to the owner or heir of the lender, without its being allowed to be retained by way of set off (*compensacion*), or on account of debt,
L.4.tit.2.P.5. L.4.[28] tit.2. P.5. 3d, That if it is not restored to the owner, the borrower is liable for the expenses, damages, and prejudices
L.9.tit.2.P.5. which he occasioned by the delay, L.9. tit.2. P.5.

[171] From the second axiom it arises, 1st, That every thing corporeal or incorporeal, personal or real, belonging to another[29],
L.2.tit.2.P.5. or to one's self may be lent, L.2. tit.2. P.5. *ad fin.* 2d, That the things which are consumed by use are only lent for pomp
L.2.tit.2.P.5. and luxury, of which kind L.2. tit.2. P.5. makes mention. 3d, That the borrower ought to take more care of the thing lent than of his own, which is called being liable for all *fault*, even '*levissima*;' but not for accidents (*acasos*) nor supernatural events, except they should happen after the expiration of the time for which the thing was lent, or it should have been applied to another use or purpose than that for which it was lent[30],
L.3.tit.2.P.5. L.3. tit.2. P.5. 4th, That the thing ought to be sent to the owner by a trusty and confidential person; because, otherwise, the borrower is responsible for the damage or loss[31]; but if it be delivered to any one who was sent for the purpose by the owner,
L.4.tit.2.P 5. it is at his risk from the instant of its delivery, L.4. tit.2. P.5. 5th, That if a thing be lent to many, each is responsible for his part, unless each binds himself for the whole. Also the heirs of the borrower, if, by their fault[32], they shall lose it, shall pay
L.5.tit.2.P.5. *pro rata*, L.5. tit.2. P.5. 6th, That if the value of the loan hath

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[28] It is supposed this law is erroneously cited for L.9. *ibid.*, before quoted, which contains an exception to the general position in the text, in the case of the debt having been contracted for the benefit of the *commodatum*, after it was lent, and the expense laid out on it was necessary.

[29] With such person's authority, must be understood, it is presumed. See L.2. tit.1. P.5. *Palacios*, in a note on this, observes that, L.2. tit.1. P.5. only permits the loan by a person of a thing which is his own; and that L.2. tit.2. P.5., does not permit the loan by one of another's property. It is conceived that the text meant to convey by the expression used, no more than is stated in the first part of this note.

[30] Or unless there should have been a special covenant to the effect. See L.3. tit.2. P.5.

[31] See *Greg. Lop.* Gl.1. on L.4. tit.2. P., 5. cited.

[32] Or if it hath been lost by the fault of their ancestor or testator.

been paid in consequence of its being considered lost, and it shall afterwards be found by the owner, he must deliver it to the borrower, or may retain it on returning the price or value which he shall have received; but if a third person should find it, the borrower has his action to recover it from him, L. 8. tit. 2. P. 5. L. 8. tit. 2. P. 5.

From the third axiom it is deduced, 1st, That the owner must make known the vice or defect of the thing lent[33], L. 6. tit. 2. P. 5. L. 6. tit. 2. P. 5. 2d, That the borrower must support, at his own expense, the beast which may be lent to him; and if it shall fall sick without his fault, he is entitled to recover what he shall expend in its cure, L. 7. tit. 2. P. 5. 3d, That if the owner is equally benefited by the thing lent, the borrower is only liable for '*culpa leve;*' which is understood of *commodato*, or loans of the second kind: and with respect to the third kind[34], the borrower is liable for the damage which may arise from *dolo* or malice (*malicia*).[35] L. 7. tit. 2. P. 5.

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[33] Such as the dishonesty of a slave, &c.; for concealment by the owner or lender, with knowledge of the vice, &c., renders him responsible to the borrower for the consequences of dishonesty, &c. See L. 6. tit. 2. P. 5., cited, and *Greg. Lop.* Gl. 1. & 2. ibid.

[34] See pp. 179, 180, ante.

[35] *Culpa lata.*

[172]

TITLE XI.

OF LOAN (*EMPRESTITO* OR *MUTUO*), AND OF DEBTS (*DEUDAS*).

Cap. 1. Of the second species of loan called mutuo.

THE other species of loan of which we have to treat, is *emprestito*, which may be considered as a thing that is lent at the request of the borrower, L. 1. tit. 1. P. 5. The thing lent must be of a quality which can be weighed, measured, or counted. Wherefore the contract of *emprestito*, is that by which the thing that is consumable (*cosa fungible*), is transferred to the dominion of another, under the obligation or condition of returning the like quantity in kind [1] as is deduced from Ll. 1. and 2. tit. 1. P. 5.

[173]

Ll. 1 & 2. tit. 1. P. 5.

Hence it is that '*mutuo*' can only be made of those things which consist of number, weight and measure. 2d, That this contract can only be valid on delivery of the thing. 3d, That it has the quality of alienation (*enagenacion*). 4th, That the debtor is bound to return to the creditor, an equal value or quantity of the same thing as that received or that which might be agreed on. From the first principle it follows, 1st, That the only objects of '*emprestito*' or *mutuo* [2] can be money, oil, corn, &c., Ll. 1. 2 & 8. tit. 1. P. 5. 2d, That the other things belong more properly to '*commodato*,' L. 1. tit. 1 P. 5.

Ll. 1. 2. & 8. t. 1. P. 5.

L. 1. tit. 1. P. 5.

From the second principle it results, 1st, That the pact or promise to lend does not make the person liable, who declares to have received the thing, unless two years pass after the execution of the instrument of writing, containing such declaration, or if it should be proved by the lender, that he really delivered the thing [3], although in the present day the renunciation of the ex-

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[1] See *Wood's Inst. Civ. L.*, p. 212, 213, before referred to.

[2] Which are not such as are weighed, measured, or counted.

[3] *Palacios* very justly observes that, it is necessary to refer to L. 9. tit. 1. P. 5., cited further on in the text, for a proper understanding of what is desired to be conveyed by the text. The substance of which is, that if a person, under the expectation of receiving a promised loan, executes a deed or instrument acknowledging the receipt of such promised loan, which, in point of fact, hath not been paid or delivered, and allows two years to pass by without claiming to be relieved against his act, or to have the instrument delivered up or cancelled, if he be sued, after the expiration of that time, on the deed, for the repayment or return of the thereby admitted loan, he will be liable for the amount. The renunciation in the deed of the exception, *non numerata pecunia*, mentioned in the succeeding sentence of the text, produces the like liability, even though the plea of non-receipt of such promised loan should be preferred before the expiration of the two years.

ception *non numerata pecunia*, L. 9. tit. 1. P. 5., is an usual clause in deeds. 2d, That the obligation of the '*emprestito*,' is binding or complete, inasmuch, or as far as delivery is made of the thing by its owner, or by another in his name, L. 2. tit. 1. P. 5. L. 9. tit. 1. P. 5. L. 2. tit. 1. P. 5.

From the third principle it is inferred, 1st, That the property (*senorio*) of the thing lent (*emprestito*) passes to the person who receives it, L. 2. tit. 1. P. 5. 2d, That the debtor or borrower remains bound or liable for the thing in whatever way, or by whatever cause it may be lost or destroyed, L. 10. tit. 1. P. 5., by reason of its being at his own risk. 3d, That those persons may lend who are able to alienate their property. L. 2. tit. 1. P. 5. L. 10. tit. 1. P. 5.

From the fourth principle it arises, 1st, That a loan can be made to the person only who is capable of being bound, or of binding himself; but if the loan '*emprestito*,' should be made to a church, city, town, to the king, or to another in his name, in order that either may be bound or liable, it is necessary for the creditor to prove the loan to have been converted to their benefit, L. 3. tit. 1. P. 5. But if the person sent in the name of the king demands a credit in virtue of a sufficient power which he may produce for the purpose, the king ought to pay the debt, whether it be or not to his advantage, L. 3. tit. 1. P. 5. 2d, That the child under the paternal power (*el hijo de familias*) cannot take any thing upon credit [4], L. 22. tit. 11. Lib. 5. Rec., which furnishes a clue to come at the right or true meaning of L. 4. 5 & 6. tit. 1. P. 5. 3d, That one who conducts a shop, or * business in the name of another, obliges or binds his principal for what he borrows by his authority or order, for the benefit [5] of the business or concern, L. 7. tit. 1. P. 5. 4th, That the thing lent ought to be returned at the time, place, and in the kind agreed upon; and if no time hath been expressed, restitution must be made within ten days, Ll. 2. & 8. tit. 1. P. 5.; and if the payment, hath been made in money, the thing must be valued if it should not be otherwise agreed on, according to what it should be worth, in the place and at the time it shall be sued for, L. 8. tit. 1. P. 5. L. 3. tit. 1. P. 5. L. 3. tit. 1. P. 5. L. 17. tit 1. Lib. 10. Nov. Rec. Ll. 4. 5. & 6. t. 1. P. 5. * [174] L. 7. tit. 1. P. 5. Ll. 2 & 8. tit. 1. P. 5. L. 8. tit. 11. P. 5.

[4] *Palacios* says that the effect, if any credit or loan should be given or advanced, is, that no one could demand or recover it, neither from the minor nor the person to whose power such child might be subject. He is borne out in this position by L. 17. tit. 1. Lib. 10. Nov. Rec.; which, in effect, seems to subvert or repeal all the provisions in Ll. 4, 5, & 6. tit. 1. P. 5., respecting the liability of such minors, &c., for loans for necessaries, &c. See those laws, and also L. 17. tit. 1. Lib. 10. Nov. Rec.

[5] If for such benefit, the principal is liable, even in the absence of any authority or order. See L. 7. tit. 1. P. 5., cited.

Cap. 2. Of the modes by which mutuo is extinguished.

L. 1. tit. 14. P. 5.

The obligation of loan (*emprestito*) and of every other debt is extinguished or discharged, 1st, By payment which is made to him who is to receive it, so that he is paid for it, L. 1. tit. 14. P. 5.

§ 1. Of solution or payment.

L. 2. t. 14. P. 5.

Hence it is, 1st, That whoever pays, discharges the obligation L. 2. tit. 14. P. 5. 2d, That payment should be made in the manner it was agreed upon; but if the debtor is not able to pay the same thing he promised, he shall pay with other things, obtaining, therefor, the sanction of the judge [6], L. 3. tit. 14. P. 5. 3d, That the payment which is made by a debtor, or by another in his name, even though it be against the will of the debtor, is valid, L. 3. tit. 14. P. 5. 4th, That it must be made to the creditor or to his attorney, Ll. 5. & 7. tit. 14. P. 5. 5th, That if the creditor be a minor, payment must be made to him under the authority or sanction of the judge, in order that the debt may be extinguished or discharged, L. 4. tit. 14. P. 5. 6th, That the payment being lawfully made, the debtor is exonerated and discharged, as are also his sureties, mortgages and heirs, L. 1. tit. 14. P. 5. 7th, That if a person be indebted on many accounts, or owe many debts to one person, and pay him something, it is to be understood (though not expressed) that he pays an equal proportion in discharge of all the debts [7], unless that one of them be more onerous (*mas gravosa*) [8] than the others; in which case the payment is understood to be made in discharge of it, L. 10. tit. 14. P. 5. The mode in which payment should be made to the father [9], to the monk, &c., is treated of by *Salgado Labyrint. cred.*, Part 1. cap. 27.

L. 3. tit. 14. P. 5.

L. 3. tit. 14. P. 5.

Ll. 5. & 7. tit. 14. P. 5.

L. 4. tit. 14. P. 5.

L. 10. t. 14. P. 5.

It often happens that a person pays what is not due through error or ignorance. These payments are null, and what has been paid must be returned, upon proving the error or mistake, L. 28. tit. 14. P. 5. This proof must be given by the plaintiff, the defendant confessing the payment; and if he deny it, it will be sufficient for the plaintiff to prove having made the payment, in order to be entitled to recover. [10] But if the plaintiff should be a minor under twenty-five years, a woman, a simpleton

L. 28. t. 14. P. 5.

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[6] Or without it, if the creditor should consent. L. 3. tit. 14. P. 5., cited.

[7] *Palacios* says, provided all should be equally long due, and of the same class; for if not, the payment should be applied in discharge of that which was first due, and he cites *Greg. Lop.* Gl. 4. L. 10. tit. 14. P. 5.

[8] By reason of the existence of a penalty for non-payment of the debt bearing interest, &c. See L. 10. tit. 14. P. 5., cited.

[9] On account of his son.

[10] Unless the defendant should prove that the payment was made because it was justly due to him, L. 29. tit. 14. P. 5.

(*sencillo*), a labourer, or military person, and the defendant acknowledge the payment, the latter must prove it to have been lawfully made, L. 29. tit. 14. P. 5.

On all that has been said, it is established, 1st, That whoever paid what he knew he did not owe, cannot recover it back, unless he were a minor, L. 30. [11] tit. 14. P. 5. 2d, That what is paid through ignorance of law, cannot be recovered back, because we are all obliged to know the laws of the kingdom [12], from the study of which only military persons, women, labourers [13], minors, &c., are exempted, L. 31. tit. 14. P. 5. 3d, That if payment is made of a debt which was not justly due in consequence of a sentence of the judge, it cannot be recovered back, unless it be proved that the sentence was given through false instruments [14], L. 33. tit. 14. P. 5. 4th, That the possessor of an estate under good faith, may deduct from the estate what he shall have paid or incurred on account of it, L. 36. tit. 14. P. 5. 5th, That if a person who is obligated to deliver one of two things [15], should deliver or pay both through error, he may recover back which of the two he thinks fit [16], L. 39. tit. 14. P. 5. 6th, That the tradesman or artificer shall recover his charges from the person for whom he performed any work, under a supposition [17] that he was obliged to do it, L. 40. tit. 14. P. 5. 7th, That if the thing which is delivered through error of fact, should yield fruits, it must be returned together with them; and if the person who received it under bad faith (*con mala fe*), should sell or lose it, he is obliged to restore the price according to the valuation of the judge; but if he were a possessor, '*de buena fe*,' he is only bound to the restitution in the case of selling it, L. 37. [18] tit. 14. P. 5.

L. 30. t. 14. P. 5.

L. 31. t. 14. P. 5.

L. 36. t. 14. P. 5.

L. 39. t. 14. P. 5.

L. 40. t. 14. P. 5.

L. 37. t. 14. P. 5.

This action for the recovery of what hath been paid through error, which the Romans called *condictio indebiti*, ought not to be confounded with other actions, because whoever for a certain honest object, and not through error, pays or delivers that which he promised, may recover it back, if the condition or object on or for which it was paid or delivered is not fulfilled, Ll. 41. 43.

Ll. 41. 43, 44. & 46. tit. 14. P. 5.

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[11] L. 3. is erroneously cited in the original.

[12] See also L. 20. tit. 1. P. 1.

[13] The law cited, L. 31. tit. 14. P. 5., says, simple labourers.

[14] Or false testimony. See L. 33. tit. 14. P. 5., cited.

[15] As a horse or a mule, instanced in L. 39. tit. 14. P. 5., cited.

[16] Provided both, as in the example put in L. 39. tit. 14. P. 5., should be alive; for if only one should remain, it seems, he forfeits the opportunity of relieving himself against the effect of his error.

[17] Erroneous in point of fact. See L. 40. tit. 14. P. 5., cited.

[18] For which L. 57., *ibid.*, is erroneously cited in the text.

44. & 46. tit. 14. P. 5.; and he who delivered something for any indecorous or disgraceful object [19] on the part only of the person who receives it, has his action '*ob turpem causam*,' to demand it back, if what was agreed upon be not fulfilled or complied with, examples of which are given in Ll. 47, 48, 49. 53 & 54. tit. 14. P. 5. [20] But if this turpitude rests on him who gives or pays for the said object, he has no right to recover it back [21], L. 50. tit. 14. P. 5.

Ll. 47, 48, 49. 53, & 54. tit. 14. P. 5.

L. 50. t. 14. P. 5.

§ 3. Of the discharge or release (quitamiento) from the debt.

The second mode by which the debt is extinguished, is by * discharge or release (*quitamiento*), when those duly authorised agree or consent never to demand from the debtor what was due by him, or when they discharge or release him from the debt, L. 1. [22] tit. 14. P. 5. Hence it is that the discharge must be made by the creditor himself, or by his attorney having power to grant it, L. 7. tit. 14. P. 5.

* [176]

L. 1. tit. 14. P. 5.

L. 7. t. 14. P. 5.

§ 4. Of novation (renovamiento).

The third mode of discharging the debt is by novation (*renovamiento*), changing the cause of the debt or obligation, by paying in the way of loan that which was due in consideration, or for the value of a thing purchased; or by the debtor offering to the creditor another person to pay in his stead the debt [23] which he owes, L. 15. tit. 14. P. 5. In this case, 1st, It is necessary that the new or substituted debtor whom our laws term '*manero*,' be expressly recognised or received by the creditor, renouncing the first debt [24], because otherwise both of them remain bound, L. 15. tit. 14. P. 5. 2d, If this novation should be made conditionally, it has no force until the condition be fulfilled, L. 15. tit. 14. P. 5. 3d, This novation may be made by the new debtor obliging himself to pay or do purely or absolutely (*puramente*) that which was owing or performable conditionally, and expressly stating this circumstance [25], L. 16.

L. 15. t. 14. P. 5.

L. 16. t. 14. P. 5.

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[19] *Ob turpem causam.*

[20] Which see.

[21] *Palacios* observes, that this doctrine will be better understood by saying that, when the turpitude is only on the part of the receiver, the right or reclamation takes place; but when it is on the part of both giver and receiver, or on the part of the giver alone, it does not take place: only when there is no turpitude on the part of the giver does the right of reclamation exist.

[22] Not L. 11. *ibid.*, erroneously quoted in the original.

[23] This is properly called delegation. See *Greg. Lop.* Gl. L. 15. tit. 14. P. 5., for which L. 15. tit. 4. P. 5., is misquoted in the original.

[24] Or rather releasing the first debtor from responsibility: this, although the literal version of the text, is not given in the exact words of the law cited, although clearly conveyed by it. See, however, *Greg. Lop.* Gl. 4. 6, & 7., L. 15. tit. 14. P. 5., cited.

[25] Or rather his consent to pay positively, although the condition on which the payment was originally due should not be fulfilled. See L. 16. tit. 14. P. 5., cited. *Palacios* also here observes, referring to the law just cited, that when

tit. 14. P. 5. 4th, As the novation of debts is a new obligation, the child under paternal power (*de familias*), shall not be able to contract it, except with respect to his property, called *castrense*, or *quasi castrense*, L. 17. [26] tit. 14. P. 5., nor the minor without the authority of his guardian [27], L. 18. tit. 14. P. 5. 5th, He who becomes '*manero*,' or undertakes to pay a debt for a person to whom he believed himself indebted, although he is obliged to pay the debt, will have his action to demand from him for whom he became bound, a release from the obligation, supposing he is not indebted to such person; and if the latter is not willing to consent to this, he shall be obliged to make satisfaction to the former for what he shall pay in his name, L. 19. tit. 14. P. 5.

L. 17. t. 14. P. 5.

L. 19. t. 14. P. 5.

§ 5. Of tender of payment (consignacion ú oblacion.)

The fourth mode of discharging the debt is by tender of the debt or money due (*consignacion ú oblacion*), when the debtor offers the payment at its time, and the creditor will not receive it; for then the former, by depositing it in the custody of the judge, or paying it into court, remains discharged from the obligation, and the good or ill that shall attend the thing is at the risk and injury of the creditor [28], L. 8. tit. 14. P. 5.

L. 8. tit. 14. P. 5.

§ 6. Of compensation or set off.

The fifth mode of discharging the debt is by compensation or set off, discounting one debt for another. In order to the validity of compensation, it is necessary, 1st, That the parties agree among themselves privately, or in court (*en juicio*). 2d, That the debts be certain; for proof of which, when judicially pleaded

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the first obligation is conditional, and the second pure, there is no novation if the condition is not fulfilled; for it cannot be said that the second obligation renews the first, when the first does not yet exist, and it does not exist while the condition is not performed: notwithstanding, if it should be agreed that, although the condition of the first obligation might not be fulfilled, the second should be valid or binding, it would in effect be so, as is said in the law referred to; but it could not be said, properly speaking, that there was a novation in such case.

[26] This is a misquotation in the text: L. 17. tit. 14. P. 5. declares, a slave, except for a debt incurred by his owner by reason of the purchase for him of a *pejugar*, cannot novate; nor can a *femme coverte*, novation being in the nature of a security to which a married woman cannot bind herself. See the exception in L. 3. tit. 11. Lib. 10. Nov. Rec.

[27] See L. 18. tit. 14. P. 5. cited; by which it appears, that a novation of a debt accepted from a minor, without the consent of the guardian, is not only not binding on the minor, but has the effect, also, of releasing the first debtor from the original obligation. See also *Greg. Lop.* Gl. 1. on this law.

[28] This will be equally the case, if the debtor should make an actual tender of the money to the creditor, at a proper time and place, before legal witnesses (*buenos omes*), and on the creditor's refusing to receive it, should deposit it in the custody of a trust-worthy person, or in the vestry of any church. See L. 8. tit. 14. P. 5. cited.

L.20.t.14.P.5. L.1.tit.28. Lib.11. Nov. Rec.

(*en juicio*), a term of only ten days is given[29], L. 20. tit. 14. P. 5. & L. 2. tit. 21. Lib. 4. Rec. 3d, That the debts which are set off, be specified, certain, and *liquid*, L. 21. tit. 14. P. 5. 4th, This compensation ought to be judicially prayed for or demanded by the defendant, or party that was sued, and by no other[30], except such give security that defendant will ratify and confirm,

L.25.t.14.P.5.

or hold valid what he shall do on his behalf, L. 25. tit. 14. P. 5.[31] 5th, Compensation does not take place in debts of the king, or

L.26.t.14.P.5.

of any corporation, L. 26. tit. 14. P. 5. 6th, Nor in the case of a deposit and of a debt which results from judicial sentence[32],

L.27.

L. 27. tit. 14. P. 5.

§ 7. Of the letter of licence (moratoria) which suspends the debt.

The letter of licence (*moratoria*) which the king may grant to debtors to prevent their being molested by their creditors, does not extinguish the debt, but only suspends it until the specified time.—*Vide Salgado Labyrint. Cred.* Part 2. Cap. 3.

Cap. 3. Of the suits of cession of property, and meeting or concurso of creditors.

As it often happens that debtors owe so much that their property is not sufficient to pay all their debts, the laws have provided the two proceedings of cession of property, and a meeting (*concurso*) of the creditors of a bankrupt[33], by which the former

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[29] *Palacios* says, these ten days are for the defendant, who alleges the compensation to prove the debt due to him; for if he does not prove it in this period, the Judge will not allow the plea, and will proceed in the cognizance of the cause. It is said in the *Teatro de la Legis de Esp.* vol. 7. tit. compensation, p. 363. that the claim of set off may be alleged either before or after contestation of the plaintiff's demand, or in the act of the execution of the sentence. But if it is pleaded as an exception, it shall be pleaded and proved like all other exceptions, that is, on citation to *remate*. See L. 1. tit. 28. Lib. 11. Nov. Rec. & L. 20. tit. 14. P. 5. cited in the text. See also Appendix Q & R.

[30] 'Not only,' says *Palacios*, and as appears by L. 24. tit. 14. P. 5. to which he refers, 'may the principal debtor pray or plead compensation, but so may his surety, in respect of the debt which is due by the plaintiff to himself, or to the defendant, for whom he was surety.

[31] L. 25. tit. 14. P. 5. cited, particularly applies to the case of the son's pleading, on the behalf of his father, a set-off of a debt due by the plaintiff to the latter. See L. 24. tit. 14. P. 5. cited in the antecedent note.

[32] Given for an injury or offence committed against the injured party, by the person sentenced to pay it, as is observed by *Palacios*, and stated by L. 27. tit. 14. p. 5. cited in the text. The doctrine of compensation is said, in the *Teatro de la Legis de Esp.* vol. 7. cited in n. 29. ante, to have been adopted from the civil law without any alteration in practice. See *Wood's Inst. Civ. L.* book 3. ch. 9. p. 259. See also 3d *Blac. Com.* ch. 20. p. 304-5.

[33] *Palacios* observes, that the text here proposes two different suits (*juicios*) *cesion de bienes*, and *concurso de accredores*, and under this division treats of both in their separate order; but that it ought to be observed, in order to avoid confusion and mistake, that what is said of one, appertains to the other; and that really they are one and the same thing, whether under the name of *cesion de bienes*, or under that of *concurso voluntario y preventivo*; the first being called *cesion de bienes*, because the debtor makes the cession; and the other *concurso*, because the creditors resort to it; that it is true there is a cession of property called *simple cession*, (for the differences between which, he refers to *Salgado, Labyrint. Cred.* p. 1. c. 1. § *init. et sequent.*) and that there

secure what is due to them as far as the amount of his property is capable of satisfying them.

§ 1. Of the proceeding of cession.

The proceeding of cession is termed surrender (*desamparamiento*), by the laws of the Partida, tit. 15. P. 5. By it those whom ill fortune has reduced to the situation of being unable to pay their debts with the property they possess, cede it to their creditors in order that they may be paid out of it as far as it may be sufficient.

This cession may be made, 1st, By every person who shall be either his own master, or subject to the power of another, not having wherewithal to pay his debts [34], L. 1. tit. 15. P. 5. 2d, The person who makes this cession ought to be a prisoner until the suit of his creditors be finished [35], and shall be set at liberty on giving sufficient security [36] to pay at the periods stipulated, provided they do not extend beyond five years, L. 7. tit. 19. Lib. 5. and L. 16. tit. 18. Lib. 4. Rec.; without the creditors being able of their own authority to arrest their debtors, Ll. 5 & 6. tit. 13. Lib. 4. Rec. 3d, The cession ought to be made before the judge by the debtor himself or by his attorney, acknowledging his debts, and [37] after a sentence has been given

L. 1. tit. 15. P. 5.

L. 7. tit. 32. Lib. 11., L. 19. tit. 20. Lib. 11. Nov. Rec. Ll. 5 & 6. t. 34. Lib. 11. Nov. Rec.

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are other sorts of *concursos*, as the necessary, which is called *pleyto ú occurrencia de accredores* (*suit*, or meeting of creditors;) that called *espera* or *moratoria*, (time granted by creditors to debtors, for payment of their debts, See 7th vol. *Febr. ad* P. 2. lib. 3. ch. 3. § 3. p. 116. commencing n. 232.) and that called *remision ó quitamiento de acreedores*, (remission or abatement made by creditors in their demands, in favour of their debtors; See 7th *Febrero adic*, just quoted, p. 124. n. 245. to p. 125. ending n. 248.) but that the voluntary sort, or *cesion de bienes* is here treated of, which is called *concurso voluntario y preventivo*, and is that which is now in use. That cession of property, or voluntary and preventive *concurso* is, therefore, under this conception, a legal benefit or remedy which the Romans granted, L. 1. *et* 4. c. *qui bon. ced. poss.*, and was adopted in Spain for the benefit of debtors, who, by the misfortunes and calamities of the times, were unable to pay their creditors, being on this account imprisoned at the suit of some of them; and to prevent thereby such debtors being subjected to the vexations which their creditors caused them; and in order that they might recover their liberty on making a judicial cession of their property in favour of their creditors, and that the latter might be paid thereout, according to the preference of their demands; that this benefit hath been since extended to those who are not imprisoned. The Learned Professor concludes by referring for fuller information on the subject, to *Curia Philip.* § 24. P. 2. p. 165. *cesion de bienes. Covarubias*, Lib. 2. *var res*, ch. 1. L. 2. tom. p. 140. to *Salgado, Labyrint. Cred.* before cited, or to *Febr. refor.* Lib. 3. c. 3. § 1. tom. 5. P. 2. p. 71.

[34] See 7 *Febr. ad.* P. 2. c. 3. § 1. p. 2. n. 4. 5. 6. 7. & 22. p. 10. as to those who cannot make a cession.

[35] This is not at all necessary. See n. 33. ante; and so *Palacios* repeats in a note in this place.

[36] The giving security would seem to apply to the case of *espera*, and not to extend to *concurso* or cession. See L. 7. tit. 32. Lib. 11. Nov. Rec. cited in the text.

[37] Read or see L. 1. tit. 15. P. 5. cited. In either case or mode may the cession be made, says *Palacios*. See *Greg. Lop.* Gl. 3. on the same law.

[178] against him, Ll. 1. & 4. tit. 15. P. 5. 4th, The practice and judicial form or solemnity consist in the debtor presenting a petition, stating the reason of his imprisonment [38], accompanied by two memorials or lists, one of his property and the other of his creditors, praying that the cession may be admitted, that an administrator of the property may be named or appointed, and himself set at liberty on his giving security [39] to pay, if he should arrive at better fortune, which cession is admitted no fraud being proved. But merchants who, six months before becoming bankrupts, took merchandise or money, on credit, are considered as fraudulent bankrupts (*alzados*), and incur the penalties set forth in Ll. 2. & 6. tit. 19. Lib. 5. Rec., as provided by L. 7. *ibid.* 5th, The ceremony of putting the ring round the debtor's neck spoken of by Ll. 6. 7. & 8. tit. 16. Lib. 5. Rec. [40] is not now in use. 6th, The cession is allowed on account or behalf of property which has been stolen (*por lo hurtado*) [41], on the corporal punishment being carried into execution, L. 9. tit. 16. Lib. 5. Rec. This cession is commonly formed when one or more persons are creditors [42] for debts of the same nature and class [43], L. 2. tit. 15. P. 5.; and thus first, by this proceeding all are equally [44] paid according to the amount due to them, from the value or proceeds of the property sold at public auction under the authority of the judge, leaving nothing to the debtor but his wearing apparel, Ll. 1 & 2. tit. 15. P. 5.; unless this cession should be made by the father or the ascendants in favour

Ll. 2. & 6. t. 32. Lib. 11., L. 7. tit. 32. Lib. 11. Nov. Rec.

L. 8. tit. 32. Lib. 11. Nov. Rec.

L. 2. t. 15. P. 5.

Ll. 1 & 2. t. 15 P. 5.

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[38] If such should be the case. There are seven requisites to a properly formed cession or *concurso*, stated by *Febrero adic.* 7th vol. before quoted, p. 5. n. 10. *ad fin.* nos. 11. 12. 13. 14. 16. & 17. ending p. 8. *Salgado, Labyr. cred.* tom. 1. pars 1. c. 1. says, there are six. See ibid. num. 7. 13. 21. 22. 27. & 41.

[39] It seems that this may be nominal security, or the *cautio juratoria* of the bankrupt, if he is not able to give any other. *Præstabit* (says *Covarubias*, 2d tom. Lib. 2. cap. 1. *var. res.* p. 143. num. 1.) *cedens cautionem de solvendo ære alieno cum ad pinguiorem fortunam pervenerit: cautionem inquam juratoriam cum eo in statu aliam dare non valeat.*

[40] See nota 1. tit. 32. Lib. 11. Nov. Rec. which says, the laws cited in the text are obsolete.

[41] Theft (*hurto*). The punishment may be said to be two-fold by the Spanish law; first, as regards the relief to the party injured, or from whom the property is stolen, in its restitution, and sometimes beyond that, to him; and as regards the reparation to the public in the corporal punishment of the offender, according to the nature or quality of the offence, &c. See THEFT, Tit. XX. post.

[42] Three creditors, at least, are necessary, whose names must be set forth in the schedule or list to be given in by the debtor, at the time of making the cession. See *Febrero ad.* 7th vol. P. 2. Lib. 3. § 1. p. 7. & *Salgado*, c. 1. n. 41. Par. 1. p. 7.

[43] And likewise when of different classes. See L. 2. tit. 15. P. 5. cited.

[44] Not so. They are paid according to the preference to which their demands are respectively entitled. See § 2. post.

of the descendants, or *vice versâ*; or by the husband in favour of his wife, or by her in favour of him; or by the partner in favour of his copartner; or if this cession should be formed on account of a donation promised; for, in all these cases, the judge ought to leave a part of the property to the debtor for his support according to his situation in life (*estado*), L. 1. tit. 15. P. 5; and as to what respects alimentary allowance to a debtor, see *Salgado, Labyrint. cred.* Part. 1. cap. 24.[45] 2d, In virtue of this cession the personal creditor may sue the debtor of his debtor, *Olea de cessione jur.* tit. 4. quæst. 4. n. 1., and the mortgagee who has a mortgage upon any note or bond (*vale*) of his debtor may sue the obligor of the note or bond on behalf of his debtor, *Olea, ibid. á* n. 23. *al fin.* This cession does not comprehend or include the property of the wife which is not bound for the debts of her husband, L. 7. tit. 3. Lib. 5. Rec., nor can she be imprisoned (*ser presa*) for civil debt[46], Ll. 10. & 8. tit. 3. Lib. 5. Rec.

L. 1. tit. 15. P. 5.

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L. 2. tit. 11. Lib. 10. Nov. Rec.

Ll. 2. & 4. tit. 11 Lib. 10. Nov. Rec.

The meeting (*concurso*) of creditors is another proceeding (*otro juicio*) by which the debtor cites all his creditors in order to be paid according to the force and priority of the right of each. This proceeding is different[47] from the *cession* of property; 1st, Because in the *concurso*, as the only contention is with respect to the strength and preference of the sum due to the creditors, the amount that is due to each of them ought not to be expressed in the schedule or list of creditors. 2d, Because in the proceeding of *concurso* each creditor is cited individually or particularly. 3d, Bankrupts may form a *concurso*, but cannot make a cession[48], *Salgado, Labyrinth. credit.* Part. 1. cap. 1.

§ 2. Proceedings against insolvent debtor by his creditors; or concurso of creditors.

The competent judge in this proceeding, is he to whose jurisdiction the debtor is subject according to practice: for he is in this case the defendant, *Salgado, ibid.* Part. 1. cap. 2.; and even though the creditors be clergymen, or persons privileged (*exentos*), they ought to have recourse in this proceeding to the lay judge, *Salgado, ibid.* cap. 6.

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[45] 1 tom. p. 194. [46] See Appendix I. [47] See note [33], p. 190. *ante.*

[48] *Palacios* says, that these differences pointed out between *concurso* and cession, must be understood to apply to simple cession. The alleged difference in the text respecting bankrupts, applies to fraudulent bankrupts mentioned in the laws of the 32d title, 11th book, Nov. Rec. See also 7th vol. *Febrero ad.* before cited, p. 3. n. 6. & 7.; 1st vol. *Salgado, Lab. Cred.* p. 7. n. 51. c. 1. Part. 1. There is no effectual difference between cession and *concurso*. They are both directed to the same object, the payment of the debts due by the insolvent, as far as the property ceded will go in satisfaction of them. See *Salgado, ibid.* n. 57. & 7th vol. *Febrero adic. ibid.* § 2. n. 40. *al fin.*

The exchequer or crown (*fisco*) alone, being a creditor, has the privilege of evoking the cause before its own judge; but this is avoided whenever a part of the property is separated or put apart for the payment of the crown's debt, *Salgado, ibid.* cap. 7. *á* n. 14. *al* 19.

The *concurso* of creditors is found established on these principles, 1st, That it is indivisible, as well with regard to the property of the debtor as to the rights of the creditors. 2d, That in it the creditors are to be graduated and paid according to the prelation of the sums due to them. 3d, That this proceeding is an acquittance and discharge from the debts to that day contracted by the debtor. [49]

According to the first principle, 1st, When the debtor forms a *concurso*, all the causes for debt pending against him ought to be accumulated to this proceeding, *Salgado, ibid.* Part. 1. cap. 4. n. 6.; in which case he cannot revoke or supersede the proceeding according to practice and general opinion, unless it be by paying his creditors [50], *Salgado, ibid.* Part. 3. cap. 16. 2d, If the concurso was formed by the creditors, although it be in a particular suit or proceeding, the causes ought to be accumulated, the judge before whom the suit was instituted having cognizance [51],

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[49] Unless, says L. 3. tit. 15. P. 5., he should have acquired such property (*ganancias*), as might enable him to pay all or a part of his debts, and to have sufficient left to live upon. So says the Learned Commentator on the laws of England, in a note *y*. p. 483. 2d. vol. book 2. ch. 31. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. The learned Commentator on the *Partidas, Greg. Lop.* Gl. 3. on the law cited in the first part of this note, seems to think the debtor would not be so liable in respect of such after-acquired property in the case of compulsory cession, or *concurso de accreedores: nota quod si cessio bonorum facta fuit cum vituperio, non tenebitur postea debitor etiam si pervenerit ad pinguiorem fortunam:* and he adds, in Gl. 4. on same law, *Et sic in bonis quæsitis post cessionem non tenetur ultra quam facere potest deducto, scilicet ne egeat.*

[50] *Palacios* says, that by L. 2. tit. 15. P. 5., the debtor shall be able to revoke the proceedings without paying his creditors, before the cession is accepted and the creditors resort to the *concurso*. This he has adopted from *Febrero Reformado*, whom he cites: see 5th vol. page 84. n. 33. ch. 3. § 1.; and perhaps has collected it from *Greg. Lop.* Gl. 3. on this law cited; but the law itself only says, that the debtor may prevent the sale of the property ceded by him, alleging, he wishes to get it back to pay his debts, or to make lawful defence against the claims of his creditors. See L. 2. tit. 15. P. 5. *al fin.* *Palacios* goes still further, and concludes his note referred to by adding, that the debtor may even revoke the proceeding after it is contested, and without paying his creditors, if they refuse to suspend it (*remetir*); but he is not supported by the quotation to which he refers in *Febrero Refor. ibid.*

[51] *Palacios* here observes, that when the *concurso* hath not been formed by the debtor, but by the creditors, it is called necessary *concurso*, or *meeting* or *proceeding of creditors;* and in this case, although it may agree in some

Salgado, ibid. Part. 1. cap. 4. § 1. 3d, The same takes place, although one of the creditors may have obtained a sentence in another tribunal; because to preserve his right, he is obliged to have recourse to the *concurso*, *Salgado, ibid.* Part. 1. cap. 4. § 2. 4th, The creditor who does not make this application within the prescribed time [52], loses his preference of rank (*grado*) and mortgage [53], saving his right of recovering from what should remain, *Salgado, ibid.* Part 1. cap. 8. 5th, Although the creditor retain the pledge (*prenda*) he must bring it into the *concurso*, *Salgado, ibid.* Part. 1. cap. 11. P. 87. *á* n. 3. *al* 11. 6th, The creditor to whom tenant in tail (*poseedor de mayorazgo*) hath obligated or mortgaged all his property, which obligation was afterwards confirmed by the judge [54], ought to be graduated or ranked (*graduarse*) in this proceeding, notwithstanding *Salgado, ibid.* Part. 1. cap. 31., says that the approbation only respected the property which the tenant was able to obligate. [180]

From this it is also deduced, 7th, That the property which the debtor made over or assigned to his creditor, shall be brought into *concurso*, although it was assigned under an agreement, that it should not come into *concurso*, *Salgado, ibid.* Part. 1. cap. 12. [55] 8th, That the heir of the debtor, during the *concurso*, although he should not have made an inventory, is not obliged to make satisfaction out of his patrimony for the difference of property [56], *Salgado, ibid.* Part. 2. cap. 1. *á* n. 6. 9th, If the grandson, after the death of his father [57], hath acquired the inheritance of his grandfather, the creditors of his father have no right or claim against this inheritance, *Salgado, ibid.* Part. 2. cap. 25. n. 17. & 18. 10th, When there are many demands against a debtor, but relating to different concerns (*negociaciones*) [58], and inheritances or properties (*patrimonios*), a separation of property

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things with the voluntary and preventive proceeding or cession, it is different in various others; and he refers to *Febrero Refor.* 5th. vol. lib. 3. ch. 3. § 2. n. 86.

[52] Being specially and personally cited, it is presumed.

[53] This is not a settled opinion. See 1st *Salgado, Lab. Cred.* 1st. tom. ch. 8. Part. 1. before cited, n. 18. *et seq.*

[54] *Palacios* observes, properly, that *Salgado* says confirmed by the king; and that it ought to be so expressed: and he refers the reader to *Salgado* on this matter, in the cap. 31. Part. 1., cited.

[55] Num. 8. 22. & 23.

[56] This must mean if the heir hath not entered on the inheritance; because, otherwise, the reverse of what is laid down in the text, is stated by *Salgado* in Part. 2. cap. 1., cited n. 7.

[57] That is, his father having predeceased his grandfather.

[58] See *Cur. Phil.* tit. *Prelacion*, p. 424. n. 60.; *Febr. Adic.* 7 tom. lib. 3. c. 3. § 2. p. 115. n. 230.

is made, *e.g.* the creditors of the deceased do not class with those of the heir, particularly if he inherited with benefit of inventory: the same occurs when two intails are united in one person; or when there are creditors of a certain or particular administration, &c., *Salgado, ibid.* Part. 1. cap. 9. 11th, This accumulation of property and demands (*creditos*) is made equally in the *concurso* formed by the donee, or purchaser, when the debtor gives or conveys his property to them under an agreement to pay or satisfy his creditors, *Salgado*, Part. 2. cap. 26. *á* n. 54. *al fin*, which is founded on the statement in L. 2. tit. 16. Lib. 5. Rec., that in virtue of an agreement, a right of action may be acquired against a stranger or third person[59].

L. 1. t. 1. Lib. 10. Nov. Rec.

[181] Under the second principle, is comprehended the graduation or ranking of creditors. Of them we may form four classes. In the first, we place those who come with, or are entitled to dominion. In the second, those who have mortgages. In the third, personal chirographical (*quirografarios*) creditors.[60] And, in the fourth place, creditors by verbal contracts.[61] To the first class belong, 1st, All those who deposit any thing except money, or other things which are wont to be delivered, measured, weighed, &c., because being of such a nature or description, the claimants are paid after the mortgage creditors: for it is not certain or clear, whether the articles exist or remain[62], L. 9. tit. 3. P. 5. 2d, Those who deliver any thing on loan (*cosa pres-*

L. 9. tit. 3. P. 5.

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[59] See *Azevedo* on L. 2. tit. 16. Lib. 5. Rec.; n. 26. 27. 30. 31, &c.

[60] On simple written instruments, or notes of hand, &c. *Dr. Browne*, 1st. vol. *Civ. L.* p. 257. book 2. ch. 8. says, that *chirographa* may be compared with deeds poll.

[61] For full information respecting the different classes of creditors, and the preference of their demands, see *Curia Philip.* title *Prelacion*, lib. 2. *com. Ter.* c. 12. p. 414. *Febrero ad.* 7 tom. Part. 2. c. 3. § 2. p. 18. *et seq.* or *Febr. Reform.* tom. 5. Part. 2. c. 3. § 2. p. 86. *et seq.*; and upon the whole matter of cession, *concurso*; and see the elaborate work of *Salgado, Labyrinthus Creditorum*, if this title should not damp the ardour of research, and deter from reference to this last work. The work of *Febrero*, however, treats, masterly, the whole subject.

[62] *Quære*, if the money, &c., can be identified, whether not entitled to preference. See *Febr. ad.* 7 tom. P. 2. Lib. 3. c. 3. § 2. p. 101. n. 200, also 201. *Palacios*, referring to L. 2. tit. 3. P. 5., says that the reason for what is laid down in the text is, because the things there mentioned are of such a nature, that the dominion or property in them passes to the depositary; and that, consequently, the person who deposited them cannot claim thereby right of dominion, as he may those things which he deposited, and which do not consist in weight, measure, number. See note [8], page 178. *ante*.

[63] *Palacios* says, that *prestar*, properly speaking, is said of those things which are delivered by weight, number, or measure; and under this view, those who delivered any thing on loan (*prestada*), so far from being in a state to re-demand the dominion of it, have transferred it to the borrower (*mutuatario*), who received it, L. 1. tit. 1. P. 5. That what the text says, takes place when a book

tada)[63], according to L. 33. tit. 13. P. 5., in these words, '*Si el debdo primero es sobre peño*,' &c. 3d, The exchequer (*el Fisco*), when the property of the debtor has been confiscated, because the mortgage of the creditors is determined, and the *Fisco* acquires the Dominion, *Salgado, ibid.* Part. 4. cap. 9. L. 33. t. 15. P. 5.

The creditor for expenses incurred on account of the funeral of the deceased debtor, although he has only a personal action, is so privileged, that he is preferred to every mortgage creditor, L. 30. tit. 13. P. 5.[64] *Rodriguez de concurs. cred.*, Part. 1. art. 3. num. 1 & 2. After him the costs of the suit and formation of the concurso, among which expenses are included those incurred by the administrator, shall be paid from the mass (*del cuerpo*) of the property; nevertheless, the administrator cannot retain the property, on account of any balance that may be due to him, but must have recourse to the concurso, *Salgado, ibid.* Part. 3. cap. 9. n. 12.[65] L. 30. t. 13. P. 5.

Among the mortgage creditors of the second class are privileged, 1st, *Dote*[66], and the exchequer (*Fisco*) according to their respective anteriority, Ll. 29. & 33. tit. 13. P. 5. 2d, Those who give credit or lend money, to purchase, repair, preserve, and keep in order property mortgaged (*la hipoteca*), are preferred to the anterior mortgagees, L. 9. tit. 3. P. 5. and Ll. 28[67] 29, 30, tit. 13. P. 5. Ll. 29. & 33. tit. 13. P. 5. L. 9. tit. 3. P. 5. Ll. 28, 29, 30. tit. 13. P. 5.

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horse, or other things not accustomed to be counted, weighed, or measured, are the subject of loan; in short, when delivered *en comodato*, that is to say, when the dominion or property hath not been transferred. He adds, that L. 33. tit. 13. P. 5. cited, in the text, does not treat of loans (*prestamos*), but of the privileges of the *fisc*, and *femme coverte*, for *dote*, with respect to her husband's property, &c. See this law.

64 See also L. 9. tit. 3. P. 5.

65 Wrongly cited. See *d* n. 5. *al* 7. *ibid.*

66 L. 29. tit. 13. P. 5. adds, *ó de arras*; but *Greg. Lop.* Gl. 2., on this law, says, that this is understood of *arras* given in augmentation of *dote*, but not of simple *donatio propter nuptias*. See note 35, p. 62. *ante.*

67 The extraordinary extent to which the privilege arising from the doctrine contained in this law was carried under the sanction of judicial decisions in Trinidad, demands some notice, although the pretension to such privilege has been removed by a late Order in Council, of 5th August, 1822, given in the Appendix S.

So early as the month of October, 1809, in a case entitled 'Foulk *versus* Whitmore,' decided by his Honor, George Smith, Esq., now deceased, then Chief *Oidor* of Trinidad, and late Chief Justice of the Mauritius, as published in the Trinidad Gazette at the period in question, a claim was urged by the supplier of what were termed necessaries for the subsistence of the slaves, and the cultivation of a sugar estate, for preferential payment, over other creditors, out of the proceeds of the crop. The case was described by the learned judge, 'as one deserving particular attention, and as arising out of those constant and unavoidable transactions which took place between planters and traders, by which the former were supplied by the latter with those articles either of subsistence for their negroes, materials for erecting or repairing buildings on their estates, or instruments of husbandry for the cultivation of their

After these are admitted the mortgage creditors [68], without any distinction as to the nature of their mortgage, whether it be

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lands, all of which were stated by his Honor properly to come under the nomination of supplies for an estate.'

It is not necessary, for the present purpose, to follow the terms of this decision further than to say, that the learned judge was pleased to found the reasons of his decision on a law of Spain, which, although it does not appear to bear directly on the question, he declared entitled the merchant to be paid for such supplies out of the crops of the ensuing year. The law of Spain referred to by the learned Judge, was alleged to have been passed on the 16th July, 1790, and is presumed to be L. 5. tit. 8. Lib 10. of the Nov. Rec. of the laws of Castille.

In so far as regarded either the limitation or the description of articles denominated supplies by the learned Judge, or of the privilege arising out of their advance or contribution, the decision in question, was not, however, adhered to, in subsequent practice, with respect to demands of a similar nature: for attempts were, afterwards, made to procure the application of the provision of the law cited in the text (L. 28. tit. 13. P. 5.), which was anterior to the one referred to by the Chief *Oidor*, and did not seem to have come under his view, to purposes and objects which it never contemplated.

A law (the 25th in one edition, and the 26th in another), of the 13th title, 5th *Partida*, first gave a tacit mortgage for monies advanced to fit out or to repair a ship, or to repair or build any house or other building; and the 28th law of the same title and *Partida*, created the privilege in question. The compilation of the more modern laws of Spain, now called the *Novisima Recopilacion*, does not, it is apprehended, contain a solitary specific enactment on the point, or in the least analogous to the law of the *Partida* referred to in the text; and the laws of the Indies are, it is believed, equally silent on the subject: so that the law of the *Partida*, which was limited in its specifications, may be considered the only base on which a privilege was superstructed, until it reached such a height or extent, that its destruction became, from the evils it produced, a matter of necessary justice, and of executive enactment.

The law of the *Partida*, thus supposed to have furnished the first foundation for a claim of this peculiar and extraordinary description, will be found to be borrowed from the Roman code; as a reference to Ll. 5. & 6. tit. 4. Lib. 20. Dig. will show: but both the Spanish and Roman laws alluded to, specified the objects of the application of the rule; and notwithstanding it is more usual to seek to limit than to extend privileges, the principle was extended, by the British judicial decisions in Trinidad, to objects which had no existence when these laws were enacted.

The laws of most countries of modern Europe will be found to have borrowed and acted up to the extent of the rule of the Roman law. Those of Great Britain, however, will be seen to have narrowed the rule, by restricting the lien or privilege to repairs on ships, and to have even confined the preference to repairs made in a foreign port; and to have fixed the *maximum* of amount to which such repairs may extend, by annexing disqualifications as to the character of the ship, in the event of an excess of repair beyond the amount so fixed. [See *Mr. Abbott's* (now Lord Chief Justice of England) most useful and able *Treatise on the Law relative to Merchant Ships and Seamen*, p. 133–142., 4th edit.; also 26 *G.* 3. c. 60. § 2.]

The extent to which the privilege in question was carried in Trinidad, and its consequent evils, in the universality and indefinitude of the claims preferred under it, produced the Order in Council of his Royal Highness the Prince Regent, of 8th June, 1816, set forth in the Appendix M. The provision of this Order in Council was considered, however, nothing more than one of limitation or prescription with respect to the time for preferring claims of privilege allowed by L. 28. tit. 13. P. 5. to creditors, as they were termed, of *refaccion* and supply; and as made to prevent the frauds and prejudices which might

tacit or express, general or special, (although, with respect to this last, the authors do not agree) according to the anteriority and preference of their demands conformably with the rule which says, *qui prior est tempore potior est jure*[69], Ll. 27 & 29. tit. 13. Part. 5. *Rodriguez, ibid.* Part. 2. art. 1. *á* n. 23. *al* 43. Wherefore if two creditors contracted with the debtor at one and the same time, although on different instruments, neither can pretend to anteriority, but they are both to be paid *pro rata*, *Salgado, ibid.* Part. 2. cap. 4. *á* num. 132.[70] *al* 165. [182]

From this principle it follows, 1st, That if any one mortgaged his property in favour of another as for a sum due (*por razon de credito*), and shall not receive the money, and he afterwards mortgages it to a second person who does deliver him the money, this second creditor shall be preferred to the first, L. 27. tit. 13. P. 5. 2d, That there being, for instance, three mortgage creditors, the third shall be preferred to the second, if the money which he lent was made use of to pay the debt of the first, or if the first should cede or assign to the third his right of preference[71], the

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arise to mortgagees and others, from the indefinite periods in which this privilege was claimed.

Finally, the Order in Council of the 5th August, 1822, Appendix S. declared that, from and after its publication, all privilege or preference in favour of any article of supply furnished subsequent thereto, with the humane exception in favour of slaves, in regard to articles furnished, under judicial sanction, for their subsistence, clothing, medical attendance, and payment of managers and overseers, pending an action or process brought against their owners and proprietors, should, as matter of right, cease and determine. It may be also observed, that a similar humane provision has been engrafted on the colonial codes of some of the British West Indian islands having local legislatures; and that, by them, debts contracted by a proprietor or possessor of a sugar, cotton, or coffee planation, or of slaves, not less than twenty in number, generally employed as a task gang, for food and clothing furnished for necessary subsistence, are made a prior lien on all the slaves belonging to such plantation or task gang (except as against the king), if sued for within twelve months after actual sale and delivery of the articles specified, and other formalities pointed out by the law on the subject be complied with. See, on this point, the *Laws of Antigua*, published under the direction of *Anthony Browne, Esq.*, the agent of that island.

[68] *Palacios*, properly, observes, that before these come creditors for rent of land, who must be preferred to other creditors of whatever quality or class they may be, in regard of the fruits or product of the land for the amount of rent due; and he adds, that there are two cases mentioned in L. 30. t. 13. P. 5., in which some mortgage creditors are preferred to those spoken of in the text.

[69] See the exception to the rule in L. 27. tit. 13. P. 5., in case of money agreed to be lent, being paid or delivered by the second mortgagee before that previously agreed to be advanced, and for which the first mortgage was executed, as stated *post* in the text.

[70] Read 154.

[71] This might lead to a first impression, that the doctrine of English equity, 'that if a third mortgagee, who, at the time of his mortgage, had no notice of the second, purchases the first mortgage, both the first and third mort-

assignor of such right of preference, occupying the place of the

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gages shall be paid out of the estate before any share of it can be appropriated to the second,' was attributable to the Roman or civil law, notwithstanding my Lord Hardwicke, in his judgment in the case of Wortley *versus* Bukhead, was pleased to state, 'that this rule was founded on the particular constitution of the law of England; and that it could not happen in any other country but England, because the jurisdiction of law and equity was administered in England in different courts, and created different kinds of rights in estates,' &c. See *Treatise on Equity*, 2d vol. book 3. ch. 3. p. 304., and Mr. Fonblanque's note (*e*) there. The above impression appears to have been entertained by *Dr. Browne*, in his *View of the Civil Law*, 1st. vol. book 2. note (17). p. 209; although he seems to ascribe, erroneously, to Mr. Fonblanque, what is said by Lord Hardwicke, in his judgment in the case before mentioned: but further consideration will induce an admission of the exclusive title of England to the questionable credit (see Mr. Christian's note (4) 2d vol. *Blac. Com.* p. 160. cap. 10) of the establishment of such a rule. By the Spanish law, the third mortgagee acquires no other right than what strictly belonged to the first, whose right and preference he may have purchased, and the intermediate mortgagees are not prejudiced by any act to which they were not parties, or did not consent. This also, it is conceived, will be found to be the extent to which the civil law has gone. (See *Wood's Inst. Civ. Law*, book 3. ch. 1. p. 223., subrogation or cession.) Law 34. tit. 13. P. 5., cited in the text, only says, that in such case, the third mortgagee shall have the right in the thing mortgaged which the first had; but it does not say that the third mortgagee shall be also paid the amount of a third mortgage to himself, in preference to the mortgage previously given to the second mortgagee: and the latter part of the law gives, expressly, to the second mortgagee, the right to stand in the place of the first mortgagee, even after the assignment to the third of the first mortgagee's right, on the repayment only by the second mortgagee to the third mortgagee, of the sum paid by the latter to the first mortgagee, not exceeding the amount that was due on the first mortgage. This explanation of the Spanish rule of law is founded upon the Law (34. tit. 13. P. 5.) cited in the text, and is fully supported by *Salgado, Lab. Cred.* Par. 3. cap. 13.; see particularly num. 33. 35. 36. 59, 60. 75. 79, 80, 81. 99. 103, 104. *ibid.* It may be permitted to observe in this place, that the doctrine of tacking, as known to British courts of equity, has not, however, the same claim to originality as the rule of English equity before mentioned, but unequivocally proclaims its Roman parentage under the title of *retentio*, and has also been transplanted into Spanish jurisprudence. Law 22. tit. 13. P. 5., expressly recognizes this doctrine, and says that, if a man is indebted, on mortgage, to another, and should afterwards borrow more money from, or contract to the mortgagee another debt, personal, or not secured by mortgage, the mortgagor shall not redeem without payment of the latter debt, as well as that secured by mortgage; and adds, that this only holds as regards the mortgagor and his heirs, and will not affect a subsequent mortgagee or *bonâ fide* purchaser; in which case, such subsequent mortgagee or purchaser may redeem upon payment of the mortgage debt only. See L. 22. tit. 13. P. 5., cited; also *Treatise on Equity*, Mr. Fonblanque's note in 2d. vol. book 3. ch. 1. § 9. p. 272.: also *Powell on Mortgages*, 1st vol. p. 315. The laws of the 16th title, 10th book, *Nov. Rec.*, required the registry of all mortgages, in the mode and at the times thereby pointed out; and, as regards Trinidad, the proclamation of 5th February, 1814, and the Order in Council of 6th April, 1818, have since made ample and particular provisions respecting the execution, registry, &c., of all mortgages, contracts, deeds, &c., affecting real property and slaves in that island; both of which see in Appendix, O. P.

By L. 10. tit. 13. P. 5., a mortgagor cannot grant a second mortgage without the knowledge and consent (*sin sabiduria y sin mandado*), of the first mortgagee, unless the mortgaged property should be worth the amount of both debts; otherwise, besides being obliged to give another or available mortgage to the second creditor, the mortgagor is guilty of fraud, or *stellionate*, and is liable to be punished at the discretion of the judge. In respect to England,

third mortgagee, L. 34. tit. 13. P. 5. *Salgado, Lab. cred.* Part. 3. [72] § *un. á* num. 59. *al* 73. 3d, Likewise, if any other person should pay the debt of the first mortgagee in the name of the mortagor, he shall be preferred to all three, although he may not be a mortgage creditor, provided that the first creditor whom he pays cede to him his right, *Olea, de ces. jur.* tit. 5. quæst. 1. *á* num. 15. *al* 18. 4th, That the mortgage creditor, with an instrument made by a public escribano [73], (*de guarantiguia ó de tercio*) is preferred to a creditor who has none; unless the second has a private instrument, written and signed with the hand of the debtor, and witnessed by three witnesses [74], L. 13. tit. 13. P. 5. *Salgado, ibid.* Part. 2. cap. 21. n. 29. 5th, That if the first creditor consented to the mortgaged property being mortgaged in favour of a third person, the mortgage of the first is determined in favour of the latter, who is considered anterior with respect to the first; but he does not obtain any greater right to the prejudice of the intermediate creditors between him and the first mortgagee, *Salgado, ibid.* Part. 3. cap. 13. § *un. á* num. 19. *al* 44. 6th, That if a creditor is mortgagee of intailed property, and of that which is not intailed, he ought to be paid in the first place out of the latter, because the obligation of the former is subsidiary, *Salgado,* Part. 2. cap. 5. num. 16 & 17. 7th, That if the possessor of an intail hath redeemed an annuity, he enters into the place of the annuity creditor, *Salgado, ibid.* Part. 2. cap. 7. 8th, The first conditional creditor, having fulfilled the condition, is preferred to him who hath not fulfilled it, L. 32. tit. 13. P. 5. 9th, That the mortgage executed by virtue of a power (*mandato*), does not refer back to the date of the power, as to the effect of being preferred to other mortgages executed before the date of the mortgage executed in virtue of such power, because the power of itself produces nothing, *Salgado, ibid.* Part. 1. cap. 30. [75]

L. 13. tit. 13. P. 5.

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L. 32. t. 13. P. 5.

The chirographical creditors (*chirografarios*) of the third class ought to be paid their demands *pro ratâ*, from the remnant of the property; L. 11. tit. 14. P. 5. *Rodriguez, ibid.* Part. 2. art. 3. num. 2. And it is to be observed, that L. 48. tit. 25. Lib. 4. Rec. considers as privileged the creditor who has a bond on stamped paper, in respect of him who has not.

L. 11. t. 14. P. 5. L. 5. tit. 24. Lib. 10. Nov. Rec.

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by the 4th and 5th *W.* & *M.*, if any person mortgages his estate, and does not previously inform the mortgagee, in writing, of a prior mortgage, or of any judgment or incumbrance which he has voluntarily brought upon the estate; the mortgagee shall hold the estate as an absolute purchaser, free from the equity of redemption of the mortgagor. See Mr. Christian's note (2), *Blac. Com.*, p. 159. ch. 10., and the Act cited.

[72] Add. cap. 13.

[73] See L. 10. tit. 13. P. 5.

[74] See Appendix O. & P.

[75] See note [60], p. 196. *ante.*

To the third principle appertains, 1st, That the debtor, forming a concurso, is not obliged to pay the debts which, by reason of his insufficiency of property, remain unsatisfied, although he may afterwards attain to better fortune[76]; in which respect this proceeding (*juicio*), differs from the cession of property. 2d, That the property being already adjudged, sold (*rematados*), and the term expired, if a better bidder offers, he ought to be accepted, which is special in the proceeding of *concurso*, for the interest of the creditors and of the debtor, *Salgado, ibid.* Part 2. cap. 2.[77] 3d, That as the property of the *concurso* is destined for the payment of the creditors, and the debtor cannot administer it, he is incapacitated from making any contract with respect to it, *Salgado, ibid.* Part 1. cap. 14. n. 4. *al* 21. 4th, That by this proceeding the power is extinguished, which the debtor gave to another person to administer, pay, &c., *Salgado, ibid.* Part. 1. cap. 28. 5th, That if the debtor, during this proceeding[78] should aliene his property, or part of it, in fraud of his creditors, they may annul the alienation or transfer within a year after they knew of it, except it was made in favour of a minor (*huerfano*), who ought to be reimbursed for the price or value, Ll. 7 & 15.[79] tit. 15. P. 5. 6th, But notwithstanding this, the debtor may renounce, an inheritance or legacy, &c., because it is one thing to aliene, and another not to acquire, *Salgado, ibid.* Part. 2. cap. 24. num. 4. 5. 6. and 17. 7th, That if the property of the debtor should not be sufficient to pay his debts, the sales

Ll. 7. & 15. t. 15. P. 5.

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[76] The debtor, says *Palacios*, although he forms a *concurso*, is not thereby discharged from the payment of those debts which, for want of property or means, remain unsatisfied. For, by the *concurso*, neither the natural nor civil obligation he is under to pay them is extinguished. Therefore, if the debtor should arrive at better fortune after the *concurso*, he shall be obliged to pay, out of his newly-acquired property, his creditors who are unsatisfied. The only thing which L. 3. tit. 15. P. 5. allows him, in this case, is the benefit of competency, which means aliment from his property so acquired, and even to this it offers an exception in two cases; that is to say, when he should have any office or employment by which to earn a livelihood, L. 15. tit. 10. P. 5. *al fin;* and when the creditor or creditors unsatisfied, should be so poor as not to have wherewithal to support themselves; and the Learned Professor refers to *Febrero* (*reformado*) Lib. 3. cap. 2. § 3. n. 154. (not 161. as cited.) See also n. 153. & 155. *ibid.* & Lib. 3. cap. 3. § 1. n. 19. It is to be observed, that L. 15. tit. 10. p. 5. relates to a bankruptcy or distress occasioned by the demands of one copartner against another, and that the Learned Professor has incorporated an observation of *Greg. Lop.* Gl. 8. L. 15. tit. 10. P. 5. on the law itself, which will not be there found, as to the debtor having an office or employment; or he has taken it from *Febrero* (*reformado*), whom he cites. Both the laws cited in this note forbid the stripping the bankrupt of all his subsequently acquired property for the satisfaction of old unsatisfied claims, and require sufficient to be left him thereout for his support.

[77] Numb. 12. *et seq.*

[78] L. 7. tit. 15. P. 5. cited, says, after the debtor *es condemnado en juicio.*

[79] There is no such law in tit. 15. P. 5.

which shall have been in contradiction (*á oposicion*) of his creditors or their attornies [80], within the year, may be set aside or annulled, L. 8. tit. 15. P. 5. 8th, That the debtor may pay whichever of his creditors he pleases, even in case of not having sufficient property, provided it be before he makes a cession of his property, or before a concurso of his creditors takes place; and if otherwise, they have a right to demand the return of what shall have been received by the person whom the debtor hath paid [81], L. 9. tit. 15. P. 5. 9th, That if creditors of a lower degree were paid in preference to those of a higher degree, the latter may demand or proceed against any of the former they may please, for the revocation of the payment, and recover the sum which such posterior creditors have received against the due order of payment, *Salgado*, Part. 3. cap. 14. *á* n. 19. *al* 29. 10th, That releases or discharges by the debtor of debts due to him, in prejudice of his creditors, are not valid [82], L. 12. tit. 15. P. 5. 11th, That if, during the proceeding of concurso, the inability of the debtor to pay, appears manifestly, the creditors may have recourse to his sureties, *Salgado*, *ibid.* Part. 1. cap. 23.

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L. 8. tit. 15. P. 5.

L. 9. t. 15. P. 5.

L. 12. t. 15. P. 5.

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[80] *Licet non constet aliter de participatione fraudis*, says *Greg. Lop.* Gl. 1. L. 8. tit. 15. P. 5. cited.

[81] This, observes *Palacios*, takes place in respect of creditors of equal right; for if it should not be so understood, this doctrine would be contrary to that laid down in the 8th, or following number of this section. See *Greg. Lop.* Gl. 3. L. 9. tit. 15. P. 5. cited.

[82] When, observes *Palacios*, (as does also L. 12. tit. 15. P. 5. cited,) this is done fraudulently, and the debtors, in favour of whom the discharge is granted, are cognizant of the fraud, and the consideration or cause of their debt is *onerous*; for if it were lucrative, their knowledge of the fraud would not be necessary to render the release invalid, and he refers to L. 7. tit 15. P. 5., and to *Greg. Lop.* Gl. (2. 3. 4. 5.) on Law 12. ibid.

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TITLE XII.

OF COMMISSION, AUTHORITY, OR POWER OF ATTORNEY (*MANDAMIENTO*).

Cap. 1. Of commission (mandamiento).

A COMMISSION (*mandamiento*) is a contract of good faith, by which one person commits to the gratuitous charge of another his affairs, and the latter accepts the charge. It may be advantageous to the constituent alone, to a third person, or to the principal jointly with a third person [1], Ll. 20. & 21. tit. 12. P. 5., in as much as the two kinds mentioned in L. 22. tit. 12. P. 5., are more in the nature of a debt with interest (*al credito con interes*), and that in L. 23. *ibid.*, is reduced to simple advice or counsel. From this we derive two principles: 1st, That this contract is perfected by mutual consent. 2d, That in it the faith or friendship of the party is particularly considered.

Ll. 20. & 21. tit. 12. P. 5.

L. 22. t. 12. P. 5.

L. 23. t. 12. P. 5.

From the first principle, it is inferred, 1st, That the commission may be amongst absent persons by letters (*cartas*), and messengers (*mensageros*), limited, or for a certain time, under condition [2], &c., L. 24. tit. 12. P. 5. 2d, That ratification has the force or effect of a commission (*mandato*); e. g. if one without the order of another shall recover and pay his debts, and the latter shall subsequently approve of it, L. 32. tit. 12. P. 5. 3d, That the *mandamiento* is at an end, by the dissent of the parties, by renunciation [3], and by the death of the mandator or of the mandatee.

L. 24. t. 12. P. 5.

L. 32. t. 12. P. 5.

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[1] Or, says *Palacios*, to the *mandator* and the *mandatee*, or to the *mandatee* and a third person, or to the *mandatee* alone. These are the kinds which are pointed out by Ll. 22. & 23. tit 12. P. 5., which properly belong to this title, although that mentioned in L. 23. is, as the authors say, more advice or counsel, than commission; on account of which the adviser is not bound or liable for any thing, unless the advice should have been given with an evil design (*con mala intencion*), and any injury should result to the person advised; for in this case the adviser would be obliged to pay. See *Wood's Inst. C. L.* book 3. ch. 5. p. 242. and 243.

[2] *Or general, special,* or *absolute.* See L. 24. tit. 12. P. 5. cited.

[3] *Palacios* says, there is no royal law or statute which declares that the commission is put an end to or dissolved, by the renunciation of the *mandatee*, and if attention is paid to the words of L. 20. tit. 12. P. 5.; for if the *mandatee* receives or undertakes the commission, who is obliged to fulfil it, we should say, that the *mandatee* cannot renounce it; and more so, if to this is added L. 1. tit. 1. Lib. 10. Nov. Rec. Perhaps the Learned Professor's objection may be obviated by saying, timely renunciation. L. 20. tit. 12. P. 5. adds, that if he who receives, *id est*, undertakes a commission, is guilty of any fraud in not

L. 2. tit. 16. Lib. 5. Rec.

From the second principle it is deduced, 1st, That the mandatee ought not to exceed the limits of his authority which are expressed in the power. 2d, That the mandatee has his action to recover the expenses which he has incurred on account of the mandator, L. 25. tit. 12. P. 5. L. 25. t. 12. P. 5.

Here belongs also the voluntary attorney, or *negotiorum gestor* of the Romans; that is, one who takes charge of other persons' business without the knowledge of the owner. Cap. 2. Of the voluntary attorney, called negotiorum gestor.

Hence arises this axiom: That the owner or principal, remains obliged by a consent presumed from the advantage which he derives.

From this we infer, 1st, That if any one, without an authority or commission (*mandato*), administers, improves, and benefits the property of an absent person, he may recover the expenses from the owner, to whom he shall be obliged to give a just or perfect account of all that has been done by him, L. 26. & 31. tit. 12. P. 5. L. 26. & 31. t. 12. P. 5. 2d, The same is understood of the expenses incurred on the property of a minor (*huerfano*), except with respect to those which are not permanent, which the minor is not obliged to pay [4], L. 28. tit. 12. P. 5. L. 28. t. 12. P. 5. 3d, That although a person with a bad intention laid out expenses on the property of another, from which it derived benefit, he may retain for them; but not for those from which utility resulted to the property [5], L. 29. tit. 12. P. 5. L. 29. t. 12. P. 5. 4th, That the administrator of another's property is obliged to pay the injury (*los perjuicios*) occasioned by his fault or fraud, unless it be, that finding the property entirely abandoned, he was desirous of administering it out of pure compassion [6], L. 30. L. 30. t. 12. P. 5.

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fulfilling the commission, or if by his fault (*culpa*), any damage results to the *mandator*, the *mandatee* is liable for it. And *Greg. Lop.* Gl. 5., same law, says, that this liability is for the smallest (*levissima*) fault or neglect. It is to be recollected, that the commission must be undertaken *gratis*. The notions of friendship are, perhaps, not carried in modern times to that exalted or refined pitch they were wont to be among the Romans, and the considerations suggested by this note may induce great caution in respect of undertaking such an office or duty.

[4] L. 28. tit. 12. P. 5. says, that if the expenses laid out on the property of a minor of 14 years should be necessary, the voluntary attorney who incurred them ought to recover them from the minor; but that if such expenses or outlays should appear useful at first, and it should afterwards turn out they were not so, the tutor under whose tutelage the minor should be, is bound to pay them. In the instance hitherto put in the text, *buena fe* is considered to have actuated the *negotiorum gestor*.

[5] Not those it should be, observes *Palacios*, from which utility did not result to the property.

[6] *Palacios* observes, that L. 30. tit. 12. P. 5. cited, does not make this exception; but what it says is, that if prejudice or injury to the proprietor should be occasioned by fraud, the administrator, in every such case, is bound to make it good, even though he be a person who administered from pure com-

tit.12. P.5. 5th, That whoever intermeddles in the administration of the affairs of another without a commission (*mandato*), only ought to do that which the principal was accustomed to do; and, acting otherwise, he shall be responsible for the damages which he might occasion [7], L.33. tit.12. P.5. 6th, That if any one, out of charity, undertakes the education and bringing up of any minor (*huerfano*), he cannot demand or recover the expenses which he shall have incurred by reason thereof, L.35. tit.12. P.5.; excepting, if the mother, grandmother, or stepfather, having under their power or care their children or grandchildren, &c., furnished them aliment, and educated or brought them up, protesting or declaring that they did it with the intention of being reimbursed from the minor's property [8], Ll. 36. & 37. tit.12. P.5.

L. 33. tit. 12. P. 5.

L. 35. t. 12. P. 5.

Ll. 36. & 37. tit. 12. P. 5.

L. 1. tit. 18. Lib. 7. Nov. Rec. Cap. 3. Of the procurator syndic (procurador sindico personero).

By *Auto acordado* of 5th May, 1766, cap. 7., it was ordered that every town (*comun*), or corporation (*concejo*), should elect every year a public procurator or attorney syndic (*procurador sindico personero del publico*), which ought to be done by the town (*pueblo*), being divided into districts or wards (*barrios*), as the instruction of 26th June of the same year, 1766, more fully provides; and inasmuch as in many towns the office of procurador syndic is sold (*enagenado*), or devolves by custom or by privilege upon a particular regidor of the cabildo, or the latter is accustomed to elect or propose him, it was ordered that in such towns the public should choose annually a procurador, *Cedulas de* 15th November, 1767. These attornies have their seat in the cabildo after the syndic, and in the meetings with respect to the public granaries (*de posito*), with a right to ask and propose every thing which may appear conducive to the public benefit, but without a right of voting in the like way as the syndics, who have never enjoyed it, as may be seen more at large in the cedulas referred to.

L. 2. tit. 18. Lib. 7. Nov. Rec.

L. 3. tit. 18. Lib. 7. Nov. Rec.

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passion; and that *Greg. Lop.* Gl. 3., on the same law, adds, this last person is also obliged to make good that occasioned by his gross fault (*culpa lata*), which always accompanies or is compared with fraud.

[7] Whether occasioned by his fault, or by casual or unforeseen events, or in any way whatsoever. See L. 33. tit. 12. P. 5. cited.

[8] L. 37. tit. 12. P. 5., as regards stepfathers, says, that notwithstanding this declaration, if the youth should be of an age to be serviceable to his stepfather, his services shall be an equivalent or compensation for the expense of maintaining him, but not for extraordinary expenses, or those incurred in the care, &c. of the youth's property; and that what is said in this law as to stepparents having charge, &c. of their step-children, is understood to apply to all persons having charge of other people's children.

TITLE XIII.

[188]

OF PURCHASE AND SALE, OR BUYING AND SELLING (*COMPRA Y VENTA*).

Cap. 1. Of purchase and sale, or buying and selling.

OF the contracts which are onerous to both parties, the first is that of sale and purchase, or selling and buying. This contract is a sort of agreement which men make use of among themselves, and is made with the consent of both parties for a certain price which the purchaser and seller agree upon, L. 1. tit. 5. P. 5. L. 1. tit. 5. P. 5.

§ 1. Upon the principles upon which this contract is established or constituted.

From this definition it follows, 1st, That purchase and sale is perfect or complete by the consent of both parties. 2d, That every thing in commerce, or that is not prohibited, may be sold and purchased. 3d, That the price ought to be certain, just, and for money counted (*en dinero contado*). 4th, That this contract is onerous to both parties.

From the first axiom it is deduced, 1st, That all those may sell and purchase, who may consent freely [1], L. 2. tit. 5. P. 5., L. 2. tit. 5. P. 5. whether by parol, by letter (*carta*), by messenger (*mensagero*), or by deed, Ll. 8. & 48. tit. 5. P. 5. Ll. 8. & 48. t. 5. P. 5. 2d, That children under the paternal power cannot purchase, nor can merchants sell to them [2], L. 22. tit. 11. Lib. 5. Rec., neither can students, L. 4. tit. 7. Lib. 1. Rec. L. 17. tit. 1. Lib. 10. Nov. Rec. 3d, That the son can only sell to his father his property called *castrense ó quasi*, L. 2. tit. 5. P. 5. L. 1. t. 6. Lib. 8. Nov. Rec. 4th, That no person can be compelled to sell his property by force, unless public utility requires it, L. 3. tit. 5. P. 5., *Gomez*, Lib. 2. *var. res.* cap. 2. [3] L. 2. tit. 5. P. 5. 5th, That for want of this free consent, guardians and executors cannot purchase any of the property which they administer, L. 23. tit. 11. Lib. 5. Rec., unless a decree should be previously given by the judge, stating its advantage to the minor [4], L. 4. tit. 5. P. 5. L. 1. tit. 12. Lib. 10. Nov. Rec. 6th, That the sales made by the [189] L. 4. t. 5. P. 5.

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[1] Who may bind themselves, and mutually contract with one another. See L. 2. tit. 5. P. 5.

[2] Under the paternal power, without consent of fathers; nor minors, without consent of guardian. See the law cited.

[3] Numb. 51.

[4] *Palacios*, in a note on a former part of the text, Lib. 1. tit. 3. § 2., observes, that when L. 23. tit. 11. Lib. 5. *Rec.* (L. 1. tit. 12. Lib. 10. *Nov. Rec.*) prohibits the guardian from purchasing any thing belonging to the ward, it does not add that he may do it with the authority of the judge, and the consent of the co-guardians, and that the interpreters dispute, whether by this law of the *Rec.*

judges, compelling any person to purchase the property of delinquents, are null, L. 18. tit. 1. Lib. 8. Rec. 7th, That the sale made against one's will or consent, and through fraud or deceit on the part of the purchaser, is not valid [5], L. 57. tit. 5. P. 5. 8th, That the sale [6] made with another person's money is valid, except it be of persons privileged mentioned by L. 49. tit. 5. P. 5.

L. 7. tit. 12. Lib. 10. Nov. Rec.

L. 57. tit. 5. P. 5.

L. 49. tit. 5. P. 5.

From the same it follows, 9th, That if the parties should disagree about the price, or as to the thing sold, the sale is not valid; or if there should be a fraudulent error or mistake as to the material of which the thing is composed, as selling brass for gold [7], &c., Ll. 20 & 21. tit. 5. P. 5. 10th, That this contract is perfect or complete as soon as the purchaser and seller are agreed upon the price of the thing, although no earnest money may have been paid nor given [8], L. 6. tit. 5. P. 5., and L. 2. tit. 16. Lib. 5. Rec., in virtue of which last law, every obligation derives its force from mutual consent.

Ll. 20. & 21. tit. 5. P. 5.

L. 6. tit. P. 5.

L. 1. tit. 1. Lib. 10. Nov. Rec.

From the second action it is inferred, 1st, That there is no difference with respect to purchase and sale, whether the thing which is the object of it exists now, or may exist hereafter [9] as the fruits

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L. 4. tit. 5. P. 5. was repealed or altered, which, with the observance of these requisites, permitted the purchase. See *Greg. Lop.* Gl. 8. L. 4. tit. 5. P. 5., and *Azevedo* on L. 23. tit. 11. Lib. 5. *Rec.* n. 3. 4. 5. 6.

[5] Sale made through fear, force, or fraud. See Ll. 56. & 57. tit. 5. P. 5. *Palacios* says, if the sale is against will or consent, although without fraud or deceit, it is void; if with fraud or deceit alone, it is either void immediately, or may be prayed to be declared void, or the price be either reduced to what is the just value, or the sale annulled. If fraud or deceit was the cause of the contract, and inducement to it, the contract is void. It may be prayed to be annulled or made void, if there should be any fault or defect in the thing sold, and the seller should not have manifested or pointed it out; in which case, the purchaser may return the thing, and demand back the sum paid for it (*redhibitoria*), L. 65. tit. 5. P. 5.; and it may be prayed, that the price be reduced to the just value, when there should have been deceit or lesion in more than half the just value; in which last case, the person deceived may pray, either that the sale be annulled, or be reduced to the just value (*quanto minoris*), which shall be optional with the person guilty of the deceit, L. 56. tit. 5. P. 5. See the same stated in *Wood's Inst. Civ. Law.*, book 3. chap. 5. p. 230.

[6] Read purchase; and in such case, the property purchased belongs to the person by and in whose name bought, and not to the owner of the money, except the money belonged to knights in the court of the king, minors, or *femme coverte*, as *dote*, and others, mentioned in L. 49. tit. 5. P. 5., cited.

[7] *Palacios* says, if the error should be in the substance or body of the thing sold, whether it be fraudulently made or not, the sale is void, as may be seen by Ll. 20. & 21. tit. 5. P. 5., cited.

[8] See Proclamation, Trinidad, 5th February, 1814, and Order in Council, 6th April, 1818, Appendix O. P. See also the distinction made by L. 6. tit. 5. P. 5., as to when it is contracted that the sale shall be by deed (*carta*), in which case, the party may repent before the execution of the deed.

[9] The text says '*que existe*, or *ha de existir*;' and see *Greg. Lop.* Gl. 1. & 2. on L. 11. tit. 5. P. 5., cited.

of an estate; and if these shall not grow, the price shall be restored to the purchaser, unless they were purchased at a hazard (*á la ventura*); *ex. gr.* the first fish that is caught or killed, L.11. tit.5. P.5. But if these *fruits* should be sold with the knowledge of the vendor that the thing sold would not produce them, although the contract is valid, he is bound to reimburse the purchaser for the damages and prejudices which may have resulted to the latter from not having the *fruits*[10], L.12. tit.5. P.5. 2d, That things incorporeal may be the object of this contract; *ex. gr.* rights, actions, &c., L.13. tit.5. P.5. 3d, That the property of another person may be sold, the vendor entering into a warranty[11] (*saliendo á la eviccion*), if the owner should recover it at law; of which we shall speak hereafter, L.19. tit.5. P.5. But if the king should sell another person's property as his own, the owner shall recover its value within four years[12], L.53. tit.5. P.5. *Castillo*, L.3. *Controvers*, cap.6. 4th, That a person may sell the thing which he has conjointly with another, provided he pays the amount of his partner's share, unless a proceeding or suit for a division hath been previously instituted[13], L.53. tit.5. P.5. 5th, That the sale of that which is destroyed, pulled down, or burnt in whole, or the greater part[14], is not valid; but if it be only in the smaller part, the contract will be valid, making a reduction in the price for what it shall be worth less on account of this deterioration, except the thing should have been sold under these circumstances, with the knowledge of the seller; for then,

L.11.tit.5. P.5.

L.12.tit.5.P.5.

L.13.tit.5.P.5.

L.53.t.5.P.5.

L.55.tit.5.P.5.

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[10] Or the value of the *fruits*.

[11] The sale by a person of another's property is valid, says *Palacios*, whether the vendor enters into or agrees to the warranty (*eviccion*) or not; for the nature of this contract carries with it the circumstances of warranty, whether it be expressed or not: what is to be understood here is, that if the purchaser knew that the property belonged to somebody else when he bought it, and if he is afterwards condemned to restore it to the owner, the vendor would not be bound to return him the price, unless he should have been bound to the warranty; but if the purchaser was ignorant that it was another's property, the vendor would be obliged to return to the purchaser the price paid, together with the damages which may have resulted to him by this sale." See L.19. tit. 5. P.5., cited; also *Wood's Inst. C. L.*, book 3. c. 5. p.233.

[12] That is, says *Palacios*, the dominion is immediately transferred to the purchaser, and the owner remains only with the power or right of demanding its value from the king within four years. L.53. tit.15. P.5., cited.

[13] *Palacios* says, that in the case proposed, the partner either sells the whole, or only his share; if the whole, he did it without an authority or power for doing so; and if he only sells his share, which is only what he can do, he has nothing to pay to his co-partner: L.55. tit.5. P.5., declares more than this: it is there said, that the other partner has the right to purchase his partner's share at the price offered by the stranger (*el derecho de tanteo*).

[14] The purchaser being ignorant of the fact. See L.14. tit.5. P.5., cited.

although the contract does not subsist, he is obliged to pay the damages and prejudices to the purchaser, L.14. tit. 5. P. 5.[15]

L. 14. tit. 5. P. 5.

§ 2. Of prohibited sales.

From the same axiom it results that the following cannot be sold: 1st, Sacred things, unless they are sold as accessory to some territory or seigniory[16], L.15. tit. 5. P. 5., or under the circumstances[17] mentioned in L. 2. tit. 14. & L. 3.[18] tit. 13. P. 1. 2d, Public things of a town or corporation, L. 15. tit. 5. P. 5. 3d, The free man, L. 15. tit. 5. P. 5. 4th, The columns or pillars, beams (*maderos*), or other things which support any useful building, cannot be removed from their situation to be sold, L. 16. tit. 5. P. 5. 5th, Poisonous things, unless they are sold with that moderation and rule which the art of medicine requires for its use, L. 17. tit. 5. P. 5. 6th, That the *judges* and *corregidors*, or any of their family, cannot purchase an estate (*heredad*) in their jurisdiction, but only what is necessary for their support[19], L. 5. tit. 5. P. 5. 7th, That no office of jurisdiction or government can be purchased, Ll. 7 & 8. tit. 7. Lib. 2. Rec.[20].

L. 15. tit. 5. P. 5.
L. 2. tit. 14. and L. 3. tit. 13. P. 1.
L. 15. t. 5. P. 5.
L. 16. t. 5. P. 5.
L. 17. tit. 5. P. 5.
L. 5. tit. 5. P. 5.
Ll. 5. & 6. t. 12. Lib. 5. Nov. Rec.

§ 3. Of limited sales.

To this place also belong the sales and purchases which, by different laws of the kingdom, can only be made under certain limitations; such as, 1st, Early corn (*pan adelantado*), which cannot be purchased but at the price it shall be worth in the chief town of the district, L. 17. tit. 11. Lib. 5. Rec.; for the purchase of which the public granaries of the kingdom are to be preferred, L. 18. tit. 11. Lib. 5. Rec. 2d, That no person can buy up wheat, barley, &c., to resell, except the carriers who live by carrying wheat from some parts to others; but they ought not to gather it up in barns, nor to put it under ground to keep (*ni ensilarlos*), L. 19. tit. 11. Lib. 5. Rec.[21] 3d, That it is prohibited to purchase up tares (*algorrabas*), irons (*yerros*), and salt, to re-

L. 1. t. 19. Lib. 7. Nov. Rec.
Ll. 2. t. 19. Lib. 7. & 10. t. 13. Lib. 10. Nov. Rec.
L. 3. t. 19. Lib 7. Nov. Rec.

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[15] Then, says L. 14. tit. 5. P. 5., cited, the contract subsists, although the vendor shall be obliged to pay the vendee for all the injury and damages that may have resulted to him by reason thereof.

[16] But, observes *Palacios*, nothing in this case should be added to the price on account of spiritual things, or those annexed to them, for it would be simony.

[17] By the prelates, with the consent of the chapter, in the modes pointed out by L. 2. tit. 14. P. 1., cited, but the gifts of the kings or queens to the church cannot be so aliened. See L. 8. tit. 15. P. 1., as to the transfer of the right of presentation.

[18] This law relates to the right of burial.

[19] *Para comer, ó para beber, ó para vestir.* See L. 5. tit. 5. P. 5., cited.

[20] The laws cited in the text, Ll. 7 & 8. tit. 7. Lib. 2. Rec.; which are Ll. 5 & 6. tit. 12. Lib. 5., Nov. Rec., do not apply; and it is supposed, L. 8. tit. 2., & L. 7. tit. 3. Lib. 7. Rec., are meant, which correspond with L. 8. tit. 4., & L. 9. tit. 5. Lib. 7. Nov. Rec., which see.

[21] This, and the subsequently cited laws in this part of the text, are acts to prevent forestalling, regrating, engrossing, &c.

sell, Ll.24 & 25. tit.11. Lib.5. Rec. 4th, That no one who purchases silk in pod (*en capullo*), or bundle (*mazo*), can resell it, except woven or dyed, L.25. tit.12. Lib.5. Rec. 5th, That live food cannot be sold in the same market (*feria*) in which it shall be bought, L.7. tit.14. Lib.5. Rec. 6th, That it is not lawful to purchase provisions or necessaries to resell in the court and five leagues round about[22], Ll.1, 2, 3, 4, 5, & 6. tit.14. Lib.5. Rec. 7th, That the sale of silks, cloths, &c., ought to be regulated according to the good economical dispositions which are fully expressed in tit.12. Lib.5. Rec.[23], and according to the last regulations of commerce. 8th, That the purveyors of fish can only take a supply to last for two days from the retailers (*revendedores*), L.20. tit.18. Lib.5. Rec. 9th, That the people may take from the contractors (*arrendadores*) the half of the bread they contract for (*de su arrendamiento*), at the same prices at which they contract, L.12. tit.11. Lib.5. Rec. 10th, That wool purchased to be carried out of the kingdom may be taken at the same price[24], L.48. tit.18. Lib.6. Rec. 11th, That the merchants cannot sell in the suburbs, L.9. tit.1. Lib.7. Rec. 12th, That the old clothes dealers may not purchase at public auctions, L.17. tit.12. Lib.5. Rec. 13th, That there may not be any brokers of cattle (*corredores de ganados*) at the fairs, L.8. tit.14. Lib.5. Rec.; and brokers of merchandise cannot purchase, sell, nor make contracts respecting their own merchandise, L.26. tit.11. Lib.5. Rec. 4th, That no forestaller or regrater may go out on the high roads, out of the gates, &c. to buy by wholesale, in order to sell by retail, goods which are brought to the capital (*corte*), *Auto* 2. tit.14. Lib.5. Rec. 15th, That no regrater may buy goods from the manufactories (*de fabricas*) in order to retail, *Aut.*1. tit.14. Lib.5. Rec.[25] 16th, That the sale of provisions and warlike stores to the enemies of our holy faith is prohibited, under the penalty of treason, L.22. tit.5. P.5.

Ll.7 & 8.t.5. Lib.9. Nov. Rec.

L.6.tit.5. Lib.9.Nov. Rec.

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L.4.tit.7. Lib.9. Nov. Rec.

Ll. 6, 7, 8, 9, 10. tit.17. Lib.3. Nov. Rec.

L.11.tit.13. Lib.10. Nov. Rec.

L.4.tit.19. Lib.7. Nov. Rec.

L.16.tit.13. Lib.10. Nov. Rec.

L.1.t.22.Lib.7 Nov. Rec.

L. 4. tit. 12. Lib.10. Nov. Rec.

L.5.t.7.Lib.9. Nov. Rec.

L.4.t.6.Lib.9. Nov. Rec.

L.15.tit.17. Lib.3. Nov. Rec.

L.9.tit.5.Lib.9. Nov. Rec.

L.22.t.5.P.5.

[22] See the cases in which it is permitted, in L.7. tit.17. Lib.3. cited. L.5. tit.14 Lib.5. Rec., cited in the text, is not inserted in the *Nov. Rec.*

[23] The laws of this title of the *Rec.* (*sale of brocades*) are scattered through titles 4. 5. 6. Lib. 9. tit.23. 24. Lib. 8. & tit. 12 & 13. Lib. 10. Nov. Rec.

[24] L. 16. tit. 13. Lib. 10. cited, says, half may be taken away by any inhabitant on application, for and through judicial assistance from the intended exporter, by paying him the same price at which he purchased the wool.

[25] The policy of the above laws, in this part of the text, is, to use a moderate designation, very questionable, and the punishment for their infraction will, perhaps, be generally considered disproportionately and unnecessarily severe. In England, the general penalty for forestalling, regrating, and engrossing, offences by common law, (for all the statutes concerning them were repealed by 12th Geo. 3. c.71.) is, as in other minute misdemeanors, discretionary fine and imprisonment. See 4th vol. *Blac. Com.* ch.12. p.158. 159.

Under this axiom ought to be comprehended, 1st, The sales by the laity of lands in mortmain (*de legos á manos muertas*) which pay upon the duty (*alcabala*) the fifth of their value, which John the II. imposed very abundantly (*á mayor abundamiento*) the 13th April, 1452, as a tribute and charge on the same lands [26], *Auto* 1. tit. 10. Lib. 5. Rec. This is the duty or tax (*derecho*) on mortmain, which the cortes wished to increase to the third, following the example of Valencia, as is to be seen in the petition of the cortes of Madrid, of 1534. 2d, The sales which are covertly made to the injury of the royal treasury, on account of tribute, tax, &c., of which L. 59. tit. 5. P. 5. speaks.[27]

L. 12. t. 5. Lib. 1. Nov. Rec.

L. 59. tit. 5. P. 5.

[192] From the third axiom it follows, 1st, That the price of the thing will be certain, if it be left to the determination (*á arbitrio*) of a third person, and he should specify or fix it; by which decision the parties ought to be bound [28], unless the price fixed should be disproportionate, in which case, it ought to be reformed by the judgment or award (*juicio*) of good men; L. 9. tit. 5. P. 5. 2d, That the sale will be valid in which the contracting parties should have agreed upon the price, with reference, or agreeably (*arreglado*) to the amount of a sum of money deposited in a particular box, bag, &c., if any part of it should be found there, but not if there should be none, L. 10. tit. 5. P. 5. 3d, That the price is certain when the thing is sold for as much as it was purchased for, if there's a certainty as to its having been at first purchased [29], L. 10. tit. 5. P. 5. 4th, That the sale is not valid the price of which was left to the determination of one of the parties, or of an uncertain person [30], L. 9. tit. 5. P. 5.

L. 9. tit. 5. P. 5.

L. 10. tit. 5. P. 5.

L. 10. tit. 5. P. 5.

L. 9. tit. 5. P. 5.

By the fourth axiom, it is demonstrated, 1st, That the purchaser ought to pay the price promised, and the vendor deliver the thing which is sold, with every thing accessory to it, fruits ungathered (*pendientes*), &c. L. 28. tit. 5. P. 5. *Guzman, de Evict.* quæst. 21. n. 50., and therefore if a house be sold, it passes to the pur-

L. 28. tit. 5. P. 5.

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[26] See note (3) tit. 5. Lib. 1. Nov. Rec.

[27] And by the same Law 59. tit. 5. P. 5. if the purchaser is privy to, or cognizant of the fraud, he shall forfeit or pay to the crown, out of his own property, the amount which he paid, or was to pay, for the property so purchased. See also L. 5. tit. 7. Lib. 10. Nov. Rec.

[28] If the person, to whom it was left to fix a price, should die before determining it, the sale would not be valid. See L. 9. tit. 5. P. 5. *al fin.*

[29] But if it should have come to the seller as a gift, devise, &c., the sale, it appears, would not, under the proposition in the text, be valid. See L. 10. tit. 5. P. 5. cited, *al fin.*

[30] Or of an uncertain person. This is not stated in the law, but by Gl. 3. *Greg. Lop.* on this law.

chaser with all the materials which compose it [31], except those which should not belong to the vendor, and the furniture (*muebles*) and stock (*animales*), which he might raise or have there, Ll. 29 & 30. tit. 5. P. 5. But if a plantation of olives (*olivar*) is sold, the press (*lagar*), mill, &c. which should be there, do not pass to the purchaser, unless it is expressed in the contract [32], L. 31. tit. 5. P. 5. 2d, That all the covenants and conditions ought to be observed by both parties, provided they be not opposed to the laws of the kingdom or good manners, L. 38. tit. 5. P. 5. 3d, That the covenant that the sale shall be dissolved or annulled, if the purchaser does not pay the price [33] at a day appointed, is valid [34]; in which case, if the purchaser does not fulfil his agreement, the earnest money which might have been paid by him, will be the vendor's; but then the fruits gathered or received from the property, are the purchaser's.[35] But the demand of the rest of the price or the revocation of the sale, depends upon the will of the vendor, who shall not be able to retract or repent when he has once made his election; and in case of the sale being revoked, the purchaser is responsible for the deterioration which the property shall have suffered by his fault, during the time it was in his possession, Lib. 38. tit. 5. P. 5. 4th, That the covenant (*pacto*) *addictionis in diem*, is valid; which is, when the thing is sold under a covenant that, if within such a time a person should be found, who would give more, or would better the purchase, it may be given to this better offerer

Ll. 29 & 30. tit. 5. P. 5.

L. 31. tit. 5. P. 5.

L. 38. tit. 5. P. 5.

L. 38. tit. 5. P. 5.

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[31] Not fixtures, which go to the purchaser. See what are, and what are not considered appurtenances and fixtures, in Laws 29 & 30. tit. 5. P. 5. cited.

[32] Or unless expressly put in the place for the use or purpose of taking off the crop. See the law cited.

[33] Or the greater part of it. See L. 38. tit. 5. P. 5. Therefore it is presumed the sale could not be annulled against the will of the purchaser, if the greater part of the price, or consideration, were paid by him, and that the vendor would be left, in such case, to his action, to recover the balance or remainder due: at any rate, that if the sale could be so annulled, the vendor would be obliged to return to the purchaser the part of the purchase money so paid, the latter accounting for the fruits or crops intermediately received by him, subject to deduction for necessary expenses, as well as those which have been incurred by him for the benefit of the property. See L. 44. tit. 28. P. 3.

[34] This, says *Palacios*, is the *pacto de la Ley commisoria*, which is valid, differently from that which is called *pacto commisorio*, which consists in a person's mortgaging or pledging his property, under a covenant, that if he does not redeem it by a certain day, it shall be the mortgagee's for what he lends or gives on it: which contract is not valid, L. 41. tit. 5.; & L. 12. tit. 13. P. 5. See also note [12], p. 157. *ante*.

[35] The fruits are the vendor's, and it is only in case that the vendor should not wish to return the earnest money (*señal*), or the part of the purchase money which should have been received by him, that the purchaser shall be able to retain the fruits as his own, as is observed by *Palacios*. See L. 38. tit. 5. P. 5.

(*mejorador*), and then the seller ought to make known to the purchaser the bid or the melioration proposed, who, if willing to pay or do the like (*arreglandose á esta*), shall keep the property, but not doing so, it shall pass to the highest bidder, the first purchaser restoring the fruits which he hath gathered or received, provided he be paid the expenses of taking off the crop (*de la cosecha*). But if this bid should be made fraudulently, through the artifice of the seller, the sale shall not be set aside,

L. 40. t. 5. P. 5. L. 40. tit. 5. P. 5. 5th, That the covenant that the thing purchased shall be at the risk of the vendor, before delivery, is valid, L. 39. tit. 5. P. 5. 6th, That the covenant of resale (*retrovendendo*) is lawful, when the seller reserves to himself or to his heirs, the right of buying back again the thing sold for the same price which he received for it, and the purchaser not complying with it, shall pay the damages and penalties which

L. 42. t. 5. P. 5. might have been agreed upon, L. 42. tit. 5. P. 5. 7th, That the covenant to pay a certain penalty to the vendor, if the purchaser or his heirs should aliene the thing sold to any of the persons to whom they might be prohibited by the contract to

L. 43. tit. 5. P. 5. sell it, is valid[36], L. 43. tit. 5. P. 5. 8th, That in the conditional sale if the vendor or purchaser dies before the fulfilment of the condition, the heirs are bound to fulfil the contract,

L. 26. tit. 5. P. 5. L. 26. tit. 5. P. 5.

§ 4. To whom appertains in this contract the damage or benefit arising to the thing sold (el dano ó mejora).

From the same axiom it is deduced that the injury or benefit which the thing sold undergoes, appertains to the vendor before the contract is perfected; and to the purchaser when once it is perfected, L. 23. tit. 5. P. 5. By injury or deterioration is here understood every injury or loss which may happen to the thing

L. 23. t. 5. P. 5. sold by accident and without the fault of the vendor; and by benefit or improvement, every advantage or increase that the thing may receive, L. 23. tit. 5. P. 5.

By this rule we understand, 1st, That the injury and benefit appertain to the purchaser the moment he and the vendor are

L. 23. tit. 5. P. 5. agreed with respect to the thing and the price[37], L. 23. tit. 5. P. 5. 2d, That the risk is the vendor's in regard of things which are sold[38]

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[36] L. 43. tit. 5. P. 5., cited, says, that a covenant or agreement not to sell or aliene to particular persons is not binding; but that any penalty imposed by the parties to enforce such a covenant, must be paid by the party guilty of its breach.

[37] In other words, the contract is perfected or complete by the mere consent of the parties with respect to the object of sale and the price to be paid.

[38] Which are accustomed to be tasted, measured, or weighed before they are purchased. See L. 24. tit. 5. P. 5., cited.

by measure, weight, or taste, until they be measured, weighed, or tasted, L. 24. tit. 5. P. 5.; unless they should be sold at sight (*á ojo*), then the risk or benefit is the purchaser's, L. 25. tit. 5. P. 5. 3d, That if a certain day be appointed to taste, measure, or weigh them, and the purchaser should not come, thenceforward the thing is at the risk of the purchaser; and if no day be appointed, the vendor will fix the risk upon the purchaser, when having cited or required him, before witnesses, to proceed to measure &c. the articles the purchaser should not appear for the purpose, and in this case the vendor has a right to sell the thing to another, and the purchaser shall be responsible for the damages (*daños*) and prejudices which his delay may have occasioned to the vendor; who may at the cost of the purchaser hire a vessel or other thing to supply the want of the one which contains the commodity, if he has occasion for it, L. 24. tit. 5. P. 5. 4th, That in the sales of gold, silver, or the like thing, after the sale is made, if they have not been weighed or measured, the damage that may arise to the thing is at the risk of the vendor; but the increase or diminution of value is the purchaser's[39], L. 24. tit. 5. P. 5. 5th, That in a conditional sale the deterioration or improvement which happens to the thing before the condition is fulfilled is the purchaser's, but not the risk, L. 26. tit. 5. P. 5. 6th, That the delay of the vendor in delivering the thing after the purchase is agreed on and the price is paid [40], causes the risk and injury of the thing whatever it may be, to fall upon the vendor, L. 27. tit. 5. P. 5.

L. 24. tit. 5. P. 5.

L. 25. tit. 5. P. 5.

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L. 24. tit. 5. P. 5.

L. 24. tit. 5. P. 5.

L. 26. tit. 5. P. 5.

L. 27. tit. 5. P. 5.

§ 5. Of warranty (saneamiento) by the vendor, which is called eviction.

As the vendor is obliged to make the thing sold secure to the purchaser, he is bound to deliver it to him free and discharged from every incumbrance, so that he shall be responsible in case any one should recover it at law from the purchaser [41]; which the common law [42] (*derecho comun*) calls *præstare evictionem*, and we

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[39] *Palacios* observes, that what L. 24. tit. 5. P. 5. says, and what takes place in this respect, is, that if any of those things should be sold which are accustomed to be sold only by weight or measure, and the whole or a part should be lost before they are delivered to the purchaser, the loss will be the vendor's; but if the thing should be preserved, and the price of the article should in the meantime rise or fall in value, the increase or diminution would be the purchaser's: for this reason, because, as regards the price, it is understood that the contract is already perfected, although it may not be so in respect of the risk, as is said by *Greg. Lop.* Gl. 11. L. 24. tit. 5. P. 5. Note what is there said by *Greg. Lop.*

[40] The actual tender to the vendor by the purchaser, before witnesses, of the purchase money or price is sufficient. See L. 27. tit. 5. P. 5., cited.

[41] In case of eviction.

[42] That is, the Roman or civil law. See *Castro Disc.* 2. Lib. 1. tom. 1. p. 30. *sobre las leyes.*

term, to warrant (*sanear*) or secure the thing to the purchaser
L.32.tit.5.P.5. (*sanear ó hacer sana la cosa*), L.32. tit.5. Part.5. *Prestar eviccion* or *sanear* in this sense, is to defend (*amparar*) the purchaser or any other who hath been molested or sued at law for any thing he might have received for an onerous consideration or title, the vendor being obliged to undertake its defence (*á facer derecho sobre ella*) as though he were in possession of it,
L.33.tit.5.P.5. L.33. tit.5. P.5. He on whose account any one is disturbed is called the demandant (*autor*), and therefore this obligation does not only belong to this contract, but also to all other onerous ones. This warranty or indemnification (*eviccion ó saneamiento*) is founded on the following principles, 1st, That all vendors (*autores*) who transfer to another any thing are obliged to warrant or secure it (*sanearla*). 2d, That indemnification must be made (*se ha de prestar eviccion*) for eviction or recovery of the title by a stranger for a cause which preceded the contract. 3d, That the purchaser or another [43] is bound to give notice to the vendor (*autor*) of the suit which has been instituted for the recovery of the thing. 4th, That these circumstances
[195] concurring, the person injured has his action to recover from the vendor (*autor*) the damages and prejudices sustained by him. From the first principle it arises, 1st, That *warranty* (*eviccion*) ought to be made in the contract of renting, *Guzman, de Evict.* quæst.24. 2d, In donation arising from promise according to common opinion, *Guzman, ibid.* quæst.25. *á* n. 1. *al* 23.; but not that which arises from the delivery of the thing, *Guzman, ibid.* n.25., where, as to which, some limitations will be met with. 3d, In *dote* with respect to those who are obliged to give dote [44] (*dotar*), *Guzman, ibid.* quæst.26. *á.* n.1. *al.*6. 4th, In legacies [45], because the heir is obliged to pay or deliver them to the legatees, *Guzman, ibid.* quæst.27. 5th, In the thing given in payment, because such a payment is similar to sale, *Guzman, ibid.* quæst.28. 6th, In exchange (*permuta*), *Guzman, ibid.* quæst.29. n.6. 7th, In the partition of property among brothers [46], because it has the force of exchange, *Guzman, ibid.*

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[43] On behalf of the purchaser must be understood.

[44] Such as parents.

[45] *Palacios* says, this is understood when a general legacy has been bequeathed to the legatee; and it having been delivered or paid to him, he is judicially deprived of it, but not when any particular specific legacy should have been bequeathed to the legatee.

[46] And, adds *Palacios*, amongst those who are not brothers; and this, because the nature of suits or proceedings of partition require it, not because it may or may not have the force of exchange.

quæst. 33. n. 6. But '*eviccion*' does not take place if the parent should have made the division [47], *Guzman*, *ibid.* n. 16. 8th, In public judicial sale the creditor ought to warrant [48] (*prestar eviccion*) for the security of the purchaser, L. 50. tit. 13. P. 5. L. 50. t. 13. P. 5. *Guzman*, *ibid.* quæst. 34., unless the purchaser should know that the thing belonged to another, for then it is understood that he was willing to give the price, *Guzman*, *ibid.* quæst. 46.

From the second principle it is deduced, 1st, That warranty is made, as well if the entire thing should be sold as though only a part of it should be, L. 35. tit. 5. P. 5. 2d, That if any L. 35. tit. 5. P. 5. one should sell his right and actions in regard of any inheritance, he shall only make indemnity when the purchaser is evicted of all the inheritance that is considered indivisible, L. 34. L. 34. tit. 5. P. 5. tit. 5. P. 5. 3d, That the warranty (*eviccion*) will only take place if the purchaser should have lost the thing by definitive judicial sentence, *Guzman*, *ibid.* quæst. 15. & 57., where will be seen the limitations to this position; and let it be observed, that the sentence must be executed, *Guzman*, *ibid.* quæst. 15. n. 37. 4th, That if the purchaser submitted to a voluntary arbitration (*compromiso voluntario*), and lost the thing by the sentence of the arbitrators, there is no warranty [49], L. 36. tit. 5. P. 5. *Guzman*, L. 36. tit. 5. P. 5. *ibid.* quæst. 41. 5th, Nor when the thing hath been lost by an unjust sentence of the judge [50], or by the fault of the purchaser, or if sentence was given when the vendor was not present, L. 36. tit. 5. P. 5. 6th, Neither will there be warranty (*eviccion*), [196] if the purchaser hath lost the thing at play [51], L. 36. tit. 5. P. 5. L. 36. tit. 5. P. 5.

From the third principle it is inferred, 1st, That the knowledge or presence of the vendor is not sufficient but the suit must be notified to him, *Guzman*, *ibid.* quæst. 4., where the limitations to this will be found. 2d, This notice must be given

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[47] *Palacios* says, it will take place in this case, if it appears that the father wished his children should inherit equally, as is said by *Greg. Lop.*, Gl. 2. L. 9. tit. 15. P. 6.; and it will also take place if, by reason of his not having granted or required it, either child would be prejudiced in respect of his legitimate portion of the inheritance (*legitima*).

[48] In the later edition of the text, it is said the title ought to be warranted to the creditor for the security of the purchaser. L. 50. tit. 13. P. 5., cited, says, if the property is sold at the instance of the creditor or mortgagor, as the debtor's property, the creditor is not bound to the warranty, but the debtor, except by express covenant, or as is subsequently stated in the text; as also, says *Guzman*, where referred to.

[49] That is, says *Palacios*, if he hath done so without notice to, and the order of, the vendor. See the limitations mentioned by *Guzman*, quæst. 41. cited.

[50] In which case the judge is bound to the warranty or indemnity.

[51] See other exceptions mentioned in L. 36. tit. 5. P. 5., cited. And see tit. 23. Lib. 12. Nov. Rec. against gaming, particularly L. 15. ibid.

in time to be available for the defence [52], *Guzman, ibid.* quæst. 12.
L. 32. t. 5. P. 5. n. 8., and L. 32. tit. 5. P. 5. 3d, That then the vendor (*autor*) is bound to defend the defendant [53], and therefore shall be obliged to follow his jurisdiction, although it be an ecclesiastical one, *Guzman*, quæst. 6. *á* n. 1. *al* 7. *y* quæst. 7. *al* n. 15. 4th, That this notice being omitted, the vendor is not bound to the warranty or indemnification (*á la eviccion*), unless the purchaser and vendor be both sued, *Guzman, ibid.* quæst. 5. n. 1., or if the purchaser is unable to give it, *Guzman, ibid.* n. 2., or if it hath been dispensed with by express agreement, *Guzman, ibid.* n. 30. [54] 5th, That if the same thing hath been sold to two or more successively, the last purchaser alone can give notice to his immediate vendor, and sue him upon the warranty as his vendor (*autor*), and the first vendor shall not be liable or bound to the second purchaser, unless the latter's vendor (*su autor*) should have ceded or assigned to him his actions, in virtue of which he shall be able to sue as first purchaser, the first vendor, because, otherwise, the personal actions shall not pass to the successor, as *Guzman, ibid.* quæst. 11. fully explains.

From the fourth principle it follows, 1st, That if the vendor being once required should not assist the purchaser in the defence of the thing, the latter may claim against him the costs of the suit, and the damage (*perjuicios*), *Guzman, ibid.* quæst. 13. *á* n. 1. *al* 23. 2d, That he is obliged to return the purchaser the price or consideration paid for the thing, the damages which
L. 32. t. 5. P. 5. may result to him being estimated, L. 32. tit. 5. P. 5. 3d, That if it happened when the vendor made the sale, he bound himself in a penalty to double the amount, if he should not defend the thing according to law, this double amount ought to be estimated according to the value of the thing or property, and not
L. 32. t. 5. P. 5. according to the price paid for it, L. 32. tit. 5. P. 5. *al fin.* [55]

Finally, from what has been said, it is evident, 1st, That the vendor is not bound to warranty (*á la eviccion*), if the king by his authority should deprive the purchaser of the thing [56],
L. 37. t. 5. P. 5. L. 37. tit. 5. P. 5. 2d, That even in case of its being agreed that the vendor shall not be bound to warranty or indemnification (*no preste eviccion*), notwithstanding, if the thing be re-

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[52] At latest, says *Palacios*, before the publication of proof. So also says L. 32. and likewise L. 36. tit. 5. P. 5.

[53] Or purchaser.

[54] See also n. 29 & 31. ibid., which last say, notwithstanding, it is to be given from equity.

[55] See *Greg. Lop.* Gl. 8 & 9. on this law.

[56] See the proviso in this law and *Greg. Lop.* Glos. thereon.

covered at law from the purchaser, the vendor is bound to return the price or consideration money to the purchaser of good faith [57], *Guzman, ibid.* quæst. 43.

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Cap. 2. Of the modes by which this contract may be annulled or set aside.

Having already explained the modes by which the contract of sale and purchase is made, we must now state those by which it is annulled or set aside; which also arise from the good faith which should attend this contract as regards the consent, the thing, and the price or consideration.

§ 1. Of the want (falta) of consent in the mind of the person contracting. Ll. 7 & 61. t. 5. P. 5.

As to what regards consent, we say 1st, That every sale is annulled by the mutual dissent of the parties. 2d, That the contract not being perfected or complete [58], either of the contracting parties may recede from it, Ll. 7 & 61. tit. 5. P. 5. 3d, That after the contract is made, it is of no use to allege it was made through want or indispensable (*forzosa*) necessity, L. 62. tit. 5. P. 5. 4th, That the sale made through fear or force is voidable, Ll. 56 & 62. tit. 5. P. 5. 5th, That the purchase and sale in which fraud or deceit (*engaño ó dolo*) intervenes on the part of the vendor is not valid; but if this fraud should have occurred on the part of the purchaser in concealing any circumstance with respect to the thing, the contract subsists, but he ought to pay to the vendor the damages and prejudices which may result to him from this dole [59], L. 57. tit. 5. P. 5.

L. 62. t. 5. P. 5.

Ll. 56. & 62. t. 5. P. 5.

L. 57. tit. 5. P. 5.

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[57] Warranty is implied in every case. See what is said by *Wood* in his *Inst. C. L.* book 3. chap. 5. p. 233. on warranty, and compare it with what has been stated with respect thereto in the text.

[58] In a manuscript copy of *Dr. Halifax's Lectures on the Civil Law*, in the possession of the Translator, which, it is believed, have never been printed, although an analysis of them has, it is said, ch. 18. on *consensual contracts*, book 2. that this contract, *emptio venditio*, was perfect as soon as the price of the thing to be sold was agreed upon, whether the money was paid or not, and in payment it was consummated. For whatever was taken as *arra* or *earnest*, only served as a proof. It was therefore so far completed by consent alone. L. 7. tit. 5. p. 5., in the first part, says, that the purchaser having given *señal* or earnest, if he afterwards repents, loses the earnest or *arra*; and that if the vendor repents, he forfeits double the amount of the *arra* or *señal* paid, and the sale will not be afterwards valid. But *ad fin.* that if when the purchaser gave or paid the *señal*, he declared to give it as part of the price, or by way of consent (*otorgamiento*), he cannot afterwards repent nor rescind the sale. See *Greg. Lop.* Gl. on this law. L. 61. ibid. also quoted in the text, says, that the vendor, after the sale should be made, cannot repent, although he should be willing to pay the purchaser double the amount of the price or consideration, unless with the consent of the latter.

[59] *Palacios* observes, that in order to understand what the authors wished to say in this part of the text, what is stated by L. 57. tit. 5. P. 5. cited, ought to be known; which is, that if one should fraudulently, or through deceit, induce another to sell a thing which he was not desirous to sell, nor of which he knew the value, nor had seen, this sale would be null. But if he was desirous to sell it, and the fraud should consist in the concealing from the vendor any thing accessary or belonging to it, the sale would be valid, although the purchaser would be bound to make reparation for the fraud; as though it should

6th, That the sale is annulled if either of the contracting parties should not observe the covenants and conditions which were agreed upon at the time of making the contract, L. 58. tit. 5. P. 5.

L. 58. tit. 5. P. 5.

§ 2. Of the want of consent by reason of defect or vice (vicio) in the thing.

This deceit or fraud may happen from the concealment of certain circumstances, on account of which it is presumed that the purchaser would not have given his consent. Thus, therefore, in every contract of sale, every incumbrance (*carga*) or fault or defect (*tacha*) which the thing has, must be clearly expressed or made known; *ex gr.* if the thing or estate is liable or subject to any service (*servidumbre*) or annuity (*censo*); if the particular estate produces grass injurious to cattle; if animals [60] labour under any vice or infirmity, &c. In the first two cases the sale may be annulled without limitation as to time; the vendor being obliged to return the price, and make amends for the damages and prejudices, unless he should prove that he was ignorant, at the time of the contract, of the faultiness or defect of the thing; for then he is only obliged to return the price, L. 63. tit. 5. P. 5. But, in the third case, a demand must be instituted against the vendor within six months in order to get back the price; and after these have elapsed, the purchaser has six months longer, until the completion of the year, to bring his action to demand that so much of the price may be returned as the beast shall be less valuable on account of the fault or defect which was concealed in the sale; from which time these two periods of limitation are counted. But if the vendor should make known the defect (*tacha*), and the purchaser should notwithstanding consent, he shall not be able to revoke the contract, L. 66. tit. 5. P. 5. *vide Guzman, ibid.* quæst. 61.

L. 63. tit. 5. P. 5.

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L. 66. tit. 5. P. 5.

§ 3. Of the want of consent in respect to lesion enorme and fraud (engano).

In what respects price, we have before said that it ought to be just; and, consequently, that the sale may be annulled if there was *lesion enorme*, or fraud, in an excess of half the just price, as well on the part of the vendor as of the purchaser [61], L. 56. tit. 5 P. 5.

L. 56. tit. 5. P. 5.

From this principle it follows, 1st, That if the purchaser or the vendor should be prejudiced by this *lesion*, the contract

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say, that if the fraud or deceit is the cause of, and inducement to the sale, the contract is null; but that if the fraud intervenes incidentally, or accompanies accessorily the contract, it then is valid, according to the tenor of the different cases touched upon above.

[60] Also slaves. See L. 64. tit. 5. P. 5.

[61] Unless the vendor or purchaser, says *Palacios*, referring to L. 56. tit. 5. P. 5. & L. 2. tit. 1. Lib. 10. Nov. Rec. is willing to make good the deficiency, or reduce the excess.

ought to be amended or annulled within four years, if the thing exists without having undergone much deterioration, L. 56. tit. 5. P. 5. & L. 1. tit. 11. Lib. 5. Rec., which extends to all onerous contracts; and does not take place when purchasers are compelled to purchase[62], L. 6. tit. 11. Lib. 5. Rec. 2d, That notwithstanding this lesion, the sale will be valid, if the contracting parties agreed and bound themselves by an oath that it should be valid, except if any one of them were under 14 years of age, L. 56. tit. 5. P. 5. 3d, That all contracts celebrated between persons above twenty-five years of age, although there may be deception in the price (*engaño*) not exceeding half the just value, are valid, provided there be no fraud[63] (*dolo*), L. 57. tit. 5. P. 5. & L. 2. tit. 11. Lib. 5. Rec. 4th, That artisans cannot allege this *lesion*[64], by reason of the skill which they are supposed to possess, L. 3. tit. 11. Lib. 5. Rec.

L. 56. tit. 5. P. 5.
L. 1. tit. 1. Lib. 10. Nov. Rec.
L. 2. tit. 1. Lib. 10. Nov. Rec.
L. 56. tit. 5. P. 5.
L. 57. tit. 5. P. 5.
L. 3. tit. 1. Lib. 10. Nov. Rec.
L. 4. t. 1. Lib. 10. Nov. Rec.

In what relates to the thing or property sold, the sale may be set aside when there exists the right of *retracto ó tanteo*, by which, if the person possessing the right (*el retrayente*) offers the same price as was agreed upon, the contract ought to be revoked. Some persons may retract (*retraer*) by reason of the quality or nature of the thing which hath been sold, and others by reason of the quality of the person. The first are, 1st, The direct lord or proprietor (*señor directo*), or the person who has a share in the thing sold[65], who ought to be preferred to the relations when their claims come together, L. 13. tit. 11. Lib. 5. Rec. 2d, The partner in the common property, L. 14. tit. 11. Lib. 5. Rec.

§ 4. Of the mode of setting aside this contract by reason of the right of retracto ó tanteo.

L. 8. tit. 13. Lib. 10. Nov. Rec.
L. 9. tit. 13. Lib. 10. Nov. Rec.

Those who possess the right of *retracto*, by reason of the quality of the person, are, 1st, The nearest relation[66] in the sale

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[62] And see also the exceptions in the case of property sold publicly by appraisement, *ad fin.* L. 2. tit. 1. Lib. 10. Nov. Rec. Such, it is presumed, as is sold at judicial sale. See *Azevedo* and *Matienzo* on L. 6. tit. 11. Lib. 5. Rec.

[63] That is, fraud in the contract. See L. 3. tit. 1. Lib. 10. Nov. Rec., cited. What is here laid down in the text, does not appear very reconcileable with what preceded it, nor with what is stated in L. 2. tit. 1. Lib. 10. Nov. Rec. The apparent inconsistency may, perhaps, be thus explained. If deceit was the cause of the contract, and the inducement to it, the contract is void. If it was in the contract itself (by buying and selling too dear or too cheap), it is not void, but may be made void by action or exception, as of *Redhibitoria* or *Quanto minoris*. See *Wood's Inst. Civil Law*, Book 3. ch. 5. p. 230.

[64] In respect of any work undertaken or done in their respective art or calling.

[65] Also *superficiario*, L. 8. tit. 13. Lib. 10. Nov. Rec. cited. *Palacios* says, *superficiario* is he who possesses a house or building on the soil or ground of another, for which he pays some annual rent (*pension*). *Contractus superficiarius* is a contract, observes *Wood*, in which a man hires ground to build upon, at a yearly rent. See *Inst. Civ. Law*, Book 3. ch. 5. p. 239.

[66] Of the vendor, adds *Palacios*, provided he be within the fourth degree.

of a patrimonial or ancestorial estate, and if there are two of equal degree, they shall divide the estate between them, L. 13. tit. 10. Lib. 3. *Fuero Real.* and L. 7. tit. 11. Lib. 5. Rec. 2d, If this sale should be made to a stranger [67], the nearest relation must make use of or exercise this right within nine days, swearing that he wants the thing for himself; and not being disposed [68] to exercise or avail himself of his privilege, this right passes to the next in degree, L. 12. tit. 11. Lib. 5. Rec., which alters in this part, L. 7. tit. 11. Lib. 5. Rec. 3d, These nine days run against absent minors [69] by way of prescription, without their being admitted afterwards to claim although they may allege the right of restitution in *integrum*, L. 8. tit. 11. Lib. 5. Rec. 4th, The son of the vendor is preferred to his uncle, L. 8. tit. 11. Lib. 5. Rec. 5th, This right takes place or holds with respect to sales at public auction [70], the person who exercises it paying the costs, diligences, &c., L. 9. tit. 11. Lib. 5. Rec. 6th, If many things belonging to an ancestorial estate be sold for one price, all ought to be taken or none; but if they be sold for different prices, one may be taken without the other [71], L. 10. tit. 11. Lib. 5. Rec. 7th, If the thing be sold on credit, it may be taken on giving security within the nine days to pay the price for which it was agreed to be sold, L. 11. tit. 13. Lib. 5. Rec. 8th, That this right of *tanteo* by reason of relationship only takes place with respect to property inherited, and not that which the vendor acquired by contract *inter vivos* [72], L. 15. tit. 13. Lib. 5. Rec. 9th, The *hijosdalgo*, according to the custom (*fuero*) of Castille, have this right of *tanteo* or redemption of the

L. 1. tit. 13. Lib. 10. Nov. Rec.

L. 7. tit. 13. Lib. 10. Nov. Rec.

L. 1. tit. 13. Lib. 10. Nov. Rec.

L. 2. tit. 13. Lib. 10. Nov. Rec.

L. 2. tit. 13. Lib. 10. Nov. Rec.

L. 4. tit. 13. Lib. 10. Nov. Rec.

L. 5. tit. 13. Lib. 10. Nov. Rec.

L. 6. tit. 13. Lib. 10. Nov. Rec.

L. 3. tit. 13. Lib. 10. Nov. Rec.

Whether this computation is to be according to the canon or civil law, is a question which has its several various supporters; and there being no declaratory law to the contrary, the Learned Professor gives his assent to the computation of the canonists.

[67] And also if it should be made to a relation, says *Palacios*, according to the common opinion.

[68] Or able. See L. 7. tit. 13. Lib. 10. Nov. Rec. cited.

[69] Against minors and absent persons. See L. 2. tit. 13. Lib. 10. Nov. Rec. cited.

[70] Even though by judicial order. See L. 4. tit. 13. Lib. 10. Nov. Rec. cited.

[71] *Palacios* says, *Azevedo*, on L. 10. tit. 11. Lib. 5. Rec. excepts two cases, in which one cannot be taken without the other, which see.

[72] *Palacios* says, that *Gomez* on L. 73. *de Toro*, n. 5. is of opinion, that the same takes place in respect of property acquired by the vendor, although it be by contract, *inter vivos*, if he acquired it from his ascendants. As, for instance, if any of them should have made a donation, *propter nuptias*, or should have given any of their property by way of *mejora*; and that it is certain, that the reason there is for its taking place with respect to property inherited, exists for its doing so with respect to the description of property last mentioned.

property of their ancestors without limitation of time in respect to the property which descended from their father and grandfather *de abuelo arriba*[73], L. 1. tit. 4. Lib. 4. *del Fuero viejo de Castilla.*

§ 5. Of the obligation of the possessor of good or bad faith in case of this contract being annulled.

When it happens that the purchaser loses the thing judicially, there must be a distinction made between him who may be a *bonâ fide* possessor, and him who may be so *malâ fide*; that is, he who, at the time of the purchase, should know that the thing did not belong to the vendor.[74] The first makes the fruits his own until the day of contestation; but the latter is obliged to restore them, Ll. 39 and 40. tit. 28. P. 3. Ll. 39&40. t. 28 P. 3.

With regard to the expenses which both might have incurred, it must be observed that *Garcia de expensis.* cap. 1. num. 10. distinguishes four classes of expenses: The first are necessary, without which the thing will be destroyed; the second profitable or advantageous ones which improve the thing (*mejoran*); the third, those of mere pleasure, such as paintings, &c.; and the fourth, those which are incurred for the purpose of gathering in the fruits. [200]

According to our laws, 1st, As well the possessor *bonâ fide*, as he *malâ fide*, may recover necessary expenses, retaining the thing for the payment, L. 44. tit. 28. P. 3. 2d, Only the possessor bonâ fide recovers expenses laid out for the advantage of the property (*provechosas*), Ll. 41, 42, & 44. tit. 28. P. 3. 3d, As also those of mere taste, L. 44. tit. 28. P. 3. 4th, Both may deduct the expenses of the fourth class, L. 42. tit. 28. P. 3. *vide el Garcia, de expensis*, cap. 1, 2, & 5. L. 44. t. 28. P. 3. Ll. 41, 42. & 44. tit. 28. P. 3. L. 44. t. 28. P. 3. L. 42. t. 28. P. 3.

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[73] But not from ascendants farther removed than them. See L. 1. tit. 4. Lib 4. *Fuero viejo de Cast.* cited.

[74] *Palacios* observes, that not only is a person said to possess in bad faith, who knew at the time of the purchase that the property did not belong to the vendor, but if he afterwards comes to know it, and from the time he does know it; and in so much is the latter a possessor in bad faith, that if, after knowing it, he should make any new work on the property purchased, and should be evicted by the lawful owner, he shall not be able to recover the expenses he incurred in respect thereof, L. 41. tit. 28. P. 3.; and in the same manner he shall be obliged to restore the fruits of the property received, L. 39. tit. 28. P. 3.

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TITLE XIV.

OF RENTS, RENTING. (*DE LOS ARRENDAMIENTOS.*)

Of renting or letting in general.

THE second onerous contract is that of renting, by which one person lets or grants to another the service or labour of his person or beast, or the use or enjoyment of a thing, for a certain time, which must be paid in ready money [1], L. 1. tit. 8. P. 5. Our laws distinguish renting (*el arrendamiento*) from letting (*el alquiler*), applying the term rent to an estate or land (*heredad*), and the latter to a house [2], a castle, &c., L. 1. tit. 8. P. 5.

L. 1. tit. 8. P. 5.

L. 1. tit. 8. P. 5.

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[1] *Vide contra Wood's Inst. C.L.*, p. 236; 1st, *Browne, C.L.* p. 178. It is said in the text, that the price or reward must be paid in ready money; but this appears to be only applicable to the term *loguero*, not *arrendamiento*; which first term may, perhaps, be properly rendered wages, or reward, or remuneration for services or labour, whether of man or beast: for by the civil law, the rent or reward is not, as in the contract of buying and selling, confined to ready money, but is extended to every thing that consists in number, weight, and measure, or in a certain quantity of provisions, or in a portion of the fruits; and *vide* L. 7. tit. 11. Lib. 10. Nov. Rec.; and note 1. *ibid.*, and *nota Greg. Lop.*, L. 4. tit. 8. P. 5. Since the foregoing part of this note was written, the Translator has procured the edition of the text with the notes of *Dr. Palacios*, professor of laws in the University of Huesca, of which it will be seen, he has availed himself whenever the transcription of these notes or their substance appeared useful. The Learned Professor observes on this part of the text, that the definition given according to the law cited (L. 1. tit. 8. P. 5.) belongs to *Loguero*: that *arrendamiento*, according to the same law, consists in *renting an estate*, or any *other thing for a certain rent*: that it is of *Loguero* and of *arrendamiento*, L. 1. tit. 8. P. 5., speaks; and of the word *alquiler* or *alquilar*, that L. 5. *ibid.*, makes mention. But that in the language or terms of the present time, the term *logar* is unknown, except in some particular towns; where, to agree with a man for his services or labour, to reap, &c. is called *logar*; and *logarse* is said of those who hire themselves, or furnish their labour for wages: that the term *arrendar* is made use of in speaking of renting or leasing an estate or possession; the term *alquilar*, in speaking of the letting or hiring any house, lot of land, or other things, for a certain sum and time; and *ajustar* or *concertar* (to bargain or agree), is said in speaking of work done and performed (*las obras*). That the word *arrendador*, which the text applies to the *lessor* or person who lets to rent or hire, is applied also by the laws, and without travelling out of this 8th Title of the 5th *Partida*, to the lessee or hirer; and if regard is had to the common acceptation or use of the day, it is more applicable to the latter than to the former; but that, properly speaking, the latter ought to be called *arrendatario* (lessee or hirer). That in *Febrero Reformado*, P. 1. tom. 2. c. 10. § 1. num. 1., the person who lets to rent or hire, is called *arrendatario*; but that this is a mistake. A reference, however, to the 4th edition of *Febrero Reformado*, published at Madrid 1807, tom. 2. Par. 1. cap. 19. § 1. num. 1. p. 1., will show that the learned Professor is deceived, and that the reverse and proper definition is given to the word *arrendatario*.

[2] The word *cosa* is made use of in the text; but it is apprehended that this is a typographical error, and that the word *casa* is meant.

This contract then consists in three things; in the consent of the parties; in the thing or labour which is rented or let; and in the price. In the first place hence it is, that renting derives its perfection from consent. 2d, That all things capable of use and mechanical labour or service, may be rented or hired. 3d, That the price must be just, certain, and in ready money.[3] 4th, That the renter or lessor is obliged to grant the use of the thing rented, or to perform the labour stipulated, and the lessee or person hiring to pay the price which he promised.

§ 1. In what rent consists, and the principles on which this contract is founded.

From the first principle it is inferred, 1st, That any one may rent who can sell and buy[4], the agreement being for a certain time, or for the life of either of the contracting parties, L. 2. tit. 8. P. 5. 2d, That this contract admits every covenant or pact that may not be opposed to the laws and good customs, L. 2. tit. 8. P. 5. 3d, That if the tenant or lessee holds three days beyond the time agreed on, the renting is presumed[5] to continue for another year under the like covenants. But if he should be lessee or tenant of a house, tower (*torre*), or other building, such presumption does not take place, for the reason assigned by L. 20. tit. 8. P. 5.

L. 2. tit. 8. P. 5.

L. 20. tit. 8. P. 5.

From the second principle it results, 1st, That all things may be rented or let, from the use whereof we can derive advantage; and also the usufruct of an estate, vineyard, or other like thing, L. 3. tit. 8. P. 5. 2d, The work and labour of others, Ll. 3. 9, 10, 11. tit. 8. P. 5.

L. 3. tit. 8. P. 5. Ll. 3. 9. 10. 11. tit. 8. P. 5.

From the third principle it arises, 1st, That the price or amount of the rent ought to be regulated according to the law or custom of the place[6], or by agreement of the parties, L. 4. tit. 8. P. 5.[7], and as regards the wages of daily labourers, it is provided that they be regulated or fixed by the town councils

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L. 4. t. 8. P. 5.

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[3] See note [1], p. 224. *ante*.

[4] *Palacios* says, L. 2. tit. 8. P. 5. specifies various persons, who, though they may buy and sell, cannot take on lease or hire, lands (*campos*). Those are *caballeros* and officers of the king's court; and he refers to tit. 10. Lib. 10. Nov. Rec. for information as to those who cannot rent or hire the royal rents, or those of any town wherein they hold or exercise their offices.

[5] It is not only presumed, says *Palacios*, but is positively known, and is clear according to L. 20. tit. 8. P. 5., cited; and by L. 3. tit. 10. Lib. 10. Nov. Rec., farmers and landlords are obliged to give each other notice to quit at the beginning of the last year of the term; if not, the term continues over for another year.

[6] With reference to the time of renting.

[7] In the absence of all which, if the rent is payable yearly, it must be paid at the end of the year; and when it is payable out of the fruits, it is not due before the crop or harvest is reaped. *Vide* the law quoted in the text, and note 1. *Greg. Lop.* on ditto.

L.4.tit.26. Lib.8. Nov. Rec. or corporations [8], L.3. tit.11. Lib.7. Rec. 2d, That it ought to be paid at the time stipulated, and if none be appointed, at the end of the year, L.4. tit.8. P.5., but the wages of mechanics must be paid daily, L.4. tit.11. Lib.7. Rec. 3d, That if the rent be not paid at the appointed time, the landlord or lessor may oust or remove the tenant or lessee, it being always understood that for the satisfaction of the rent he has a tacit mortgage on whatever is found belonging to the latter on the premises rented [9], L.5. tit.8. P.5. 4th, That the lessee being punctual in the payment of the rent, cannot be dispossessed or ousted [10], except in the cases expressed by L.6. tit.8. P.5. 5th, That if the thing rented be sold within the term, the lessee ought to give it up; but the vendor is obliged to make good to him a share of the price proportioned to the time that remains to complete the term, unless it shall have been otherwise covenanted. [11]

L.4.tit.8.P.5. L.2.tit.26. Lib 8. Nov. Rec. L.5.tit.8.P.5. L.6.tit.8.P.5.

From the fourth principle it is inferred, 1st, That at the expiration of the term, the thing must be restored to the renter or lessor; and in case of delay or refusal [12] on the part of the tenant or lessee, he shall restore double the amount [13], and make good the damages and deteriorations, L.18. tit.8. P.5. 2d. That the tenant or lessee of an estate ought not to pay the rent or price if any calamity, war, fire, &c., should arise, which may destroy the fruits or produce, unless it should have been covenanted to the contrary, or unless this loss may be compensated from the abundance of other years [14], Ll.22 & 23. tit.8. P.3. 3d, That if the estate produces double fruits, or gives a double return, not by reason of the industry, but by the me-

L.18.tit.8.P.5. Ll.22. & 23.t.8. P.3.

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[8] Or the wages may be fixed by agreement between the labourers and their employers. *Vide* note 1. tit. 26. Lib. 8. Nov. Rec.

[9] *Palacios* observes, if they should have been put there with the knowledge of the owner, referring to L.5. tit. 8. P.5. *Quære*, if beasts belonging to the plough, and things necessary to tilling and cultivating the ground of lessee, can be distrained?

[10] Until, says *Palacios*, the term be concluded; and that it is to be observed, that L.6. tit. 8. P.5. cited, does not speak of lessees or tenants of estates (*heredades*), but of tenants or lessees of houses.

[11] Or the lease should have been granted for the life of either lessee or lessor perpetually.

[12] L.18. tit.8. P.5. says, until sentence given against him (lessee).

[13] *Palacios* says, the restitution or payment of double the amount, in such case, is not practised.

[14] Either former or subsequent. See L.23. tit.8. P.5., cited: provided, adds *Palacios*, according to the law 22, *ibid.*, the event by which the produce is destroyed should not be one of those accidents often accustomed to happen; and he refers also to *Greg. Lop.* Gl. 3. on the same law; or unless it should be the custom of the place for this loss to belong or attach to the lessee.

lioration or augmentation [15] of the thing, the price or rent ought to be doubled, L. 23. tit. 8. P. 5. 4th, That the full annual salary or stipend of schoolmasters must be paid, although they die before the completion of the year, because the instruction was not wanting from their fault. But the heirs of an advocate who should die before the completion of the suit, and those of a mechanic or tradesman who undertook to perform any work, cannot recover the entire wages or price, unless they provide an equally competent advocate or workman to finish what was begun, L. 9. tit. 8. P. 5. 5th, That the person letting any thing [16] is responsible for the damages which may accrue to the hirer by reason of its inutility or defect, except in the case [17] provided by L. 14. tit. 8. P. 5. 6th, That if the lessors or landlords, or others, by reason of any right that they may possess over the thing rented, of which the lessors or landlords were cognizant, should impede or obstruct the lessees or tenants in the use of it, they ought to pay to the latter the damages and prejudices occasioned by such obstruction [18], L. 21. tit. 8. P. 5. 7th, That the herdsman, or keeper of cattle, shall satisfy the damage done by the animals, which proceeds from his fault, L. 15. tit. 8. P. 5. 8th, That the master workman who shall have undertaken any work by the job or lump, is obliged to do it over again, or to return the price with the damage, if it should tumble down while it is building, or if after it is finished, in the opinion of honest men of his calling, it should be judged faulty and dangerous through his fault, L. 16. tit. 8. P. 5. But if the work should be undertaken under the agreement of paying the price after it is finished, the payment cannot be delayed under the pretext of its not being considered good, because the inspection of skilful persons will be sufficient to destroy this excuse. And if the agreement were to pay on the work being done to the satisfaction of him who ordered it to be done, and that till then it should be at the risk of the workmen, if this approbation should be deferred through the fault of the former, from the period of this delay, all deterioration ought to be at his risk, provided it does not arise from the faultiness or defect of the work, L. 17. tit. 8. P. 5.

L. 23. tit. 8. P. 5.

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L. 9. tit. 8. P. 5.

L. 14. tit. 8. P. 5.

L. 21. tit. 8. P. 5.

L. 15. t. 8. P. 5.

L. 16. t. 8. P. 5.

L. 17. tit. 8. P. 5.

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[15] That is, accidental. See also *Greg. Lop.* Gl. 6. on L. 23. tit. 8. P. 5., cited.

[16] Such as casks or vessels for holding wine, oil, &c.

[17] With respect to bad grass in a pasture or meadow, of which the lessor was ignorant. See L. 14. tit. 8. P. 5. cited.

[18] See the amplifications and limitations to this contained in L. 21. tit. 8. P. 5. cited.

Hence it follows, 10th, That the freighter of a ship must pay the value of the thing that shall be laden in it, with all prejudices to the owner of it, if it was endangered or broken by the fault of the former, L.13. tit.8. P.5.[19] 11th, That a carrier of goods is liable to the same penalty, if they be lost through his fault, L.8. tit.8. P.5.[20] 12th, That every error of an artist or professor, from which loss or deterioration may arise to the thing which he took under his charge, induces the obligation, on his part, of satisfying or paying the value of it[21], L.10. tit.8. P.5. 13th, That if the lessor or lessee should die within the term, the reciprocal obligations pass, or are transferred to the heirs of both[22], except that the thing rented were the usufruct of an estate; because being personal, the lease or term will expire with the death of the lessee, Ll.2 & 3. tit.8. P.5. 14th, That the owner of a warehouse is not answerable for the things placed there by the tenant or lessee[23]; but he is not by this absolved from the obligation of paying the damages occasioned by his fault or fraud, L.25. tit.8. P.5. 15th, That innkeepers[24] are responsible for the property of their guests, because they ought to exercise hospitality with good faith, and return, or justify the confidence placed in them, Ll.26 & 27. tit.8. P.5. 16th, That as the lessee or tenant is obliged to pay the damages which the thing shall sustain while in his possession, in the same way the lessor or landlord ought to satisfy the lessee or tenant for the value of the improvements which, by his industry, the property rented hath undergone[25], L.24. tit.8. P.5.

L.13.t.8.P.5.

L.8.t.8.P.5.

L.10.t.8.P.5.

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Ll.2 & 3.t.8. P.5.

L.25.tit.8.P.5.

Ll.26 & 27. tit.8.P.5.

L.24.t.8.P.5.

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[19] See L.13. tit.8. P.5. cited.

[20] See also L.8. tit.8. P.5. cited.

[21] This extends to physicians, surgeons, farriers, &c. See L.10. tit.8. P.5. cited.

[22] *Palacios* says, that this is not understood with respect to particular successors, nor to those of an intail. And for a clearer comprehension of the difference, he refers to *Gom. var res*, Lib.2. cap.3. to *Murillo cur. jus. can.* this title. *Ferraris prompta Biblioth. verb. Locatio; Febrero reformado*, p.1. c.10. § 1. tom.2.

[23] Unless he undertook their charge or custody. See L.25. tit.8. P.5. cited.

[24] Also owners, &c. of vessels; and this responsibility extends to loss by negligence, theft, &c. See L.26. tit.8. p.5. cited.

[25] *Palacios* says, it must be observed by way of conclusion to this title, that by a royal order of 21st June, 1768, it is forbidden to tenants or lessees to underlet the lands rented to them, which order it is necessary to bear in mind, because *Gomez. 2. var res.* cap.3. n.11., and some others allege, that the tenant or lessee may under-let that which was rented to him. The royal order, however, referred to by the Learned Professor, is not found in the *Chronological Index of Pragmaticas, &c.* to the *Nov. Rec.*

TITLE XV.

[206]

OF PARTNERSHIP OR SOCIETY.

THE third onerous contract is that of partnership, which is a union of two or more men, formed with the intention of making gain from their joint stock, associating themselves with one another, L.1. tit.10. P.5. Cap. 1. Of partnership and its kinds. L. 1. tit. 10. P. 5.

There is a partnership which is called universal or general, by which all the property of the partners present and future is joined together. The other is particular, as regards certain specific things or objects. All partnership must have for its object an honest and just purpose, and which must not be opposed to good manners or customs, of which examples are given in Ll. 2 & 9. tit.10. P.5. Ll. 2 & 9. t. 10. P.5.

Hence proceed the following axioms: 1st, That partnership is a contract which derives all its force from the consent of the partners. 2d, That all profits and losses arising from the things which should be brought into the partnership be common. 3d, That it proceed from good faith. § 1. Upon what principles this society is established.

From the first axiom it follows: 1st, That partnership may be formed, tacitly or expressly, by mere parole agreement, by instrument or deed, by *mensagero*, &c., L. 7. tit.10. P. 5. 2d, That all persons may enter into it, with exception of the madman [1] and minor under fourteen years; but the minor under twenty-five years has always the right of restitution *in integrum* against the damages or fraud which he may suffer, L.1. tit.10. P.5. 3d, That this contract can only be made for a certain time or for the life of the partners, but never for that of their heirs, unless it be a partnership of rent regarding things belonging to the crown or any corporation, L.1. tit.10. P.5. This does not prevent the heirs from being responsible by reason of the passive actions which their ancestors and members of the partnership transmitted to them, L.17. tit.10. P.5. 4th, That from the day in which the partnership was formed, there is no necessity for a formal delivery of the things, in order to their being considered common to the partners in their use and right of them, except L.7.tit.10.P.5. L.1.tit.10.P.5 L.1.tit.10.P.5. L.17.t.10.P.5.

[1] *Palacios* observes, that every person who cannot consent, by what reason soever it may be, is unable to make this, or any other contract.

actions of seignory or dominion [2], and against debtors, for which, in order to their being rendered common, an express power or
[207] authority is required from the lord or proprietor, or the creditor,
L.6.tit.10.P.5. L.6. tit.10. P.5.

From the second axiom it is inferred, 1st, That the distribution or partition of losses and gains may depend upon the will of the partners, provided it be proportioned to the capital or labour
L.4.tit.10.P.5. of the partners, L.4. tit.10. P.5. 2d, That the partnership called *leonine* is not valid, by which one partner is deprived of
L.4.tit.10.P.5. all gain, and charged with all loss [3], L.4. tit.10. P.5. 3d, That if the contracting parties do not determine the gains or losses, they shall be equal [4]; and if the gains are determined, and not the losses, the latter shall be proportioned to the former, and
L.3.tit.10.P.5. *vice versâ*, L.3. tit.10. P.5. That the injuries arising from the fault of any particular partner are chargeable entirely to him [5],
L.7.tit.10.P.5. L.7. tit.10. P.5. 5th, That if the determination of these gains or losses be left to the decision of a third person, provided such decision be not conformable to the said rules, it ought to be
L.5.tit.10.P.5. reformed by experienced persons, L.5. tit.10. P.5. 6th, That in particular or limited partnership, as regards gain or loss,
L.7.tit.10.P.5. only the things specified enter into communion, L.7. tit.10. P.5.

To the third axiom appertains, 1st, That one partner cannot

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[2] *Palacios* says, this means, that if any of the partners should have a seignory or jurisdiction (manorial jurisdiction), the other partners cannot exercise this jurisdiction, unless special power should have been given to them for the purpose. Also, if one partner should have any debts due to him (individually is meant), the other partners cannot demand or sue for those debts, without a like power or authority.

[3] *Palacios* here observes, that the partnership in which it is agreed, that one partner shall bear the whole loss, may be valid; and that this is laid down in L. 4. tit. 10. P. 5. which says, *ó se fazen pleyto que perdiesen en la compania en aquellas cosas que usan, que non oviese parte en la perdida; tales pleytos como estos valen é deben ser guardados.* Such, he adds, would be the case, where one partner should contribute a thousand dollars capital, and the other partner his labour; with the agreement, that if they lost, the capital so contributed should be lost by the former. *Quære*, however, if the loss should extend beyond the amount of the thousand dollars contributed by the one partner, would not each partner be liable to his moiety or proportion of such excess of loss? The Learned Professor concludes by stating, that a partnership is therefore termed *leonine*, when it has been agreed that one partner may have all the gain, and bear no share in the loss, or that all the loss should be his and he should be entitled to no part of the gain, and that this is not valid. It may be observed, that the epithet *leonine*, is taken from the division made by the lion in the fable.

[4] Proportionably, it is presumed, to the goods, &c., brought into the stock. This observation, it is found, is confirmed by *Palacios*, who says that what is above stated, is implied or understood in the text.

[5] But a partner was obliged to observe only the same ordinary care and diligence in the affairs of the partnership which he observed in keeping his

exact more care from the other than what he bestows on his own property or affairs, L. 7. tit. 10. P. 5.[6] 2d, That this good faith and care ought to accompany all the affairs of the co-partnership, so that the prejudice or loss caused in one firm or branch of commerce by the fault of one of the partners cannot be compensated or set off by the gain which he should make for them in another[7], L. 13. tit. 10. P. 5. 3d, That the debts contracted and expenses incurred for the utility of the company, or of him who shall be commissioned in the service of the partners are to be common, L. 16. tit. 10. P. 5. 4th, That when any person is induced by the fraud of another to form a co-partnership, he is not bound to observe the contract after he discovers the fraud; nor to fulfil the covenant of not prosecuting the other on account of it, L. 5. tit. 10. P. 5. 5th, That if partition hath been made by one of the partners of gains fraudulently or improperly acquired, and for this reason he hath been obliged to restore them to the party injured, the partners shall be bound equally to restore the portion which they have respectively obtained in the partition, if they were ignorant of the bad faith of their partner; but if they had knowledge of it, they shall be obliged to satisfy the party aggrieved in equal portions[8], L. 8. tit. 10. P. 5. It being the duty of persons who form a partnership to act towards one another as brothers, L. 1. tit. 10. P. 5.; it follows, 1st, That on account of debt one partner cannot sue the other for more than he is able to pay, leaving him a sufficiency to subsist on if he has not wherewithal to obtain it, L. 15. tit. 10. P. 5. 2d, That if the administrator of the company[9] should give to any of the other partners their shares without notice to the rést, and the administrator should come to poverty or be insolvent, there shall be another partition made; and if the other partners were aware of it and did not demand in time their proportions, this collation shall not be formed, L. 15. tit. 10. P. 5. 3d, That if any of the partners should take any thing belonging to the company without the

L. 7. tit. 10. P. 5.

L. 13. t. 10. P. 5.

L. 16. t. 10. P. 5.

L. 5. tit. 10. P. 5.

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L. 8. t. 10. P. 5.

L. 1. tit. 10. P. 5.

L. 15. t. 10. P. 5.

L. 15. t. 10. P. 5.

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own private property, and proof of this being done, would absolve him from the entire or particular loss. *Vide* L. 7. tit. 10. P. 5., quoted in the text.

[6] *Vide* note [5], *ante*.

[7] This is brought more within the meaning of the Law 13. tit. 10. P. 5. cited in the text, than given as the literal translation of the text. See this law, and *Greg. Lop.* Gl. 4 & 5. thereon.

[8] And this whether they have received any part of the gains or not. *Vide* the Law 8. tit. 10. P. 5. quoted in the text.

[9] That is to say, one of the partners administering the affairs of the company. *Vide* the L. 15. tit. 10. P. 5. quoted in the text.

knowledge of the rest, he cannot be prosecuted for theft, unless
L.17.t.10.P.5. there should exist evident proofs of it, L.17. tit.10. P.5.

§ 2. Of the modes by which partnership is dissolved.

From these principles it is evident, 1st, That the copartnership is at end by the renunciation of any of the partners; and if this renunciation was made before the term agreed upon, or before the object or business was completed for which the partnership was formed, he is obliged to satisfy the others the
L.11.t.10.P.5. damages and prejudices occasioned by reason thereof, L.11. tit.10. P.5. This renunciation ought not to be fraudulent; for if it be proved such, all the profits from thenceforward become common among the other partners, and the losses appertain
L.12.t.10.P.5. exclusively to the one who fraudulently renounced, L.12. tit.10. P.5. 2d, That the partnership is also at an end by the natural
L.10.t.10.P.5. or civil death of any of the partners, L.10. tit.10. P.5. 3d, By a cession of property, L.10. tit.10. P.5. 4th, By the destruction of the thing which was the object of the contract, L.10. tit.10. P.5. 5th, By reason of the bad temper or disposition of any of the partners, or the non-observance of the covenants or
L.14.t.10.P.5. terms of the contract[10], L.14. tit.10. P.5. 6th, For the close or discharge of the accounts, the administrator is obliged to present to the company not only the cash book, but also the journal.—*Escovar Muñoz de ratiociniis*, cap.10. *á* n. 39. *al* 41.

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[10] These two, says *Palacios*, are not modes of dissolving copartnership, but just causes for the renunciation or separation from it by him who suffers unjustly.

TITLE XVI. [209]

OF EXCHANGE OR PERMUTATION.

THE fourth onerous contract is that of exchange or permutation. Exchange is to give and deliver a specific or particular thing for another, L.1. tit.6. P.5. To exchange it is not necessary for the things exchanged to be present, nor that the consent of the parties be expressed by word; for the act of receiving the thing by one of the persons bartering will be sufficient [1], L.1. tit.6. P.5. Cap.1. Of exchange or permutation. L.1.tit.6.P.5. L.1.tit.6.P.5.

This contract bears a total resemblance [2] to that of purchase and sale, L.2. tit.6. P.5. Under this principle we establish, 1st, That no one can exchange who cannot sell and buy, L.2. tit.6. P.5. 2d, That only that can be exchanged which is capable of being purchased [3], except spiritual things, which, although they cannot be sold, may be exchanged [4] with the permission of the prelate who has jurisdiction over them [5], L.2. tit.6. P.5. 3d, That when once this contract is perfected L.2.tit.6.P.5. L.2.tit.6.P.5. L.2.tit.6.P.5.

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[1] *Palacios* says, that L.1. tit.6. P.5. does not specify any exchange which may not be made by parol. That, by the law, three modes of making an exchange are referred to; and in the third, to which, it appears, the text refers, it thus declares:—"When an exchange is made by parol, which is afterwards fulfilled by the act of both, or one of the parties." Nor can it be said, that by the mere receipt of the thing by one of the parties, without having manifested an intention of making this contract, does an exchange take place.

[2] *Quære*. *Vide* the difference noticed by *Brown*, 1st vol. book 2. c.11. p.371. *Wood's Inst. C. L.* p.235. By the civil law, exchange was not perfected by bare consent. Actual permutation must take place before the contract was perfect; for from an agreement to exchange, no action arose, (but *vide* L.1. tit.1. Lib.10. Nov. Rec.) nor could the risk be transferred from one to another before actual permutation.

[3] *Palacios* says, it is to be observed, that the property of another person can be bought, and the purchase will be valid to various effects. L.28. *de contr. empt.* Ll.51. & 53. tit.5. P.5. and which cannot be exchanged, nor would the exchange be valid. L.1. tit.6. P.5. *Cur. Philip. com. ter.* Lib.1. c.12.

[4] By other spiritual persons, observes *Palacios*, but not by temporal or lay persons.

[5] But this requisite, the same learned Professor also states, is not alone sufficient; for various are the others, besides this, which are necessary, in order that spiritual things may be exchanged; but he adds, that this belongs to the canonists, and refers to *Murillo curs. jur. can.* tit *de ver. permut.* He further observes, that prebends and other ecclesiastical livings (*piezas*,) cannot be bartered without the royal permission, in virtue of the *concordate* with the court of Rome, the collation and canonical institution to them relating only to the ordinary diocesan. He quotes *Febrero Reformado*, tom.1. P.1. c.17. n.3. p.392. 4th ed.

by consent, it must be fulfilled [6], or the interest or damages (*intereses*) paid to the party suffering by him who repents or refuses [7], L. 3. tit. 6. P. 5. 4th, That permutation is annulled and extinguished by the same modes and for the same reasons that purchase and sale are, the persons exchanging being bound to the warranty or security (*eviccion*) of the things exchanged, L. 4. tit. 6. P. 5.

L. 3. tit. 6. P. 5.

L. 4. tit. 6. P. 5.

Cap. 2. Of bills of exchange.

Under these same general rules is found established in Spain the business or traffic termed *colibistica* [8], or the exchange of letters or bills [9], which is the permutation of monies for the purpose of remitting money from one part or country to another, L. 4. tit. 18. Lib. 5. Rec.[10] Limiting our discourse to the subject of the exchange of bills, it is evident by its nature, 1st, That for the perfection and fulfilment of this contract four persons intervene. He who draws the bill [11]; he on whom it is drawn [12]; he who delivers or pays the money for it, and he in whose favour it is drawn [13]; although it is possible that these two last circumstances concur in one person. [14] 2d, That when once the bill

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[6] *Quære.* *Vide* note [8], *ante;* but also *vide* L. 1. tit. 1. Lib. 10. Nov. Rec.

[7] *Palacios* confirms what has been observed in notes 2 & 6., which were made before the edition of the text by the learned Professor came under the notice of the Translator. He states, that by the law of the *Partidas*, exchange was not perfected by consent alone, or by parol promise (*por palabras.*) That when it was made by parol and promise, that is, by stipulation, he who repented, or became unwilling to fulfil the exchange, might be compelled to carry it into execution, or to pay to the other party the damages and prejudices which resulted to him by its non-fulfilment. That when it was made by parol, or by *nude pact*, a distinction was made: if one party fulfilled his part, and the other refused to perform his, it was in the election of him who had fulfilled his agreement, either to recover back his thing or property, or to demand the damages and prejudices which resulted to him by reason thereof; but that if neither had delivered the thing agreed, either of them might freely repent, without being able to be forced to the fulfilment of the covenants, L. 3. tit. 6. P. 5.; but that since the passing of L. 1. tit. 1. Lib. 10. *Nov. Rec.* the exchange cannot be repented of; and the party is bound to its fulfilment, in whatever way he may have manifested his intention to bind himself.

[8] The translator cannot find an English word for *Colibistica.*

[9] It is not easy to discover the affinity between the doctrine of the contract of exchange, and the doctrine of bills of exchange. The rules of the first are traceable to the civil law, those of the latter are only referrible to the conveniences and refinements of modern commerce. Mr. Justice *Blackstone*, 2d vol. p. 467. gives credit to China for the introduction, in 1236. It is not a little curious, however, that *Wood*, in his *C. L.* p. 235. should have fallen upon the same plan as the text. He however admits, that though the contract of bills of exchange hath the name, it hath nothing of the nature of that under which it is mentioned.

[10] Not inserted in the *Nov. Rec.* See Ll. 7 & 8, and note 4. tit. 3. Lib. 9. Nov. Rec., which treat of bills of exchange.

[11] The drawer.

[12] Drawee, and after accepting it, acceptor.

[13] Payee.

[14] *Palacios* mentions the following requisites to a bill of exchange. 1st, The date, place, day, month, and year in which the bill is drawn. 2d, The amount

is presented, by him to whom it is remitted, to the person on whom it is drawn, if the latter accepts it, or another for him, they remain bound for the payment; but if the bill be not accepted, a judicial request having been made by him who pre- [210] sented it, the holder takes out the protest and transmits it to the person who remitted the bill, and the latter may oblige the drawer or giver to return him the amount expressed [15], Ll. 9 & 10. tit. 15. Lib. 9. Rec.[16], *Dominguez, de Letras de Cambio*, Lib. 2. Disc. 1. 3d, That on the delivery of the bill of exchange results the irrevocability of the contract, so that the parties cannot secede from it [17], *Dominguez*, ibid. Disc. 8. n. 1, 2, & 3. 4th, That by the acceptance of the bill there is only inferred a tacit consent to pay, and so that no novation nor delegation having taken place, the drawer or giver shall not be absolved from his obligation in respect of him in whose favor it is drawn. From which it is inferred, that if the acceptor should fail, there is a recourse against the drawer [18], *Dominguez*, ibid. Disc. 11. With

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or sum for which given, expressed in figures at the head of the bill, and in letters or words in the body of it. 3d, The period at which it is drawn payable. 4th, The name of the person in whose favour it is drawn, who is called the payee (*tomador*). 5th, The person from whom the amount or consideration of the bill is received. This requisite might be well merged, it is conceived, in the 4th, the payee being generally the person who, or on whose behalf the consideration, is paid for the bill. 6th, The signature of the drawer. 7th, The name of the person on whom it is drawn, and the place of his residence; *i. e.* the drawee. He further observes that when the sum expressed in the body of the bill does not correspond with that mentioned in figures at the head of it, regard must be had to the sum set forth in the body of the bill, unless by the letter of advice the contrary appear; and he adds, that when no time of payment is expressed in the bill, but it is simply directory to pay a certain sum, it ought to be understood, as payable at sight, or on presentation of the bill. The last rule holds in England. See *Chitty on Bills*, p. 279. ed. 4.

[15] *Palacios* says, that if by the neglect or *laches* of the holder or person to whom the bill is remitted, the time for payment should expire without the bill's having been accepted, and the drawee refuses payment, the holder loses his recourse against the drawer. If the holder presents it at due time, and it is not accepted, he ought to take out the protest for non-acceptance; and in consequence or virtue (*en vista de*) thereof, oblige the drawer to deposit the amount of the bill, to reimburse him, in case the bill should not be paid when it becomes due. That by the mere circumstance of the want of, or of non-acceptance, the drawer cannot be compelled to return the amount of the bill, but he may be to deposit it as abovementioned. The Translator must here observe, that the *ordenanza* 23 of Bilbao does not require a deposit, in such case, of the amount, but only directs that in the above case, the drawer, on being required, shall be obliged to give the holder security to pay the bill when it becomes due. See also *Suarez*, 1st. vol. *Letr. de Camb.* p. 103. 4, 5. n. 172. 3 & 4.

[16] These laws are not in the *Nov. Rec.*

[17] Unless, as observes *Palacios*, before it has been indorsed or negotiated, the drawer and payee should mutually agree to do so.

[18] Unless by the *laches* of the holder he should have lost this recourse against the drawer and indorsers, when he can only look to the acceptor. In

respect to the acceptances and payments which are made with protest, the reader is referred to *Dominguez*[19], ibid. Disc. 12 & 13. As this business depends principally upon good faith, it has been necessary to protect it with the following provisions: 1st, That bill-brokers (*cambiadores*) be creditable, competent, and responsible, or sufficient people, L.1. tit.18. Lib.5. Rec. 2d, That for this trade there must be at least two *bound in solidum*; and that those who are bill traders or brokers cannot hold or carry on any other trade nor commerce[20], L.12. tit.18. Lib.9. Rec.[21] 3d, That no money exchanger or banker may have money that is not current by law, nor more than one set of scales and weights, L.64. tit.21. Lib.5. Rec.[22] L.2. tit.18. Lib.5. Rec. 4th, That no foreigner can be a money exchanger or banker in the kingdom, although he may have letters of naturalization[23]; neither can any such be an exchange broker, whose office ought to be appointed for fairs in places where they are accustomed to be appointed, Ll.7 & 11. tit.18. Lib.5. Rec. 5th, That bankers cannot take five maravedis per thousand to pay in good money, L.5. tit.18. Lib.5. Rec.[24] 6th, That accommodation bills (*cambios secos*) are prohibited under various penalties; such are always considered when persons who borrow money on interest (*tomaren dinero á cambio*) have neither money, credit, nor correspondent in the places on which they borrow it, L.13. tit.18. Lib.5. Rec. 7th, That the agreement to borrow money for various successive fairs, so that the interest of the first may enter into the principal sum, and cause other interest on the second[25], is prohibited, L.13. tit.18. Lib.5. Rec. 8th, That the books of money exchangers or bankers (*cambiadores*) and

Ll.tit.3.Lib.9. Nov. Rec.

L.12.tit.12. Lib.9., Nov. Rec.

Ll.1 & 2. tit.6. Lib.9. Nov. Rec.

L.4.tit.3.Lib.9. Nov. Rec.

L.4.t.3.Lib.9. Nov. Rec.

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the case of due diligence or conduct being observed by the holder, he has his recourse against the drawers and indorsers, without being obliged to attend to the progressive order of indorsement, &c.

[19] There is a more modern treatise on bills by *Suarez* in two vols.; and there are some very good points of information collected in 3d. vol. *Febrero adic.* Appendix to c. 18.

[20] *Palacios* says that practice negatives this.

[21] This law is not inserted in the Nov. Rec.

[22] Not in *Nov. Rec.*; and it appears there is no such law in the *Rec.* of 1775.

[23] Neither, says *Palacios*, is this observed, since the greater part of the bankers (*cambistas*), in the kingdom, as well in the capital as in the provinces, are Frenchmen, Italians, Irishmen, &c.; and that there are also many foreign exchange or bill brokers. He adds, that in all cases that occur with respect to bills of exchange which are not provided for by the *ordenanzas* of commerce, attention must be paid to practice; the most accredited bankers being consulted thereupon, and the same with respect to towns where there are no *ordenanzas*.

[24] This law is not in *Nov. Rec.*

[25] That is, compound interest.

merchants ought to be regulated or kept according to the order and in the mode prescribed by L.10. tit.18. Lib. 5. Rec. [26], and the establishment of public banks, according to that directed by L. 5. tit.18. Lib. 5. Rec.; which, among other things, requires the license of the government and sufficient security. 9th, That the exchange, its circumstances, the value of the bills, &c., cannot be proved by the oath of the persons who shall lend the money on interest, but by public instruments, witnesses, &c. L.13. tit.18. Lib. 5. Rec. 10th, That to the books of bankers, if they are made or kept with due formality, faith is given in [27] their favour, and against them, by reason of their being the depositaries of the public faith; which is not admitted with respect to the books of merchants [28], *Escobar Muñoz de Ratiociniis*, cap.11. *á* n. 7. *al.* 33., where there are various limitations laid down to this. 11th, That money cannot be lent to carry interest, nor to be trafficked with, if the person lending it be not interested in the contracts [29], L.15. tit.18. Lib. 5. Rec.

[211]

L.12.tit.4. Lib.9. Nov. Rec.

L.5.t.3.Lib.9. Nov. Rec.

L.4.t.3. Lib.9. Nov. Rec.

L.21.tit.1. Lib.10. Nov. Rec.

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[26] See also L.13. tit.4. Lib.9., Nov. Rec.

[27] *Quære*, if this may not be properly translated, faith is given to their contents for or against the owners.

[28] The books of merchants are entitled to faith, or are proof against them, observes *Palacios*, in the form and cases provided by L. 23. tit.19. Lib. 9. Rec.: this law is not in the *Nov. Rec.* See *Cur. Philip.* Lib. 2. cap. 8. *Com. Ter.*

[29] Or perhaps unless they are to share in the profit and loss: "*sino es á perdida y á ganancia*," says L.21. tit.1. Lib.10. Nov. Rec., referred to in the text. See this law.

TITLE XVII.

OF CONTRACTS, THE FULFILMENT OF WHICH DEPENDS UPON CHANCE OR CONTINGENCY.

Cap. 1. Of insurance.

THE contracts of which we are about to treat in this title, constitute a third class, and among them the principal is insurance, by which one person insures to the other his merchandise against the danger or risks of the sea or land for a certain price or premium which he receives for it [1], *Hevia, Curia Filip. Comerc. Nav.* cap. 14. n. 1. He who takes upon himself this work is called the insurer or underwriter, and he who is insured against it, the insured or assured [2]: with respect to this contract the ordinances of maritime nations vary.

[212] On the nature of this contract the following axioms are founded: 1st, That those who may contract, or are not prohibited from so doing, may insure. 2d, That all classes or descriptions of merchandize, except those prohibited, may be insured. 3d, That the clauses of this contract ought to be interpreted strictly, and without extension. 4th, That the insurer is made responsible for the risk by reason of the premium which is paid to him. 5th, That the insured ought to point out all the circumstances of the thing, and give notice of the injury or damage which the merchandize insured may have suffered.

From the first axiom it follows: 1st, That minors, prodigals,

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[1] *Palacios* observes, that the particular and precise knowledge of what appertains to chap. 1 & 2 of this title, depends upon the information which must be respectively afforded by the *ordinanzas* by which each *consulado* is regulated and governed: but that therefore the things which in all places constitute the essence of this contract of insurance must not be omitted; which are 1st, That there be one or many effects which form the matter or ground of it; and that one of the parties have that which may be insured by the other. 2d. That there be risks to which the effects which the assurer takes upon himself to insure, may be exposed, or ought to be exposed. 3d, That there be a determinate or an indeterminate sum which the assurer promises to pay to the assured by way of indemnity, in case of the loss of the effects insured by any of the fortuitous events against which the assurer hath insured. 4th, That a certain sum or rate be agreed on, which the assured may pay or be bound to pay to the assurer, in consideration of the insurance. 5th, The consent of the contracting parties.

[2] The sum which is given as the price or consideration of the risk, says *Palacios*, is called the premium or rate of insurance; and the act extending it, the instrument or policy of insurance.

madmen, &c., cannot insure. 2d, Nor brokers (*corredores*) of merchandize for the Indies, L. 4. tit. 39. Lib. 9. *Rec. de Indias.* L. 4. tit. 39. Lib 9. Rec. Ind.

From the second axiom it is inferred, that the insurance of goods prohibited as contraband, seized for nonpayment of duty, and those which are without or beyond risk, is not valid, *Hevia Cur Phil.* ibid. n. 8. 2d, Nor of the property of enemies, or things destined for them, *Wedderkop. Introd. in Jus Nauticum*, Lib. 3. tit. 7. § 73. 3d, That according to L. 5. tit. 39. Lib. 9. Rec. *de Ind.*, only two thirds of goods going to the Indies can be insured; and by the *Consulado de Barcelona*, it is permitted to insure the seventh of eight parts, if the owners are natural born subjects; and the third of four parts, if they are foreigners, *Capitulaciones del año* 1485.[3] cap. 1. 4th, That the insurance of goods loaded on the other side of the Straits of Gibraltar is not valid, according to the Consulado of Barcelona, *Capitulaciones de* 1484. c. 2. 5th, That the guns and tackle and furniture of the ships of the Indies cannot be insured, L. 5. tit. 39. Lib. 5. Rec. *de Ind.* 6th, That the gold and silver which come from the Indies are not to be insured by the disposition of the *Ordenanzas de Bilbao*, cap. 33. L. 5. tit. 39. Lib. 9. Rec. Ind. L. 5. tit. 39. Lib. 5. Rec. Ind.

From the third axiom we deduce, 1st, That when the vessel simply is insured, the goods which she has on board are not understood to be insured, and *vice versâ*, *Hevia. Cu. Phi. ibid.* n. 16. 2d, That the things which one has on board his vessel being insured, the insurance only devolves on those which he had actually on board at the time, and not on those which have been afterwards laden, *Hevia Cu. Phi. ibid.* n. 12. 3d, That [213] if the underwriter insures the goods of a person that is in partnership with another, he is only considered to insure the part or share of the assured, and not that of his partner, unless it should be otherwise expressed, *Hevia. Cu. Phi. ibid.* num. 13. 4th, That if a vessel be insured, it is understood for the first voyage she shall make until she arrive at anchor in the port of her destination, *Hevia Cur. Phi. ibid.* num. 21 & 22. 5th, That the insurance of one ship cannot be extended to another, *Hevia Cur. Phi. ibid.* n. 23. 6th, That if one insures a certain quantity of goods, and they were not on board at the time the ship was lost, the underwriter is not bound to pay their value, *Hevia Cur. Phi. ibid.* n. 17. 7th, That the insurance is not annulled, although the assured may place the goods on board another's

[3] In the edition of the text edited by *Palacios*, it is 1484.

vessel (*en cabeza de otro*), in order that it may be understood they belong to the latter, *Hevia Cu. Phi. ibid.* n. 16.

By the fourth axiom it is established, 1st, That the insurance is not valid until the premium be paid, *Capitulaciones de* 1484. cap. 15., which ought to be paid within two months on insurances to the Indies, L. 11. tit. 39. Lib. 9. *Recop. Ind.*, and within twenty-four hours at the port of Bilbao, *Ord. de contrat. de Bil.* c. 34. 2d, That the risk of the underwriter commences from the time the goods were laden or shipped, until they were unladen at the port or place of destination, *Wedderkop, ibid.* § 82. & 137., and L. 48. tit. 39. Lib. 9. *Rec. Ind.* 3d, That the insurance of goods lost at the time of the contract is null, if the loss should have happened in a place that, reckoning a league for an hour travelling by land, the insurer might have been able to know it, L. 7. tit. 39. Lib. 9. *Rec. Ind. Capil. de* 1484. cap. 17. *Ordenanzas de Bilbao*, cap. 22.[4] n. 25. 4th, That the risk and damage for which the underwriter is responsible, is intrinsic (*el intrinseco*), arising from violence or a fortuitous event, such as tempest, fire, &c., and not that which happens from the interior vice or defect of the thing, *ex gr.* if wine turn vinegar, or oil become rancid, &c., L. 42. tit. 39. Lib. 9. *Rec. Ind. orden. de Bilbao* (cap. 48. 50. & 65.[5] quoted). 5th, That the insurer is responsible for general average of throwing goods overboard (*echazon*), and expenses incurred for unloading and lightening the vessel, Ll. 20. & 43. tit. 36. Lib. 9. *Rec. Ind. Wedderkop, ibid.* § 91. 6th, That the underwriter is not liable for the damage arising from the fault of the insured, or the captain, or pilot of the vessel, *Hevia. Cu. Phi. ibid.* num. 24. *Orden. de Bilbao*, cap. 46.[6] 7th, That if part of the goods were to be found which were believed lost, the insured is bound to receive it on account of the value which the insurer (*asegurado*)[7] is obliged to pay him, *Ordenanzas de Bilbao*, cap. 61.[8] 8th, That the underwriter ought to take care to cause the goods to be valued, and not doing so, it shall depend upon the oath of the insured, L. 41. tit. 39. Lib. 9. *Rec. Ind.* 9th, That the

L. 11. tit. 39. Lib. 9. Rec. Ind.

L. 48. tit. 39. Lib. 9. Rec. Ind.

L. 7. tit. 39. Lib. 9. Rec. Ind.

L. 42. tit. 39. Lib. 9. Rec. Ind.

Ll. 20. & 43. tit. 36. Lib. 9. Rec. Ind.

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L. 41. tit. 39. Lib. 9. Rec. Ind.

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[4] The quotation in the text is cap. 31.

[5] This quotation is erroneous with reference to the edition in the possession of the Translator, viz. that of 1813.

[6] Does not correspond with edit. of 1813.

[7] *Quære*, '*asegurador?*' and so it is translated. The Translator since finds in the edition of *Palacios*, that the word in the text is '*asegurador*,' as translated.

[8] The Quotation does not correspond with the edit. of 1813.

premium of insurance is not due, by the vessel which hath not performed the voyage, or for the goods which were not embarked or shipped, *Capitulaciones de* 1484. cap. 5.; and this premium may be demanded within fifteen days on insurances to the Indies, L. 12. tit. 39. Lib. 9. *Rec. Ind.*, and by the *Ordenanzas de Bilbao*, cap. 38. [9], the insured ought to notify it to the underwriters rebating the half per cent. of what hath been given or paid. 10th, That the ship which goes to the Indies is considered lost, if within a year and a half no information hath been received of her, L. 8. tit. 39. Lib. 9. *Rec. Ind.*

L. 12. tit. 39. Lib. 9. Rec. Ind.

L. 8. tit. 39. Lib. 9. Rec. Ind.

From the fifth axiom it arises, 1st, That he who causes insurance to be made on a vessel, must declare her built, if she was taken in time of war, if she is a very fast sailor, &c., *Wedderkop, ibid.* § 108. 2d, That the insured ought to attend as far as he is able, to the good condition and conservation of the goods, to which end the *Orden. de Bilbao*, cap. 26. [10], direct that the vessel and its tackle, apparel, and furniture (*aparejos*), be valued, and that the insured incur the risk of twenty-five per cent., in order that he may take more care in providing for the vessel.

Cap. 2. Of maritime interest (cambio maritimo).

The second contract of this class is maritime interest (*cambio maritimo*). [11] In this contract a certain amount or sum is offered on the hull (*cuerpo*) of the ship, or on the goods therein laden, on condition to repay the capital with certain interest in case of arriving safe at their destination. *Wedderkop, ibid.* Lib. 3. tit. 11. § 123. When credit is given on the ship, it is the contract which the French call *contrat à grosse aventure.*

Hence we draw three principles, 1st, That those only who can bind the ship and wares may make this contract. 2d, That the creditor runs the risk of the ship and the goods. 3d, That, by reason of this risk, he may demand the capital with interest. [215]

From the first of these principles it is inferred, 1st, That those interested are bound in this contract for the value of the vessel and cargo, so that the quantity or amount exceeding it is

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[9] The quotation does not correspond with the edit. of 1813.

[10] Do.

[11] *Vide* 2d vol. *Black. Commentaries*, p. 457. edit. 1809, *fœnus nauticum*. ***Palacios*** here takes occasion to observe, that the ignorance, confusion, and informality which took place on the subject of maritime interest, induced the *consulado* of commerce of Barcelona, with its accustomed zeal, to represent the necessity of establishing there a register of maritime interests, which it proposed under eight articles, and which the king was pleased to approve by royal *cedula* of 23d of December, 1795, and that this is a proof of the necessity there is for seeing the laws which govern in each *consulado*, to acquire the corresponding information in these matter

L. 6. tit. 39. L. 9. Rec. Ind.

considered a pure loan (*emprestito*), *Wedderkop, ibid.* §126.: and according to L. 6. tit. 39. Lib. 9. *Rec. Ind.* no master can borrow on interest on a vessel which goes to the Indies more than a third part of the value, and with license of the *consulado*. 2d, That the captain can only borrow on interest, if the parties interested be present, with their approbation; and being absent on account of some urgent necessity, as for the repairs of the vessel, &c., *Ordenanzas de Bilbao*, cap. 41. [12]

From the second principle it follows, 1st, That the creditor begins to incur the risk from the time that he made the contract until the vessel hath arrived at the port of her destination, *Wedderkop, ibid.* §130. 2d, That if the vessel hath incurred risk, not by a fortuitous event, but by varying the due course of her navigation, by arriving at a more distant port than that expressed in the contract, by carrying contraband goods, this ought not to cause any prejudice to the creditor, *Wedderkop, ibid.* §131.; but it is to be observed that money lent on interest ought not to contribute to make good the damage caused by throwing overboard or jetsam (*echazon*), *Wedderkop, ibid.* §134. By the third principle it is acknowledged that the interest on maritime loan (*cambio*) ought to be graduated in proportion to the danger and risk of the navigation, *Wedderkop, ibid.* §132.

Cap. 3. Of bets or wagers (apuestas).

The third contract which depends on chance, is wager, *apuesta*, or a reciprocal promise between two with respect to a conditional doubtful event, past, present, or future. [13] Wagers or bets are obligatory, provided that there be no fraud or deception (*dolo*) on the part of any of the contracting parties [14]; see the examples set forth in *Hevia, Cu. Phi. ibid. comercio naval.* c. 15.

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[12] This quotation does not correspond with the edit. of 1813. *vide* cap. of ditto 24. n. 36. 37. 38. & 39. on this subject.

[13] *Palacios*, referring to *Cu. Phil.* Lib. 3. c. 15. n. 1. says, that a wager is a reciprocal promise which is made between two or more, each laying a wager to the contrary of what the other says, to gain or lose it upon a conditional, doubtful event (although it be with respect to a third and uncertain person,) past, present, or to come. He adds, that a wager may be also defined a pact between two or more, who dispute upon any doubtful thing, by which it is agreed, that he on whose part that which is assigned is not verified, shall lose any sum or other thing, and the other shall gain it, or a third person, according to the agreement.

[14] Although there be no fraud or deception, says *Palacios*, there are various wagers which are not obligatory. Wagers respecting who shall eat or drink most, and wagers respecting immodest or illicit things are not binding, although there be no fraud or deception. If two lay a wager, and one should know the truth of the thing upon which the bet was made, and should not declare it to the other, who was ignorant of or doubted it, he would not gain the wager.

TITLE XVIII.

OF SECURITY.

SURETY is one who engages or promises to another to give or do something by the order or at the request of the person on whose behalf he enters into security, L. 1. tit. 12. P. 5. There are conventional and judicial securities. Here we treat of the first class. Of the contract of suretiship. L. 1. tit. 12 P. 5.

From what has been said we extract three principles, 1st, That suretiship is an accessary contract which requires consent. 2d, That sureties enjoy the benefit of order [1] not to be sued but in default of the principal. [2] 3d, That the surety who paid, alone, has an action against his co-sureties in virtue of the cession of the right of action of the creditor; and the sureties have an action against the principal debtor. [3]

From the first axiom it is deduced, 1st, That every person who can oblige or bind himself may be a surety [4], L. 1. tit. 12. P. 5. L. 1. tit 12. P. 5. 2d, Bishops, clergymen [5], friars, cannot be, L. 2. tit. 12. P. 5. L. 2. tit. 12. P. 5. 3d, Nor the wife for the debt of her husband, although it should

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[1] *Beneficium ordinis sive excussionis.*

[2] It appears that judicial sureties do not enjoy this benefit; *vide Pothier; Domat. C. L.;* and 2d vol. *Febrero Adicionado*, p. 162. n. 49.; and *Wood's C. L.*, p. 227. *Palacios*, referring to L. 11. tit. 12. P. 5., says, that the surety who paid the whole debt in the name of the debtor, has no action against the other sureties, but only against the debtor himself: if he paid in his own name, he has it also against the debtor; but he may, if he prefers it, require the creditor to cede to him his actions against the other sureties; to demand from each of them the proportion for which each is respectively liable; this cession is what is termed *carta de lasto*, or cession of actions. That if when the surety paid, he said not in whose name he did pay, it shall be understood that he paid in his own name, provided he immediately afterwards demanded the cession of actions; but if he did not so immediately demand it, he shall be understood to pay in the name of the debtor.

[3] One benefit of sureties, namely *divisionis*, is omitted. *Vide Wood, C. L.*, p. 227.; and L. 8. tit. 12. P. 5.

[4] *Palacios*, citing L. 28. tit. 21. Lib. 4. Rec.; which is L. 7. tit. 11. Lib. 10. Nov. Rec., says, that labourers or planters (*labradores*), are an exception to this rule; who, although they may bind or oblige themselves, cannot be sureties unless it is among one and other, and not for others, without their being able to renounce this privilege. See also *nota* 1. tit. 11. Lib. 10. Nov. Rec.; which is *auto* 8. tit. 25. Lib. 5. Rec.

[5] L. 2. tit. 12. P. 5., observes *Palacios*, says regular clergymen; for, generally speaking, it is permitted to clergymen, although they be of the superior orders, to be sureties for other clergymen for their churches, and for destitute

L.3.tit.11. Lib.10. Nov. Rec. have been converted to her benefit[6], L.9. tit.3. Lib.5. Rec.; except in the eight cases mentioned by L.3. tit.12. P.5.[7] 4th, L.3.tit.12.P.5. That no one can become security for any minor, if the latter L.3.tit.1. Lib.10.Nov. Rec. has not the license of his father or curator, L.2. tit.11. Lib.5. Rec. cited[8], which amends or alters, L.4. tit.12. P.5. 5th, L.4.tit.12.P.5. That suretiship may be accessory to every obligation, civil and L.5.tit.12.P.5. natural, L.5. tit.12. P.5. 6th, That the surety may be bound before or after the principal debtor, at a certain time, under L.6.tit.12. P.5. condition, &c., L.6. tit.12. P.5. 7th, That the surety cannot be bound for more than the principal, and this excess may consist in a greater amount, in an inconvenient place, or in a L.7.tit.12.P.5. shorter time of payment, or even without condition, L.7. tit. 12. P.5. 8th, That the obligation of the surety is extinguished when that of the principal is; and for five causes besides.[9]

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persons; and even when they should enter into security for those for whom they are prohibited to be sureties, the security would be binding in regard to their property, although their superior might punish them for having done so.

[6] But it would appear that when a woman joins in an obligation with her husband, she is liable, *pro ratâ*, according as she hath been proved to have been advantaged; *vide* L.3. tit.11. Lib.10. Nov. Rec.: except in case of necessaries, which the husband is bound to furnish her. She may be surety in respect of debts to the crown; but even though *femme covert* may be surety for her husband in respect of taxes or debts due to the crown by him, she cannot be arrested or imprisoned therefor; nor for any debts of her husband, L.2. tit.11. Lib.10. Nov. Rec. See also 6th *Febrero Adicionado*, P.2. Lib.3. cap.2. § 3. p.400. n.160.; also L.4. tit.11. Lib.10. Nov. Rec. and App. J.

[7] This law (3. tit. 12. P. 5), is anterior to that of the *Nov. Rec.* (L.3. tit.11. Lib. 10). *Palacios* takes occasion here to remark, that the authors say, that a *femme covert* cannot be surety for the debt of her husband, although it may be converted to her own benefit; and in continuation they except eight cases: one of which is, that she may be so when it is for her own utility or advantage, as may be seen in L.3. tit.12. P.5.; which they cite to this effect. That this is an error or want of explanation: that what is certain is, that the wife, if her being security for her husband is treated of, can be surety for him in no case, by L.9. tit.3. Lib.5. Rec.; which is L.3. tit.11. Lib.10. Nov. Rec.; and if her being security for a stranger or third person is treated of, although generally speaking she cannot be so, there are eight cases excepted by L.3. tit.12. P.5. See the law last-cited for the excepted cases alluded to by the Learned Professor. It must be observed, that the above general disability or disqualification of being surety, is not confined to a *femme covert*, but extends to all women. See L.2. tit.12. P.5. The note [6], to which attention is craved, as it affects the above remarks of *Palacios*, was written before the Translator saw the observations of the Learned Professor; and he, with deference, ventures yet to submit it to scrutiny.

[8] *Palacios* says, that it is doubtless to L.22. tit.11. Lib.5. Rec.; (L.17. tit.1. Lib.10. Nov. Rec.): to which the text means to refer; and which, as also what is stated in this part of the text, must be understood, when the minor or child under paternal power (*hijo de familias*), should purchase or borrow any thing on security; as, in such cases, the law annuls the contract, oath, or security, which shall be entered into or given in respect thereof.

[9] For these causes, says *Palacios*, the surety may demand of the judge, that the principal debtor discharge him from the obligation. But it may be here observed, the discharge of the creditor is the object of the surety.

1st, If the surety should pay the debt or part [10] of it. 2d, If he should remain a long time bound, which is left to the discretion of the judge to determine. 3d, If on the arrival of the time for payment, he deposits the money before witnesses. 4th, If the time for which he became bound hath expired. 5th, If the principal debtor dissipates his property, L. 14. tit. 12. P. 5. 6th, The security is not at an end by the death [11] of the surety, but it descends to *his* heirs, L. 16. tit. 12. P. 5. [217]

L. 14. tit. 12. P. 5.

L. 16. t. 12. P. 5.

From the second principle it arises, 1st, That if execution go against the principal debtor, and he has not wherewithal to pay, the sureties may be sued; and if it should happen that the debtor should be absent from the place, and the sureties demand time to produce him, it must be granted to them, L. 9. tit. 12. P. 5. 2d, That if the sureties were simply or jointly bound, each can only be sued for his respective part or proportion; and if they have bound themselves each *in solidum*, or for the whole [12], the creditor may demand the whole debt from whomsoever of the sureties he pleases; but if there be among them any poor persons, the rest must pay the whole [13], L. 8. tit. 12. P. 5. & L. 1. tit. 16. Lib. 5. Rec.

L. 9. tit. 12. P. 5.

L. 8. t. 12. P. 5. L. 10. tit. 1. Lib. 10. Nov. Rec.

On the third principle it is established, 1st, That if the creditor recovered from one of the sureties *in solidum*, he must assign to him his rights and actions, in order that he may recover from his co-sureties their corresponding proportions, L. 11. tit. 12. P. 5. 2d, That sureties in paying have a right to proceed against the principal debtor, unless they have paid with the intention of not demanding it; or if the security conduced to the utility of the sureties; or the sureties became bound against the will or desire of the principal debtor; L. 12. tit. 12. P. 5. 3d, That if one of the sureties paid the whole debt in the name of the principal debtor, he can have recourse against him only, and not against his co-sureties, [14], L. 11. tit. 12. P. 5. 4th, That if any one become bound by order or request (*mandado*) of another, who is not the principal, and any injury should arise to him by reason of such security, he has his action only against the person by

L. 11. t. 12. P. 5.

L. 12. t. 12. P. 5.

L. 11. t. 12. P. 5.

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[10] *Quære*, if he pay only part of it, unless he be merely jointly bound with others, and not *in solidum*.

[11] In judicial bail for the appearance of a person accused, the obligation expires, of course, with the death of the party for whom it was given. *Vide* L. 19. tit. 12. P. 5.

[12] That is, jointly and severally.

[13] And this whether they be only simply or jointly bound, as well as if bound in *solidum*. *Vide* L. 8. tit. 12. P. 5., quoted.

[14] See what is said in note [2], p. 245. *ante*.

L.13.t.12.P.5. whose order or desire he became bound [45], L.13. tit.12. P.5. 5th, That if the surety could oppose or allege any exception or defence in a suit respecting the debt due by his principal, and he did not do so, he will not be able to recover what he paid on account of the debt [16], unless this exception should belong or
L.15.t.12.P.5. relate only to the person of the surety [17], L.15. tit.12. P.5.

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[15] But if the security produced advantage to the person for whom he became bound, he has his recourse against either: this observation is confirmed by a similar remark of *Palacios*, with the addition, that if the person on whose behalf the order or request was so made, was present, and did not contradict it, he is also liable to the surety. *Vide* L.13. tit.12. P.5.

[16] The omission to make the exception, a peremptory one is meant by the law cited, must be wilful: ignorance will excuse him. *Vide* L.15. tit.12. P.5. quoted. By the civil law, the mismanagement of the cause by surety, seems only to affect his right of recovering back the costs of suit paid by him on account of his principal. If, says *Wood, Civ. Law*, p. 227. ch. 3. book 3., the surety being prosecuted by the creditor, makes an ill defence, and is cast for want of management of his cause, it ought to be judged according to the circumstances of the matter, whether he shall recover his costs of suit of the principal debtor.

[17] Or belonging only to the person of the debtor, as noticed by *Palacios*. See L.15. tit.12. P.5., *al fin.*

TITLE XIX. [218]

OF CRIMES AND PUNISHMENTS IN GENERAL.

HAVING treated of the right to the thing, and of the different obligations arising from a lawful act, we will now treat of that which produces an unlawful act, which is called crime. Cap. 1. Of crimes and their divisions.

Crime (*delito*)[1] is every bad act which is done or committed wilfully by one to the injury (*daño*) or discredit (*deshonra*) of another, *Prol.* Part. 7. If this bad act is done with an injurious or malicious (*dañada*) intention, that is with *dolo*, it is a real or proper crime (*delito verdadero*), which our laws comprehend under the general name of offence (*malfetria*); but if this act proceeds only from an omission, although culpable, it is called *quasi* crime. Hence it is, that only the person who is of sufficient age to act with this malice, can be a delinquent, and punished as such: this age our legislators have determined to be ten years and a half, and upwards (*de diez años y media arriba*)[2], L. 9. tit. 1. P. 7. § 1. Of the kinds of offences, proper and improper. [219] Prol. P. 7. L. 9. t. 1. P. 7.

The madman, or person of non-sane mind, is also not capable of committing a crime, L. 9. tit. 1. P. 7. L. 9. t. 1. P. 7.

The difference between public and private crimes does not arise among us merely from the diversity of persons against whom they are committed, but principally from the circumstance whether the judge may proceed against the delinquent *de oficio proprio*, or by accusation alone; and, in this sense, are reckoned Cap. 2. Of the division of crime, into public and private.

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[1] *Delito*, says *Palacios*, is transgression or contravention of law, which deserves punishment by human laws.

[2] *Palacios* observes, and he is supported by L. 9. tit. 1. P. 7., that even from or after that age, they are not to be punished as persons of greater age. 17 years seems the age at which full punishment for an offence may be inflicted. See also L. 10. tit. 7., L. 17. tit. 14., and L. 8. tit. 31. P. 7., and Ll. 2. & 3. tit. 14. Lib. 12. Nov. Rec. It is said that a person under 14, cannot be punished for perjury, although it would seem that such an one might, if *doli capax*. See L. 7. tit. 11. P. 3., and *Greg. Lop.* Gl. 3. thereon. It may be here observed, that by the laws of England, an infant within the age of seven years cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for, *ex presumptione juris*, such an infant cannot have discretion, and against this presumption no averment shall be admitted; yet it appears there is a precedent in the *Register*, fol. 309. *b* of a pardon granted to an infant within the age of seven years, who was indicted for homicide, the Jury having found that he did the fact before he was seven years old. *Russell on Crimes*, 1st vol. p. 3. and note (m). See also 4th *Blac. Com.* p. 23.

among the first kind, robbery (*robo*) and theft (*hurto*).[3] The division of crimes into ordinary and extraordinary does not take place (*no es el caso*) among us[4]; because our laws have been so prolix in establishing certain punishments for every kind of crime, that it is only left to the discretion of the judge to moderate or increase them when their circumstances vary.

§ 1. Of the public crimes of high treason, læsæ majestatis.

Among public crimes, that of *læsæ majestatis*, or treason, as being the most atrocious, holds the first place. Numerous are the modes whereby crime is committed against the supreme majesty of the sovereign, and which, with reason, draw down upon the offenders the disgraceful name of traitors. The crime of treason is that which is committed against the person of the king, or

L. 3. t. 2. P. 7.

against the commonwealth, L. 3. tit. 2. P. 7. As this crime proceeds from the little veneration or respect that is shewn to the sovereign, he who in deed or act is wanting in this, becomes a delinquent. Therefore, not only is the person guilty of treason who offends against the king (*majestad*) by any of the fourteen

L. 1. tit. 2. P. 7.

acts expressed by L. 1. tit. 2. P. 7., but also he who shall speak

L. 6. t. 2. P. 7.

ill of the king, his family and state, L. 6. tit. 2. P. 7. and L. 1. tit. 18.

L. 7. t. 8. Lib. 1. Nov. Rec.

Lib. 1. Rec.[5]; for which case the decree of 18*th September*, 1766,

[220]

ought to be kept in mind, which prohibits all murmuring and invective (*declamacion*) against the government. So heinous is

L. 1. tit. 42. Lib. 12. Nov. Rec.

this crime, that it is not included among the pardons (*perdones*) which the king grants, L. 1. tit. 25. Lib. 8. Rec.

In this class of crimes may be included that committed by

L. 7. tit. 15. Lib. 12. Nov. Rec.

defrauders of the royal rents, L. 1. tit. 8. Lib. 9. Rec., and smugglers (*contrabandistas*) defrauding the rights of the royal revenue (*real hacienda*), and against whom various decrees have been promulgated. See that of 19th *November*, 1748.[6]

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[3] *Palacios* says, public crime is that which is committed principally against the commonwealth, and of which, under this consideration, our laws permit any one of the public to be the accuser. Every crime, therefore, which is committed in offence of God, of the sovereign, state, or the country (*patria*), will be a public one. A private crime is that which is committed principally (perhaps directly would be a more appropriate term than principally, although *principalmente* is in both instances made use of), against any private individuals, and of which the party interested or injured, only is permitted to be the accuser. See also *Wood's Civ. Law*, book 3. ch. 7. p. 250., who makes this distinction between public and private offences. When the offence is of a public nature, it is properly called a *crime;* when it is private, it may be more properly called *delictum* or *maleficium*, a trespass or an offence. The Learned Professor first mentioned further observes, that whatever is not conformable to the above definition and principles, in the classification and list which the text gives in this title of public and private crimes, ought to be dismissed from the understanding.

[4] *Palacios* is, however, of a different opinion.

[5] This law is not inserted in the *Nov. Rec.*

[6] *Palacios* says, that since that year forty royal orders have been issued with respect to smuggling. He refers to the royal *cedula* of 8th June, 1805, and the instruction inserted in it, which is that which governed in 1806.

In the second place, forging is a crime against the public, of which utterers of false money (*monederos falsos*) who clip or counterfeit the current coin, are guilty, L 9. tit. 7. P. 7. 2d, The counterfeiters of royal seals, L. 4. tit. 7. P. 7. 3d, The escribanos who are wanting in any thing which regards the public faith, to which they are bound by their office, Ll. 1. & 6. tit. 7. P. 7. 4th, The prevaricating advocate who cites false laws (*leyes falsas*) in the suits which he carries on, L. 1. tit. 7. P. 7. 5th, The keeper of the archives of the council, or public archives, who shews the archives contrary to his orders, L. 1. tit. 7. P. 7. 6th, The judge who decides contrary to law, L. 2.[7] tit. 7. P. 7. 7th, The perjured person who swears falsely, L. 1. tit. 7. P. 7. 8th, He who suborns the judge or witness, L. 1. tit. 7. P. 7. 9th, He who pretends to be a knight (*caballero*) or priest, without being so, L. 2. tit. 7. P. 7. 10th, Those who make use of false measures or weights in trade, L. 7. tit. 7. P. 7. 11th, Public surveyors who knowingly or wilfully (*á sabiendas*) measure falsely, L. 8. tit. 7. P. 7.

§ 2. Of the public crimes of forging (de los falsarios). L. 9. tit. 7. P. 7. L. 4. t. 7. P. 7. Ll. 1. & 6. tit. 7. P. 7. L. 1. tit. 7. P. 7. L. 1. tit. 7. P. 7. L. 2. tit. 7. P. 7. L. 8. tit. 7. P. 7.

In the third place, those are public crimes which cause scandal (*escandalo*) against which the judge may proceed *de oficio*, according to L. 4. tit. 19. Lib. 8. Rec.[8] & L. 5. tit. 19. Lib. 8. Rec. In this class are comprehended, 1st, Those who live in concubinage (*amancebados*), Ll. 1, 2, 3 & 4.[9] tit. 19. Lib. 8. Rec. 2d, Heretics whom the *Prol.* of tit. 26. P. 7. defines in this way: — a description of mad people who labour to pervert (*de escatimar*) the words of our Lord Jesus Christ, and give them another meaning contrary to that which the holy fathers gave, and which the church of Rome believes and orders to be observed. To this class belong the Jews and Moors, whom we are bound to discover or make known (*descubrir*,) if we know they are among us without the royal permission, according to L. 9. tit. 25. P. 7.[10]; and therefore all the other laws of the 24 and 25 tit. P. 7., which treat of the mode in which they should live in Spain, are obsolete. 3d, Sodomites who commit an abominable sin, having connection with one another contrary to nature or natural custom,

§ 3. Of public crimes by scandal (escandalo). L. 1. tit. 26. Lib. 12. Nov. Rec. Ll. 3, 4, & 5. tit. 26. Lib. 12. Nov. Rec. Prol. t. 26. P. 7. L. 9. t. 25. P. 7.

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[7] L. 1. tit. 7. P. 7. is meant.

[8] This law is not inserted in the *Nov. Rec.* The quotations in the text appear to be erroneous. Ll. 4 & 5. tit. 18. Lib. 8. Rec. are the laws cited in the edition of the text by *Palacios*.

[9] Not inserted in the *Nov. Rec.*

[10] This law applies to ambassadors from the Moors coming or being sent to reside in Spain, and does not touch upon the matter here set forth in the text. The 25th title of the 7th *Partida* contains enactments relative to Moors; and those of the 24th title of the same *Partida* refer to Jews.

Prol.t.21.P.7. *Prol.* tit.21. P.7. 4th, Pimps, or panders, who entrap women, inducing them by cunning arts, or procuring them to prostitute
L.1.t.22.P.7. their bodies, L.1. tit 22. P.7., which specifies five kinds of pimping. 5th, Persons practising witchcraft (*hechiceros*), augurers (*agoreros*), soothsayers (*adivinos*), and other buffoons (*truanes*), who, with their impositions, lead the people into a thousand errors, pretending to possess the power of God in knowing
L.1.t.23.P.7. things which are to happen, L.1. tit.23. P.7. 6th, Blasphemers
tit.28.P.7. against God, the most holy Mary, and her saints, tit.28. P.7. By blasphemy is understood all that is said in contempt, and with the intention of being revenged by word[11], *Prol.* tit.28.
Prol.t.28.P.7. P.7. 7th, Bigamists, or those who are married at one time to
L.9.tit.28. Lib.12. Nov. Rec. two women, L.8. tit.20. Lib.8. Rec.[12] 8th, Sacrilegious persons, who are of two sorts, 1st, Those who raise their angry hands against the clergy, or religious persons. 2d, Those who
Ll.1 & 2.tit.18. P.1. steal or rob any sacred thing in a church, or out of it, Ll.1.&2. tit.18. P.1. 9th, Persons guilty of simony, who purchase or
L.1.t.17.P.5. sell a spiritual thing, L.1. tit.17. P.1. 10th, Persons guilty of incest, tit.28.[13] P.7. 11th, Ravishers of a religious woman, a widow, virgin, or married young woman; against whom an accusation may be preferred by any of the people, if the relations of such women should not do it, L.2.[14] tit.20. P.7.
L.2.tit.20.P.7.

§ 4. Of public crimes attended by force or violence. Tit.10.P.7. In the fourth place, those commit a public crime who make use of force and violence to take any thing, real or personal, the kinds of which are expressed in tit.10. P.7. By the laws of this title, it appears those are guilty of using force (*forzadores*), 1st, Who with arms, and in a mutinous manner (*amotinadamente*),
L.2.t.10.P.7. possess themselves of any thing, L.2. tit.10. P.7. 2d, Those who rob at the time of any fire, or prevent its being
L.3.t.10.P.7. extinguished, L.3. tit.10. P.7. 3d, Judges who do not admit
L.4.t.10.P.7. an appeal from their sentence, L.4. tit.10. P.7. 4th, Royal tax gatherers or collectors of rents or revenue (*recaudadores*),
L.5.t.10.P.7. who collect more than the king orders, L.5. tit.10. P.7. 5th, Powerful or wealthy persons (*poderosos*), who, through the dread of their power impede the due or right administration of
L.6.t.10.P.7. justice, L.6. tit.10. P.7. 6th, Persons guilty of arson (*incen-*
L.9.t.10.P.7. *diarios*), L.9. tit.10. P.7. 7th, Those who enter on the pos-

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[11] Another and more appropriate definition of blasphemy is given by *Palacios*, who says it is a bad word, or injurious expression against God or his saints.

[12] See also Ll. 6, 7, & 8. tit. 28. Lib. 12. Nov. Rec.

[13] A typographical error: read tit. 18. P. 7.

[14] See also L. 1. *ibid.*

session of the inheritance of another without the order of the judge, L. 10. tit. 10. P. 7. 8th, Those who refuse to give up the thing which they hold under rent, deposit, &c., L. 12. tit. 10. P. 7. 9th, He who pledged (*empeño*) his property, if he takes it away from his creditor by force before he has paid the debt [15], L. 13. tit. 10. P. 7. 10th, Those who without the authority of the judge, arrest their debtors or take any thing from them [16], Ll. 14 & 15. tit. 10. P. 7. 11th, Those who break prison, and their aiders [17], L. 13. tit. 29. P. 7. 12th, The violators or seducers (*desfloradores*) of virgins, and the ravishers of women, upon which the laws of the 19th Title, Part 7. treat.

L. 10. t. 10. P. 7. L. 12. t. 10. P. 7. L. 10. t. 13. P. 7. [222] Ll. 14 & 15. t. 10. P. 7. L. 13. t. 29. P. 7. tit. 19. P. 7.

Among crimes committed by force, we must also reckon homicide, challenges (*desafios*), adulteries, and injuries from which bloodshedding follows [18], L. 4. tit. 10. Lib. 8. Rec.

§ 5. Of homicide, and its kinds. L. 3. tit. 25. Lib. 12. Nov. Rec.

Homicide is, the killing of man (*matamiento de home*), L. 1. tit. 8. P. 7. It is casual or excusable (*casual*), wilful or felonious (*determinado*), and justifiable (*justo*). The casual is that which happens without any previous (*prevenida*) intention, and ought not to be punished, Ll. 4 & 5. tit. 8. P. 7. The wilful is that which is committed intentionally: of this kind of homicide not only is the person guilty who intentionally goes to kill or kills another, but also the person who furnishes or concerts (*pone*) the means by which he dies. Thus, therefore, are to be punished as guilty of homicide, 1st, Physicians, surgeons, &c., who, ignorant of their arts or professions, cause death by attempting to practise them [19], L. 6. tit. 8. P. 7. 2d, Mothers who take any thing to destroy their young (*el feto*) [20], L. 8. tit. 8.

L. 1. t. 8. P. 7. Ll. 4 & 5. t. 8. P. 7. L. 6. t. 8. P. 7. L. 8. t. 8. P. 7.

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[15] This applies strictly to pledge or pawn, where possession of the property pledged has been delivered by the debtor to the creditor. See L. 13. tit 10. P. 7. cited; and *Greg. Lop.* Gl. 1. thereon.

[16] In satisfaction or security of their debt.

[17] L. 13. tit. 29. P. 7., cited in the text, does not particularly add their aiders.

[18] These crimes considered in themselves, and without other circumstances, ought not to be reckoned, says *Palacios*, among crimes of or accompanied by force; nor do the laws reckon them such: and he refers to tit. 10. P. 7., where crimes of force are treated of.

[19] *Palacios* says, it is one thing to kill through ignorance, and another through malice. That, in the first case, such persons are punishable with five years' transportation to some island, according to L. 6. tit. 8. P. 7. cited in the text, though, as he observes, *Greg. Lopez.* Gl. 3. L. 9. tit. 15. P. 7. hath said, that this punishment of banishment to an island was not in use even in his time; but, in the second case, they are punishable with death.

[20] If the woman, in such case, hath quickened, she is punishable with death: if she hath not quickened, she is punishable with five years' transportation to an island. See L. 8. tit. 8. P. 7. cited. *Palacios* here observes, that it is necessary in the case mentioned in the text, death should have been the effect thereof.

P. 7. 3d, The apothecary or spice dealer, who sells noxious
L. 7. t. 8. P. 7. herbs, knowing they serve to cause death to any one, L. 7. tit. 8. P. 7. 4th, Those who chastise cruelly their child, scholar, or
L. 9. t. 8. P. 7. servants[21], L. 9. tit. 8. P. 7. 5th, He who lends arms or assist-
L. 10. t. 8. P. 7. ance to kill another[22], L. 10. tit. 8. P. 7. 6th, The judge who
L. 11. t. 8. P. 7. maliciously gives sentence of death against any one[23], L. 11. tit 8. P. 7. 7th, He who castrates another, if death ensue[24],
L. 13. t. 8. P. 7. L. 13. tit. 8. P. 7.

Justifiable homicide is, when any one kills another with just reason, either by defending himself, or revenging the injury (*agravio*) done to his person or property at the time (*en el mismo*
L. 2 & 3. t. 8. P. 7. *acto*), Ll. 2 & 3. tit. 8. P. 7.

§ 6. Of duels (desafios). Those who challenge to fight a duel, the person challenged, the seconds, those who knowingly carry the challenge, those who are present at a duel, and do not prevent it themselves, or give information of it to justice, commit the grave crime of duelling (*desafio*)[25], which is to challenge one another to fight
L. 2. tit. 20. Lib. 12. Nov. Rec. (*emplazarse para reñir*), *Auto* 1. tit. 8. Lib. 8. Rec., by which the ancient laws respecting summoning to combat (*riepto*) were annulled and prohibited under heavy penalties.

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[21] Or slave, the law cited adds. If death be the result, and it was unintentional, the punishment is five years' transportation to an island; and if the chastisement was with the intention to kill, the punishment is death. This is noticed by *Palacios*, and is stated in L. 9. tit. 8. P. 7. cited in the text.

[22] As also one who should wilfully lend or give arms to a madman, drunkard, person in a violent rage, &c. to kill himself, if death should in either case ensue.

[23] Whether it be of natural or civil death (banishment), or of loss of limb, according to L. 11. tit. 8. P. 7. cited. It may be useful to notice a most material difference in the wording of this law in the edition of the *Partidas*, with the Gl. of *Greg. Lop.* published at Valencia by Benito Monfort, in 1767, and the edition of the *Partidas* published in Madrid, 1807, by the Royal Academy of History. In the first, the law runs thus:—"*Pena de omicida meresce el judgador, que á* sabiendas *da falsa sentencia*," &c. In the second, the words *á sabiendas* are entirely omitted.

[24] And even though death should not ensue, observes *Palacios*, referring to L. 13. tit. 8. P. 7. cited, by which he is supported.

[25] *Palacios* observes, that it is not to be inferred from this that all are guilty of the same crime, L. 2. tit. 20. Lib. 12. Nov. Rec. says, that as well they who send, who receive, and who carry the challenge with a knowledge thereof, or act as seconds, shall unpardonably lose, for such conduct, all the offices, rents, and honours, which they may hold from the king, and are incompetent to hold them in future. If the parties go out to the place appointed, although no duel takes place, the principals, it would seem, are punishable with death and confiscation of all their property. All those who witness the duel, and being able, do not prevent it, or do not go to give information to justice, are punishable with six months' imprisonment, and the loss of the third part of their property. In this crime, prescription does not take place. There is a distinction made by L. 1. tit. 20. Lib. 12. Nov. between the challenger and the challenged; but this does not appear by L. 2. ibid., which is a much later enactment than L. 1. See both, and L. 3. ibid.

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§ 7. Of adulteries. L. 1. t. 17. P. 7.

Adulterv is the crime which a man commits knowingly (*á sabiendas*), by having intercourse with a married woman, or one betrothed (*desposada*) to another man, L. 1. tit. 17. P. 7. The husband, the father, the adulteress, her brother, and paternal or maternal uncles, are the legitimate accusers of the adulterer, while the marriage is not dissolved by the sentence of the church; and after it is dissolved, within sixty useful or lawful (*utiles*) days, L. 2. tit. 17. P. 7. But if the scandal were great, L. 2. tit. 17. P. 7. any of the town people may accuse in the first case; and in the second for four months after[26], reckoned also usefully (*utilmente*); and in case of the husband dying, six months, reckoned from the day on which the adultery was committed, are allowed to prefer the accusation, L. 3. tit. 17. P. 7. While the married per- L. 3. tit. 17. P. 7. sons are united, the accusation may be preferred before the competent judge until or within five months from the day on which the adultery happened; and if force was used, until thirty years[27], L. 4. tit. 17. P. 7. In regard to the person accused L. 4. tit. 17. P. 7. of this crime, we say that he may avoid the prosecution (*el juicio*) with exceptions. 1st, If the accusation was preferred after the above mentioned times, L. 7. tit. 17. P. 7. 2d, If at the first L. 7. tit. 17. P. 7. citation the adulteress should prove she committed the offence with the consent of her husband[28], L. 7. tit. 17. P. 7. 3d, If the L. 7. tit. 17. P. 7. accuser, be he who he might, should abandon the cause when once begun, and afterwards should wish to continue it, L. 8. L. 8. tit. 17. P. 7. tit. 17. P. 7. 4th, If the husband should say before the judge that he does not wish to accuse his wife, and afterwards endeavour

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[26] From the expiration of the sixty days allowed the husband, &c. See L. 5. tit. 17. P. 7. cited.

[27] *Palacios*, after pointing out various errors into which the text has fallen, with reference to what is stated in the laws of the 17th title of the 7th *Partida*, which it has cited, says, that by L. 2. tit. 19. Lib. 8. Rec., which is L. 4. tit. 26. Lib. 12. Nov. Rec., the husband alone can prefer the accusation of adultery, and that he cannot accuse the adulteress, without accusing the adulterer, nor *vice versâ*, while they are both living, referring for the last position to L. 2. tit. 20. Lib. 8. Rec., which is L. 3. tit. 28. Lib. 12. Nov. Rec. The law referred to by the Learned Professor in support of his first position, does not seem to bear him out in its unqualified statement. This L. 4. tit. 26. Lib. 12. Nov. Rec. provides for the mode of proceeding by Justices, against the concubines (*mancebas*,) of the clergy, and against husbands who may consent to their wives being such. This law, after declaring that no married woman, but only a *feme sole*, can be said to be the concubine of a clergyman, friar, &c. adds, "*y que la tal muger casada no pueda ser demandada en juicio ni fuera de el, salvo si su marido la quisiere acusar*," which is all it states upon the subject. But *Ant. Gom.* in his *var. res.* tom. 3. cap. 1. n. 89., lays down the position in the same manner as the Learned Professor has here done.

[28] That is to say, as *Palacios* properly observes, if this exception should be opposed before contestation of suit, and should be proved. See L. 7. tit. 17. P. 7., cited.

L.8.tit.17.P.7. the contrary, L.8. tit.17. P.7. 5th, If, knowing the adultery, he should admit her into his house, and should live with her, L.8.tit.17.P.7. L.8. tit.17. P.7. 6th, If the husband accuser were of bad L.9.tit.17.P.7. character and habits [29], L.9. tit.17. P.7. 7th, If they should accuse her of adultery, from which she was previously acquitted for want of proofs, but not if it were for a second offence, L.9. L.9.tit.17.P.7. tit.17. P.7. 8th, If the husband accuses the widow with whom he married, of adultery committed in the time of the first marriage; because having married her, the accusation is presumed L.9.tit.17.P.7. renounced, L.9. tit.17. P.7.

§ 8. Of robbery and theft, and their kinds. Prol. tit.13. P.7. L.1.tit.13.P.7. In the fifth place robbery and theft are public crimes. Robbery (*robo*) is a sort of offence (*malfetria*) which falls between theft and force or violence, *Prol.* tit.13. P.7., that is which partakes of both [30], and therefore when L.1. tit.13. P.7. defines rapine (*rapina*) saying that it is robbery (*robo*) which men commit on the property of others, that is moveable or personal, it means to

[224] say, that it is a theft committed with violence, in contradiction to simple theft which is not accompanied with violence. There are three sorts of robbery, 1st, That committed by soldiers in time of war which we call pillage (*saqueo*). 2d, That which is committed in a desert place, or in a town without lawful reason for doing it, and under this sort are comprehended highwaymen (*salteadores de caminos*) or footpads and robbers in towns, against whom the judges ought to proceed *de oficio* whenever they know in what town there are any. The third sort of robbery is that which those commit who assist in the burning of any house [31], in the wreck or destruction of any ship under the pretence of succouring and affording assistance. These are L.3.tit.10.P.7. considered as persons guilty of violence (*forzadores*), by L.3. tit.10. P.7. [32]

Theft is an offence which men commit who take secretly (*encubiertamente*) any moveable [33] thing belonging to another without the will of the owner, with the intention of gaining the

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[29] And the wife should allege, observes *Palacios*, this exception, before contesting the suit, and should prove it. See L.9. tit. 7. P.7. cited.

[30] In which both theft and violence intervene, also explains *Greg. Lop.* Gl.1. on prol. tit. 13. P.7.

[31] This, by the laws of England, is called arson.

[32] This law does not refer to the destroying or plundering vessels, although it treats of arson. L.1. tit.10. P.7., does however, apply to robbing or plundering vessels, as does L.1. tit.13. P.7. See *Greg. Lop.* Gl.3., on this last law; and see *Russell on Crimes*, 2d vol. ch.13. p.1208, as to plundering vessels in distress or wrecked; and *ibid.*, ch.44. p.1731, as to destroying and damaging vessels and articles belonging to them, under the laws of England.

[33] L.1. tit.14. P.7., cited, says theft cannot be committed of real property.

property (*señorio*) or possession, or the use of it, L. 1. tit. 14. P. 7. Hence it is, 1st, That every thing stolen must be moveable, and taken against the will of the owner. 2d, That to constitute theft, it must be accompanied with a malicious intention. 3d, That it be always committed on the property of another. 4th, That it be done with the intention of acquiring the property, possession, or use of the thing which is stolen. From the first principle it follows, 1st, That if a person should take the property of another with the will or consent of the owner, or supposing he has it[34], such person does not commit theft, L. 1. tit. 14. P. 7. 2d, That gamblers (*tahures*), or jugglers (*truanes*), who keep a gaming house, cannot complain of the theft[35] committed against them by the persons collected there, it being presumed that they have given their consent to it by admitting bad people into their houses, L. 6. tit. 14. P. 7. 3d, That the taking of castles, cities, &c., is not properly theft, but force and violence, Ll. 2. & 10. tit. 10. P. 7.

L. 1. tit. 14. P. 7.

L. 1. tit. 14. P. 7.

L. 6. tit. 14. P. 7.

Ll. 2 & 10. t. 10. P. 71.

From the second principle it is inferred, 1st, That madmen, persons insane, and minors of ten years and a half cannot commit theft, L. 17. tit. 14. P. 7. 2d, That persons under twenty years ought to be punished with lighter punishment than those above that age, L. 7. tit. 11. Lib. 8. Rec.[36] 3d, That what is stolen to support hunger, or in a small quantity by servants, ought not to be punished as theft[37], L. 17. tit. 14. P. 7.

L. 17. tit. 14. P. 7.

L. 1. tit. 14. Lib. 12. Nov. Rec.

[225]

L. 17. tit. 14.

From the third principle it is deduced, 1st, That he who takes any thing from an inheritance not yet entered upon, or appropriated (*heredad yacente*)[38], does not commit theft,

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[34] But with ground or foundation for so supposing, observes *Palacios*.

[35] Or indeed other wrong or injury short of homicide or mutilation of limb. See L. 6. tit. 14. P. 7., cited, and *Greg. Lop.* Gl. 3. thereon.

[36] *Palacios* says, that by this law, thieves and vagabonds under twenty years of age; and women, who are vagabonds and thieves; and slaves, to whomsoever they may belong, may not be sentenced to the gallies, but are to be punished according to the laws of the kingdom. But that by L. 9. tit. 11. Lib. 8.; (L. 2. tit. 14. Lib. 12. Nov. Rec.); posterior to L. 7. tit. 10. Lib. 8. Rec.; or L. 1. tit. 14. Lib. 12. Nov. Rec., cited in the text, the punishment for thieves is increased; and it is directed, that persons of seventeen years of age may be punished with or condemned to the gallies.

[37] L. 17. tit. 14. P. 7. says, that what is great or petty larceny, is left to the discretion of the judge, to be regulated by the consideration of the thing stolen, and the person by and from whom stolen. See the law.

[38] If a person, observes *Palacios*, referring to L. 21. tit. 14. P. 7., cited, should take away any thing from an inheritance not accepted, or *herencia yacente* (*hereditas jacens*), as it is wont to be called, he cannot be prosecuted for the recovery of the thing, and for theft, but he may be compelled to return the thing with the fruits; and besides, the judge may inflict on him a corresponding punishment for the offence. This punishment, according to the

but the crime *expilatæ hæreditatis*, which is equivalent to an offence a person commits in plundering (*mesar*) the estate of
L.21.t.14.P.7. another, L.21. tit.14. P.7. 2d, That children cannot be prosecuted, as for theft, for things which they take belonging to their parents, although their advisers, and aiders or abettors are
L.4.tit.14.P.7. guilty of theft, L.4. tit. 14. P.7. 3d, That the same is understood with respect to what the wife may take from her husband [39],
L.4.tit.14.P.7. L.4. tit.14. P.7. 4th, That guardians cannot be accused as thieves for what they may take [40] from the wards or minors under their power or guardianship, because they are as fathers and masters of them; although they shall not remain without
L.5.tit.14.P.6. their just punishment, L.5. tit. 14. P.7.

From the fourth principle we discover, 1st, That if any thing is carried off, or taken away with another design than that of robbery or theft, as in the case of those who run away with, or
L.1.tit.20.P.7. carry off (*roban*) women, theft is not committed, L.1. tit.20. P.7. 2d, That persons are guilty of this crime who make use of the thing lent to them (*en comodato*) longer than was agreed
L.3.tit.14.P.7. upon [41], L.3. t. 14. P.7. 3d, That those who, without the license of the king, coin or manufacture money, although it may be of the same value as the public or legalized coin, commit theft, by reason of the gain which they thereby make for themselves, and also those who counterfeit any work of gold, silver,
L.15.t.14.P.7. &c., by the admixture of another metal of base value, L.15. tit.14. P.7. 4th, Those commit theft who take away the timber, pillars, or other materials of building or work belonging to
L.16.t.14.P.7. another to appropriate them to their own use, L.16. tit.14. P.7. 5th, Persons also commit theft [42] who change the land-

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law cited, which is to be imposed at the discretion of the judge, is either five years' banishment, or transportation to any island, or condemnation to hard labour for a certain time, according to the rank of the offender.

[39] And the same rule applies to slaves stealing from their owners. See L. 4. tit. 14. P.7., cited.

[40] *Take* is a more appropriate word than *steal*, which is made use of in the text; and L. 5. tit. 14. P.7., authorizes the adoption of the first. The punishment for such spoliation on the part of the guardian is, by the law cited, forfeiture or payment to the ward of double the amount of the property so taken.

[41] This must be taken with some limitation or qualification; if the borrower thought the lender would not be angry with him on account of such extended use of the thing, or if, in point of fact, the lender should not be angry, although the borrower might have thought otherwise, it will not amount to theft. The *animus quo* the thing was kept, would, perhaps, be the proper rule to go by in such a case. See L. 3. tit. 14. P.7., cited.

[42] *Palacios* observes, that it cannot, properly speaking, be said that they commit theft in this case, and, quoting the words of L. 30. tit. 14. P. 7., that although a man cannot be properly said to commit theft in respect of property which is real, yet he commits an offence which is similar to theft.

marks or boundaries of an estate or town (*termino*), L. 30. tit. 14. P. 7. 6th, That there is theft of the thing itself, of the possession, and of the use thereof. Theft of the thing is committed by taking any thing moveable, whether it be animate or inanimate, Ll. 19. & 22. tit. 14. P. 7.[43] The debtor who takes away the thing which he had given in pawn (*en prenda*) to his creditor commits theft of the possession, L. 9. tit. 14. P. 7. He who uses a thing for other purposes than those for which it was granted or lent commits theft of the use, L. 3. tit. 14. P. 7. Besides the distinction of theft into manifest and occult, of which L. 2. tit. 17. P. 4. speaks, we are acquainted also with that of a simple and qualified (*calificado*) theft; the first is made without noise or violence (*estrepito*), and the second with arms, fracture or breaking[44] (*quebrantamiento*), &c. Simple theft is distinguished into petty and great, according to the quantity or value (*cantidad*)[45] of what is stolen; and therefore it is left to the discretion of the judge to consider of the quality of the thief, of the thing stolen, &c., in order to impose the punishment. The action of theft is instituted (*se instaura*) by the owner of the thing or his heir, against the thief and his accomplices, L. 4. tit. 14. P. 7.[46]; and if they are many, against each of them in solidum, L. 20. tit. 14. P. 7. See Ll. 10, 11 & 12. tit. 14. P. 7.

L. 30. tit. 14. P. 7.

Ll. 19. & 22. t. 14. P. 7.

L. 9. t. 14. P. 7.

L. 3. t. 14. P. 7.

L. 2. t. 17. P. 4.

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L. 4. t. 14. P. 7.

L. 20. t. 14. P. 7.

Ll. 10, 11 & 12. t. 14. P. 7.

Private crimes are reduced to damage or trespass (*daño*), or to injury by deed, word, or writing (*injuria*) done to an individual. The damage or trespass (*daño*) is either caused by men, or by beasts.[47] The first the Romans called *damnum injuria datum*, and the second *pauperies*.[48]

Cap. 3. Of private crimes by libel or scandal (injuria), or by damage or hurt (daño).

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[43] The first of these laws cited, applies to stealers of cattle and sheep, &c., *abigei*; and the second to man-stealing, including slaves, &c.; this last offence is called *Plagium*. See both laws, 19 & 22. tit. 14. P. 7., cited.

[44] *Palacios* says, simple theft is that which is attended with no circumstance of aggravation; and qualified theft is that which is so attended: and he adds, referring to L. 18. tit. 14. P. 7., among other things, it will be there found that a theft of any thing sacred committed in a church, is qualified, without its being necessary to make it so, that it should be committed with any noise or violence (*estrepito*).

[45] *Palacios* observes, that qualified theft will be petty or grand according to the quantity or value of what is stolen.

[46] The 17th tit. is here erroneously referred to in the text, as also with respect to the four following quotations.

[47] And therefore, says *Palacios*, the first will be reckoned among crimes, but not the second; for he adds, in the words of *Justinian*, § *init. Inst. si quæd. paup. fec. dic.* '*nec enim potest animal injuriam fecisse dici, quod sensu caret.*'

[48] *Palacios* says, these two offences (*daño and injuria*), were, among the Romans (from whose codes so many laws were borrowed or taken for the composition of the *Partidas*), two of the four private crimes of which *Justinian* makes mention in § *init. Inst. de Oblig. quæ ex del nasc:* and for a better understanding of them, and the actions for damage caused by animals, he

§ 1. Of damage or trespass (dano) and its kinds.

L.1.t.15.P.7. Damage or trespass (*daño*), is the deterioration, injury, or destruction which a man suffers with respect to his person or his property by the fault (*culpa*) of another, L.1. tit.15. P.7. There are three kinds of *daño*; the first, that, by reason of which a person's property or thing is deteriorated by being mixed with the property of another [49]; the second when it loses part of its value; and the third when it is destroyed or totally

L.1.t.15. P.7. lost, L.1. tit.15. P.7.

Upon this two principles are founded: 1st, That all damage caused to the thing (*en la cosa*) ought to be made good to the owner of it by him who caused the damage. 2d, That for this purpose it is enough that the most trifling fault (*levissima culpa*) intervenes.

From the first principle it is deduced, 1st, That the owner of

L.2.t.15.P.7. the thing, or his heir, may institute this action, L.2. tit.15. P.7.; and in the absence of them, the person enjoying the usufruct (*usufructuario*), the feudatory (*feudatario*), the depositary (*depositario*),

L.2.t.15.P.7. and the attorney (*apoderado*)[50], &c., L.2. tit.15. P.7. 2d, The mortgagee, if damage be done to him in respect of the thing which he has in mortgage or pawn, the debtor not having where-

L.2.t.15.P.7. withal to pay him, L.2. tit.15. P.7. 4th, That the heirs of him who caused the damage [51] ought to make it good, if the suit were commenced before the death of his ancestor or devisor [52],

L.3. t.15.P.7. L.3. tit.15. P.7.

From the second principle it follows: 1st, That the damage which a judge causes to a vanquished party by his sentence [53],

L.4.t.15.P.7. ought not to be made good by him, L.4. tit.15. P.7. 2d, Nor

[227] that which an agent or servant (*un subdito*) causes by order of his superior, unless it should be an unlawful thing [54] which he ought

L.5.t.15.P.7. not fulfil or execute, L.5. tit.15. P.7. 3d, That those who commit an act in a place where people assemble, from which

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refers thereto; and to the title of ditto, *De Leg. Aquil.:* and to *Vinnius*, in his respective commentaries on the same. See also *Halifax on C.L.*, p.72. ch.24. p.85. ch.2.: also *Wood's C.L.*, p.258. § 3. & p.266.

[49] Or, adds *Palacios*, by other reason, L.1. tit.15. P.7.

[50] See L.2. tit.15. P.7., cited.

[51] Or by whose order or advice it was caused.

[52] And, adds *Palacios*, although the suit should not have been begun (contested is meant) before his death, if the heirs received any benefit from the damage caused by him from whom they take, they ought to make restitution to the amount of such benefit, L.3. tit.15. P.7., cited.

[53] Given justly or rightly (*derechamente*), says L.4. tit.15. P.7., cited; but otherwise, if such sentence be wrongfully (*tortizeramente*), given. See the law referred to: but see Appendix T.

[54] See L.5. tit.15. P.7., cited.

damage may arise, are responsible for the injury or damage which may result therefrom to persons who assemble there, as the person who rides fast through the streets (*que corre á caballo por las calles*); the bricklayer who does not give warning when he throws his bricks on the ground; he who lops the branches of a tree on the side of the road without giving notice of it, Ll. 6. & 25. tit. 15. P. 7. 4th, Equally guilty is he who sets traps (*trampas*), snares (*cepos*), and game traps (*armadijos*), in roads (*caminos*) or public places from which damage arises to the passengers; and likewise the person who, taming a wild animal [55], does not watch him so as to prevent his doing harm, L. 7. tit. 15. P. 7. 5th, The physician, surgeon, farrier, &c., ought to pay the damage which they shall cause to their patient by their own fault, or for abandoning (*desamparar*) the cure, L. 8. [56] tit. 15. P. 7. 6th, Likewise is he bound to pay the damage who puts fire near straw, wood, corn, or other like thing, when there is wind, L. 10. tit. 15. P. 5.; and the baker who does not take care of the fire in his oven, if by such cause what he is baking be lost or destroyed, L. 11. tit. 15. P. 7. 7th, Those are also responsible for any damage [57] done to merchandise in a ship, or other vessels, on board which they are kept, who shall do any thing by which the goods are deteriorated or lost, L. 13. tit. 15. P. 7. Innkeepers (*mesoneros*) and others, for the damage which the things hung up at their doors or windows cause to passengers, L. 16. [58] tit. 15. P. 7. Barbers who venture to shave in public, if they should do injury by wrangling (*por tropezar*) with another, L. 27. tit. 15. P. 7. 8th, Lastly, the destroyers of vines and plantations of trees, &c., are very guilty and deserving of punishment, L. 28. tit. 15. P. 7.

Ll. 6. & 25. t. 15. P. 7.

L. 7. t. 15. P. 7.

L. 10. t. 15. P. 5.

L. 11. t. 15. P. 7.

L. 13. t. 15. P. 7.

L. 27. t. 15. P. 7.

L. 28. t. 15. P. 7.

As regards the damage which animals cause to property and to persons, under the same principles, we establish, 1st, That whoever worries or terrifies a dog, or other animal, from which damage arises to another, he is bound to make reparation for it, L. 21. tit. 15. P. 7. 2d, That if the animal should do damage without the fault of the person who conducts it, it being tame, the owner is obliged to pay the damage [59], L. 22. tit. 15. P. 7.

L. 21. t. 15. P. 7.

L. 22. t. 15. P. 7.

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[55] Such as bulls, cows, &c. See L. 7. tit. 15. P. 7., cited.

[56] This law is erroneously cited for L. 9. tit. 15. P. 7.; and see *Greg. Lop.*, Gl. 2 & 3, on this law.

[57] By boring a hole or otherwise. See L. 13. tit. 15. P. 7., cited.

[58] This law is erroneously cited for L. 26. tit. 15. P. 7.

[59] But if the animal should be goaded or provoked by a third person to do the damage, such person is liable, and not the owner of the animal. See L. 22. tit. 15. P. 7., cited.

3d, The same[60] takes place with respect to a wild animal, which, on account of not being properly kept, should do an injury to
L.23.t.15.P.7. any person, L.23. tit.15. P.7. 5th, In the like manner shall be made good the damage caused by cattle or stock (*ganado*) on the property of another person, the same being manifest[61], and determined by the award (*á juicio*), of fit men (*hombres buenos*);
[228] and if this damage hath been occasioned with a malicious intention on the part of the owner of the animals, he shall pay double[62],
L.24.t.15.P.7. L.24. tit.15. P.7. This estimation of damages and prejudices (*perjuicios*) is left to the judgment of skilful persons (*peritos*), if the injury should be caused to real property: and in what regards the damage done by animals, attention must be had to the injury (*perjuicio*) which results to the owner of the thing injured, distinguishing the death from the wound only, or fracture of any limb[63], L.18. tit.15. P.7.

§ 2. Of injury, or libel (injuria) and its kinds. L.1.t.9.P.7. Injury (*injuria*) is the same as dishonour (*deshonra*), which is done or said to another wrongfully (*á tuerto*), and in contempt of him, L.1. tit.9. P.7. There are two kinds of injury, one by word (*de palabra*), and the other by deed (*de hecho*). In the first kind are included the injuries which result from libels and
L.3.t.9.P.7. defamatory writings, L.3.[64] tit.9. P.7. Of injury by deed[65]
Ll.4,5&6.t.9. P.7. various examples are found in Ll.4[66], 5, & 6. tit.9. P.7.

Of injuries or libels, some are heinous (*graves*), and others trifling (*leves*). Those which are heinous, are so either in respect of the heinousness (*gravedad*) of the act in regard of the place where done or committed, or of the person injured or
L 20.t.19. P.7. libelled[67], L.20. tit.19. P.7.[68] Trifling ones are all those which

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[60] And a great deal more, adds *Palacios*, desiring reference to L.23. tit.15. P.7., cited; such as paying double the amount of damage caused thereby, the expense of cure, if the injury be to the person, damages for loss of time, &c.: it is necessary to see the law cited to ascertain the extent of liability of the owner of the animal in this case.

[61] It being manifest, or the person sustaining the injury being able to prove it; in which case, the damage ought to be estimated by skilful, respectable persons: this is observed by *Palacios*, who refers to L.24. tit.15. P.7.

[62] This is in the case the owner put the animals there knowingly or intentionally (*á sabiendas*), as stated by L.24. tit.15. P.7., cited.

[63] In Spain, says *Palacios*, according to some interpreters or commentators, the distinction of L.18. tit.15. P.7., is not observed; but every damage which is occasioned through the fault of any one, is estimated or assessed by the discretion of the judge.

[64] L.13 is erroneously cited in the text.

[65] Assault and battery.

[66] L.4. does not apply to *injuria de hecho*.

[67] Or, adds *Palacios*, in respect of the person who libels, or of the libel itself.

[68] See also L.8. tit.25. Lib.12. Nov. Rec.

do not require consideration with respect to these three things; whence arises the difficulty of determining a certain or prescribed punishment for this kind of crime, L. 21. tit. 9. P. 7. L. 21. tit. 9. P. 7.

In order to the libelling or injuring a person it is necessary to prove a determinate mind or intention (*determinado animo*) in the person who libels; and therefore such not being able to happen with respect to a minor of ten years and a half old, the madman, idiot, &c. it follows, 1st, That neither of them can injure or libel, L. 8. tit. 9. P. 7. 2d, That the judge who imprisons by reason or virtue of his office does not commit injury, L. 16. tit. 9. P. 7. 3d, Nor the minister who proposes any person to the king as more capable than another to exercise an office, L. 19. tit. 9. P. 7. L. 8. tit. 9. P. 7. L. 16. t. 9. P. 7. L. 19. t. 9. P. 7.

This action may be brought by all persons injured or their representatives [69], as appears from the examples laid down in Ll. 8, 9, 10, 11, 12, 13. and 23. tit. 9. P. 7.; and is at an end or is prescribed after a year, L. 22. tit. 9. P. 7. It is necessary to observe, that if the injury is done expressly to the person, who is found disguised or masked, he cannot complain of it; wherefore if a virtuous woman or one of good character goes disguised with the clothes or proper dress of a street walker or prostitute (*muger publica*), she cannot complain if they call her unchaste; nor can the clergyman, if he does not wear his clerical habits, complain to the judge as a clergyman, L. 18. tit. 9. P. 7. Ll. 8, 9, 10, 11, 12, 13. & 23. tit. 9. P. 7. L. 22. tit. 9. P. 7. [229] L. 18. tit 9. P. 7.

The punishments common to all these crimes, are those which were established by the laws for the punishment of offences (*para castigo y escarmiento*), L. 1. tit. 31. P. 7. Punishment is therefore the compensation or satisfaction (*enmienda*) by fine or punishment which the law requires from or imposes upon any persons for the offences they have committed, L. 1. tit. 31. P. 7. Cap. 4. Of punishments in common. L. 1. tit. 31. P. 7. L. 1. tit. 3. P. 7.

We are only acquainted with two sorts, corporal punishment § 1. Of ordinary and extraordinary punishment.

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[69] *Palacios* says, this means, that the action may be brought by those under whose power they are; and that, as at present, the daughter-in-law is not under the power of her stepfather, nor the grandchild under that of the grandfather, nor the great-grandchild under that of the great-grandfather, what is said in L. 9. tit. 9. P. 7. respecting these persons, will not hold: that it has been already said, in various places, that the married son is not under the power of his father. It may be observed, that the actions here treated of do not pass or descend to heirs, unless they should have been instituted and contested in the lifetime of the injured party, except the injury were done to the party during his last sickness, of which he died, or reflected on his memory after death, although this last may not be considered as an exception to the rule, but as a distinct right or remedy given to the living heir. See L. 23. tit. 9. p. 7. cited.

by which a man is punished in his person; and pecuniary [70] which always falls upon his property. Of these some are called ordinary punishments if they are determined or fixed by the laws, and those which are left to the discretion of the judge according to the circumstances of the crime, are called extraordinary or arbitrary. Of these punishments some are lawful, others unlawful. Those which are lawful are expressed in

L.4.tit.31.P.7. L. 4. tit. 31. P. 7., and are, the punishment of the gallows or hanging (*horca*), strangling (*garrote*), loss of limb (*perdimiento de miembro*), the mines (*minas*), the gallies (*galeras*), transportation (*destierros*), imprisonment (*carcel*), hard labour in the public works (*obras publicas*), infamy (*infamia*), shame (*verguenza*), and public whipping inflicted by the hangman (*de azotes*) [71]; all other punishments are unlawful [72] according to L. 6. tit. 31. P. 7. It may be added that amongst us the following and other like punishments, being considered barbarous are obsolete; the delivering up the accused or culprit (*reo*) to the will and power of the injured party; burning alive unless for being a Jew [73]; the rack or torture on a wooden horse (*el eculeo*) [74]; throwing the

L.6.t.31.P.7.

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[70] *Palacios* says, we are acquainted also with the punishment of infamy, of which the text makes mention further on, and that of confiscation of property may be also added. But this last, the Translator may be permitted to observe, will come under the description of pecuniary punishment. *Lardizabal sobre las Pen.* cap. 5. p. 152. divides punishment into capital, corporal, infamous, and pecuniary; the second may be, however, said to include the first. *Gutierrez Prac. Crim.* 3 tom. cap. 6. p. 86. n. 1., mentions three kinds, corporal, infamous or stigmatizing, and pecuniary. *Wood*, in his *Inst. Civ. Law*, p. 334. book 4. chap. 4. reduces punishments to two sorts, capital and not capital.

[71] One sort of punishment is omitted, which, for its peculiarity, should be mentioned. Exposure to the sun, some hour in the day, stripped naked, and rubbed over with honey, in order to be eaten or bitten by the flies. Seven sorts of punishment are set forth in L. 4. tit. 31. P. 7. viz.: — 1st, Death, or loss of limb. 2d, Condemnation for life, to work in irons in the royal mines, or other works. 3d, Banishment or transportation for life, to some island or place, with confiscation of all property. 4th, Imprisonment in irons for life; but this punishment is limited to slaves. 5th, Banishment, or transportation for life, without confiscation or forfeiture of property. 6th, Punishment of infamy, or deprivation of office, or prohibition for an advocate or attorney to practise for a specified time, or for life. 7th, Public whipping, or condemnation to the pillory; or exposure to the sun in a state of nudity, for some hour in the day, with the body smeared over with honey, to be bitten by the flies, as mentioned in the beginning of this note.

[72] *Palacios* observes, that the pecuniary punishment, which is not here mentioned, is not unlawful; and some one of those mentioned in the text as lawful, however just it might have been in its origin, hath ceased to be in use, such as the loss of limb, and that even the punishment of condemnation to the gallies might be added, because at present they are not in a state to be used; and therefore, by the royal order, convicts are not destined or sent to them. He refers to the last note of this title. *Vide* Post.

[73] The Jews do not appear to have been a favoured race among the Spaniards, if judgment may be formed from their enactments respecting them.

[74] This word has been translated as seen in the text; for torture generally

culprit among wild beasts. Upon what has been said we establish, 1st, That the judges cannot mitigate nor increase the ordinary punishments, except in the cases which regard the circumstances of the heinousness of the offence, of the sex, of the age, and of the person against whom it is committed, L.8. tit.26. Lib.8. Rec.[75] L.14. tit.26. Lib.8. Rec.; keeping in mind that when the commutation of punishments takes place, it is to be changed into that of the gallies[76], L.8. tit.11. Lib.8. Rec. 2d, That the extraordinary punishment ought to be proportioned to the circumstances of the crime[77], L.7. tit.31. P.7.; so that being corporal it be that of the gallies, L.6. tit.24. Lib.4. Rec.[78] 3d, That the punishment can be imposed only by the competent judge or the judge who has jurisdiction, L.5. tit.31. P.7.; such amongst us for a capital punishment, being the king, his counsellors, *audiencias*, and inferior judges, provided that in the excepted crimes in which there is no appeal, the latter advise with their superiors upon the sentence, *vide Matheu de re criminali contr.* 3. 4th, That no person ought to be punished for the meditation or contemplation only of crime unless it be of treason or of notorious heinousness (*gravedad notoria*)[79], L.2. tit.31. P.7. 5th, That the relations and heirs

L.7.tit.21. Lib.12. Nov. Rec.
L.2.tit.40. Lib.12. Nov. Rec.
L.7.t.31.P.7. L.7.tit.38 Lib.12. Nov. Rec.
L.5.t.31. P.7.
[230]
L.2.t.31. P.7

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was not entirely out of use in Spain, when these Institutes were written. *Lardizabal*, in his work upon punishments, published in 1782, and which was afterwards, it is believed, suppressed by the Inquisition, perhaps for the very reason about to be stated; namely, for having very properly inveighed against the absurd and useless inhumanity of this barbarous punishment, says, p.285., with some degree of apparent exultation at its almost disuse, *en España mismo se usa ya muy pocas veces en los tribunales*, &c.: and a similar remark is made by a humane Spanish writer, on the criminal law of Spain, *Gutierrez*, tom.1. p.280. n.50. *Practica Crim.* published 1804; who refers to this very observation of *Lardizabal* in the same spirit: and it was thought fit expressly to repeal torture by Art. 303 of the Political Constitution of the Spanish Monarchy, proclaimed in Cadiz, 19th March, 1812, and re-proclaimed in March, 1820.

[75] This law does not apply, and the next cited in the text is not inserted in the *Nov. Rec.* *Palacios* says, they are both erroneously cited for L.8. tit.31. P.7., which declares, that the judges ought to examine the circumstances of the offender and the offence; and, according to what they shall find, to augment, diminish, or remit the punishment.

[76] *Palacios* refers to the last note made by him in the following title; which *see* Post

[77] This may be virtually declared by L.7. tit.31. P.7.

[78] This law does not apply. *Palacios* says, L.6. tit.24. Lib.4. is erroneously cited in the text for L.6. tit.24. Lib.8., which is L.3. tit.40. Lib.12. Nov. Rec., and does apply. He refers to his last note in the following title.

[79] Such as treason, homicide, and rape; when, by L.2. tit.31. P.7., cited, if the person meditating the offence proceed, or begin to take steps towards effecting it, he is punishable as though he had completed the crime. But see *Greg. Lop.* Gl.4. on this law. *Palacios* refers to L.2. tit.23. Lib.8. Rec., which is L.3. tit.21. Lib.12. Nov. Rec. See 3d vol. *Gutierrez. Prac. Crim.* p.65, 66. &c. c.4. n.15. *et seq.* Also, 1st vol. *Villan.* p.344. n.20., & 3d vol. *Villan.* p.41. n.12.

of the offender ought not to partake of the punishment except in crimes of high treason (*de læsa majestad*), for which the infamy or disgrace passes to the children [80], L. 9. tit. 31. P. 7. 6th, That the punishment being once decreed, cannot be changed, L. 9. tit. 31. P. 7. 7th, That the punishment of death must be executed publicly, L. 11. tit. 31. P. 7. 8th, That every punishment must be promptly carried into effect, unless it be that of death which is awarded to a pregnant woman, for then her delivery must be waited for, L. 9. [81] tit. 31. P. 7.

L. 9. tit. 31. P. 7.

L. 9. tit. 31. P. 7.

L. 11. t. 31. P. 7.

§ 2. Of the pecuniary penalties or fines applied to the fisc (penas de cámara).

L. 1. tit. 41. Lib. 12. Nov. Rec.

L. 10. tit. 41. Lib. 12., Ll. 21. & 22. tit. 2. Lib. 5., L. 11. tit. 41. Lib. 12., L. 16. tit. 11. Lib. 7., L. 7. tit. 41. Lib. 12., L. 5. tit. 33. Lib. 12., L. 7. tit. 21. Lib. 12. Nov. Rec.

There is another class of pecuniary punishments which are applied to the *Fisc*, and are called *penas de cámara*, which are not carried into effect, until the sentence passes into a thing adjudged (*cosa juzgada*), L. 1. tit. 26. Lib. 8. Rec. For the due accounting, &c. (*para la buen cuenta y razon*), of these penalties, their recovery and application [82], a receiver general has been appointed who must conform to L. 8. tit. 6. Lib. 2.; Ll. 20 & 21. tit. 1. L. 66. tit. 4. Ll. 11. & 35. [83] tit. 5. L. 19. tit. 7. L. 21. tit. 9. Lib. 3. and L. 18. tit. 26. Lib. 8. Rec., and others of the same collection.

§ 3. Of the pardon of punishments.

Ll. 1. 2. & 3. t. 32. P. 7.

Punishment may cease by means of the pardon of the prince whose province it is to grant it, and not that of the magistrate [84], Ll. 1, 2 & 3. tit. 32. P. 7. The pardon or remission of the punishment does not take away the right which the persons may have to whom the property hath been given up [85], L. 3. tit. 25.

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[80] *Palacios* says, this is understood of males grown up to manhood (*varones*), and that *Azevedo*, on L. 2. tit. 18. Lib. 2. Rec., even with respect to them, limits the infamy to cases only of treason against the person of the king (*læsæ majestatis*), or against the commonwealth; that it is certain that such laws, which, from a particular motive, are extended to punish the innocent, ought to be interpreted or construed with all possible favour for their benefit.

[81] This law is erroneously cited for L. 11. *ibid.*

[82] For the collection or recovery of these penalties, their management, and distribution, says *Palacios*, there is an instruction of the 27th December, 1748, consisting of twenty-three chapters or articles. That by the royal order of the 12th April, 1779, the 20th chapter thereof is directed to be punctually observed; and by the 19th chapter of the instruction to corregidors, of 1788, they are ordered to comply with what is prescribed by the referred to instruction. Lastly, that another instruction of the 16th July, 1803, has been published for the government, administration, and benefit of the produce, or results of penalties, *de Cámara*, as an addition to that of 1748, cited.

[83] L. 35. tit. 5. Lib. 3. Rec., is not inserted in the *Nov. Rec.*

[84] The council, chanceries, and *audiencias*, says *Palacios*, grant also pardons in their visits to the prisons, in the name of the sovereign; but their powers with respect to these visits and pardons are reduced to discharging (*dar libertad*), or enlarging on bail (*ampliar la carceleria*), persons imprisoned by the royal ordinary jurisdiction, except it be for crimes which his majesty is wont to except in acts of general pardons: he refers to *Gutierrez Prac. Crim.*, tom. 1. c. 11. See *ibid.*, n. 17 & 18. p. 338.

[85] That is, the pardon does not affect the rights of third persons.

Lib. 8. Rec. In order to the validity of the pardon, it must be signed and sealed by the king and two of the council [86], and only comprehends the crime which it expresses; so that a general pardon does not extend to any particular or special thing or case, Ll. 2. & 4. tit. 25. Lib. 8. Rec. The act (*carta*) of pardon is not valid if a sentence hath been passed for any crime, and it makes no mention of it, L. 2. tit. 25. Lib. 8. Rec. Pardons are regularly granted on Good Friday, and not more than twenty can be granted in each year, L. 2. tit. 25. Lib. 8. Rec.

L. 2. tit. 42. Lib. 12. Nov. Rec.

Ll. 2 & 5. t. 42. Lib. 12. Nov. Rec.

L. 2. tit. 42. Lib. 12. Nov. Rec.

L. 2. tit. 42. Lib. 12. Nov. Rec.

[86] See *Gutierrez*, 1st. vol. c. 4. p. 329, *et seq.*, respecting matters connected with this subject. See also *Proviso* in Cl. 17. Order in Council, Appendix F.

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TITLE XX.

OF THE PROPORTION WHICH THE LAWS OF SPAIN ESTABLISH BETWEEN CRIMES AND PUNISHMENTS.

In proportion to the heinousness (*gravedad*), the malice, and the circumstances of the crimes, our laws have imposed corresponding punishments, a statement of which is communicated in this title, forming a catalogue thereof in alphabetical order; but it is proper to observe, that practice has altered the punishments in many of them.

Advocates[1] who do not practise or pursue their profession according to law, or are guilty of falsehood and malice, pay all the damages and prejudices they may cause to the parties, besides double the amount, L. 6. tit. 16. Lib. 2. Rec.

L. 9. tit. 22. Lib. 5. Nov. Rec.

Adultery[2], the woman who commits it ought to be whipped

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[1] The advocate, says *Palacios*, who shall agree with his client to receive part of the thing in dispute, or sued for, ought to be deprived of office, as infamous, L. 14. tit. 6. P. 3., that he who shall make any discovery to the adverse party, and in prejudice of his own, and he who shall knowingly allege or cite false laws, ought to be banished for life to some island, and forfeit all his property in favour of his relations; and if he should not have any within the third degree, in favour of the king, Ll. 1 & 6. tit. 7. P. 7. That by the law of the *Recopilacion*, and according to the one which the text cites, the advocate, who by his malice, fault, negligence, or unskilfulness, shall occasion damage to his clients, is bound to make it good to them, and to pay double the amount besides; although this penalty of paying double the amount is not in practice. That the advocate who shall recapitulate what is already written in the process, ought to pay 600 maravedis, L. 4. tit. 16. Lib. 2. Rec.: or L. 1. tit. 14. Lib. 11., Nov. Rec. That in practice they are also admonished and fined, &c. according to their excesses and defects.

[2] By L. 15. tit. 17. P. 7., says *Palacios*, the adulterer was punished with death, and the adulteress with whipping (*azotes*), and reclusion (in a monastery), and loss of *dote* and *arras*. That by L. 1. tit. 20. Lib. 8. Rec., which is L. 1. tit. 28. Lib. 12., Nov. Rec., both of them, and their respective property (if they have no children) ought to be placed in the power of the husband to do what he shall please with them; but that, at present, the punishment is reduced to banishment, or confinement in a house of correction (*presidio*), as regards the adulterer; and reclusion (confinement in a monastery), as regards the adulteress. That as respects the relations, it was never permitted them to kill the adulterers as the text erroneously cites; that it is only the father who may kill with impunity his daughter guilty of adultery; but for this it is necessary that he find her committing the adultery in his house, or in that of his son-in-law; and that he kill, at the same time, the adulterer, L. 14. tit. 17. P. 7. That the text also erroneously cites L. 5. tit. 20. Lib. 8. Rec., in support of what it advances. That what L. 7. tit. 2. Lib. 3. *Fuero Real*, says, is, that the woman loses her *arras* if she goes away from the house with the design to commit adultery, although it may not be proved nor

publicly (*azotada*), and shut up in a monastery with the loss of her *dote* and *arras*; and the adultery being followed with flight from her husband's house, she also loses her ganancial property, L. 5. tit. 20. Lib. 8. Rec.[3] The man ought to be banished, for the punishment of death imposed by L. 15. tit. 17. P. 7. has been mitigated. At present, the laws which permitted relations to kill the adulterer are obsolete. L. 5. tit. 28. Lib. 12. Nov. Rec.

Sorcerers, and persons practising witchcraft, suffer the punishment of transportation[4], Ll. 6, 7 & 8. tit. 3. Lib. 8. Rec. *Tumultuous meetings*[5] (*asonadas*), *assemblies of troops* (*apellidos*), *factions* (*bandos*), *parties* (*parcialidades*), *revolts* (*levantamientos*), &c., are prohibited under penalty of transportation, and of death for the third offence, L. 6. tit. 15. Lib. 8. Rec. Ll. 2 & 3. tit. 4. Lib. 12. Nov. Rec. L. 8. tit. 12. Lib. 12. Nov. Rec.

Associations (*ayuntamientos*), and *leagues* (*ligas*), &c.: no corporation or council, nor other persons can form them, L. 1.

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effectuated, through any impediment. See also what L. 15. tit. 17. P. 7., says with respect to this last case; and see also *Greg. Lop.* Gl. 1. L. 14. tit. 17. P. 7., with respect to what is said above, as to a father being permitted to kill his daughter when taken in adultery.

[3] See L. 15. tit. 17. P. 7., which is meant to be cited.

[4] Sorcerers, &c. *Palacios* says, the laws which the text cites do not impose the penalty of transportation or banishment as is there said, but that of death; but that death being so rigorous a punishment, says *Vizcayno* in his *Codigo Criminal*, 1 *pal. adivinos, num.* 15., the custom of the tribunals hath moderated it into that of whipping (*azotes*), and being covered with feathers and crowned with a cap as a mark of infamy or disgrace (*emplumados y encorazados.*) See 3d vol. *Gutierrez Prac. Criminal*, p. 22. n. 26.: it is there said, with reference to the author quoted by *Palacios*, that the punishment of whipping is inflicted on men, and that of feathering and crowning on women guilty of the practices of sorcery, &c.

[5] *Palacios* says, under this term is understood every commotion or insurrection. That the *Pragmatica* of 17th April, 1774, L. 5. tit. 11. Lib. 12. Nov. Rec., which points out to the judges the mode of proceeding when they happen, orders the imposition, in such cases, of the punishments which the laws determine, without saying what laws these are: that there are various laws which treat of this matter, and by them regard is had to the person against whom the offence is directed, the mode and circumstances which intervene, with all that accompanies it; and that thus shall the offender be punished, sometimes by death, with confiscation of property; at others, with the gallies; at others, with banishment or transportation; and for the most, not to mention all, as *Azevedo* on L. 1. tit. 15. Lib. 8. Rec. (not in Nov. Rec.), by an arbitrary punishment on the part of the sovereign, to whom an account shall be given according to the same law. That the said *Pragmatica* of 1774, directs these causes to be instituted or formed by the ordinary judges, according to the rules of law, advising upon their sentences with the courts *Del Crimen* or *De Corte*, of their respective districts; or with the council, if necessity requires it. He refers to L. 3. tit. 19. P. 2.; to Ll. 16 & 17. tit. 26. P. 2.; Ll. 1 & 2. tit. 2. P. 7.; Ll. 2 & 8. tit. 10. P. 7.; L. 1. tit. 7. Lib. 1. Rec.; some Laws of tit. 14. Lib. 8. Rec.; and of tit. 15. Lib. 8. *ibid.* He concludes by stating, that an *Aut. Accord.* of 5th May, 1766, L. 3. tit. 11. Lib. 12. Nov. Rec. says, among other things, that those who should commit this crime, on suffering the punishment of the law, shall be marked as enemies of their country, and their memory shall be infamous to all civil effects, and the guilty consequences shall follow without prescription or limitation of time.

L. 1. tit. 12. Lib. 12. Nov. Rec. L. 12. tit. 12. Lib. 12. Nov. Rec. L. 3. tit. 12. Lib. 12. Nov. Rec. L. 4. tit. 12. Lib. 12. Nov. Rec. [232] L. 2. tit. 27. Lib. 12. Nov. Rec. L. 1. tit. 27. Lib. 12. Nov. Rec. L. 3. tit. 27. Lib. 12. Nov. Rec.

tit. 14. Lib. 8. Rec., not even under the pretext of *cabildos* or societies (*cofradias*), except those already formed with royal permission, L. 3. tit. 14. Lib. 8. Rec.; also those of ecclesiastics are prohibited, L. 5. tit. 14. Lib. 8. Rec., and those of students, which are called factions (*bandos*), L. 1. tit. 7. Lib. 1. Rec.

Pimps (*alcahuetes*). The punishment of one hundred stripes (*azotes*), and ten years' condemnation to the gallies ought to be inflicted upon them for the first offence; for the second, stripes and perpetual condemnation to the gallies, although they may be under twenty years of age, Ll. 5. & 10. tit. 11. Lib. 8. Rec., and for the third the penalty of death [6], L. 4. tit. 11. Lib. 8. Rec. These punishments include husbands who consent to the prostitution of their wives, L. 9. tit. 20. Lib. 8. Rec.

Concubinage (*amancebamiento*). The married man who lives in concubinage with a single woman, is obliged to endow her (*dotarla*) in the fifth of his property to the amount of 1000 maravedis, L. 5. tit. 19. Lib. 8. Rec.; and if she is married, he forfeits the half of his property, L. 6. tit. 19. Lib. 8. Rec. Ll. 1, 2, 3 & 4. tit. 19. Lib. 8. Rec. and L. 4. tit. 19. Lib. 8. Rec. [7], speak of the concubines of the clergy.

L. 1. tit. 26. Lib. 12. Nov. Rec. L. 2. tit. 26. Lib. 12. Nov. Rec. Ll. 3, 4, & 5. tit. 26. Lib. 12. Nov. Rec.

Arms prohibited. No person can carry pistols, blunderbusses (*trabucos*), which are not a yard long, daggers (*dagas*), poniards (*puñales*), &c., under penalty of six years' condemnation to the mines if he is a plebeian, and if he be a nobleman, six years' imprisonment (*de presidio*), *Pragmatica de* 29 *Abril*, 1761. Nobles may make use of horse pistols (*pistolas de arson*). To coachmen and footmen, the use of the sword is forbidden under penalty of ten thousand maravedis, and one year's transportation [8], L. 26. tit. 23. Lib. 8. Rec. [9] See Ll. 16, 17, 18 & 19. tit. 23. Lib. 8. Rec.

L. 19. t. 19. Lib. 12. Nov. Rec.

Ll. 5 & 6. tit. 19. Lib. 12. Nov. Rec.

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[6] *Palacios* says, that practice has reduced the punishments mentioned in the laws cited by the text to exposing such offenders, if men, to public disgrace, with a crown or cap of disgrace (*coroza*); and if the husband, with horns; and if women, to being feathered (*emplumadas*); and afterwards, the former are punished with more or fewer years of imprisonment (*de presidio*); and the last with confinement in the cloister of San Fernando. By the law of the *Partidas*, he who for money was the pimp, or procured the prostitution of his wife, or of other married woman, virgin, or nun, or widow of good character, was liable to suffer death, L. 2. tit. 27. P. 7.; this last law cited by the Learned Professor does not apply.

[7] This law is not inserted in the *Nov. Rec.*

[8] *Palacios* refers upon this subject to royal orders of 29th September, 1791, September, 1760, and 3d March, 1774.; also to his last note in this title.

[9] This law is not inserted in the *Nov. Rec.* In the edition of *Palacios*, L. 20. tit. 23. Lib. 8. Rec., is cited.

Faro banks are prohibited, *Auto* 4. tit. 7. Lib. 8. [10] Nota 6. tit. 23. Lib. 12. Nov. Rec.

Bigamists are punishable with two hundred stripes, and ten years' condemnation to the gallies, L. 8. tit. 20. Lib. 8. Rec. [11] L. 9. tit. 28. Lib. 12. Nov. Rec.

Blasphemers of God and the most holy Virgin (*Maria Santisima*). Their tongues are cut out, and they are to receive one hundred stripes, if the crime be committed in the court (*corte*), and if out of it, their tongue is to be cut out, and one half of their property confiscated [12], L. 2. tit. 4. Lib. 8. Rec. L. 2. tit. 5. Lib. 12. Nov. Rec.

Blasphemers [13] of the king. If they have children, half of their property is to be confiscated; if they have none, they forfeit the whole of it, deducting the debts due by them, *dote*, &c., L. 3. tit. 4. Lib. 8. Rec. and L. 16. tit. 26. Lib. 8. Rec.; and besides, they suffer ten years' condemnation to the gallies, L. 7. tit. 4. Lib. 8. Rec. [14] L. 2. tit. 1. Lib. 3. & L. 5. tit. 17. Lib. 7. Nov. Rec. L. 7. t. 5. Lib. 12. Nov. Rec.

Drunkard (*boracho*). He who in this state kills another, is punishable with five years' transportation, L. 5. tit. 8. P. 7. L. 5. t. 8. P. 7.

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Gaming-houses and tables are prohibited under the penalties set forth in *Aut.* 2. & 3. tit. 7. Lib. 8. Rec. Notas 4 & 5. tit. 23. Lib. 12. Nov. Rec.

He who makes or breaks a hole or place in any house (*el que*

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[10] See also L. 15. tit. 23. Lib. 12. Nov. Rec.

[11] Into public disgrace (*verguenza publica*), one and ten years condemnation to gallies. See also Ll. 6, 7, 8, & 10. tit 28. Lib. 12.: and see also L. 16. tit. 17. P. 7., which is altered by L. 8. tit. 28. Lib. 12. Nov. Rec., with respect to the mode of punishment, and this punishment is extended by L. 9. *ibid.*, cited in the text. *Palacios* says, in the case of the woman being cognizant of the first marriage of the man, her punishment is banishment or confinement in a monastery.

[12] See all the Laws of tit. 5. Lib. 12. Nov. Rec. *Palacios*, after stating the certainty of the commission of this crime, and of unlawful swearing, laments that neither the punishments prescribed by the laws (a sample of which is given in L. 2. tit. 5. Lib. 12. Nov. Rec., cited in the text), nor others more mild are inflicted. The fair answer that might be given to this lamentation of the Learned Professor is, that the extreme severity of these laws defeats their own object, and secure a sort of impunity for the commission of such offences.

[13] This word, it may be permitted to remark, is generally confined to designate those who speak impiously or irreverently of God; and it is, therefore, a species of blasphemy to apply it to libellers of the king, or any human being. Those of the superior class, guilty of the alleged offence, says *Palacios*, are immediately arrested and sent to the king, or an account may be given to him of the fact, in order that he may order the infliction of the deserved punishment; and if of another class, they forfeit all their property, if they have no children; and if they should have any, they lose the half: he refers to L. 3. tit. 4. Lib. 8. Rec.; (L. 2. tit. 1. Lib. 3. Nov. Rec.)

[14] *Palacios*, properly, observes, that this law only relates to blasphemy against God, which is our understanding of the word; and he adds, that L. 16. tit. 26. Lib. 8. Rec.; (L. 5. tit. 17. Lib. 7. Nov. Rec.), also cited in the text, does not treat of the subject. The law quoted in the edition of the text by the Learned Professor, is L. 16. tit. 16. (not tit. 26), Lib. 8. Rec.: now there is no such law as that referred to by the Learned Professor; L. 9. being the last law in the title and Book so referred to.

forada alguna) by which a man may enter to commit a burglary or offence (*á hacer maleficio*), forfeits half of his property for the use of the fisc. (*para la cámara*), L. 6. tit. 26. Lib. 8. Rec.

L. 9. tit. 15. Lib. 12. Nov. Rec.

Roads and Streets. He who stops them up, or obstructs them, pays a fine to the crown (*cámara*) of one hundred maravedis [15], L. 5. tit. 26. Lib. 8. Rec.

L. 1. tit. 35. Lib. 7. Nov. Rec.

Gelder, a person who castrates another. *Vide Homicida.*

Smugglers (*contrabandistas*) incur the punishment set forth in *Auto*[16] 6. & 9. tit. 8. Lib. 9. Rec., and by a decree of 10th *December*, 1760, that of imprisonment (*de presidio*) and loss of office; as likewise those who make use of rappee snuff (*tabaco rapé*), *Instruct. de* 22 *Julio*, 1761. [17]

L. 2. tit. 19. Lib. 9. Nov. Rec.

Associations (*cofradias*) of officers may not be formed, under penalty of ten thousand maravedis for each offender, and transportation for one year, L. 4. tit. 14. Lib. 8. Rec.

L. 13. tit. 12. Lib. 12. Nov. Rec.

Dice (*dados*) may not be made nor sold in the kingdom; and no one may play at them, under pain of transportation for five years; a fine of two hundred ducats if the delinquent is an *hidalgo*; and, if a plebeian, of one hundred stripes, five years' condemnation to the gallies, and a fine or forfeiture of thirty thousand maravedis [18], L. 13. tit. 7. Lib. 8. Rec., which increases the punishment prescribed by L. 7. tit. 7. Lib. 8. Rec.

L. 11. tit. 23. Lib. 12. Nov. Rec.

L. 6. tit. 23. Lib. 12. Nov. Rec.

Defrauders of royal rents (*defraudadores de rentas reales*). He who impedes the irrecovery, or aids in this impediment (*embarazo*), is punishable with death [19], L. 1. tit. 8. Lib. 9. Rec. If any one hinders the obtaining (*sacar*) a pledge or security (*prenda*) from the debtor of the king, he is punishable with a year's transportation, and subject to the payment of four times the amount of the expenses [20], L. 4. tit. 8. Lib. 9. Rec.

L. 7. tit. 15. Lib. 12. Nov. Rec.

L. 6. tit. 31. Lib. 11. Nov. Rec.

Duel or challenge (*desafio.*) He who sends a challenge forfeits his property, L. 10. tit. 8. Lib. 8. Rec. As to what relates to the

L. 1. tit. 20. Lib. 12. Nov. Rec.

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[15] And besides, adds *Palacios*, referring to the law cited in the text, must remove or abate the obstruction or nuisance at his own cost.

[16] This *auto* is not inserted in the *Nov. Rec.*

[17] *Palacios* refers to the royal *cedula* of 8th June, 1805, as governing on this subject.

[18] And the houses in which games of dice are played, are declared forfeited. See L. 11. tit. 23. Lib. 12. Nov. Rec., cited in the text; also L. 15., *ibid.*

[19] L. 7. tit. 15. Lib. 12. Nov. Rec., cited, adds to this forfeiture of property.

[20] Besides payment of the amount of the taxes, respecting which the resistance or hindrance was made. *Palacios* observes, that the royal *cedula* of 8th June, 1805, is what governs on this subject of the text: he refers previously to L. 19. tit. 8. Lib. 9. Rec. L. 1. t. 19. Lib. 9. Nov. Rec., as containing various degrees of punishment, with reference to the circumstances, for such offence.

act of going out to fight or fighting [21] (*de reñir*), it is prohibited with the punishment of death, forfeiture of property, &c.[22], L. 1. tit. 8. Lib. 8. Rec.; *See Pragmat.* 28 *Abril*, 1757. L. 2. tit 20. Lib. 12. Nov. Rec.

Person excommunicated (*descomulgado*). For being so thirty days, he is obliged to pay six hundred maravedis; and if he should be so during six months, he must pay six thousand maravedis; and, after that, one hundred maravedis for each day, and be banished from the place, under pain, in case of returning, of confiscation of his property [23], L. 1. tit. 5. Lib. 8. Rec. [234] L. 5. tit. 3. Lib. 12. Nov. Rec.

Defloration or debauchment of a maid (*desfloro de doncella honesta*). The debaucher (*desflorador*) is obliged to endow her (*dotarlo*), or to marry her, L. 1. tit. 19. P. 7. [24] In practice some discretionary punishment is added, according to the circumstances. If the offence is committed in an uninhabited place (*desplobado*), he is punishable with death, L. 3. tit. 2. P. 3. [25]; which practice is commuted into imprisonment (*presidio*), condemnation to the mines, &c., according to persons and cases. The violation of a nun (*monja*), although only attempted, is punished with death [26], L. 2. tit. 19. P. 7. [27]. L. 1. t. 19. P. 7. L. 2. t. 19. P. 7.

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[21] This may be thought a liberty with the text, but it is the language or sense of L. 2. tit. 20. Lib. 12. Nov. Rec., cited.

[22] See note [25], p. 252, *ante*.

[23] The law cited, says half of his property. *Palacios* adds, that these penalties mentioned in the text are incurred when excommunication were by denunciation of the church, and the sentence published and not appealed from, or the appeal not continued or prosecuted.

[24] L. 1. tit. 19. P. 7., cited, does not declare what is set forth in the text.

[25] L. 3. tit. 2. P. 3., cited, does not apply.

[26] L. 2. tit. 19. P. 7., does not state what is here set forth in the text.

[27] *Palacios* observes, that the punishment for the defloration or debauchment of a maid or widow of chaste character by L. 1., or rather by L. 2. tit. 19. P. 7. is very different from that which is here stated by the text. But let that be as it may, that at present mere defilement is punished by condemning the delinquent to endow, or to marry such person; and if the circumstances of the dishonoured person require it, condemning him to imprisonment (*á presidio*), or to be married to her. That if this offence hath been committed in an uninhabited or lonely place (*en despoblado*), or the maid is not marriageable (*viripotente*), or the offence is among persons between whom marriage cannot take place, he is punished with corporal punishment at the discretion of the judge, according to the circumstances. That in cases of defilement where bail is given by the defendant for appearance to the action, and payment of the judgment or sentence, he may not be molested with imprisonment nor arrests; and if the defendant should not be able to give bail or security for such appearance and payment of the judgment or sentence, he may be allowed the liberty of the town for his prison, on giving juratory caution to present himself whenever he shall be ordered, and to comply with the decision which shall be given on the cause. He cites the royal cedula of 30th October, 1796. [L. 4. t. 29. Lib. 12. Nov. Rec.] That in practice, if there is no complaint at the instance of the party, this crime is not proceeded in *de oficio*, unless to provide for the safety of the offspring (*feto*), if there is any, and to admonish in such case the delinquents, the whole with the greatest secrecy,

The receiver or concealer (*encubridor*) *of heretics* forfeits the house or place in which he receives or conceals them; and if it is hired, he is bound to pay ten pounds of gold to the crown (*cámara*), and not having wherewithal to pay, he must be punished with stripes (*azotes*), L. 5. tit. 26. P. 7.; and in case of protecting them[28], he must be banished from the dominions of his majesty, L. 6. tit. 26. P. 7.

L. 5. t. 26. P. 7.

L. 6. t. 26. P. 7.

Receivers of cattle stealers are punishable with ten years' transportation, L. 19. tit. 14. P. 7.

L. 19. t. 14. P. 7.

Receivers of challenges (*desafios*) are punishable with banishment[29], *Auto* 1. tit. 8. Lib. 8. Rec.

L. 2. tit. 20. Lib. 12. Nov. Rec.

Receivers of delinquents, or guilty persons. If upon being required by justice they do not surrender the offender (*reo*), they are punishable with banishment, L. 4. tit. 16. & L. 6. tit. 22. Lib. 8. Rec.

L. 3. tit. 18. Lib. 12., L. 1. tit. 11. Lib. 12. Nov. Rec.

Stellionate (*estellionato*), or fraud in contracts, is punished by making good the damages and prejudices (*perjuicios*), L. 3. tit. 19. P. 7. The heir may institute this action, but not against him who was compelled to purchase[30], L. 3. tit. 16. P. 7. L. 6. tit. 11. Lib. 5. Rec.

L. 3. t. 19. P. 7.

L. 3. t. 16. P. 7. L. 2. tit. 1. Lib. 10. Nov. Rec.

Forgers or counterfeiters of royal seals. This offence is punished with death, and the confiscation of one-half of the offender's property[31], L. 6. tit. 7. P. 7. & Ll. 3. & 5. tit. 17. Lib. 8. Rec.

L. 6. t. 7. P. 7. L. 1. tit. 8. Lib. 12. Nov. Rec.

Counterfeiters of money. For coining it out of the royal mints,

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for the great degree in which the honour of the dishonoured fair one is involved. That with respect to the defilement of a nun, the punishment by L. 2. tit. 19. P. 7. is the same for that of a virgin or widow of good character. He refers to L. 2. tit. 19. P. 7. for the punishment which servants, or slaves, incur (namely, burning), who commit this offence of constupration (*estupro*), or have other carnal communication with the female relation, maid servant, or other women of the house of their master, referring to L. 4. tit. 20. Lib. 6. Rec. (L. 3. tit. 29. Lib. 12. Nov. Rec.), which, he says, mitigates the punishment of L. 6. tit. 20. Lib. 8. Rec. (L. 3. tit. 16. Lib. 6. Nov. Rec., which does not apply), and much more that of the Partida cited.

[28] After being excommunicated by sentence of the church, and being contumacious for a year; and the punishment, in addition to banishment declared in the text, is infamy and unfitness to hold office or place of honour; and if the person protecting were a lord of any place or castle, he loses his seignory thereof; and if he should be a person of low condition, his body, and all he possesses, are at the mercy or disposal of the king to inflict such punishment as he shall deem the offence to merit.

[29] See note [25], p. 252. *ante.*

[30] It would seem that this plea of *engaño*, or *Lesion*, is not available with respect to property sold publicly at judicial sale under appraisement. See *Azevedo* on L. 6. tit. 11. Lib. 5. Rec.

[31] This confiscation would seem to extend to the whole of the offender's property. See L. 3. tit. 8. Lib. 12. Nov. Rec. *Palacios* observes, that such offenders are punished as counterfeiters of money, and refers to the royal instruction of 1794.

the punishment is death and burning, with forfeiture of property to the crown, and confiscation of the house in which the money is coined, Ll. 11 & 67. [32] tit. 21. Lib. 5. Rec. & L. 4. tit. 6. Lib. 8. Rec. [33] & L. 16. tit. 7. P. 7. [34] L. 1. tit. 17. Lib. 9. Nov. Rec.

Counterfeiters of weights and measures. For making use of unlawful weights and measures, the penalty is payment of five *sueldos* for each false weight, and if the person is a money changer (*cambiador*), ten *sueldos* for the first time; for the second, double the penalty; and for the third, a hundred *maravedis* and transportation, L. 1. tit. 13. Lib. 5. Rec. [35]; although with respect to this punishment, the custom of each place chiefly governs; see Ll. 15. & 16. tit. 22. Lib. 5. Rec. [36] L. 3. tit. 8. Lib. 12. Nov. Rec. L. 2. tit. 22. Lib. 12. Nov. Rec. *[235] L. 1. tit. 9. Lib. 9. Nov. Rec.

A false escribano is punished with four years' imprisonment, privation of office, costs, &c., L. 4. [37] &c. tit. 17. Lib. 8. Rec. L. 4, &c. tit. 6. Lib. 12. Nov. Rec.

False witness, in civil causes, is to be punished with ten years' condemnation to the gallies; and in criminal cases in which the punishment for the offence charged does not extend to death, public disgrace (*vergüenza*), and perpetual condemnation to the gallies, L. 7. tit. 17. Lib. 8. Rec. [38] L. 5. tit. 6. Lib. 12. Nov. Rec.

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[32] The same punishment is applicable by this law to clippers, as well as counterfeiters or coiners, of money; and although it attaches forfeiture of property to the commission of the offence, it declares that only half such property shall devolve to the crown, one moiety of the other half being allotted to the accuser, and the remaining moiety of such half to the judge who shall condemn or give sentence against the offender.

[33] This law is erroneously cited, it applies to the offence of usury.

[34] See the exceptions mentioned in this law.

[35] *Palacios* says, that this law cited in the text refers to former ones, and that by L. 7. tit. 7. P. 7., the weights and measures ought publicly to be broken before the doors of the person who used them, who ought to pay to those he defrauded double the amount of such fraud or injury, and moreover to be banished for a certain time at the discretion of the judge. The law referred to by the learned professor, L. 7. tit. 7. P. 7., says, at the discretion of the king; although note 2. to the edition of the Partidas of 1807, by the Royal Academy of History, Madrid, says, at the discretion of the *judge or the king*; thus supporting his statement. The professor adds, that at present the offenders mentioned in this part of the text are punished by fine (*multa*).

[36] These laws are not inserted in the *Nov. Rec.*

[37] This law applies to the perjury of witnesses. *Palacios* observes, that neither L. 4., quoted in the text, nor any other law of tit. 17. Lib. 8. Rec., appoints the punishment asserted by the text. That by L. 16. tit. 19. P. 3., the hand of the false escribano with which he forged or drew the false deed or instrument is cut off, he cannot be a witness, nor enjoy any honour during life, and remains for ever infamous; also L. 6. tit. 7. P. 7.:—most just laws, he is pleased to say, which should be in their full vigour, so that they may be enforced; but adds, that at present, according to the falsehood or forgery, and its circumstances, the offenders are punished by fines, admonitions (*apercibimientos*), privation of fees or office, by imprisonment, &c.

[38] This law extends the same punishment to subornation of perjury as it does to the offence of perjury itself. *Palacios* says, that by L. 4. tit. 17. Lib. 8 Rec. (L. 4. tit. 6. Lib. 12 Nov. Rec.), the punishment *talionis* is visited upon persons giving false testimony in criminal causes, in which corporal punish-

Disseizor (forzador) *of ecclesiastical or church property.* If he does not restore it, execution shall be levied on his property for double the amount of what he shall have taken[39], L. 9. tit. 12. Lib. 8. Rec.

L. 6. tit. 5. Lib. 1. Nov. Rec.

Ravisher of women is to suffer death, and his property is to be applied to the ravished woman[40], L. 3. tit. 20. P. 7.

L. 3. t. 20. P. 7.

Gipsies ought to be banished from the kingdom within six months; so that those found without employment and without the means of living are to be sent to the gallies, and to incur the punishment prescribed by Ll. 11.[41] & 12. tit. 11. Lib. 8. Rec. They cannot live in places but where there are upwards of one thousand inhabitants, nor can they deal in the purchase and sale of cattle, L. 15. and *auto* 5. tit. 11. Lib. 8. Rec.; and it is only permitted them to exercise the employment of labourers (*labranza*), *auto* 1. & L. 17. tit. 11. Lib. 8. Rec., all which is found laid down more comprehensively in L. 16. and *autos* 7, 8, 9, & 15. tit. 11. Lib. 8. Rec.[42]

L. 5. tit. 31. Lib. 12., L. 1. tit. 16. Lib. 12. Nov. Rec.

Ll. 4 & 6. tit. 16. Lib. 12. Nov. Rec.

Nota 1. tit. 16. Lib. 12. Nov. Rec.

Ll. 7, 8, & 9. tit. 16. Lib. 12. Nov. Rec., Nota 3. tit. 17. Lib. 12. Nov. Rec.

Heretics[43] cannot exercise public employments, and are liable to be punished with confiscation of property, Ll. 1, 2, 3,

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ment attends the conviction of the offence charged. That in other criminal and in civil cases, the persons guilty of perjury are punished by extraction or deprivation of their teeth, L. 3. tit. 12. Lib. 4. *Fuero Real.* That by the law cited in the text, the punishment was commuted in civil causes into that of public disgrace (*vergüenza publica*), and ten years' condemnation to the gallies, and in criminal causes not extending to death, in which the same punishment must be inflicted, into public disgrace, and condemnation for life to the gallies. He refers to his last note on this title: notwithstanding, adds the learned professor, in practice, scarcely ever is it seen that false witnesses are punished, which is a reason why false witnesses are found to prove whatever may be desired.

[39] *Palacios* says that, according to the law cited in the text, if the offender do not restore the property, he ought to pay double the amount in addition to the value or amount of what he took; but that in practice this punishment of paying double the amount of the property taken is not observed.

[40] This, says *Palacios*, applies to the ravishment of widows of good fame, or virgins, or married women, or nuns; and he adds, that L. 8. tit. 11. Lib. 8., Rec.; (L. 2. tit. 40. Lib. 12. Nov. Rec.), commutes the punishment of death imposed by L. 3. tit. 20. P. 7., into that of condemnation to the gallies. See L. 3. tit. 20. P. 7., quoted in the text; by which it would appear, that a rape committed on other women, such as prostitutes, &c., is punishable at the discretion of the judge.

[41] This law applies to vagrants generally.

[42] *Palacios* says, that these laws are altered by a *pragmatica* of 19th September, 1783, (L. 11. t. 16. Lib. 12. Nov. Rec.) accompanied by an instruction or declaration of forty-four sections (*capitulos*), directed first to extinguish by mild means, and proceeding afterwards progressively to the imposition of the penalty of death, to punish this race of persons, to speak more properly their mode of life, and to make them useful citizens.

[43] L. 1. tit. 3. Lib. 12., Nov. Rec., cited in the text, defines a heretic to be one who is baptised a Christian, and does not believe in the articles of the catholic faith, or any of them. *Palacios* observes, that in order to the incurring these penalties, it is necessary that the party be declared a heretic by the tribunal of the Inquisition, to which the cognizance and punishment of this offence belongs; as also of all those which directly offend against re-

& 4. tit. 3. Lib. 8. Rec.; neither can they be constituted heirs, L. 4. tit. 3. P. 6. nor be witnesses, L. 8. tit. 16. P. 3. and L. 9. tit. 1. P. 6. Ll. 1, 2, 3, & 4. tit. 3. Lib. 12. Nov. Rec.

Foundling or child abandoned (echado) *by his father*[44]: the latter loses the right of his being heir to his son, L. 1. tit. 23. Lib. 4. *Fuero Real.* [236]

Homicide is punishable with death, Ll. 8, 10, & 15. tit. 8. P. 7. and Ll. 2, & 3. tit. 23. Lib. 8. Rec.; unless it were committed in self defence, or by killing the robber who should be found robbing, L. 4. tit. 23. Lib. 8. Rec.[45] He who castrates another is considered a murderer, and punished as such, L. 13. tit. 8. P. 1.[46] and L. 25. tit. 6. P. 1.[47] Ll. 8. 10. & 15. t. 8. P. 7. Ll. 3 & 4. tit. 21. Lib. 12. Nov. Rec. L. 1. tit. 21. Lib. 12. Nov. Rec. L. 13. t. 8. P. 7.

Felo de se. The property which he leaves is applied to the use of the fisc if he has no descendants, L. 8. tit. 23. Lib. 8. Rec.[48] L. 15. tit. 21. Lib. 12. Nov. Rec.

A person committing homicide or wounding another with a hand gun (*alcabuz*), is traitorous (*alevoso*) and ought to forfeit all his property, one half to the king, and the other to the heirs of the deceased, L. 15. tit. 23. Lib. 8. Rec. L. 12. tit. 21. Lib. 12. Nov. Rec.

Theft (*hurto*). Its punishment is the restitution of the thing stolen; and if it is private, it is punished with the restitution of double, stripes (*azotes*), public disgrace (*vergüenza*), condemnation to the mines, imprisonment (*presidio*), the gallows (*horca*), &c., according to the circumstances and the quality of the thief, L. 18. tit. 14. P. 7, and Ll. 7. & 9. tit. 11. Lib. 8. Rec. He who commits theft, whether it be qualified or not, in the place or town in which the court resides (*corte*), or within five leagues of its environs, if he is seventeen years old, incurs the penalty of L. 18. t. 14. P. 7. Ll. 1 & 2. t. 14. Lib. 12. Nov. Rec.

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ligion. The Inquisition is abolished by the 12th Article of the Constitution of the Spanish monarchy; and by the decree of the Cortes of the 22d February, 1813, L. 2. tit. 26. P. 7., is re-established in its pristine vigour; and the cognizance of such offences belongs to the bishops or their substitutes; but the imposition of the punishment or penalties to the secular judges.

[44] *Palacios* says, "the father loses by this barbarous act the right of *patria potestad*, according to L. 4. tit. 20. P. 4., revived and confirmed by *Royal Cedula* of 11th December, 1796, (L. 5. tit. 37. Lib. 7. Nov. Rec.)." It may be added, that by L. 4. tit. 20. P. 4., if a slave be so abandoned by the owner, such slave becomes free.

[45] See all the laws cited in this part of the text.

[46] Read P. 7.

[47] No such law.

[48] *Palacios* says, without citing any authority for his *dictum*, that the punishment attached by this law to the commission of suicide is not in practice; because, it is presumed, that the person committed it through insanity: in which case, this punishment does not take place, according to L. 24. tit. 1. P. 7.; nor that of being dragged and burnt, as laid down in L. 19., *tit. fin. del ordenamiento:* nor that of dying excommunicated, and the punishments consequent thereon: *can.* 9. & 12.; *caus.* 23. *quæst.* 5. The validity of the practical infringement, or disregard of an express statutory enactment, may be very fairly questioned, without intending any disrespect to the opinion of the Learned Professor.

death, if above fifteen, that of 200 stripes, and ten years' condemnation to the gallies, one witness and two *indicios* being sufficient to prove the crime [49], *Auto* 19. & 21. tit. 11. Lib. 8. Rec.

Ll. 3 & 5. tit. 14. Lib. 12. Nov. Rec.

Arson. The person guilty of this offence (*incendiario*), besides the punishment of death according to L. 6. tit. 12. Lib. 8. Rec., forfeits the half of his property to the *camara*, L. 8. tit. 26. Lib. 8. Rec. [50]

L. 5. tit. 15. Lib. 12. Nov. Rec.

L. 7. tit. 21. Lib. 12. Nov. Rec.

Incest. He who commits it, besides the punishment of adultery, L. 3. tit. 18. P. 7., is liable to that of the confiscation of half his property, L. 7. tit. 20. Lib. 8. Rec.

L. 3. t. 18. P. 7. L. 1. tit. 29. Lib. 12. Nov. Rec.

Injury or *libel* (*injuria*). He who injures or libels his father, is obliged to pay six hundred *maravedis*, four hundred to the injured party, and two hundred to the accuser; besides [51], is

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[49] *Palacios* says, the punishment of theft is pecuniary to satisfy the party or individual injured, and corporal to satisfy public vengeance. That the pecuniary punishment for *manifest* theft is, for the person committing it, to return the thing stolen, or its value, to him from whom it was stolen, and fourfold the value besides: for *private* theft, to return the thing stolen, or its value, and double the amount, L. 18. tit. 14. P. 7., although *Ant. Gomez*, 3 *var. res.* cap. 5. hath said, that at present, these penalties of two, and four-fold the amount, are not in use; and that the parties should be content to recover the thing stolen, with compensation for the damages and prejudices. This, observes the Learned Professor, is not to say, that the law of the *Partida* (L. 18. tit. 14. P. 7.), cited in the text, ought not, in this respect, to be in full vigour and observance. That the public good is much interested in the severe punishment of thieves. The corporal punishment, proceeds the Professor, for the first simple theft, is public disgrace (*vergüenza*), and six years' condemnation to the gallies; and for the second, 100 stripes, and perpetual condemnation to the gallies, Ll. 7 & 9. tit. 11. Lib. 8. Rec.; (Ll. 1 & 2. tit. 14. Lib. 12. Nov. Rec.): he refers also to his last note of this title, p. 283. *post.*: that for the third offence, some authors say the punishment of death ought to be inflicted; but that, although he, *Palacios*, is of opinion thieves ought to be punished with all the rigour of the law, he hath not found one law which expressly imposes this punishment; and therefore he does not subscribe to the opinion of these authors. That some qualified thefts are punished for the first time with death, as are highwaymen or footpads; persons guilty of burglary in, or breaking into (*quebrantadores*), churches, houses (*casas*), or other place. He refers to L. 18. tit. 14. P. 7. He adds, that *simple* theft, committed in the place or town where the court resided (*corte*), was punished with death; but that by a royal decree of 18th April, 1746 (see L. 6. tit. 14. Lib. 12. Nov. Rec.), it was ordered, that simple thefts which should be committed within the place of residence of the court (*corte*), should be punished by arbitrary punishments; and that, although there are two royal decrees posterior to the above, which point out and determine the punishment, its execution seems to be suspended. He refers to the *Prontuario* of *Dr. Aguirre*, in a note on the word *robos*. See Ll. 3. & 5. tit. 14. Lib. 12. Nov. Rec.; and 3d vol. *Gutierrez, Prac. Crim.*, p. 88. n. 19. to p. 98. n. 36. inclusive.

[50] *Palacios*, on this subject, in addition to the laws cited in the text, refers to L. 2. tit. 9. P. 1 & L. 10. tit. 15. P. 7.; the royal decree of 23d February, 1775, and the royal order of 19th April, 1775, neither of which are inserted in the Chronological Index of the Nov. Rec.

[51] Read or see L. 4. tit. 25. Lib. 12. Nov. Rec., cited.

liable to suffer twenty days' imprisonment [52], L. 1. tit. 10. Lib. 8. Rec. He who libels another with stigmatizing or infamous language [53] (*palabra denigrativa*), shall pay twelve hundred *maravedis*, and shall be obliged to recant (*desdecirse*), if he is not an *hidalgo*, L. 2. tit. 10. Lib. 8. Rec., although in this particular the punishment is proportioned to the quality of the offence, L. 3. tit. 10. Lib. 8. Rec. [54]

L. 4. tit. 25. Lib. 12. Nov. Rec.

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L. 1. tit. 25. Lib. 12. Nov. Rec.

L. 2. tit. 25. Lib. 12. Nov. Rec.

Gaming (*juego*). He who plays at dice or cards in public [55], or he who has a gaming table in his house, incurs the penalties set forth in Ll. 2, 3. 13 & 14. tit. 7. Lib. 8. Rec., unless something to eat immediately is played for, L. 5. tit. 7. Lib. 8. Rec. Artificers or workmen (*oficiales*), and day labourers (*jornaleros*), are prohibited from playing on work days, Ll. 14. & 16. tit. 7. Lib. 8. Rec. [56]

Ll. 1, 2. 11. & 12. tit. 23. L. 4. tit. 23. Lib. 12. Nov. Rec. L. 12. tit. 23. Lib. 12. Nov Rec.

Common swearer (*jurador*) ought to be imprisoned a month

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[52] In addition to the punishment prescribed by Ll. 1. 6. 20 & 21. tit. 9. P. 7., and L. 4. tit. 6. P. 7.: see note (*a*), L. 4. tit. 25. Lib. 12. Nov. Rec., cited in the text.

[53] As calling a man a sodomite, cuckold, traitor, a heretic, or a married woman a whore, &c.: it would seem that the punishment of this law does not extend to the calling a widow whore. See *Azevedo*, on L. 2. tit. 10. Lib. 8. Rec. n. 43.: and *Parladorius* on ditto, n. 50. cap. 17. Lib. 1. p. 55.

[54] This law relates to libellous words of a less gross character than those mentioned in L. 1. tit. 25. Lib. 12. Nov. Rec.; for which the punishment is payment of two hundred *maravedis*, and the judge is authorised to impose a greater punishment according to the quality of the persons, and of the injury or libel. See the law cited. *Palacios* adds, that he who libels any foundling (*expósito*), by calling him bastard, &c., besides being compelled to retract in court or judicially his injurious assertion, ought to suffer a proportionate pecuniary punishment, royal decree, 20th January, 1794 (not inserted in the Chronological Index of Nov. Rec.). That he who libels another by written defamatory libel (*libelos infamatorios*), incurs the same punishment that the person libelled would incur, if what is imputed to him should be proved, L. 3. tit. 9. P. 7., and that in case the libel is in writing, the libeller is not exempted from the punishment, although the libellous matter be true. That if the libel should be verbal, or slander, and the person uttering the slanderous or libellous words should wish to prove the truth of what he said, he will be admitted to proof thereof, provided the public be interested in its being known; and in such case he will not be liable to the punishment; but if the public is not interested therein, he is not admitted to such proof, and consequently incurs the punishment, although the slander be true, because no one has a right to insult another; and it is always unjust and injurious to reproach others with their defects or faults, however true they may be. That in this sense, L. 1. tit. 9. P. 7. must be understood, and he refers to Greg. Lop. Gl. 7. on this law. He concludes by observing that the action for libel (*injuria*), can only be instituted within a year, for after a year hath expired, it is understood that the libel or injury is forgiven, or it is presumed the party did not consider himself dishonoured, L. 22. tit. 9. P. 7. The action is also barred if the party libelled should afterwards eat in company, or associate with the libeller. See L. 22. tit. 9. P. 7., referred to by the professor.

[55] Or in private. See Ll. 1. & 12. tit. 23. Lib. 12. Nov. Rec.

[56] Gaming is severely punished by the laws cited in the text. See them, and also L. 15. and the other laws of tit. 23. Lib. 12. Nov. Rec. on the subject.

for the first offence; for the second, banished for six months [57], and for the third, have his tongue nailed (*se le enclava la lengua*) if he is a plebeian; and if he should be a person of condition, the banishment shall be doubled [58], Ll. 5. & 6. tit. 4. Lib. 8. Rec.

Ll. 4. & 6. tit. 5. Lib. 12. Nov. Rec.

Masks. Plebeians are prohibited to walk with masks under pain of one hundred stripes; and nobles under pain of banishment or transportation for six months; and it being in the night time, the punishment is doubled [59], L. 7. tit. 15. Lib. 8. Rec.

L. 1. tit. 13. Lib. 12. Nov. Rec.

Clandestine marriage draws down the punishment of forfeiture of property and perpetual transportation from His Majesty's dominions [60], L. 1. tit. 1. Lib. 5. Rec.

L. 5. tit. 2. Lib. 10. Nov. Rec.

Beggars who can work may be driven out of the place, and receive fifty stripes, L. 2. tit. 11. Lib. 8. Rec.

L. 2. tit. 31. Lib. 12. Nov. Rec.

Landmarks (*mojones*); he who alters them, or confounds the boundaries or limits of towns (*terminos*), incurs a penalty of fifty *maravedis* of gold for each boundary mark, and loses any right which may result to him from it [61], L. 30. tit. 14. P. 7. and L. 6. tit. 6. Lib. 3. Rec.

L. 30. t. 14. P. 7.

L. 12. tit. 21. Lib. 7. Nov. Rec.

Prostitutes (*mugeres publicas*) shall not have female servants under forty years of age, under pain of transportation for a year, and a fine of 2000 *maravedis*, L. 7. tit. 19. Lib. 8. Rec.; and there shall be no brothels (*casas publicas de ellas*), L. 8. tit. 19. Lib. 8. Rec. [62]

L. 6. tit. 26. Lib. 12. Nov. Rec.

L. 7. tit. 26. Lib. 12. Nov. Rec.

Lewd or obscene expressions (*palabras deshonestas*). He who utters them, pays two hundred *maravedis*, L. 3. tit. 10. Lib. 8. Rec.; and no one may sing them under pain of banishment [63] for a year, and punishment of one hundred stripes [64], L. 5. tit. 10. Lib. 8. Rec.

L. 2. tit. 25. Lib. 12. Nov. Rec.

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L. 6. tit. 25. Lib. 12. Nov. Rec.

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[57] And to pay one thousand maravedis. See L. 4. tit. 5. Lib. 12. Nov. Rec.

[58] Also the pecuniary penalty. See L. 4. tit. 5. Lib. 12. Nov. Rec. cited.

[59] *Palacios* says, that masks are prohibited by decrees (*bandos*) of 1767. 1773, and 1775, and the person masking (*desfraz*), is punished with thirty days' imprisonment in the common gaol (*de carcel*), the noble with four years' confinement (*de presidio*), and the plebeian to labour in the dock yard (*de astillero*). That the person who is proved to have danced, or been in any house with a mask or disguise, incurs also a fine of a thousand ducats.

[60] Under pain of death if they should return; and the parents may disinherit their children contracting such marriage. See L. 5. tit. 2. Lib. 10. Nov. Rec. cited.

[61] He who changes landmarks loses the right which he might have to the land on which he placed them, and if he had no right therein, he shall restore to the proprietor the land so surreptitiously sought to be gained by him, with an equal quantity of his own land. See L. 30. tit. 14. P. 7. cited in the text.

[62] See also L. 8. and Auto 1. tit. 26. Lib. 12. Nov. Rec.

[63] From the town or place where convicted of the offence.

[64] See L. 10. tit. 25. Lib. 12. Nov. Rec., which punishes men guilty of using obscene language, or performing indecent actions, with a month's labour in

A Parricide [65] is punishable with death, for at present the ancient punishments prescribed by L. 12.tit. 8.P. 7. [66] are obsolete. [67] L.12.t.18.P.7.

Feigned parturition (*parto fingido*). The woman who feigns it [68] must be transported, Ll. 3. & 6. tit. 7. P.7. Ll.3. & 6.tit.7. P.7.

Perjury. The property of a person guilty of perjury is confiscated, L. 1. tit. 17. Lib. 8. Rec.; and being one of the parties to the suit, he loses the cause, L. 3. tit. 12. Lib. 4. *Fuero Real.* [69] L.2.tit.6. Lib.12. Nov. Rec.

Detestable crime (*pecado nefando*). The person guilty of it must be burnt, and his property confiscated [70], L. 1. tit. 21. Lib. 8. Rec. L.1.t.30. Lib.12.Nov. Rec.

Plagiarios are those who steal or kidnap men to sell them in an enemy's country. The noble who is guilty thereof is imprisoned (*va á presidio*)[71]; and the offender not being a noble, incurs the punishment of death, L. 22. tit. 14. P. 7. [72] L.22.t.14.P.7.

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the public works, and women for the like period in the establishment of San Fernando for the first offence; and it increases the punishment for a second and third commission thereof.

[65] This extends to other relations and persons, besides parents. See L. 12. tit. 8. P. 7. The bare purchase of and endeavour to administer poison by a child to a parent, although it should not be effected, is punishable with death; and if any other child should be cognizant thereof, and should not advise the parent, such child is punishable with five years' transportation by L. 12. tit. 8. P. 7.

[66] These punishments are to be publicly whipped, then to be sewn up in a leathern bag, with a dog, a cock, a serpent, and an ape, and thrown into the sea, or nearest river. See L. 12. tit. 8. P. 7.

[67] *Palacios* observes, that *Posadilla* in his *Prac. Crim.* tom. 3., says, these punishments are in some manner executed by covering the dead body of the parricide with leather, on which the animals mentioned in the preceding note are painted.

[68] To impose a false, or other person's child upon her husband. See L. 3. tit. 7. P. 7. cited in the text.

[69] *Palacios* observes, that "the person who may break, or not keep his oath in any contract he hath made, shall forfeit all his property to the crown (*camara*), is said by L. 2. tit. 6. Lib. 12. Nov. Rec.; but that in practice he is compelled to fulfil it, and it is not seen that the said penalty is imposed. He adds, that he who on oath gives false testimony, shall pay the demand to him who lost it by such testimony; that his evidence shall be no more valid, and that his teeth shall be taken out, and that this is what is stated in L. 3. tit. 12. Lib. 4. *Fuero Real.* See False Witness, p. 273. ante.

[70] And it is not necessary that the perfection or consummation of the crime should be proved, but the proof of acts approaching to, or very near its conclusion, will be sufficient to produce the punishment mentioned in the text. See L. 1. tit. 50. Lib. 12. Nov. Rec. cited.

[71] The punishment by L. 22. tit. 14. P. 7. for an *hidalgo* guilty of this offence, is being cast into irons, and condemned for life to work on the works of the crown.

[72] *Plagium*, or man stealing, is the knowingly selling, purchasing, or concealing a free man, or another man's slave, or otherwise depriving a man of his slave. Also the knowingly receiving a free man, with the intention to make use of him as a slave. See L. 22. tit. 14. P. 7., and *Greg. Lop.* gl. 1., thereon; *Wood, Civ. Law*, p. 285. ch. 10. Book 3., (which see, as also p. 285. *ibid.*) says, that it is *plagium* where a slave is persuaded to run away from his master, or when he is concealed after he hath run away from him.

A person guilty of an escape from, or of breaking prison, is liable to a punishment of two hundred stripes, or public disgrace (*vergüenza publica*), and to a fine of six hundred *maravedis* to the king; besides, to be taken as confessed with respect to the crime for which he is imprisoned[73], L.13. tit.29. P.7. & L.7. tit.26. Lib.8. Rec.

L.13.t.29.P.7. L.17.tit.38. Lib.12.Nov. Rec.

Regraters who obstruct the supplying of the town with provisions (*que estorban los abastos*) must be punished with stripes and fines (*multas*),[74] Ll.1, 2, & 6. tit.14. Lib.5. Rec.

Ll.6,7,& 8,t.17. Lib.3.Nov. Rec.

Apostates (*renegados*), whom our laws call turn-coats (*tornadizos*), are liable to the same punishment as heretics; *vide Tit. Heretics*, p. 274.

Resistance to justice. The person who makes it, is punishable with eight years' condemnation to the gallies[75], L.7. tit.22. Lib.8. Rec.; and according to Ll. 1, 2, 3, & 4, tit.22. Lib.8. Rec., those who oppose the *alcaldes de corte* are liable to the penalty of death, and confiscation of property; and if they should kill any of the ordinary justices of the towns, they ought to suffer death, and forfeit half of their property; and if they should only wound them, they shall forfeit half of their property, and be transported for ten years from the kingdom, L.5. tit.22. Lib.8. Rec.[76]

L.6.tit.10. Lib.12.Nov. Rec.

Ll.1.2,3 & 4. tit.10.Lib.12. Nov.Rec.

L.5.tit.10. Lib.12. Nov. Rec.

Raffles and games of chance, even under pretence of devotion, are prohibited, under the penalty of forfeiture of the things raffled for; and, besides, the price put down or paid to raffle, with as

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[73] And the gaoler, or person having him in custody by L.17. tit.38. Lib.12. Nov. Rec., must answer in his stead, and pay a fine to the crown (*camara*) of six hundred maravedis. *Palacios* observes on this part of the text, that by a royal order of 27th January, 1787. (nota 2. tit.40. Lib.12. Nov. Rec.), a person guilty of the offence of breaking prison, is sent or condemned to the gallies, if the crime for which he was imprisoned should not require a greater punishment, and it should be proved. That from this it is inferred, that from the mere circumstance of breaking prison, he ought not to be taken, or had as having confessed the crime, for although when by the laws cited he was so held (and he was not always so held, as *Azevedo* on L.7. tit.26. Lib.8. Rec. explains), this presumed confession did not exclude the proof which the breaker or person guilty of the escape might give of his innocence, for presumptive proof ought to yield to positive proof. That the laws cited in the text do not make mention of the punishment of two hundred stripes, nor of that of public disgrace. That law 13. tit.29. Part 7., leaves the punishment to the discretion of the judge.

[74] Regraters, observes *Palacios*, it is seen, are punished with fines (*multas*), but not with stripes. That by the royal order of the 29th April, 1804, the use of the iron ring (*argolla*) was directed to be re-established in Madrid for regraters of all classes.

[75] And disgrace (*vergüenza*). The punishment may be greater, according to the nature of the resistance, &c. See L.6. tit.10. Lib.12. Nov. Rec.

76 See the laws of the 10th title. 12th book, *Nov. Rec.*, cited in the text: also the royal decree of 2d April, 1783, (not in *Nov. Rec.*)

much more on the part of those who put it down or pay it, L.12. & *Auto* 1. tit.7. Lib.8. Rec.[77]. Ll.1 & 2.tit.24. Lib.12. Nov. Rec.

Robbery.[78] He who robs on the high roads (*en caminos*); besides the punishments ordained by the common law (*segun derecho*), is obliged to pay six thousand *maravedis* to the *camara*, L.1. tit.12. Lib.8. Rec. Every robbery in a desert or uninhabited place, of the value of one hundred and fifty *maravedis*, is punishable with transportation and stripes; with the addition, that the robber must pay to the party double the amount of the property robbed. If the robbery should amount to five hundred *maravedis*, the robber is punished with stripes and the cutting off his ears; if it exceeds five hundred *maravedis*, up to a thousand, with the cutting off his foot, and with never being allowed to ride on horse or mule back; and if it exceeds five thousand *maravedis*, he ought to suffer death for it, L.3. tit.13. Lib.8. Rec.[79] At the present time, highway robbers incur the penalty of death.[80] He who steals any slave, or the child of another, must suffer death, if he is a plebeian; and if an *hidalgo*, be condemned for life to hard labour[81], L.22. tit.14. P.7. Stealers of cattle by use and habit, deserve the punishment of death; and when the robbery is confined to one or two heads, it is punished with imprisonment (*presidio*), condemnation to the mines, &c., according to the crime and its circumstances, L.19. tit.14. P.7. L.3.tit.15. Lib.12. Nov. Rec. L.22.t.14.P.7. L.19.t.14.P.7.

Sacrilege is punishable by excommunication, and other penalties according to L.4. and other laws, tit.18. P.1.[82] L.4. &c. tit.18. P.1.

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[77] See also L.3. tit.24. Lib.12. Nov. Rec.; and title gaming, p. 277. *ante*.

[78] See title *Theft*, and note (49) p. 275-6. *ante*.

[79] This law is not inserted in the *Nov. Rec.*

[80] *Palacios* says, that the laws of the *Partida* make a difference between robbery (*robo*), and theft (*hurto*); giving the name of *robo* to what the Romans called *rapina*, L.1. tit.13. P.7., which implies theft in which force intervenes *Princip.*; tit.12. P.7., but that as these words are commonly taken as synonimous, the word *hurto* may be referred to. See p. 275-6, *ante*, and note 49 *ibid.* That, notwithstanding it is there said, that the pecuniary punishment of *theft* (*hurto*), not manifest, is the payment of the double of the amount or value stolen; and that of manifest theft, fourfold the amount: and the penalty of threefold the amount having been affixed by L.3. tit.13. P.7., and L.2. tit.12. Lib.8. Rec., (L.4. tit.34. Lib.12. Nov. Rec.), to the offence of robbery or rapine, it is convenient, in order to avoid confusion, to add here the motive for this difference. The Learned Professor goes on to observe, that the laws of Spain in this particular, (he might have added in most others), were taken from those of the Romans; and the Roman prætors established the penalty of threefold the amount with respect to robbery; not because that in robbery the same actions are not given as in theft, — for, as the Emperor Justinian says, § *init. Inst. de vi bon. rap.*, he who commits robbery is an infamous thief, and is subject to the same actions as he who commits theft; but in order to prove their zeal, and in detestation of this crime.

[81] See title *Plagiarios*, and note [72], p. 279. *ante*.

[82] Sacrilege, says *Palacios*, is an offence *mixti fori*, the penalties of excommunication, and the other ecclesiastical penalties being of ecclesiastical cognizance.

Breaking open graves (*sepultura quebrantador*). Persons guilty of this offence are punished arbitrarily, or they are condemned to imprisonment (*á presidio*) according to the circumstances of the breaking open; and if effected by arms, and the ill treating the dead bodies, it is punishable with death, L. 12. tit. 9. P. 7. [83]

L. 12. t. 9. P. 7.

Simony. [84] He who is guilty of the offence, forfeits the gift (*gracia*) which he may have obtained, and besides double the amount of what he may have given or promised, and must be transported from the kingdom for ten years, L. 19. tit. 26. Lib. 8. Rec. *Suborners*, are punishable with transportation, Ll. 5 & 6. tit. 9. Lib. 3. Rec. [85]

L. 3. tit. 22. Lib. 3. Nov. Rec. Ll. 7 & 8. tit. 1. Lib. 11. Nov. Rec.

Highwaymen (*salteadores*). See title robbery.

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Treason or *traitor* (*traidor*). The punishment of death and confiscation of property is inflicted upon persons guilty of this crime, L. 2. tit. 18. Lib. 8. Rec. He loses his privileges of nobility or rank (*hidalguia*), and his houses are rased to the ground to serve as a mark of perpetual infamy, L. 1. tit. 12. Lib. 8. Rec.; and he who knowingly admits into his [86] house or gives an asylum [87] (*acoge*) to traitors forfeits half his property, L. 4. tit. 18. Lib. 8. Rec. [88]

L. 2. t. 7. Lib. 12. Nov. Rec. L. 3. tit. 15. Lib. 12. Nov. Rec. L. 3. tit. 7. Lib. 12. Nov. Rec.

Vagabonds. Under this name are comprehended all sturdy or healthy beggars, L. 11. tit. 11. Lib. 8. Rec. They are punished for the first time with four years' condemnation to the gallies, for the second with one hundred stripes and eight years' condemnation to the gallies; and for the third with one hundred stripes and perpetual condemnation to the gallies, L. 6. tit. 11. Lib. 8. Rec. [89]

L. 5. tit. 31. Lib. 12. Nov. Rec. L. 4. tit. 31. Lib. 12. Nov. Rec.

Outlaws or banditti (*bandidos*). If being cited or called by edicts and proclamations (*pregones*) they do not appear they are considered as contumacious, and any person may kill them, and

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[83] See this law: the relations of the deceased person may proceed civilly if they prefer it, and recover from the offender 100 maravedis of gold.

[84] This, says *Palacios*, belongs to the canonists, and its cognizance to the ecclesiastical jurisdiction.

[85] The laws cited by the text, says *Palacios*, only treat of judges, who receive gifts from the suitors, punishing them for this crime with privation of, or degradation from office: and he refers to cap. 9. *Instruc. de Corregidores* on this subject.

[86] This Law 3. tit. 15. Lib. 12. Nov. Rec.; which is L. 1. tit. 12. Lib. 8. Rec., cited in the text, does not apply.

[87] For three days, says L. 3. tit. 7. Lib. 12. Nov. Rec., cited in the text.

[88] *Palacios* refers to the whole of tit. 13. P. 2., particularly to L. 6. thereof.

[89] *Palacios* says, that all the royal orders respecting the assemblage (*recogimiento*) of vagrants, remained without force by cap. 41 of the *Royal Cedula*, or enactment respecting the press, of 7th May, 1775. (See L. 7. tit. 31. Lib 12. Nov. Rec.,) which is that which governs with regard to vagrants, &c.

being once taken they must be drawn, hanged, and quartered, and their property confiscated, *auto* 3. tit. 11. Lib. 8. Rec. [90] L. 1. tit. 17. Lib. 12. Nov. Rec.

Usurer. The contracts made by such person are null, he forfeits or loses that which he lends on usury, and he pays as much more (*otro tanto*). Being a second time guilty of the offence, he forfeits the half of his property; and the third time he forfeits the whole [91], Ll. 4. & 5. tit. 6. Lib. 8. Rec. Ll. 2 & 4. tit. 22. Lib. 12. Nov. Rec.

NOTE.

¶ By the ordinance (*pragmatica*) of 12th March 1771 [92] it is established, That persons guilty (*delinquentes*) of qualified crimes such as those who in transgressing the laws commit crimes (*delinquen*) with a depraved and wicked mind, are punishable with imprisonment in Africa (*de presidio de Africa*); and that those guilty of crimes not qualified (that is committed without such wicked mind or intention) are sent to the dock yards of Cadiz, Ferrol, and Carthagena, under the dispositions therein directed [93] whereby also the extension which was improperly

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[90] *Vide* the quotation.

[91] *Palacios* says, that the contracts made by a usurer are null, and do not carry prompt execution; but that this, it is stated by *Febrero Reformado*, p. 1. cap. 16. § 1. n. 30., is only observed with respect to the interest; for that with respect to the principal execution goes against the debtor, notwithstanding what the two laws cited in the text lay down. With great deference to the Learned Professor, and the compiler whom he has quoted, it would be going too far to set up the authority of even *Febrero*, against positive statutory enactments.

[92] L. 7. tit. 40. Lib. 12. Nov. Rec.

[93] *Palacios* observes, that the contrary of what is stated in the text, is laid down in the Pragmatica of 12th March, 1771 (L. 7. tit. 40. Lib. 12. Nov. Rec.), that is, that the last mentioned punishment, which cannot exceed ten years, is awarded to the first class of crimes, and the first to the last: he transcribes a great part of this law (which see), and asserts, that notwithstanding its definite terms, and its severity, practice, as is stated in the text at the beginning of this title, hath altered and mitigated the punishments in many crimes. That at present, and by a royal order of 30th December, 1803, no one ought to be sentenced or condemned to the gallies, they not being found in a state to be useful, and therefore that some other equivalent punishment should be imposed, when, according to the laws, any offender should deserve it. He also refers to the instruction (16th July), of 1803 (L. 21. tit. 41. Lib. 12. Nov. Rec.), which ordered (el. 5.), as an addition to that issued on 27th December, 1748. (L. 17. tit. 41. Lib. 12. Nov. Rec.), "that opulent persons should be punished by pecuniary fines in lieu of corporal punishments, of imprisonment (*de carcel*), and others of a like nature for light offences; and that the superior tribunals should be also able to commute the punishments of imprisonment (*de presidio*), where the class or description of offence should permit it, &c. That by cedula of 28th March, 1786 (L. 15. tit. 40. Lib. 12. Nov. Rec.), which refers to former ones (*Pragmat.* 12th, March, 1771. cap. 5. or L. 7. tit. 40. Lib. 12. Nov. Rec.), it is ordered that no offender shall be sentenced for life to imprisonment (*de presidio*), nor to confinement for an indefinite period in a house of correction, in order to prevent the desperation of offenders and

L. 2. tit. 40. Lib. 12. Nov. Rec.

given to L. 8. tit. 11. Lib. 8. Rec.; and of those laws corresponding with it is done away.

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other disadvantages, or evils. That some royal orders fix ten years for the greater punishment, and others, especially that of 17th February, 1786 (not in *Nov. Rec.*), direct that those which appoint ten years, are understood to apply to only one sentence or conviction, and without prejudice to a fresh charge for new crimes. That ten years with the order of confinement (*clausula de retencion*), is the utmost period to which condemnations of imprisonment (*de presidio*) can be extended. Royal cedula, 7th October, 1796 (L. 16. tit. 12. Lib. 5. Nov. Rec.). That as regards the punishment of mutilation of limb, it hath ceased to be in use in Spain. That with respect to the ancient pecuniary punishments, it may be said that they have been made arbitrary in consideration of the great depreciation of money since the laws which imposed them were established, which would render them almost useless, if the letter of the law should be observed. And that the instruction for corregidores of 1788 (see L. 25. tit. 38. Lib. 12. Nov. Rec.), will be of use, in order to proceed with certainty in regard to some criminal points.

For more full information on the subject of this title of the text, the reader is referred to the 7th Partida, Book 12. of the *Novisima Recopilacion de las Leyes de España*, to *Antonio Gomez*, and to *Mathæus de delictis*, and to the practical criminal works of *Vilanova* and *Gutierrez*.

BOOK III.

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OF ACTIONS.

TITLE I.

OF JURISDICTION, JUDGES, AND TRIALS, OR JUDICIAL PROCEEDINGS IN SPAIN IN GENERAL.

Cap. 1. Of jurisdiction, its causes and effects.

HAVING treated of the two first objects of justice, it remains to discuss, in this third book, the last, which relates to actions, under which term is understood all that is embraced or comprised in a trial or judicial proceeding (*juicio*); therefore we shall treat in succession of each of its parts.

Jurisdiction [1] is the power which the king or lord of a domain possesses over his subjects or vassals as arising from the dominion which he exercises over them. This dominion (*imperium*) is pure (*mero*) and mixed. Pure dominion or jurisdiction is that which confers upon the prince the power of deciding criminal causes. Mixed is that which confers upon him the cognizance of civil causes, L. 18. tit. 4. P. 3. Thus then this supreme jurisdiction in matters civil and criminal resides only in the king, L. 1. tit. 1. Lib. 4. Rec.; and therefore no lord or private individual can exercise in the dominions of the crown this jurisdiction without producing the title or privilege he possesses for so doing, L. 2. tit. 1. Lib. 4. Rec. Whence proceeds the pre-eminence or right of the crown to appoint secular judges to the cognizance of these two kinds of causes, as also escribanos and other ministers of justice, L. 2. tit. 4. P. 3.

L. 18. tit. 4. P. 3.

L. 1. t. 1. Lib. 4. Nov. Rec.

L. 2. t. 1. Lib. 4. Nov. Rec.

L. 2. tit. 4. P. 3.

Cap. 2. Of the first division into ordinary and delegated jurisdiction.

Jurisdiction in the first place is ordinary or delegated. Ordinary is, that which is vested with every extension in the* magistrate by reason or virtue of his office. Delegated is that which is given to any one for the cognizance of a certain and determinate cause, which is exercised by all judges who are commissioned or deputed (*comisionados*).

* [242]

From the different nature of these two jurisdictions we deduce,

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[1] See *Wood's Civ. Law*, book 4. ch. 1. p. 292.

that the ordinary is favourable and perpetual, and the delegated, odious and limited. 1st, Wherefore if a commission is given to an ordinary judge to take cognizance of any cause, over which he possessed ordinary jurisdiction, he is understood to exercise the latter, unless something be added to, or taken from it, but even in this last case, if he hath not made use of the limitation or extension, he will be always considered to have exercised the ordinary. *Hevia, Cur. Filip.* part.1. § 4. num.4. & 5. 2d, That both jurisdictions concurring in one judge he is understood to exercise the ordinary, *Hevia, ibid.* num.5.

As in delegation oftentimes regard is had to the ability or fitness which the substitute shews for the office which he is to exercise, it hence follows, 1st, That the appointment can only pass to his successor when the substitute or delegate is not named; or being named if it can be proved that the person delegating was unacquainted with the delegate at the time he commissioned him, *Hevia, ibid.* num.12. 2d, That the delegate cannot commit his jurisdiction to another judge although he be an ordinary one, L.47. tit.18. P.3.

L.47.t.18.P.3.

Cap.3. Of the division into privative and prohibitory jurisdiction.

In the second place jurisdiction is divided into privative or exclusive (*privativa*), and preventive (*acumulativa*). The first is that which of itself alone deprives other judges of, or excludes them from, the cognizance of the cause; and this all judges enjoy or exercise to whom causes are committed with an inhibition to others of the district to take cognizance of them. The second is that by which a judge may have cognizance of causes which another judge undertakes, or in which he has concurrent jurisdiction, with *prevention*[2] between them, L.19. tit.8. Lib.2. Rec. The latter, those enjoy, 1st, Who acquire it by favour of the person while living. 2d, Those who acquire it by prescription. 3d, Those who possess jurisdiction delegated to them by a judge superior to the one of the district or place; by reason or virtue of which they may inhibit the ordinary and other judges from the cognizance of causes contained in their commission, although they may be pending before such judges; and in the mean time, if this commissioned judge dies, or his office or power is defective or at an end, they cannot even take cognizance of such causes

L.9.tit.14 Lib.5. Nov. Rec.

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[2] This right of prevention of *Jurisdiccion acumulativa*, may be better defined. It consisted in this, that where two judges had concurrent jurisdiction over causes of the same nature, he before whom a cause was first instituted, and by whom the party was lawfully cited, acquired exclusive jurisdiction over that cause to conclusion. *Vide Instruc. Jurid. de Colom.*, 2d. vol. lib. 1. cap. 1. p. 40. n. 10.; and L.12. tit.7. P.3.

without a new power or delegation from the person who appointed (*el delegante*), L. 47. tit. 18. P. 3. *Hevia, ibid.* n. 14. & 15.[3] L. 47. t. 18. P. 3.

Cap. 4. Of the third division into jurisdictions necessary and voluntary: whence the jurisdiction submitted to of an incompetent judge (prorogada) as the effect of the last. L. 32. t. 2. P. 3. L. 7. tit. 29. Lib. 11. Nov. Rec.

In the third place jurisdiction is divided into necessary and voluntary. Necessary is that which is actually exercised over persons who are subject to it. Voluntary is that which is possessed over him who, of his own accord or free will, is disposed to submit to it, L. 32. tit. 2. P. 3.

From this last arises the jurisdiction called *prorogada* which is the extension of jurisdiction to the case or person to which or whom it is not by its nature extended. *Carleval*, tit. 1. disp. 2. sect. 1. q. 8. L. 20. tit. 21. Lib. 4. Rec.[4]

Hence it is, that in order to be bound by an incompetent jurisdiction (*prorogarse la jurisdiccion*), two things are necessary. The first, consent of the parties; the second, that the judge to whom submission is made, has antecedently lawful jurisdiction, *Carleval, ibid.* num. 979. & 1071.

The first requisite arises from tacit or express consent, whence springs jurisdiction *prorogada*, tacit or express. Tacit jurisdiction *prorogada* takes place when those who contract or commit a crime subject themselves to a foreign or other (*ageno*) judge, who has cognizance of any of these proceedings in another jurisdiction, L. 32. tit. 2. P. 3.; or when one appears before a judge, to whose jurisdiction he is not amenable, without pleading to it, L. 32. tit. 2. P. 3. *Carleval, ibid.* sect. 2. num. 892. to 1000.; but contumacy, as it is compulsory, or not voluntary, does not induce or infer submission (*prorogacion*), *Carleval, ibid.* num. 1000. *et seq.* Jurisdiction *prorogada* express is, when one submits to the jurisdiction of another judge, renouncing his own privilege or right, *Carleval*, 1. *ibid.* sect. 1. num. 976. & sect. 2. num. 1003. to 1019., where may be seen the cases in which this express consent is not valid; neither does this jurisdiction take place when the defendant files a cross bill by way of compensation or set-off against the plaintiff before the same judge before whom he is sued or cited. The reason of this submission (*prorogacion*) is founded on this principle; that it is proper that after the plaintiff hath desired to establish or obtain his right before a judge,

L. 32. t. 2. P. 3.

L. 32. tit. 2. P. 3.

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[3] And L. 5. tit. 34. Lib. 12. Nov. Rec., *al fin.*

[4] The definition of *Sala Ilus. del Derecho R. de Esp.* 2d vol. book 3. tit. 2. p. 149. n. 23, seems more clear, which is the submitting oneself to an incompetent jurisdiction; and he adds, that it is very rare, and of little use. *Vide* also *ibid.*, p. 146. *ante*, no. 18.

the defendant should be allowed to do the like before the same judge, L. 20. tit. 4. P. 3. L. 20. t. 4. P. 3.

From the second requisite follows: 1st, That every superior judge may submit to the jurisdiction of an inferior ordinary judge, L. 7. tit. 9. P. 1. L. 7. t. 9. P. 1. 2d, That so also may the judge of equal jurisdiction submit to that of his equal, *Hevia*, *ibid.* num. 23. 3d, That the jurisdiction of every ordinary judge appointed for one or three years, although the term be expired, is submitted to until his successor enters on the possession of the office, L. 5. tit. 5. Lib. 2. Rec. L. 2. tit. 11. Lib. 5. Nov. Rec. 4th, That all jurisdiction, although necessary or compulsory (*forzosa*), may be exercised in another territory with permission of the judge of that district, *Hevia*, *ibid.* num. 25.[5] 5th, That the prince, lord, or judge, being absent from their territory or jurisdiction, may appoint a person to preside or decide in their name; but having two or more separate seignories or jurisdictions, and being in one of them, they may take cognizance of causes from the other, provided that the party be not obliged to go from his domicile, L. 13. tit. 7. P. 3.[6]

Hence it also follows, that all jurisdiction, from its nature, may be submitted to, unless that its constitution or a statute forbid it on another account, *Carleval*, *ibid.* sect. 4. By the law of the realm the following persons are prohibited from submitting themselves to an incompetent jurisdiction: 1st, Laymen to an ecclesiastical judge, Ll. 11. and 13. tit. 1. Lib. 4. Rec. L. 6. tit. 1. Lib. 10. L. 8. tit. 1. Lib. 4. Nov. Rec. 2d, Persons under 25 years of age, without the authority of their curator, *Carleval*, *ibid.* n. 1130. 3d, Agriculturists (*labradores*), even in case of submitting themselves to the nearest royal corregidor, or to the head of the district, L. 25. cap. 4. tit. 21. Lib. 4. Rec. L. 15. tit. 31. Lib. 11., L. 6. tit. 11. Lib. 10. Nov. Rec. 4th, Poor persons, *Carleval*, *ibid.* n. 1142. 5th, An attorney without special authority, *Carleval*, *ibid.* n. 1143. Jurisdiction by its constitution cannot be submitted to: 1st, In suits pending in the audiences, which cannot be invoked to the council, Ll. 10. & 23. tit. 5. Lib. 2. Rec. L. 8. t. 1., L. 23. tit. 1. Lib. 5. Nov. Rec. 2d, In cases of the value of thirty thousand *maravedis*, the cognizance of which belongs to the councils or corporations of cities or towns, *Pragmatica of 28th June*, 1619. 3dly, In causes of appeal; because no appeal can be preferred but to the immediate superior judge, *Carleval*, *ibid.* sect. 5. num. 1224.

[245] The effects of *prorogacion* are, 1st, That this jurisdiction

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[5] Who adds the requisite of the consent of the parties interested. *Vide* also L. 7. tit. 4. P. 3.

[6] The law quoted does not apply. See L. 17. tit. 4. Part. 3.

passes to the successor in office unless the submission hath been personal [7], *Carleval, ibid.* sect. 6. n. 1234. and 1235. 2d, That being made to the judge delegate, it is at an end with the delegation, *Carleval, ibid.* n. 1236. 3d, That the sentence given by the judge to whose jurisdiction submission hath been made, may be carried into execution by him; unless the assistance of another jurisdiction be necessary, as happens in respect of the ecclesiastical judge, who cannot execute his sentences without the assistance of the secular power, Ll. 14 & 15. tit. 1. Lib. 4. Rec. 4th, That when once the submission is admitted by the judge he can be compelled to the cognizance of the cause, *Carleval, ibid.* n. 1240. 5th, That the judge may delegate this jurisdiction which has been submitted to, *Carleval, ibid.* n. 1241.

Ll. 4 & 12. tit. 1. Lib. 2. Nov. Rec.

From the royal and ecclesiastical jurisdiction emanate other subordinate or inferior ones, known under the name of *fueros privilegiados*, such are the military jurisdiction, those of the universities, and of the inquisition, &c., but such as can in no way prejudice or affect the civil or royal, from whence they have derived their existence. For the conservation of this jurisdiction, reference is had to the following provisions, 1st, That no ecclesiastical jurisdiction can impede the royal under pain of losing its privileges (*su naturaleza*), and its temporalities (*temporalidades*), Ll. 3 & 4. tit. 1. Lib. 4. Rec., jointly with L. 12. tit. 8. Lib. 1. Rec. [8]; which comprises the penalty of judges *conservadores* who intermeddle in profane or lay causes. 2d, That only in causes relating to benefices, tithes, and in criminal and matrimonial causes can ecclesiastical judges cite laymen in the tribunal or jurisdiction (*cabeza*) of the bishops, L. 5. tit. 1. Lib. 4. Rec. 3d, That ecclesiasticks, who possess temporal jurisdiction must exercise it through laymen, L. 8. tit. 3. Lib. 1. Rec. 4th, That the *corregidors* and justices must make their report every year, if the ecclesiastical judges usurp the royal jurisdiction, L. 17. tit. 5. Lib. 3. Rec. 5th, That special commissions may not be given in prejudice of the ordinary jurisdiction, except when it shall seem fit to the council, L. 10. tit. 9. Lib. 3. Rec. [9]

Cap. 5. Of other subordinate jurisdictions which emanate from the royal and ecclesiastical jurisdiction.

L. 3 & 4. tit. 1. Lib. 4. Nov. Rec.

L. 5. t. 1. Lib. 2. Nov. Rec.

L. 10. tit. 1. Lib. 2. Nov. Rec.

L. 1. tit. 15. Lib. 2. Nov. Rec.

L. 1. tit. 10. Lib. 4. Nov. Rec.

These jurisdictions are given and appropriated by the king to magistrates who judge in his name. Therefore they are called judges, which implies good men who are appointed to order and

Cap. 6. Of the judge as exercising these jurisdictions, and his requisites.

[7] That is, to the judge personally.
[8] Not inserted in the *Nov. Rec.*
[9] The law quoted seems to forbid it altogether. *Vide* L. 1. tit. 10. Lib. 4. Nov. Rec.

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L. 1. tit. 4. P. 3. L. 3. tit. 4. P. 3.

to administer justice, L. 1. tit. 4. P. 3. Hence it is, that every judge ought to be qualified, of good manners and habits, and endowed with the qualities expressed by L. 3. tit. 4. P. 3. This qualification or fitness consists in age, science, and capacity. In respect of age no one under twenty-six years can hold a judicial appointment [10], L. 2. tit. 9. Lib. 3. Rec. As regards science every judge must have studied ten full years [11], L. 2. tit. 9. Lib. 3. Rec., and must decide by the laws of the kingdom, L. 4. tit. 1. Lib. 2. Rec. Finally, in regard of capacity, neither the insane (*loco*), the dumb, the deaf, the blind, the habitually infirm, the religious, the female, nor the clergyman can be a judge, Ll. 7. [12] & 8. tit. 9. Lib. 3. and L. 10. tit. 3. Lib. 1. Rec.

L. 6. tit. 1. Lib. 11. Nov. Rec. L. 6. tit. 1. Lib. 11. Nov. Rec. L. 5. tit. 2. Lib. 3. Nov. Rec. Ll. 4 & 5. tit. 1. Lib. 11., & L. 5. tit. 9. Lib. 1. Nov. Rec.

As a judge ought to be a good man (*hombre bueno*), it is inferred that no man of ill conduct can be judge nor alcalde, L. 7. tit. 9. Lib. 3. Rec. 2d, Nor he who receives presents for administering justice, L. 5. tit. 9. Lib. 3. Rec. 3d, That no one can be such in causes in which his relations and friends (*allegados*) are interested, Ll. 9 [13] & 10. [14] tit. 4. P. 3.

L. 4. tit. 1. Lib. 11. Nov. Rec. L. 7. tit. 1. Lib. 11. Nov. Rec. Ll. 9 & 10. tit. 4. P. 3.

The obligations of judges are very numerous, and do not properly belong to the object of our institutes. Reference is made to Ll. 6, 7, 8. 12, 13, 14, 15, & 16. tit. 4. P. 3. and Ll. 3. & 16. tit. 9. Lib. 3. Rec.

Ll. 6, 7, 8. 12. 13, 14, 15, & 16. tit. 4. P. 3., & L. 3. tit. 1. & tit. 35. Lib. 11. Nov. Rec.

Cap. 7. Of the three kinds of judges; ordinary, delegated, and arbitrators.

L. 1. tit. 4. P. 3.

There are three kinds of judges, ordinary, delegated, and arbitrators or judges of fact (*arbitros*). The ordinary are persons who are ordinarily appointed to perform their offices in regard of those over whom they are to decide in places in which they have jurisdiction, L. 1. tit. 4. P. 3. In this class are comprehended all judges who are appointed officially by the king, as magistrates (*corregidores*), alcaldes, &c., L. 1. tit. 4. P. 3.; with regard to whose powers, privileges, and other things belonging to their office and duties, there are various provisions collected in various titles of Lib. 2. Rec. [15] which ought to be studied with reflection.

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[10] And the penalty, in such person accepting it, is, by the law quoted, incapacity to hold the like or other offices in future. *Palacios* says, that the age stated in the text is, with reference only to a professional judge (*letrado*); and that L. 2. tit. 9. Lib. 3. Rec. (L. 6. tit. 1. Lib. 11. Nov. Rec.), does not alter L. 3. tit. 9. Lib. 3. Rec. (L. 3. tit. 1. Lib. 11. Nov. Rec.), which, in respect to the office of an ordinary or unprofessional judge (*Juez ordinario*), allows a person of twenty years of age to hold it.

[11] This law relates to the incompetency of a slave to be judge.

[12] The civil or canon law is understood, adds *Palacios*.

[13] In civil cases, it appears he may delegate another person to decide, but not in criminal, note 2 gloss. said law.

[14] This law forbids a person to be judge in his own cause, as also when he has been previously the advocate or counsellor.

[15] See tit. 11. Lib. 7. Nov. Rec.

Delegated judges are those appointed to hear and determine (*oir*) certain or specific suits by command of the king or of other judges ordinary (*jueces ordinarios*), L. 19. tit. 4. P. 3.; and it is to be observed that he who is delegated by the king may commit to another his delegation, but not he who is delegated by the ordinary judge, L. 19. tit. 4. P. 3. In the person delegated by the ordinary judge these four circumstances ought to concur. 1st, That he exercise his jurisdiction in the territory of the person delegating. 2d, That the cause or suit over which the delegation devolves be within the cognizance of the person delegating. 3d, That it be not of that number which cannot be delegated according to L. 18. tit. 4. P. 3. 4th, That he investigate the cause to which he is commissioned, abiding in the place directed by the commission or appointed by the person delegating, L. 17. tit. 4. P. 3. These circumstances are not necessary with respect to the person delegated by the king, who before setting out on his commission ought to qualify himself with the solemnities of the oath, and other requisites expressed by L. 18. cap. 19. & 20. tit. 26. Lib. 8. Rec. [16] not being able to give as his sureties any of the officers who shall accompany him, nor the escribano de camara. *Auto* 28. tit. 19. Lib. 2. Rec. explains the mode in which these judges, commissioned by the council (*concejo*), must proceed in commissions *de oficio*, not being allowed to be accompanied by agents (*diligencieros*) or fiscals, *Auto* 9. tit. 1. Lib. 8. Rec.; nor to exceed the bounds prescribed to their powers, *Auto* 4. tit. 1. Lib. 8. Rec. Their commission being completed, they ought to give an account of it to the council within twenty days, L. 46. tit. 4. Lib. 2. Rec.; without whose certificate they cannot obtain that from the fiscal of having given an account of the penalties or fines of the *camara*, *Auto* 3. tit. 13. Lib. 2. Rec. The persons whom these judges shall condemn, ought to present themselves to the council within fifteen days, if within the walls of the city (*los puertos*), and within forty days if without the city, *Auto* 5. tit. 14. Lib. 2. Rec.

These delegations are made for two purposes, either for the full or entire cognizance of the cause to definitive sentence, or

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L. 19. tit. 4. P. 3.

L. 19. tit. 4. P. 3.

L. 18. tit. 4. P. 3.

L. 17. tit. 4. P. 3.

L. 1. tit. 14. Lib. 4., L. 11. tit. 34. Lib. 5., L. 16. tit. 27. Lib. 4., L. 3. tit. 14. Lib. 4, & L. 3. tit. 10. Lib. 4. Nov. Rec. Nota 6. tit. 10. Lib. 4., Nota 15. tit. 10. Lib. 4. Nov. Rec. Nota 7. tit. 10. Lib. 4. Nov. Rec. L. 14. tit. 34. Lib. 12. Nov. Rec. L. 8. tit. 10. Lib. 4. Nov. Rec. Nota 4. tit. 10. Lib. 4 Nov. Rec. Nota 2. tit. 14. Lib. 4. Nov. Rec.

[16] *Palacios* says, that this law is erroneously cited; that L. 44. tit. 4. Lib. 2.; Ll. 16 & 40. tit. 6. Lib. 3.; and L. 7. tit. 1. Lib. 8. Rec.; (L. 1. tit. 13. Lib. 7.; L. 9. tit. 1. Lib. 4.; L. 4. tit. 11. Lib. 7.; and L. 11. tit. 34. Lib. 12. Nov. Rec.); with some other laws, treat of this matter.

for conducting the process (*actuar el proceso*), the judge delegating, reserving to himself the pronunciation of the sentence,
L. 1. tit. 4. P. 3. L. 1. tit. 4. P. 3.

Every delegated judge ought to decide according to the
L. 1. tit. 4. P. 3. orders of the persons delegating, L. 1. tit. 4. P. 3.; and from this principle it follows, that he can only hear the cause delegated and its accessory, without which the commission cannot
Ll. 19-20. tit. 4. P. 3. be carried into effect (*expedirse*), Ll. 19 & 20. tit. 4. P. 3., L. 46.
L. 46. t. 10. P. 3. tit. 10. P. 3. 2d, That it is in the power of the person delegating to suspend him from the exercise of the office delegated whenever he pleases, L. 19. tit. 4. P. 3. 3d, That the person delegated may take cognizance of (*oir*) the action of *reconvention*, and the agreement by the parties to refer to arbitrators (*compromisos*) upon matter appertaining to the commission, although
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L. 19. t. 4. P. 3.
L. 20. tit. 4. P. 3. nothing relating thereto be expressed in it, L. 20. tit. 4. P. 3.
Delegated jurisdiction is terminated, 1st, By the revocation of
L. 21. tit. 4. P. 5. the person delegating, L. 21. tit. 4. P. 3. 2d, By the non-exercise
L. 35. t. 18. P. 3. of it within the year by the person delegated, L. 35. tit. 18. P. 3. 3d, By the death of the person delegating, or of any of the parties before the commission is entered on (*principiarse*),
L. 21. tit. 4. P. 3. L. 21. tit. 4. P. 3.; for the delegation once acted on is perpetuated, *Hevia, ibid.* n. 11. Of the delegation of the coroner or judge of inquest (*juez pesquisidor*), we will treat in the 11th title.

Arbitrators (*arbitros*) are mediating judges (*jueces avenidores*), who are chosen and appointed by the parties to decide the mat-
L. 23. tit. 4. P. 3. ter in dispute between them, L. 23. tit. 4. P. 3. These are of two kinds: the first named by the parties in order that they may determine according to law, and the others appointed by them as friends to adjust or compose the matter that is submitted to them. Here we shall speak of the first. [17]

From what has been explained, the following axioms are derived. 1st, That the arbiter is in the place of the judge, although he is not properly so. 2d, That in order to be elected arbiter, the compromise or submission of the parties is required, and the acceptance of the person chosen. 3d, That the arbiter

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[17] *Wood*, in his *Inst. Civ. Law.*, p. 326. book 4. cap. 3. says, there is an arbitrator and an arbiter; an arbitrator is, properly, a reconciler or moderator, according to equity and truth. Arbiter is the kind here treated of, and such as described in L. 4. tit. 17. Lib. 11. Nov. Rec.; as *arbitro juris;* and the other arbitrator, *juez amigo*, or *arbitro arbitrador:* both sorts are also distinctly treated of in the law quoted in the text, L. 23. tit. 4. P. 3.; and a penalty is therein recommended to be inserted in the arbitration bonds, for the performance of the award in both cases.

be bound to take cognizance of and decide, or give his award in the cause. 4th, That the parties are bound to obey the sentence or fulfil the award.

From the first principle it is inferred, 1st, That no person can be an arbiter who is subject to the legal impediments by which we have said a person is prevented from being a judge. 2d, That no one can be arbiter in his own cause, unless for an injury or insult, L. 24. tit. 4. P. 3. 3d, That the sentence given by an arbiter cannot be revoked by reason of his minority [18], L. 5. tit. 4. P. 3. 4th, That the ordinary judge cannot be arbiter, except, indeed, to approve the submission or compromise of the parties, L. 24. tit. 4. P. 3. *Carleval, disputa* 2. sect. 4. num. 1212.

L. 24. t. 4. P. 3. L. 5. t. 4. P. 3. L. 24. tit. 4. P. 3.

From the second principle it follows, 1st, That all those who can bind themselves and alienate property, may compromise or submit to arbitration, *Valeron de trans.* tit. 4. quæst. 5. n. 1. 2d, That this compromise or reference should be accompanied with a certain conventional penalty, L. 26. tit. 4. P. 3. [19] 3d, That the arbitration bond (*compromiso*) be authorised by the signature of a public escribano, and set forth the suit which gives rise to the reference, the names of the arbiters, the mode in which they must proceed, and every thing necessary for the said purpose, L. 23. tit. 4. P. 3. 4th, That an arbitration or compromise is only valid with regard to a doubtful [20] cause, *Valeron, ibid.* q. 4. and L. 4. tit. 21. Lib. 4. Rec. 5th, That compromise or arbitration with respect to public crimes or offences, and causes of matrimony, is not valid, L. 24. tit. 4. P. 3. [21] 6th, That those only can compromise or refer to arbitration who can sue; and therefore the minor must have the authority of

L. 26. t. 4. P. 3. [249] L. 23. t. 4. P. 3. L. 4. tit. 17. Lib. 11. Nov. Rec. L. 24. t. 4. P. 3.

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[18] Because the parties have expressly consented to his appointment.

[19] *Vide* also L. 23. tit. 4. P. 3. Though there is no penalty annexed to the submission, says *Wood, Inst.* p. 327. b. 4. c. 3., yet an action *in factum* will lie for the performance of it. *Palacios*, referring to Ll. 2. tit. 16. Lib. 5.; and L. 4. tit. 21. Lib. 4. Rec.; (Ll. 1. tit. 1. Lib. 10.; and 4. tit. 17. Lib. 11. Nov. Rec.) says, a compromise may be with or without a penalty, and the one is of equal validity with the other.

[20] Perhaps this is more strictly with respect to *transaccion*, which is defined a concord, or agreement of an uncertain and doubtful suit, both litigants yielding up part of their pretences on each side; the case must be doubtful, and something must be given or done. If the matter is certain in its nature, a transaction upon it is null and void: *Wood, Inst. C. L.*, p. 326. b. 4. ch. 3., The law of the Nov. Rec. quoted, does not, by its letter, go to the length of the position in the text; but *Azevedo*, in his comment on the same, L. 4. tit. 21. Lib. 4. Rec. n. 21. supports it, and says, that uncertainty is the substance of transaction; and that arbitration (*compromissum*), is like unto it. *Vide* this last author on this law.

This law adds those regarding banishment, liberty, and slavery.

L.25.t.4 P.3. his curator, L.25. tit.4. P.3., and the proctor or judicial attorney (*á pleytos*) a special power for the purpose, unless he have a full and absolute power to perform completely all things
L.19.tit.5.P.3. in the suit, L.19. tit. 5. P.3., *Valeron*, tit.4. q.5. *á* n.8. *al* 12.

Hence also it follows, 7th, That no one can be compelled by the ordinary judge to accept the appointment of arbiter, L.29.
L.29.tit.4. P.3. tit.4. P.3. 8th, That a person may allege the following excuses for being exempted from this commission. 1st, The parties having moved the subject of arbitration before the ordinary judge. 2d, The parties having changed the arbiters. 3d, By reason of the injury or prejudice that may ensue to him. 4th, On account of being occupied in a public office or charge, or in the care of one's own property. 5th, On account of sickness, L.30.
L.30.tit.4. P.3. tit.4. P.3.

From the third principle it is inferred, that the arbiter must proceed according to the rules of law, in conformity to the
L.26.tit.4. P.3. powers which the parties shall give him, L.26. tit.4. P.3. 2d. That sentence ought to be awarded on the cause of arbitration, and on no other, which is not accessary to it, in the place and within the term appointed, if the parties should not prorogue it; and if no particular time hath been agreed on, that of three
Ll.32.&27.t.4. P.3. years is understood according to law, Ll.32. & 37. tit.4. P.3.[22] 3d, That if any of the arbiters be absent, the others cannot determine the matter of reference without the fresh consent of the
L.32.t.4.P.3. parties, L.32. tit.4. P.3. 4th, That if the arbiters differ, a third person or umpire is chosen by the same parties, or by the
Ll.26.&29.t.4. P.3. ordinary judge, Ll.26. & 29. tit.4. P.3. 5th, That the sentence or award pronounced by arbiters on a feast day (*dia feriado*),
[250] is not valid, unless it were by those of the second class or ar-
L.32.t.4.P.3. bitrators, L.32. tit.4. P.3. 6th, That the causes being many, the arbiters may pronounce sentence on each in particular, unless the parties had agreed to the contrary, L.32. tit.4. P.3.
L.32.tit.4.P.3. *al fin.*

By the fourth principle it is established, 1st, That the parties must obey the award within the term that is prescribed by the arbiter, and if no term hath been prescribed, within four months
33.t.4.P.3. under the penalty stipulated, L.33. tit.4. P.3. 2d, That the parties will be exempted from the payment of this penalty on

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[22] *Palacios* states, it is Law 27. tit. 4. P. 3. which says that the award should be made as soon as possible, so that it may not be prolonged beyond three years from the day of the submission of the arbitration. He adds, there is no L.37. in the title of the *Partida* cited in the text, and he is borne out to the extent of his statement.

account of being unable to comply with the award, by the lawful impediment of infirmity, royal service, &c., L. 4. tit. 4. P. 3. L. 4. tit. 4. P. 3. 3d, That the award which is contrary to law, good customs, or is impossible to be fulfilled, or pronounced through subornation or enmity, or beyond the limits of the matter submitted, is not obligatory, Ll. 31. & 34. tit. 4. P. 3. 4th, That there is L. 31. & 34. t. 4. P. 3. no appeal from the award, because whoever will not abide by it, is absolved from it by paying the conventional penalty; and if there be none agreed on, by signifying his dissent to the opposite party within ten days after the award is pronounced, L. 35. tit. 4. P. 3. 5th, That exclusively of these cases, the L. 35. t. 4. P. 6. ordinary judge may compel the fulfilment of the award at the instance of any of the parties, L. 35. tit. 4. P. 3. L. 35. t. 4. P. 3.

From all that has been said, it is inferred, 1st, That the office of arbiter is at an end by the death of any of the parties, unless the heirs be expressly bound by the submission, in which case the arbitration may be proceeded in with citation to them, L. 28. tit. 4. L. 28. t. 4. P. 3. P. 3. 2d, That the office is at an end by the civil or natural death of the arbiters, L. 28. tit. 4. P. 3. 3d, By the loss or L. 28. t. 4. P. 3. destruction of the thing in dispute, L. 28. tit. 4. P. 3. 4th, By L. 28. t. 4. P. 3. reason of the term allowed for the completion of the compromise, or reference having expired, L. 27. tit. 4. P. 3. L. 27. t. 4. P. 3.

Trial is the legal debate or controversy, and decision of a cause before and by a competent judge. Trials are divided principally, 1st, Into ordinary, extraordinary, and summary. Ordinary trial is that in which the proceeding is carried on according to the order and solemnities of law. Extraordinary is that which is carried on without this solemnity: summary is that when the process is carried on simply, briefly without the form or solemnity of law, *Hevia, Cur. Filip.* p. 1. § 8. num. 2. 2d, Trials are divided into civil, criminal, and mixed, by reason of the cause: if this cause is merely civil, relative to the particular interest of the person, it is called a civil trial or suit (*juicio civil*): [251] when the cause appertains to any crime, the trial is criminal: and it will be mixed if it participates of both civil and criminal. Lastly, a trial may be divided into petitory and possessory, accordingly as it may have for its object the possession or the property. Cap. 8. Of trial or suit (juicio), and its divisions.

TITLE II.

OF THE DIFFERENCE OF JURISDICTION; AND OF COMPETENCY.

THERE often arises a doubt who is the legitimate and competent judge of the cause. The determination of this point depends on the knowledge of the nature and diversity of jurisdictions (*fueros*).

Cap. 1. Of jurisdiction and its kinds.

Jurisdiction (*fuero*) is the place of trial where the right and justice of the parties who litigate are discussed, *Hevia, cur. Filip.* p. 1. § 5. num. 1. Jurisdiction being secular and ecclesiastical, each has its peculiar jurisdiction (*fuero*)[1] for the causes which belong to it; whence arises the distinction of ecclesiastical and secular jurisdiction, to which ought to be added the third species of mixed jurisdiction, regarding causes which belong to both jurisdictions; of which kind are the causes respecting the payment or non-payment of ecclesiastical tithes; respecting pious bequests, and the execution of testaments, if the year of the executorship hath passed by without their being fulfilled, *Hevia, ibid.* § 5. num. 13.

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The rule is, that to the ecclesiastical jurisdiction belong spiritual causes, and those annexed to them; such are the causes relating to the right of patronage, tithes, first-fruits, marriages, burials, benefices, &c. L. 5. tit. 1. Lib. 4. Rec.[2]; it being observed that patrimonial suits, and other ecclesiastical ones relating to benefices, must be entertained in the audiences, L. 21. tit. 4. Lib. 1. Rec.[3]; the reader is referred to *Bobadilla* in his *Politica*, Lib. 2. c. 17 & 18, where he treats fully of the causes belonging to every kind of urisdictions (*fueros*).

L. 5. tit. 1. Lib. 2. Nov. Rec.

There are seven causes[4] from which the diversity of jurisdic-

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[1] It is difficult to find different words to express the meaning of *jurisdiction* and *fuero*. Jurisdiction, with us, means both legal authority, or power of judging, and the district or place to which that authority extends: in Spanish, the word *jurisdiccion* is used to denote the first, and *fuero* the latter; and *fuero* also means the tribunal of the judge.

[2] *Palacios* says, this law is erroneously cited for L. 56. tit. 6. P. 1.

[3] Not inserted in the *Nov. Rec.* *Palacios* says, it is erroneously cited for *Aut.* 2. tit. 6. Lib. 1. Rec. (L. 4. tit. 21. Lib. 1. Nov. Rec.)

[4] *Palacios* says, L. 32. tit. 2. P. 3. points out fourteen causes; but that they are commonly reduced to four, which are domicile, contract, crime, and situation or place of thing.

tions (*fueros*) proceeds, and which render the judge competent for the cognizance of them.

1st, Domicile, so that any person may be sued before the judge of the place where he is found settled, L. 32. tit. 2. P. 3. L. 32. t. 2. P. 3.

2d, Birth-place (*patria*), provided the defendant be not absent from it, L. 32. tit. 2. P. 3. *Carleval*, tit. 1. disp. 2. quæst. 2. num. 63. L. 32. t. 2. P. 3.

3d, The place where the property is situate, although the defendant be not a native of it, nor domiciled there, L. 32. tit. 2. P. 3.; but this is understood when the plaintiff institutes a real, and not a personal action, *Carleval*, *ibid.* quæst. 3. num. 151. L. 32. t. 2. P. 3.

4th, The place where the contract is entered into which gives rise to the suit [5], L. 32. tit. 2. P. 3. L. 32. t. 2. P. 3.

5th, The heir may be cited, in quality of heir and successor, before the competent judge of his deceased ancestor, L. 32. tit. 2. P. 3., provided he be not a clergyman (*clerigo*) who is privileged as to his jurisdiction, *Carleval*, *ibid.* quæst. num. 307. L. 32. t. 2. P. 3.

6th, The commission of crime requires the prosecution and punishment of the delinquent in the place where he perpetrated it, L. 32. tit. 2. P. 3. L. 32. tit. 2. P. 3.

7th, Finally, the privilege of exemption from jurisdiction prevents the defendant from being sued but before the judge of his jurisdiction. These privileges are, 1st, That of the clergy, to be sued in all cases before the ecclesiastical judge, L. 50. tit. 6. P. 1. & L. 5. tit. 3. Lib. 1. Rec. This privilege extends also to those of the first clerical degree (*tonsurados*) provided they wear the tonsure and clerical habit, have a benefice, and reside on it, or are occupied in another place with the license of the bishop, L. 1. tit. 4. Lib. 1. Rec. 2d, Religious persons, of whose causes the judges conservators (*conservadores*) have cognizance, in virtue of bulls and apostolic *indultos*, possess privilege of jurisdiction, *Carleval*, *ibid.* sect. 2. Knights of military orders must be sued before their judges in criminal causes; and in civil ones belonging to the commanderies (*encomiendas*) of the order; but in other civil causes, and even in criminal ones, in many cases in which knights commit offences as such, they are subject to the ordinary jurisdiction, *Auto* 9. tit. 1. Lib. 4. Rec. *Carleval*, *ibid.* sect. 3.; and the king being the supreme master of these orders, he may delegate the cognizance of the causes of knights to the judges he may

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L. 50. tit. 6. P. 1. L. 3. tit. 1. Lib. 2. Nov. Rec.

L. 6. tit. 10. Lib. 1. Nov. Rec.

L. 12. tit. 8. Lib. 2. Nov. Rec.

[5] *Palacios* observes, that it is stated by *Covarrubias*, cap. 1. *Pract. Quæst.*, that in order to competency of jurisdiction, in respect to the place of contract, it is necessary that the defendant be found in it at the time the action is entered against him.

L.10.tit.8. Lib.2. Nov. Rec. L.7.tit.10. Lib.12. Nov. Rec.

think fit, *Auto* 2. tit.1. Lib.4. Rec. 4th, Matriculated students, whose judge is the rector of the university, enjoy the privilege of jurisdiction, L.28. tit.7. Lib.1. Rec., except in cases of resistance to the officers of justice, or of using prohibited arms. 5th, Military persons possess a particular jurisdiction, whose judges are the auditors of war[6], *Orden. Milit.*; but the militia are subject, in the first instance, to the ordinary judge even in criminal causes, *Auto* 27, 28. & 30. tit.4. Lib.6. Rec. 6thly, Officers of the inquisition enjoy their own jurisdiction in criminal causes only, except when they proceed from capital (*mayores*) offences, expressed by L.18. c.4, 5, & 6. tit.1. Lib.4. Rec. This privilege ceases in causes relating to the felling of forests (*talas de montes*), ordinances of police, and resistance to justice, *Cedula of August 18th*, 1673.[7] 7th, Widows, wards, poor and miserable persons, have the privilege of pleading to the jurisdiction of the inferior judge, and of having recourse to the superior tribunals, which is termed *caso de corte*, L.5. tit.3. P.3.; who miserable persons are, is explained by *Carleval, ibid. sect.* 7. from num. 529. *ad finem.* 8th, The cognizance of causes of the royal rents is reserved to the superintendants and subdelegates of the royal revenue (*real hacienda*), *Auto* 2. tit.7. Lib.9. Rec., who have also cognizance of the causes of their dependents, when such causes relate to the fulfilment of its duty, as appears by various decrees of his majesty. Reference may be had to L.1. cap.3, 4, & 5. & L.2. cap.25 & 26. tit.2. Lib.9. Rec. 9th, The prior and consuls of the city of Burgos have exclusively cognizance of suits and disputes which may occur between merchant and merchant, with respect to their dealings and affairs; from whose sentence there is only an appeal to the *corregidor*, or lord mayor of the city, L.1. cap.1, 2. 4. &12. tit.13. Lib.3. Rec. This privilege hath been extended to the *consulados* or tribunals of commerce of Madrid, Bilbao, and Seville, L.1. cap.13. & L.2. tit.13. Lib.3. Rec.

L.12.tit.9., L.10.tit.2. Lib.7.,& Nota 10.tit.6. Lib.6. Nov. Rec. L.1.tit.7. Lib.2. Nov. Rec.

L.5.tit.3. P.3. [254]

L.6.tit.10. Lib.6. Nov. Rec.

L.2.tit.10. Lib.6., L.1. tit.14. Lib.10., L.3.tit.10. Lib.6. Nov. Rec.

Ll.1, 2, & 3. tit.2. Lib.9. Nov. Rec.

It is to be observed that all these jurisdictions cease in causes of tumult and popular commotion, so that the guilty are subject to the ordinary jurisdiction, *Order* (*decreto*) of *2d October*, 1766.

L.4.t.11. Lib.12. Nov. Rec.

Cap.2. Of appeal against injury done by the ecclesiastical judge, or remedy by prohibition.

When the ecclesiastical judge intermeddles in the cognizance of causes merely profane, the party aggrieved may appeal and protest to the royal assistance against the injury. Then the complainant presents a petition, having recourse by way of pro-

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[6] See Proclamation 9th February, 1815, Appendix U.
[7] Not in Chronological Index of the *Nov. Rec.*

tection to the royal tribunal of the district where the ecclesiastical judge resides, a decree or writ is issued by the ordinary judge, charging the ecclesiastical to rescind for the term of eighty days, any censure he may have imposed, and ordering him to remit to the ordinary tribunal the original proceedings. Having seen these proceedings, if the ordinary judge declares that the ecclesiastical judge has done wrong, or exceeded his jurisdiction in taking cognizance of this cause, every act is annulled or revoked; but if it is declared that he has not exceeded his jurisdiction, the proceedings are returned to him in order that he may do justice, *Aut.* 4. cap. 2. tit. 1. Lib. 4. *Bobadilla*, Lib. 2. cap. 17. num. 182. L. 39. tit. 5. Lib. 1. Rec. [8]

This recourse of appeal (*recurso de fuerza*), which they call a writ of prohibition [9] (*auto de legos*), is founded on the defence and protection which the prince affords, in order that ecclesiasticks may not injure nor oppress his vassals. In this case, there [255] intervenes an extrajudicial cognizance, by means of a view and information of the proceedings, without treating of, or discussing the principal matter of the cause, *Salgado de Regiâ protect.* p. 1. cap. 1. *prelud.* 5.

With respect to this kind of recourse, the following rules must be borne in mind: 1st, That it does not take place in matter relating to the inquisition, *Auto* 3. tit. 1. Lib. 4. Rec. 2d, That appeals (*recursos de fuerza*) from the vicar of Alcala are determined in the council, *Auto* 15. cap. 25. tit. 4. Lib. 2. Rec. 3d, That appeals from ecclesiastical judges with respect to the property (*espolios*) which bishops leave are preferred to the council, *Auto* 23. tit. 4. Lib. 2. Rec.; as also those with respect to excise duties (*millones*), *Auto* 35. tit. 4. Lib. 2. Rec. 4th, That in appeals of consequence (*de gravedad*), the court of government (*sala de gobierno*) may call to it those of 1500 (*mil y quinientas*), *Auto* 71. cap. 13. tit. 4. Lib. 2. Rec. 5th, That the appeals of the Indians go before the council of the Indies, L. 4. tit. 2. Lib. 2. Rec. de Ind., which repeals *Auto* 2. tit. 4. Lib. 2. Rec. 6th, That friars and monks may have recourse to the council from any part of Spain against the injuries and oppressions of their superiors, L. 40. tit. 5. Lib. 2. Rec. 7th, That the audiences do not take cognizance by way of appeal (*por via de fuerza*) of things relating to the decrees of the council of Trent,

L. 3. t. 7. Lib. 2. Nov. Rec.

Notas 2. 6, 7. 9, & 10. tit. 5. Lib. 4. Nota 4. tit. 2. Lib. 2. Nota 12. tit. 10. Lib. 12. Nov. Rec. Nota 5. tit 2. Lib. 2. Nov. Rec. L. 15. tit. 2., Lib. 2. Nov. Rec. L. 4. tit. 3., L. 2. tit. 16., Ll. 4, & 5. tit. 4., L. 7 tit. 14., L. 19. tit. 7. Lib. 4., L. 8. tit. 22. Lib. 11., L. 9. tit. 9., & L. 12. tit. 27. Lib. 4. Nov. Rec. L. 4. t. 2. Lib. 2. Rec. Ind. Nota 3. tit. 2. Lib. 2. Nov. Rec. L. 9. t. 2. Lib. 2. Nov. Rec.

[8] Not inserted in *Nov. Rec.* *Palacios* says, it is wrongly cited for L. 36. tit. 5. Lib. 2. Rec. (L. 2. tit. 2. Lib. 2. Nov. Rec.)

[9] *Vide* 3 *Black. Com.*, p. 112 & 113., edit. 1809.

because these applications go to the council, L. 81. tit. 5. Lib. 1. Rec.[10] 8th, That these suits for redress of judicial injury (*pleytos de fuerza*) may be sentenced or decided on review (*en revista*), L. 38. tit. 5. Lib. 1. Rec.[11]

Cap. 3. Of the suit or contention for competency of jurisdiction between two tribunals.

There is another recourse against injury (*recurso de fuerza*) when the ecclesiastical judge denies or refuses the appeal interposed by any of the parties, of which we shall treat with more propriety in the 9th title. Besides the case referred to, if the question of competency is raised between two tribunals, it belongs to the fiscal to form it; and then each tribunal respectively appoints two ministers or agents (*ministros*), and both consult his majesty on the appointment of the fifth, who decide the competency; this is to which belongs the cognizance of the cause, *Auto* 10. & 12.[12] tit. 1. Lib. 4. Rec.

Nota 5. tit. 1. Lib. 4. Nov. Rec.

Upon this particular, it ought to be observed: 1st, That no question of competency can be formed with the tribunal of the crusade, in respect to the recovery of the subsidy, *Auto* 4. cap. 12.[13] tit. 1. Lib. 4. Rec. 2d, That in a cause relative to confiscated property, no question of competency is formed, *Auto* 45.[14] cap. 1. tit. 1. Lib. 4. Rec.[15] 3d, Nor with respect to causes of the officers of the inquisition; if the council shall consider that they are of that class, the cognizance of which appertains to the tribunals of ordinary justice, they may consult his majesty, *ibid. Auto* 45. cap. 2. tit. 1. Lib. 4. Rec.[16] 4th, That the tribunal of the inquisition admits the competency when the royal authority (*la justicia real*) is exercised against the officers of the inquisition for crimes committed in the performance of their offices and duties, *ibid. Auto* 45. cap. 3.[17]; as also, if it shall be doubted whether the cause in its origin is or is not privileged, *idem. Auto* 45. cap. 4.[18] 5th, That when the inquisition answers that it does not admit the question of competency (*competencia*), it must express the reason, *idem*, cap. 6.[19]

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[10] Not in *Nov. Rec.*: *quære*, L. 8. tit. 5. Lib. 1. Rec. which is L. 9. (tit. 6. Lib. 1. Nov. Rec.

[11] Not in *Nov. Rec.*: wrongly cited for L. 38. tit. 5. Lib. 2. Rec. L. 32. tit. 1. Lib. 5. Nov. Rec.) *Palacios.*

[12] Not in *Nov. Rec.*

[13] This chapter of the *auto* quoted, does not appear in the *Nov. Rec.*

[14] *Auto* 5, says *Palacios*, here, and in the three subsequent similar references in the text.

[15] Not in *Nov. Rec.* [16] Ibid. [17] Ibid.

[18] Ibid. [19] Ibid.

TITLE III.

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OF THE PLAINTIFF, DEFENDANT, PROCTOR OR ATTORNEY, AND ADVOCATE.

THE principal persons who compose the court or trial are, the judge (of whom we have already spoken), the plaintiff, the defendant, the proctor or attorney, and the advocate.

Cap. 1. Of the plaintiff and defendant.

The plaintiff is he who institutes this suit or demand at law, to obtain right or justice, L. 1. tit. 2. P. 3. The defendant is he against whom any suit or demand at law is instituted or preferred, *Prol.* tit. 3. P. 3.

L. 1. tit. 2. P. 3.

Prol. tit. 3. P. 3.

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In these definitions it is established, 1st, That the plaintiff claims or alleges some right. 2d, That the defendant is he from whom something is demanded. From the first principle it follows, 1st, That the child or grandchild who is under the power (*en potestad*) of the father or grandfather, cannot sue him except it be on account of aliment, or on account of the deterioration of property, which the child hath acquired from another person, L. 2. tit. 2. P. 3. 2d, That these persons being free or exempt from the paternal authority or power, may sue their fathers or grandfathers, asking first permission [1] through motives of respect, L. 3. tit. 2. P. 3. 3d, That the person under 25 years of age, the dumb, the deaf, the insane or *non compos mentis* (*loco*), and prodigal, cannot appear in a law suit in quality of plaintiffs or defendants without authority of their curators; and not having them, the judge ought to appoint them officially, Ll. 7 and 11. tit. 2. P. 3., and Ll. 12 and 13. tit. 16. P. 6. 4th, That the wife cannot appear in suit without the permission of her husband, L. 3. tit. 3. Lib. 5. Rec., and the judge may also, with cognizance of the cause, oblige the husband to give his assent [2], L. 4. tit. 3. Lib. 5. Rec.

L. 2. tit. 2. P. 3.

L. 3. tit. 2. P. 3.

Ll. 7-11. tit. 2. P. 3.

Ll. 12-13. t. 16. P. 3.

L. 12. tit. 1. Lib. 10. Nov. Rec.

L. 13. tit. 1. Lib. 10. Nov. Rec.

From the second principle it arises, 1st, That friars and monks cannot be sued, and the cause ought to be carried on with the monastery, L. 10. tit. 2. P. 3. 2d, That the demand being laid against any corporation (*consejo*), or university, it is sufficient to have recourse to the syndic or the

L. 10. tit. 2. P. 3.

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[1] *i. e.* of the judge.

[2] And if the husband refuses, the judge himself may grant the wife the necessary permission, L. 13. tit. 1. Lib. 10. Nov. Rec., *al fin.*

L. 13. tit. 2 P. 3. attorney (*procurador*), L. 13. tit. 2. P. 3. 3d, That in causes respecting an inheritance, the heirs are lawful defendants, L. 14. tit. 2. P. 3., and if they shall be found absent, and cannot come, the judge, having information of it, appoints a curator and defender of the property, L. 12. tit. 2. P. 3.

L. 14. tit. 2. P. 3.

L. 12. tit. 2. P. 3.

Cap. 2. Of the proctor or attorney (procurador).

Any person may be a party to a suit by himself or by attorney, who is he who manages or conducts any suits or the affairs of another by command or desire (*mandado*) of the principal, L. 1. tit. 5. P. 3.; whence result the following axioms, 1st, That only the absolute master of his affairs may appoint an attorney. 2d, That the latter is constituted by commission (*mandato*), and lawful power. From the first principle it is deduced, that one under 25 years of age cannot appoint an attorney without the consent of his curator, unless it be for his benefit, Ll. 2. and 3. tit. 5. P. 3. From the second principle it is inferred, 1st, That a minor [3], a woman (*muger*), a madman (*loco*), a deaf person (*sordo*), a prodigal, a clergyman, a religious person (*religioso*), and a powerful person (*hombre poderoso*), a military man, and other persons employed in his Majesty's service, cannot be attornies, Ll. 4, 5, 6, 7, 8 & 9. tit. 5. P. 3. 2d, That notwithstanding what is expressed in L. 10. tit. 5. P. 3., one must sue and be sued in the present day, in the audiences and chanceries, through the medium of a proctor or solicitor of the number admitted, who before exercising their office are examined, and being incompetent, may be excluded, Ll. 1 & 10. tit. 24. Lib. 2. Rec. They cannot prefer any allegation, nor petition in one hall or court (*sala*) which they shall have preferred in another, L. 9. tit. 24. Lib. 2. Rec. They ought to deliver to the advocates the money and writings or papers (*escrituras*), which the parties shall send them, L. 7. tit. 24. Lib. 2. Rec. and they are made responsible for the proceedings, so that they must return them within the terms prescribed, L. 4. tit. 24. Lib. 2. Rec. 3d, That when the attorney appears in the suit, he must exhibit a sufficient power or authority, although it be in the same proceedings, certified or attested by an advocate, L. 2. tit. 24. Lib. 2. Rec. L. 24. tit. 16. Lib. 2. Rec., and Ll. 13. & 14. tit. 5. P. 3. 4th, That the attorney cannot exceed the limits of his power, nor substitute, unless he should have authority to do so, or free and full or ample power (*un poder libre y lleno*), L. 19. tit. 5. P. 3. 5th, That the ratification of what has been

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Ll. 2 & 3. t. 5. P. 3.

Ll. 4, 5, 6, 7, 8, 9. tit. 5. P. 3.

L. 10. tit. 5. P. 3.

Ll. 1. & 12. tit. 31. Lib. 5. Nov. Rec.

L. 10. tit. 31. Lib. 5. Nov. Rec.

L. 8. tit. 31. Lib. 5. Nov. Rec.

L. 6. tit. 31. Lib. 5. Nov. Rec.

L. 3. tit. 31. Lib. 5. L. 3. t. 3. Lib. 11., & L. 8. tit. 10. Lib. 11. Nov. Rec.

Ll. 13-14. tit. 5. P. 3.

L. 19. t. 5. P. 3.

[3] Judicial attorney (*para pleytos*) is understood, says *Palacios*; for a person above seventeen years of age may be an extra-judicial attorney (*para negocios*), L. 19. tit. 5. P. 3.

done by an attorney, considered as such, has the force or virtue of a commission or authority (*mandato*), L. 20. tit. 5. P. 3. 6th, That if there be several attornies, the suit must be carried on with him who begun it, and if all shall commence it, it will be sufficient that one of them prosecute it for the rest, L. 18. tit. 5. P. 3. 7th, That if the power of the attorney should appear doubtful or suspicious, he shall not be permitted to pursue it, without giving security that the principal shall hold as firm and valid whatever he shall do, L. 12. tit. 5. P. 3. 8th, That he is responsible to the party for the injury (*daño*), which he shall occasion by his fault (*culpa*), L. 26. tit. 5. P. 3. 9th, That on rendering his accounts, he shall be paid his expenses (*gastos*), except they should be incurred through his bad faith, contumacy, &c. L. 25. tit. 5. P. 3. 10th, That in order to demand restitution on behalf of the minor or the child, that any one retains against the will of the father, or to accuse as suspicious a guardian, a special power is necessary, Ll. 15, 16, & 17. tit. 5. P. 3. 11th, That the power for suits, or judicial power, is at an end by the death of the principal or of the attorney, if it happen before contestation, but not if after; by revocation or renunciation, provided it be communicated or made known to the party, Ll. 23 & 24. tit. 5. P. 3. [4]

L. 20. tit. 5. P. 3.
L. 18. tit. 5. P. 3.
L. 12. tit. 5. P. 3.
L. 26. tit. 5. P. 3.
L. 25. tit. 5. P. 3.
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L. 15, 16, 17, tit. 5. P. 3.
Ll. 23 & 24. t. 5. P. 3.

An advocate is a person who advocates the cause of another or his own, in suing or defending, L. 1. tit. 6. P. 3. The minor of 17 years of age, the deaf, the dumb, the madman, the prodigal, the friar, a woman, an infamous person, or one guilty of a heinous offence (*delito mayor*), a jew, &c. cannot be an advocate, Ll. 2, 3, 4, 5 & 6. tit. 6. P. 3. The obligations adherent to the profession of an advocate, are comprehended under the following dispositions, conformable to our laws, 1st, That no one can be an advocate without being first examined, and swearing that he will conduct himself faithfully and will not defend unjust causes, Ll. 1 & 2. tit. 16. Lib. 2. Rec. 2d, That they allege facts briefly, and do not cite laws, L. 4. tit. 16. Lib. 2. Rec. 3d, That they do not advocate contrary to the disposition or authority of the law, L. 16. tit. 16. Lib. 2. Rec. 4th, That they first see the proceedings and do not allege malicious things, L. 13. tit. 16. Lib. 2. Rec.

Cap. 3. Of the advocates.
L. 1. t. 6. P. 3.
Ll. 2, 3, 4, 5 & 6. tit. 8. P. 3.
Ll 1. & 3. tit. 22. Lib. 5. Nov. Rec.
L. 1. tit. 14. Lib. 11. Nov. Rec.
L. 13. tit. 22. Lib. 5. Nov. Rec.
L. 17. tit. 22. Lib. 5. Nov. Rec.

[4] It may be here observed that, in Trinidad, an advocate, practising in the tribunals there, is appointed, under the character of defender of absent persons, to defend or support, judicially, the rights and interests of unrepresented absent defendants, and claims against the estate of deceased intestate persons, whose heirs are absent, and unrepresented in the colony. *Vide* L. 12. tit. 2. P. 3.

L. 17. tit. 22. Lib. 5. Nov. Rec.

L. 10. tit. 22. Lib. 5. Nov. Rec.

Ll. 11 & 12. tit. 22. Lib. 5. Nov. Rec.

L. 22. tit. 22. Lib. 5. Nov. Rec.

L. 2. tit. 14. Lib. 11., L. 29. tit. 22. Lib. 5., & L. 6. t. 3. Lib. 11. Nov. Rec.

L. 4. t. 9. Lib. 11. Nov. Rec.

5th, That the advocate who hath assisted one party in the first instance, may not assist the opposite party in the second, L. 13. tit. 16. Lib. 2. Rec. 6th, That at the commencement of the suit, they take a report of the affair, signed by the party, L. 14. tit. 16. Lib. 2. Rec. 7th, That no one discover the secret of his party, nor abandon the cause which he shall have begun, Ll. 17 & 22. tit. 16. Lib. 2. Rec. 8th, That they cannot demand any thing on account of the success of the suit, L. 8. tit. 16. Lib. 2. Rec. 9th, That no one may be an advocate in a cause in which his father, son, son-in-law, or father-in-law, are judges or escribanos, L. 34. tit. 16. Lib. 2. and L. 7. tit. 25. Lib. 4. Rec. 10th, That they may not ask or put questions or positions upon what has been confessed by the parties, L. 4. tit. 7. Lib. 4. Rec.

With respect to reporters (*relatores*), and escribanos, our laws have laid down the most fit provisions, which are found collected in Titles 17, 19, 20 & 21. Lib. 2. Rec.

TITLE IV. [261]

OF ACTIONS AND DEMANDS.

§ 1. Of actions and their kinds.

ACTION is the legal demand of one's right [1] (*el derecho de la cosa que se pretenda*). The principal division of actions, according to our jurisprudence, is into real, personal, and mixed. By real action, the dominion or property in the thing [2] is demanded or sued for: by personal, the right which belongs to one in virtue of any contract[3]: the mixed partakes of both; such is the personal action strengthened or confirmed by the establishment of [262] a mortgage. Actions are also divided into civil and criminal, according to the quality of the trials or suits (*juicios*).

The exercise or prosecution of the action [4] unto definitive sentence is called instance, *Hevia*, part. 1. § 9. num. 1.

§ 2. Of the mode of determining them (proponerlas), and hence, of cases of court (casos de corte).

The cognizance of causes in first instance appertains to the ordinary judge, to whom they belong, except those which are cases of court (*casos de corte*) [5], for then the litigants are withdrawn from their own jurisdictions and domiciles. Of cases of court (*casos de corte*) some are notorious, so that it is sufficient to allege them; such are the causes of corporations, universities, monasteries, grandees, nobles, or persons having titles, ministers, alcaldes, and magistrates, or corregidors (*corregidores*), L. 8. tit. 3. Lib. 4. Rec.: but the king's servants do not enjoy the privilege of *caso de corte*, according to L. 60. cap. 4. tit. 4. Lib. 2. Rec. [6] which reforms or amends [7] L. 9. tit. 3. Lib. 4. Rec. There are other *casos de corte* upon which it is necessary to

L. 9. tit. 4. Lib. 11. Nov. Rec.
L. 2. t. 10. Lib. 4. Nov. Rec.
L. 10. tit. 4. Lib. 11. Nov. Rec.

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[1] This perhaps may not be the literal translation of the passage, but is the correct meaning; "*actio nihil aliud est quam jus persequendi in judicio quod sibi debetur*," the right and power of prosecuting in judicature for what is one's due, or the means which the law puts into a man's hands of pursuing and recovering those rights, whether perfect or imperfect, of which he is unjustly deprived. *Vide Wood, C. L.* book 4. c. 3. p. 315. *Hal. Anal. C. L.* book 3. c. 1. p. 77. *Sala. Inst. Rom. Hisp.* tom. 2. lib. 4. tit. 6. p. 358. n. 8. *Sala. Il.* tom. 2. lib. 3. tit. 1. p. 124. n. 1. &c.

[2] *Jus in re.*

[3] *Jus ad rem.*

[4] From contestation he adds, "*despues de la contestacion.*" *Vide also Paz, Prax.* 2. *Annot. de Inst.* num. 6. p. 9.

[5] The cognizance of which belongs principally to the king, and by enactments to his council, chancery, audiences, 6 *Feb. Ad.* p. 11. n. 45. & 46.

[6] This quotation is incorrect.

[7] This does not appear. *Vide contra*, 6 *Feb Ad.* p. 20. n. 45.

afford information; such are causes relating to intails (*bienes de mayorazgo*), those of miserable persons, and the criminal ones expressed in L. 8. tit. 3. Lib. 4. Rec. Let reference be made to Ll. 9. & 10. tit. 7. Lib. 5. Rec., *Villadiego, in his Politica*, c. 1. n. 61.; and it is to be observed that no one enjoys the privilege of *caso de corte* in causes of ten maravedis [8] and under, L. 11. tit. 3. Lib. 4. Rec.

L. 9. tit. 4. Lib. 11. Nov. Rec.

Ll. 2. & 3. t. 24. Lib 11. Nov. Rec.

L. 5. tit. 3. Lib. 11. Nov. Rec.

Any plaintiff who shall present his demand should set forth the fact with clearness, declaring whether he sues for possession or property, or whether for any right in virtue of contract, &c. If he shall sue for real property, its boundaries must be expressed, the place where it is situate; and if moveable, he must point out its description, quality, weight, measure, &c., except in those cases in which the demand may be laid generally, as happens when any one demands an inheritance, castle, or village, with its limits (*términos*); the accounts of administration of the property of a minor, corporation, &c.; and also when that which is contained in any chest or portmanteau is demanded or sued for, &c., L. 4. tit. 2. Lib. 4. Rec. and Ll. 25, 26. 31. & 40. tit. 2. P. 3.

L. 4. tit. 3. Lib. 11. Nov. Rec.

Ll. 25. 26. 31. & 40. tit. 2. P. 3.

Besides this he should present, with the demand, information respecting the *caso de corte* (if it should be such) together with the written documents justificative thereof (*escrituras justificativas*); and not possessing them, he must swear that he believes he has witnesses to prove his cause: so that written documents which he may afterwards present shall not be admitted [9], unless it is by swearing that until then he had no knowledge of them, L. 1. tit. 2. Lib. 4. Rec.

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L. 1. tit. 3. Lib. 11. Nov. Rec.

In civil suits of four hundred [10] maravedis and under, the proceeding is summary, without it being necessary for the demand to be in writing or by declaration. These trials or suits do not admit an appeal, restitution, nor any other remedy, L. 19. tit. 10. Lib. 3. Rec. [11]

L. 8. tit. 3. Lib. 11. Nov. Rec.

In the same libel or declaration many different actions may be entered, but not contrary actions; for if they be contrary the plaintiff must elect that which he will bring, L. 7. tit. 10. P. 3.

L. 7. tit. 10. P. 3.

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[8] It should be ten thousand maravedis and under, L. 11. t. 3. Lib. 4. Rec. [L. 5. t. 3. Lib. 11. Nov. Rec.] *Palacios* (3).

[9] This is with respect only to *Casos de Corte*.

[10] Increased to 1000 by L. 8. tit. 3. Lib. 11. Nov. Rec.

[11] L. 19. t. 9. Lib. 3. Rec. [L. 8. t. 3. Lib. 11. Nov. Rec.] Complaint Court, Trinidad. See Proclamations, &c. respecting ditto, Append. V, W, X. The *Alcaldes de Barrios*, or magistrates of the wards of the towns, had summary verbal cognizance of suits to the amount of 500 *reales*. *Vide nota* (1), tit. 3. Lib. 11. Nov. Rec.

The possession and property may be also demanded at the same time, so that if the plaintiff does not prove the possession, he is at liberty to give proof of the dominion, L. 27. tit. 2. P. 3. L. 27. tit. 2. P. 3.

The plaintiff cannot include in his demand or declaration more than is really due to him, nor enter his action before the time, nor out of the place agreed on (*contratado*), under pain of paying three times as much with the costs and damages (*perjuicios*), Ll. 42. 44. & 45. tit. 2. P. 3. [12], and supposing that he should not establish all that he claims the action will be valid with regard to what he shall prove, L. 48. tit. 2. P. 3. Ll. 42. 44. & 45. tit. 2. P. 3. L. 48. tit. 2. P. 3.

If it shall happen that two persons shall institute a demand against a third, he who shall first cause the defendant to be cited shall be first heard; and if both shall institute it at the same time, the judge shall select him who appears to be best entitled in law, L. 6. tit. 10. P. 3. But when of two plaintiffs one shall demand the possession of the thing, and the other the seignory or property, the demand of the former shall be first entertained, unless the second offer immediately certain irrefragable proof of the dominion which he claims, L. 27. tit. 2. P. 3. L. 6. tit. 10. P. 3. L. 27. tit. 2. P. 3.

No demand can be instituted on feast days (*dias de fiesta*) [13]; nor can farmers or husbandmen be sued when they are employed in gathering in their crops or vintages, L. 33. to 39. tit. 2. P. 3.; neither can it be instituted before an escribano who is the brother of the plaintiff, L. 7. tit. 25. Lib. 4. Rec. L. 33. to 39. t. 2. P. 3. L. 6. tit. 3. Lib. 11. Nov. Rec.

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[12] *Palacios* says, there are four causes of excess of demand in regard to actions, *viz.* in respect to amount or quantity, time, place, and manner, L. 42. t. 2. P. 3. A plaintiff suing for more than is due to him shall only recover what he shall prove to be actually due to him, and shall be condemned in damages and costs caused to the defendant by reason of the excess of demand, L. 43. t. 2. P. 3., which doctrine is confirmed by Ll. 8 & 9. tit. 21. Lib. 4. Rec. It may be remarked on the above statement, as to excess of amount due, that L. 43. t. 2. P. 3. says, the plaintiff in such case shall be condemned in the costs or expenses [*costas ó misiones* are the words of the law, not *daños y costas*, as used by the learned professor,] occasioned to the defendant by reason of the excess of demand; and that L. 6. tit. 28. Lib. 11. Nov. Rec. (L. 9. t. 21. Lib. 4. Rec., L. 8. *ibid.* not being inserted in Nov. Rec.) declares, the plaintiff who shall demand execution for more than was due to him shall pay double the amount of such excess (*la demasia con otro tanto*); and further, that before the writ of execution shall be granted, the judge shall swear the plaintiff as to the sum which is justly due to him, for which and no more, the execution is to be granted. With respect to excess as regards time, or, in other words, to suit in anticipation of time of payment, L. 45. tit. 2. P. 3., which relates to the point, punishes the premature plaintiff by granting to the defendant an extension of the original term of payment, equal to double the period of the anticipation of the action, and by condemning the plaintiff to pay the costs and expenses incurred by the defendant by reason thereof.

The triple penalty mentioned in the text is confined to cases in which the excess in considered as to place and manner. *Vide* L. 45. t. 2. P. 3. cited.

[13] *Vide* Appendix Y, also J & Q.

[264] With respect to the mode of instituting and conducting a suit or demand, reference must be had to the practical works of Paz, Villadiego, &c. [14]

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[14] *Palacios* says, that the work called *Curia Filipica* is the one which is directed to be studied in the universities by the royal order of 5th Oct. 1802 [L. 7. t. 4. Lib. 8. Nov. Rec.], and that the work of the *Conde de la Cañada* (*Instituciones practicas de los Juicios civiles*) is the most deserving of recommendation. He adds, that *Elizondo*, in his "*Practica universal*," and *Febrero* (who is cited so often with commendation), both also treat of these matters.

TITLE V.

OF CITATION AND CONTESTATION.

WHEN the plaintiff presents his demand by proctor or attorney, whose power has been examined and declared sufficient, he is furnished with the writ of citation or summons for the defendant to appear within the term of the law, L. 2. tit. 2. Lib. 4. Rec. L. 2. tit. 3. Lib. 11. Nov. Rec.

Citation is the summons made to one to appear before the judge or to fulfil his order, L. 1. tit. 7. P. 3. Cap. 1. Of citation. L. 1. tit. 7. P. 3.

If the citation should be within the limits (*puertos*) of the place of the council or audience, the person cited has the peremptory term of thirty days to appear to the suit; and forty if the citation should be beyond the limits: although the judges may prorogue and shorten the term according to the quality of the person, cause, demand, distance, &c., Ll. 1. & 2. tit. 3. Lib. 4. Rec., provided they do not do it maliciously, L. 9. tit. 7. P. 3. [265] Ll. 12. & 13. tit. 4. Lib. 11. Nov. Rec. L. 9. tit. 7. P. 3.

Regularly citations are made by messengers (*porteros*) and others whose office it is to cite. They cannot cite without the order of the judge, and if it be without the place, the order must be given in writing, for not being so, the citation is null, and they ought to pay the costs and prejudices, L. 3. tit. 3. Lib. 4. Rec. L. 14. tit. 4. Lib. 11. Nov. Rec.

On the nature of citation it is established, 1st, That the parties must be cited who have an immediate interest in the cause, and it is not necessary [1] to cite those who have only a mediate interest in it, *Hevia*, p. 1. § 12. *á* n. 3. *al* 8. 2d, That the citation must be made or served on the party in person if he can be met with, and not being to be met with it will be sufficient to serve it in his house, giving notice of it to his wife, his children, servants, &c., and if the defendant have no house, he must be cited by edict or proclamation (*pregon*), L. 1. tit. 7. P. 3. 3d, That if the defendant shall be found in the limits of another jurisdiction, the judge may issue his warrant requisitorial (*requisitoria*) and writ of summons, in order that he may be commanded to appear, L. 7. tit. 3. Lib. 4. Rec. 4th, That if he who hath cited shall not appear by himself or by his attorney, L. 1. tit. 7. P. 3. L. 3. tit. 4. Lib. 11. Nov. Rec.

[1] But it will be useful, observes *Palacios*, referring to *Hevia* cited (which is the work usually called *Curia Filipica*), and to *Febrero* (*Reformado*), p. 2. Lib. 3. cap. 1. § 3. num. 106. See Append. Q & R, as to trial and rules in respect to civil suits.

he must pay the costs and damages to the person cited, and
L.6.tit.4. Lib.11. Nov. Rec. besides one hundred *maravedis*, L.5. tit.3. Lib.4. Rec. 5th, That through respect and decency, women (*mugeres*) must not
L.3.tit.7.P.3. be cited to present themselves before the judge [2], L.3. tit.7. P.3. 6th, That a woman cannot be cited before the judge who wished to use violence towards her, or to be married to her
L.6.tit.7.P.3. without her consent, L.6. tit.7. P.3.

The effects of citation are, 1st, That by it the judge acquires
L.12.tit.7.P.3. exclusive cognizance of the caues, L.12. tit.7. P.3. 2d, That the defendant must present himself personally or by attorney
L 2.tit.7.P.3. before the judge who cited him, L.2. tit.7. P.3.; therefore
[266] citations for the person cited to appear personally are not
L.8.t.4.Lib.11. Nov. Rec. universally obligatory, L.15. tit.3. Lib.4. Rec. [3] 3d, That the person cited is excused from appearing, and does not incur contumacy, being lawfully prevented by sickness, the event of a voyage or journey, urgent occupation in the service of the king, being at weddings or funerals of his relations and friends,
Ll.2. & 11. t.7. P.3. Ll.2. & 11. tit.7. P.3. 4th, That the alienation of the property or thing respecting which citation hath been made is null, except it hath been alienated or transferred by last will, for the establishment of *dote*, or, if belonging to many or several, some of them should desire to alienate it to the others; but in all these cases he to whom the thing is transferred must answer the demand,
Ll.13,14,15. tit.7.P.3. Ll.13, 14. & 15. [4] tit.7. P.3. 5th, That he who shall conceal the thing sued for, ought to pay the damage or deterioration the
L.19.tit.2.P.3. plaintiff shall swear to, L.19. tit.2. P.3.

Cap.2. Of contestation. Whence once the defendant hath been cited and the demand hath been notified to him, he must reply or plead to it (*contestarle*), admitting or denying within nine continuous days [5], and otherwise he is held as contumacious and confessed [6], L.1. tit.4. Lib.4. Rec.
L.1.tit.6. Lib.11. Nov. Rec.

But this penalty does not take place with respect to the

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[2] This is understood as to civil suits, for, in respect to criminal causes, women may be summoned, and must appear personally, L.3. t.7. P.3. *Palacios* (2). See Append. I, K, Q, & R.

[3] See the law cited.

[4] L.15. tit.7. P.3. This law goes further, and renders null any alienation made in anticipated apprehension of citation.

[5] In which feast days are counted. *Vide* tom.1. *Colom. de Escrib.* p.30. But with respect to feast days in *Trinidad*, see Order in Council, 18th May, 1822, Append. Y, also Q & R.

[6] This is not strictly followed. The rule is that, after three days have elapsed from notification of the demand, the defendant is accused of contumacy, and again after the expiration of other three days, and then a petition is filed by the plaintiff, praying the demand may be declared contested, and the cause received to proof, tom.1. *Colom. de Escrib.* p.30. See Append. Q & R.

plaintiff who hath not contested the demand which the defendant hath filed against him by way of reconvention [7], L. 3. tit. 4. Lib. 4. Rec. L. 4. tit. 6. Lib. 11. Nov. Rec.

Contestation may be made even on holydays (*dias feriados*) [8], (although the defendant is not bound to do so, L. 6. tit. 3. P. 3.) in any place where the judge may be found, and before the escribano of the cause [9] who shall have written or enrolled the demand (*que tenga escrita la demanda*); and if he should not have written it, before any other escribano, L. 2. tit. 4. Lib. 4. Rec. L. 6. tit. 3. P. 3. L. 3. tit. 6. Lib. 11. Nov. Rec.

After contestation issue is joined (*ya trabada la lítis*); by which the parties cannot revoke the demand or answer which they shall have given, L. 2. tit. 10. P. 3. L. 2. tit. 10. P. 3.

If the defendant shall not appear within the term, besides paying the costs and prejudices according to L. 8. tit. 7. P. 3., the plaintiff is at liberty to proceed with the cause, presenting his proofs unto definitive sentence; or he may also elect to be put into possession of property of the defendant (*la via de asentamiento*), L. 2. tit. 11. Lib. 4. Rec. *Asentamiento* is to put a man in quiet possession of some part of the property of the person who hath been cited [10], L. 1. tit. 8. P. 3. L. 8. tit. 7. P. 3. L. 2. tit. 5. Lib. 11. Nov. Rec. L. 1. tit. 8. P. 3.

If the demand or suit were real, the demandant is put in possession of the property in demand, nevertheless the defendant is allowed the term of two months in which to purge his contumacy; so that not appearing within this term, the plaintiff is not obliged to answer the defendant but with respect to the question of dominion over the property. [267]

If the demand is personal, the possession of moveable property is delivered to the plaintiff; and if the defendant have none, of his real property to the amount of the debt; and he is only allowed the term of one month in which to purge his contumacy. In this last case the plaintiff may retain possession, or pray that such property may be sold to the effect of his being paid, L. 2. tit. 8. P. 3., L. 1. tit. 11. Lib. 4. Rec. which alters Ll. 6. & 7. tit. 8. P. 3. L. 2. tit. 8. P. 3. L. 1. tit. 5. Lib. 11. Nov. Rec.

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[7] See the difference of reconvention and compensation, *Wood, Civ. Law*, book 3. c. 9. p. 269.

[8] *Quære?* on such *in honorem Dei*. *Vide Azevedo* in L. 2. tit. 4. lib. 4. Rec. No. 2. *et seq.*; *vide* Append. Y, Q, & R.

[9] "Before the escribano of the cause," these words are added as collected from L. 3. tit. 6. Lib. 11. Nov. Rec., cited.

[10] Add, on account of his contumacy. *Vide* the law quoted in the text. *Asentamiento*, according to *Febr. Adic.* tom. 2. Part. 1. p. 30. n. 56. ed. 6. Madrid, 1808, though permitted, is not practised. It may be considered the prætorian mortgage of the Romans.

It must be observed, 1st, That the plaintiff abandoning the *via de asentamiento*, may elect the mode of proof, although it be against a minor, L. 3. tit. 11. Lib. 4. Rec. 2d, That this possession of defendant's property (*asentamiento*) cannot be given in causes which do not amount to six hundred *maravedis*, L. 15. tit. 8. Lib. 2. Rec. 3d, That the possessor ought to preserve the fruits or products received to deliver them [11] to the party cited, if he shall appear within the specified terms to answer the suit (*á estar á derecho*), L. 8. tit. 8. P. 3.

L. 3. tit. 5. Lib. 11. Nov. Rec.

L. 4. tit. 5. Lib. 11. Nov. Rec.

L. 8. tit. 8. P. 3.

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[11] *Vide Greg. Lop* gl. 3. L. 8. tit. 8. p. 3. on this.

TITLE VI. [268]

OF EXCEPTIONS.

After the demand is presented or instituted, the defendant either consents to and acknowledges what is prayed, or perhaps opposes or prefers some exceptions. In the first case, the judge ought to appoint some term in which he is to pay or fulfil the same, L. 7. tit. 3. P. 3. In the second, the cause is carried on in the manner we shall point out. L. 7. tit. 3. P. 3.

Exception is, every defence that bars or stays the action of the plaintiff. Exceptions are divided into dilatory, peremptory, and mixed. The first are those which delay the suit, and do not put an end to it, L. 9. tit. 3. P. 3. Peremptory exceptions extinguish entirely the right of the plaintiff, and put an end to the cause, L. 11. tit. 3. P. 3. Mixed partake of the nature of both. Cap. 1. Of exceptions and their kinds, and the order of opposing or preferring them. L. 9. tit. 3. P. 3. L. 11. tit. 3. P. 3.

Dilatory exceptions are the competency of jurisdiction, suit depending, recusation [1] of the judge, those which relate to the person of the party, on account of being not authorised to appear in court, making the demand before the time, and with obscurity, Ll. 7, 8, & 9. tit. 3. P. 3. Ll. 7, 8, & 9. t. 3. P. 3.

These exceptions impede the progress of the suit when they are opposed and proved within nine days [2] before contestation, L. 1. tit. 5. Lib. 4. Rec., for if this term be passed, they ought not to be received in the quality of dilatory pleas or exceptions, L. 9. tit. 3. P. 3., a copy of them must be given to the party, and their merit and force must be pronounced upon before going on with the cause, *Hevia*, Part. 1. § 13. num. 10. L. 1. tit. 7. Lib. 11. Nov. Rec. L. 9. tit. 3. P. 3.

Among all the exceptions of this class, the first which must be opposed, is the plea to the jurisdiction of the judge; for otherwise it is presumed the party calls upon him to pronounce upon the other exceptions, and consequently that he submits to the jurisdiction, *Carleval, de Judiciis*, tit. 2. disp. 5. n. 7. And it is to be observed, that from the determination of the judges on [269]

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[1] See Append. Z.

[2] After citation, exclusively of the day thereof: this is understood if the defendant be within the jurisdiction; but if not, then nine days after the day of the last term which the judge hath assigned for his appearance.—*Palacios.* See Append. Q & R.

pleas to jurisdiction, there is no supplication (*suplicacion*), nor other recourse [3], L. 4. tit. 5. Lib. 4. Rec.

L. 7. tit. 21. Lib. 11. Nov. Rec.

The recusation, or challenge of the judge [4], must be alleged in the first place, in the absence of an objection or plea to his competency, and subject to the following observations. 1st, That when any alcalde, or inferior judge, is recused, an associate is appointed with him, Ll. 1. & 2. tit. 16. Lib. 4. Rec. 2d, That he cannot be recused without just cause, L. 2. tit. 10. Lib. 2. Rec. 3d, That recusation is not allowed when the suit is concluded, or in a state for definitive sentence, unless the cause were new, and provided that before it be received, the party deposit thirty thousand [5] *maravedis*, as fully set forth in L. 4. tit. 10. Lib. 2. Rec. 4th, That the cognizance or trial of such suspicion or plea, is summary, L. 1. tit. 10. Lib. 2. Rec. 5th, That the term to prove the recusation may not exceed forty days within the limits (*aquende de los puertos*), and sixty days beyond them, nor that more than six witnesses be presented, L. 6. tit. 10. Lib. 2. Rec. 6th, That the decree in which the judge declares himself as not recused, may be petitioned against (*suplicar del, &c.*). See L. 7. tit. 10. Lib. 2. Rec., with all that is besides laid down by tit. 10. Lib. 2. Rec., with respect to the recusations of oidores and counsellors.

Ll. 1 & 2. tit. 2. Lib. 11. Nov. Rec.

L. 4. tit. 2. Lib. 11. Nov. Rec.

L. 6. tit. 2. Lib. 11. Nov. Rec.

L. 3. tit. 2. Lib. 11. Nov. Rec.

L. 9. tit. 2. Lib. 11. Nov. Rec.

L. 10. tit. 2. Lib. 11. Nov. Rec.

Tit. 2. Lib. 11. Nov. Rec.

There are two extraordinary dilatory exceptions, which cause the accumulation of proceedings (*autos y procesos*), and they are, that of a suit pending, and that of not dividing the unity which should exist in every judgment or sentence (*la continencia de la causa*). This unity or continency (*continencia*) may be of five modes, or kinds. 1st, The plaintiff and defendant having an identity of action. 2d, When there is an identity of parties, and of the thing demanded, although the action be different, as happens in possessory and petitory suits. 3d, The action and the persons being the same, but not the thing demanded, *ex. gr.* in the suits of guardianship and administration. 4th, When one action is carried on against many by reason of its cause and origin, *ex. gr.* in the suit of guardianship against

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[3] This is not meant from the determination of the particular judge to whose jurisdiction the plea is made, but from that of the council and audiences, with reference thereto. *Vide* the law quoted in the text. The foregoing opinion is confirmed by a note of *Palacios* in this place, who states, that the contrary of the allegation in the text is enacted by L. 3. tit. 18. Lib. 4. Rec.

[4] The privilege or right of recusation or challenge in respect to judges, officers, or escribanos of tribunals, hath been repealed, as regards Trinidad, by Order in Council, of the 16th September, 1822. *Vide* Appendix Z.

[5] Increased to 60,000, by L. 7. tit. 2. Lib. 11. Nov. Rec.

many or several guardians, or when any one creditor may sue many debtors for the same obligation. 5th, If there is an identity of action and of the thing, although the persons be different, as happens in suits of division, *Carleval*, tit. 2. disp. 2. num. 3. [270]

The unity or continency of the cause does not produce the effect of accumulation of proceedings when the plaintiff and defendant are of distinct jurisdictions (*distinto fuero*), or when the party who opposes the exceptions does not pray it, *Carleval, ibid. á* num. 7. *al* 14. In the cases in which this accumulation takes place, the original proceedings must be passed by virtue of the power (*á poder del*) of the escribano, before whom the first suit hath been begun, *Carleval, ibid.* num. 26. Peremptory exceptions are very diverse, according to the nature of the action. They must be alleged within twenty days, which run after the nine days for contestation, which having expired, they will not be admitted, unless the defendant swear that they have recently come to his knowledge, and it being known to the judge, that he does not allege them maliciously; it being understood that if he shall not prove them within the term, he will be condemned in costs, L. 1. tit. 5. Lib. 4. Rec. L. 1. tit. 7. Lib. 11. Nov. Rec.

Mixed exceptions may be opposed as dilatory ones before contestation, or as peremptory ones to bar or extinguish the right of the plaintiff; such are transaction or accord, a thing or case adjudged (*cosa juzgada*), &c., *Carleval*, tit. 2. disp. 5. num. 4.

After publication of proofs is made, no new exception can be alleged, in order to be received for proof, unless by confession of the party or public instrument of writing, except they who prefer it, should be minors, a university, a church, &c. to whom restitution (*restitucion*) [6] must be allowed, in order to oppose their exceptions, provided they pray it before conclusion for definitive sentence, L. 5. tit. 5. Lib. 4. Rec. But these persons, to whom it is usual to grant restitution, must give bond to pay a certain penalty declared by the judge, if they shall not prove the exception, L. 6. tit. 5. Lib. 4. Rec. L. 1. tit. 13. Lib. 11. Nov. Rec. L. 2. tit. 13. Lib. 11. Nov. Rec.

Within the above-mentioned term, the defendant may file his reconvention or cross-bill and mutual petition, or demand of set-off, against the plaintiff; and if his proof consists of written documents, he must present them immediately; and if of witnesses, he shall swear that he has them; but if the proof consists of

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[6] See *Wood's Inst. C. L.*, book 4. c. 3. p. 321, 322., Restitution *in integrum*.

[271] written documents and witnesses, he ought to present them in the term, or otherwise they are not to be afterwards admitted, unless he shall swear that he had not previously knowledge of them, L. 1. tit. 5. Lib. 4. Rec.

L. 1. tit. 7. Lib. 11. Nov. Rec.

The cause of reconvention, or plea of set-off, is entertained at the same time with the principal demand, and is determined by the same sentence, L. 4. tit. 10. P. 3. Let reference be also had to *Carleval*, tit. 2. disp. 7.

L. 4. tit. 10. P. 3.

Of the exceptions which the defendant shall prefer, a copy or *traslado* is given to the plaintiff to reply and make his allegations to, within six days; and if a reconvention or plea of set-off hath been alleged, he will be allowed nine days to file his answer to it. The replication of the plaintiff will be passed to the defendant for six days to make his duplication or answer to it, so that with two petitions or allegations on both sides, the cause is held concluded to be received for proof[7], L. 3. tit. 5. Lib. 4. Rec.

L. 2. t. 7. Lib. 11 Nov. Rec.

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[7] This is re-enacted by the Order in Council, 16th Sept. 1822, and the rules of court in reference thereto. Regard must be had to them in respect to the conduct of a suit or action in Trinidad. *Vide* Append Q & R.

TITLE VII. [272]

OF PROOFS.

To the demand and answers, or after the conclusion of the pleadings (*conclusion de pleytos*) follow the proofs upon what has been alleged, L. 1. tit. 6. Lib. 4. Rec., the termination of which depends also upon two petitions, which the parties may present [1], L. 9. tit. 6. Lib. 4. Rec. L. 1. tit. 10. Lib. 11. Nov. Rec., and part of L. 3. ibid. L. 1. tit. 15.

Proof is the verification or evidence which is given in a trial or suit, in respect of any thing which is doubtful, L. 1. tit. 14. P. 3. Hence, it follows, 1st, That generally the plaintiff must afford it with respect to what the defendant shall deny. 2d, That it ought always to be given upon what is affirmed, unless the negation draw with it an affirmation, from which arises the general rule, that the party who denies any thing in a suit is not bound to prove it, L. 2. tit. 14. P. 3. 3d, That the proof be given in the suit, and upon a thing or fact relative to it, L. 7. tit. 14. P. 3. 4th, That being duly made, it produces entire faith with the judge. Lib. 11. Nov. Rec. Cap. 1. Of proof in general. L. 1. tit. 14. P. 3. L. 2. t. 14. P. 3. L. 7. t. 14. P. 3.

From the first principle it results, 1st, That if the plaintiff shall not prove, the defendant is absolved, L. 1. tit. 14. P. 3. 2d, That both the plaintiff and the defendant ought to prove in L. 1. t. 14. P. 3.

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[1] With two petitions of each of the parties, the pleadings (*el pleyto*) must be concluded, for proof, if the cause requires it; and if it does not require proof, then for definitive sentence. According to *Febrero* (*Reformado*), p. 2. lib. 3. cap. 1. § 6. num. 199., when the suit proceeds in a direct course, and there are no dilatory pleas, the practice is for the plaintiff to file two principal petitions or pleadings; which are, first, the libel or declaration; and then the replication to the contestation or plea of the defendant; in which the plaintiff must, at the same time, reply to the reconvention or plea of set-off by the defendant, if there be any; and for the defendant to file two others, the one contesting or pleading to the action, in which the reconvention or plea of set-off and the peremptory exceptions are set forth or pleaded, without presenting or filing any other for such purpose, notwithstanding what the legal disposition points out; and the other rejoining to the replication of the plaintiff, or concluding for proof; although the latter, on sight of the contestation or reconvention of the defendant, may conclude upon the whole, without filing a replication; and neither of the parties ought to present more petitions upon the principal matter or the merits, for the law holds the pleadings (*el pleyto*) as concluded.—*Palacios* (1). Reference may be also had to the positive enactments, on this point, of L. 1. tit. 14. Lib. 11. Nov. Rec. (L. 4. tit. 16. Lib. 4. Rec.) See also the Order in Council, 16th September, 1822, establishing a new Court of Civil Jurisdiction, and the rules relative thereto, Append. Q & R.

the following cases, 1st, He who alleges minority, in order to dissolve a contract, must prove it, and the injury or fraud re-
L.4.tit.14.P.3. ceived, L. 4. tit. 14. P. 3.; as also the orphan (*huérfano*), if by reason of majority, he shall desire to be freed from the curatorship; and if the curators wish to be exempted from it, they
L.4.tit.14.P.3. must prove the majority of the orphan, L. 4. tit. 14. P. 3. 2d, He who hath paid through error, if he shall wish it to be restored to him, is bound to prove that he did not owe the money, unless he be a knight (*caballero*), simple labourer, ignorant of right or law (*fuero*), a woman, and minor of fourteen, for then the oppo-
L.6.t.14.P.3. site party must prove the debt to be real, L. 6. tit. 14. P. 3.

From the second principle it is inferred, 1st, That the plaintiff must prove the negative on which his intention is founded, *Gutierrez, de juram. confirm.* P. 1. cap. 1. num. 19. & 20. 2d, That
[273] the following cases, carrying with them the affirmative, he who alleges them in the cause is bound to prove them, although he may have alleged them by a negation. These are, 1st, Negation of fitness or competency in an advocate, a judge, a wit-
L.2.tit.14.P.3. ness, &c. 2d, Negation of sanity in a testator, L. 2. tit. 14. P. 3.

From the third principle it is inferred, 1st, That proof must be given upon things from which a formal judgment may be made, as upon a thing moveable, real, the state of a person, &c.
L.7.tit.14.P.3. L. 7. tit. 14. P. 3. 2d, That the judge ought not to consent that proof be received upon useless things which do not avail the
L.7.tit.14.P.3. suit or judgment, and are foreign to or out of the cause, L. 7. tit. 14.
L.5.tit.10. Lib.11. Nov. Rec. P. 3. Ll. 7. & 4. tit. 6. Lib. 4. Rec. 3d, That upon what is confessed, proof ought not to be made, L. 4. tit. 7. Lib. 4. Rec.
L.4.tit.9. Lib.11. Nov. Rec. 4th, That the proofs ought to be shown to the judge, and not to the opposite party; although a copy or *traslado* of them shall
L.7.tit.14.P.3. be given to him if he shall pray it, L. 7. tit. 14. P. 3.

From the fourth principle it arises, 1st, That some proofs produce entire faith in law, that is, they are sufficient to condemn; and others cause half faith, or are not sufficient to condemn, *Gomez*, tom. 3. *Var. res.* cap. 12. n. 2.

Of the first class, are the six kinds of proof, of which we shall here speak; and they are, that by oath (*juramento*), that by confession of the party, that by witnesses, that by instruments, that
L.8.tit.14.P.3. by sight and evidence of the fact, and that by presumption [2], L. 8.

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[2] The law quoted in the text says, that this last is only valid in some things: and *Greg. Lopez*, in his exposition of it, says, "*Ubi est expressum in Lege alias non:* legal presumption, not *presuncion de hombre ú de Juez.*" *Vide Cur. Fil.* tit. *prueba*, p. 93. n. 40., and L. 12. tit. 14. P. 3.

tit. 14. P. 3. all the rest form half proof; but when two half proofs concur, with respect to a thing, they will produce entire faith, *Hevia, Cur. Fil.* p. 1. & 17. n. 6.

Cap. 2. Of proof by oath.

An oath is the attestation which is made by calling on God, or something holy, with respect to what any one affirms or denies [3], L. 1. tit. 11. P. 3. Hence it is that an oath is an affirmation of the truth, made religiously, L. 1. tit. 11. P. 3. Therefore, 1st, The person under 25 years of age cannot make it [4]; nor the child under his father's power, unless it were with respect to property (*castrense*), nor the madman, one who has lost his memory (*desmemoriado*), and the prodigal, except with the authority of the curator, L. 3. tit. 11. P. 3. 2d, That the attorney who has a special power for the purpose, or *cum liberâ*, may swear for his principal; or when the injury or benefit which would result from the oath, were against him alone, L. 4. tit. 11. P. 3. 3d, That it be with respect to a thing in which he who swears has at least some interest; but guardians or the attornies of corporations or of an hospital may swear only when proofs by witnesses or instruments shall fail them, L. 9. tit. 11. P. 3. 4th, That in the absence of these proofs, that by oath may be received in suits of an university; with respect to marriage or marriage contract (*casamiento*), with respect to privilege; and in criminal suits, in cases where the accused should be a man of vile and suspicious character, and the penalty not capital, L. 10. tit. 11. P. 3. 5th, That an oath ought to be made as to what one shall know, believe, or understand of the thing with respect to which he swears, and only in clear and certain cases, L. 11. tit. 11. P. 3. 6th, That the oath made through fear, in the cases expressed by L. 29. tit. 11. P. 3. *ad finem* is not valid. 7th, That all persons must swear before the judge, except those sick, widows, maids, old persons, and others prevented, who shall do it in their houses, L. 22. tit. 11. P. 3. 8th, That an oath without the solemnity of law, or that solemnity which ought to be observed according to the custom of the place, is not valid, Ll. 8. & 19. tit. 11. P. 3.

L. 1. tit 11. P. 3.

§ 1. What an oath is, and how made or taken.

L. 1. tit. 11. P. 3.

L. 3. tit. 11. P. 3.

L. 4. tit. 11. P. 3.

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L. 9. tit. 11. P. 3.

L. 10. t. 11. P. 3.

L. 11. t11. P. 3.

L. 29. t. 11. P. 3.

L. 22. t. 11. P. 3.

Ll. 8. & 19. t. 11. P. 3.

An oath is of three sorts, voluntary, necessary, and judicial. The voluntary is that which one party voluntarily offers to the other beyond the suit or out of court (*fuera de juicio*), L. 2. tit. 11. P. 3. Therefore, 1st, It must be made with the consent of the party to whom it is offered, L. 2. tit. 11. P. 3. 2d, But

§ 2. Of the kinds of oaths.

L. 2. t. 11. P. 3.

L. 2. tit. 11. P. 3.

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[3] *Vide Wood, Civ. Law*, book 4. c. 2. p. 313.

[4] *Quære?* unless under the authority of the curator. See L. 9. t. 16. P. 3., as to the prescribed age of witnesses in civil and other suits.

L.2.tit.11.P.3. when once received, it causes entire faith in law, L. 2. tit. 11. P.3. 3d, That being made with the consent of the contrary party it pro-
L.13.t.11.P.3. duces proof, although what is sworn may not be certain, L. 13. tit. 11. P. 3.

The necessary oath is that which the judge officially orders any of the parties to make, in order to the better proof of the
L.2.tit.11.P.3. truth, L.2. tit. 11. P.3. Whence it is, that there are as many kinds of this description of oath, as there are cases in which the judge may deem it necessary for the proof of that which is in dispute, or its value, or of the damage caused, &c.; examples of
Ll.5. & 6.t.11. P.3. which may be seen in Ll. 5. & 6. tit. 11. P. 3. And this the party whom the judge shall command is obliged to make; and not being willing to obey, he is condemned in the suit, or judgment shall be given against him, unless he had just reason for not
L.2.tit.11.P.3. making it, L. 2. tit. 11. P. 3.

The judicial oath is that which one party tenders to the other in the suit, obliging himself to abide by what the latter shall
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L.2.tit.11.P.3. swear, L. 2. tit. 11. P. 3. This oath may be refused by him to whom it is offered, provided he makes in return a like proposal under the same circumstances to the party who tendered it, in
Ll.2. & 8.tit.11. P.3. which case the latter cannot refuse, Ll. 2. & 8. tit. 11. P. 3. This oath may be repented of by him who calls for it, before it
L.8. tit.11.P.3. is made by his adversary, L. 8. tit. 11. P. 3.

§ 3. Of their utility or advantage. Many advantages result from these oaths; because, 1st, By them the dominion, right, or possession of the thing is proved,
Ll.12. & 13. tit.11.P.3. Ll. 12. & 13. tit. 11. P. 3. 2d, By them the suit is put an end
L.15.t.11.P.3. to, but not as though sentence had been pronounced, L. 15. tit. 11. P. 3.; and therefore, 3d, If the suit should be revived, or there should be a new trial, and he who swore should affirm the contrary, a sentence given on this last oath will prevail,
L.15.t.11.P.3. L. 15. tit. 11. P. 3. 4th, In the same manner, by a written instrument, the oath is destroyed, the sentence given by reason of the latter being revoked on account of the former, unless it be a voluntary oath [5], without the direction or desire of the judge, which cannot be revoked in any case, because it only deceives
L.25.t.11.P.3. the party [6], L. 25. tit. 11. P. 3. 5th, That the minor who hath sworn not to contravene or contradict what he hath stipulated, by reason of his minority, cannot afterwards demand restitution,
L.16.t.11.P.3. unless it be for prejudice by sentence, L. 16. tit. 11. P. 3. 6th, That if he who swore by a judicial oath he was not indebted,

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[5] Made by consent of the litigants. See L. 25. tit. 11. P. 3., cited.

[6] Add, "who consented to receive it from his adversary." See L. 25. tit. 11. P. 3., cited.

afterwards pays him who sued him for the debt, he may recover it back, assigning as a reason his having paid that which he did not owe, although it should be a lie; for by the judicial oath he remains discharged from the debt: but if he were absolved by sentence, and notwithstanding paid, he cannot recover, because then the truth is of more force than the sentence, L. 16. tit. 11. P. 3. L. 16. t. 11. P. 3.

Oaths not only benefit him who makes them, but are also of use to his heirs; to the purchaser of the thing with respect to which the oath is made; to the other partners of the person swearing; to the surety, if it is made by the principal debtor, but not on the contrary[7]; and to the ward, if the guardian made it; but the oath of the mother to keep possession in the name of the child of whom she is pregnant, does not benefit the child, who shall be obliged to prove his quality of heir, Ll. 17 & 18. tit. 11. P. 3. Lastly, they cannot be made in the holy places expressed by L. 5. tit. 7. Lib. 4. Rec. Ll. 17 & 18. t. 11. P. 3. L. 5. tit. 9. Lib. 11. Nov. Rec.

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§ 4. Of the oath of calumny.

There is another species of oath, which is called the oath of calumny, and is the oath which men make that they will proceed truly in the suit and without fraud, L. 23. tit. 11. P. 3. It is made either by order of the judge, the suit or pleadings being concluded for proof, L. 1. tit. 6. Lib. 4. Rec., or on the petition of the party; in which last case, if one is absent, a decree is given for it (*se le da la provision*) within a term, L. 3. tit. 7. Lib. 4. Rec. It was called formerly the oath of *manquadra*; because, as there are five fingers to the hand perfect, so there are five things which the plaintiff and defendant ought to swear. 1st, The plaintiff ought to swear that he does not prosecute the suit through malice, but to obtain his right (*sino por juzgar tener derecho*), and the defendant that he does not contradict or oppose maliciously, but with an intention of showing his right. 2d, They must both swear, that always, when questioned upon any matter of the suit, they will speak the truth. 3d, That they have not bribed, nor will bribe, the judge, nor the escribano. 4th, That they will not allege any false proof. 5th, That they will not pray for any time or delay through malice, L. 23. tit. 11. P. 3. This oath the principals ought to make, and not the attorney or another for him, although they may have commenced the suit in their name, unless it be an attorney of a corporation, university, &c., from whom he shall have special power for it, Ll. 23 & 24. tit. 11. P. 3. It is taken in every kind L. 23. t. 11. P. 3. Ll. 1 & 3. t. 10. Lib. 11. Nov. Rec. L. 3. tit. 9. Lib. 11. Nov. Rec. L. 23. t. 11. P. 3. Ll. 23 & 24. t. 11. P. 3.

[7] This must be qualified. *Vide* L. 17. tit. 11. P. 3.

of civil and criminal causes, and if the plaintiff oppose it, the defendant is absolved; and if the latter will not take it, he shall be taken as condemned, L. 23. tit. 11. P. 3.

L. 23. t. 11. P. 3.

§ 5. Of the questions of the judge in regard to the oath.

These oaths are always accompanied by the questions of the judge, or of the party who demands it, which questions should be put upon a thing that relates to the suit, and in clear and few words, Ll. 1 & 2. t. 12. P. 3. Of these questions [8], the interrogative libel or declaration (*libelo interrogatorio*) is composed, to which the parties ought to answer by the words "*I deny or confess, I believe, or do not believe;*" the answer, "that it is not known," not being received, and the party being taken as confessing those points to which he will not make answer, L. 1. tit. 7. Lib. 4. Rec. These answers of the party, besides being received with an oath, must be given without consulting an advocate, and without any term for deliberation, and answer is to be made to each point (*artículo*) separately, L. 2. tit. 7. Lib. 4. Rec.

Ll. 1 & 2. tit. 12. P. 3.

L. 1. tit. 9. Lib. 11. Nov. Rec.

L. 2. tit. 9. Lib. 11. Nov. Rec.

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Cap. 3. Of proof by confession.

The confession of the party is called in the Partidas (*conocencia*) confession, which means acknowledgment, because by it the party acknowledges the right and justice of his adversary. It is the answer of consent which one party makes to the other in the suit, L. 1. tit. 13. P. 3. This confession is made judicially [9], extrajudicially, and through torture [10], L. 3. tit. 13. P. 3.

L. 1. tit. 13. P. 3.

L. 3. tit. 13. P. 3.

Hence it follows that confession ought to be made voluntarily, without error, with respect to a thing certain and reasonable, or just (*honesta*), before the party or his attorney, and by a competent person, L. 4. tit. 13. P. 3. Whence it arises, 1st, That the confession made through threats is not valid, and that made through torture or the rack must be afterwards ratified [11], L. 5. tit. 13. P. 3. 2d, That being made through error, it may be revoked and proved before the suit is terminated [12], L. 5. tit. 13. P. 3. 3d, That being contrary to nature, the laws, or not devolving on a thing certain, it is not valid, L. 6. tit. 13. P. 3. 4th, That the confession made extrajudicially is not valid, unless a reason or cause is assigned [13], L. 7. tit. 13. P. 3. 5th, That only a person of twenty-five years of age, and the minor before

L. 4. tit. 13. P. 3.

L. 5. tit. 13. P. 3.

L. 5. tit. 13. P. 3.

L. 6. tit. 13. P. 3.

L. 7. tit. 13. P. 3.

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[8] Termed *posiciones*. See 6th vol. *Feb. Ad.*, p. 2. lib. 3. c. 1. § 7. p. 125. n. 288. 6th ed.: also L. 2. *et seq.*, tit. 9. Lib. 11. Nov. Rec.

[9] *Vide* L. 4. tit 13. P. 3.; and the qualifications laid down in L. 7. *ibid.*

[10] Its use in Trinidad is forbidden by the tenor of His Majesty's instructions to the governor, and the directions contained in the commissions of the judges: it was also abolished in Spain, by a decree of the Cortes.

[11] *i. e.* voluntarily. See note [10], *ante*.

[12] *i. e.* before sentence.

[13] *i. e.* for the debt or thing acknowledged being due, &c.

his guardian not contradicting or opposing it, may make it; and the confession made by the attorney is valid only when no fraud or error is proved, L. 1. tit. 13. P. 3. 6th, That being lawfully made, the suit is put an end to by it, and it affords entire proof, L. 2. tit. 13. P. 3. 7th, That when one, who is questioned with regard to confession, is doubtful upon what he has to answer, he must have time allowed him [14] to reply or contest clearly, L. 3. tit. 13. P. 3. 8th, That the contumacy of the person questioned, on his confession being made obscurely, has the same effect as acknowledgment, L. 3. tit. 13. P. 3. 9th, That a copy (*traslado*) of all that is confessed ought to be given to the parties, in order that they may see on what they have to give proof, L. 4. tit. 7. Lib. 4. Rec. [15]

L. 1. tit. 13. P. 3.
L. 2. tit. 13. P. 3.
L. 3. tit. 13. P. 3.
L. 3. tit. 13. P. 3.
L. 4. tit. 9. Lib. 11. Nov. Rec.

Witnesses are men and women, such as cannot be excluded from giving testimony; whom the parties in the suit adduce to prove things denied or doubtful, L. 1. tit. 16. P. 3.

Cap. 4. Of proof by witnesses.
L. 1. tit. 16. P. 3.

The reception or admission of witnesses is founded on these principles: 1st, That they be worthy of credit. 2d, That they be obliged to give testimony. 3d, And this before the judge. 4th, That the faith to which their testimony is entitled depends upon their numbers, their condition, attestations, and other indispensable circumstances.

As in so much the witness is entitled to faith, as he will and may clearly speak the truth, or in so far as he has no interest in the suit, it follows from the first principle: 1st, That persons of bad fame are incompetent to be witnesses (unless it be in a case of treason against the king or queen) [16]; he who is proved guilty of falsehood or perjury (*probado de falso*); is *non compos mentis*; and the person infamous by reason of any of the abominable crimes expressed by L. 8. tit. 16. P. 3. 2d, The person under twenty years of age in criminal causes, and fourteen in civil, who, after attaining their respective ages, may testify as to their remembrance of what happened before these ages, L. 9. tit. 16. P. 3. 3d, In a criminal suit the father or grandfather, the son or grandson, by reason of the reverence they bear each other, cannot be witnesses [17], nor the prisoner, nor the strumpet, L. 10. tit. 16 P. 3.

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L. 8. tit. 16. P. 3.
L. 9. tit. 16. P. 3.
L. 10. t. 16. P. 3.

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[14] See how this is qualified by the law quoted.

[15] This relates to *posiciones*.

[16] And even in these cases their testimony must not be admitted, unless they shall have been first tortured, *vide* L. 8. tit. 16. P. 3.; and therefore the testimony of all such persons may be considered excluded in all cases. See Append. Q & F, as to the competency of witnesses, and as to evidence in general in respect to Trinidad.

[17] This only applied by the law quoted in the text to the *libertus* or slave

The testimony of one who has an interest in the cause being liable to suspicion, it is inferred from this, 4th, That ascendants and descendants cannot be witnesses in each other's causes, unless to prove the age or kindred; but the father may be a witness to the military[18] will of his son who is a knight or military person,

L.14.t.16.P.3. L.14. tit.16. P.3. 5th, That the husband cannot give testimony in the cause of his wife, nor *vice versâ;* nor the brother for the brother, while they both live under the power of their father[19],

L.15.t.16. P.3. L.15. tit.16. P.3. 6th, Nor any one in his own cause; nor those of his family or household, as his overseer, servant, steward, intimate friend, &c.[20]; but the member of a corporate body or university may, in the cause of such corporation; because

L.18.t.16. P.3. then the reason of interest ceases, L.18. tit.16. P.3. 7th, That the judge cannot be a witness in a cause of which he has cognizance[21]; nor the vendor with respect to a thing which he has sold; nor the advocate, attorney, or guardian, in causes which they shall defend in the name of their parties, unless they be produced or called by the opposite party, Ll.19. & 20. tit.16.

Ll.19&20.t.16. P.3. P.3. 8th, Nor a partner in a cause relative to the partnership, and which appertains equally to all; nor the accomplice of a

L.21.t.16.P.3. crime against another accomplice, L.21. tit.16. P.3. 9th, Nor

L.22.t.16.P.3. the enemy of a person, for the causes[22] expressed by L.22. tit.16. P.3.

Conformably with the second axiom, it is established, 1st, That the witness named by the party may be compelled by the judge to give evidence, L.6. tit.6. Lib.4. Rec.; except it be a relation in the fourth degree, the son-in-law or father-in-law of him against whom the testimony is to be given in a criminal case;

L.1.tit.11. Lib.11. Nov. Rec.

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emancipated, as with respect to his patron, the father, &c., of ditto: but the following law says, that ascendants, and descendants, and relations to the fourth degree, cannot be compelled to give testimony against one another, in suits relating to their persons, their fame, or character, or where the greater part of their property is at stake; nor the son-in-law, father-in-law, step-son, and step-father, against one another: but the law adds, that if the above are willing to testify, they may do so.

[18] This is added from the law quoted in the text, which see. *Palacios* says, it should be L. 16. *ibid.*

[19] When brothers live away from their father, and separately, the law quoted in the text says, they may give testimony against each other: but it seems they may not in favour of one another. *Vide* L. 13. tit. 4. Lib. 2., *Fuero Juzgo;* and L. 11. tit. 1. P. 6.

[20] See Order in Council, 8th June, 1816, making merchants' clerks competent witnesses in favour of their employers: also Order in Council, 16th September, 1822, civil court. Append. M & Q.

[21] Which he has decided, or shall have to determine. *Vide* the law quoted in the text.

[22] See these causes of enmity which render a person incompetent.

but they may give it voluntarily, L.11. tit.16. P.3.[23] 2d, That old persons[24], honourable or respectable women, prelates, sick persons, knights (*caballeros*), or he who is actually employed for the king, cannot be compelled; for such are not obliged to come or appear before the judge or escribano, while thus prevented or circumstanced; but they are obliged to go and take the testimony of these persons at their own houses, L. 35. tit.16. P. 3. [279] L.11.t.16. P.3. L.35.t.16. P.3.

To the third principle belong the solemnities or forms of the reception of witnesses, which are reduced to the following: 1st, An oath must precede, unless the parties agree to the contrary, and citation to the opposite party to see the witness sworn, who, if he does not appear, does not, for this reason, prevent or delay the oath being received. The oath is also dispensed with, when the judge appoints any woman to examine whether another is pregnant, who demands possession of property in the name of one of whom she is with child, L. 23. tit.16. P.3. 2d, The witnesses must swear that they will speak the truth upon what they know of the fact, and will not discover their testimony to the parties, L. 24. tit.16. P. 3.; but those received upon an inquest or inquiry (*pesquisa*) ought also to swear that they will tell what they have heard and think of the fact, L. 27. tit.16. P. 3. 3d, Afterwards they are asked by the escribano of the cause the general questions set forth in L. 8. tit. 6. Lib. 4. Rec. 4th, To this succeeds the examination of each witness separately upon every point or question of the particular interrogatory, the answer and reason the witness shall give for seeing, hearing, knowing, or believing, if he were questioned about it, being noted; and, in a criminal cause, this reason may be given even after the testimony is received; this declaration of the witness ought to be read to him, in order that he may confirm it, Ll. 26. 28, 29. & 31. tit.16. P. 3. 5th, This examination in criminal[25] causes of weight or importance ought to be taken by the judges themselves, Ll. 28. & 44. tit. 6. Lib. 3. Rec.; and if the witness is absent in another jurisdiction, he shall be examined by his own judge, under a commission from the judge of the other party, and the depositions shall be sent closed and sealed, as provided by L. 27. tit.16. P. 3., except in a criminal cause, of which the judge who has cognizance must himself examine the witness in whatever part he may be, L. 27. tit.16. P. 3. 6th, After L.24.t.16.P.3. L.27.t.16.P.3. L.3.tit.11. Lib.11. Nov. Rec. Ll. 26. 28, 29. 31.t.18.P.3. L.16.tit.32. Lib.12. Nov. Rec. L.27.t.16.P.3. L.27.t.16. P.3.

[23] *Vide* notes 16, 17. 19 & 20. *ante*.
[24] The law quoted says, upwards of seventy years of age.
[25] As also in civil. *Vide* the law quoted.

this act or proceeding (*fuera de este acto*), the witnesses cannot
[280] be interrogated, unless in case of having mistaken the question, or given an equivocal answer (*á no haberse equivocado la pregunta*) or the judge desires the witness may explain any doubtful expression, L. 30. tit. 16. P. 3. 7th, The depositions or examintions must be received or taken after contestation of the suit, and not before, unless there be danger of the death or absence of the witnesses, in which case the opposite party is also cited; and if he be absent, he must be informed of it within a year after his return; but, in criminal causes, this previous examination, or *ad perpetuam rei memoriam*, does not take place, unless on a general inquest, *de oficio*[26], Ll. 2. & 3. tit. 16. P. 3.; to which ought to be added the other cases expressed by Ll. 4, 5, 6, & 7. tit. 16. P. 3., in which witnesses may be received before contestation.

L. 30. tit. 16. P. 3.

Ll. 2. & 3. tit. 16. P. 3.

Ll. 4, 5, 6 & 7. tit. 16. P. 3.

The faith or credit of witnesses consisting in their number, condition, and other circumstances, it follows: 1st, That faith or credit is only caused or produced in a suit or trial by two witnesses; to prove payment, five[27] are required; to a testament, seven[28]; and if the testator is blind, eight, L. 32. tit. 16. P. 3. That the number of witnesses for each different question cannot exceed thirty; and the party may, leaving out as many as he wishes, substitute as many more[29], the better to prove his case, L. 7. tit. 6. Lib. 4. Rec. 2d, That the witnesses who shall disagree with respect to the thing, circumstances of place or time, do not avail, L. 28. tit. 16. P. 3. 3d, That the judges may confront the witnesses, if they shall find any variance between them, L. 56. tit. 5. Lib. 2. Rec.[30] 4th, That if both parties adduce proof by witnesses, it is seen which of them are most entitled to faith on account of their reputation, fitness, number, &c.; and in cases of equality[31] with respect to them, the defendant is ac-

L. 32. tit. 16. P. 3.

L. 2. tit. 11. Lib. 11. Nov. Rec.

L. 28. tit. 16. P. 3.

L. 9. tit. 2. Lib. 4. Nov. Rec.

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[26] On a general inquest (*pesquisa*), by order of the king. *Vide* the two laws quoted in the text.

[27] It is supposed that two are quite sufficient. *Palacios*, it appears, is also of this opinion; and he adds, various authors are so with reference to L. 2. tit. 21. Lib. 4. Rec. (L. 1. tit. 28. Lib. 11. Nov. Rec.)

[28] In Trinidad, by Order in Council, of 8th June, 1816, three male witnesses, domiciliated, and inhabitants of the place, are sufficient to a testament or last will. See Appendix M & Q.

[29] But this only in case the witnesses first presented shall not have been examined. *Vide* L. 2. tit. 11. Lib. 11. Nov. Rec.

[30] Which is L. 9. tit. 2. Lib. 4. Nov. Rec.; but which does not apply.

[31] The law cited in the text, to wit, L. 40. tit. 16. P. 3., says, the judge shall attend to those who testify the more credibly, and are of better character, although they may be fewer in number. But if they are equal with respect to the credibility of their sayings, the judge shall determine according to the majority of number: if they are equal in all things, he must acquit the defendant; because judges ought to be more ready to acquit than to condemn.

quitted[32], L.40. tit.16. P.3. 5th, That if the witnesses do not agree, those are to be believed who depose best to the fact[33]; and that the witness who contradicts himself in his declarations, is not entitled to faith, L.41. tit.16. P.3. 6th, That the witnesses received before arbitrators (*árbitros*) may be again examined before the judge[34], unless the parties have stipulated to the contrary, their testimony being valid[35] if they have died, L.38. tit.16. P.3.

L.40.tit.16. P.3.

L.41.tit.16. P.3.

L.38.tit.16. P.3.

An instrument of writing (*escritura*) is every deed that is made by the hand of a public escribano, or notary of a corporation or council (*concejo*), or sealed with the seal of the king, or other authorized person, L.1. tit.18. P.3. Hence arise the two kinds of instruments which produce faith and full proof: one public, made by the escribano or notary, with the solemnities prescribed by Ll. 54. & 114. tit.18. P.3., Ll.13. 44, 45, 56.[36] & 47. tit.25. Lib.4. Rec., and explained by *Pareja, de Instrum. edict.* tit.1. resol. 3. § 2. *á* n.57. *al* 69.; another authentic (*auténtico*), which is that sealed by the king, bishops, prelates, and great men of the kingdom, L.114. tit.18. P.3.

Cap. 5. Of proof by written instruments, (escrituras) and their kinds. L.1.tit.18.P.3.

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Ll.54.&114. tit.18.P.3. L.1.tit.23., Ll.1, 2. & 4. tit.24.Lib.10. Nov. Rec.

Among public instruments are reckoned those which are made by escribanos of cabildo for things relating to them, L.1. tit.16. Lib.4. Rec.; and those which are contained in public archives, and not of private persons, *Pareja, ibid.* tit.1. resol. 3. & tit.5. resol. 2. § 3. *á* n. 28. *al* 46., copies of which must come accompanied with the certificate of the keeper of the public archives (*han de venir accompañadas del archivero público*), who declares or certifies to have copied them by order of the king, or of the magistrate who may have authority to order it, L.4. tit.20. P.3. & Ll.2. & 4. tit.15. Lib.2. Rec.

§ 1. Of public and authentic instruments. L.1.tit.2. Lib.11. Nov. Rec.

L.4.tit.20.P.3. L.4.tit.13. Lib.4., L.1. tit.21.Lib.5. Nov. Rec.

A public instrument is divided into three classes; the original draft, register or protocol (*registro*), the original and the copy. The register is the original draft or writing, which is delivered, and remains in the possession of the escribano, which we also call protocol, by which doubts are determined that may be

§ 2. What the register or protocol, the original and copy (registro, original y traslado).

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[32] See *Colom. de Escrib.*, tom. 1. in his *nota*, commencing page 41., with respect to the examination of witnesses.

[33] This is not a clear exposition of the law quoted. *Vide* L. 41. tit. 16. P.3., which says, that when the witnesses produced by the contending parties give contrary testimony, those are to be believed by the judge who appear to incline most to the truth, and whose declarations agree most with the fact, &c.

[34] By the opposite party.

[35] Saving the right of the opposite party to except (*tachar*) thereto.

[36] Not inserted in *Nov. Rec.*

Ll. 8 & 9. t. 19. P. 3. Ll. 1 & 4. tit. 23. Lib. 10. Nov. Rec.

offered with respect to the instruments which are copied from it, Ll. 8 & 9. tit. 19. P. 3., and Ll. 12. 13. & 16. tit. 25. Lib. 4. Rec. The deed which is immediately copied from the protocol is the original, which causes faith, inasmuch as it is authorized by the public escribano, before whom it passed, or by him to whom the protocols of the latter have passed, L. 14. tit. 23. Lib. 4. Rec.; but if another escribano copies it, with the authority of the judge and citation of the party, it is valid.

L. 6. tit. 33. Lib. 5. Nov. Rec.

The *traslado* is called the copy which is taken from this original, which ought to be done with the same circumstances of the latter, L. 114. tit. 18. P. 3.

L. 114. t. 18. P. 3.

From what has been said these axioms result; 1st, That every public instrument must be signed by a public escribano of the appointed number of the towns (*de número de los pueblos*); 2d, That it does not produce faith, if devoid of any solemnity; 3d, That the weight or authority of a public instrument is derived among us from the protocol, because every instrument of writing (*escritura*) made without this is null, L. 13. tit. 25. Lib. 4. Rec., and L. 9. tit. 19. P. 3.

L. 1. tit. 23. Lib. 10. Nov. Rec. L. 9. t. 19. P. 3.

From the first axiom it is inferred, 1st, That if the party takes the exception, that the instrument is not made by the hand of a notary, this throws the burthen of proof on the party who produces the instrument, L. 115. tit. 18. P. 3., except in the five cases expressed by *Pareja*, tit. 1. resol. 3. § 2. *á* n. 50. *al* 56. 2d, That the deed being made in a remote place is not entitled to faith, unless it is certified as to the signature, notarial signet, and legitimacy of the escribano, by two others of the appointed number, or by authority of the judge.[37] 3d, Neither is the instrument made by an ecclesiastical notary, in lay or profane causes, and of secular jurisdiction, entitled to faith, L. 32. tit. 3. Lib. 1., and L. 19. tit. 25. Lib. 4. Rec. 3d, That if the escribano should say that the instrument is not his, he shall be believed, if the contrary be not proved; and if he should confess it, although the witnesses to the execution of the instrument deny it, he ought to be believed if he is of good character, and the instrument agrees with the register or protocol; but the contrary, if the escribano is of bad character, and the instrument made a short time, L. 115. tit. 18. P. 3.

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L. 115. t. 18. P. 3.

Ll. 5 & 2. tit. 14. Lib. 2. Nov. Rec.

L. 115. t. 18. P. 3.

On the second axiom, it is established, 1st, That the instru-

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[37] With respect to the form, execution, proof, &c., of deeds, or written instruments, see Proclamation, 5th February, 1814, and Order in Council, 6th April, 1818, Append. O & P.

ments or deeds in which are wanting the names of the contracting parties, the escribano, witnesses, signatures, signets, term of payment (*plazo*), day, month, and year, and the matter upon which it hath been covenanted or delivered, are not valid or entitled to faith; or also, if any one of these parts is obliterated (*rota*), or cancelled, so that it cannot be understood, L. 111. tit. 18. P. 3.; but if the true meaning of the deed can be obtained, although it is obliterated in other parts which are not substantial, it will produce entire proof, Ll. 7. & 12. tit. 25. Lib. 4. Rec. 2d, That the exception of the opposite party, as to the falsehood of the deed, is admitted, and may be proved before the sentence, and even after it, before the judge of appeal, L. 116. tit. 18. P. 3. 3d, That the proof of this falsehood is allowed to be made by another instrument, or by what is equivalent, the proof of two [38] witnesses, L. 117. tit. 18. P. 3., and also by the comparison (*cotejo*), of deeds or instruments, L. 118. tit. 18. P. 3.; and exclusively of this case, proof by comparison of letters is not admitted, with respect to promissory notes (*vales*), and other private writings, L. 119. tit. 18. P. 3. Aut. 3, tit. 3. Lib. 3. Rec.[39]

L. 111. t. 18. P. 3.

L. 6. tit. 3. Lib. 11., L. 6. tit. 23. Lib. 10. Nov. Rec.

L. 116. t. 18. P. 3.

L. 117. t 18. P. 3.

L. 118. t. 18. P. 3.

L. 119. t. 18. P. 3.

L. 1. tit. 3. Lib. 3., L. 1. tit. 7. Lib. 5. Nov. Rec.

From the third axiom it follows: 1st, That the deed made by the same escribano who made the protocol will not produce faith without the assistance of the latter, *Pareja*, tit. 1. res. 3. § 1. *á* n. 9. *al* 34. 2d, That the instrument found in the possession of the party is not presumed the original. 3d, That the copy taken from a protocol spoiled or faulty (*viciado*), or wanting solemnities is null [40], *Pareja*, *ibid.* *á* n. 42. *al* 45. 4th, That in order to entitle the instrument to credit, without having relation to the protocol, it must be proved that the latter hath been lost, *Pareja*, *ibid.* *á* n. 47. 5th, That if there are two instruments which disagree with respect to the same thing, recourse must be had to the record or protocol to clear up the doubt, *Pareja*, *ibid.* n. 48. L. 9. tit. 19. P. 3. 6th, That the escribanos must not alter (*romper*) the protocol, although they may copy (*saquen*) the instruments in public form, Ll. 12 & 13. tit. 25. Lib. 4. Rec. 7th, That the extract or copy an escribano hath drawn,

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L. 9. t. 19. P. 3.

Ll. 6. & 1. tit. 23. Lib. 10. Nov. Rec.

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[38] That is, in case the alleged false instrument is not made by a public escribano; otherwise, L. 117. tit. 18. P. 3., quoted in the text, requires four witnesses. *Palacios* refers for information on this part of the text to *Curia Filipica*, p. 1. § 17. n. 35., and to *Murillo*, tit. *De Fide Instrum.*

[39] Aut. 3. tit. 2. Lib. 3. Rec. is contained in L. 1. tit. 3. Lib. 3. and L. 1. tit. 7. Lib. 5. Nov. Rec.; but they do not apply.

[40] *Palacios*, referring to L. 1. tit 25. Lib. 4. Rec. [*Vide* L. 7. tit. 23. Lib. 10. Nov. Rec.], says, that although a deed or instrument be null in all its parts, its contents may be proved by witnesses, or by any other legal mode.

without being asked, from the protocol which another made, is not proof, unless the authentic original be also shown, *Páreja*, tit. 1. resol. 3. §3. *á* n.3. *al* 13. This is not understood of the copy, which shall have been made by the same notary who has the custody of the protocol, *Pareja*, *ibid.* num. 20. *al* 24, but if the said copy should not have relation to the protocol, but to the instrument, it is not entitled to faith, *Pareja*, *ibid. á* num. 25. & 26., unless it be found in a public archive, *ibid.* num. 27. 8th, That copies made one hundred years before, the quality of the notary not being evident, nor in what year made, produce faith on account of the difficulty of proving the said quality, *Pareja*, *ibid.* n. 59. 9th, That whenever the copy of the instrument is observed to be taken by the notary without any solemnity, nor signature, in which case the antiquity does not produce faith, the presumption that it proceeds from this antiquity is destroyed by exhibiting the copy in which the requisites of a public deed do not appear to have concurred, *Pareja*, *ibid. á* num. 71. *al* 77.; from whence some limitations are collected. 10th, That the copy of a copy does not cause faith amounting to proof, nor does it assist in proving, *Pareja*, tit. 1. resol. 3. §4. *á* num. 1. *al* 7.; observing the limitations in the following numbers. 11th, That the original instrument or copy duly taken (*legitimamente*) from the record or register, will not produce faith, if it does not set forth the escribano before whom it passed, and contain his rubrick or notarial flourish (*signo*)[41], L. 12. tit. 25. Lib. 4. Rec.

L. 6. tit. 23. Lib. 10. Nov. Rec.

§ 3. Of private writings.

Besides public and authentic instruments, there are others made or executed by a private hand, or that of a particular individual. Such are notes of hand or recognizances (*conocimientos*), orders or bills (*cédulas*), promissory notes (*vales*), acquittances (*apochas*), books of account, and other simple writings, which are only proof against those who make or execute them. From which it is inferred, 1st, That a private writing is only proof when acknowledged by the party himself, or proved by two witnesses, present at its execution, who may declare in a suit or trial at law to have seen it made or executed[42], and in no other way, L. 119. tit. 18. P. 3. 2d, That things written in memorandum books or registers (*cabreos*) do not afford proof against a third person; insomuch that if one about to die orders

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L. 119. tit. 18. P. 3.

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[41] *Palacios* observes, that L. 12. tit. 25. Lib. 4. (L. 6. tit. 23. Lib. 10. Nov. Rec.), cited in the text, does not render the original instrument or copy null, by reason of the absence of the escribano's rubric (*signo*).

[42] Either by the party himself, or by his order. *Vide* the law quoted in the text, L. 119. tit. 18. P. 3.

it to be written that a person is indebted to him ten maravedis, and his heirs prove there are twenty due, the writing is no impediment to them, L.121. tit.18. P.3. 3d, That the books of merchants, which ought to be delivered to the receiver of royal rents whenever they require them, are proof with respect to their merchandize, sales, &c.[43], Ll.23, 24, & 25. tit.19. Lib.9. Rec.[44] 4th, That the original must be produced[45] by the party, and not the copy of the writing.

L.121.tit.18. P.3.

The fifth species of proof is the evidence or manifestation of the fact (*evidencia de hecho*), or ocular or personal view or inspection (*vista de ojos*), which is made by the judge, or by his order, with respect to the limits or boundaries of towns, the pulling down houses that are in danger of falling[46], personal injuries (*injurias*), the defloration of a virgin, and other similar things, Ll.8. & 13. tit.14. P.3.

Cap.6. Of proof by evidence of the fact or personal view (vista de ojos).

Ll.8.&13.t.14.

The sixth species of proof is that by presumption or suspicion, which only takes place in the cases directed by L.8. tit.14. P.3., and those are, 1st, With regard to dominion or property; for he who proved the thing to have been his, or he to whom it hath been delivered, is presumed the owner until the contrary is proved, L.10. tit.14. P.3. 2d, There is also a presumption in favour of the heir of the debtor who hath been released from the debt, unless the creditor prove that he did it through consideration or regard alone to the debtor, L.11. tit.14. P.3. 3d, Suspicions afford no proof in criminal causes, unless where the husband hath prohibited or forbidden his wife to speak with another man, and meets them alone in a suspicious place, in which case he may call upon the judge for the infliction of the penalty of adultery, on account of vehement suspicion, L.12. tit.14. P.3.

Cap.7. Of proof by presumption or suspicion.

L.8.tit.14.P.3.

L.10.tit.14. P.3.

L.11.tit.14. P.3.

L.12.tit.14. P.3.

There is another kind of proof which is called proof by fame, or notoriety, by which the death of an absent person is proved after ten years are passed, and in addition to this public report

Cap. 8. Of proof by fame or report, or notoriety.

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[43] *Vide Wood, C. L.*, book 4. c. 2. p. 312, 313., as to proof of books of account of merchants. See also *Cur. Fil.*, Lib. 2. *Com. Ter.*, cap. 8. tit. *Libros.*

[44] Not in *Nov. Rec.*

[45] All original deeds, records, or *protocolos*, must be produced in the presence of or by the officers or persons to whose custody they are by law entrusted. *Palacios*, referring to Ll.28. tit. 22. Lib. 2., and 79. cap. 54. tit. 4. Lib. 3., and Auto 4. tit. 11. Lib. 2. Rec., (*vide* L. 15. tit. 10., and L. 11. tit. 28. Lib. 11. Nov. Rec.) states to this effect: and adds, that private parties litigating may be compelled to produce, in court, originals of deeds or writings in their possession, under a corresponding citation, or subpœna *duces tecum*, as the English lawyer would say.

[46] The word used in the text, is simply "*edificios*;" but a reference to L. 13. tit. 14. P. 3., quoted, will show the translation conveys its meaning.

or fame, the country is distant; but if another sort of proof of the propinquity of the place where they say the party died can be adduced, then the proof of mere report and fame ought not
[285] to be admitted, L.14. tit.14. P. 3. Lastly, Every thing apper-
L.14.t.14. P.3. taining to law (*derecho*) is proved by the law of the kingdom,
L.15.t.14.P.3. and not by foreign law[47], L.15. tit.14. P. 3.

Cap. 9. Of terms probatory. In order for the suit to be received for proof by any of the modes or kinds which we have explained, the judge assigns a certain term, which is called probatory, and is the space or period of time which the judge allows the parties to answer, or prove what is alleged in the suit when it hath been denied, L.1.
L.1.t.15.P.3. tit.15. P.3. Hence it is, 1st, That during this probatory term nothing new may be introduced or done in the suit, L.2. tit.15.
L.2.t.15.P.3. P.3. 2d, That this term is common to the plaintiff and de-
L.2.tit.12., L.3.tit.3. Lib.11. Nov. Rec. fendant, Ll.2. & 3. tit. 8. Lib.4. Rec.[48] 3d, That it be conformable to what the law provides; that is, in suits within the ports (*puertos*) for eighty days, and beyond or without them for
L.1.tit.10. Lib.11. Nov. Rec. one hundred and twenty, L.1. tit.6. Lib.4. Rec. 4th, That the term be peremptory, so that having expired, and publication
L.9.tit.11. Lib.11. Nov. Rec. made of the proofs, no more proofs can be received[49], L.5. tit.6. Lib.4. Rec., unless the party be entitled to the privilege of *restitution*, which he must pray to prove within fifteen days after the term; and the period for which it is to be granted must be one-half of the term that was allowed for the principal or original proof: and, in this case, the penalty ordered by the judge
L.3. tit.13. Lib.11. Nov. Rec. is deposited, L.3. tit.8. Lib.4. Rec. 5th, That if witnesses must be received who are beyond sea, six months are given, as an extraordinary term, the party swearing and naming the witnesses, and depositing the expenses; which term may be ex-

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[47] Except in suits between foreigners relating to contracts made on property in a foreign country. *Vide* L. 15. tit. 14. P. 5., quoted in the text. *Palacios* adds, to the law cited in the text, a reference to L. 31. tit. 14. P. 5., L. 15. tit. 1. P. 1., and *Auto* 2. tit. 1. Lib. 2. Rec. (*Vide* L. 11. and *notas* 2 & 3. tit. 2. Lib. 3. Nov. Rec.)

[48] L. 2. tit. 12. Lib. 11. Nov. Rec. does not appear to apply: the title of the law is "The mode of proposing exceptions (*tachas*) to witnesses, in order to their being admitted." L. 3. tit. 13. Lib. 11. Nov. Rec. does seem to support the position, although the title of this last law is "The time in which restitution *in integrum* must be demanded by privileged persons:" but *vide* on this law, being L. 3. tit. 8. Lib. 4. Rec., *Azevedo*, num. 45. *et seq.*; and also the same author, on L. 1. tit. 6. Lib. 4. Rec., (which is Ll. 1. & 3. tit. 10. Lib. 11. Nov. Rec.) num. 5. p. 131.

[49] That is, by witnesses. *Palacios* here observes, that proof, by deeds or instruments, is received under the oath prescribed by L. 1. tit. 2. Lib. 4. Rec. (L. 1. tit. 3. Lib. 11. Nov. Rec.), after the publication of proof of witnesses, until the conclusion of the cause.

tended or shortened by the judge, according to distances and circumstances, L. 1. tit. 6. Lib. 4. Rec.[50] 6th, That this ultra-marine term must be prayed together or at the same time with the ordinary term, and not afterwards, L. 3. tit. 6. Lib. 4. Rec.; nor is it granted unless the party shall prove[51] that those witnesses were at the time in the place where the fact happened, L. 2. tit. 6. Lib. 4. Rec. 7th, That these same probatory terms run in criminal causes, L. 4. tit. 10. Lib. 4. Rec.[52] 8th, That they may be granted three times: but in order for the second term to be granted, the necessity must be assigned and proved; and, for the third, it is necessary that evidence be given of the impediment which prevented the party from adducing the proof in the second term, L. 3. tit. 15. P. 3.[53]

L. 3. tit. 10. Lib. 11. Nov Rec.

L. 4. tit. 10. Lib. 11. Nov. Rec.

L. 2. tit. 10. Lib. 11. Nov. Rec.

L. 3. t. 15. P. 3.

The probatory term having expired, the party prays publication of proofs, and the allegations upon the proofs, or *bien probado*[54], are made, the witnesses being objected to (*tachandose*) within six days; and if the objections shall appear conclusive, the judge decides that they be received for proof within a peremptory term, which must be half of that assigned for the principal proof; the judge not being able to shorten nor extend it[55], nor to allow the privilege of restitution, in order to oppose objections (*tachas*) either in the first or second instance, L. 1. tit. 8. Lib. 4. Rec.; but it is to be observed, that the suit cannot be received for proof of *tachas*, after fifteen effectual days have elapsed[56], L. 3. tit. 8. Lib. 4. Rec. Finally, if there be no publication of proofs, the suit is considered as concluded, if a *traslado*[57] be given, and the opposite party accused of contumacy.

Cap. 10. Of the publication of proofs.

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L. 1. tit. 12. Lib. 11. Nov. Rec.

L. 3. tit. 13. Lib. 11. Nov. Rec.

The proof with respect to the possession of nobility consists in the evidence of its possession by the litigant party, his father and grandfather, for a series of years, in places where they have lived; and if that of the grandfather was very ancient, it will be

Cap. 11. Of proofs of nobility (hidalguía).

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[50] Also *vide* L. 2. tit. 10. Lib. 11. Nov. Rec. By L. 12. tit. 3. Lib. 9. Rec., *de las Ind.*, if the proof required be from the Indies, the term is a year and a half for New Spain, two years for Peru, and three years for the Philippines.

[51] And that within thirty days. *Vide* L. 2. tit. 10. Lib. 11. Nov. Rec., *ad fin.*

[52] Not in *Nov. Rec.*

[53] The provisions of this law, as also of L. 23. tit. 16. P. 3., with respect to the granting three terms of proof, &c., are altered by L. 1. tit. 10. Lib. 11. Nov. Rec., which fixes one peremptory term: and *vide* 1st *Cañado Jur. Civ.*, p. 96. n. 4–10.

[54] *Disceptatio causæ.*

[55] The judge may shorten but not extend it. *Palacios* (2).

[56] With respect to persons entitled to restitution *in integrum*, *vide* the law quoted in text.

[57] That is, of the petition of the party praying to the effect. *Vide* the law quoted in the text.

sufficient that the witnesses depose as to hearsay and public report. As regards the question of property, the sons or grandsons, &c. of those who have obtained letters patent (*executorias*), ought to appear within fifty days after being served with the order to contend with the fiscal of his majesty, according to what is directed with sufficient extension by Ll. 8. 14, 15, 16, 17. 27. 30. 33, 34, 35, 36, & 37. tit. 11. Lib. 2. Rec.

Ll. 4. 6, 7, 8, 9. 11. 14. 12, 13. 15, 16, & 17. tit. 27. Lib. 11. Nov. Rec.

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TITLE VIII.

OF SENTENCE.

SENTENCE is the order or decree which the judge may make with respect to any of the parties by reason of the suit which they prosecute before him, L. 1. tit. 22. P. 3. It is distinguished by interlocutory and definitive, the former is given upon a certain incidental matter of the suit, and not upon the principal demand; the latter is that which puts an end to the suit, absolving or condemning the defendant, L. 2. tit. 22. P. 3.; wherefore the first may be altered or amended before definitive sentence, and may be given in writing or verbally, L. 2. tit. 22. P. 3. The second as an object of administration, is found to be established on the following principles. 1st, That the sentence must be given by the judge. 2d, That it must be conformable to law and to the proceedings. 3d, That by it an end is put to the suit. 4th, That once given it must be published and solemnly pronounced. 5th, That having passed into a thing adjudged (*cosa juzgada*) it is firm and valid.

Cap. 1. What is sentence, and its kinds.

L. 1. tit. 22. P. 3.

L. 2. tit. 22. P. 3.

L. 2. tit. 22. P. 3.

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From the first principle it is inferred, 1st, That the sentence alone is valid which is given against a person subject to the jurisdiction of the judge, Ll. 12. & 15. tit. 22. P. 3. 2d, That it is not valid against a dead person, except in the case of treason, regarding the bad reputation of a person, &c., L. 15. tit. 22. P. 3. nor against a spiritual thing, a person under twenty-five years of age, one *non compos mentis*, &c., without their curator, except it were favourable, L. 12. tit. 22. P. 3. 3d, That if many judges be required to pass sentence or give judgment, it is not valid if one be absent, L. 17. tit. 22. and L. 4. tit. 26. P. 3. 4th, Nor if there be a disagreement with respect to acquittal, although in a criminal cause the judgment of those who acquit will avail [1], L. 18. tit. 22. P. 3. 5th, That if the sentence should turn upon the determination of quantity, that given for the lesser sum will be valid [2], because all agree upon that, L. 17. tit. 22. P. 3. 6th,

Ll. 12. & 15. tit. 22. P. 3.

L. 15. t. 22. P. 3.

L. 12. t. 22. P. 3.

L. 17. t. 22. & L. 4. t. 26. P. 3.

L. 18. t. 22. P. 3.

L. 17. t. 22. P. 3.

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[1] In favour of liberty, life, &c., but then the number in these cases must at least be equal, for the law quoted (L. 18.) says, that the plurality of opinions shall determine the question of acquittal or condemnation.

[2] This also requires an equality of votes in the judges. *Vide* L. 17. tit. 22. P. 3. quoted.

That the sentence of him who cannot be a judge, or who has not authority to give it, is not valid, L. 12. tit. 22. P. 3. 7th,
L. 12. t. 22. P. 3. That if the judge entertain a doubt with respect to the decision, he may refer the cause to the superior court, citing the parties, in which interval, if the judge who referred it hath given sen-
L. 11. t. 22. P. 3. tence, it will be valid, L. 11. tit. 22. P. 3.

From the second principle it follows, 1st, That the sentence given upon a thing not demanded or prayed for is not valid; and thus if a person demand generally a horse, and the judge
L. 16. t. 22. P. 3. points out or specifies one, it is not valid, L. 16. tit. 22. P. 3. 2d, That it must be conformable to the terms of the demand,
L. 16. t. 22. P. 3. and what is there alleged and proved, L. 16. tit. 22. P. 3.; but sentence may be given without the whole truth appearing, in the
L. 7. t. 22. P. 3. cases expressed by L. 7. tit. 22. P. 3., and in these it is to be observed that the party is condemned in costs, if he was actuated
L. 8. t. 22. P. 3. by malice[3], L. 8. tit. 22. P. 3. 3d, That the sentence against law, justice, or good manners is null, and there is no necessity
Ll. 1. & 12. t. 22. for an appeal in order to set it aside[4], Ll. 1. & 12. tit. 22. and
L. 3. t. 26. P. 3. L. 3. tit. 26. P. 3. 4th, That the judges in giving sentence regard the truth which appears from the proceedings, and not the want
L. 2. tit. 16. Lib. 11. Nov. Rec. of matters of form[5] and order of process or trial, L. 10. tit. 17. Lib. 4. Rec. 5th, That the inferior judges cannot have reporters (*relatores*); and must themselves see the proceedings, and not decide by the report of the escribano, unless the parties are
L. 3. tit. 16. Lib. 11. Nov. Rec. present, L. 27. tit. 17. Lib. 2. Rec.[6] L. 6. tit. 9. Lib. 4. Rec.

From the third principle it is deduced, 1st, That the sentence
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L. 3. t. 22. P. 3. must be certain and just, L. 3. tit. 22. P. 3.; and thus the quantity must be expressed, or at least with relation to that which is
L. 16. t. 22. P. 3. written in the proceedings, L. 16. tit. 22. P. 3. 2d, That the
L. 15. t. 22. P. 3. party must be condemned or acquitted, L. 15. tit. 22. P. 3. 3d,

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[3] The general rule as to costs is, that the vanquished party shall be condemned to pay them, unless he had just cause of litigating, the decision of which is at the discretion of the judge. *Vide*, as to costs, *Faria, add. ad. covarrub.* tom. 3. c. 27. p. 165., and particularly n. 1—11. 151. 3—10. 28. 32.; *Teatro de la Leg. de Esp. é Ind.* tit. 5. *Condenaciones; Febrero, Ad.* tom. 6. p. 518, 519. n. 372. Ll. 39. 42, 43. & 45. tit. 2. L. 10. t. 3. Ll. 3. 8, 9 & 10. tit. 22. Part. 3., and tit. 19. Lib. 11. Nov. Rec.; also *Curia Fil.* p. 44. n. 5. and p. 48. n. 25. As to costs on appeal, *vide* L. 27. tit. 23. P. 3. *Greg. Lop.* gl. 3. *ibid.* and as to requiring security for costs where plaintiff has no real property in the jurisdiction, *vide* L. 41. tit. 2. Part. 3., also *Febrero, Adic.* tom. 3. p. 238. n. 20.

[4] *Quære.*

[5] But they attend to the want of matters of substance, such as want of citation, defect of proof, &c. *Palacios* (2) to this effect.

[6] Not in *Nov. Rec. Palacios* says it should be L. 17. t. 17. Lib. 2. Rec. [L. 3. t. 16. Lib. 11. Nov. Rec.]

That it is not valid when pronounced conditionally [7], (*por condicion*), or on security (*fianzas*), L. 14. tit. 22. P. 3. 4th, That judges in giving sentence with respect to the condemnation of fruits (*frutos*), must estimate them, L. 52. tit. 5. Lib. 2., and L. 2. tit. 9. Lib. 3. Rec. L. 14. t. 22. P. 3. L. 6. tit. 16., L. 6. tit. 1. Lib. 11. Nov. Rec.

On the fourth principle, it is established, 1st, That the definitive sentence ought to be pronounced [8], on the petition of the party, within twenty days, and the interlocutory within six, under a penalty of fifty [9] *maravedis* to the exchequer (*camara*), and payment of costs [10] and damages, L. 1. tit. 17. Lib. 4. Rec. 2d, That before it is pronounced, citation should be made to the parties, to hear it within the time appointed by the judge; and if only one of them shall attend or obey, it shall be given in clear or intelligible words, and shall be read [11], L. 5. tit. 22. P. 3. 3d, That although the plaintiff be absent, the term appointed for proof having expired, the judge may pronounce definitive sentence, according to the merits of the proceedings; and if this hath not expired, he may decide upon other points and costs, but not on the demand, so that the plaintiff afterwards appearing, shall be able to institute a new demand; but without availing himself of the proofs adduced in the first suit, L. 9. tit. 22. P. 3. 4th, That if the defendant does not obey, and the term hath expired, the judge gives sentence; and although he may absolve or acquit him, he shall pay the costs for his contumacy or default, L. 10. tit. 22. P. 3. 5th, That the sentence must be written, unless it be with respect to a cause of ten thousand *maravedis*, and under, which the judge shall be allowed to pronounce verbally, Ll. 6. & 12. tit. 22. P. 3.; and with respect to the mode in which *oidors* must vote and write their sentences, L. 42. *et seq.* tit. 5. Lib. 2. Rec. treat. 6th, That the sentence must be pronounced at a time not prohibited, and in a decent or proper place, L. 12. tit. 22. P. 3. L. 1. tit. 16. Lib. 11. Nov. Rec. L. 5. tit. 22. P. 3. L. 9. tit. 22. P. 3. L. 10. t. 22. P. 3. Ll. 6. & 12. tit. 22. P. 3. L. 40. tit. 1. Lib. 5. Nov. Rec. L. 12. t. 22. P. 3.

From the fifth principle, it arises, 1st, That the sentence may

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[7] *Palacios* says, it is valid, though the judge ought not so to pronounce it, if not appealed from, and will in such case pass into the authority of a case adjudged (*cosa juzgada*). If appealed from for the reason in question, the court of appeal may revoke it on such ground. The learned professor refers to L. 14. tit. 22. P. 3. cited in the text.

[8] After the conclusion of the proceedings or suit.

[9] Fifty thousand, according to L. 1. tit. 17. Lib. 4. Rec. (L. 1. tit. 16. Lib. 11. Nov. Rec.) *Palacios* (2).

[10] Which shall be doubled (*dobladas*), according to the law quoted.

[11] When this law was enacted, the lawgiver contemplated the possibility of a person being appointed a judge who could not read, or perhaps was blind; for it says, the sentence shall be read publicly by the judge if he can read; and if he does not know how, by some other person for him.

pass into a thing adjudged within sixty days, in which term the party may allege nullity, and from the sentence given thereon, a supplication or appeal [12] may be had, but the party is not allowed to allege nullity a second time; L. 2. tit. 17. Lib. 4. Rec. declaring that in suits of fifteen hundred *maravedis*, and the law of *Toro* that from sentences which shall be given in the audiencias on revision (*á revista*), or from which there is no appeal, nullity cannot be alleged at any time; and that the nullity which shall be alleged against a sentence in a cause of first cognizance (*de vista*), or on revision (*revista*), from which there shall be a supplication in that of fifteen hundred (*de mille y quinientas*), must be treated of, or discussed together with the principal matter, L. 4. tit. 17. Lib. 4. Rec.

L.1.tit.18. Lib.11. Nov. Rec.

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L.2.tit.18. Lib. 11. Nov. Rec.

2d, That the above mentioned term having expired, the sentence cannot be revoked, unless it were given through false proofs, L. 13. tit. 22. P. 3.; in which case it may be revoked within twenty days [13], after the expiration of which it becomes firm and irrevocable, L. 12. tit. 26. P. 3.

L.13.t.22.P.3.

L.12.t.26.P.3.

3d, That the sentence is revoked for being contrary to law, or for manifest nullity, and for want of formalities prescribed by law, Ll. 3, 4, & 5. tit. 26. P. 3.

Ll.3,4,5.tit.26. P.3.

4th, That it may be set aside on account of a fine being imposed on one who is not able to pay it, L. 4. tit. 22. P. 3.

L.4.tit.22.P.3.

5th, On account of restitution being demanded; which the attornies or guardians of a minor may do, citing the opposite party; by power or force of which restitution, nothing is done or pursued in the cause: and if the suit commenced while the person was a minor, and sentence hath been given after his majority, restitution does not take place, L. 2. tit. 25. P. 3. This must be demanded before the judge who gave the sentence, or his superior, shewing that there was error, and [14] that new proofs have been discovered, L. 3. tit. 25. P. 3.; and it must be granted, although the curators pursue the cause, if they did not appeal, L. 1. tit. 25. P. 3. But there is no restitution against sentences, from which no supplication lies, L. 11. tit. 17. Lib. 4. Rec.

L.2.tit.25.P.3.

L.3.tit.25.P.3.

L.1.tit.25.P.3.
L.5.tit.13.
Lib.11. Nov. Rec.

6th, That the defendant being acquitted and declared free from the demand, this sentence cannot be revoked, unless a right to do so hath been reserved, L. 9. tit. 22. P. 3. [15]

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[12] As to appeal and the rules in respect thereto, see Append. T & Z, also Q.

[13] Read years.

[14] *Or*, according to *Palacios* and to L. 3. tit. 25. P. 3. cited in the text.

[15] This law does not apply. See the law cited which relates to the case of nonsuit, and regulates the payment of costs by plaintiff in bringing new suit or action. *Palacios* here observes that it is not intelligible whether the text means the demand or the sentence cannot be revoked. He also refers to the law there cited.

Hence it follows, 7th, That no one can abrogate or reform the sentence, but the king; and if the judge has not decreed with respect to the costs and fruits, he may correct it within the day, and not afterwards, L. 3. tit. 21. [16] P. 3. L. 3. tit. 22. P. 3.

8th, That the sentence of arbitrators given against that of the judge, may be revoked, L. 4. tit. 22. Lib. 4. Rec. [17]

9th, That the cause of nullity against the sentence must be conducted before the judge who gave it, although it be appealed from, [18] if the right of opposing the said exception hath been reserved to the party, L. 2. tit. 26. P. 3. L. 2. tit. 26. P. 3.

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Cap. 2. Of he execution of the sentence.

The sentence then having passed into a thing adjudged, 1st, It ought to be carried into execution within ten days, if it is with respect to a debt; and if with respect to dominion or in a criminal matter, without delay, [19] L. 5. tit. 27. P. 3., so that no one can impede its execution under pain of losing his property, L. 8. tit. 17. Lib. 4. Rec. L. 5. tit. 27. P. 3. L. 2. tit. 17. Lib. 11. Nov. Rec.

2d, The same persons who gave the sentence, or their superiors, ought to order its fulfilment, and if the property was situate in another part, the fulfilment belongs to the judge of that jurisdiction, L. 1. tit. 17. Lib. 4. Rec. L. 1. tit. 16. Lib. 11. Nov. Rec.

3d, The sentence confirmed by the superior judge must be executed by the judge who gave it, L. 6. tit. 17. Lib. 4. Rec. L. 1. tit. 17. Lib. 11. Nov. Rec.

4th, If the condemnation comprehends the payment or performance of the entire debt or thing by many or several persons, it is executed on the property of either of them, and if it does not so, the execution must be levied on the property of all proportionably (*por partes*), L. 4. tit. 17. Lib. 4. Rec. L. 2. tit. 18. Lib. 11. Nov. Rec.

5th, The sentence given by arbitrators (*arbitros*), must be executed by the judge before whom execution shall be prayed, the judge acknowledging the legitimacy thereof, L. 4. tit. 21. Lib. 4. Rec. L. 4. tit. 17. Lib. 11. Nov. Rec.

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[16] Tit. 22. *Palacios* (1).

[17] This law is not inserted in the *Nov. Rec.* *Palacios* says, L. 4. t. 21. Lib. 4. (L. 4. t. 17. Lib. 11. Nov. Rec.) is meant.

[18] *Palacios* says, it must be before the judge of appeal, unless as is stated in the text, the right should have been reserved to argue it before the judge who pronounced it; and that it is stated by *Canada, Inst. Prac. Juic. Civ.* P. 2. C. 1. to be most suitable for all parties to submit the nullity and the appeal together as principals, in order that they may be discussed and decided at the same time in the superior or appeal court. *Vide* Order in Council, 16th September, 1822, cl. 5. Appendix, appointing a new court for the trial of civil matters at Trinidad, adopting this course of procedure. App. Q.

[19] *Palacios* says, the judge may enlarge the time. He refers to L. 17. tit. 3. P. 3. L. 5. tit. 27. P. 3. and L. 31. *D. de re judicat.* and cap. 15. *extra eodem*, tit.

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TITLE IX.

OF APPEAL AND SUPPLICATION.

Cap. 1. Of appeal, and the principles on which it is founded.

In order that parties may not receive prejudice through the malice or ignorance of judges, the remedy of appeal [1] hath been invented, which is the complaint that any of the parties prefers against the sentence or decision given against him, calling for and having recourse to the redress of the superior judge, L. 1. tit. 23. P. 3. On the nature of appeal, three principles are founded; 1st, That it must be interposed from an inferior to a superior judge. 2d, That those who feel themselves aggrieved, may appeal. 3d, That it must be lawfully interposed, conducted, and prosecuted. From the first principle it is inferred, 1st, That an appeal may be made from any of the ordinary and delegated judges, but not from the supreme tribunals, by reason of their excellence and superiority, L. 17. tit. 23. P. 3. Thus, therefore, according to our law, the appeal is from the ordinary judges to the audiences or chanceries of the districts in which they are established, L. 12. tit. 5. Lib. 2. Rec., and from the ordinary judges of towns and incorporated places (*lugares de las ordenes*) to the corporate body or council thereof. Those which are interposed from the governor or lieutenant of Madrid, being of the mere amount of 1100 *maravedis*, go to the chamber or hall of appeals of the alcaldes, and may be carried to the council, if it should be judged fit, *Aut.* 3. tit. 18. Lib. 4.

L. 1. tit. 23. P. 3.

L. 17. t. 23. P. 3.

L. 10. tit. 1. Lib. 5. Nov. Rec.

L. 21. tit. 20. Lib. 11. Nov. Rec.

Lastly, appeals in causes of ten thousand *maravedis* and under, in places where such custom shall exist, are carried to the *cabildo* of the place, who ought to appoint two regidors, in order that with the judge from whom the appeal is made, they may determine the cause within thirty days; so that these having expired, they have, notwithstanding, ten days more to decide according to the tenor of L. 7. tit. 18. Lib. 4. Rec.

L. 8. tit. 20. Lib. 11. Nov. Rec.

2d, That the appeal must be interposed from the inferior judge to the immediate superior judge, or also before the superior tribunal, even in parts where there are lordships (*tierras de señorio*), Ll. 14. & 18. tit. 18. Lib. 4. L. 1. tit. 1. Lib. 4. Rec.,

Ll. 7 & 8. t. 20. Lib. 11. & L. 1. tit. 1. Lib. 4. Nov. Rec.

[1] See Append. T & Z.

although the appeal from arbitrators (*arbitros*) may be interposed before the inferior judge, or even before the prince, according to L. 4. tit. 21. Lib. 8. Rec. [2], which in this part alters L. 17. tit. 21. Lib. 8. Rec. [3]

3d, That the appeal from the delegated judge goes to the one delegating him, L. 21. tit. 23. P. 3. [294] L. 21. t. 23. P. 3.

From the second principle, it is inferred, 1st, That all may appeal from the sentence who shall find themselves aggrieved by it, and those to whom prejudice results from it, and the guardian for his ward, &c., Ll. 2, 3, & 4. tit. 23. P. 3. L. 2, 3, & 4. t. 23. P. 3.

2d, That the appeal interposed by one of the co-parties to a suit profiteth the others comprehended in the same sentence, L. 5. tit. 23. P. 3. L 5. tit. 23. P. 3.

3d, That the person in whose favour the sentence has been given, may appeal if he considers that it is not so complete and favourable as it should be, L. 9. tit. 23. P. 3. L. 9. tit. 23. P. 3.

4th, That if the sentence in a civil cause contains different divisions or points (*capitulos*), the appeal may be made from some of them leaving the others, and the like has place with respect to a sentence given in a criminal cause[4], which may comprehend different offences and penalties, L. 14. tit. 23. P. 3. L. 14. t. 23. P. 3.

5th, That an appeal may be interposed only from a definitive sentence, but not from an interlocutory one, unless it have the force of a definitive one, or also cause an irreparable injury and prejudice in the principal suit, such as the sentence for torture, &c., L. 13. tit. 23. P. 3. and L. 3. tit. 18. Lib. 4. Rec. L. 13. t. 23. P. 3. L. 23. tit. 20. Lib. 11. Nov. Rec.

The third principle embraces the following dispositions, according to Spanish jurisprudence. 1st, That in suits of four hundred [5] *maravedis*, and under, there is no appeal [6], L. 19. tit. 9. Lib. 3. Rec. L. 8. tit. 3. Lib. 11. Nov. Rec. 2d, That it is not granted with respect to a thing which cannot be kept or preserved, and which does not admit an appeal, *ex gr.* the appointment of a guardian, &c., L. 6. tit. 18. Lib. 4. Rec. L. 22. tit. 20. Lib 11. Nov. Rec.

3d, That the judge who shall deny or refuse it [7], shall pay thirty thousand *maravedis*, L. 13. tit. 18. Lib. 4. Rec. L. 24. tit. 20. Lib. 11. Nov. Rec.

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[2] This law is not inserted in *Nov. Rec. Palacios* says, L. 4. tit. 21. Lib. 4. Rec. (L. 4. tit. 17. Lib. 11. Nov. Rec.) is meant.

[3] This law is not in *Nov. Rec.*

[4] See Append. F.

[5] 1000 maravedis by L. 8. tit. 3. Lib. 11. Nov. Rec.

[6] The same principle governs in summary decisions by the Complaint Court in Trinidad, in suits amounting to 1000 dollars. *Vide* Append. V, W, X.

[7] Except in suits relating to royal rents or revenues. *Vide* L. 24. tit. 20. Lib. 11. Nov. Rec.

4th, That the appeal may be interposed within five days after notification of the sentence, for otherwise it passes into or becomes a thing adjudged (*cosa juzgada*), L. 1. tit. 18. Lib. 4 Recop.; but this rule admits of some exceptions. 1st, That minors, or those entitled to the same consideration or privilege, *ex gr.* the fisc, churches, corporations, &c., claiming restitution [9], may appeal until four years, Ll. 1. 8, 9 & 10. tit. 19. P. 6.

L. 1. tit. 20. [8] Lib. 11. Nov.

Ll. 1, 8, 9, 10 tit. 19. P. 6.

2d, That the term for appealing does not run against those occupied in the service of the king, or those who are in captivity, on a pilgrimage, at school or the university, or banished and detained by force [10], until the impediment hath ceased or been removed, Ll. 10, 11, & 12. tit. 23. P. 3.

Ll. 10, 11, & 12. tit. 23. P. 3.

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3d, That from the sentence of arbitrators the appeal must be made, or reduction prayed within ten days [11], L. 23. tit. 4. P. 3.

L. 23. t. 4. P. 3.

4th, That immediately after the notification of the sentence, the appeal may be made by word or *vivâ voce*; but if any time hath elapsed, it must be made in writing; expressing the cause of appeal or injury, the sentence from, to, and against whom the appeal is made, and this before the judge who hath given the sentence; and, in his absence, before the escribano and witnesses, L. 22. tit. 23. P. 3.

L. 22. t. 23. P. 3.

6th, That the appeal has two effects; the one suspensive [12], (*suspensivo*), and the other devolutive (*devolutivo*): the first suspends the jurisdiction of the judge *à quo*; the second devolves the cognizance of the cause to the superior court; and thus an

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[8] And by this law the day of notification was included in the five days: but the proclamation of 19th June, 1813, App. T. hath extended this period to fourteen days after sentence, which allows appeals in all civil causes from the inferior courts to the governor, provided the sum in dispute exceeds 200*l.* sterling; and from the sentence of the governor to H. M. in his privy council in like causes, where the sum in dispute exceeds 500*l.* sterling.

[9] Restitution is the reducing a thing into its first state, where an appeal has been neglected. *Vide Wood, C. L.* Ch. 3. book 4. p. 321. and L. 1. tit. 19. P. 6.; and this privilege extends to four years after the minor hath attained to majority. *Vide* L. 8. tit. 19. P. 6.

[10] There are causes of impediment which will entitle the party to this benefit; among them, sickness, &c. *Vide* L. 12. tit. 23. P. 3. But this benefit is granted with some qualification or limitation, as in the case where there is a proper representative of the party under power of attorney. *Vide* Ll. 10 & 11. tit. 23. P. 3. quoted in the text.

[11] *Vide* L. 4. tit. 17. Lib. 11. Nov. Rec.

[12] The suspensive effect is the cognizance which the superior court takes of the sentence or decree of the judge *à quo*, or inferior court, suspending the execution of it. The devolutive is the cognizance which the superior court takes of the decree or sentence of the inferior, without suspending the execution of it. *Vide* also Vol. 7. *Febr. Adic.* Part 2. Lib. 3. c. 1. § 13. p. 250. n. 189. *Paz, Prax.* tom. 1. p. 6. n. 11. & 12. p. 261.

appeal interposed in a case prohibited by law, only produces the second effect, and not the first; for which reason the judge *à quo*, may, without exceeding his authority, proceed to the execution of the sentence, *Hevia, Cur. Filip.* p. 5. § 1. *n.* 19. & 20.

7th, That the appellant is bound to present himself in the state of appeal before the superior judge, and prosecute it within the time appointed by the judge *à quo*, or inferior court; and none being appointed by him, the period shall be forty days[13] for beyond the port or city (*puertos*), and if within it, fifteen days; in which holy days, or days on which the tribunals are closed (*dias feriados*) are reckoned, Ll. 23. & 24. tit. 23. P. 3. Ll. 2. & 15. tit. 18. Lib. 4. Rec.; and not doing so, the appeal remains deserted, and the sentence appealed from shall be valid [14], L. 23. tit. 23. P. 3. Ll. 23. & 24. t. 23. P. 3. L. 3 & 4. t. 20. Lib. 11. Nov. Rec.

8th, That it is sufficient for the appellant to present himself with a certificate (*testimonio*) of the appeal, L. 10. tit. 18. Lib. 4. Rec., although L. 2. tit. 18. Lib. 4. Rec. says, that it must be with the whole process [15]; and this certificate must be set forth with all precision and clearness, L. 10. tit. 18. Lib. 4. Rec. L. 18. tit. 20. Lib. 11. Nov. Rec. L. 3. tit. 20. Lib. 11. Nov. Rec.

9th, That on presenting the certificate, an order or warrant (*compulsorio*) is given to transcribe a copy of the process at the cost of the appellant, *Pareja*, tit. 3. resol. 1. *á* n. 29. *al* 42., except in some cases, as in appeals to the cabildo, L. 7. tit. 18. Lib. 4. Rec., in that of L. 16. tit. 8. Lib. 2. Rec., in those of the alcaldes, and in that of L. 28. tit. 20. Lib. 2. Rec. L. 18. tit. 20. Lib. 11. Nov. Rec. L. 8. tit. 20. Lib. 11. Nov. Rec. L. 2 tit. 29. Lib 4. Nov. Rec.

10th, That the appellant must pursue and finish the cause of appeal, or second instance, within a year from the time he hath appealed, L. 11. tit. 18. Lib. 4. Rec.[16] L. 18. tit. 24. Lib. 5. Nov. Rec.

11th, That the appeal being interposed, all that has been L. 5. tit. 20. Lib. 11. Nov. Rec.

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[13] The anterior law, *viz.* L. 23. tit. 23. P. 3. had made it two months.

[14] *Vide* to the same effect, L. 3. tit. 20. Lib. 11. Nov. Rec.

[15] The fifth rule established by Court of Appeal, Trinidad, 16th Feb. 1814. directs "that in all civil causes of appeal where the same may be granted in the devolutive effect, the party appellant shall lodge in the tribunals an authenticated copy of the proceedings; and the sixth rule, "That in all civil causes of appeal in the suspensive effect, the original autos (or proceedings) will be delivered by the escribano of the respective ordinary tribunals to the escribano of the tribunal of appeal, the former certifying on the last page of the autos the whole number of pages contained therein. *Vide* Append. Z & T.

[16] The year limited by this law for prosecuting and finishing the appeal, does not interfere with the provision of L. 3. tit. 20. Lib. 11. Nov. Rec., which fixes the period for the presentation of the appeal to the superior court, and this last period is included in or reckoned as part of the year allowed by the law quoted in the text for the prosecution and completion of the appeal *Vide Azevedo* on L. 11. tit. 18. Lib. 4. Rec. n. 3.

Ll. 26. & 27. t. 23. P. 3.

done by the judge *à quo* is revoked, and undone as null[17], Ll. 26. & 27. tit. 23. P. 3.

12th, That in the second instance the parties may allege that which hath not been alleged, and give proof of that which hath

296] not been proved; but proof is not admitted upon the same points, or those directly opposite to those adduced in the first

L. 6. tit. 10. Lib. 11. Nov. Rec.

instance, L. 4. tit. 9. Lib. 5. Rec.; unless it be admitted by way of restitution; or if both parties themselves offer to prove; or if the witnesses presented in the first instance were not examined[18], *Cur. Filip.* p. 5. § 3. n. 4.

13th, That proof is received with respect to new exceptions which may be alleged in the second instance, and those which were not preferred in the first instance with due solemnity; and likewise those which, after publication of proofs made, the party shall swear have recently or since come to his knowledge; for which purpose half[19] of the term assigned in the cause is granted him, and restitution is also granted to those who are entitled to

L. 7. tit. 10., & L. 4. tit. 13. Lib. 11. Nov. Rec.

it, if they pray for it within fifteen days after publication, L. 5. tit. 9. Lib. 4. Rec.

14th, That the appellant must present his instruments at the same time with his appeal (*agravios*), in the same manner as is laid down with respect to the first instance; and the same is understood with respect to the respondent, except he hath dis-

Ll. 4, 5, & 6. tit. 21. Lib. 11. Nov. Rec.

covered them recently or since, Ll. 1. 2. & 3. tit. 9. Lib. 4. Rec.

15th, That, in the second instance, in order to conclude the suit, in whatever stage, only one petition of contumacy (*rebeldia*)

L. 2. tit. 15. Lib. 11. Nov. Rec.

is required, L. 51. tit. 4. Lib. 2. Rec.

16th, That if the party who hath felt himself aggrieved by the sentence, shall prove that he dared not appeal through great fear, or on account of the judge, the superior court ought to

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[17] All that is implied is, that the inferior judge shall do nothing new in the cause, nor with respect to that on which the sentence hath been given, pending the appeal. *Vide* L. 26. tit. 23. P. 3. and L. 27. *ibid.* does not seem to apply to the particular position in the text.

[18] The broad rule laid down in L. 6. tit. 10. Lib. 11. Nov. Rec., excludes the admission of proof by witnesses upon the same points, or those directly opposite, upon which they have been adduced in the first instance, and limits the new proof on such, in the second instance, to authentic instruments or the confession of the party. By the law of the Partidas, L. 27. tit. 23. P. 3., new witnesses in such case were admitted, but this is altered by the subsequent law of the *Nov. Rec.* quoted.

[19] As regards this, L. 7. tit. 10. Lib. 11. Nov. Rec. says, the term to be allowed shall be arbitrary, or at the discretion of the Court of Appeal, provided it does not exceed the term which was granted in the first instance.

determine the cause conformably to justice, Ll. 23.[20] & 27. tit. 23. P. 3. Ll. 23. & 27. tit. 23. P. 3.

Cap. 2. Of recourse against ecclesiastical judicial grievances in causes of appeal (Del recurso de fuerza en causas de apelacion).

It often happens that in causes which are depending before ecclesiastical judges, they deny or refuse appeals lawfully interposed; and as it belongs to the prince to repeal or remedy injuries (*fuerzas*) done by ecclesiasticks, the party aggrieved may apply to the royal tribunals by way of protection, in order that, on sight of the proceedings, it may be declared whether the ecclesiastical judge has committed or not an injury (*fuerza*) in denying the appeal. This cognizance in no manner violates or infringes on ecclesiastical privileges; for, besides being extra-judicial, without touching on the subject of the cause, it is founded on a defence or protection which does not require jurisdiction, as *Salgado*[21], p. 1. cap. 1. completely proves.

The practice with respect to this recourse is reduced to this, that the complainant presents himself before the royal tribunal [297] in the limits or jurisdiction of which the judge is who denies the appeal, L. 39. tit. 5. Lib. 2. Rec.; and it dispatches it's usual order (*carta ordinaria*), exhorting the judge to defer to the appeal; but if he will not consent to do so, it issues a second order (*sobre carta*), commanding him to bring the original process; and if by that it shall appear that the appeal hath been lawfully interposed, the injury is redressed (*se alza la fuerza*); and it is decreed that the ecclesiastical judge restore to its original state all that has been done after the interposition of the appeal: but if it shall be perceived that there was no ground for the appeal, it is declared that no injury has been done, and the process is returned, with condemnation of costs, if the royal court shall see fit, in order that the judge may proceed to the execution of the sentence, L. 26. tit. 5. Lib. 2. Rec.[22] L. 4. tit. 2. Lib. 2. Nov. Rec. L. 28. tit. 1. Lib. 5. Nov. Rec.

Upon which it is worthy to be observed, 1st, That this recourse is not allowed in causes relating to the crusade (*cruzada*), to subsidy (*subsidio*), and to the exemption from payment of tribute (*escusado*), Ll. 8. & 9. tit. 10. Lib. 1. Rec., neither in those of the inquisition, *Salgado*, Part. 1. cap. 2. § 5. n. 5., nor in those belonging to the conservators (*conservadores*) of the university of Salamanca, L. 18. tit. 7. Lib. 1. Rec. Ll. 2. & 1. t. 11. Lib. 2. Nov. Rec.

2d, That the processes of visits of friars and monks ought not to be carried to the audiences, L. 40. tit. 5. Lib. 2. Rec. L. 2. tit. 6. Lib. 8. Nov. Rec. L. 9. tit. 2. Lib. 2. Nov. Rec.

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[20] L. 23. tit. 27. P. 3. does not *bear* upon the point; but L. 27. *ibid.*, quoted, fully supports the position in the text.

[21] *De Regiâ protectione.*

[22] *Palacios* says, L. 36. tit. 5. Lib. 2. Rec. (L. 2. tit. 2. Lib. 2. Nov. Rec.)

3d, That this recourse or remedy belongs equally to the clergy and to the laity, as being founded on natural defence, *Salgado*, P.1. cap.2. *á* n. 49. *al* 63.

4th, That the consideration (*vista*) of the process in the royal tribunals is suspended until, by virtue of the second order or decree (*sobre carta*), the ecclesiastical judge may grant absolution, for which effect a third decree, or letter of request (*sobre carta de ruego*) is issued; for, if there be no evidence of the wrong, he cannot be compelled to repeal or remove the censures, *Salgado*, *ibid.* *á* n.150. *al* 179.

5th, That the decrees of the tribunals on these applications are of five sorts: 1st, That by which it is declared that the ecclesiastick is guilty of the wrong. 2d, That by which the contrary is declared. 3d, Conditional, declaring that he has done the wrong in not hearing the party, or not admitting the proofs and exceptions, of which *Salgado*, P.1. c. 5. treats. 4th, When it is said that the process does not come in the order and due term (*términos debidos*). 5th, That by which it is declared that the process does not come in its proper state (*en estado*), which is, when it appears that the ordinary decree (*provision*) hath not been intimated to the judge. 6th, That the restoration or reposition (*reposicion*), which must be performed
[298] by the ecclesiasticks, must be according to the excess (*atentado*), whether it be by word or act; it being well understood that he is bound only to replace or amend what he may have done contrary to law, *Salgado*, P.1. cap. 2. *á* n. 2. *al* 13. & *á* n. 22. *al* 43.

7th, That from the restoration or amendment (*reposicion*), made by the ecclesiastick in virtue of the royal decree, there may be no appeal, L. 35. tit. 5. Lib. 2. Rec.

L.7.tit.2. Lib.2. Nov. Rec.

8th, That the not allowing the appeal, without the concurrence of any other wrong (*atentado*), is sufficient to constitute the commission of the grievance (*fuerza*) by the ecclesiastick, and to institute or try the recourse (*el recurso*), *Salgado*, P.1. cap. 6. *á.* n. 1. *al* 37.

9th, That what the ecclesiastick shall do after the ordinary decree is made known, and pending the recourse, is not an excess of his power (*atentado*); for this recourse being an extra-judicial act, it has no suspensive effect, *Salgado*, P.1. cap. 7.

10th, That the appeal interposed on the contingency (*baxo condicion*), that the judge may cause such or such an injury (*agravio*), is of no force, although the injury may be proved, because it was null from its commencement; wherefore the ecclesi-

astick does not commit excess in not allowing the like appeals, *Salgado*, P. 2. cap. 2. n. 25, 26, & 27.

As in the cognizance of the plea of wrong, the canon law must be attended to, it is foreign to our object, and to the end of these institutes, to specify the individual cases in which the not allowing the appeal constitutes grievance (*fuerza*) in the ecclesiastick; the which may be seen fully treated of in *Salgado*, P. 2. from cap. 5. *ad fin.* & in Pp. 3. & 4.

Cap. 3. Of the first supplication.

Although there is no appeal from the supreme tribunals, a supplication may be preferred before them; and this supplication is the pure effect of grace and favour of the prince, Tit. 24. P. 3., and is founded on the following rules: Tit. 24. P. 3.

1st, That against the sentence delivered (*en vista de*) in the audiences, which confirms two correspondent or conformable sentences in succession given by inferior judges, a supplication is not admitted, for against three conformable sentences an appeal does not lie, L. 5. tit. 17. & L. 2. tit. 19. Lib. 4. Rec. L. 25. tit. 23. P. 3.

L. 2. tit. 21. Lib. 11. Nov. Rec. L. 25. t. 23. P. 3.

2d, That if two sentences of inferior courts are revoked in the *audiencia* a supplication lies, but not from the sentence confirmatory or revocatory, which shall be given on it upon revision (*revista*), L. 3. tit. 19. Lib. 4. Rec.

L. 17. tit. 21. Lib. 11. Nov. Rec.

3d, That in suits commenced in the audiences, a supplication is admitted from the first sentence on the first trial (*de vista*), but not from that on revision or the new trial, L. 2. tit. 19. Lib. 4. Rec.

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L. 2. tit. 21. Lib. 11. Nov. Rec.

4th, That supplication is not admitted from the decree, by which the alleged excess of the ecclesiastick is decreed on, nor yet from that which the audiences shall pronounce upon the question of their competency as judges, L. 4. tit. 5. & L. 9. tit. 19. Lib. 4. Rec. [23]

L. 7. tit. 21. Lib. 11. Nov. Rec.

5th, That from the sentence confirmatory of that of arbitrators there can be no supplication; but otherwise, if revocatory thereof, the execution levied on the sentence of the arbitrators remaining in force [24], L. 4. tit. 21. Lib. 4. Rec.

L. 4. tit. 17. Lib. 11. Nov. Rec.

6th, That from the sentences given in council in the stage of appeal from the alcaldes of court (*de corte*), there is no supplication, L. 10. tit. 4. Lib. 2. Rec.; nor in causes of *residencia*,

L. 13. tit. 20. Lib. 11. Nov. Rec.

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[23] This last law is not inserted in the *Nov. Rec.*

[24] That is, until the sentence on revision be given. *Vide* the law quoted in the text.

L. 9. tit. 21. Lib. 11. Nov. Rec. L. 9. & 10. tit. 21. Lib. 11. Nov. Rec.

L. 52. tit. 4. Lib. 2. Rec., except in the cases [25] laid down in Ll. 2. & 3. tit. 19. Lib. 4. Rec., and others which the laws of the same title point out; nor from those in which the *oidores* declare as sufficient or not [26] the securities which the party shall give of 1500 *doblas* [27], who is desirous to make his supplication.

8th, That from an interlocutory sentence [28], the supplication must be preferred within three days without any restitution; and from a definitive one within ten days from that of the notification of the sentence, Ll. 1. & 4. tit. 19. Lib. 4. Rec.

Ll. 1 & 3. tit. 21. Lib. 11. Nov. Rec.

9th, That the suit being determined by supplication, the party may be no further heard [29], L. 3. tit. 19. Lib. 4. Rec.

L. 17. tit. 21. Lib. 11. Nov. Rec.

Ch. 4. Of the second supplication.

The second supplication is, a revision of the process which the prince grants in certain causes, for which the party has no other remedy against the injury (*agravio*), received in the second instance *Maldonado, de secund. supplicat.* tit. 1. q. 1. n. 1. It is a remedy established by the law of Segovia. [30] All belonging to this one peculiar remedy is governed by the following principles:

1st, That this second supplication must be interposed before the royal person from definitive sentences of revision (*revista*), and not from interlocutory, although they have the force of such given by the councils and audiences in causes begun or originating there by new demand and not by way of appeal, restitution, nor any other manner, Ll. 1. 6. & 7. tit. 20. Lib. 4. Rec. *Maldonado, ibid.* tit. 2. & 4. quæst. 1. Whence we infer that the second supplication has place in causes which might be treated of in the council *de hacienda*, among private individuals (*particulares*), *Maldonado*, tit. 2. q. 7. n. 13., but not in causes regarding the royal rents, as laid down in L. 4. tit. 2. Lib. 9. Rec.; likewise, that this remedy does not appertain to causes begun before the alcaldes *de corte*, because they are considered as ordinary judges, *Maldonado*, tit. 2. q. 3.

Ll. 1. 4. & 14. tit. 22. Lib. 11. Nov. Rec.

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Nota 2. tit. 10. Lib. 6. & L. 17. tit. 22. Lib. 11. Nov. Rec.

2d, A second supplication is not admitted in criminal causes

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[25] Which are two: one, when the sentence is perpetual privation of the office of the judge complained of; and the other, when it condemns to corporal punishment.

[26] This translation of the text, though not literal, is supported by the law therein quoted, and appears to be the meaning thereof.

[27] An old Spanish gold coin, varying in value at different times: at one time, a *dobla* was 490 *maravedis de Plata*, or fourteen *reals* and fourteen *maravedis de Plata*; at another, only 365 *maravedis*.

[28] Having the force of a definitive sentence is understood. *Palacios* (4).

[29] Unless in the case where a second supplication is allowed. *Palacios*, referring to L. 3. tit. 19. Lib. 4., cited (L. 17. tit. 21. Lib. 11. Nov. Rec.).

[30] Ll. 1. & 2. tit. 21. Lib. 11. Nov. Rec.

with regard to the penalty, but it is in regard to the interest of the party, Ll. 3. & 11. tit. 20. Lib. 4. Rec. Ll. 10. & 13. tit. 22. Lib. 11. Nov. Rec.

3d, They must be arduous and important causes; so that if the question treated of shall relate to property or dominion (*propriedad*), its worth and value must be three thousand *doblas* of gold *de cabeza* [31]; and if the cause related to possession, the value of the property must amount to 6000 doblas, Ll. 1. & 9. tit. 20. Lib. 4. Rec.; but besides this it is required that the question treated of be principally that of possession, and that there be not two conformable sentences regarding it, L. 9. tit. 20. Lib. 4. Rec. But in order to estimate this value, attention must be had to the sentence condemnatory, and not to the time of the demand [32], as *Maldonado*, Tit. 3. q. 1. *á* n. 15. *al fin*, proves. Ll. 1. & 6. t. 22. Lib. 11. Nov. Rec. L. 6. tit. 22. Lib. 11. Nov. Rec.

4th, The second supplication must be interposed within twenty days from the period that the sentence hath been notified; and this term having elapsed, there is no restitution, Ll. 1. & 4. tit. 20. Lib. 4. Rec. Ll. 1. & 2. t. 22. Lib. 11. Nov. Rec.

5th, He who interposes it must be obliged to give security to pay 1500 *doblas*, if the sentence shall be confirmed, the which are applied, in third parts, to the exchequer (*camara*), to the *oidores* who gave the sentence of revision (*revista*), and to the party who shall succeed, L. 1. tit. 20. Lib. 4. Rec. *Maldonado*, tit. 6. q. 14. num. 5. With respect to the form and deposit of the 1500 *doblas*, Ll. 6. & 7. tit. 20. Lib. 4. Rec. speak. If the person who shall prefer the supplication should be poor (that is, whose property does not amount to the value of three thousand *maravedis*), Ll. 20. 21. & 25. tit. 12. Lib. 1. Rec., it shall be sufficient that he give security on oath [33], to pay them when he shall arrive at better fortune, *Salg. labyr. cred.* Part. 1. cap. *fin.* But the fiscal being the supplicant, he ought only to give security in 1000 *doblas*, L. 10. tit. 20. Lib. 4. Rec. L. 1. tit. 22. Lib. 11. Nov. Rec. Ll. 1 & 2. t. 23. Lib. 11. Nov. Rec. Ll. 20 & 21. tit. 38. Lib. 12. & L. 7. tit. 19. Lib. 5. Nov. Rec. L. 12. tit. 22. Lib. 11. Nov. Rec.

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[31] Each *dobla* of gold *de cabeza*, was worth fifty-one *reales* and a half *de vellon* *: as appears from what is said by *Cantos*, in his *Escrutinio de Monedas*, cap. 15. *á* num. 16 *al* 20. *Note in the Text.*

[32] At the time of the demand or action, and not of the sentence, allege *Paz, Prax.* tom. 1. p. 7. c. *un.* n. 75., and *Curia Filip.* p. 5. § 5. n. 5. *Palacios* (2).

[33] *Caucion juratoria. Palacios* observes, that the laws cited in the text do not specify any amount of property.

* *Palacios* observes, that this calculation does not agree with what is stated by *Maldonado de Secund. Sup.* tit. 9. quæst. 12. n. 12, 13, 14, and by *Dominguez, Illus. Cur. Filip.* tom. 1. part. 5. § 5. n. 5: that according to the calculation of these two last, the 3000 *doblas* are not worth more than 42,797 *reales*.

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6th. The party supplicant may abandon this remedy within three months after he hath preferred the supplication without incurring the penalty, but not afterwards, so that the judges have not the power to absolve him from it, L. 4. tit. 20. Lib. 4. Rec.

L. 2. tit. 22. Lib. 11. Nov. Rec.

7th, No other proofs nor writings (*escritos*) are admitted [34], L. 2. tit. 20. Lib. 4. Rec.

L. 7. tit. 22. Lib. 11. Nov. Rec.

8th, The nullities of the sentences of revision (*revista*) must be treated of together with the principal cause, L. 4. tit. 20. Lib. 4. Rec.

L. 2. tit. 22. Lib. 11. Nov. Rec.

9th, The supplicant must present himself before the royal person, within forty days from the period that he hath preferred the supplication, L. 4. tit. 20. Lib. 4. Rec., and immediately the king remits the cause to five of the council, in order that they may determine it, provided that if any should die or be removed, another must be named in his place, *Au.* 2. tit. 20, Lib. 4. Rec. [35], which alters Ll. 1. & 11. tit. 20. Lib. 4. Rec.

L. 2. tit. 22. Lib. 11. Nov. Rec.

L. 13. tit. 22. Lib. 11. Nov. Rec.

10th, Those who were judges during the provisional possession of the estate (*de tenuta*) cannot be so in the second supplication, *Au.* 3. tit. 20. Lib. 4. Rec. [36]

11th, If this supplication has not place by defect of the cause or by lapse of the term, the king in virtue of the sovereign power may grant it, L. 4. tit. 24. P. 3. *Maldonado*, tit. 6. quæst. 2.

L. 4. tit. 24. P. 3.

12th, The supplicant is not excused from paying the penalty of 1500 *doblas*, if the sentence of revision (*revista*) hath been confirmed in the principal, although it be revoked or amended in any necessary point, also if this be of itself of so great value as to have admitted of a supplication, L. 3. tit. 20. Lib. 4. Rec.

L. 10. tit. 22. Lib. 11. Nov. Rec.

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[34] *Palacios* says, that *Cañada, Inst.* P. 3. cap. 4. n. 38., states, he had frequently seen written instruments admitted in the council, on the party swearing and proving they had recently come to his knowledge, and that he could not have obtained the proof before, notwithstanding his diligence, provided they manifested the right and justice of the party.

[35] Not in *Nov. Rec.*

[36] Not in *Nov. Rec.*

TITLE X.

[302]

OF THE EXECUTIVE PROCESS OR MODE OF PROCEEDING (*VIA EXECUTIVA*).

Cap. 1. Its definition.

THE executive process is that by which the cases or instruments which produce prompt execution (*traen aparejada execucion*) are carried into effect, *Cur. Filip.* P. 2. § 1. n. 1.; and it having been introduced in favour of the plaintiff, although he shall have instituted his suit in the ordinary process, he may pursue the executive, which is not contrary or adverse, on paying the costs, as is inferred from L. 3. tit. 11. Lib. 4. Rec.; and, on the contrary, the executive process may be converted into the ordinary, when the justice of the plaintiff is manifest, and it hath not been pursued according to the order and solemnities prescribed by law, *Carleval, de judiciis*, tit. 2. disp. 8.

L. 3. tit. 5. Lib. 11. Nov. Rec.

§ 1. In what time this right is prescribed.

The right to execution (*derecho de executar*) by means of the personal obligation which empowers justices to cause it to be executed (*guarantigia*) is prescribed in ten years, L. 6. tit. 15. Lib. 4. Rec., and that which arises from royal[1] right (*derecho real*) in thirty years, *Carleval*, tit. 3. disp. 4. n. 6.; but the decree of execution given upon a personal action is prescribed in twenty years, L. 6. tit. 15. Lib. 4. Rec. *Carleval, ibid. á* n. 7. *al* 12.

L. 5. tit. 8. Lib. 11. Nov. Rec.

L. 5. tit. 8. Lib. 11. Nov. Rec.

The right of execution in virtue of an instrument of rent or lease (*censo*) is prescribed in ten years, in regard to the annual charges due or past (*pensiones vencidas*), but not with respect to the future; because, in this kind of contract, the time is counted not from the commencement of the obligation, but from that of each year, *Carleval, ibid. á* n. 16. *al* 20.

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§ 2. What things carry with them prompt execution.

The things which carry with them prompt execution are, 1st, The cedulas and ordinances (*provisiones*) of the king which are not contrary to law[2], or given in prejudice of any one without being cited and heard, Ll. 1, 2, 3, & 4. tit. 14. Lib. 4. Rec.

Ll. 2. 4, 5. & 3. tit. 4. Lib. 3. Nov. Rec.

2d, The sentence passed into a thing adjudged, from which there is no appeal, nor any other recourse; or if an appeal hath not been interposed and prosecuted in the terms of the law,

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[1] That is, with respect to the right of the crown.

[2] Natural or divine is understood *Palacios*

L. 1. tit. 17. Lib. 11., & Ll. 22 & 25. t. 20. Lib. 11. Nov. Rec.

L. 6. tit. 17. Lib. 4. Ll. 6. & 11. tit. 18. Lib. 4. Rec. and this rule comprehends also the award of arbitrators, L. 4. tit. 21. Lib. 4. Rec.

L. 4. tit. 17. Lib. 11. Nov. Rec.

3d, The clear confession made before a competent judge both before and after contestation of the cause, L. 5. tit. 21. Lib. 4. Rec.

L. 4. tit. 28. Lib. 11. Nov. Rec.

Ll. 3. & 1. t. 28. Lib. 11. Nov. Rec.

4th, The public or authentic instrument, although it may not contain the clause which empowers the justices to cause it to be executed (*guarantigia*), Ll. 1. & 2. tit. 21. Lib. 4. Rec.; and execution may even be made in virtue of a tacit obligation, and virtually comprehended in the instrument or deed which may carry execution with it; *ex. gr.* if in the instrument or deed relating to a portion or dowry (*dotal*), the husband confess the receipt of the dowry, although he is not expressly obliged to restore it, *Carleval*, tit. 3. disp. 5. *á* n. 1. *al* 14. But the instrument which refers to another does not carry with it execution, unless it first appears that the latter does so; as neither does the instrument which is not liquidated in respect to the amount, damages, and interest, until it is liquidated with citation to the adverse party, *Cur. Filip.* § 8. n. 1. & 6. Whence it is inferred, that execution cannot issue for the capital placed in partnership until the accounts have passed; because, as it does not appear whether from such contract a loss or gain hath resulted, the amount is not liquidated; but from this rule, *Carleval*, tit. 3. disp. 7. *á* n. 6. *al fin*, draws five limitations.

L. 4. tit. 28. Lib 11. Nov. Rec.

5th, All instruments, promissory notes (*vales*), and writings acknowledged by the debtor, cause execution, L. 5. tit. 21. Lib. 4. Rec.

6th, The orders of payment which are given by the king or council of revenue (*hacienda*) on the royal treasurers, carry with them prompt execution, because they are depositaries (*depositarios*), L. 14. tit. 7. Lib. 9. Rec.[3]

For the same reason, the orders of payment which are issued with the authority of the judge to pay a creditor money deposited carry with them prompt execution, *Carleval*, tit. 3. disp. 6. n. 2., and the authentic orders which corporations and universities give on their treasurers, who shall be bound to pay under the clause empowering the justices to cause execution to be made (*guarentigiamente*), *Carleval, ibid.* n. 5.

7th, Bills of exchange, after being accepted, as is referred to

[3] Not in *Nov. Rec.*

in [4] L. 9. tit. 16. Lib. 9. Rec.[5]; and against the drawer, provided they be protested, and he acknowledged them, *Carleval*, tit. 3. *disp.* 6. *n.* 23. In what manner the alternative obligation of doing something, or of paying a certain penalty, carries prompt execution with it is fully discussed by *Carleval*, tit. 3. *disp.* 3. [304]

§ 3. Who may demand execution.

Not only the creditor named in the instrument, which carries with it prompt execution, may demand execution, but also any other person who may have an interest, *Cur. Filip.* § 9. *n.* 1.; from which principle it follows: 1st, That the wife, after the dissolution of marriage, may demand execution against the debtors of her husband for the debts contracted during it[7], without previously having a cession or assignment of actions, Ll. 1 & 2. tit. 9. Lib. 5. Rec.

Ll. 4 & 1. tit. 4. Lib. 10. Nov. Rec.

2d, That the husband may demand execution for the dowry (*dote*) promised, without a power or authority from the wife, which does not extend to her property called paraphernalia (*parafernales*), *Cur. Filip.* § 9. n. 5.

3d, That the assignee (*cesionario*) of the creditor may have execution (*executar*), provided the cession or assignment be just and real, *Cur. Filip. ibid.* n. 8.

4th, That each of the heirs[8] (of a testator or deceased person) may have execution for only the part or share which shall belong to him, *Cur. Filip. ibid.* n. 6.

§ 4. Against whom it has place or issues.

Execution takes place, or issues, 1st, Against the debtor and his heir, or person who shall appear to be such; provided, that if the latter hath accepted the inheritance with benefit of inventory, execution cannot go against him for more than the inheritance shall amount to; and that if there are many or several heirs, execution cannot go against each, *in solidum*, for all the debt, unless they should be possessors of property which the deceased hath mortgaged; because the *hipothecary* action always follows the thing mortgaged; but the one who, in this case, shall pay the debt *in solidum*, has his action to demand executively

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[4] *Vide* L. 7 & 8. and n. 4. tit. 3. Lib. 9. Nov. Rec.

[5] Not in *Nov. Rec.*

[6] It is stated in the author, quoted in the text, that also any other third person whose interest is treated of in the instrument, although he be not named in it, may demand execution by virtue thereof; and L. 1. tit. 28. Lib. 11. Nov. Rec. is quoted in support; but the law quoted does not expressly state thus much.

[7] That is, as *ganancial* property, or that acquired during marriage by purchase, &c., and so considered; to half of which the wife, on the dissolution of marriage, is entitled: only for her moiety of such property, says *Palacios*.

[8] But all the heirs may join in the demand for execution.

their proportions from the coheirs[9], *Cur. Filip.* § 10. n. 4.; *Vide Carleval*, tit. 3. *disp.* 9.

2d, For the debts of a corporation (*consejo*), execution has place against their lands or estates (*propios*) and property, *Cur. Filip.* § 10. num. 11.

3d, Execution proceeds or issues against the widow (*muger*) for a moiety of the debts contracted by the husband during matrimony[10], *Cur. Filip. ibid.* n. 6.

4th, Execution has place against the child (*hijo*) preferred (*mejorado*), as to the third and fifth of the property of the father or mother for the part of the debt correspondent to his preference (*mejora*), L. 5. tit. 6. Lib. 5. Rec.

L. 5. tit. 6. Lib. 10. Nov. Rec.

5th, Execution has not place against the third possessor (*tercer poseedor*) of the property of the debtor, who, not being the heir or successor, hath acquired it by special lawful title.[11] This rule is subject to three limitations[12]; 1st, If the debtor hath alienated (*enagenó*) his property, or part of it, the executive process having begun, or been instituted, to evade the right of the creditor. 2d, If the instrument in which the thing was mortgaged contain the covenant not to alienate.

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3d, If the instrument contains the clause of being constituted precarious tenant or possessor at will (*clausas de precario y constituto*), *Carleval*, tit. 3. *disp.* 11. 4th, This rule is not understood of third possessors, such as the depositary (*depositario*), borrower (*comodatorio*), the husband in respect of dotal property, &c., *Cur. Filip.* § 11. n. 4. & 6.

§ 5. Of the form and order of this proceeding.

The form and order of the executive process is as follows: 1st, The plaintiff presents his petition before the judge, who has jurisdiction over the defendant, praying execution in virtue of the instrument which he presents, in which he shall swear to the true and liquidated sum due to him, Ll. 2. & 19. tit. 21. Lib. 4. Rec.[13], and if the debt should be payable at a certain

Ll. 1 & 12. tit. 28. Lib. 11. Nov. Rec.

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[9] Under a cession or assignment of the right of action by the creditor.—*Palacios* (1).

[10] That is, with respect to *ganancial* property. *Palacios* confirms this opinion, and says it would only go against one moiety of such property, although the moiety of the debts might amount to more; and that as even any debt arising from a security entered into by the husband on behalf of another person, will not affect her individual property, under L. 7. tit. 3. Lib. 5. Rec., (L. 2. tit. 11. Lib. 10. Nov. Rec.); so neither would it affect her moiety of the *gananciales*. See Append. K.

[11] That is, a *bonâ fide* possessor by purchase, &c., or claiming under such possessor, &c.

[12] *Palacios* says, that thirteen limitations are mentioned by *Febrero Reformado*, P. 2. Lib. 3. cap. 2. num. 82.

[13] Neither of these laws requires the creditor to make oath to the amount of the sum justly due to him previously to obtaining the writ of execution;

term (*plazo*), he cannot prefer his demand before it shall arrive L. 2. tit. 21. Lib. 4. Rec. L. 1. tit. 28. Lib. 11. Nov. Rec.

2d, If the defendant against whom execution is issued (*executado*) should have submitted himself to the jurisdiction of the alcaldes of the court (*corte*) and royal audiences, with the renunciation of his own jurisdiction (*fuero*), these tribunals may proceed to levy the execution, provided the person and property of the debtor be found within five leagues, and if beyond this distance, they shall proceed by warrant (*requisitoria*) to levy the execution, and if the submission hath been made to the ordinary judges, they may cause execution to be levied on the property of the debtor within their jurisdiction, L. 20. tit. 21. Lib. 4. Rec. L. 7. tit. 29. Lib. 11. Nov. Rec.

3d, The instrument being examined by the judge before whom it is presented, and found to carry with it prompt execution, he orders it to issue without taking security from the creditor except in certain cases, Ll. 2. & 19. tit. 20. Lib. 4. and L. 40. tit. 4. Lib. 3. Rec. Ll. 1 & 12. tit. 28. Lib. 11. & L. 12. tit. 30. Lib. 11. Nov. Rec.

4th, The order or writ of execution is delivered to the creditor [14], in order that he may have it executed, otherwise there is a nullity, L. 17. tit. 21. Lib. 4. Rec., observing that the escribano must note (*hacer constar*) the hour in which the execution is delivered (*se traba*), L. 21. tit. 21. Lib. 4. Rec. L. 10. tit. 28. Lib. 11. Nov. Rec. L. 14. tit. 30. Lib. 11. Nov. Rec.

Execution is issued against a certain and determinate property which the debtor points out, and not doing so, or being absent, against that which the creditor shall point out, *Cur. Filip.* § 15. n. 1 & 2. Execution must first be levied on moveable property, and in default of that on real; and not being so levied, it shall be null, L. 19. tit. 21. Lib. 4. Rec. [15] § 6. On what property it is levied. L. 12. tit. 28. Lib. 11. Nov. Rec.

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but L. 6. tit. 28. Lib. 11. Nov. Rec. (L. 9. tit. 21. Lib. 4. Rec.) commands the judge to perform this duty before he shall grant the writ of execution to the creditor.

The exaction of this salutary measure hath been made the subject of a rule of the new Court of First Instance of Civil Jurisdiction at Trinidad, established under the Order in Council of 16th September, 1822, Appendix Q See the rules at length, Appendix R.

[14] By an Order in Council, 16th September, 1822, reciting the law quoted in the text, it is declared, that writs of execution shall not, in any future case, be deliverable to the parties, but shall be delivered by the *escribano* (the secondary or register of the court), to the *alguacil* mayor (the sheriff or marshal), upon the application of the party in whose favour the judgment shall have been obtained. See Appendix Aa.

[15] Neither L. 19. tit. 21. Lib. 4. Rec. (L. 12. tit. 28. Lib. 11. Nov. Rec.) nor any other law, declares the execution expressly null in this case: if, therefore, the defendant should tacitly approve it, that is, by not appealing, nor praying it a nullity, before proceeding to any other act or step in the cause, the understanding is, that such execution will be valid.—*Palacios*, (1).

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The property levied on must be sequestered, inventoried, and deposited with a person of stability or property (*abonada*), L. 7. tit. 21. Lib. 4. Rec.

L. 1. tit. 30. Lib. 11. Nov. Rec.

There are some kinds of property which cannot be taken in execution, and these are, 1st, Things sacred and destined for divine worship, L. 7. tit. 2. Lib. 1. Rec.

L. 3. tit. 5. Lib. 11. Nov. Rec.

2d, Implements and beasts of husbandry, and the bread which labourers shall bake by their own labours, except for royal duties (*derechos*), or for tithes, and ecclesiastical and seignorial rents, Ll. 25, 26.[16] & 28. tit. 21. Lib. 4. Rec.

L. 15. tit. 31. Lib. 11., L. 6. tit. 11. Lib. 10., L. 16. tit. 31. Lib. 11., L. 7. tit. 11. Lib. 10., & L. 8.[17] tit. 19. Lib. 7. Nov. Rec.

3d, The tools which artificers possess for the exercise of their trade or calling, *Cur. Filip.* § 16. n. 10.

L. 13. tit. 31. Lib. 11. Nov. Rec.

4th, The houses, arms, and horses of knights (*caballeros*), and noblemen (*hijosdalgo*), except for a debt to the crown[18], L. 6. tit. 17. Lib. 5. and L. 27. tit. 21. Lib. 4. Rec.

Ll. 2 & 3. tit. 29. Lib. 7. Nov. Rec.

5th, Mares destined for the breed of horses of a particular breed (*caballos de casta*), L. 2. cap. 6. and L. 3. cap. 4. tit. 17. Lib. 6. Rec.[19]

6th, The books of advocates and students, *Cur. Filip.* § 16. num. 8.[20]

L. 3. tit. 27. P. 3.

7th, The pay of military persons, L. 3. tit. 27. P. 3.

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[16] Not in *Nov. Rec.*

[17] This law (L. 8. tit. 19. Lib. 7. Nov. Rec.), does not particularly apply; but it is the latter part of it which forms with L. 16. tit. 31. Lib. 11., and L. 7. tit. 11. Lib. 10. Nov. Rec., the whole of L. 28. tit. 21. Lib. 4. Rec., which is quoted in the text.

[18] Although, according to various laws, execution ought not to be levied, except for debts due to the crown, on the dwelling-houses, arms, horses and mules in the possession and use of knights and nobles (*caballeros, é hijosdalgo*), such rule is only observed in respect to the dwelling-houses; and even then, in default of other property, execution is levied on them; for it is not just that the creditor should remain without the payment of the debt, which, in justice and conscience, is due to him.—*Febrero Reformado*, P. 2. lib. 3. cap. 2. § 2. num. 98. *Palacios*, who makes this quotation, observes, that neither L. 6. tit. 17. Lib. 5.; nor L. 27. tit. 21. Lib. 4. Rec.; (L. 13. tit. 31. Lib. 11. Nov. Rec.), prohibit execution going against the dwelling-house of the noble: but L. 61. tit. 4. Lib. 2. Rec.; [which is not inserted in the *Nov. Rec.*] He adds, that at no time of the year ought execution to be levied on the mules, oxen, nor other beasts of the plough or agriculture, belonging to husbandmen, farmers, or agriculturists (*labradores*), L. 25. tit. 21. Lib. 4.; Ll. 5 & 6. tit. 17. Lib. 5. Rec.; (L. 15. tit. 31. Lib. 11.; and L. 6. tit. 11. Lib. 10.; Ll. 12 & 13. tit. 31. Lib. 11. Nov. Rec.). The Learned Professor does not notice the exceptions from this exemption in respect to debts due by such persons to the court, or for taxes; and for rent of the land to the proprietor. See the laws of the *Nov. Rec.* cited, particularly of tit 31. Lib. 11. *Labradores* were, it will be seen, peculiarly protected. The exemptions in these and other laws, in favour of particular persons, are repealed by Order in Council, 16th September, 1822, Appendix J: which see.

[19] Not in the *Nov. Rec.*

[20] See Order in Council, 16th September, 1822, Appendix J, making them liable.

8th, Beds, wearing apparel, and other things necessary for daily use [21], *Cur. Filip.* § 16. num. 19.

9th, Foreign ships, or ships from foreign parts [22], with merchandize, unless the debtors should point them out to be levied on, L. 12. tit. 17. Lib. 5. Rec. L. 4. tit. 31. Lib. 11. Nov. Rec.

10th, Things destined for the public use, nor the property [23] (*propias*) of the inhabitants (*vecinos*) cannot be taken in execution for the debts of the corporation (*concejo*), L. 7. tit. 17. Lib. 5. and L. 16. tit. 21. Lib. 4. Rec. L. 1. tit. 30. Lib. 11. & L. 2. tit. 20. Lib. 7. Nov. Rec.

11th, Execution may be levied on the property (*propiedad*) of the thing subject to a right (*servidumbre*), L. 8. tit. 32. P. 3. [24]

12th, For the debts contracted by the husband before or during marriage, only the fruits of the dotal property, which shall be left after having satisfied the burthen or charges (*cargas*) of matrimony, may be taken in execution, for the contrary would be in prejudice of the wife [25], *Carleval*, tit. 3. disp. 19. *á* n. 2. *al* 9.; but if the wife hath contracted the debt before marriage, the dotal property may be taken in execution in default of paraphernalia (*parafernales*), and not the fruits, which belong to the husband, *Carleval, ibid. á* n. 9. *al* 12. If the wife hath contracted a lawful debt during marriage, execution cannot go against her dotal property (*dote*), in prejudice of the husband, *Carleval, ibid. á* n. 12. *al* 19., and much less if the debt were common to both, because then execution must be levied on property common to both (*bienes comunes*), *Carleval, ibid. á* n. 19. *al fin.* [307]

The debtor who will not give security, or bail of *saneamiento*, ought to be imprisoned (*preso*) [26], L. 19. tit. 21. Lib. 4. L. 12. tit. 28. Lib. 11. Nov. Rec.

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[21] See Order in Council, 16th September, 1822, Appendix J.

[22] That is, for debts due to persons of the country whence such ships come; but *quære*, if not for debts contracted on account of such ships, or of the owners, in the ports they come to?

[23] This appears to mean, from reference to L. 2. tit. 20. Lib. 7. Nov. Rec., only the bread or grain deposited in the public granaries: and the other law quoted in the text, *viz.* L. 1. tit. 30. Lib. 11., Nov. Rec., does not bear upon the subject.

[24] This is an erroneous quotation.

[25] *Palacios* refers to *Carleval*, cited in the text, for an understanding thereof.

See Order in Council, 16th September, 1822, Appendix K, containing provisions in respect to the property of married women.

[26] The law (L. 12. tit. 28. Lib. 11. Nov. Rec.), cited, says, the writ of execution directs execution to be levied on personal, and in default, on real property; the debtor giving security for their sufficiency to satisfy the debt (*saneamiento*); and, in default of such security, orders the arrest and imprisonment of the debtor, unless privileged therefrom. *Palacios* observes to this effect.

Rec. There are some persons who enjoy the privilege of being exempt from arrest or imprisonment for debt [27], and these are, 1st, He who should have possessed for three whole years twelve mares of a particular breed (*de casta*), L. 2. c. 4. tit. 17. Lib. 6. Rec.

L. 2. tit. 20. Lib. 7. Nov. Rec.

2d, The attornies of towns (*pueblos*) who are in the court, Ll. 10 & 11. tit. 7. Lib. 6. Rec.

L. 5. tit. 8. Lib. 3. & L. 8. tit. 31. Lib. 11. Nov. Rec.

3d, Nobles and their descendants, or persons entitled to the privileges of nobility (*hijosdalgo*), L. 4. tit. 2. Lib. 6. Rec., provided the debt does not proceed from crime or *quasi* crime, L. 6. tit. 2. Lib. 6. Rec.

L. 2. t. 2. Lib. 6. Nov. Rec. L. 10. tit. 2. Lib. 6. Nov. Rec.

4th, Doctors and licentiates of the higher degree (*en facultad mayor*), Ll. 8 & 9. tit. 7. Lib. 1. Rec.

Ll. 14 & 15. tit. 18. Lib. 6. Nov. Rec. L. 15. tit. 31. Lib. 11., L. 6. tit. 11. Lib. 10. Nov. Rec. L. 3. tit. 5. Lib. 10. Nov. Rec.

5th, Labourers in the time of crop or harvest, or the labour of the field, except for debts to the crown, or proceeding from crime, Ll. 25 & 26. [28] tit. 21. Lib. 4. Rec.

6th, A woman [29] (*muger*) cannot be imprisoned (*presa*) for a debt of any nature, L. 8. tit. 1. Lib. 5. Rec.

§ 7. Of the sale of the property levied on, taken in execution.

As the end or object of the execution is to cause payment to be made to the creditor, it is necessary to sell the property levied on at public auction; to which effect, being real, three proclamations or public outcries (*pregones*) [30] must be made in twenty-seven days, each in nine days; being moveable or personal, three proclamations are made from three to three days, L. 19. tit. 21. Lib. 4. Rec.

L. 12. tit. 28. Lib. 11. Nov. Rec.

The first of these proclamations is made in the place or domicile of the defendant in execution (*executado*), and all the three in the place or court where the trial is had, L. 36. tit. 4. Lib. 3. Rec.; and the debtor may renounce the proclamations and their terms, *Cur. Filip.* § 18. num. 8.

L. 13. tit. 28. Lib. 11. Nov. Rec.

The execution being made or levied, and the term of the proclamations expired, the debtor must be cited to the sale (*remate*), in order that within three days he may either pay the debt or allege his exceptions, L. 19. tit. 21. Lib. 4. Rec., and if the execution shall be amended or extended (*se mejorare*), or

L. 12. tit. 28. Lib. 11. Nov. Rec.

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[27] See the limitation of this exemption to the persons mentioned in the proviso or exception contained in the Order in Council, 16th September, 1822, Appendix J.

[28] Not inserted in *Nov. Rec.* See Order in Council, 16th September, 1822, Appendix J.

[29] Limited to married women, by Order in Council, 16th September, 1822, Appendix J.

[30] These proclamations, or *pregones*, were done away with in Trinidad, by proclamation 12th May, 1815. See Appendix Bb.

made anew on other property, it is necessary to cite again the debtor to the sale (*remate*) of it, *Cur. Filip.* § 19. num. 4.

In the before mentioned term of three days, the debtor must make his opposition, alleging whatever exceptions he may have; and in order to prove them, the term of ten days is granted him, which are reckoned from the day of opposition, in which he must present his documents (*escrituras*), and witnesses, Ll. 2 & 3. tit. 21. Lib. 4. Rec. And it is to be observed, that against contracts, sentences, and compromises (*compromisos*), which carry with them prompt execution, no exception is admitted, except payment by the debtor, an agreement not to sue or demand, an exception of falsehood or deceit (*falsedad*), usury, fear, force, and other lawful exceptions, L. 1. tit. 21. Lib. 4. Rec. A sight, or *traslado*, of the opposition of the debtor, is given to the creditor, and the term of ten days allowed him to produce or make his proof, Ll. 2 & 3. tit. 21. Lib. 4. Rec., and the said term may be prorogued at the instance of the creditor, by reason of the executive process being for his benefit, *Cur. Filip.* § 20. num. 4.

Ll. 1 & 2. tit. 28. Lib. 11. Nov. Rec.

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L. 3. tit. 28. Lib. 11. Nov. Rec.

Ll. 1 & 2. tit. 28. Lib. 11. Nov. Rec.

In whatever time or stage of the executive cause, even after the sentence of sale (*remate*), provided that payment hath not been made, nor possession given of the property, the opposition of the third opposer (*tercero opositor*), who presents himself claiming the dominion of the property levied on, or the preference of the debt, must be admitted, L. 41. tit. 4. Lib. 3. Rec. provided that this opposition be not malicious, directed to retard the execution, *Cur. Filip.* § 26. num. 5. With respect to which we say, 1st, That the question of dominion being clear (*constando del dominio*), a stop must be put to the execution, *Cur. Filip. ibid.* num. 10.

Cap. 2. Of the opposition of the third person.

L. 16. tit. 28. Lib. 11. Nov. Rec.

2d. That if this third opposer should claim to be anterior to the person at whose suit execution is made (*executante*), and to compete with him the executive process, the execution must be stayed or suspended until by the ordinary process it be determined which of the two creditors ought to be preferred, as *Carleval*, tit. 3. disp. 12. proves, and if the opposers be many, the rules of preference established or laid down in Tit. 11. cap. 3. § 2. Lib. 2. shall be observed.

3d, That a sight, or *traslado*, of the opposition of the third person is given to the defendant in execution (*executado*), and to the plaintiff at whose suit it is levied, (*executante*); proof is received if necessary, and the cause is carried on between them by the ordinary process, *Cur. Filip, ibid.* num. 12.

Cap. 3. Of the sentence of sale (remate).

The term of citation having expired, if no opposition should have been made, or having been made after the term of it, the judge without any other citation, or delay, decides the cause of sale, annulling the execution, or ordering it to proceed until sale take place, and payment be made to the party, L. 19. tit. 21. Lib. 4. Rec., provided the creditor gives the security of the law of Toledo; this is, that in case of the execution being revoked by the superior judge or court, he will restore that which he received in payment, L. 2. tit. 21. Lib. 4. Rec.

L. 12. tit. 28. Lib. 11. Nov. Rec.

L. 1. tit. 28. Lib. 11. Nov. Recop.

§ 1. Of the appeal from this sentence.

The appeal from the sentence of sale (*remate*), has only the devolutive effect, and therefore it ought to be executed, notwithstanding such appeal, or any nullity whatsoever, which shall be alleged, except it be notorious, and result from the same proceedings, Ll. 3 & 19. tit. 21. Lib. 4. Rec.

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Ll. 2 & 12. t. 28. Lib. 11. Nov. Rec.

§ 2. Of the adjudication of property.

After the sentence[31] they proceed to make the sale or adjudication of the property; which is sold at public auction (*almoneda*) to the person offering the best bid and terms (*comprador de mejor postura y condicion*), *Cur. Filip.* § 22. n. 1.

From which principle it results, 1st, That the offer of the second bidder being accepted, the first is discharged, and not otherwise, *Cur. Filip. ibid.* n. 6.

2d, That when the order conformable to justice and due solemnity hath not been observed at the public sale or auction, the sale is re-opened and bids are received, *Cur. Filip. ibid.* n. 7.

3d, That after the sale is made or closed, no bid is admitted, *ibid.* n. 8., except with respect to the property of minors, or those to whom restitution is granted, *ibid.* n. 10.

4th, That there being no purchaser, the creditor may require that the property be delivered to him in payment, estimating it at what it might be worth, for otherwise[32] he is not entitled to purchase it, L. 6. tit. 27. P. 3. *Cur. Filip. ibid.* n. 23.

5th, That if fraud, or *dole* hath intervened in the sale of the property levied on, the debtor has his action for the restoration of it, on returning or giving the price, *ibid.* n. 21.

6th, That from the value of the property, payment must be made of the principal and costs; and not being sufficient,

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[31] Add, of sale (*remate*). For the due understanding of the present regulations in Trinidad, in respect to the forms of proceeding in civil suits, to the sale of property under execution, and to other matters connected with the subject of this book, the reader must refer, in addition to what has been before stated in the course of the notes by the Translator, to the Appendix. See Q, R, Mm, S, Cc, Dd, Ee, Ff, Gg, Hh, Ii, Jj, Kk, Ll.

[32] *Vide* what is said with respect to the ability of the creditor to purchase: 6th *Febr., ad.* p. 2. lib. 3. c. 2. § 5. n. 329. 345, 346, 347, commencing p. 498.

an execution or compulsory order (*mandamiento de apremio*), is issued against the debtor, and his bail of *saneamiento*, *ibid.* n. 13.

Cap. 4. Of the tenth or fee, on execution, to the marshal or sheriff.

In the executive suit, the debtor must pay to the officer of justice who shall execute the writ of execution, the tenth part (*decima*) of the amount of the debt, in places where a custom should exist to pay this fee[33], L. 7. tit. 21. Lib. 4. Rec. without being able to exact others, L. 12. tit. 21. Lib. 4. Rec. Upon which it is to be observed, 1st, That the *decima* or fee is not due until sixty-two hours after the execution hath been levied, L. 30. tit. 21. Lib. 4. Rec.

L. 1. tit. 30. Lib. 11. Nov. Rec. L. 4. tit. 30. Lib. 11. Nov. Rec. L. 17. tit. 30. Lib. 11. Nov. Rec.

2d, That it is not due on debts to the crown or *fisc*, but at the rate of thirty *maravedis* for a thousand, L. 8. tit. 21. Lib. 4. Rec. [34]

L. 1. tit. 30. Lib. 11. Nov. Rec.

3d, That the decima or fee cannot be exacted until the creditor be declared satisfied and paid, L. 7. tit. 21. & L. 31. [35] tit. 4. Lib. 4. Rec.

Ll. 14, 15 & 16. tit. 30. Lib. 11. Nov. Rec.

4th, That there is no *decima* or fee, if the debtor shall pay within twenty-four hours after the execution is made, or shall deposit the amount, Ll. 21, 22 & 23. tit. 21. L. 4. Rec., and he is also in this case discharged or relieved from the costs of the escribano, L. 22. tit. 21. Lib. 4. Rec.

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L. 15. tit. 30. Lib. 11. Nov. Rec.

5th, That if any dispute should arise whether the debtor had paid or not within the twenty-four hours, and the hour should not have been noted by the escribano, the latter must pay the costs.

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[33] The fees of the sheriff or marshal (*alguazil mayor*), are regulated in Trinidad by docket.

[34] This law is not inserted in *Nov. Rec.*

[35] Not inserted in *Nov. Rec.* *Palacios* says, it should be L. 31. tit. 4. Lib. 3. Rec. (L. 7. tit. 30. Lib. 11. Nov. Rec.): which law says, in addition to the text, the *decima* shall not be paid if the parties agree or arrange the suit.

TITLE XI.

OF CRIMINAL TRIALS OR PROSECUTIONS.

Cap. 1. Of criminal trial, and its kinds.

HAVING already explained the mode of proceeding in civil suits it now only remains for us to expound what particularly and differently belongs to criminal trials; wherefore we shall take care not to repeat any of those things which they have in common, and which therefore are already treated of.

A criminal trial is that in which the cognizance and punishment of a crime committed are treated of.

The proceeding to the punishment and investigation of crimes is, either by accusation of the party, or by inquisition (*pesquisa*) arising from denunciation, or from the office of the judge (*de propio oficio*), L. 6. tit. 1. Lib. 8. Rec.

L. 2. tit. 34. Lib. 12. Nov. Rec.

§ 1. Of criminal trial by accusation.

Accusation is the charge which one man prefers against another before the judge, charging an offence which he alleges the accused hath committed, and praying the infliction on him of punishment for it, L. 1. tit. 1. P. 7. It is considered with reference to the following axioms: 1st, That only they can accuse who have a motive or an interest (*entienden*) in the accusation; those who can [1] strike terror (*aterrar*) into the delinquent; those who by accusing, do not act against piety, and those who are in no manner of suspicious character (*sospechosos*).

L. 1. t. 1. P. 7.

2d, That all can be accused who are capable of offending and suffering punishment.

[311] 3d, That the calumnious or false accusation does not remain unpunished.

From the first principle it is inferred, 1st, That a woman [2] cannot accuse, nor a minor of fourteen years of age, nor a person of bad character, nor the perjured, nor one bribed or suborned (*cohechado*); he who has two accusations pending cannot in the

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[1] On the contrary, those who cannot strike or cause terror, says *Palacios*; and that one of the reasons assigned by *Greg. Lop.*, Gl. 5. L. 2. tit. 1. P. 7. for a judge being prohibited to be an accuser, is, because he might produce this effect on the accused. A better reason for such exclusion is, that the judge ought not to be the accuser. The learned Professor also observes, that the language of the law is, every person may be an accuser who is not prohibited by the laws, L. 2. tit. 1. P. 7. For information as to the constitution of the criminal courts, and the mode of proceeding in criminal trials, in Trinidad, the reader is referred to the Appendix F.

[2] A woman, observes *Palacios*, may accuse for the murder of her husband, as also the husband for the murder of his wife, L. 14. tit. 8. P. 7.

mean time prefer a third, nor can a person of very great poverty accuse, nor the accomplice in the crime, nor can a relation or servant accuse a relation in the line of ascendants [3], or being a brother, unless it were for the crime of high treason (*læsæ majestatis*), or for a crime committed against their relations in the fourth degree, fathers-in-law, sons-in-law, or step-fathers, L. 2. tit. 1. P. 7. L.2.t.1.P.7.

2d, Neither can he accuse who has another accusation pending against him [4] until his trial be concluded, unless it be for a crime against his person, or that of any of those relations in the degree we have mentioned; but if he should be condemned to perpetual banishment, he can at no time accuse another, unless for an offence against his relations [5], which his accuser hath committed, [6] L. 4. tit. 1. P. 7. L.4.t.1.P.7.

3d, That no judge can accuse, but may give information to the king of offences committed in the places of his jurisdiction, Ll. 2. & 5. tit. 1. P. 7. Ll.2. & 5.t.1. P.7.

4th, That when several accuse a person of the same crime, the judge ought to select from the accusers him whom he understands to proceed with the best intention, L. 13. tit. 1. P. 7. L.13.t.1.P.7.

5th, That any one may accuse or charge with respect to a crime committed against his person, or to the injury of another, except the crime of adultery, not having the consent of the husband, L. 2. tit. 19. Lib. 8. Rec. L.4.tit.26. Lib.12. Nov. Rec.

From the second axiom it follows,

1st, That persons deceased cannot be accused, unless it be for the crime of high treason, or against the public, or of heresy, or for having misapplied the property of the crown [8], L. 7. tit. 1. Part. 7. L.7.t.1.P.7.

2d, That also every judge who may have aggrieved [8] a party accused before him, may be accused even after death; also the sacrilegious thief, and the woman who attempts the death of

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[3] Or descendants, adds *Palacios*.

[4] A person, says *Palacios*, referring to L. 4. tit. 1. P. 7.; and *Greg. Lop., Gl.* thereupon, who has an accusation pending against him, cannot accuse another of a crime of less or equal degree to that of which himself is accused.

[5] Or against himself, adds *Palacios*.

[6] This exception does not appear to be, to the extent, or in the manner put in the text, supported by the law of the 7th Part, referred to; which would only seem to permit the accusation, when the sentence for banishment was temporary, and not perpetual; and then without any qualification or limitation as to persons against whom the offence might be committed.

[7] This seems to apply only to persons charged with the administration, receipt, custody, &c. of property of the crown.

[8] *Ex. gr.* through bribery, &c.

her husband [9], because all these ought, by reason of their crimes, to suffer in their property the punishment which cannot be inflicted on their bodies, L. 8. tit. 1. P. 7.

L. 8. tit. 1. P. 7.

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3d, Persons under fourteen years of age cannot be accused [10], unless for crimes of blood, death, theft, and others of a like nature, being above ten years and a half old, in which last case the punishment must be lessened with respect to them, L. 9. tit. 1. L. 17. tit. 14. and L. 8. tit. 31. Part 7.

Ll. 9. tit. 1., 17. t. 14., 8. t. 31. P. 7.

4th, Nor madmen, &c., L. 9. tit. 1. P. 7.

L. 9. tit. 1. P. 7.

5th, Neither can judges, while in office, be accused, except for a crime committed by reason of their station or employment, L. 11. tit. 1. P. 7.

L. 11. tit. 1. P. 7.

6th, Nor can one who has once been accused be a second time accused of the same offence of which he hath been acquitted, except in the second accusation it be proved that the first was carried on with fraud or deceit (*dolo*); or the first having been prosecuted by a stranger, the second should be preferred by a relation, who proves that he was ignorant of the first, L. 12. tit. 1. P. 7.

L. 12. tit. 1. P. 7.

From the third principle it is inferred,

1st, That the accusation ought to be made in writing, setting forth the name of the accuser, that of the accused, that of the judge before whom the accusation is preferred, specifying the crime, the place, year, and month in which it was committed; and the judge must inscribe the day on which he receives it, and make the accuser take the oath of calumny [11], L. 14. tit. 1. P. 7.

L. 14. tit. 1. P. 7.

2d, That he who shall accuse through calumny or falsely, ought to suffer the punishment [12] of the accused, L. 26. tit. 1. P. 7. But there are certain persons in whom, although they may not prove the accusation, it can only be considered presumptive, and not evident calumny; for which reason our laws exempt

L. 26. tit. 1. P. 7.

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[9] A trial commenced against a wife, under such a charge, who may happen to die during its progress, may be concluded, and sentence given, declaring her infamous in case the offence be proved. — *Palacios*, referring to L. 8. tit. 1. P. 7., cited in the text.

[10] The offences, observes *Palacios*, referring to L. 9. tit. 1. P. 7., of which persons under fourteen cannot be accused, are those relating to carnal excesses (*de luxuria*).

[11] And the accused being cited, the accusation is passed to him; and twenty days allowed him to answer. *Vide* L. 14. tit. 1. P. 7., quoted in the text.

[12] *Vide* persons excepted by the law. *Vide* relations, &c.

them from this punishment. Such are[13], 1st, The guardian[14] of an orphan. 2d, He who accuses one of being a false coiner. 3d, The heir who follows up the accusation which the testator announced in his life time[15] against a determinate person for having attempted his death. 4th, He who accuses with respect to an act committed against himself. 5th, He who accuses on account of the death of his relations in the fourth degree. 6th, And the husband and wife on account of the death of each other, Ll.6. 20, 21, & 26. tit.1. P.7. Ll.6.20,21. & 26.tit.1.P.7.

From the fourth principle we deduce, 1st, That the judge of the place where the accused committed the offence, or of that where he shall be accused, is the competent judge, when once submission shall be made to his jurisdiction by the medium of contestation, or the judge of the domicile of the accused, or of the place where he shall have the greater part of his property, L.15. tit.1. P.7. 2d, That if the same person hath committed two crimes, the judge who first takes cognizance ought to substantiate or establish the cause, and afterwards transmit it to the other who demands it, *Cur. Filip.* P.3. § 4. n.6. L.15.tit.1.P.7.

3d, That if the judge in whose jurisdiction the crime was committed, should demand the accused from the judge of his domicile, although the latter may have previous cognizance of the cause (*prevenga en la causa*), he ought to hand the accused over, unless he is liable to corporal punishment, or being so, if the proceeding should be by accusation, *Cur. Filip. ibid.* [313]

4th, That the alcaldes of the court (*de corte*) being supreme criminal judges, are in no case obliged to hand over or give up the accused, *Cur. Filip. ibid.* n.7.

5th, We say the same of the alcaldes *del crimen* in the chanceries and audiences in respect to the cases *de corte* enumerated in *Cur. Filip. ibid.*

The accusation being preferred before a competent judge, he ought to cite the accused to appear or answer within twenty days, giving him a copy or *traslado* of the accusation, L.14. tit.1. P.7. L.14.tit.1.P.7.

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[13] Such persons, says *Palacios*, are excused from the punishment of presumptive calumny, which is, when the accuser does not prove the accusation; but not from the punishment of evident calumny, which is, when it is proved that he made it maliciously. He refers to *Greg. Lop.* Gl. 5., L. 6. tit. 20. P. 7., cited; and to *Curia Filip.*, p. 3. § 8.

[14] Unless he be proved to have accused through malice. *Vide* L.6. tit.1. P.7.

[15] Or mentions in his will, L.21. tit.1. P.7. *Vide* the law.

L.16.t.1. P.7. and in this term admit him to allege exceptions[16], L.16. tit.1. P.7. From thenceforward neither the accuser nor accused can
L.17.t.1.P.7. desist from the criminal prosecution[17], L.17. tit.1. P.7. The accusation may be abandoned with the permission of the judge within thirty days after being preferred; and this may be always granted, provided no fraud or deceit is discovered in the accusa-
L.19.t.1.P.7. tion, or except in the six cases expressed by L.19. tit.1. P.7.

The accusation is at an end by the death of the accuser[18] or the accused, except it be with respect to crimes, which may be
L.23.t.1.P.7. prosecuted against persons deceased[19], L.23. tit.1. P.7., and in
Ll.24, 25.t.1. P.7. the cases expressed in L.24 & 25.[20] tit.1. P.7.

Cap. 1. Of the criminal trial by inquisition (pesquisa).

The proceeding in the enquiry or investigation of a crime may be also by the mere denunciation of the party which any one may prefer, without being obliged to prove it before a competent judge, unless the delator bind himself to do so, or the judge
L.27.t.1.P.7. should know that he proceeds maliciously, L.27. tit.1. P.7.

The fiscal cannot prefer this delation without having information of the crime *in scriptis*, L.3. tit.15. Lib.2. Rec.[21], except
L.11.tit.13. Lib.4. Nov. Rec. upon notorious facts; and, in this case, the delator must give security at the will of the judge to prosecute to conclusion the delation, L.40. tit.1. P.7.[22] Then the judge proceeds to
[314] make the inquest of the crime, which is called *pesquisa*, L.27.
L.40.t.1.P.7. tit.1. P.7.
L.27.t.1 P.7.

§1. What crimes are the subject of inquest, and what not.
L.28.t.1.P.7. This inquest (*pesquisa*) may be executed by virtue of office, not only in the five cases which L.28. tit.1. P.7. points out, but also with respect to any other crime committed in the jurisdic-

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[16] Dilatory exceptions before contestation or answer. *Vide* the law quoted, and note 1. *Greg. Lop.*, thereon.

[17] In any stage of the trial before sentence, the accuser may compound with the accused in criminal cases, where the punishment is corporal, except in that of adultery, (which at present may be said not to entail corporal punishment), L.22. tit.1. P.7. But this does not prevent the judge from proceeding in virtue of his office, in the like trial, until imposing the corporal punishment which the offence shall deserve, L.10. tit.24. Lib.8. Rec.: (L.4. tit.40. Lib.12. Nov. Rec.)—*Palacios.*

[18] Heirs, if accusers, are not obliged, after his death, to prosecute, but they may do so. *Vide* L.23. tit.1. P.7.

[19] Or rather their property.

[20] As to the pecuniary penalty, the trial may be carried on against the heirs of the accused, even after his death, if, in his life-time, he had contested or answered the demand.

[21] This should be L.3. tit.13. Lib.2. Rec; (L.1. tit.33. Lib.12. Nov. Rec.): as noticed by *Palacios;* which, he observes, does not set forth what is stated by the text. The law states, that the fiscal shall not accuse or prosecute, nor enter a civil suit in the name of the king, unless he furnish to the *oidors* or judges the name of the informer (*delator*), whose declaration or information shall be taken in writing before the public *escribano*. *Vide* this law.

[22] This quotation is erroneous. *Palacios* says, it should be L.4. tit.15. Lib.2. Rec.: (L.2. tit.33. Lib.12. Nov. Rec.)

tion of the judge, Ll.1. 5 & 6. tit.1. Lib.8. Rec.; if the crime were perpetrated out of the ordinary jurisdiction, the inquest being made, the process is sent to H.M., L.1. tit.1. Lib.8. Rec. Ll.6.7.tit.34. L.1.tit.4.&L.2. tit.34.Lib.12. Nov. Rec. L.7.tit.34. Lib.12. Nov. Rec.

Crimes which are not subject to inquest are, 1st, Verbal or slanderous injuries of little weight (*palabras livianas*), although they be of the grave kind (*graves*), if the party does not complain of them, L.4. tit.10. Lib.8. Rec. L.3. tit.25. Lib.12. Nov. Rec.

2d, Gaming, after the expiration of two months, L.10. tit.7. Lib.8. Rec. L.9.tit.23. Lib.12. Nov. Rec.

3d, Bad, or fraudulent tithe-gatherers, (*dezmeros*) L. 5. tit. 5. Lib.1. Rec. L.4.tit.6. Lib.1. Nov. Rec.

§ 2. How many sorts of inquest there are.

There are two sorts of inquest, one particular, and the other general; the general inquest is that by which a general inquisition is made of all crimes, without particularizing either the crime or the delinquent. The particular is, that which is directed to a specific crime and delinquent, *Cur. Filip.* p. 3. § 10. n. 2. The first is prohibited, unless it be by royal order or provision[23], L.3. tit.1. Lib.8. Rec.; but if it be so made, no account ought to be given to the parties of what hath been done, unless the inquest be directed against particular acts of persons; in which case, the answer of the witnesses may be shewn to them for their defence, L.4. tit.1. Lib.8. Rec.; nor must the ordinary judges execute it in person, L.11. tit.1. Lib.8. Rec.[24] But the particular inquest must be made on hearing the party, giving him a copy of the process, and proceeding summarily, L.1. tit.1. Lib.8. Rec. L.3.tit.34. Lib. 12. Nov. Rec. L.1.tit.34. Lib.12. Nov. Rec. L.8.tit.34. Lib.12. Nov. Rec. L.7.tit.34. Lib.12. Nov. Rec.

The judge of inquiry (*pesquisidor*) being a commissioned judge, it follows,

1st, That he ought to possess the qualities required by Ll.8 & 9. tit.17. P.3. Ll.8 & 9.t.17. P.3.

2d, That no one can excuse himself, on pain of one hundred *maravedis*, unless on account of sickness, enmity, or suits, L.6. tit.17. P.3. L.6.t.17.P.3.

3d, That not fulfilling his duty properly and faithfully, he may suffer the penalty *talionis*, L. 12. tit.17. P.3. L.12.t.17.P.7.

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[23] *Palacios* says, there are inquests which are general in respect to persons, and special in respect to crimes; that such inquests are not prohibited, but are very frequent; and that every judge may take or make them in virtue of his office; for that, otherwise, offences could not be established. The learned Professor cites *Cur. Filip.*, p. 3. § 10.

[24] *Palacios* observes, that the law cited enjoins the contrary; that is, that the judges must execute the duty in person. *Vide* L.8. tit. 34. Lib. 12 Nov. Rec.

4th, That the judge of inquiry against a mayor (*corregidor*), cannot act as such in the place where the latter presides, until after the expiration of a year, L. 6. tit. 7. Lib. 3. Rec.

L. 16. tit. 13. Lib. 7. Nov. Rec.

§ 3. The obligations or duties of a judge of inquiry.

The king, or the council in his name, may appoint a judge of inquiry (*juez perquisidor*) at the instance of the party, or on his own authority, who must, 1st, Swear before receiving the appointment what is contained in the laws of the *Ordenamiento de Alcala*, and expressed in L. 7. tit. 1. Lib. 8. Rec.

[315]

L. 11. tit 34. Lib. 12. Nov. Rec.

2d, He ought to set out within three days, it being at the instance of the party, and not doing so, recourse may be had to the fiscal to compel him to do it, L. 10. tit. 1. Lib. 8. Rec.

Nota 2. tit. 34. Lib. 12. Nov. Rec.

Ll. 5. tit. 11. Lib. 7. & 6. t. 34. Lib. 12. Nov. Rec.

3d, The judge of inquiry must go at the cost of the party who prays the inquest, L. 5. tit. 5. Lib. 3. Rec., and if it were through the negligence of the ordinary judge, it must be at the cost of the latter [25], Ll. 2 & 8. tit. 1. Lib. 8. Rec., he remaining suspended from office. [26] 4th, The proceedings of these commissioned judges must not depart from the rule of the ordinary judge of inquest, which is explained in *Cur. Filip.* § 10. P. 3.

Ll. 5. & 10. t. 34. Lib. 12. Nov. Rec.

5th, Not more than one proceeding must be made, although there be several delinquents, L. 12. tit. 1. Lib. 8. Rec.

L. 9. tit. 34. Lib. 12. Nov. Rec.

6th, The commission being completed, a *traslado*, or copy of its sentences, must be given to the ordinary judges, or the judges of *residencia*, as to what respects those absent from their jurisdiction, L. 9. tit. 1. Lib. 8. Rec.

L. 12. tit. 34. Lib. 12. Nov. Rec.

7th, No commissioned judge can pronounce sentence against a person of distinction (*grande*) without the advice (*consulta*) of the council, L. 33. tit. 6. Lib. 2. Rec.

L. 19. tit. 1. Lib. 6. Nov. Rec.

8th, The judges commissioned by the council must give an account within twenty days of their commission, *Aut.* 2. tit. 1. Lib. 8. Rec. [27], and the escribanos who go to the inquest are bound to deliver the processes within two months to the escribano of the council which shall have despatched them, under a penalty of three thousand *maravedis*, and a year's suspension from office; a *traslado* or copy of which, if it should be prayed

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[25] *Palacios* adds, if the judge shall not be culpable, at the cost of those who are guilty; and if these should not be found, at the cost of the corporation or town funds (*proprios*); and if there should be no such funds, at the cost of those who are accustomed to pay in all things which are for the good of the town or place: he refers to L. 5. tit. 5. Lib. 3.; and L. 8. tit. 1. Lib. 8. Rec.; (L. 3. tit. 11. Lib. 7.; and 6 & 10. tit. 34. Lib. 12. Nov. Rec.)

[26] This would seem in regard to the particular case. *Vide* L. 5. tit. 34. Lib. 12. Nov. Rec., *ad fin.*

[27] Not inserted in the *Nov. Rec.*

for by the parties, is extracted or made by the escribano of the cause without delay, Ll. 10. & 17. tit. 1. Lib. 8. Rec. L. 18. tit. 34. Lib. 12. Nov. Rec.

9th, The ordinary judges can only appoint (*comisionar*) the inquest in grave cases, L. 8. tit. 1. Lib. 8. Rec., and even this within their jurisdiction, also as alcaldes *del crimen* of the audiences they cannot send judges of inquiry beyond the five leagues, L. 4. tit. 7. Lib. 8. Rec. [28] L. 10. tit. 34. Lib. 12. Nov. Rec. L. 3. tit. 23. Lib. 12. Nov. Rec.

In order to provide that no criminal shall remain unpunished for his offence, the judge must take care that the delinquent be imprisoned or secured (*preso*) in the best way possible; to this end prisons are established in the towns of their jurisdiction, which belong (*son privativas*) to the king, his magistrates, and those to whom the sovereign gives permission to have them under pain of death [29], L. 15. tit. 29. Part 7. Cap. 3. Of the imprisonment (prision) of the delinquent. L. 15. t. 29. P. 7.

Thus, therefore, in order to imprison a delinquent, it is necessary to have in consideration the gravity of the offence, and the quality or rank of the offender. Wherefore, 1st, The imprisonment ought to be executed by the judge, or those commissioned by him, on a previous information of the crime, except when done or directed on the commission of the offence itself (*in flagranti delicto*). [316]

2d, That with respect to certain persons, and for certain offences, the imprisonment is excused or moderated.

From the first principle it follows,

1st, That if on a summary information received, there results any presumption or proof of an offence, the judge proceeds immediately to the apprehension or arrest of the accused [30], L. 1. tit. 29. P. 7.; and if the accused should be out of his jurisdiction, although it be in districts of peculiar dominion (*señorio*), he ought to send to demand him from the judge in whose jurisdiction he may be, accompanying his demand with a warrant (*carta requisitoria*), setting forth (*que justifique*) the offence; and being L. 1. tit. 29. P. 7.

[28] *Palacios* observes, that this should be L. 4. tit. 7. Lib. 2. Rec.; (L. 7. tit. 14. Lib. 5. Nov. Rec.)

[29] But private individuals may have stocks in their houses, &c., to confine slaves, &c., to restrain them from absconding. *Vide* L. 15. tit. 29. P. 7. *ad. fin.*

[30] *Vide* Notes, *Greg. Lopez* on this law. The word *prision* is used in the text, which may mean actual imprisonment, or a mere arrest; in the last sense it is given in the translation; and in this sense it appears to be used in L. 1. t. 29. P. 7. *Palacios*, from an observation on this part of the text, would seem to view it in the first sense. He says, every presumption does not appear to me sufficient to proceed to so important an act as that "*de una prision*;" nor does every crime appear to me sufficient to authorise it, although there be proof. He, however, quotes a criminal law writer, who uses the word *arrestar*; and he refers to the *Instruction to Corregidors* of 15th May, 1778; and the *Pragmat. Sanc.* of 27th May, 1786. *Vide* L. 25. tit. 38.; and L. 10. tit. 32. Lib. 12.; and L. 19. tit. 31. Lib. 11. Nov. Rec.

a commissioned judge, his commission ought to be inserted in the warrant, *Cur. Filip.* P. 3. § 11. n. 7 & 8.; and even if there be a cause pending against him before the judge in whose jurisdiction he shall be found, and there is evidence of his escape,

L. 18. tit. 1. P. 7. the latter may remand him without such warrant, L. 18. tit. 1. P. 7.

L. 5. tit. 18. Lib. 12. Nov. Rec. 2d, That any one required by the judge of the cause, is bound to deliver up the accused, L. 2. tit. 16. Lib. 8. Rec.

3d, That justices, as well ecclesiastick as secular, and others, together with any inhabitant, are bound to afford assistance to apprehend the accused whenever the judge may demand it, *Cur. Filip.* P. 3. § 11. n. 9.

4th, That no one of his own authority may apprehend the delinquent after any time has elapsed from the execution of the

L. 2. tit. 29. P. 7. crime, except in the cases mentioned in L. 2. tit. 29. P. 7., presenting him to the judge within twenty-four hours, *Greg. Lop. ibid.* gl. 1 & 5.

5th, That the alguazil cannot apprehend the delinquent without the order of the judge, except he be found *in flagranti delicto*; in which case he is obliged to present the offender to the judge,

L. 4. tit. 33. Lib. 5. Nov. Rec. before lodging him in jail [31], L. 7. tit. 23. Lib. 4. Rec.

6th, The inferior judge may also apprehend, *in flagranti delicto*, the delinquent over whom he has not jurisdiction, and transmit him to his judge, *Cur. Filip.* part. 3. § 11. num. 4 & 5.

L. 11. tit. 2. Lib. 6. Nov. Rec. On the second principle it is established, 1st, That the noble cannot be committed to the same prison as the plebeian, Ll. 4. & 6. tit. 29. P. 7.; L. 11. tit. 2. Lib. 6. Rec.

Ll. 4. 6. tit. 29. P. 7.

[317] 2d, That women must have a separate prison from men; and being of quality, must not be imprisoned in a public prison, except for a grave or serious crime: so that whenever they can be secured on bail, or in any secluded place of a monastery, it

L. 5. tit. 29. P. 7. must be done, L. 5. tit. 29. P. 7.; L. 2. tit. 24. Lib. 4. Rec.

L. 3. tit. 38. Lib. 12. Nov. Rec. L. 16. tit. 1. P. 7. L. 6. tit. 12. Lib. 5. Nov. Rec. 3d, If the offence does not merit corporal punishment, the judge is bound to admit the prisoner to bail; and if his innocence appear, to discharge him, L. 16. tit. 1. P. 7. and L. 8. tit. 7. Lib. 2. Rec. [32]; it being observed, that although one of the al-

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[31] *Palacios*, referring to the law cited in the text, says, if the *alguazil* should apprehend the delinquent in the night, he may lodge him in the jail; giving immediate information in the morning to the judge, in order that he may issue the necessary order. He adds, that any one who hears another blaspheming, may arrest and carry him to jail, L. 4. tit. 4. Lib. 5. Rec. (L. 3. tit. 5. Lib. 12. Nov. Rec.)

[32] *Vide* also on this point, 2d *Vil. Mat. Crim. ob.* 9. § 4. p. 128. n. 127.;

caldes of the court (*de corte*), may take the information, and order the apprehension or imprisonment of the offender, he cannot, by himself, discharge him without the approbation of the whole hall (*sala*), L. 6. tit. 6. Lib. 2. Rec.

L. 8. tit. 27. Lib. 4. Nov. Rec.

The offender who escapes from prison, besides being taken, or considered as having confessed, must be punished for the breach or escape at the discretion of the judge, L. 13. tit. 29. P. 7.; L. 7. tit. *fin.* Lib. 8. Rec.; and he who violently rescues (*saca por fuerza*) the prisoner from jail, incurs the penalty of the offence; and if the prisoner was confined for debt, that of being obliged to pay it, and of being punished at the discretion of the judge for the breach: but this last is moderated with respect to the son who rescues his father, and with respect to the husband who rescues his wife, or *vice versa* [33], L. 14. tit. 29. P. 7.

L. 13. t. 29. P. 7. L. 17. tit. 38. Lib. 12. Nov. Rec.

L. 14. t. 29. P. 7.

Cap. 5. Of the confession of the delinquent.

The offender being imprisoned, the judge himself, in the presence of the escribano, ought to receive the confession of the accused on oath, Ll. 1 & 6. tit. 29. P. 7. [34], and this with entire secrecy, L. 3. tit. 30. P. 7. [35] This confession, in order to be just and legal, must be received by the judge who has jurisdiction of the cause (*competente de la causa*), there being one eye-witness of the fact (*testigo de vista*), or having certain knowledge thereof, (*cierta ciencia*) against the accused, free from all exception; or presumptions (*indicios*), which produce half proof, he being notified of the same, having the deposition read to him, and being informed thereof, *Cur. Filip.* P. 3. § 13. n. 4. &c.; where may be seen various opinions with regard to criminal confession.

Cap. 6. Of the torture (tormento) of the delinquent.

If, after the publication of the proofs of the witnesses, it is prayed by the accuser that the accused may be tortured, on account of not having sufficient proof, if there be sufficient proof to authorise its infliction on the accused, and he is a person to whom torture may be applied, this last means of proof (or rather mode of procuring proof) is resorted to, in order that he may not remain unpunished.

1st vol. *Gut. Prac. Crim.*, c. 6. p. 209. No. 2.; and *Greg. Lop.* Gl. 4 & 5. on L. 16. tit. 1. P. 7.; also *Greg. Lop.* Gl. 4. L. 10. tit. 29. P. 7.; the summary of this last title; *Curia Filip.* tit. *Prision*, p. 209. n. 14.; L. 6. tit. 12. Lib. 5. Nov. Rec.; and L. 25. tit. 38. Lib. 12. Nov. Rec. It is inferred from some of the foregoing authorities, that mere imprisonment is not considered a corporal punishment which renders an offence not bailable under the Spanish law.

[33] *Palacios* says, these exceptions are not to be found in L. 14. tit. 29. P. 7., cited, but in *Curia Filip.* p. 3. § 11. n. 13.

[34] These laws do not apply.

[35] This law applies to cases of torture. *Cur. Phil.* p. 3. § 13. n. 1. quotes Ll. 4 & 6. tit. 29. P. 7., in support of the precise *dictum*; the first of which laws has reference to the point.

Torture is a species of proof, which those who were lovers of justice [36] found out, in order to investigate and know by it the truth of those evil acts which are done secretly and cannot be
L.1.tit.30.P.7. known or proved in any other manner, L. 1. tit. 30. P. 7. [37]

[318] Formerly in our Spain both the accused and the accuser were tortured [38] in order that the cause might be proceeded in with greater certainty, L. 2. tit. 1. Lib. 6. *Fuero Juzgo.* The mode by which the accused purged themselves of a crime was remarkable, exposing themselves to chance, by which they overcame the torture of boiling water, red-hot iron, and others, on which the definitive sentence of the judge depended, L. 3. *ibid.*

With respect to torture, we establish three principles, 1st, That it is not applied to all kinds of persons.

2d, That it is made use of only to complete the discovery of truth.

3d, That it must be preceded by the most urgent or violent presumptions (*indicios*), in grave crimes.

From the first principle it follows, 1st, That persons under fourteen years of age, a knight (*caballero*), one of the degree of doctor, a counsellor, a mayor of a corporation (*regidor de concejo*), nor their children, nor those of good character, cannot be tortured, nor the woman who is pregnant, until she brings forth,
L.2.tit.30.P.7. L. 2. tit. 30. P. 7.

2d, Neither can all those in the right ascending or descending line to the fourth degree be tortured to give evidence against each other, nor collaterals to the same degree against their re-
L.9.tit.30.P.7. lations, L. 9. tit. 30. P. 7.

3d, Nor the wife against her husband, nor the father or mother-in-law against their sons or daughters-in-law, nor step-fathers against the children of a former marriage, and *vice versâ*,
L.9.tit.30.P.7. L. 9. tit. 30. P. 7.

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[36] What a libel on the term Justice!

[37] The insertion of this chapter in the translation may seem unnecessary in regard to any desired information connected with Trinidad; but as it forms part of the work, it has been thought fit to give it due place here. The infliction of torture, in the case of Louisa Calderon, reported in *Howell's State Trials*, vol. xxx. p. 225. produced, it is believed, instructions from the British government to the governors of that island, to prevent recourse to any punishment not permitted by the laws of England; and British professional judges have, for some years past, presided in the courts of the island.

Humanity has deeply to mourn the discovery and adoption of this probatory species of detestable ingenuity.

By late Orders in Council, of 16th September, 1822, given in Append. F & Q, beneficial alterations have been made in the judicial establishments of the colony, and in the course of juridical procedure.

[38] This would seem to have established impunity for crime, for doubtless there could have been none or very few accusers found. *Palacios* says, that the accused only was tortured, as stated by the law quoted.

From the second principle it arises, 1st, That in torture the judge, escribano, and executioner must be present, the judge putting questions generally, as directed by L. 3. tit. 30. P. 7. L. 3. tit. 30. P. 7.

2d, That there being two or more persons to be tortured, they begin with the weakest, or if not with the one against whom there is the most vehement presumption, L. 5. tit. 30. P. 7. L. 5. tit. 30. P. 7.

3d, That the judge protests that if the person does not speak the truth, and dies from the torture, the charge is not with him; but if he inflicts the torture unjustly, he ought to suffer the same punishment as he orders to be inflicted, comparison being had (*graduandose*) to the persons of the judge and him tortured, L. 4. tit. 30. P. 7. L. 4. tit. 30. P. 7.

4th, That a confession received under torture, is not valid, unless it be afterwards ratified in another place, L. 4. tit. 30. P. 7. L. 4. tit. 30. P. 7.

5th, That if on this last confession he shall deny, he may not be again tortured, except it be the crime of high treason, theft, or robbery; but in these cases, the accused being tortured three times, if afterwards he shall deny the charge, the torture shall not be repeated, L. 4. tit. 30. P. 7. [319] L. 4. tit. 30. P. 7.

6th, That the (ordinary) tortures must be made use of, and not new extraordinary kinds, L. 1. tit. 30. P. 7. L. 1. tit. 30. P. 7.

7th, That the witness who is perceived varying in his answers, may be tortured in the same manner as the accused, L. 8. tit. 30. P. 7. L. 8. tit. 30. P. 7.

8th, That there being full proof of the crime, the accused cannot be tortured under pain of the judge paying the damages and interests (*intereses*), *Cur. Filip.* P. 3. § 16. n. 2.

From the third principle, it is inferred, 1st, That the accused cannot be tortured without previous sufficient presumptions, L. 2. tit. 30. P. 7., which depend on the prudence and discretion of the judge. L. 2. tit. 30. P. 7.

2d, That if the accused shall deny the charge under torture, he may be tortured again, there supervening most urgent or vehement presumptions, *Cur. Filip.* p. 3. § 16. n. 16.

3d, That the torture is only applied from presumptions of crime which deserves corporal punishment, and not pecuniary, L. 26. tit. 1. P. 7.[39]

When once the innocence or guilt of the delinquent is established, they proceed to sentence, from which not only the accused Cap. 7. Of the criminal sentence.

[39] This law does not apply. See *Cur. Filip.*, p. 3. § 16. n. 3.

may appeal[40], but any one in his name[41], so that within the term of appeal he be authorized to do so, or his act be ratified; for which circumstance it is not necessary that the appellant be related to the delinquent, L.6. tit.23. P.3. In the mean time he must not be released from prison, but he must be handed over secured to the judge of appeal, L.16. tit.18. Lib.4. Rec.

L.6.tit.23.P.3.

L.19.tit.20. Lib.11. Nov. Rec.

But no appeal is admitted from noted (*famosos*) crimes which are fully proved, nor from an unnatural crime (*pecado nefando*[42], L.16. tit.23. P.3. & L.1. tit.21. Lib.8. Rec.

L.16. t.23.P.3. L.1.tit.30. Lib.12. Nov. Recop.

If the sentence is that of death, it is executed (being preceded by the administration of the sacrament to the delinquent, L.9. tit.1. Lib.1. Rec.) publickly for a warning to all others, L.11. tit.31. P.7.

L.11.tit.1. Lib.1. Nov. Rec. L.11.t.31.P.7.

If the delinquent, through contumacy or absence, cannot be had or taken, and the crime were of the class which requires the sequestration of property, the sequestration ought to be made without proclamation (*pregon*), and the delinquent cited for three periods of nine days, whether he be or not in the jurisdiction[43]; and if at the first period (*plazo*) he should not appear, he shall pay the contempt (*despres*)[44]; appearing at the second period, he shall pay the contempt and costs, and may be heard: but if at the second he does not appear, and he be accused of a second contumacy (*rebeldia*), in the crime of death or murder, he shall be condemned in the fine for killing (*homecillo*)[4]; if at the third [320] period he should come, he shall pay the contempt, the fine of killing, and the costs, and may be heard: but if this last term be passed, and he does not appear, the accusation shall be laid against him in form, as though he were present, he being ordered to answer within three days; and not coming, and being accused of this contumacy, the pleadings (*pleyto*) are had as concluded. The cause is received for proof in the regular terms of a civil suit, until conclusion for definitive sentence, he being declared guilty of the crime, and being condemned to the punishment which he may merit, there being proof sufficient to put him to the torture. The accused having appeared to offer himself at

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[40] See Order in Council, 16th Sept. 1822 Appendix F.

[41] Any one, says *Palacios*, referring to L. 6. tit. 23. P. 3., may appeal; but this is understood in respect to a capital case.

[42] For information in respect to appeals, &c., in criminal cases, *Palacios* refers to *Gutierrez, Prac. Crim.* tom. 1. cap. 10. §§ 1, 2, & 3.

[43] On this subject *Palacios* refers to Ll. 7. tit. 6. Lib. 2.; and 3. tit .10. Lib. 4. Rec. (Ll. 2 & 1. tit. 37. Lib. 12. Nov. Rec.)

[44] Which, says *Palacios*, referring to *Azevedo* on L. 3. tit. 10. Lib. 4., Rec., means as much as sixty *maravedises*.

[45] 600 *maravedises*, says *Palacios*.

the prison, or being arrested before the definitive sentence, if he pays the penalties of contumacy, he ought to be heard anew, all the process remaining in force; and even if he present himself within the year after the definitive sentence, he may be heard with regard to the pecuniary penalties[46], which cannot be executed or levied within it. If within this year the accused should die, his heirs shall be heard with respect to the pecuniary penalties in the cases in which the crime is not extinguished or expiated by death, wherefore L. 7. tit. 8. P. 3. is altered. The sequestration being made against the property of the absent delinquent, if within thirty days he does not appear, the judge shall be obliged to sell it at public auction, if perishable (*deteriorable*), and place the amount in sequestration, L. 3. tit. 10. Lib. 4. Rec.

L. 1. tit. 37. Lib. 12. Nov. Rec.

In order to declare the accused contumacious, after the sentence and conclusion, it is necessary that there be lawful proof; that three months be expired, and that the plaintiff accuse him of contumacy, L. 1. tit. 10. Lib. 4. Rec.

L. 4. tit. 37. Lib. 12. Nov. Rec.

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[46] And in respect also to the corporal punishment, adds *Palacios*.

END OF THE THIRD BOOK.

APPENDIX.

APPENDIX A.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart. Governor and Commander-in-Chief in and over the said Island and its Dependencies, Vice-Admiral of the same, Intendant of the Royal Treasury and Judge of Crown Lands, and Exercising the Powers of the Royal Audiencia, &c. &c. &c.

AN ORDER OF GOVERNMENT.

RALPH JAMES WOODFORD. *GOVERNMENT HOUSE, Port of Spain, 11th April, 1821.*

WHEREAS by the 6th Law of the 8th Tit. and 5th Book of the Recopilated Laws of the Indies, it is ordered and directed that all escribanos of Municipal Corporations do keep a book in which they shall enter an account of all guardianships and curatorships, and of all estates and properties which guardians and curators may have under their charge, together with such securities as they shall have entered into for the faithful discharge of their duties; and all judges are directed by the said law not to appoint by their judicial order or decree any but substantial and respectable persons to the office of guardian and curator, nor to make any such appointment unless good and sufficient security be first given by the appointee to render an account of his administration, and to pay the proceeds thereof, whenever the same shall be required to be rendered and paid; the formalities required by the said law being first also duly had and observed.

And whereas, it is necessary to provide for a due observance of, and obedience to, the provisions and formalities of the said law in this island, *it is hereby ordered and declared, and directed*, that within the term of six months from and after the promulgation of this order, all persons whomsoever, who, either as testamentary guardians and curators, or as next of kin, or guardians acting under judicial appointment and authority, or in any other manner, or under any other authority whatsoever, shall have the charge, or be in possession of any lands, slaves, houses, lots, or any other property, real or personal, or of what nature and kind soever, belonging to any minor or minors within this jurisdiction, shall render to one of the escribanos of the tribunal of His Majesty's Chief Judge, a true and particular return of the name of the minor or minors, his or their age, and an account of all such lands, slaves, houses, lots, or other property, real or personal, belonging to such minors; signifying in such return and account the value of the respective properties, and the right in which such minors claim; and also stating and particularly setting forth the authority, order, decree, or warrant, under which the party or

parties rendering such returns have acted as such guardians or curators; and also the nature and extent of the securities entered into by them, for the due and faithful administration of the property of such minors: And in case any person or persons, so acting as guardian or curator as aforesaid, or any other person or persons in possession of any property whatsoever, belonging to any minor or minors, shall neglect or refuse to render such account and return within the period and in the manner hereinbefore limited and appointed for making and rendering the same, such person or persons shall, for such neglect or default, be liable and subject to a penalty not exceeding 200*l.* currency, to be recovered in any of the courts of this island, upon the complaint and at the prosecution of the father-general of minors, and to be dismissed from the future charge and care of the person and property of such minor; and will also be liable to the damages that such neglect may have occasioned.

And it is hereby further ordered and directed, That from, and immediately after, the expiration of the term hereinbefore limited and appointed for the presentation and delivery of such returns and accounts, the escribano shall lay the same before the court of His Majesty's Chief Judge, who, with notice and citation to, and in the presence of, the father-general of minors and the guardian or curator, whose returns and accounts shall be under examination, shall proceed to the examination and approval thereof; as also of the securities entered into by such guardian or curator, subject nevertheless to such correction, alteration, or amendment, as to the said court may seem necessary and proper, and which the said court is hereby authorised and required to order and direct to be made; and such examination and approval shall be signified by the Chief Judge under his hand, and then the commission or letters of administration will be issued by the court to the guardian or curator.

And it is hereby further ordered and directed, That when and so soon as all the said returns and accounts shall have been examined and approved by the said court, under the direction and authority hereinbefore contained and given for that purpose, the same shall be delivered by the escribano, to the secretary and register of the cabildo, or his lawful deputy, who shall forthwith cause the same to be entered at length in a book to be kept by him expressly for that purpose, and to be entitled "The Book of Registry of the Property of Minors;" such entry to be made according to the printed form in blank, within the term of three calendar months, unless the court shall, upon application being made to it for that purpose, and upon reasonable cause being shewn, by its order or decree permit any extension of the said period, so limited by this order, and that each folio of such book of registry shall be numbered and attested by the initials of the name of the said register, or his lawful deputy: And that all copies or extracts which may thereafter be made from such book or registry, and duly certified by the said register or his lawful deputy, under his hand, shall be received as full and sufficient proof of the appointment of such guardian or curator, and of his due qualification to act as such, as well as for his responsibility to answer for the property under his charge.

And it is hereby further ordered and declared, That in all judicial adjudications, liquidations, partitions, or divisions of any property, belonging to any minor or minors, which may hereafter be made in any of the tribunals of this colony, and in all cases in which guardians or curators may be appointed to the charge of any property or

of the person of any minor or minors, when possession thereof shall have been given to the guardian or curator, an extract of the adjudication, liquidation, partition, or division, and of the decree confirming the same; as also of any mortgage or other securities which may be executed or entered into by the said guardians or curators for the due and faithful discharge of the duties of their office, shall be lodged by the escribano with the secretary and register of the cabildo, or his lawful deputy, within six days from the date of the said decree, for the purpose of being entered in the said book, to be entitled "The Book of Registry of the Property of Minors;" and the said secretary and register, or his lawful deputy, shall cause the same to be so registered and kept, within six days from the date of the delivery thereof to him, in default whereof, the escribano or secretary and register, as the case may happen, shall be liable and subject to a penalty not exceeding 100*l.* currency, to be recovered in any of the courts of this island, upon the complaint and prosecution of the father-general of minors, and to be deposited in the chest of the court, to be applied for public purposes; and that in all extra-judicial cases of mortgages, or other securities, executed in this island, for the purpose of securing the property of any minor or minors therein, the said secretary, or his lawful deputy, do, within six days from the entry thereof in his office, prepare and enter in the said book of registry of minors' property, an extract of such mortgage or other security, in default whereof he will be subject to such and the same penalty as is last hereinbefore mentioned.

And it is hereby declared, That for the entry and registration of all such accounts, returns, adjudications, liquidations, partitions, and divisions, securities, decrees, or other instruments as aforesaid, the secretary and register shall be entitled to, and shall receive, the following fees, to be paid by the guardian or curator in charge of the property, contained in such accounts, returns, adjudications, liquidations, partitions, or divisions, as aforesaid; and to be charged and chargeable in his account with the minor or minors:

Docket of Fees for the Secretary of the Cabildo, which he will charge against the Property of the Minor or Minors.

	£.	s.	d.
To filling up an original return - - - - - -	2	0	0
To entering the extract of adjudication of property, mortgage, accounts, and of the decree of approbation by the judge	1	10	0
To an authenticated copy of any document, the fee will be according to the present judicial document - - -			

NOTE. — The fees of the court will be the same as those of the general docket.

And it is hereby further ordered and directed, That in case, either at the time of rendering the original returns and accounts of the said guardians or curators under the order hereinbefore contained for that purpose, or at any subsequent period, any doubt should arise or be entertained as to the validity or sufficiency of any mortgage or other security given or entered into by any guardian, curator, or other person charged with, or in the possession of, the property of any minor or minors as aforesaid, the court shall direct the necessary investigation or inquiry to be forthwith made and proceeded in, in such manner as it may think fit, for the purpose of ascertaining the validity and sufficiency of such security; and in case, upon investigation, any such security shall appear to the court to be inadequate or insufficient, such further security shall be forthwith given and entered

into by and on behalf of such guardian, curator, or other person as aforesaid, to the satisfaction of the court, and of the father-general of minors, as the court shall order and direct; in default whereof, such guardian or curator shall be removed from his said office, and some other proper and sufficient person appointed in his stead.

And it is hereby further ordered and declared, That all persons so acting as guardians or curators, or any person or persons in possession of any property whatsoever, belonging to any minor or minors as aforesaid, shall, on or before the 31st day of the month of January in each and every year, render to the court of His Majesty's Chief Judge a full and particular account of the annual revenues and expenditure, in respect thereof, and of the state and situation of such property, certifying particularly the state of the Negroes thereto belonging (if any such there may be); in default whereof, the party neglecting so to do shall be subject to dismissal from his office, and to such penalty, not exceeding 200*l.* as the court, upon the application of the father-general of minors, shall think fit to impose: And that all such annual accounts as aforesaid, when examined and approved by the court and by the father-general of minors (such examination and approval to be signified under their hands), shall be forthwith delivered by the escribano to the secretary and register of the cabildo, who will cause the same to be attached to the return or accounts, liquidation, partition, or division, to which it belongs, under the respective number of the original return, to be carefully preserved in the archives of his office.

And it is hereby ordered and declared, That the duty of parents as tutors, will only be to present, on oath, the original return; they being, by law, exempted from the obligation of giving security.

And it is also declared, That the tacit mortgage, and the other privileges, which minors enjoy, is not in any manner affected by these presents: but the same is hereby affirmed.

And it is hereby ordered and declared, That the secretary of the cabildo shall keep an alphabetical index, wherein the names of the minor, the tutor or curator, as well as of the security, shall be indexed with reference to the principal book.

It is hereby also ordered, That whenever the father-general of minors shall find it necessary, in the fulfilment of his duties, to examine the book of registry, the secretary of the cabildo will allow him to do so at any time or occasion, and give him any copy or certificate that he may require; the said secretary charging the respective fee against the estate of the minor, according to the judicial general docket. That the father-general of minors shall revise the securities every third year, in the month of January, and shall report to the court, if there is any security which may be necessary to be renewed; and the same enquiry and report he will make, without delay, at any time, in case of any deficiency or suspected deficiency of such securities.

And whereas, It frequently happens that the expences, on application for judicial permission, for the sale of small properties of minors, under the value of 250*l.* currency, have been heavy in proportion to the inconsiderable value of such properties, on account of the formalities hitherto required and observed, previous to the granting of the said permission; with a view to lessen the same, and to obviate delay and inconvenience, *It is hereby declared and directed*, That in cases of such sales, under such sum, the father-general of minors shall, verbally, state the matter in the complaint court, and the judge

of the court shall receive summary information of the utility of such sale; and the same, being established, the court may give the consent, the father-general of minors receiving from the succession a fee of four dollars, or two pounds currency, for his inquiry, attendance, and trouble.

ANTONIO GOMEZ.

Before me, JOHN CARTER, *Escribano de Camara.*

Return of Tutor or Curator of Minor or Minors, Son or Daughter of such a one deceased, as the case may be.

Minor.	Parent, Tutor, or Curator.	Security.	Property.	Where situated.	Observations.

APPENDIX B.

By His Excellency THOMAS PICTON, Esq. Lieutenant Colonel of the 56th Regiment of Foot, Governor, Commandant General, &c., of the Island of Trinidad.

ORDINANCE.

WHEREAS in a West India colony settled by different nations, varying in customs and opinions, it is important to excite the inhabitants of every class to mitigate the situation of their Slaves, by rendering their servitude as limited and easy as possible, and by promoting their natural increase, so as that in course of time the importation of Slaves from Africa may be considerably diminished, if not totally dispensed with: And whereas those desirable ends cannot be more effectually attained, than by compelling the owners of Slaves to lodge, clothe, and maintain them sufficiently, as well in health, while able to work, as in time of sickness, age, and infirmity; by prescribing reasonable bounds to the power of masters and others, having the charge of Slaves, and by instructing them in the principles of Christianity, to inspire them with some degree of morality.

We have therefore resolved to issue the present Ordinance, by virtue of the authority with which His Majesty has invested us, in order that the regulations it contains may be publicly and generally known, and have their due execution from the date of their publication;—charging *all persons* under our government to pay due obedience thereunto, on pain, in cases of negligence or contumacy, of incurring the penalties hereinafter specified.

ART. I. Every proprietor or possessor of a plantation shall provide the Slaves attached thereto, with good and comfortable houses, well wattled and thatched, so as to be perfectly wind and water tight. The head or chief of every family shall have a house for himself, separated into two or more apartments, according to the number of that family, and there shall be cabanes or bed-places in those apartments, raised at least eighteen inches, to preserve them from the dangerous effects of sleeping on the moist ground. Young Negroes

of fourteen and upwards, who have no family, shall be lodged at the rate of three to a house, and they are to have their cabanes raised eighteen inches from the ground as aforesaid. The Slaves shall be allowed to inclose their houses with a fence or hedge, to form a little yard for their stock, and defend them from the incursions of the cattle in the pasture, &c.

ART. II. The proprietor or attorney of every plantation shall have one quarre, or three acres, or $\frac{1}{24}$ of a fanegue of land, for every ten working Negroes, planted and cultivated in provisions, for the maintenance of his gang; and he shall also, on the Monday or Saturday of every week, distribute to every Negro, of fourteen years and upwards, under his care, three pounds of salt meat, or four pounds of salt fish (being the weekly allowance), and to all Slaves under age, and children, a weekly allowance of salt meat or fish in that proportion.

Exclusive of the allowance of salt meat or fish (in which there can be no exemption), every working Negro of fourteen years and upwards, shall have a portion of land allotted him, adequate to produce, by cultivating it, a sufficiency of ground provisions for himself and his family; and, to furnish him more effectually the means of doing so, he shall be allowed the Saturday, from noon, to work in his grounds, from the first day of July to the first day of January, if he belongs to a sugar plantation; and from the first day of January until the first day of July, if he belongs to a coffee, cocoa, or magnioc plantation; he will also have his Sundays, and the four great annual holidays of Christmas Day, New Year's Day, Good Friday, and Corpus Christi.

The portion of land allotted the Slave for his garden, cannot be taken from him, or exchanged, without his consent: if the owner or attorney thinks proper to change the situation of the Negro grounds, he must give the Slaves a year's warning, unless he prefers obtaining their consent by paying them their improvements, and assigning them grounds for gardens, to their satisfaction, elsewhere: And it is a duty most incumbent on managers and overseers, to take care that the Negroes have their grounds in good cultivation, and that they do not lavish or misemploy the surplus time allowed them for that purpose.

ART. III. Owners of plantations, whose locality does not admit of allowing Negro gardens, nor of having provision grounds, shall furnish weekly to every working Negro under their care, sixty full-grown plantains, or six quarts farine of magnioc, *i. e.* cassava meal; and in case they cannot procure plantains or cassava-meal, it shall be commuted in money, at three bits a week, in lieu of the vegetable allowance, independent of the allowance of salt meat or fish, of which, on no pretext, there can be any exemption.

ART. IV. To every Negro two shifts of cloathing, complete, shall be furnished yearly, one in May, the other in December; and in case of refusal, there shall be inflicted on the owner a penalty of twelve dollars for every Negro who is not clothed at the time appointed.

ART. V. Owners or attornies shall not punish Slaves by more than thirty-nine lashes *; and managers or overseers shall not punish

* This, by an Order of the 7th February, 1815, was commuted to twenty-five stripes, being the number fixed by the Royal Cedula of 31st May, 1789.

by more than twelve lashes, for any one offence; the Slave who has received thirty-nine lashes, shall not be flogged again on the same day, nor until he be recovered from the effects of that punishment; and an infractor of this article will be fined fifty dollars. Should the crime of the Slave, however, be of a nature to deserve a severer chastisement, he shall be conducted before the Commandant of the District, who will order such corporeal punishment as the case deserves: it being well understood that it cannot extend to death or mutilation, nor shall it be permitted the owner to inflict any farther punishment for the same crime, under penalty of fifty dollars.

ART. VI. Whoever shall be convicted of having inhumanly struck a Slave with an edged weapon, such as a cutlass, axe, sword, or with a bludgeon or loaded beau-stick, will be prosecuted and punished according to law; and if the crime shall be committed by his master or owner, he (the Slave) shall be immediately removed from his (the master's) authority, and deposited with the Commandant of the District, or alcalde de barrio, to be sold to some person of known humanity; and the sum arising from the sale, shall be applied, in whole or in part to the relief of the wounded Slave, or in such other charitable purposes as may be deemed proper; and the sale of such Slave, it is hereby declared, shall be valid, nor shall the purchaser be disturbed in the possession thereof.

ART. VII. The field Slaves shall have half an hour in the morning for breakfast, and two hours at noon for dinner. Nurses having children at the breast, shall be permitted to leave the field at noon and night, half an hour before the others, and are exempted of throwing grass. Field Slaves are not to go to the field before five o'clock in the morning, nor to work there after six in the evening, except in bringing grass at noon and night for the stock: but it is not meant that this regulation should interfere with the night work on sugar estates in crop time, which cannot possibly be dispensed with.

ART. VIII. Negroes superannuated, infirm, or invalided by sickness or accident, shall not be abandoned by their owner; on the contrary, he shall lodge, feed, and clothe them as usual, and if any person should be so inhuman as to treat them ill, he shall be punished.

ART. IX. It has been for many years a custom with some of the inhabitants to give their Negroes Saturday in place of allowance, and with gangs of laborious active Creole Slaves it was found to answer the purpose; but in gangs composed of new Africans, those who adopted it had reason to repent of the experiment: a new Negro being naturally so lazy and inactive, that he would rather suffer hunger and enjoy his repose, than procure himself his subsistence by industry. The increasing opulence of the inhabitants having laterally enabled them to augment their force by considerable purchases of this description of Negro, the custom of giving the Saturday becomes highly imprudent, and would occasion great losses in the colony: Wherefore it is hereby abolished and prohibited, under penalty of fifty dollars for every delinquent.

ART. X. Owners or managers of plantations shall not oblige their Slaves to work on Sundays, or the holidays herein-before specified: but this regulation shall not extend to watchmen or pasture-boys (who will continue as heretofore to do that duty in turn), nor to family domestics, the intention being simply to assure the field Negro the free enjoyment of his holidays, to work in his grounds.

ART. XI. Any Negro who shall assume the reputation of being a spell-doctor or obia-man, and shall be found with an amulet, a fetiche, or the customary attributes and ingredients of the profession, shall be carried before the Commandant of the District, who will take cognizance of the accusation; and, provided the crime be not capital, inflict a proper punishment: but should it appear probable that the culprit has been the cause of the death of any person by his prescriptions (as very frequently happens), the Commandant will then transmit him to the common goal, as a criminal, to be prosecuted and dealt with according to law.

ART. XII. It is a duty incumbent on Christians, not only to feed and clothe those who are dependent on them, but also to instruct them in their duty towards their Maker. Planters who have attended to this precept, have found the benefit of it in the improvement of their Slaves' dispositions. It should be therefore the essential duty of the master, to teach his Slaves the first elements of the Christian religion, to prepare them for baptism; and we expressly recommend to the parish curates the observance of this part of their office, reminding them that it is a principal object of their mission, to teach the Gospel to the poor.

ART. XIII. There shall be on every plantation an hospital, proportioned to the number of its Slaves, and one or more female attendants attached thereto. The Negro who from sickness is incapable of doing his duty, shall there be lodged and attended until he be perfectly recovered: and here it is proper to observe, that careful nursing is generally found the most efficacious remedy in Negro disorders. The owner or manager will keep an hospital diary, on which he will note the date of the admission and discharge, or decease of the Slave; and on giving in the annual enumeration of the estate, he will make also an obituary report.

ART. XIV. It is a prevalent opinion that owners of plantations, by humane and moderate treatment, might preserve the offspring of their Slaves, and thereby considerably increase their population: To encourage so beneficial a measure, we have ordained, that every mother of a family having more than three children on her master's plantation, shall be allowed one day in the week extraordinary, from the first July to the first January, if attached to a sugar or cotton estate, and from first January to first July, if to a coffee, cocoa, or manioc estate, and at the end of every year she shall receive from her master a dollar a head, for her future encouragement in the care of her children.

A mother of a family having seven children living on her master's estate, shall be exempted from all labour, and she shall be furnished her allowance and maintenance in common with the other Slaves, and receive the reward, already specified, of a dollar a head per annum for her children.

The same motive obliges us to prohibit women being put to work before they are perfectly recovered from child-bed, nor shall the infant be carried to the field, but remain under the care of a prudent woman, to be appointed guardian of the children, who will take charge of them in her own house, or a house appropriated to the purpose, until the mother's return from her work, or in her absence.

ART. XV. Penalties incurred by infractions of these regulations, to be recovered by warrants, signed and sealed by the Commandant of the District in which they have been incurred, which warrants are hereby approved: and all fines recovered in virtue thereof, shall be

paid into the hands of the treasurer of the illustrious cabildo, to be applied to defraying the charges of justice and of public works: for such is our will and pleasure.

ART. XVI. The present Ordinance shall be printed, published, and proclaimed in all places within our government: and shall be in full force and execution from the date of the publication until further orders.

THOMAS PICTON.

Government-house, Port Espano,
Island of Trinidad, 30th June, 1800.

APPENDIX C.

At a Court at Carlton House, the 26th of March, 1812, present, His Royal Highness the PRINCE REGENT in Council.

WHEREAS it is deemed expedient to provide more effectually for the prevention of the illegal and clandestine importation of Slaves into the island of Trinidada, it is therefore this day ordered by His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council:

That there shall be established within the island of Trinidada a public registry, for the registration and enrolment of the names and descriptions of all Negroes, Mulattoes, and Mustees, who now are, or at any time hereafter shall be held in a state of slavery within the said island, and of the births and deaths of all such Slaves.

And it is further hereby ordered, That within the term of one week from and after the arrival of this present order at Trinidada, and the receipt thereof by the governor, lieutenant-governor, or other person having the chief civil command under His Majesty within the said island, the same shall be publicly notified to the inhabitants of the said island in such manner as to the said governor, lieutenant-governor, or civil commander-in-chief shall seem most fit and effectual, and shall be enrolled at length in the book of minutes of the Board of Council, and among the records of the Cabildo, and of the court of the Oidor or Chief Judge; and the said governor, lieutenant-governor, or civil commander-in-chief, shall forthwith proceed to appoint some fit and proper person, unless some person then resident there shall have been previously appointed by His Majesty, to the office of registrar of Slaves for the said island; which person, before he enters on the execution of his said office, shall take the following oath before the said governor, lieutenant-governor, or commander-in-chief, in council:

"I *A. B.* do solemnly promise and swear, that I will not wil-
"lingly or knowingly make or permit, or suffer to be made, any
"false or fraudulent entry, erazure, or obliteration in the registry
"of Slaves to be committed to my charge; but if any such false
"or fraudulent act shall become known to me, will immediately
"give notice thereof to the governor, lieutenant-governor, or civil
"commander-in-chief, and to the oidor or chief judge of this

" island for the time being, and will in all respects faithfully and
" uprightly perform the duties of the office of registrar of Slaves
" for this island. So help me GOD."

And the said person so appointed to the said office of registrar of Slaves shall also, before he enters on the execution of his said office, become bound by bond or recognizance to His Majesty, his heirs and successors, with two sufficient sureties, to be approved by the said governor, lieutenant-governor, or civil commander-in-chief, himself in the penal sum of two thousand pounds, and his sureties each in the sum of one thousand pounds sterling money, with condition for the faithful performance by him, the said registrar, of all the duties of his said office; and in case of the death, absence, or incapacity of the said registrar, or any avoidance of the said office, a new registrar shall be in like manner, from time to time, appointed by His Majesty, his heirs or successors, or by the governor, lieutenant-governor, or civil commander-in-chief for the time being, (until the royal pleasure in respect of such appointment shall be signified,) who shall take the same oath, and enter into like securities, before he enters on the execution of the said office.

And it is hereby further ordered, That the said governor, lieutenant-governor, or civil commander-in-chief, shall also forthwith proceed to provide a proper and convenient house or building within or near to the town of Port of Spain, in the said island, for the sole purpose of the registry hereby established, wherein the books and papers belonging thereto may be at all times safely kept; and if no such house or building can be immediately found, the best temporary house or room that can be procured or allotted for the said purpose shall be provided and appointed by the said governor, lieutenant-governor, or civil commander-in-chief, until a proper and convenient registry office can be procured or erected in or near to the said town.

And it is hereby further ordered, That the said registrar shall forthwith provide two large blank paper books, strongly and durably bound, for the purpose of the registry and enrolment hereinafter directed, one of which books shall be entitled " Registry of Plantation Slaves," and the other " Registry of Personal Slaves;" in which said first-mentioned book shall be entered and registered, as hereinafter directed, the names and descriptions of all Slaves which belong to, and are usually worked or employed upon any particular plantation or plantations within the said island; and in the other of which said books shall be entered and registered, in like manner, the names and descriptions of all Slaves employed in domestic labour, or in any handicraft, art, or trade within the said island, or in manning or navigating any vessels or boats belonging to the ports of the said island, or which are let or hired by their owners for the purpose of agricultural labour, commonly called task-work, on plantations not belonging to the owners of such slaves; and, in general, all Slaves within or belonging to the said island, which are not attached to any particular plantation or plantations, and therewith owned, held, or possessed; all which several descriptions of Slaves shall, for the purposes of this order, be distinguished from Plantation Slaves by the general name of Personal Slaves.

And it is hereby further ordered, That within one calendar month from and after the public notification of this order at Trinidada as aforesaid, every person who shall then be resident in the said island, and who shall be in possession of any plantation, Slaves or Slave

within the said island, whether as proprietor, mortgagee, trustee, or receiver, manager or attorney, whatever their title, trust, or interest therein may be, or who then shall own or possess any Slave or Slaves whatsoever within the said island, whatever his or her tenure of or title to the same may be, shall respectively make and deliver upon oath to the registrar so to be appointed such schedules, lists, and particulars in writing, subscribed by him, her, or them, to be called his or her original return of Slaves, as are hereinafter mentioned (that is to say), every person in possession of any plantation as aforesaid shall so make and return a schedule or list in writing for each plantation within the said island of which he or she shall be then in possession, in any of the rights or characters aforesaid, therein specifying, in the first place, the name by which the plantation is usually called or known, and when two or more plantations are held and occupied together by the same person, and cultivated by the same body or gang of Negro Slaves, the names of each of the said plantations so jointly held and cultivated, and in what parish, quarter, or other division of the said island every such plantation is situated, and whether the same is a sugar plantation, or a coffee or cotton plantation, or of what other description; and in the next place the name or names of the present owner or owners of such plantation or plantations, as well as of the person or persons then in possession of the same, and making such return, and the right or character in which he, she, or they then held such possession, namely, whether as proprietor, lessee, mortgagee, trustee, receiver, attorney, manager or otherwise; and when the property or possession of any such plantation has been changed within seven years prior to such return thereof, then the said schedule shall also mention the name of the late owner or proprietor, and in whose tenure or occupation the same lately was, and every person making a return of any Slave or Slaves not attached or belonging to any plantation in the said island hereby called "Personal Slaves," shall so return a list or schedule in writing, containing, in the first place, his own name and description, or the name and description of such other person or persons being the owner or owners of such Slave or Slaves on whose behalf the return is made, and the right or character in which he, she, or they then hold possession of and claim title to such Slave or Slaves, namely, whether as proprietor, lessee, mortgagee, sequestrator, guardian, committee, trustee, receiver, executor, administrator, or otherwise; and if such personal Slave or Slaves shall have been purchased or acquired within seven years prior to such return, then the name or names of the seller or former owner thereof; and after such descriptions as aforesaid of such plantation and of the owner or owners of such Personal Slaves respectively in the said schedule, the parties making the said returns shall proceed to name, describe, and enumerate distinctly thereon the several Negro, Mulatto, or other Slaves then attached or belonging to the same plantation, or to the same owner or owners, by distinct lists, in manner following; that is to say, in the first place, such schedule shall contain a list of all Slaves who have husbands or wives, either by actual marriage, or known and constant cohabitation, or who have parents or children, brothers or sisters, among the Slaves of the said plantation, or of the same owner or owners, which list shall be entitled the "List of Families of Slaves on the Plantation of *A. B.*" (inserting the proper name of the plantation, or "of *C. D.* the owner of Personal Slaves," as the case may be); and the said list shall be divided into as many

sections as there are different families to be inserted therein, and each section shall be entitled, " The Family of *A. B.*" inserting the name of the superior relation, or, where there are only brothers, or other relations of the same degree, the name of the elder individual; and each of the said schedules shall also contain two other lists, in one of which shall be inserted the names of such male Slaves, and in the other of such female Slaves, as have no wives or husbands, parents or children, brothers or sisters, among the Slaves of the same plantation; or the same owner or owners; which lists shall be respectively entitled, " General List of Male Slaves" and " General List of Female Slaves" on the plantation of *A. B.*, (inserting the proper name of the plantation), or " belonging to *C. D.*" as the case may be.

And all the Slaves attached or belonging to the same plantation, or the same owner or owners, shall be named and described in the said schedule respectively, in the particular lists or sections to which they respectively belong, in the manner and form following, (that is to say)

The schedule or paper containing each of the said lists shall be divided into eight perpendicular columns, of convenient breadths, respectively entitled at the heads thereof, names, surnames, colours, employment, age, stature, country, and marks; to which shall be added, in the lists of families, a ninth column, of convenient breadth, entitled Relations; and the more clearly to distinguish the description of each particular Slave, as many horizontal lines, with convenient spaces between them, shall be drawn across the said perpendicular lines or columns, as are equal in number to the number of Slaves to be inserted in each list.

And in the first of the said columns shall be inserted the name of baptism of each Slave, if he or she shall have been baptized, and if not, the name by which he or she has been usually called and known. In the second of the said columns shall be inserted the surname or second name of the Slave, if he or she has ever been called or known by any surname or second name, and if not, then, in cases of Family Slaves included in the said lists of families, the name of the superior relation; and in the cases of Slaves who are included in the said general lists of males and females, such name as the owner or party making the return shall think fit to insert therein as the surname by which the Slave and his lawful issue, or her natural issue, and their descendants respectively, shall thereafter always be called; provided nevertheless, that in cases of Family Slaves, the owner or party making the return may also give, if he thinks fit, some other family name instead of that of the superior relation, so as no two families on the same plantation, or belonging to the same owner, shall have the same surname in the said schedule or return; but for all the purposes of this order, the surname by which each Slave shall first be returned and registered, shall continue for ever after to be the surname of such Slave, and of his lawful issue, if a male, or her natural issue, if a female, and of their respective descendants, and shall not afterwards be changed. In the third of the said columns shall be inserted Negro, Mulatto, or Mestee, as the case may be, or such designation of intermediate shades of colour within the limited degrees of slavery, if any, as are in use within the said island. In the fourth of the said columns shall be inserted the particular trade, occupation, or ordinary employment of the Slave, specifying, in the cases of mechanics, artizans, or handicraft-men, the particular art or

business in which he or she is usually employed; in the cases of Family Slaves, the particular domestic service or department in which he or she is usually employed; and in cases of ordinary plantation Slaves, describing them as labourers only; and in the fifth of the said columns shall be inserted the age of the Slave, according to the best of the knowledge and belief of the owner, or other party making the return. In the sixth of the said columns shall be inserted the exact stature, in feet and inches, by actual measurement of the Slave, which measurement, in cases of infant Slaves, or such as have not clearly attained to their full growth, shall be repeated prior to every annual return hereinafter directed to be made. In the seventh of the said columns shall be inserted, not only whether the Slave is an African or Creole Negro, but if an African, the name of the country or district of Africa from which he or she was brought; and if a Creole Slave, the name of the island or colony in which such Slave was born, or from which he or she was brought, according to the best of the knowledge or information and belief of the owner or other party making the return. And in the eighth of the said columns shall be inserted, whether the slave has any, and what seams and marks on the face, or other parts of the body, such as African Slaves commonly have, and which are usually called country marks, or any such brands or marks as are used in some of the colonies for distinguishing the owner's property, or has any apparent bodily singularity, defect, or deformity, all which shall be specified, with convenient certainty, so as at least to mention the part of the face or body wherein the marks, brands, defects, or other singularity appears; and lastly, in the further column, to be added as aforesaid in the lists of Family Slaves, shall be inserted the relation that the Slave bears to the superior relative, or Slave, by whose name the family section of the list to which he belongs is entitled as aforesaid, with such further particulars of genealogy or family connection, as the owner or party making the return shall think fit to add; and at the end of the said returns respectively, shall be summed up and set down, in words at length, the whole number of Slaves then belonging to the plantation, for which, or the owner or owners of Personal Slaves, on whose behalf such returns are made.

And for the better ascertaining of the proper form of such returns of slaves as are hereby required to be made, so that no person may pretend ignorance thereof, a form or example of such returns is contained in a schedule to this order annexed, to which all persons are required, so far as shall be found practicable, to conform; and at the time of promulgating and publishing this order in the said island as aforesaid, public notice shall be given by the said governor, lieutenant-governor, or civil commander-in-chief, in such manner as to him shall seem most fit and effectual, that a form or example of the returns hereby required to be made may be seen, and a printed copy thereof, with blanks, to be filled up according to the rule aforesaid, obtained at the register office to be appointed as aforesaid, and printed blank copies of the said forms shall accordingly be provided by the registrar, and delivered to all persons applying for the same, at a price not exceeding threepence for each printed copy.

And it is further hereby ordered, That every person making and subscribing any and every such schedule or return shall personally deliver the same, either to the said registrar, or to some other person that shall be by him appointed, and deputed to receive such returns or schedules in the proper district of the said island, in which

the party making the same shall reside, and shall at the same time take the following oath, which the said registrar, and every person to be by him appointed and deputed as aforesaid, is hereby empowered and required to administer, that is to say,

"I *A. B.* (*name the deponent*) do solemnly swear, that the "schedule or return now by me delivered to be registered, contains, "as I verily believe, a just, true, and full return, account and "description of all the slaves now attached or belonging to the "plantation therein named, (or belonging to the owner or owners "therein named,) and being within this island; and that the said "return is made by me according to the best of my knowledge "and belief, truly and without fraud, deceit, or evasion.

"So help me GOD."

And it is further hereby ordered, That within one calendar month, to be computed from the time hereinbefore appointed for the making and delivery of the said returns or schedules, every return or schedule that shall have been duly made and delivered to the said registrar, or any of his said deputies, shall, by him, his clerks or assistants, be entered and copied in a fair, distinct, and legible manner, in the proper book to be by the said registrar appointed for the registry and enrolment of slaves as aforesaid, that is to say,

Every such return or schedule of slaves attached or belonging to any plantation or plantations, in the book to be entitled "Registry of Plantation Slaves," and every other such return or schedule in the book to be entitled "Registry of Personal Slaves," the former under the name of the plantation, and the latter under the name or names of the owner or owners mentioned in the return; which name or names shall be written in a large hand at the top of every double page or folio containing the return.

That every double page or folio of each of the said books, that is to say, the whole breadth of the book when open, from the left to the right hand, shall be divided by perpendicular lines into ten different columns of such breadth, and by horizontal lines into spaces of such dimensions as will most conveniently contain the various particulars hereinbefore directed to be returned in the said schedules or list of slaves; and such further entries in the tenth column as are hereinafter directed to be made, leaving at the top of each folio a space for the name of the particular plantation or owner whose slaves are registered therein; which name shall be always there written in large and distinct letters; and at the top of the first of the said ten columns shall be written "Names;" of the second, "Surnames," of the third, "Colour;" of the fourth; "Employment;" of the fifth, "Age;" of the sixth, "Stature;" of the seventh, "Country;" of the eighth, "Marks;" of the ninth, "Relations;" and of the tenth, "Corrections;" and under each of the said titles in the nine former columns shall be entered, in a plain, distinct, and durable hand, according to the different schedules or lists returned, the particulars respectively contained in the same, distinguishing the families of slaves from each other, and from the general list of individual slaves, by their proper titles; and at the end of the registry of each original return shall be summed up and written, in words at length, the whole number of slaves returned and registered as belonging to the plantation, or to the owner or owners mentioned in such return; that the pages of the said books shall be distinctly numbered at the top of each double page or folio, from the beginning to the end of

each book respectively, before any entry shall be made therein; and at the bottom of each page, containing any registry of slaves, as well as at the end of the registry of each original return, the registrar shall subscribe his name at length, in testimony of the fidelity and accuracy of the entries therein contained.

That whenever the said books, or either of them, shall be fully occupied with the said original entries, and with future entries and registries, so that there shall not remain room enough therein for the future annual entries and registries hereinafter required to be made, a new book or books, of a like form and size, shall be provided and opened; but the pages thereof respectively shall be continued in the same series of numbers with that of the original book or books respectively, and a reference shall always be made to and from the page in the registry, at or from which the entries of slaves belonging to the same plantation, owner or owners, are carried forward or continued, when the same cannot be done in the next following page of the same book.

That a convenient number of leaves shall be left in the beginning of each of the said books respectively, for an index of plantations and owners' names, and therein shall be inserted, in alphabetical divisions, at the time of entering and registering every return, the name or names of the plantation for which, or of the owner by, or for whom, such return is made, with proper references to the folio or folios, book or books, in which such return is registered, and in which it shall be afterwards continued.

And it is hereby further ordered, That no erazure shall, on any pretence, or for any cause whatever, be at any time permitted to be made in the said books of registry; but if any clerical error shall occur in the insertion of any name or other particular in any schedule or return contained, or otherwise, in the making up and keeping the said books of registry, a line of red ink shall be drawn through the word or words improperly inserted, so as to leave the original word or words legible; and the correction thereof, or any word or words which may have been erroneously omitted, shall either be interlined or written in the margin, and always, when practicable, by the same hand as the rest of the same list or entry; and the registrar shall, either under such word or words written in the margin, or under a mark of reference there made to any such interlineation, subscribe his name at length; but after the registry of original returns of slaves shall have been completed, and certified upon oath, as hereinafter directed, no interlineation, insertion, or other correction of the registry of any such original returns shall, on any account, be made or permitted, except as is hereinafter expressly provided.

And it is hereby further ordered, That an office copy, certified as such by the said registrar, of the registry of the slaves belonging to any plantation, or to any particular owner or owners, shall, at the request and charge of the owner or owners, or party or parties who made the return, be made and delivered to him, her, or them, by the said registrar, and for which there shall be charged no more than at the rate of one penny sterling for every Slave therein named; and all persons shall have free liberty to inspect the said register books, in the presence of the registrar or his assistants, for the purpose of ascertaining that the returns and lists by them, or on their behalf delivered, have been accurately registered in manner aforesaid.

And it is hereby further ordered, That when and so soon as all the original returns or schedules, which shall have been delivered to the said registrar pursuant to this order, shall have been fairly entered and registered as aforesaid, which shall be done and completed within the term of two calendar months from and after the first public notification of this order at Trinidada aforesaid, the registrar shall give notice thereof forthwith to the governor, lieutenant-governor, or other person having the chief civil command under His Majesty within the said island, for the time being; and such governor, lieutenant-governor, or commander-in-chief, shall thereupon publicly notify to the inhabitants of the said island, in such manner as he shall deem most fit and effectual, that the registry of slaves is ready to be verified before him, as far as respects the original registry of slaves now within the said island, or belonging thereto, and is and will continue open at the proper office, for the inspection of all persons who have made returns of Slaves for insertion therein, for the term of one calendar month from the date of such notification, to the intent that they may be satisfied of the accuracy of the said registry; and that if any owners or possessors of Slaves, within or belonging to the said island, have, from any accident or unavoidable impediment, hitherto omitted to return proper schedules or lists of their slaves into the said registry, as by this order required, they must immediately apply to the said governor, lieutenant-governor, or civil commander-in-chief, who, upon satisfactory proof that such omission has not been wilful, has power to make an order for the admission and registration of their returns or schedules by the registrar; but that if this remedy is not taken, so as to obtain such registration within the said term of one month, the omission cannot afterwards be supplied.

And it is hereby further ordered, That if, during the said last-mentioned term of one month, any owner or possessor, owners or possessors of slaves, shall apply to the said governor, lieutenant-governor, or civil commander-in-chief, and make it appear to his satisfaction that the non-delivery of his, her, or their return or returns of Slaves to the said registrar, within the term formerly prescribed, has arisen from accident, or some other unavoidable impediment, and not from wilful delay, and shall then produce such his, her, or their return or returns, and make oath before the said governor, lieutenant-governor, or civil commander-in-chief, that no slave therein named has been imported or brought into the said island within three calendar months preceding, it shall and may be lawful for the said governor, lieutenant-governor, or civil commander-in-chief, if he shall think fit, to make an order in writing by him subscribed, and addressed to the said registrar, commanding him to receive and register any such return or returns, as if the same had been delivered in due time; which order the registrar is hereby required to obey, so as any such new or further return may be registered in the said books in manner aforesaid, before the end of the said term of one calendar month last before mentioned.

And it is hereby further ordered, That at the end of the said last-mentioned term of one month, the said registrar shall proceed finally to close and authenticate the said primary registration of all the slaves in the said island, (which shall thenceforth be called, "The Original Registry of the Slaves of Trinidada,") in manner following; to wit, in each of the said books, the said registrar shall write with his own hand, in large legible characters, immediately after the last

entry of the said returns or lists of Slaves, either on the same folio or double page, or on the back of the last leaf, containing the same, "Here ends the Original Registry of the Plantation (or Personal) Slaves of Trinidada;" and the said registrar shall thereto subscribe his name, and affix his seal of office, and below the said signature shall be written, in like characters, by the said registrar, the following affidavit:

"Before *A.B.* (inserting the name and title of the governor, "lieutenant-governor, or civil commander-in-chief, for the time "being) personally appeared *C.D.* (naming himself) the registrar "of Slaves in this island of Trinidada, who being duly sworn on the "holy evangelists, makes oath and says, that he the said *C.D.* "has twice carefully examined, and compared all the preceding "entries in this book, with all the different returns of plantation "(or Personal Slaves) delivered to him, or to his knowledge or "belief, to any deputy, clerk, or assistant, by him appointed, "first, by examining the said entries, while his clerk or assistant "read the original returns respectively entered therein, and afterwards, by examining the said returns while his clerk or assistant "read the said entries in this book respectively made therefrom; "and that he is enabled thereby to depose, and does depose, that "the preceding original registry of the Plantation (or Personal) "Slaves of Trinidada, is in all respects correctly and faithfully "made."

Which affidavit being subscribed by the said registrar, shall be sworn before the said governor, lieutenant-governor, or civil commander-in-chief, who shall subjoin thereto the following certificate, under his hand, and the great seal of the said island:

"I, *A.B.* (*inserting his name and title of office*) do hereby certify, that the above affidavit was duly sworn before me, this "day of one thousand eight hundred and "Witness my hand, and the great seal of Trinidada, this "day of one thousand eight hundred and "*A.B.* (*L.S.*)

And it is hereby further ordered, That the said registrar shall next proceed to make out, for each of the said books of original registry, a full and correct alphabetical index, both of the names and surnames of all the slaves registered in each of the said books respectively, with correct references to the proper page of the book, in which they are respectively entered, registered, and described as aforesaid; and each index shall, after a careful comparison of the same with the book to which it belongs, be therein transcribed and entered in a large legible hand, in the pages next following the said affidavit and certificate; and at the end of each index the registrar shall write, "This is the index of the names of Slaves in the foregoing original registry of the plantation (or Personal) Slaves of Trinidada, carefully made out, and compared by me, this day of in the year one thousand eight hundred and Witness my hand, *A.B.* Registrar."

And shall accordingly subscribe the same; and for the easier research in the said indexes, and better preservation of the said books, the said registrar shall afterwards transcribe, into a small general index book, to be prepared for that purpose, as well the said indexes of plantations and owners' names, which are to be written at the

beginning of the said books of original registry as aforesaid, as the said indexes of the names of Slaves; and shall carefully compare the copies thereof with the respective originals, and shall write at the end thereof, "This general index book is faithfully and correctly compiled from the several indexes contained in the books of original registry of Plantation Slaves, and of Personal Slaves respectively, with which I have carefully compared the copies thereof respectively, herein contained. *A. B.* Registrar."

And if the said general index shall, by frequent use or otherwise, at any time become defaced, or illegible, the same shall be renewed and certified in like manner by the registrar for the time being.

And it is hereby further ordered, That within two months after the said original registry shall be closed and authenticated as aforesaid, the said registrar shall prepare accurate and perfect duplicates of both the said books of original registry, with their respective indexes; and also a duplicate of the said general index book, by causing the same respectively to be carefully transcribed into other books of like sizes and forms, to be provided for that purpose; and shall authenticate and certify each of the said duplicates, in the same manner and form, in all respects, as is hereinbefore directed, in regard to the said originals respectively, except that in the affidavits and certificates to be thereunto annexed, the same shall be described as duplicates of the original registries and indexes; and the said duplicate books, when so authenticated and certified, shall be delivered by the said registrar to the governor, lieutenant-governor, or civil commander-in-chief for the time being, who shall, by the first safe conveyance, transmit the same, under his official seal, to His Majesty's principal secretary of state for the colonial department in England, to be carefully preserved in his office.

And it is hereby further ordered, That after the expiration of twelve calendar months, to be computed from the time when the said original registry shall be completed and authenticated as aforesaid, on the 1st day of January, or within ten days after that day in every year, every person resident in the said island, who shall be in possession of any plantation within the same, whether as proprietor or mortgagee, sequestrator, trustee, or receiver, manager, or attorney, or whatever their estate, title, trust, or interest therein may be, or who shall own or possess any Slave or Slaves whatsoever, within the said island, whatsoever his or her tenure of, or title to the same may be, shall make and deliver upon oath, to the registrar of Slaves for the time being, an account, or schedule, in writing, by him or her subscribed, to be called "The annual Return of Slaves," containing a true and particular account of all the births and deaths of Plantation Slaves, upon or belonging to the plantation for which, and of Personal Slaves belonging to the person or persons on whose behalf such annual return is made, within the year preceding; or in the case of the first of such annual returns, within the year and portion of a year that shall have elapsed since the said original returns were made; and also an account of all deductions from, or additions to, the former stock of Slaves belonging to such plantation, or to such person or persons, within the same periods, by other means than deaths or births, whether the same shall have happened by permanent desertion, sale, or other transfer of property, or enfranchisement, or by the return of fugitive Slaves, formerly registered as permanent deserters, or by purchase, succession, reversion, or other lawful acquisition, within the said island, or lawful importation from

other British colonies, which particular cause, or mode of deduction or addition, shall, in all cases, be distinctly specified in such annual returns: and in cases of purchase, or other acquisition or sale, or other transfer of manumission of Slaves formerly registered, the registered name and description of every such newly-purchased, or acquired, or transferred, or manumitted Slave, and of his or her former plantation, owner or owners, shall also be set forth at large in such annual return: and in respect of infant Slaves, formerly registered, or Slaves who had not, at the time of the original registration thereof, attained to their full stature, the said annual returns shall specify their then existing stature, by actual measurement, and shall also state and describe any distinguishing bodily defect or deformity, the effect of accident or disease, which may have materially altered the former description of any Slaves, under the title of "Marks," since the last return, with the causes of any such alteration; and every such annual return shall also contain all such further particulars, in respect of every newly-acquired Slave named therein, as are hereinbefore directed to be contained in the said original returns; and when, by the death of the owner, or any other cause, there shall have been, within the period to which the return relates, any change of property in, and possession of, any Personal Slave, from the owner or owners under whose names the same were registered, to any new owner or owners, such change of property and possession shall also be mentioned in the said annual returns; and such annual returns shall also state the whole number of Slaves then belonging to the plantation, owner or owners, mentioned in such returns; but when there has been no alteration since the last return, in the number or description of the Slaves belonging to the plantation for which, or the person by, or for whom the return is made, or the property thereof, it shall be sufficient to state the whole number of Slaves, and to add, "No alteration, required by law to be specified, has taken place since the last return."

And it is hereby further ordered, That every person making and subscribing any such annual return, shall personally deliver the same, either to the said registrar, or to such other person as shall by him be appointed and deputed to receive such returns as aforesaid, and shall at the same time take the following oath, which the said registrar is hereby empowered to administer, viz.

"I, *A. B.* do solemnly swear, that the contents of the schedule "or return, now by me delivered, are true, and that the same "contains, to the best of my knowledge and belief, a full, fair, "and correct account of all the births and deaths which have "happened, among the Slaves attached, or belonging to the plan- "tation therein named, (or belonging to the owner or owners "therein named), and being within this island, since the original "return and registration thereof, (or during the last year) and of "all other additions to, or deductions from the said Slaves, within "the same period, and of the whole number of Slaves now actually "belonging to the said plantation, (or to the said owner or "owners). So help me GOD."

And it is hereby further ordered, That the said registrar, on the receipt of such annual returns at his office, shall forthwith proceed to correct, enlarge, and continue, pursuant thereto, the former registry of the Plantation Slaves, and Personal Slaves, to which such returns respectively relate, in manner following, that is to say),

The said registrar shall, in the first place, carefully compare such returns, and the names and descriptions of Slaves therein contained, with the original registry of the Slaves of the same plantation or plantations respectively, and of such other plantation within the said island from which any of the said Slaves may be stated to have been newly purchased or transferred, or of the same owner or owners of Personal Slaves, and of any former owner or owners thereof under whom the present owner or owners thereof shall derive his or their title, and also with all intermediate continuations and corrections of the said original registry by former annual returns, so as to ascertain not only that the whole number of Slaves mentioned in the said returns corresponds with the original and former entries of Slaves belonging to the same plantation or plantations, owner or owners respectively, having regard to all former continuations and corrections, but also that the descriptions of all Slaves in such annual returns named and described, correspond with such former descriptions thereof (if any,) as are in the said books of registry contained, except so far as such descriptions are in any particular stated to have been altered, in respect to stature or bodily marks, since the last registered returns; and in case there shall be found any apparent inconsistency between any such annual returns, and the said original, or former annual registries of Slaves, belonging to the same plantation or plantations, owner or owners respectively, or if in the case of any Slave or Slaves, returned as newly acquired, by purchase or transfer, succession or reversion, from any other plantation or plantations, or former owner or owners, within the said island, there shall not appear, in the return of the same year, for such other plantation, or former owner or owners, a corresponding entry of the same Slaves, as deducted by sale or transfer, determination of estate, or otherwise, from the last registered stock of such other plantation or plantations, or former owner or owners, the registrar shall give notice thereof to the owner or owners, or other party or parties, maknig any such return or returns, and require him or them to attend before him, the said registrar, to explain or remove such apparent inconsistency or defect; and until the same shall be accordingly done, to the entire satisfaction of the said registrar, by an examination upon oath, if necessary, (which oath the said registrar is hereby empowered to administer) the said registrar shall not proceed to register any such annual returns, so apparently defective or erroneous; but the party or parties refusing or omitting so to explain, and, if necessary, to correct the same, shall, for all the purposes of this order, be deemed and taken to have omitted to make any return for the year to which such defective return relates; saving, nevertheless, to him or them, such remedy, by appeal, as is hereinafter provided, in case of any error or misconduct herein by the said registrar.

And it is hereby further ordered, That immediately from and after such comparison and examination as aforesaid, every annual return which shall be found to be not inconsistent with the said original and preceding annual registries, or which shall have been satifactorily explained or corrected as aforesaid, shall be registered in the said books of registry, that is to say, when any such returns shall state that there has been no alteration in the number or descriptions of the Slaves since the last returns for the same plantation, or the said owner or owners of Personal Slaves, the said registrar shall carry forward the whole number, so last returned, to a new folio or double page in the said original book of registry, and shall enter and

insert under the same, " No alteration by return for the year 18 as by return dated ," and shall subscribe his name to such entry; but as to Slaves stated in any such annual returns to have died, or to have been sold, or otherwise transferred, or to have been manumitted, or to have permanently deserted, the said registrar shall write in the column of corrections of the said original registry, and of every intermediate annual registry wherein the name of any such deceased, sold, transferred, or manumitted Slave or deserter shall have been inserted in the proper space of the said column, opposite to the name of such Slave, the word " Dead," or " Sold," " Transferred," " Manumitted," or " Deserted," as the case may be; and the said registrar shall then proceed to sum up the number of all Slaves which, by any of the means aforesaid, have been deducted from the former and last registered account of the stock of Slaves belonging to the same plantation, or to the same owner or owners of Personal Slaves, as the case may be, since the said last registered returns, and shall deduct the whole number thereof from the last registered amount of Slaves of such plantation, owner or owners, and shall carry forward the remaining number thereof to a new folio or double page of the proper book of registry, making a written reference thereto at the foot of the folio from which the same is carried, and subscribing the same with his name; and in such new folio or double page, and in as many successive folios as may be necessary, shall be afterwards inserted the names and descriptions of all Slaves mentioned in the same annual returns to have been newly added to the former registered stock, by any of the lawful means aforesaid, distinguishing, not only the several families, and all other particulars, as in the said original registry, but also the particular mode of acquisition of every such newly added Slave, by the word " Born," " Purchased," " Returned," " Imported," or such other brief designation as may be applicable to each case.

And it is hereby further ordered, That the said registrar shall be entitled to demand and receive, for registering every return of Slaves by him registered, the sum of ten shillings sterling money, and the further sum of one shilling like money for every Slave mentioned or described in every such return, and no more, to be paid by the party or parties making such return: provided always, that no Slave so returned as newly imported into the said island shall be registered, nor shall any return containing any Slave or Slaves so described be received as a correct return, unless it shall appear by a certificate from the collector or chief officer of the customs, as well as by the affidavit in writing of the importer or party making such return, (which certificate and affidavit shall always be brought into and filed in the registry within twenty-one days from the time of the importation of any such Slave or Slaves,) that such Slave or Slaves was or were lawfully imported, with regular certificates from some other British colony, pursuant to the directions of an Act of Parliament made in the forty-sixth year of His Majesty's reign, intituled, " An " Act to prevent the importation of Slaves, by any of His Majesty's " subjects, into any islands, colonies, plantations, or territories, " belonging to any foreign sovereign, state or power; and also to " render more effectual a certain order made by His Majesty in " Council, on the fifteenth day of August, one thousand eight hun- " dred and five, for prohibiting the importation of Slaves, except in " certain cases, into any of the settlements, islands, colonies, or " plantations, on the continent of America, or in the West Indies,

" which have been surrendered to His Majesty's arms during the " present war, and to prevent the fitting out of any foreign Slave- " ships from British ports."

And it is hereby further ordered, That at the end of every such registration of each annual return, the said registrar shall carefully sum up and insert, in words at length, the whole number of Slaves appearing by the same return then to belong to the said plantation for which, or the owner or owners by whom, or on whose behalf, the return is made, and shall subscribe the same with his name, and shall also subscribe his name at the bottom of each folio, or double page, containing the said annual returns.

And it is hereby further ordered, That no annual return of Slaves shall, on any pretext, be received to be registered, after the said time hereinbefore limited, to wit, the eleventh day of January in each year; but if any owner or owners, possessor or possessors of Slaves within the said island, shall have omitted to make his, her, or their return thereof, in any year, at or before the said annual period; and if such owner or owners, possessor or possessors, or any other person, who, at the time of such omission, was or shall have since become the owner or possessor, whether in his own right, or in the right of any other person or persons as aforesaid, of any Slave or Slaves so omitted to be returned, shall, at the time of making his or their next annual return, make oath before the said registrar, and prove to his satisfaction, by such other credible evidence, as from the nature of the case may be reasonably expected, and required, that such omission was not wilful, but arose from some specified accident, or other unavoidable impediment, or from the neglect or default of some person or persons, other than the true and absolute owner of the said Slave or Slaves, who was in possession thereof, at the time of such neglect or default, it shall be lawful for such party or parties, so making his, her, or their return for the next following year, with the consent of the said registrar, to insert in such return for the next following year, (but not afterwards,) such account as is hereinbefore directed, of the births and deaths, and of all other deductions from, or additions to, the stock of Slaves, in respect of which such return is made, which happened within the two last preceding years, distinguishing nevertheless the respective deductions and additions in each year; and such return, when duly made and registered, together with the cause of the former omission, which shall be certified and signed by the said registrar, on the registry of such return in the proper book, shall from thenceforth be deemed and taken to be as valid and effectual, for all the purposes of this order, as if the matters therein contained had been duly returned and registered in each of the said two years respectively.

And it is hereby further ordered, That on or before the first day of March in each year, the said registrar shall carefully make out a general account or abstract of all the annual returns that shall have been made and registered in that year as aforesaid, wherein shall be inserted, in alphabetical order, and in two divisions, the one containing Plantation Slaves, and the other Personal Slaves, the effect of each annual return, according to the registration thereof, to wit, the registered names of the plantations or owners, the numbers of births and deaths of Slaves, with their names and descriptions, and the amount and particulars of all other deductions or additions, respectively specified in each return; and also the whole remaining or existing number of Slaves, then appearing by the registry to belong

to such plantation or owner, for which, or whom the return has been made; and the registrar shall also make out a fair copy or duplicate of every such general account or abstract, and shall subscribe both the original and duplicate thereof with his name, and shall subjoin to each of the same an affidavit in the following form; viz.

"Before *A. B.* (inserting the name and title of the governor, "lieutenant-governor, or civil commander in chief, for the time "being) personally appeared *C. D.* (naming himself) the registrar "of Slaves of the island of Trinidada, who being duly sworn on "the Holy Evangelists, makes oath and says, that the preceding "account or abstract is a true account or abstract of all the "returns of Plantation or Personal Slaves that have been to, and "registered in, the registry of Slaves of the said island in the "present year, and that the same contains, and truly and accu-"rately specifies, all such particulars as he, the said registrar, "is required by law to make therein, according to the best of his "knowledge and belief, he having carefully compared the same "with the said returns and the registry thereof remaining in his "said office."

Which affidavit being subscribed by the said registrar, shall be sworn before the said governor, lieutenant-governor, or civil commander in chief, who shall certify the same to have been sworn in manner herein-before directed, in respect of the said books of registry, and the said annual abstracts or accounts shall be thereupon delivered to the said governor, lieutenant-governor, or civil commander in chief, who shall carefully transmit one of the said accounts or abstracts by the first safe conveyance, under his official seal, to His Majesty's Principal Secretary of State for the Colonial Department in England, retaining the said duplicate or copy until he shall be informed that the original thereof has been received, or that the same has miscarried, in which latter case he shall in like manner transmit the duplicate or copy, and on the receipt of such annual abstracts or returns, the said Secretary of State shall cause the respective divisions thereof to be forthwith, or as soon as conveniently may be, registered in the said duplicate books of Plantation Slaves and Personal Slaves respectively, which are to remain in his office as aforesaid, with the proper corrections of the said respective duplicate books of registry, such as are herein-before directed to be made and entered in the said island, so that the said duplicate books in the office of the said Secretary of State shall from time to time, and at all times after the transmission and receipt of the last annual returns, and the registration thereof in the said office of the Secretary of State, in all points correspond and agree with the registry of Slaves in the said island of Trinidada.

Provided always, and it is hereby further ordered, That if the said registrar shall, in the exercise of his said office, refuse to receive for registration any return, or to make any entry which he ought to receive or make, according to the directions herein contained, and the true intent and meaning of this order, or shall, contrary to the said directions, or to the true intent and meaning hereof, receive for registration any return, or make or cause, or suffer to be made any entry which ought not to be so received or made, it shall be lawful for any person or persons thereby aggrieved or liable so to be, to present a petition or complaint in writing, in the nature of an appeal

to the court of the oidor, or such other court or judge as shall have the supreme jurisdiction, in civil causes, within the said island, praying relief against such default or misconduct of the said registrar; which court or judge shall forthwith cause a copy of such petition or complaint to be served upon the said registrar, with notice to him to answer the matter thereof in writing, by an early day, to be for that purpose appointed; and the said court or judge shall thereupon proceed, in a summary manner, but upon written evidence, to examine the matter of such petition or complaint, and to make such order thereupon, and as to the costs of the controversy, as shall seem proper and expedient, which order the said registrar, and the said party or parties petitioning and complaining respectively, shall be bound to obey: but it shall nevertheless be lawful for either of the said parties to appeal from the decision of such court or judge, to His Majesty in his privy council, giving such security or securities thereupon, as are usual in other cases of such appeals; and whenever, in pursuance of any decision of the said court or judge, or of His Majesty in his privy council, any entry in either of the said books of registry shall be made, expunged, or altered, the insertion, correction, or alteration so made, shall be valid and effectual for all the purposes of this order; any thing herein contained to the contrary thereof notwithstanding.

And whereas, by the provisions of the twelfth chapter or article of the cedula or ordinance for regulating the education and treatment of Slaves in the Spanish colonies, made and published by the king of Spain on the thirty-first day of May, one thousand seven hundred and eighty-nine, and which still has the force of law within the said island, as part of the laws in force therein at the time of the conquest thereof by His Majesty's arms, which, by His Majesty's authority have been hitherto retained, it was ordered and directed, that the masters of Slaves shall be obliged, every year, to deliver in to the judge or magistrate of the city or town within the district of which their estates are situated, a list, signed and sworn to by them, of all the Slaves which they possess, in order that the notary of the town-house may take an account of them in a separate book, to be kept for that purpose at the town-house, together with the list presented by the master, who is further thereby required, whenever any of his Slaves die or absent themselves from his estate, to inform the said judge or magistrate of it within the term of three days, that by the order of the procurator syndic it may be noted in the said book. It is hereby further ordered, that from and after the opening of the public registry of Slaves hereby established, it shall not be necessary for any master or owner of Slaves within the said island to deliver to the said judge or magistrate any such annual lists or returns, or to give any such notices of the deaths or absence of Slaves as are by the said cedula or ordinance required, but the said annual returns and registry hereby directed shall in that respect supply the place of the said annual lists or returns, and notices, and the said twelfth article of the said cedula or ordinance shall from thenceforth cease to have any force or effect within the said island.

And it is hereby further ordered, That if the said registrar shall, in the exercise of any of the duties thereby imposed upon him, or any of the functions of his said office, or otherwise, wilfully make or knowingly permit or suffer to be made any false or fraudulent entry in the said books of registry, or either of them, or in the said accounts or abstracts, or shall fraudulently eraze, obliterate, or alter,

or knowingly permit or suffer to be fraudulently erazed, obliterated, or altered, any entry which shall have been duly made in the said books of registry, or either of them, the said registrar shall, upon conviction of any such offence, not only be liable to all such pains and penalties as ought by the laws in force within the said island, at the time of such offence, to be inflicted upon persons convicted of forging or fraudulently altering public judicial records; but shall for ever forfeit his said office, and shall be incapable of ever after holding the same, or any other public office within the said island, and shall moreover be liable to the civil suits or actions of all and every person or persons who shall sustain any damage or injury by any such offence, who, besides full reparation for every such damage or injury, shall recover against such registrar double costs of suit; and if any deputy, assistant, or clerk of the said registrar, shall commit, or knowingly permit, or suffer to be committed, any such offence as aforesaid, he shall, upon conviction thereof, not only in like manner be liable to all such pains and penalties as ought by the said laws to be inflicted upon persons convicted of forging or fraudulently altering public judicial records, but shall forfeit such his office or employment, and be incapable of ever after holding the same, or any other public office within the said island; and if any other person or persons shall wilfully make, or cause, or procure to be made, any false or fraudulent entry in the said books of registry, or either of them, or in the said accounts or abstracts, or shall fraudulently eraze, obliterate, or alter, or cause, or procure to be erazed, obliterated, or altered, any entry which shall have been made in the said books of registry, accounts or abstracts, or either of them, every such person or persons so offending shall, upon conviction, not only be liable to all such pains and penalties as aforesaid, but shall forfeit to His Majesty, his heirs or successors, all his and their estate, right, title, property, and interest of, in, and to any Slave or Slaves that shall be the subject or subjects of any such false or fraudulent entry, erazure, obliteration, or alteration; and if such person or persons so offending shall be the sole owner or owners of such Slave or Slaves, every such Slave or Slaves shall, upon conviction, be adjudged to be, and shall from thenceforth be absolutely enfranchised and free.

And it is hereby further ordered, That if any person or persons making any such original or annual return of Slaves as aforesaid, shall falsely and wilfully insert therein any name or names, description or descriptions, of any Slave or Slaves, or pretended Slave or Slaves, belonging to any plantation or plantations, owner or owners, knowing that such Slave or Slaves, or pretended Slave or Slaves, as shall be so named or described, doth not, or do not in fact belong at the time of making such return, to such plantation or plantations, owner or owners, any person or persons so offending shall forfeit for every Slave or pretended Slave, so falsely returned, the sum of one hundred pounds sterling money, to be recovered in such manner as any other penalty or forfeiture may be recovered in the said island by any law thereof, or any statute of this kingdom then in force therein, the one moiety thereof to the use of the governor, lieutenant-governor, or civil commander in chief, within the said island for the time being, and the other moiety thereof to the use of such person as shall inform, sue and prosecute for the same: Provided always, that no person shall be liable to any such penalty or forfeiture as last aforesaid, in respect of any Slave or Slaves which he shall prove to have been at the time of the return actually employed upon the plantation, or in

the service of the asserted owner or owners, to which the same were represented by such return to belong, although he shall not be able to prove that the property in such Slave or Slaves was such as was stated in the return, except when the prosecutor shall give evidence beyond the falsification of the return in the point of property, to shew that the same was fraudulent, or wilfully false.

And it is hereby further ordered, That, from and after the final closing and authentication of the said original registry of Slaves in the said island, as herein-before directed, no estate, right, title, property or interest whatsoever, at law or in equity, of, in, or to any Slave or Slaves in the said island, shall be created or transferred, or shall in any manner pass by sale or mortgage, gift, grant, judgment, decree, execution, or other voluntary alienation, nor by marriage, succession, inheritance, will, devise, administration, or otherwise howsoever, unless such Slave or Slaves shall have been first duly registered, according to the directions herein-before contained.

And it is hereby further ordered, That from and after the said final closing and authentication of the said original registry of Slaves in the said island, it shall not be lawful to hold or detain in slavery, nor to use or treat as a Slave, in the said island, any Negro or Mulatto, or other person, who shall not have been first duly registered as a Slave, according to the directions herein-before contained, but that every Negro, Mulatto, or other person within the said island, not so registered as a Slave, shall be deemed and taken to be free, except only fugitive Slaves from any other island or place in the West Indies, who may be apprehended within the said island, and who shall be detained in custody, by authority of any court or magistrate, for the purpose of being delivered up to their owners.

Provided always, that nothing herein contained, shall entitle any Negro, Mulatto, or other person, not duly registered as a Slave, upon any annual return of Slaves, to his or her freedom for that cause alone, until it shall be seen whether at the next annual period for making such returns, or within such further period as are herein-after in certain cases allowed, such defect of registration may not be proved, on the part of his or her owner or owners, to have arisen from accident, or some unavoidable or excuseable cause, such as is herein-before and herein-after, in certain cases, allowed and provided for; and whether such defect may not be thereupon, at such next annual period of registration, or within such further periods as aforesaid, lawfully remedied and supplied, in manner hereinbefore and hereinafter directed; but if, in the mean time, and prior to such next annual period of registration, or within such further period as is herein-after in certain cases allowed, any question shall arise as to the right of any such Negro, Mulatto, or other person, to enjoy his or her freedom, by force and virtue of this present order, or the right of the alleged owner or owners to treat him or her as a Slave, the court or magistrate before whom any such question shall be brought, shall forthwith give notice thereof to the governor, lieutenant-governor, or civil commander in chief of the said island for the time being, who is hereby empowered and directed to make all such orders for the employment, support, protection, government, and restraint of such Negro, Mulatto, or other person, as shall be necessary or proper, for the prevention, on the one hand, of his or her being sent out of the jurisdiction of the courts of the said island, or otherwise illtreated or oppressed by the authority of the asserted owner or owners; and on the other hand, for the preventing such Negro, Mulatto, or other

person, from withdrawing himself or herself from the said jurisdiction, until his or her lawful condition, as a Slave, or free person, so far as the same may depend on this present order, shall, by the registration or non-registration of him or her as a Slave, pursuant to the directions herein-before contained, at the next annual period of registration, or within such further period as is herein-after in certain cases allowed for that purpose, be ascertained and decided.

And it is hereby further ordered, That whenever, in any action, suit, or other judicial proceeding, within the said island, it shall be necessary for the master or mistress, owner or claimant of any Slave or Slaves, or of any Negro, Mulatto, or other person or persons, asserted to be a Slave or Slaves, to prove his or her property therein, such master or mistress, owner or claimant, shall, in the first place, be bound to shew that such Slave or Slaves hath or have been duly registered as such, according to the directions herein contained, either by or on behalf of such master or mistress, owner or claimant, or by or on behalf of the person or persons from, by, or under whom his or her title is derived.

Provided always, That no default of any tenant or tenants, for life or years, or other particular estate, in not returning to the registry any Slave or Slaves which ought by him, her, or them, to be returned for registration, pursuant to the directions herein contained, shall entitle such Slave or Slaves to freedom, to the prejudice of any person or persons entitled to such Slave or Slaves, in remainder or reversion; but all the estate, right, title, and interest, at law, and in equity, of any tenant for life, or years, or other particular estate, of, in, and to any Slave or Slaves, in his or her possession, which he or she shall omit to return for registration as aforesaid, contrary to the directions of this order, shall be forfeited to the person or persons next in remainder or reversion, who shall and may forthwith after, take or recover the possession thereof, and hold the same in slavery, any thing herein contained to the contrary notwithstanding; so as such Slave or Slaves be, by him, her, or them, duly returned for registration, according to the directions herein-before contained, within such time, and in such manner, as is herein-after in that behalf limited and directed.

Provided also, That no default of any mortgagee or mortgagees, in possession of any Slave or Slaves within the said island, in not returning any Slave or Slaves, which ought by him, her, or them, to be returned for registration, pursuant to the directions herein contained, shall entitle such Slave or Slaves to freedom, to the prejudice of the mortgagor or mortgagors of any such Slave or Slaves, his, her, or their representatives, or any other person or persons claiming under any second or subsequent mortgage, charge or incumbrance, or under any sale or conveyance, executed, made, or suffered, by such mortgagor or mortgagors, but all the estate, right, title, and interest, at law and in equity, of such mortgagee or mortgagees, in possession of, in, and to such Slave or Slaves, as he, she, or they shall omit to return for registration as aforesaid, contrary to the directions of this order, shall from thenceforth cease and determine, as if such Slave or Slaves had been actually redeemed by the mortgagor or mortgagors, or by such person or persons as would have been entitled to such redemption, on payment of the mortgage debt; and such Slave or Slaves shall and may accordingly be recovered and taken possession of by such mortgagor or mortgagors, or such other person entitled to the benefit of such redemption, and held in slavery

by him, her, or them, (any thing herein contained to the contrary notwithstanding) discharged of the said mortgage debt, so as such Slave or Slaves be afterwards, by such mortgagor or mortgagors, or such other person or persons as aforesaid, duly returned for registration, according to the directions herein-before contained, within such time, and in such manner as is herein-after in that behalf limited and directed.

Provided also, That no default of any mortgagor or mortgagors in possession of any Slave or Slaves, in not returning the same for registration aforesaid, shall entitle such Slave or Slaves to freedom, to the prejudice of the mortgagee or mortgagees, or any persons claiming under him, her, or them; but if any mortgagor or mortgagors, in possession of any Slave or Slaves within the said island, shall omit to return the same, or any of them, for registration, contrary to the directions herein contained, the estate of the mortgagee or mortgagees, of and in all the mortgaged lands, Slaves, and other premises contained in the mortgage, shall forthwith become absolute in the law; and such mortgagee or mortgagees shall and may immediately enter upon, and take, or recover possession, not only of such Slave or Slaves not duly returned for registration, but of all the other Slaves, lands, and premises comprised in the mortgage, and shall have all other remedies provided by the law of the said island for the recovery of the mortgage debt, as in cases of mortgages forfeited by the non-payment of the principal or interest monies thereby secured, pursuant to the proviso or covenants of redemption therein contained, and shall moreover be entitled to hold such Slave or Slaves, as were not duly returned for registration, absolutely and irredeemably as against such mortgagor, and his heirs, executors, or administrators, without any deduction or allowance for the value thereof out of the mortgage debt, so as such Slave or Slaves be afterwards duly returned for registration by such mortgagee or mortgagees, within such time, and in such manner as is hereinafter in that behalf limited and directed.

Provided also, That no default of any trustee, guardian, receiver, committee, sequestrator, or other person appointed by any court of justice, who shall be in possession of any Slave or Slaves within the said island, in returning any Slave or Slaves for registration, pursuant to the directions herein contained, shall entitle such Slave or Slaves to freedom, to the prejudice of the person or persons beneficially entitled to, or interested in, such Slave or Slaves, if such person or persons so beneficially entitled to, or interested in such Slave or Slaves, shall afterwards duly return the same for registration (which he or they, whether in possession of the same or not, is and are hereby empowered to do), within such time, and in such manner, as is hereinafter in that behalf limited and directed; that is to say, Provided nevertheless, and it is hereby further ordered, That in order to entitle any remainder-man, reversioner, mortgagor or mortgagee, or person beneficially interested under any trust, or otherwise, to keep and hold in slavery any Negro, Mulatto, or other person, who, by the default of the tenant for life or years, or other particular tenant, or of the mortgagee or mortgagor in possession, or of any trustee, guardian, receiver, committee, or sequestrator, shall not have been duly registered as a Slave, according to the directions herein-before contained, it shall be necessary for such remainder-man, or reversioner, mortgagor, mortgagee, or other person beneficially interested, at the annual period hereby appointed for the registration,

of Slaves in the said island, next after he, she, or they shall have taken possession of any such Slave, and within three years at most from the time of such default of registration, (except in cases of defaults in the annual returning of any new-born Slave, the issue of any female Slave, previously registered as such, and in respect of such new-born Slaves, within ten years at most from the time of such default, and within one year from the time of taking possession thereof,) to make such full and particular return and description of such Slave, in writing, and upon oath, to the said registrar, as is herein-before directed to be made, for the purpose of the original registration of the Slaves in the said island, together with an affidavit in writing, to be sworn before the said registrar, stating the time, and the particular nature of the former default of registration, and by whom the same was committed or incurred, and by what title, and for what estate and interest such defaulter was in possession of such Slave at the time of such default of registration, and shewing under what settlement, or conveyance, or by what other means he or they, the said reversioner, remainder-man, mortgagor, or mortgagee, or person beneficially interested, making such return, was entitled to, some specified estate in remainder or reversion, or to some right or equity of redemption, or some mortgage, term, or estate, or equitable estate, or interest of, in, to, or upon such Slave, at the time of such default of registration, and averring positively that such Negro, or Mulatto, or other person so returned as a Slave, is really and rightfully such, the former default of registration only excepted, and specifying how such servile condition lawfully arose, namely, whether by the alleged Slave having been lawfully held in slavery in the said island, prior to the original registration of Slaves hereby directed, or having been since born of some, and what female Slave, duly registered as such within the said island, or having been lawfully imported into the said island from some and what other British colony, at some time, and when subsequent to the said original registration of Slaves; and it is hereby provided and ordered, that such affidavit, being duly filed in the said registry, the registrar shall examine the return to which the same relates; and if it appears on the face thereof to be such a return as ought, if true, to be received and registered, according to the intent and meaning of this order, he shall proceed to require such further proof thereof, as the nature of the case may afford, and especially by the production of any Negro, or Mulatto, or other person inscribed in the said return as a Slave, to be by him the said registrar personally inspected, and privately examined, and also by the production of any deeds, or other instruments mentioned in the said affidavit, or duly authenticated copies thereof, and by reference to entries in the said registry, as to the alleged mother or female ancestors of such asserted Slave, and by reference in respect of any Slave asserted to have been imported from other British colonies, to the certificates of his or her lawful importation, herein-before directed to be brought into and filed in the said office; and for the better investigation of any facts stated in any such return, the said registrar shall have power to examine the party or parties making the same, upon oath, if he shall think fit; and if after such examination and proof, the said registrar shall think the said return to be sufficiently verified, and not otherwise, he shall proceed duly to register the same, according to the directions and regulations herein-before contained, in respect to annual returns; but any party or parties, aggrieved by an erroneous decision of the

said registrar herein, shall and may have such remedy, by appeal, as is herein-before provided, in respect of any default or misconduct of the said registrar.

Provided always nevertheless, and it is hereby further ordered, That whensoever, by reason of any such default as aforesaid, by persons in possession of Slaves not being their own absolute property, in any of the cases aforesaid, it shall be allowable and necessary for any owner or owners, innocent of such default, to return for registration any Slave or Slaves, after the time at which the same ought to have been registered by any tenant for life or years, or other particular estate, mortgagee, or mortgagor, in possession, trustee, guardian, committee, sequestrator, or other officer, if the party or parties charged with such default or defaults, is, or are, still living and resident within the jurisdiction of the courts of the said island, or otherwise amenable thereto, the registrar shall forthwith lay the said return, or a copy thereof, before the attorney-general, procurator syndic, or other proper law-officer, whose province it is to prosecute for the crown in the said island, who shall consider the same, and if it appears to him that any penalty or penalties, forfeiture or forfeitures, has, or have been incurred by the alleged default or defaults, he shall forthwith give notice to the party or parties charged with the same, to attend him, and show cause why a prosecution, to recover such penalty or penalties, forfeiture or forfeitures, shall not be commenced; and if the said party or parties shall not so attend, or, attending, shall not show sufficient cause in that behalf, the said attorney-general, procurator syndic, or other law-officer, shall cause a prosecution, for such penalty or penalties, to be instituted in the proper court of the said island, against such party or parties so offending, and shall prosecute the same to trial, judgment, and execution; and the person or persons making such return shall be bound, on such trial, to furnish sufficient evidence for the conviction of the defendant or defendants; or on failure thereof, his said return shall be rejected, and the asserted Slave or Slaves in question, as against the party or parties making such return, shall be deemed and taken to be free; and until the event of such prosecution, the registrar shall not proceed to register such return, notwithstanding any such evidence as aforesaid adduced or offered to him, but shall reserve the same, if need be, for registration, in case the same shall be ultimately allowed, at the next annual period for registering returns after such allowance, when the registration thereof, if duly made, shall be as valid and effectual as if made at the regular time.

And for the better enabling all remainder-men, and reversioners, and all mortgagors and mortgagees, not in possession, and all other persons beneficially entitled to, or interested in, any Slaves in the said island, in the possession of any tenants for life or years, or other particular tenants, or of any mortgagees, mortgagors, trustees, guardians, receivers, committees, or sequestrators, to discover any default of the party or parties in possession of such Slaves, in not duly returning the same to be registered in the said original registration of Slaves, and thereupon to have and use the remedies hereby provided; it is hereby further ordered, That it shall and may be lawful, to and for every person that is, or shall, or may be, legally or beneficially entitled to, or interested in, any Slave or Slaves in the said island, in remainder or reversion, or by virtue of any mortgage or equity of redemption, or of any settlement, or conveyance, or will, or otherwise howsoever, which Slave or Slaves are in the immediate posses-

sion of any tenant for life or years, or other particular estate, or of any mortgagor, mortgagee, trustee, guardian, receiver, committee, or sequestrator thereof, once within the term of three years, from the time of the said original registration of Slaves, and at any part of that term, by himself or herself, or his or her attorney or agent, to give notice, in writing, to the parties in possession of any such Slave or Slaves, that he or she, the said person, legally or beneficially entitled or interested, or his or her attorney, therein named and described, will attend at the house, plantation, or place, where such Slave or Slaves is or are usually kept and employed, at some day, and some convenient hour in the day-time, specified in such notice, and not less than ten days after the service thereof, then and there to inspect the said Slave or Slaves, and compare him, her, or them, in point of numbers and descriptions, with an office copy of the registered returns; at which time and place, the party in possession of such Slave or Slaves shall, by himself or herself, or his or her attorney, manager, or agent, produce the same accordingly, and submit him, her, or them, to the inspection and examination of the said party, so entitled or interested, or his or her said attorney; or in default thereof, without some necessary and unavoidable impediment (the proof whereof shall lie upon such defaulter), shall forfei and pay, for every Slave omitted to be so produced, the sum of twenty pounds sterling money.

And for the better protection and security of infants, married women, lunatics, and all other persons under any disability or incapacity, who are, or shall, or may be, beneficially entitled to, or interested in, any Slave or Slaves within the said island; it is hereby further ordered, That within three months from and after the closing and authentication of the original registry of the Slaves of the said island, as herein-before directed, the registrar shall make out, and certify in writing, and transmit to the court of oidor, or such other court or judge as shall have the supreme jurisdiction in civil causes within the said island, an abstract, or list in writing, of all returns which shall have been made by persons in possession of Slaves, as trustees, guardians, receivers, committees, or sequestrators, and such court shall thereupon, ex officio, issue a commission, directed to three or more trust-worthy and intelligent persons, empowering and requiring them to repair to the several plantations in respect of which such returns have been made, and to the places of abode of such trustees, guardians, receivers, committees, or sequestrators, as have made any returns of Personal Slaves in their possession, there, by inspection of the Slaves, to verify or correct the said registered returns; to which commissioners, all such trustees, guardians, receivers, committees, or sequestrators, shall be bound, on reasonable notice, to be allowed by such court or judge, to produce all the Slaves by them respectively returned, for the inspection of the said commissioners; and the said commissioners shall thereupon proceed to compare the same, with the descriptions thereof in the said returns; and the said commissioners shall have power to examine the said trustees, guardians, receivers, committees, and sequestrators, upon oath, as to the truth of the said returns, so as to ascertain whether all the Slaves are included therein that ought to have been returned, and also to inquire whether any trustees, guardians, receivers, committees, or sequestrators, in possession of any Slave or Slaves within the said island, have omitted to make any returns; and for that purpose to call before them and examine witnesses, and to examine all public

registries and records; and the said commissioners shall, within six months from and after the closing and authentication of the said original registry, make a full and distinct return to the said court or judge, specifying any defaults or defects in the said original and registered returns, or any omissions to make returns, which they shall have discovered, with the names of the defaulters; and all such descriptions of the slaves, the subjects of any such defaults as are herein-before required to be specified in the said original returns; and the said court or judge shall thereupon cause all such defaulters to be summoned to appear and show cause why such defaults or defects of registration should not be corrected and supplied, and why they, the said defaulters, should not pay the penalties hereby imposed for such defaults, and shall proceed, in a summary manner, to examine the truth of the return that shall have been made by the said commissioners, and the causes that shall be shown against the allowance thereof, and shall allow or disallow the said return, in the various particulars therein contained; and if any defaults or defects of returns for original registration shall be established, to the satisfaction of the said court or judge, an order shall be made thereupon, distinctly and fully specifying the same, with all such particulars as shall be necessary for supplying and correcting such defaults and defects, and reforming the said original registry, and commanding the same to be reformed accordingly at the next annual period of registration, and such order shall, by the said court or judge, be transmitted, at or before the said annual period of registration, to the said registrar, who shall transcribe the same at large in the said books appointed for the registration of Plantation Slaves and Personal Slaves respectively, and the same shall from thenceforth be deemed and taken to be a part of the said original registry of Slaves, and shall have the same force and effect as if the corrections or additions, by such order made, had been contained in the said original returns, any thing herein contained to the contrary thereof notwithstanding.

And it is further hereby ordered, That every trustee, guardian, receiver, committee, or sequestrator, who shall wilfully refuse or omit to produce any Slave in his possession, for the inspection of the said commissioners, being thereto by them required as aforesaid, or who shall be found to have wilfully omitted to return, for original registration, any Slave or Slaves in his possession, or wilfully to have described the same improperly in such his return, shall forfeit and pay, for every Slave, the subject of any such offence, such sum as the said court or judge shall adjudge and order, not exceeding the sum of twenty pounds sterling for every such Slave, to be recovered in the same court; the produce of which fines shall be applied towards defraying the expences attending the said commission.

And it is further hereby ordered, That the said court or judge shall adjust and award a reasonable allowance and compensation to the said commissioners, and any clerk or clerks to be by them appointed, as well for their time and trouble, as their expenses in executing the said commission, to defray which, or the residue thereof, after the application of the produce of the said fines as aforesaid, the said trustees, guardians, receivers, committees, and sequestrators, shall be respectively assessed, in proportion to the number of Slaves by them respectively possessed in their said respective characters; such sums (to be paid by them respectively, and allowed to them in their accounts with the estates, or person beneficially interested in

such Slaves) as shall be ordered by the said court or judge, not exceeding the sum of five shillings sterling money for each Slave so by them respectively possessed.

Provided also, and it is hereby further ordered, That after any Slave shall have been duly registered as such in the said island, either in the said original registration, or by such corrections thereof as are herein-before allowed and provided, or in any annual return and registration, either as a new-born Slave, the issue of a registered female Slave, or as newly imported from some other British colony, with such certificate of lawful importation as is herein-before in that case required, such Slave shall not be entitled to his or her freedom by reason of any subsequent default of annual registration, in any case in which such registration is hereby required to be made, except as against the party or parties making such default; and all persons claiming by, from, or under him or them, by title subsequent to such default, unless such other person or persons as may thereupon be, or become entitled, beneficially, to such Slave, being of full age, and under no personal disability, shall omit duly to return such Slave for registration, in manner herein-before directed and provided, at or before the annual period of registration next but one after his, her, or their right and title to, and actual possession of such Slave, shall have accrued.

And it is hereby further ordered, That whenever, by reason of the wilful default of any tenant for life or years, or other particular estate, or of any mortgagee or mortgagor in possession, or any trustee, guardian, receiver, committee, sequestrator, or other person in possession of any Slave or Slaves, the same shall become entitled to his, her, or their freedom, by force and virtue of any of the provisions herein contained, the party or parties making such default shall be liable to pay and satisfy to such persons, not privy and consenting to such default, as shall be prejudiced thereby, in respect of his or their former property or interest in such enfranchised Slave or Slaves, the full amount of all damages by him or them sustained, not exceeding the value of such Slave or Slaves at the time of such default, together with costs of suit.

And it is hereby further ordered, That if any person or persons shall, by means of any false or fraudulent return or entry of him, her, or them, or by or with his, her, or their procurement, consent, privity, or knowledge, made in the said registry, keep or hold, or attempt to keep or hold, in slavery, any African or other Negro, or Mulatto, or other coloured person, which shall have been illegally imported or brought into the said island, and shall be thereof lawfully convicted, he, she, or they shall forfeit and pay for every African or Negro, Mulatto, or other coloured person, the subject of any such offence, the sum of three hundred pounds sterling money, the one moiety to the governor, lieutenant-governor, or civil commander in chief within the said island, and the other moiety thereof to such person as shall sue, inform, and prosecute for the same, with full costs of suit, to be recovered as aforesaid; and shall moreover, after any such conviction, be for ever after incapable of owning, holding, or possessing any Slave or Slaves within the said island.

And it is hereby further ordered, That in any suit or prosecution to be commenced, sued, or prosecuted in any court, or before any judge of the said island, for the recovery of any of the penalties or forfeitures herein contained, or for enforcing of the directions or

provisions of this order, or obtaining relief or reparation for any breach of the same, it shall not be an admissible defence, plea, or exception, to allege, that the plaintiff, prosecutor, or person suing or complaining is a slave, when his or her right to freedom may be established by the success of such suit or prosecution; nor shall the testimony of any indifferent witness, being, or alleged to be a Slave, be rejected for that cause, in any such suit or prosecution, but the same shall be admitted; subject, nevertheless, to all such objections to the credit of such testimony, as, from the condition of the witness, or the nature of the case, may, in the discretion of the court or judge, be reasonably allowed.

And it is hereby further ordered, That the certificate of the said registrar, by him subscribed, certifying any extracts from the books in his office, shall be received in all courts, and by all judges in the said island, as sufficient evidence of the authenticity of such extract; saving, nevertheless, to the party or parties against whom such evidence is adduced, the right of contradicting, impeaching, or correcting the same, by an inspection of, and a comparison with, the original book or books of registry in the said island, or the duplicates thereof, to remain in the office of the said secretary of state, as aforesaid.

And it is hereby further ordered, That the said registrar shall be entitled to have and receive, for every certificate by him given, of any extract from, or entry in, the said registry, the sum of ten shillings sterling; and for every hundred words therein contained beyond the first hundred words, the sum of two shillings like money, and no more, from the party requiring and obtaining the same; and for every search in the said registry the sum of five shillings like money, and no more; which fees, and all other fees hereby appointed in sterling money, shall be calculated at the rate of exchange prevalent in the said island at the time of the service performed.

And it is hereby further ordered, That it shall not be lawful for the said registrar, while he shall hold his said office, directly or indirectly, to be the owner, part owner, or mortgagee, of any Slave or Slaves, and that the said registrar shall be personally resident in the said island, while he shall continue to hold his said office, except when from ill health, or other necessary cause, his temporary absence from the said island shall be permitted by a licence in writing under the hand and seal of the governor, lieutenant-governor, or other person having the chief civil command in the said island for the time being, specifying the cause of such temporary leave of absence, a copy of which licence shall be forthwith transmitted to His Majesty's principal secretary of state for the colonial department; and if the said registrar shall be at any time absent from the said island without such licence, or after the expiration thereof, or any disallowance thereof by His Majesty, his heirs or successors, or shall be owner, part owner, or mortgagee of any Slave or Slaves, directly or indirectly, by his own act, consent or agreement, he shall absolutely forfeit his said office, and during any such licensed absence as aforesaid, or any other temporary incapacity of the said registrar, a deputy registrar shall be appointed by the said governor, lieutenant-governor, or civil commander-in-chief for the time being, who shall and may exercise and perform all the duties hereby imposed on the said principal registrar, as fully and effectually for all the purposes

of this order, as if the same were executed and performed by the said principal registrar in person.

And lastly, all governors, lieutenant-governors and civil commander-in-chief of the said island, and the council and cabildo of the said island, and the oidor, and all other courts, judges, magistrates, and other officers, within the same, are required to take notice of, observe, and obey this present order, and to cause the same to be effectually observed, obeyed, and executed, by all persons within the said island, as they shall answer the contrary at their peril.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, and the Right Honourable the Earl of Liverpool, one of His Majesty's Principal Secretaries of State, are to give the necessary directions herein as to them may respectively appertain.

CHETWYND.

SCHEDULE.

THE RETURN of *A. B.*, for the Plantation called *C. D.*, in the Parish (or Quarter) called *E. F.*, a Sugar (or Coffee) Plantation, owned by *G. H.*, of which the said *A. B.* is in possession as Manager (or as Trustee or Mortgagee, &c.), and which was lately owned by (or in the possession of) *J. K.** — (or in Returns of Personal Slaves)† — THE RETURN of *A. B.*, of the Town (or Parish, &c.) of *C. D.*, Esq. of Personal Slaves, being his own Property, (or the Property of *E. F.*, of Esq.) whereof the said *A. B.* is in possession as Attorney (or Lessee, or as Trustee or Guardian, &c.)‡ (and which Slaves were late the Property of *G. H.*)

Names.	Surnames.	Colour.	Employment.	Age.	Stature.	Country.	Marks.	Relations.
LIST OF FAMILIES OF SLAVES on the Plantation *A. B.* (or of the said *E. F.*)								
Anthony	Williamson	Negro	Driver	41	5 feet 10 inch.	Creole of this island	A scar on the right cheek.	Husband of Sarah, and father of John and Sam. Williamson
Sarah	Williamson	Negro	Sempstress	39	5 feet	Same	Has lost the fourth toe of the left foot.	Wife of Anthony, and mother of John and Sam. Williamson
John	Williamson	Negro	Labourer	20	5 feet 8 inches	Same	No marks	Son of Anthony and Sarah Williamson.
Samuel	Williamson	Negro	In the little grass gang	10	4 feet 3 inches	Same	A deep scar on the left shoulder from a wound.	Son of Anthony and Sarah, and brother of John Williamson.

* This Clause is necessary only when there has been a change of property or possession within seven years.

† It will be more convenient to have different printed Forms, for Plantation and Personal Slaves respectively, and to entitle them accordingly. The Plantation Returns, of course, will require, in general, more than a single sheet; and there may be separate printed Forms for all but the first sheet, omitting the title.

‡ Necessary only when change of property within seven years.

SCHEDULE — continued.

Names.	Surnames.	Colour.	Employment.	Age.	Stature.	Country.	Marks.	Relations.
GENERAL LIST OF MALE SLAVES on the said Plantation, (or of the said *E. F.*)								
Jack	Thomas	Negro	Boiler	3	5 feet 9 inches	Creole of St. Kitt's	Lame in the right leg	
Ned	Smith	Mulatto	Cooper	40	5 feet 10 inch.	Creole of St. Vincent's	No marks	
Sampson	Strong	Negro	Labourer	25	5 feet 8 inches	African from the Windward Coast	Country marks, two seams on each cheek	
George	Ward	Negro	Labourer	29	5 feet 7 inches	African, from the Gold Coast	Has lost the first joint of the middle toe, left foot	
GENERAL LIST OF FEMALE SLAVES on the said Plantation, (or of the said *E. F.*)								
Phillis	Johnston	Negro	Labourer	42	5 feet 1 inch	African, from Congo	No marks	
Susan	Strange	Negro	Labourer	39	4 feet 11 inch.	African, from Gold Coast	Country marks on the arms	
Betty	Edwards	Negro	Washer	29	4 feet 10 inch.	Creole of this island	No marks	
Sally	Baker	Mulatto	In the little weeding gang	11	4 feet 3 inches	Same	Cast in the eye	

The whole number of Slaves on the said Plantation *C. D.* (or of the said *E. F.*) is twelve.

A true Return,

A. B. January 1st, 1813.

APPENDIX D.

TRINIDAD.

By his Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its Dependencies, and Vice Admiral thereof.

(L. S.) RALPH JAMES WOODFORD.

A PROCLAMATION.

WHEREAS it is expedient that the laws now in force respecting the public gaol of this island should be revised, and that some further regulations should be made for the internal government thereof, as well with a view to meliorate the condition of the persons committed to gaol, as to prevent any undue punishment or detention therein, contrary to law; I do therefore proclaim, order, and declare, as it is hereby proclaimed, ordered, and declared, that from and after the date of these presents, the following

ORDERS AND REGULATIONS

shall be strictly observed under the penalties annexed to the same for a contravention thereof.

I. That from and after the date hereof, no person of any description whatever, shall be committed or sent to gaol without an order in writing from the Governor, the Chief Judge, the Alcaldes in Ordinary, the *Teniente Justitia Mayor* of the city of St. Joseph de Oruna, the Commandants of Quarters, the Chief of Police, or the *Alcaldes of Barrios*, nor unless there shall be expressed in the order of commitment the nature of the crime with which the prisoner may stand charged.

II. That every person committed shall be reported by the *Alguazil Mayor* or his deputy, within twenty-four hours, either to the Governor, Chief Judge, or *Alcaldes* in Ordinary, specifying the offence, and the period for which the prisoner stands committed.

III. That all Slaves found in the streets after nine o'clock at night, without a pass, shall be arrested and confined in the cage for the night.

IV. That the Alguazil Mayor, or his deputy, shall cause all Slaves so arrested and confined, and not released or claimed by their masters before ten of the clock of the ensuing morning, to be conducted before the Chief of Police, in order that such Slave or Slaves may be forthwith punished, released, or re-committed for the further specified time that may be adjudged.

V. That all prisoners be locked up by seven of the clock in the evening; the female prisoners being kept apart from the male.

VI. That no light be permitted in the gaol after that hour.

VII. That the gaoler shall make a round of the prison every night at eight o'clock, and insert in the gaol registry book the state in which he finds the gaol at the time he goes the round.

VIII. That no prisoner be closely confined but by an express order to that effect, except the keeper shall deem it necessary for the better security of any prisoner.

IX. That prisoners so confined, if not refractory, may be permitted to walk on the platform for one hour in the morning and evening, but under the charge of the sentinel on duty.

X. That no gambling of any description whatever shall be permitted in the gaol.

XI. That no prisoner be permitted to quit the prison without an order from one or other of the judges or magistrates mentioned in the clause number I., and in case of being committed by the Governor, without his order.

XII. That twenty-five stripes, being the number fixed by the Royal Cedula of the 31st of May, 1789, shall be the extent of the number of stripes to be inflicted on ordinary occasions, as a correctional punishment by masters or managers upon Slaves; and that number shall not be exceeded without an express authority in writing from the Governor, the Chief Judge, the Alcaldes in Ordinary, or the Commandants of Quarters.

XIII. That those punishments that are inflicted within the gaol, shall not take place after six o'clock in the morning, unless otherwise judicially ordered.

XIV. That no pigs, pigeons, or poultry shall be kept within the walls of the prison, and all filth shall be removed once in every day from the interior of the gaol.

XV. The outward doors and gates of the prison shall be locked and made secure at the hour of eight o'clock every night, the gaoler keeping the keys of all the gates.

XVI. The interior of the cells or apartments in the gaol that are inhabited, shall be white-washed on the first day of every month, unless such day should fall on Sunday, and in such case on the day ensuing.

XVII. That all Slaves sentenced to be confined in the gaol beyond forty-eight hours, or any runaways, shall work in the chain-gang for the benefit of the public.

XVIII. That all Slaves committed for desertion, or adjudged by a sentence of a tribunal to imprisonment for any petty offence, shall immediately work in chains for the benefit of the public, unless exempted by the gaol physician, whose certificate of exemption will be noted in the gaol book of registry.

XIX. That no Slave committed as a runaway shall remain in gaol for a longer period than two months; and unless such Slave so committed shall be claimed and released by his master at the expiration of that time, and the gaol fees paid, he will be exposed to sale by the *Alguazil Mayor* or his deputy, and the proceeds, after payment of the fees, will be deposited in the colonial treasury until claimed by the owner.

XX. That a list of the several Slaves and the dates of their commitment, written in a legible hand, shall be hung up daily at the door of the gaol, and in a conspicuous situation, for the information of the respective owners of Slaves.

XXI. That no Slave, unless confined for some criminal act, shall be allowed to remain therein when in a state of indisposition, and any such Slave not confined for a criminal act shall, on the report of the physician, be immediately sent to his or her owner.

XXII. That all the apartments of the gaol be washed every Wednesday and Saturday mornings at gun-fire.

XXIII. That the gaol and gaol-yard be swept and cleaned every morning.

XXIV. That each prisoner be furnished daily with half a pound of salt fish and eight large plantains, or one pound and a half of prepared farine, for which the Alguazil Mayor will charge two shillings currency.

XXV. That all provisions be regularly served out before six of the clock in the morning to the working prisoners, and before eight to all others.

XXVI. That all the provisions be of sound, good, and wholesome qualities, subject to the daily inspection and approbation of the *Regidor* of the week, and the Chief of Police, whose duty it is, and who are hereby ordered to cause all provisions that are not of that description to be destroyed, reporting the same to the Governor.

XXVII. That under no pretence whatsoever shall any money be issued to the prisoners in lieu of provisions, unless by virtue of an express permission of His Excellency the Governor.

XXVIII. That all persons shall be permitted to visit the gaol between the hours of eight and ten in the morning, and one and three in the evening, and at no other time.

XXIX. That no wines, spirits, or strong waters be permitted to be introduced into the gaol under any pretence whatever, without a judicial order, or by the order of the physician.

XXX. That there be kept in the gaol by the Alguazil Mayor, or his deputy, two books; one as a diary, and the other as a registry, which shall never be removed therefrom; and wherein shall be entered the name of each prisoner, the day of his commitment, his personal description, the time for which he is committed, and by whose order, the cause thereof, the day of his release, the sentence for the same, the punishment inflicted, and the amount of fees received from or on account of such prisoner, together with a column for remarks, wherein shall be noted the clothes or effects brought by each prisoner to gaol.

XXXI. That the Alguazil Mayor, or his deputy, shall place in a conspicuous part of the gaoler's apartment the docket of fees established for the gaol, which said docket shall not be exceeded in any case whatever, under pain of suspension from office of the *Alguazil Mayor*, or his deputy.

XXXII. That the attorney of the gaol, accompanied by the *Regidor* of the week, and the Chief of Police, shall visit the gaol once a week, to hear any complaints which the prisoners may have to make against the Alguazil Mayor or his deputy, or the gaoler, examine the same or decide thereon: and in order that these rules and regulations be strictly observed, the three last-mentioned persons will, in testimony thereof, insert in the registry a note of their visit, the cause of any complaints, the result of their examination of the same, and the Alguazil Mayor, or his deputy, shall transmit a copy thereof to his Excellency the Governor.

XXXIII. The Governor will inspect the prison and the prisoners on an early day in each month; at these visits His Majesty's Chief Judge, the Assessor of the Governor, the Alcaldes in Ordinary, His Majesty's Attorney-General, the Chief of Police, the Alguazil Mayor, Procurator Syndic, and the Gaol Physician will attend, when the books of the gaol will be examined and passed.

XXXIV. That should any of these rules and regulations be violated or contravened by the *Alguazil Mayor*, his deputy, or the gaoler, either directly or indirectly, the punishment for the same is, as it is

hereby declared to be; — forfeiture of office, or a pecuniary fine, at the discretion of His Excellency the Governor, not exceeding 400 dollars, nor less than 100 dollars.

XXXV. That the whip or instrument of punishment now approved of, and to be hereafter used in the gaol, shall be hung up in a conspicuous part of the gaoler's apartment, and shall not be used for any other purpose, nor shall any other whip or instrument of punishment be substituted in lieu thereof. And as often as it may be necessary to be renewed, the one to be substituted shall, previously to its being used, be approved of by the Governor, the Chief Judge, the Alcaldes in Ordinary, and the law officer of the crown.

XXXVI. That if any person imprisoned in the said gaol shall attempt to escape, or shall aid any other person imprisoned in escaping, or attempting to escape from the same, such person shall, on conviction thereof before any of the ordinary tribunals of justice established in the said island, be adjudged to be imprisoned in the said gaol for such further term after the expiration of the term for which such person shall have been originally committed as the Court in its discretion shall deem proper.

XXXVII. That if any person or persons shall in any manner howsoever aid or assist any person confined in the said prison in escaping, or attempting to escape from the same, such person or persons shall, upon conviction thereof in due form of law as aforesaid, be adjudged to be imprisoned in the said gaol, and sentenced to hard labour for such time as the Court in its discretion shall deem proper, not, however, exceeding two years.

XXXVIII. That any person or persons who shall convey any disguise, instrument, or arms into the gaol to and for the use of any prisoner committed or detained therein, with the intention of facilitating his or her escape, though no escape be made, such person or persons shall, upon conviction thereof in due form of law as aforesaid, be punished with imprisonment, and sentenced to hard labour for such time as the Court in its discretion shall think proper, not, however, exceeding one year.

And I do hereby further declare and order, that this my proclamation shall, in virtue of the proclamation of His Royal Highness the Prince Regent, of the 18th of December, 1813, be registered in the books of record directed thereby to be kept by the Governor, the Chief Judge, and the Judges of the Tribunals established in the said island.

And, lastly, I do hereby will and require, and strictly charge and command their Honors the Judges of the Tribunals established in the said island, His Majesty's Attorney-General, *Teniente Justicia Mayor*, Commandants of Quarters, *Regidors*, Chief of Police, Alcaldes of Barrios, Provost-Marshal or Alguazil Mayor, his deputy, and Gaoler, and all other persons whomsoever coming within the intent and meaning of this my proclamation, duly to obey and observe the same, and govern themselves accordingly.

Given under my hand and seal of office, at Government House, in the town of Port-of-Spain in the said island, this 7th day of January, 1815, and in the fifty-fifth year of His Majesty's reign.

By His Excellency's command.

(Signed) P. REINAGLE, Secretary.

GOD SAVE THE KING.

APPENDIX E.

59 Geo. III. c. 120.

An Act for establishing a Registry of Colonial Slaves in Great Britain, and for making further Provision with respect to the Removal of Slaves from British Colonies. [12th *July* 1819.]

WHEREAS laws have been passed in several of the colonies and other foreign possessions of His Majesty, for enforcing the due registration therein, of all persons who are now, or may at any future time be held in slavery within the same: and whereas provision has been made for transmitting to one of His Majesty's Principal Secretaries of State, a copy duly certified of each such registry: and whereas it is expedient, both for the better and more effectual preservation of the said copies, and for the convenience of all persons having any interest in persons held in slavery in the British colonies, that the copies of such registries should be deposited and kept in some public office in this country; be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful for His Majesty to nominate and appoint, by warrant under the hand and seal of one of His Majesty's Principal Secretaries of State, some fit and proper person as the registrar of colonial slaves, to receive the copies of all registries or returns of Slaves, and of any abstracts or indexes referring thereto, which may have been, or which may at any time hereafter be transmitted from any of His Majesty's foreign possessions, either in pursuance of any order of His Majesty in Council, or of any law or ordinance duly passed in any of the said colonies respectively, which said registrar and his successors respectively, shall continue to hold the said office during His Majesty's pleasure.

His Majesty may appoint a registrar of colonial Slaves to receive returns of Slaves from His Majesty's foreign possessions.

II. And be it further enacted, That the Commissioners of His Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three or more of them, shall assign to the registrar so appointed, such a salary, not exceeding in the whole the sum of eight hundred pounds per annum, as shall appear to them adequate and proper, and shall fix the number of such clerks, officers, or other persons to assist the said registrar, as may from time to time be necessary, and shall allow to them also such salaries as may be proper, and also reasonable sums for incidental charges; all which salaries and charges shall be defrayed and paid in the same manner as the salaries and incidental charges of the offices of His Majesty's Principal Secretaries of State are now defrayed and paid.

Treasury to assign such registrar a salary not exceeding 800l. per ann., and fix the number of clerks, &c., and allow them salaries.

III. And be it further enacted, That the said Commissioners of the Treasury, or any three or more of them, shall provide a proper and distinct office for the said registrar, and shall appoint the several fees to be taken by the registrar or his assistants in the said office, and shall cause a schedule of the same to be delivered to the said registrar at the time of his appointment, which said schedule, or a

Office to be provided, and a schedule of fees prepared.

copy thereof, shall be always kept and hung for public information in the office of the said registrar; provided always, that the fees so received by the registrar or his assistants shall be carried to the public account, and the residue thereof, if any, after paying the salaries of the registrar and other persons employed in his office, shall be applied under the direction of the said Commissioners of the Treasury, in aid of the expenses of His Majesty's civil list.

Application of fees.

Registrar to take an oath before he enters upon office.

IV. And be it further enacted, That the person who may be at any time appointed registrar of colonial Slaves, shall, before he enters on the execution of his said office, be sworn before the chief justice or one of the justices of His Majesty's Courts of King's Bench or Common Pleas, or the Chief Baron, or one of the Barons of His Majesty's Court of Exchequer, in the words following:

Oath.

"I, *A. B.* do solemnly promise and swear, that I will in all "respects faithfully and uprightly perform the duties of registrar "of colonial Slaves, to the best of my judgment and ability.
"So help me GOD."

Registrar not eligible to sit in the House of Commons.

V. And be it further enacted, That any registrar of Slaves who may be appointed by virtue of this act, shall, during his continuance in such office, be incapable of being elected, or of sitting as a member of the House of Commons.

Copies and duplicates of registers of Slaves, &c., received by the Secretaries of State to be delivered over to the registrar.

VI. And be it further enacted, That as soon as the office of registrar of colonial Slaves shall be opened, copies and duplicates of the several registries and returns of Slaves in the several colonies, and all papers connected therewith, which may have been received by any of His Majesty's Secretaries of State, shall be delivered over to the said registrar, and shall be by him kept in the said office; and the said registrar shall from time to time carry on, continue, correct, and enlarge the copies of the several registries of Slaves respectively, pursuant to the further returns of Slaves which may from time to time be received from the several colonies, and shall form such indexes and abstracts, and such convenient arrangements in other respects, as may best promote regularity in keeping the said books and facilitate search therein.

Attendance to be given daily from the hours of ten to four, (except Sundays and holidays).

Search to be made and certificates given.

VII. And be it further enacted, That every such registrar, or his clerks or assistants, so to be appointed as aforesaid, shall give due attendance at the said office every day in the week (except Sundays and such holidays as are kept at the bank of England), from the hour of ten in the morning to the hour of four in the afternoon, for the despatch of all business belonging to the said office; and that every such registrar, or his clerks or assistants, shall as often as required make searches concerning any Slave or Slaves that shall be registered or supposed to be registered in any of the said books, and shall also, if required, give certificates under the hand of the said registrar, as to the registration or non-registration of any such Slave or Slaves, with extracts, when the same is or are found to be registered, of the name and description or names and descriptions thereof, and of the plantation or plantations, owner or owners, to whom the same is or are described to belong, and of any other particulars relating thereto which may be stated in the said registry; and that such registrar shall be entitled to receive for every such search, certificate, or extract, such sums as shall be duly appointed in the schedule of fees to be fixed by the said Commissioners of the Treasury as is herein-before provided for.

VIII. And be it further enacted, That from and after the first day of January, one thousand eight hundred and twenty, it shall not be lawful for any of His Majesty's subjects in this United Kingdom to purchase, or to lend or advance any money, goods, or effects upon the security of any Slave or Slaves in any of His Majesty's colonies or foreign possessions, unless such Slave or Slaves shall appear by the return received therein to have been first duly registered in the said office of the registrar of colonial Slaves; and that every sale, mortgage, and conveyance, or assurance of, and every charge or other security upon any Slave or Slaves not so appearing to be registered, which at any time or times after the said first day of January, one thousand eight hundred and twenty, shall be made or executed within this United Kingdom, to or in trust for any of His Majesty's subjects, shall be absolutely null and void in respect of any such unregistered Slave or Slaves, and that for this purpose no Slave or Slaves shall be deemed and taken to be duly registered, unless it shall appear that a return of such Slave or Slaves duly made by the owner or owners, or other persons in his or their behalf, in the manner and form required by law, in the colony in which such Slave or Slaves may reside, or a copy or abstract of such return, shall have been received in the office of the said registrar, from the colony in which such Slave or Slaves shall reside, within the four years next preceding the date of such sale, mortgage, conveyance, or assurance, charge or security as aforesaid.

After Jan. 1, 1820, no purchase to be made or money lent on the security of Slaves, unless they shall have been registered in the office of the registrar. Sale or mortgage otherwise made shall be void, &c.

IX. And it is hereby further enacted, That from and after the said first day of January, one thousand eight hundred and twenty, no deed or instrument made or executed within this United Kingdom, whereby any Slave or Slaves in the said colonies shall be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law, to pass or convey, charge or affect any such Slave or Slaves, unless the registered name and description or names and descriptions of such Slave or Slaves shall be duly set forth in such deed or instrument, or in some schedule thereupon indorsed or thereto annexed, according to the then latest registration or corrected registration of such Slave or Slaves in the said office of the registrar of Slaves: Provided always, that no deed or instrument shall be avoided or impeached, by reason of a clerical error in setting forth the names and descriptions of any Slave or Slaves therein, or in any schedule thereto contained, nor shall the same be avoided or impeached, by reason of any disagreement between the names and descriptions, and the entries thereof in the books of registry, or duplicate registry, which shall have arisen from any error or default of the registrar, his assistants or clerks, in extracting and certifying the said names and descriptions, without the fraudulent contrivance or wilful default of the parties to such deed or instrument: Provided also, that nothing herein contained shall extend to or be construed to hinder or prevent the transfer or assignment of any security, mortgage, or charge of or upon Slaves granted, made, created, or executed antecedently to the passing of this act, nor to avoid any deed or instrument whereby such security, mortgage, or charge shall be hereafter transferred, nor to avoid, hinder, or impeach any will, codicil, or other testamentary paper, or any probate or letters of administration, or any bill of sale, assignment, conveyance, or instrument made by or under the authority of any commission of bankrupt, or any public officer appointed to assign

No deed executed for the conveyance of Slaves that are not registered shall be valid.

Misnomers not to invalidate.

Securities executed before the passing of this act, and certain other deeds herein mentioned, not to be affected.

or convey any insolvent's estate and effects, or by or under the authority of any court of justice, or any officer thereof, or in the execution of any legal process, by reason that the registered names and descriptions of any Slaves are not set forth in such deed, will, codicil, testamentary paper, probate, letters of administration, bill of sale, assignment, conveyance, or instrument.

Issue of Slaves named in any deed to be conveyed thereby, if afterwards registered.

X. And be it further enacted, That the issue of any Slave or Slaves named or described in any deed or instrument executed in the United Kingdom, or any schedule thereto, born after the return required by law, in the colony in which such Slave or Slaves may be resident, who shall afterwards be duly registered in the next return required by law, in the said colony, shall be deemed and considered to pass, and be conveyed and affected as registered Slaves by such deed or instrument, as effectually to all intents and purposes, as if such issue were therein named and described, any thing in this act contained to the contrary notwithstanding.

46 G. 3. c. 52.

XI. And whereas by an act passed in the forty-sixth year of His Majesty's reign, intituled, *An Act to prevent the importation of Slaves, by any of His Majesty's subjects, into any islands, colonies, plantations, or territories belonging to any foreign sovereign, state, or power; and also to render more effectual a certain order, made by His Majesty in Council on the 15th day of August, one thousand eight hundred and five, for prohibiting the importation of Slaves (in certain cases) into any of the settlements, colonies, or plantations on the continent of America, or in the West Indies, which have been surrendered to His Majesty's arms during the present war; and to prevent the fitting out of foreign Slave-ships from British Ports;* certain regulations were made with respect to the removal of Slaves from one British colony to another: and whereas it is expedient further to regulate the same; be it therefore further enacted, That wherever any Slave or Slaves shall be sent from any colony now or hereafter under the dominion of His Majesty, his heirs or successors, with intent that such Slave or Slaves shall be removed to and remain in some other colony under the dominion of His Majesty, his heirs or successors, the owner or owners, or other person or persons sending any such Slave or Slaves, shall produce to the collector or other principal officer of His Majesty's customs at the port at which any such Slave or Slaves shall be shipped or embarked, a copy duly certified by the registrar of the said colony, of the name and description, or names and descriptions, by which such Slave or Slaves has or have been registered, and of all other particulars relating thereto stated in the said registry; which copy so certified shall be by such collector or other principal officer indorsed with his own name and hand-writing, and shall be annexed to the clearance or permit to be given for the shipment and exportation of such Slave or Slaves, and shall on the arrival of such ship or vessel in which such Slave or Slaves shall be sent, at the port in any other British colony to which the same shall be destined, be produced also to the collector or principal officer of the customs at such last-mentioned port, who shall examine the same, and shall also ascertain by personal inspection whether the Slave or Slaves brought by such ship or vessel agree in description with the Slave or Slaves mentioned in such certificate or clearance, and if not, shall refuse to admit the same to an entry; but in case of such agreement, shall indorse such certificate with his name and hand-writing, and the said certificate so indorsed shall be forthwith delivered by the collector to the registrar of Slaves in such last-mentioned colony.

When Slaves are sent from one colony to another, the owner shall produce at port of shipping a certified copy of the register of their names and descriptions, which shall be annexed to the clearance for the inspection of the officer at the port of arrival.

XII. And be it and it is hereby further enacted, That if any Slave or Slaves shall be exported, sent, carried or conveyed from any colony under the dominion of His Majesty, his heirs or successors, without such certified copy from the registrar of the colony from which the same shall be so exported, sent, carried, or conveyed, such Slave or Slaves, with the ship or vessel in which the same shall be so exported, sent, carried, or conveyed, shall be forfeited, and shall and may be seized as forfeited, and prosecuted, condemned, and dealt with in all respects as if such Slave or Slaves had been brought from or destined to any foreign colony or place contrary to the act passed in the forty-seventh year of His Majesty's reign, intituled, *An Act for the Abolition of the Slave Trade:* Provided always, that nothing herein contained shall prevent or be construed to prevent the embarkation or passage from one British colony to another, or to any other colony or place, in such manner as is now permitted by law, of any domestic Slave or Slaves in actual attendance on the person of his, her, or their master or mistress, or any part of the family of such master or mistress, being a passenger or passengers in the same ship or vessel, or of any Slave or Slaves employed as a mariner or mariners on board of any such ship or vessel; but in addition to all clearances and certificates now required by law, it shall be necessary, in all such cases after the first day of January, one thousand eight hundred and twenty, for the master or owner of any such domestic Slave or Slaves, or mariner or mariners, to obtain from the registry of the colony to which the same shall belong, an extract certified by the registrar thereof, shewing that such domestic Slave or Slaves, or that such Slave or Slaves employed as a mariner or mariners, has or have been duly entered in the Slave registry of the said colony, by their name and description or names and descriptions therein specified; which extract and certificate shall be always on board the ship or vessel in which any such domestic or mariner is carried or employed; and unless such extract and certificate of registration shall be found on board, any such Slave or Slaves so carried or employed after the time aforesaid, shall be forfeited, and shall and may be seized as forfeited, and prosecuted, condemned, and dealt with as aforesaid: provided always, that if any domestic Slave or Slaves in actual attendance upon the person of his, her, or their master or mistress, or any part of the family of such master or mistress, shall be brought into or landed in any British colony, the extract and certificate of his, her, or their registration in the colony from which he, she, or they may have come, shall be forthwith produced to the collector or principal officer of the customs, and a copy thereof shall be by him delivered to the registrar of Slaves in the colony into which he, she, or they may be brought; and if the said domestic Slave or Slaves shall be again removed from the colony into which they may have been so brought previous to the next period for making returns of Slaves therein, the collector shall, previous to the embarkation of such domestic Slave or Slaves, return to the party requiring it, the original extract and certificate of registration delivered into his office, to be kept on board the ship or vessel in which such domestic Slave or Slaves may be carried.

Slaves sent without such certificate shall be forfeited agreeably to 47 G. 3. c. 36.

Not to affect the embarkation of domestic Slaves as now allowed.

But after Jan. 1 1820, owners of domestic Slaves, &c. shall obtain extracts certified by the registrar of their having been registered, which shall be kept on board, and produced to the proper officer.

XIII. And be it further enacted, That this act may be altered, amended, or repealed by any act or acts to be passed in this present Session of Parliament.

Act may be altered this Session.

APPENDIX F.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, 16th September, 1822: Present, the King's most Excellent Majesty, in Council.

Provision for the more speedy administration of justice in criminal offences.

WHEREAS His Majesty deems it necessary to provide for the more speedy administration of justice in criminal offences, committed in the island of Trinidad, by which, whilst his Majesty shall afford facilities for the better prosecution of offenders, he shall at the same time give them such protection as an equal distribution of justice demands; and His Majesty being desirous to extend to His subjects, in the said island, such parts of the principles and practice of the criminal law of the United Kingdom as the present condition of its inhabitants, and the mixed nature of its population appear to warrant: His Majesty, therefore, by and with the advice of his Privy Council, is pleased to order and declare, and it is hereby ordered and declared, that from and after the publication of this Order in the said island, the following Regulations, which His Majesty is pleased to establish in this behalf, shall be strictly followed.

Ordered that in the island of Trinidad there shall be 1st, a Court of Criminal Inquiry, 2d a Court for the Trial of Criminal Prosecutions. 3d a Court of Appeal in condemnation of death. In whom the said Tribunals of Appeal shall be vested.

I. There shall be established in the Island of Trinidad, the following tribunals for the administration of criminal justice, viz.

1. A Court of Criminal Inquiry.
2. A Court for the Trial of Criminal Prosecutions.
3. A Court of Appeal in all cases of Condemnation to Death.

II. The said tribunals of appeal shall be vested in the Governor, Lieutenant-Governor, or officer administering the government of the island, for the time being, assisted by the Council of the said island, of whom three shall, with the Governor, be sufficient to constitute a Court: the prosecutor and the prisoner being heard verbally, by themselves or their advocates, on a day to be fixed for the purpose, within one week after the appeal shall have been entered, and judgment forthwith given: And in all confirmations or reversals of sentences of death, three concurrent voices, being a majority of the members then present, shall be sufficient to warrant the execution or reprieve.

Of whom the Court for the Trial of Criminal Prosecutions shall consist.

III. The Court for the Trial of Criminal Prosecutions shall consist of—

The Chief Judge, as President;
The Assessor of the Governor;
The Alcaldes in Ordinary;

And the Escribanos of the Civil Tribunal shall act in the same capacity therein; and there shall be an Interpreter, and such inferior officers as the Governor may, from time to time, think fit to appoint.

Three Judges to concur in the sentence of death.

IV. Three of the Judges shall concur to warrant a sentence of death; and every sentence of the said Court shall be signed by all the Judges of the same who shall concur therein; and shall be countersigned by an Escribano and the Interpreter.

V. The Tribunal of Criminal Inquiry shall consist of a Judge; an Escribano, who is ministerially to assist the Judge, and to forward the business of the Court by every exertion in his power; a Clerk; a Porter, and a competent number of Alguacils or Constables; with the following salaries, in lieu of all the ordinary fees, to be paid out of the revenues of the said island, and to be charged on the civil establishment thereof, viz.

Tribunal of Criminal Inquiry to consist of a Judge and Escribano, a Clerk, &c. at certain salaries.

The Judge - - -	£3000 (currency)
Escribano - - -	800
Clerk - - - -	500
Porter - - -	300
Alguacils — One white - -	250
Two coloured, at £200. each -	400

There shall also be an Interpreter, with a salary of 1000*l.*; but it shall be also his duty to attend at all criminal trials whatever.

VI. This tribunal is to hold and exercise the authority and jurisdiction of a Court of First Instance, to take cognizance of criminal offences which shall be inquired into in the following manner:—

This tribunal to hold jurisdiction of a Court of First Instance.

VII. Informations of criminal offences, shall be made in the country to the nearest Magistrate or Commandant, and in the town of Port-of-Spain to the Chief of Police; but it shall be equally lawful to report the same to the Judge of Criminal Inquiry. In the former case the Magistrate or Chief of Police shall address a report to the said Judge or to his Escribano, sending the prisoner and such evidence as shall have been offered or obtained, to the tribunal, by the Alguacil, or other sufficient custody, and the prisoner shall be immediately lodged in a place of security, which shall be provided for the purpose, and not in the gaol or common prison; and in the temporary absence or sickness of the Judge of Criminal Inquiry, it shall be competent for any other Judge, or for the Attorney-General, to order the prisoner to be so secured, unless he shall give good and sufficient security to the satisfaction of the Judge, or of the Attorney General, as the case may be, for his appearance to answer to the offence of which he has been charged, in cases in which security may be admissible, and immediately, or at least within twenty-four hours after such commitment, the Judge of Criminal Inquiry shall proceed to take the evidence of the parties against the prisoner, making those diligences therein which the law terms pesquizas and indagaciones, and in the taking whereof it shall not be necessary for him to require the presence of an Escribano, except in taking the declaration of the prisoner, which the Judge shall do at the time he thinks most conducive to the ends of justice, if he shall deem it necessary at all; but no oath shall in any case be administered to the prisoner; and he shall not at any time be compelled or persuaded, but every prisoner shall be allowed to give his own account respecting his knowledge of, or conduct, concern, or participation in the offence or charges alleged against him.

Divisions as to Informations of the First Instance.

VIII. When the summary information shall have been concluded, the Judge of Criminal Inquiry shall determine on the course to be pursued either of prosecution or dismissal of the complaint; and in cases of dismissal, in absence of full proof, but in which there may be presumptions against the accused, the said Judge of Criminal Inquiry may order the prisoner to give security for his good behaviour; and in cases of voluntary confession by the prisoner, of the matters charged against him, or of prosecution being ordered

Regulations when the summary information shall have been concluded.

by the said Judge of Criminal Inquiry, the information shall be passed to the Attorney-General, or Law Officer of the Crown, and the prisoner shall be notified thereof by the Judge of Criminal Inquiry, who shall call upon him to select, within two days, his advocate, if he has the means of employing one; or, in defect thereof, the Judge of Criminal Inquiry shall appoint one to act in his behalf; for which purpose the Escribano shall keep a list of the advocates, that they may be appointed to such duty in rotation; and they shall exercise the same free of charge, except in capital offences, in which they will be allowed, from the funds that may be assigned to this service in the Court of Criminal Trial, their fees according to the subjoined schedule.

Prisoner having been informed of prosecution to be committed.

IX. The Prisoner, being informed of the prosecution having been ordered, will be committed to prison by an order of the Judge of Criminal Inquiry, except in the cases herein-before excepted. The committal shall be directed to the Alguacil Mayor, who shall deliver the party accused to the keeper of the prison, to be confined in such manner and place as the said Judge shall direct.

Prosecution or charge to be filed within 8 days, and a copy delivered to the prisoner within 48 hours afterwards.

X. Within the eighth day after that the prosecution shall have been ordered, and the informations passed to the Attorney-General, or Law Officer of the Crown, the prosecution or criminal charge shall be filed in the Court by that officer, and a copy of the said charge shall be delivered by the Escribano of the Court, to the prisoner, or his advocate, within forty-eight hours after the same shall have been exhibited; to which prosecution the prisoner shall make answer, setting forth the nature and substance of such objections as he shall be advised to make at his trial; such answer to be filed at least two complete days before the day of trial, and to be forthwith communicated by the Escribano, with whom the same is to be filed, to the Attorney-General or Law Officer of the Crown.

Within 48 hours afterwards the Escribano to obtain from the Chief Judge the nomination of trial, which shall be within 14 days, unless, &c.

XI. Within the period of forty-eight hours after the filing the prosecution, the Escribano shall take care to obtain from the Chief Judge the nomination of the day of trial, which shall be within fourteen days from that in which the prosecution was filed, unless good and sufficient cause be shown for delay; which cause shall be submitted to and decided upon by the Court of Criminal Trial: the Escribano shall forthwith notify the same, by writing to the members of the Court, to the advocates of the prosecution, and to the prisoner; and the Alguacil Mayor shall be notified to demand the prisoner on that day, and to conduct him into the presence of the Court, and during the continuance of the trial the prisoner shall be under the custody of the Alguacil Mayor, who shall be at liberty to remand him to the prison, with the permission, or by order of the Court, during the progress of the trial, or the adjournment thereof, provided such adjournment shall not exceed fourteen days.

Proceedings when the Court is assembled.

XII. The Court being assembled, the criminal charge or act of prosecution shall be read by one of the Escribanos in open Court, and after that, the answer or defence; and then the summary information, which shall have been deposited with the Escribano on filing the prosecution, and shall have been seen by the members of the Court during the fourteen days assigned as the interval between the prosecution and the trial, shall be brought into the Court, and delivered to the advocate of the prosecutor: who having been heard in support of the prosecution, the witnesses to the information shall be called, and being sworn, the deposition of every one shall be read over to him, and if necessary, interpreted; and it shall be competent

to a witness to amend or alter his declaration, with consent of the Court, and an Escribano shall take such alterations in writing, or declare the ratification by the witness of his former testimony; and such witness shall then be examined by the prosecutor in open Court, and be cross-examined by the advocate of the prisoner; and the advocate of the prosecution shall be allowed to put such further questions to him, for elucidation of the evidence, that the cross-examination may have drawn from him, as, with the consent of the Court, shall be necessary; and such examinations and cross-examinations shall be taken down in writing, as the same respectively proceed, by the Escribano of the Court.

Proceedings after the evidence closed.

XIII. When the evidence for the prosecution shall have been closed, the advocate of the prisoner shall state the nature of the defence intended to be submitted to the Court; and the witnesses for such defence, for whose appearance an order shall have been issued, upon proper application by the Court before the trial commences, shall be separately called and sworn; and each having given his testimony, may be cross-examined by the advocate for the prosecution, and the Court may order the witnesses to be confronted if it shall think fit; and the same advantage shall be allowed to the advocate of the prisoner, to put such further questions for the elucidation of the evidence, which the cross-examination may have drawn from them, as, with the consent of the Court, shall be necessary; and the evidence for the prisoner being closed, the attorney-general or advocate for the prosecution shall be heard in support thereof; and then the advocate for the prisoner shall be heard in answer or defence; and the former shall have the right of reply; and the arguments being closed, the prisoner shall be asked if he has aught to allege further in his defence, and if he wishes to make any further defence, he may then be heard.

One witness only necessary against offenders.

XIV. And whereas it frequently happens that offenders escape punishment from the necessity, according to the existing law, of establishing the charge against the party accused, by the direct or positive testimony of two witnesses; It is therefore hereby ordered and declared, that the positive or direct testimony of one free, credible witness, competent, according to the law of England, in such cases, and supported or corroborated by circumstantial evidence, on the oath of one other such witness, shall be held sufficient for the proof of the matter or offence charged, and the conviction of the prisoner; except in cases of perjury and treason, in which the positive or direct testimony of two such witnesses shall be required for the purpose of proof or conviction: Provided always, that no child shall be compelled to give testimony against parent, nor parents against their children; but such children or parents may be permitted, if willing, so to testify: and provided always, that the question of admissibility or competency, and the credibility of all witnesses, be matter for the consideration and determination of the Court: Provided also, that in all criminal cases it shall be in the discretion of the Court, in which any charge is depending, to admit as witnesses persons not free, who in other respects would be competent, according to the law of England, to give evidence in such cases.

Certain exceptions.

When evidence closed, the President of the Court to sum up, and direct.

XV. When the evidence and pleadings shall have been closed, the President of the Court shall, from the notes which he shall have taken during the trial, sum up the evidence; and afterwards, commencing with the junior member, collect the opinion of the Court, as to the guilt or innocence of the prisoner; which shall be decided

by a plurality of the voices of the members, who, in capital cases, shall all be bound to attend. The President shall then either declare the prisoner acquitted, or proceed to determine with the Court, the nature and extent of the punishment to be adjudged to the prisoner, and then pronounce sentence accordingly: Provided always, that it shall be lawful in all cases for the Court to retire, for the purpose of forming their opinions on the guilt and punishment, or acquittal of any prisoner; but not to separate, except in cases of capital offences, in which case the Court may adjourn for any term not exceeding four days, for the purpose of deliberation; and the sentence being pronounced, shall be carried into execution, by warrant under the hands of the members of the Court concurring therein, countersigned by the Escribanos and Interpreter, and directed and delivered to the Alguacil Mayor, in three days, from the time that the same was pronounced, unless appealed from within the twenty-four hours next ensuing the delivery of such sentence.

Appeals from Court of Criminal Jurisdiction to be made in writing.

XVI. In cases in which an appeal is made against a sentence of the Court of Criminal Trial, such appeal shall be delivered in writing to an Escribano of the said Court; and in the Appeal Court no other written proceeding shall be admitted but the records of the proceedings had in the Court below, signed by the several members who have assisted and concurred therein; which shall be forthwith delivered to the Escribano de Camara, who shall obtain from the Governor the appointment of a day, within the term assigned, for hearing the appeal, and notify the same to the Council, as well as to the advocates of the prosecution and of defence; and also to the prisoner, and to the Alguacil Mayor, who shall attend with the prisoner as directed in the trial.

Directions as to proceedings in the Court of Appeal.

XVII. The proceedings in the Court of Appeal shall consist in reading the informations and the evidence, as taken in writing by the Escribano; the advocate for the appellant shall then be heard, and the Attorney-General or advocate for the prosecution in answer, and the advocate of the appellant in reply, and the Court shall then give sentence, which shall be executed at such time and place as the court shall order.

Proviso for saving the rights of the Crown.

Provided always, that nothing contained in this order shall extend or be construed to extend to prevent or restrain the said Governor from exercising the powers and authorities in him vested, in and by the commission granted by virtue of His Majesty's Letters Patent, under the Great Seal of the United Kingdom, where he shall see cause, or shall judge any offender or offenders in criminal matters, or for any fines or forfeitures due unto His Majesty, fit objects of His Majesty's mercy, to pardon all such offenders, and to remit all such offences, fines, and forfeitures, treason and wilful murder only excepted; and in such last cases, upon extraordinary occasions, to grant reprieves to the offenders until His Majesty's royal pleasure shall be known therein.

Clause for the more effectual suppression of petty thefts within the town of Port-of-Spain.

XVIII. And for the more effectual suppression of petty thefts and offences, within the town of Port-of-Spain, and the suburbs thereof, as the same may be now, or hereafter be limited, the Alcaldes in Ordinary shall by turns, two days in each week, or oftener if it shall be by the said Governor deemed necessary, sit in open Court, for the hearing and determining of all such petty thefts, assaults, breaches of the peace, contraventions of the police laws and regulations, and all similar misdemeanors as by the Chief of Police, or by his assistants, shall be brought before them; and the Alcalde shall

have power and authority to adjudge the prisoner, on a verbal and summary hearing being had of the parties in the prisoner's presence, to a fine not exceeding thirty pounds current money of the said island, or to imprisonment, for any term not exceeding two months, with or without hard work during such imprisonment; or to work in chains in cleaning the streets, or other public work, for any time not exceeding the like term, or to corporal punishment; taking care, however, that if in the verbal hearing the offence shall appear to deserve public prosecution, that the parties be immediately taken before the Judge of Criminal Inquiry.

Proviso in favour of free persons.

XIX. If however in any cases of free persons which the Alcalde shall think fit to determine, corporal punishment shall be adjudged to the offence, the prisoner on his being convicted shall be committed to the gaol, there to abide the next ensuing monthly gaol-meeting of the magistrates, who may order such punishment by stripes, not exceeding forty in number, or solitary confinement, or hard labour with or without chains, as the offence may demand, for any period not exceeding three months; and in these cases, the Chief of Police shall assemble the witnesses, and the gaol attorney shall act in behalf of the prisoner; and the whole shall be conducted verbally and summarily before the magistrates; but the case shall be entered in the gaol registry, and the order of the magistrates upon the same by the gaol attorney.

Witnesses may be cited as in civil causes.

XX. And for the more effectually ensuring the attendance of witnesses in the Courts, it is further ordered, that all witnesses, whether for the prosecution or for the prisoner, shall be named and cited in the same manner and form, and shall be subject to the same compulsory process and penalties as is provided in cases of civil causes in the sixth clause of His Majesty's Order in Council, bearing even date herewith, for regulating the proceedings in civil causes.

Judge of Criminal Inquiry, and his Officers, are to sit daily,

XXI. The Judge of Criminal Inquiry is, with the officers of his Court to attend thereat daily throughout the year, except on Sundays, Christmas-day, and Good Friday, or on such days as he may sit in the Civil Court, or unless prevented by sickness: He is responsible for the order and regularity of the records and books of registry of offences brought before him; and he is to be sworn before the Governor in Council, to the due administration of justice, without fear, favour, enmity, or affection, and that he will not take any fee, perquisite, or other reward in the execution of his office, than His Majesty shall appoint for him, and the officers attached to his tribunal shall be sworn to their respective duties in the like manner.

and all laws observed.

XXII. And all laws and customs tending to impede the free exercise of the authorities conferred by these regulations and orders, or any privilege to the contrary of any thing that is herein-before ordained and declared, shall be, as the same are hereby, repealed and annulled.

As to costs of persons.

XXIII. And whereas it may be necessary and tend to the more perfect attainment of justice, that Courts of Criminal Trial should be held in other parts of the said island, as well as in the town of Port-of-Spain, it shall be lawful for the Governor exercising the powers of the Royal Audience, to order and appoint the same from time to time, as he may think fit; as well as to provide for the expences of the same: and as regards the inquiry into criminal offences, it is hereby ordered and declared, That nothing herein-before ordered, shall tend to prevent the Judge of Criminal Inquiry from proceeding to any part of the said island where an offence may be committed,

for the purpose of taking those immediate examinations and diligences which the law prescribes for the purposes of substantial justice; and in all such cases, it shall be lawful for the Governor to reimburse to the said Judge, and to his officers, the bonâ fide expenses incurred by them, out of the revenues of the said island, provided such expenses be just and reasonable, and be approved in the Tribunal of the Royal Audience.

Certain fees established as to criminal prosecutions.

XXIV. And whereas by the Order in Council, bearing date the sixteenth day of December, 1814, and duly proclaimed in the said island, it was ordered and directed, that the cognizance of all criminal offences not provided for or made punishable by the several Mutiny Acts passed, and to be passed at any time thereafter, by the Parliament of the United Kingdom of Great Britain and Ireland, of, and with which, any persons serving in His Majesty's regular army, and stationed in the said island of Trinidad, might be charged and accused, or suspected, should from such time exclusively, belong, and appertain to the Governor and Commander-in-Chief of the said island of Trinidad for the time being, or the Lieutenant-Governor of the same, accompanied by his assessor, and to no other tribunal; And whereas it is proper to extend the benefit of this Order to that class of His Majesty's subjects, it is therefore hereby ordered and declared, that the cognizance of all offences whatsoever of a criminal nature, except such as are provided for, and made punishable by the Mutiny Act, in force for the time being, with which any officer, non-commissioned officer, or soldier belonging to His Majesty's forces, serving in the said island, or any retired officer or soldier receiving any pension, allowance, or subsistence from His Majesty, and residing and being in the said island, shall from and after the promulgation of this Order, in the said island, appertain and belong to the Courts of Criminal Inquiry, and of Criminal Trial, to be established under this Order; and it is hereby declared, that so much of the said Order of the 16th of December, 1814, as is herein-before recited, is hereby repealed.

SCHEDULE of FEES to be taken in Public Criminal Prosecutions.

	Trinidad currency. £	s.	d.
The Attorney-General as Promoter Fiscal,			
For his Act and Charge of Prosecution - -	10	0	0
For his Attendance in Court - - -	10	0	0
The Advocate of the Prisoner,			
For his Fee - - - - -	15	0	0
For his Attendance in Court - - -	10	0	0
The Escribano of the Trial or of the Appeal Court,			
For each Notification - - - -	0	5	0
For every other Diligence - - -	0	10	0
For the Copy of the Prosecution, for every 90 Words - - - - -	0	2	0

The Fees of Court, of which a Schedule shall be prepared by the Governor, and approved by the Secretary of State, to be paid into the Treasury of the Colony, and applied in aid of the establishment of the Tribunal of Criminal Inquiry. And the Right Honourable

Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG,
Administering the Government.

Government House,
Trinidad, 16th January, 1823.

GOD SAVE THE KING.

APPENDIX G.

(L. S.)

At the Court at Carlton House, the 10th of March, 1824: Present, the King's most Excellent Majesty, in Council.

1. WHEREAS it is necessary that provision should be made for the religious instruction of the Slaves in His Majesty's island of Trinidad, and for the improvement of their condition: And whereas the Procurador Syndic of the Cabildo of the town of Port-of-Spain in the said island, hath hitherto performed the duties of the office of protector and guardian of Slaves in the said island, and it is expedient that the said office should be more fully established, and that the duties thereof should be more clearly ascertained, and that provision should be made for the support thereof: His Majesty is therefore pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the Procurador Syndic of the Cabildo of the town of Port-of-Spain aforesaid, shall be, and he is hereby confirmed in his said office of protector and guardian of Slaves: And that as such protector of and guardian of Slaves he shall receive and be paid, at the time and in the manner herein-after mentioned, such salary as His Majesty shall be pleased to appoint; and that such salary shall commence from and after the twenty-fourth day of June, in the present year one thousand eight hundred and twenty-four, and that on or before that day, if possible, or if not then, so soon afterwards as conveniently may be, the said protector and guardian of Slaves shall appear before the Governor, or Acting Governor for the time being, of the said island, and in his presence shall take and subscribe an oath in the following words, that is to say: —

Procurador Syndic of the Cabildo confirmed as protector and guardian of Slaves; with such salary as H. M. may appoint.

Appointment to commence from 24th of June, 1824.

" I, *A. B.* do swear, that I will, to the best of my knowledge and
" ability, faithfully execute and perform the duties of the office of
" protector and guardian of slaves in the island of Trinidad, with-
" out fear, favour, or partiality. — So help me GOD."

His oath of office.

Provided nevertheless, and it is hereby ordered, That nothing herein contained shall extend to prevent His Majesty from disuniting the office of protector and guardian of Slaves from the office of Procurador Syndic aforesaid, and from appointing a distinct and separate officer to act as, and be the protector and guardian of Slaves, in case His Majesty shall see fit so to do.

Offices of Syndic and protector of Slaves may be disunited.

Protector to keep an office in Port-of-Spain, and regularly attend.

2. And it is hereby further ordered, That the said protector and guardian of Slaves shall establish and keep an office in the town of Port-of-Spain, in the said island, and shall regularly attend at such office on such days, and during such hours of the day, as the Governor or Acting Governor of the said colony, by any general or special orders to be by him from time to time issued, may appoint; and shall at such office, and not elsewhere, keep, deposit, and preserve the several records, books, papers, and writings herein-after directed to be kept by him.

To keep his papers at the office.

Protector not to have any interest in any plantation, or in Slaves, or in any mortgage, and not act as attorney, manager, &c. If he becomes possessed of property in right of his wife, or in trust for others, worked by Slaves, to forfeit his office.

3. And it is further ordered, That the said protector and guardian of Slaves shall not be the owner or proprietor of any plantation situate within the said island, or of any Slaves or Slave employed or worked upon any plantation, or in any kind of agriculture, and shall not have any share or interest in, or any mortgage or security upon, any such plantation, Slaves or Slave, and shall and is hereby declared to be incompetent to act as, or be the manager, overseer, agent, or attorney of, for or upon any plantation or estate within the said island, or to act as the guardian, trustee, or executor of any person or persons, having, or being entitled to, any such plantation, or any Slaves, or Slave; and in case any such protector and guardian of Slaves within the said island shall have, acquire, hold, or possess, either in his own right, or in the right of his wife, or in trust for any other persons or person, any plantation situate within the said island, or any Slaves or or Slave employed or worked upon any plantation, or in any kind of agriculture, or any share or interest in, or any mortgage, or security upon any such plantation, or Slaves or Slave, or shall act as such manager, overseer, agent, attorney, guardian, trustee, or executor as aforesaid, he shall thenceforth, *de facto*, cease to be such protector and guardian of Slaves as aforesaid, and forfeit such his salary; and some other fit and proper person shall forthwith be appointed to succeed to the said office. Provided, nevertheless, that all acts which may be done by, or by the order of, any such protector and guardian of Slaves, after any such avoidance as aforesaid of such his office, and before the same shall, by public notice in the Gazette of the said island, be declared void, shall be as valid and effectual in the law as if no such avoidance of office had occurred.

Protector to reside and not quit without special licence.

Leave limited to three months at a time.

4. And it is further ordered, That the said protector and guardian of Slaves shall be resident within the island, and shall not quit the same without a special licence to be granted for that purpose by His Majesty, through one of his Principal Secretaries of State, or by the Governor or Acting Governor for the time being of the said island: and no such licence shall, in any case, be granted for any time exceeding three months, nor shall any such licence be granted by any such Governor or Acting Governor as aforesaid, unless it shall be made to appear to him, on the oath of some medical practitioner, that such absence is necessary for the recovery of the health of the said protector and guardian of Slaves.

In case of vacancy Governor to appoint.

Deputy to receive such proportion of the salary as Governor may ap-

5. And it is further ordered, That upon the death or resignation of the said protector and guardian of Slaves, or in the event of his sickness, or other bodily or mental incapacity, or during his temporary absence from the said island, it shall be lawful for the Governor or Acting Governor to nominate and appoint some other fit and proper person to act as the deputy for the said protector and guardian of Slaves, until his Majesty's pleasure shall be known; and the said deputy shall receive such allowance, to be deducted from and out of the salary of the said protector and guardian of Slaves, as the Go-

vernor or Acting Governor for the time being of the said island shall be pleased to appoint. Provided always, that no person shall be appointed, or be competent to act as such deputy as aforesaid, who, according to the provisions of this order, would be incompetent to act as the protector and guardian of Slaves. Provided also, that the protector and guardian of Slaves in the said island shall at all times perform his duty in person, and not by deputy, except only in cases in which the Governor or Acting Governor of the said island is hereinbefore authorized to appoint a deputy for that purpose.

no one to act as Deputy that cannot act as Principal.

Principal to perform his duty in person.

6. And it is hereby further ordered, That the said protector and guardian of Slaves shall be, and he is hereby declared to be, a magistrate in and for the said island of Trinidad; and all such powers and authorities of what nature or kind soever as are now by law vested in the Commandants of the several quarters of the said island, for the maintenance of the public peace and good order, shall be, and the same are hereby vested in the said protector and guardian of Slaves, to be by him exercised throughout each and every quarter of the said island.

Protector to be a Magistrate with powers of a Commandant.

7. And it is hereby further ordered, That the Commandants of the several quarters within the said island shall be, and they are hereby declared to be, assistant-protectors and guardians of Slaves, in their several and respective quarters; and the said Commandants shall, and are hereby required, in their several and respective quarters, to be aiding and assisting the protector and guardian of Slaves in the execution of the powers hereby committed to him; and for that purpose to obey and carry into execution such lawful instructions as they may from time to time receive from him, about, or in relation to, the matters herein mentioned, or any of them.

Commandants to be Assistant Protectors, and to aid and assist Protector.

8. And it is hereby further ordered, That in all actions, suits, and prosecutions, which may at any time hereafter be brought or commenced in any tribunal or court of justice within the said island, wherein any Slave may be charged with any offence punishable by death or transportation, or wherein any question may arise as to the right of any alleged Slave to freedom, or wherein any person may be charged with the murder of any Slave, or with any offence against the person of any Slave, or wherein any question may arise respecting the right of any Slave to any such property as he or she is hereafter declared competent to acquire; then, and in every such case, such notice shall be given to the protector and guardian of Slaves of every such action, suit, or prosecution, as according to the law of the said island would be given to the said Slave, if he or she were of free condition. And the protector and guardian of Slaves shall, and is hereby required to attend the trial or hearing; and all other the proceedings in every such action, suit, or prosecution, as the protector of such Slave, and on his or her behalf, and to act therein in such manner as may be most conducive to the benefit and advantage of any such Slave.

In any action affecting the life of a Slave, or imposing banishment, or any question of freedom, or murder of a Slave, or Slave's right of property, notice to be given to Protector, who shall attend the trial.

9. And whereas His Majesty hath been graciously pleased to intimate his intention to make effectual provision for the religious instruction of the Slaves in the said island of Trinidad; and it will be proper and necessary, so soon as such His Majesty's intentions can be carried into effect, that Sunday markets should be utterly abolished throughout the said island; and it is therefore hereby further ordered, that it shall and may be lawful for the Governor or Acting Governor for the time being, of the said island, and he is hereby required, in bedience to any instruction which may for that purpose be issued by

Whenever H. M. has made effectual provision for the religious instruction of Slaves, Gov. to abolish Sunday Markets.

His Majesty, through one of his Principal Secretaries of State, to issue a proclamation in His Majesty's name, for the discontinuance of all markets throughout the said island on the Sunday; and so soon as such proclamation shall have been issued, all Sunday markets shall forthwith cease, and be absolutely unlawful. And in any such proclamation the said Governor or Acting Governor shall and may, and is hereby authorized to make, all such rules and regulations as may be necessary for the effectual suppression of such markets, and to impose such penalties as may be requisite for giving effect to any such rules and regulations. And whereas a certain proclamation or ordinance was, on the 16th day of November, 1823, issued by the Governor of the said island of Trinidad, whereby it was, and is ordered and declared, "That from and after the first day of "December then next, the market holden in the town of the Port "of Spain for the sale of meat, vegetables, and other provisions on "Sundays, and all other markets to be holden on the Sabbath day "throughout the island, should be limited to the hour of ten o'clock "in the forenoon, and that due warning should be given by the "ringing of a bell at half-past nine o'clock, to all persons to prepare "to depart; and that from and after the hour of ten in the forenoon, "no person or persons whatsoever shall remain therein, or publicly "shew forth, or expose for sale, any meat, poultry, vegetables, provisions, fruits, herbs, wares, merchandise, goods, or effects, on the "Lord's day, after the hour of ten o'clock aforesaid; upon pain that "every person guilty of a disobedience, or non-conformance of this "order, shall forfeit the goods and effects so exposed for sale, or on "refusing to quit the place, forfeit the sum of ten shillings. And it "is by the said ordinance further ordered, that if any person or "persons shall offend in these premises, it shall be lawful for the "chief of the police, or his assistants, or the clerk of the market, or "any Alguacil or Constable; and they are respectively thereby "required to seize the goods exposed for sale, and cause them to "be taken before any Judge or Magistrate, or any regidor of the "cabildo, who, upon view of such goods so exposed, shall order the "same to be sold forthwith, and the proceeds thereof to be applied "and disposed of as follows; that is to say, one third to the informer, "and the remainder to such pious or charitable purposes, and in "such manner as the Magistrate or Justice ordering the sale shall "determine. And it is by such ordinance further ordered, that in "like manner, any person refusing to quit the market-place may be "apprehended by the authorities aforesaid, who are authorized and "required to demand the penalty thereinbefore provided; and in "default of payment to commit the offender for twenty-four hours' "imprisonment. And it is by the said ordinance provided, that "nothing therein contained shall extend to the prohibition of dressing "or selling meats in inns or victualling houses, nor to the sale of fish "at the fish-house, provided the same do not take place during the "hours appointed and set apart for divine service. And it is by the "said ordinance noticed and set forth, that the limitation therein-"before declared, respecting the markets to be holden on Sundays, "may not afford sufficient time for the sale of the articles and provisions necessary for the consumption of the inhabitants; and it is "therefore thereby ordered, that Thursday be also a market-day, "on which free persons are invited to attend, so as to lessen the "number of persons resorting to the market on Sundays, which is "especially retained for the due and reasonable encouragement of

Ordinance of 16th of Nov. 1823, confirmed.

" the Slave population in habits of industry; and as it may not oc-
" casionally be inconvenient for proprietors to permit their Slaves to
" bring the produce of their labour to market on another day than
" Sunday, the day of Thursday in each week is thereby declared to
" be a market-day in future. And it is by the said ordinance further
" ordered, that when, and as soon as the same may be found prac-
" ticable, the market on Sundays will be further limited to the hour
" of nine in the forenoon of the said day." And whereas it is expedient that the said order or proclamation, of the 16th of November, 1823, should continue and be in force throughout the said island, in the mean time, and until such proclamation as aforesaid should be issued for the absolute and total abolition of Sunday markets; it is therefore hereby ordered, that the said ordinance or proclamation, of the 16th of November, 1823, shall be, and the same is hereby confirmed. And that the said ordinance shall be, and continue in force within the said island, until a proclamation shall be issued in manner aforesaid, for the total abolition of Sunday markets therein.

Any person compelling a Slave to labour between Saturday evening and Monday morning, for benefit of Owner, &c. to forfeit 50 dollars; attendance on families and care of Stock reserved.

10. And it is hereby further ordered, that if any person or persons within the said island shall work or employ any Slave, at any time between the time of sunset on any Saturday, and sunrise on any Monday, or shall, during that period, procure, induce, or compel any Slave to perform or engage in any labour for the profit or advantage of his or her owner, manager, or employer, the person or persons so offending shall incur and become liable to a fine not exceeding fifty, nor less than five dollars; Provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to any work or labour which any Slave may perform on Sunday in the necessary attendance upon the person, or in the family of his or her owner or employer, or in the necessary and unavoidable preservation of the cattle or live stock upon any plantation.

Illegal to carry any whip, cat, &c. in the field,

or to use such for impelling Slaves to labour.

or carry such as an emblem of power.

11. And it is further ordered and declared, That it is, and shall henceforth be, illegal for any person or persons within the said island of Trinidad, to carry any whip, cat, or other instrument of the like nature, while superintending the labour of any Slaves or Slave in or upon the fields or cane pieces upon any plantation within the said island, or to use any such whip, cat, or other instrument for the purpose of impelling or coercing any Slaves or Slave to perform any labour of any kind or nature whatever, or to carry or exhibit upon any plantation, or elsewhere, any such whip, cat, or other instrument of the like nature, as a mark or emblem of the authority of the person or persons so carrying or exhibiting the same over any Slaves or Slave; and in case any person or persons shall carry any whip, cat, or other instrument of the like nature while superintending the labour of any Slave or Slaves in or upon any plantation or cane-piece within the said island, or shall use any such whip, cat, or other instrument as aforesaid, for the purpose of impelling or coercing any Slave or Slaves to perform any labour of any kind or nature whatsoever, or shall carry or exhibit upon any plantation, or elsewhere, any such whip, cat, or other instrument as aforesaid, as a mark or emblem of their, his, or her authority over any Slave or Slaves, the person or persons so offending, and each and every person who shall or may direct, authorize, instigate, procure, or be aiding, assisting, or abetting, in any such illegal driving, or use, or exhibition of any such whip, cat, or other instrument as aforesaid, shall be, and be deemed adjudged and taken to be, guilty of a misdemeanor, and being thereof convicted, shall suffer such punishment as is hereinafter provided.

Offenders guilty of a Misdemeanor.

Illegal to inflict more than twenty-five stripes on any male Slave, in any one day, or to punish any Slave, unless his person be free from marks of former punishment; or without a free person be present, besides person ordering the punishment; or inflicting punishment on male Slaves till twenty-four hours after commission of offence.

12. And it is further ordered and declared, That it is, and shall henceforth be, illegal for any persons or person to inflict in any one day upon any male Slave for any crime or offence, or upon any ground, or for any reason whatsoever, any number of stripes or lashes exceeding twenty-five in the whole, or to inflict upon any such male Slave any punishment or correction by the whipping, scourging, or beating of his person, unless the person of such Slave shall, at the time of such punishment or correction, be free from any laceration occasioned by any former whipping, scourging, or beating, or to inflict upon any such male Slave any punishment or correction by the whipping, scourging, or beating of his person until twenty-four hours at the least shall have elapsed from the time of the commission of the offence for, or in respect of which any such punishment or correction may be so inflicted; or to inflict upon any such male Slave any such punishment or correction as aforesaid, unless one person of free condition shall be present at, and witness the infliction of, such punishment, other than and besides the person by, or by the authority of whom the same may be so inflicted; and in case any person or persons shall inflict, in any one day upon any male Slave, any number of stripes or lashes exceeding twenty-five in the whole, or shall whip, scourge, or beat any such male Slave at any time when there may be upon his person any laceration occasioned by any former whipping, scourging, or beating, or shall inflict upon any such male Slave any such punishment or correction as aforesaid, within twenty-four hours next after the commission of the offence, for or in respect of which the same may be so inflicted, or without the presence and attendance during the whole of such punishment of some person of free condition other than and besides the person by, or by the authority of whom the same may be so inflicted, the person or persons so offending, and each and every person who shall or may direct, authorize, instigate, procure, or be aiding, assisting, or abetting, in any such illegal punishment of any male Slave, shall be, and be deemed to be, guilty of a misdemeanor, and being thereof convicted, shall suffer such punishment as is hereinafter provided; Provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to any punishments which may be inflicted upon any male Slave, under, or by virtue of, any sentence or judgment of any court of competent jurisdiction within the said island.

Offenders guilty of a Misdemeanour.

Proviso for punishments by virtue of sentence of a Tribunal.

Not lawful to flog any female Slave.

13. And it is hereby further ordered, That henceforth it shall not be lawful to correct or punish by flogging, or whipping, any female Slave within the Island of Trinidad, for any offence committed, or alleged to be committed, by any such Slave; and if any person or persons within the said island shall flog, whip, or correct any female Slave, with any whip, cat, stick, or other such like instrument, the person or persons so offending, and each and every person who shall and may direct, authorize, instigate, procure, or be aiding, assisting, or abetting in any such correction or punishment as aforesaid, of any such female Slave, shall be, and be deemed, adjudged, and taken to be guilty of a misdemeanor, and being thereof convicted, shall suffer such punishment as is hereinafter provided. And whereas it is necessary that effectual means should be adopted for punishing such offences, as may hereafter be committed by female Slaves, within the said island; it is therefore hereby ordered, that any female Slave who shall or may commit any offence within the said island, which by the laws in force there, was heretofore punishable by flogging, shall for such her offence, be subject and liable to imprisonment, or to be con-

Offenders guilty of a Misdemeanour.

Females committing offences to be imprisoned, or confined in the

fined in the stocks, or to such other punishment or correction as may be necessary for the effectual suppression of such offences, and as may be specially sanctioned in, and by any proclamation to be hereafter issued by the authority, and in the name of His Majesty, in the said island. And the Governor or Acting Governor of the said island, shall, and is hereby authorized to make and ordain such rules and regulations as may be necessary for preventing any excess in such punishments, or any abuse in the mode of inflicting the same. Provided that such rules and regulations be not in any wise repugnant to this present order; and provided also that the same be forthwith transmitted by such Governor or Acting Governor as aforesaid, for His Majesty's approbation; and that all such rules or regulations shall cease to be binding or in force within the said island, unless His Majesty's allowance thereof shall be signified to such Governor or Acting Governor, within two years next, after the date of such rules and regulations.

stocks, or suffer such other correction as may be sanctioned by Proclamation.

Such Proclamation to cease in effect if not confirmed in two years.

14. And it is hereby further ordered, That there shall be kept upon every plantation and estate throughout the said island, a book to be called *The Plantation Record Book*; and that it shall be the duty of the owner, proprietor, manager, or other person, having the direction of, and the chief authority in, the said plantation, to enter and record in the said book, at or immediately after the time of the infliction of any punishment whatsoever, on any female Slave, or any male Slave, who may be punished with any number of stripes exceeding three, a statement of the nature and particulars of the offence for, or in respect of which such punishment may be inflicted; and at the time at which, and the place where such offence was committed; and at the time at which, and the place where such punishment was inflicted; and of the nature, extent, and particulars of the punishment, and in the cases of male Slaves, of the number of stripes actually inflicted upon the offender, together with the names of the persons by whom, and by the authority of whom, the punishment was inflicted; and of the persons or person of free condition present, and attending at the infliction of every such punishment.

Record Book to be kept on every Estate.

Person having chief authority to record any punishment on Females, or Males who may receive more than three stripes, the particulars of every punishment, and names of free persons at flogging of Males.

15. And it is hereby further ordered, That if any person being the owner, proprietor, or manager of any plantation or estate, within the said island, or having the management thereof, or the chief authority therein, shall neglect or omit to make in the said Plantation Record Book, any entry which according to the provision of this present order ought to be made therein, or shall not make such entry within two days next after the infliction of each and every punishment, to which the same may refer, the person so offending shall incur and become subject and liable to a penalty not exceeding one hundred pounds, nor less than five pounds sterling, British money; to be recovered and applied in manner hereinafter mentioned. And if any person or persons shall wilfully or fraudulently make, or cause or procure to be made, any false entry, or fraudulent erasure in any such Plantation Record Book, or shall wilfully or fraudulently burn, destroy, cancel or obliterate the name or any parts or part thereof, the person or persons so offending, shall be, and be deemed and taken to be, guilty of a misdemeanor, and being thereof convicted, shall suffer such punishment as is hereinafter provided.

Persons omitting such entry, or not making it within 2 days after the punishment, to forfeit.

False entries or wilful erasures, or destruction, to be a misdemeanor.

16. And it is hereby further ordered, That every owner, proprietor, or manager, or other person having the chief authority within each and every plantation or estate within the said island, shall, on the first Monday which shall happen next after the fifth day of

Every chief Proprietor on days specified, to go to Commandant and

produce an exact transcript of every Quarterly Record,

April, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in each year, repair to the Commandant for the time being, of the quarter in which such plantation or estate may be situated; and then and there produce before him a precise and exact transcript of every entry; which during the quarter of a year next preceding, may have been made in the Plantation Record Book, of his or her plantation or estate; and shall also take and subscribe an oath, to be annexed to the said transcript, in the following words; (that is to say)

and to take this Oath.

"I, *A. B.*, the owner, or manager, (as the case may be), of the "plantation called in the quarter of "in the island of Trinidad, do make oath and say, "that the paper writing hereunto annexed, contains a true and "exact copy of every entry, which since the "day of last, hath been made in the Plantation "Record Book of the before-mentioned plantation. And I do "further swear, that the said Plantation Record Book hath been "punctually and accurately kept since the said "day of in the manner by law required, and "that no fraudulent erasure or false entry hath been made therein "by me, or by any person by my procurement, or with my know-"ledge or consent. So help me GOD."

And if no punishment has been inflicted;

And in case any such owner or manager, as aforesaid, shall not, since the time of making his last preceding return to the Commandant of the quarter, have inflicted, or cause to be inflicted, any punishment upon any female Slave, on his plantation or estate, or any punishment on any male Slaves, exceeding three lashes, then, and in every such case, in lieu of the oath aforesaid, such owner or manager shall, at the several times aforesaid, take and subscribe before the Commandant of the quarter in which such plantation may be situate, on oath, in the following words; (that is to say)

then to take this Oath.

"I, *A. B.*, do swear, that since the day of "now last past, no punishment hath been "inflicted by me, or by my order, or with my knowledge, upon "any female Slave belonging, or attached to, the plantation called "situate in the quarter of "whereof I am manager. And that no punishment hath since "the said day of been inflicted "upon any male Slave, belonging or attached to the said planta-"tion, exceeding three lashes. And I further swear, that no "entry of any such punishments hath since the said "day of been made in the Plantation "Record Book of the said plantation. So help me GOD."

14 days before each Quarterly return, Commandant to send Forms of Affidavits to each Estate, and state the time he will receive them — for 3 days and no more.

17. Provided always, and it is further ordered, That the Commandant of each, and every quarter, within the said island, shall, fourteen days at the least, before the time of making the returns, transmit to the owner, or manager of every plantation situate within his quarter, a printed blank form of the before-mentioned affidavits, together with a notice of the time and place, at which he will attend for the purpose of receiving the returns, and administering the oaths aforesaid, and the said Commandant shall, and is hereby required to attend, from day to day, for three successive days, and no more, for

the purposes aforesaid; and in case it shall be made to appear to such Commandant, by the certificate of any medical practitioner, that any person or persons liable to make such return, is or are, by reason of sickness, incapable of attending for that purpose, at the time and place so to be appointed as aforesaid, then, and in every such case, the said Commandant shall, and he is hereby required to attend the person or persons so incapacitated, at his, her, or their place or places of abode for the purpose of receiving the said returns, and taking such affidavits as aforesaid.

Commandants to attend sick persons.

18. And it is hereby ordered, That if any person or persons shall refuse or neglect to make any return, or to take and subscribe the oaths required by this present order, the persons or person so offending, shall incur, and become liable to the payment of a fine, not exceeding one hundred pounds, nor less than ten pounds sterling, British money; to be recovered and applied in manner aftermentioned.

Neglect or refusal to make the Returns to be fined.

19. And it is hereby further ordered, That the Commandant of each, and every quarter, in the said island, shall, and he is hereby required to, transmit to the protector and guardian of the said island, at his office in the town of Port of Spain, the whole of the returns so to be made to him as aforesaid, together with the original affidavits thereunto annexed, within fourteen days next after such quarterly returns shall be complete. And in case any such Commandant shall himself be the owner or manager of any plantation, he shall, together with the said returns, deliver to the said protector and guardian of Slaves, a transcript of the entries in his own Plantation Book, for the last preceding quarter of a year, together with an affidavit to be by him sworn before the Chief Judge, or some one of the Alcaldes in Ordinary, of the said island, in the manner and form hereinbefore described, under such and the like penalty, as hereinbefore mentioned in the case of other persons refusing or neglecting to make their returns, or to take the before-mentioned oaths.

Commandant to send to Protector the above returns in 14 days after each quarterlyperiod with the Oath

Commandant to swear his own return before Chief Judge or Alcaldes, under penalty.

20. And it is hereby further ordered, That the said protector of Slaves shall record and enrol in books to be by him kept for that purpose, the whole of the returns so to be made to him, and shall keep and preserve in his office the originals of the said returns and affidavits; and for the better and more convenient keeping of the said records, it is further ordered, that the said protector and guardian of Slaves shall keep a distinct book for each quarter of the said island, and shall therein transcribe each of the said returns in alphabetical order, according to the name by which each plantation is described in every such return, and shall also make and keep full and exact indexes of such books.

Protector to enter said Returns in a Book, and preserve the originals.

To keep a Book for each Quarter, with Index.

21. And it is hereby ordered, That upon the prosecution of any person being the owner, proprietor, or manager of any plantation, for inflicting, or causing or procuring to be inflicted on any Slave or Slaves any punishment hereby declared illegal, if the Slave so alleged to be illegally punished shall be produced in open court, and if the marks or traces of recent flogging or laceration shall appear on the person of such Slave, and if such Slave shall in open court declare such traces to be the consequences of any such unlawful punishment or correction, and being duly examined by the said court, shall make a particular, consistent, and probable statement of all the circumstances attendant on such unlawful punishment, then and in every such case, although such Slave should not be a

On Prosecution of any Owner or Manager, a Slave illegally flogged shewing marks, and worthy of credit, Owner to prove such was inflicted without his order, or that it was legal, and before one free witness.

competent witness within the provisions of this present order, the owner, proprietor, manager, or other person having the charge of such Slave, shall be bound to prove, either that the punishment, of which the marks and traces may be so apparent, was not inflicted by him, or by his procurement, or with his knowledge or consent, or that such punishment was a lawful punishment, within the meaning of this order, and was inflicted in the presence of one such witness of free condition as is required by this present order; and in default of such proof, such owner, proprietor, manager, or other person as aforesaid, shall be convicted and adjudged to be guilty of the offence imputed to him: And it is further ordered, that every such prosecution as aforesaid, shall be conducted by the protector and guardian of Slaves, and that it shall not be lawful for him to discontinue any such prosecution except by virtue of an order in writing, to be for that purpose issued under his hand and seal by the Governor or Acting Governor for the time being of the said island.

In default of proof, conviction to follow; Prosecutions to be conducted by Protector; not to be discontinued without written leave of Governor.

22. And it is further ordered, That any persons being in a state of slavery, who may be desirous to intermarry, shall at their election, apply either to the protector and guardian of Slaves, or to the Commandant of the quarter in which the woman may reside, for a marriage license, and as an authority to him to grant the same, shall produce the consent in writing, of their owner or owners, manager or managers, to the celebration thereof; but in case the owner or manager, or both, or either of the said Slaves, shall refuse to consent to any such marriage, or to give such written permission for the celebration thereof as aforesaid, then and in every such case the said protector and guardian of Slaves. or Commandant, as the case may be, shall thereupon issue a summons, under his hand and seal, requiring the owner or manager of such Slaves, or the persons or person under whose direction such Slaves may be, to appear before him, by themselves or their agents, at some convenient time and place, to be for that purpose appointed, such time being not more than fourteen days distant from the time when such application as aforesaid, shall have been received by such protector and guardian of Slaves, or Commandant as aforesaid. And if such owner or manager, or other person as aforesaid, being duly cited, shall fail to appear before the said protector of Slaves, or Commandant, or appearing, shall fail to lay before him, good and sufficient proof that such proposed marriage would be injurious to the well-being of the said Slaves, then and in every such case, the said protector and guardian of Slaves, or Commandant, shall, without fee or reward, issue a license under his hand and seal, thereby authorising any clergyman of the Established Church of England and Ireland, or any minister of the Kirk of Scotland, or any priest or curate professing the Roman Catholic religion, or any public teacher of religion within the said island, carrying on there no other profession, business, or occupation of profit, except that of a schoolmaster, to solemnize the marriage of the said Slaves. And it shall and may be lawful for any such clergyman, minister, priest, curate, or religious teacher, upon receiving any such license, to solemnize any such marriage as aforesaid, and the same, when so solemnized, shall to all intents and purposes, be binding, valid, and effectual in the law; and any person by whom any such marriage may be so solemnized, by virtue of any such license, shall, within fourteen days next after the solemnization thereof, under a penalty of not more than twenty pounds, and not less than five pounds sterling, transmit to the said protector of Slaves,

Slaves desirous of marrying to apply to Protector or Commandant where woman lives, for License, on shewing owner's written consent; if refused, Protector to summon owner to appear in 14 days; owner not appearing, or not shewing any cause for refusal, Protector or Commandant to issue License to any Clergyman, &c. to solemnize such Marriage.

Clergy on such license, to solemnize, and such Marriages to be valid in law.

Certificates of Marriages to be sent to Protector for Registry, within 14 days under Penalty of 20*l.*

a certificate of the solemnization of such marriage; and the said protector and guardian of Slaves shall register in a book, to be by him kept for that purpose, every marriage which may be so solemnized, with the date thereof, and the names, descriptions, and places of abode of the parties contracting, and of the person solemnizing every such marriage; Provided nevertheless, that nothing herein contained, shall extend, or be construed to extend, to render any marriage between persons in a state of slavery valid or effectual, which would be illegal or void, if such persons were of free condition.

Marriage illegal among Free to be equally so among Slaves.

23. And it is further ordered, That it shall not be lawful in the execution of any judgment, sentence, decree, or order of any tribunal of any court of justice within the said island, to seize or sell in satisfaction thereof, any Slave having a husband or wife, or a child under the age of sixteen years, or a reputed husband, or wife, or child under the age aforesaid, who may be the property of the same persons or person, unless such husband, and wife, and child, or reputed husband, wife, or child, shall be sold together, and in one and the same lot, and to the same person or persons: And if in the execution of any such judgment, sentence, decree, or order, any Slave or Slaves shall be sold separate or apart from any such husband, or wife, or child, or reputed husband, or wife, or child as aforesaid, then, and in every such case, such sale and execution shall be, and the same is hereby declared to be, absolutely null in the law, to all intents and purposes whatsoever.

Husbands, Wives, or Slaves reputed as such, and Children under 16, belonging to one person, not to be separated in Judicial Sales.

24. And whereas, by the usage of the said Island of Trinidad, persons in a state of slavery have hitherto been reputed competent in the law, and have in fact been permitted to acquire, hold, and enjoy property, free from the control or influence of their owners; and it is expedient that the said laudable custom should be recognised and established by law, and that provision should be made for enabling such Slaves to invest such their property on good security; it is therefore hereby ordered and declared, that no person in the island of Trinidad, being in a state of slavery, shall be, or be deemed, or taken to be, by reason or on account of such his condition, incompetent to purchase, acquire, possess, hold or enjoy, alienate or dispose of property; but every such Slave shall, and is hereby declared to be competent to purchase, acquire, possess, hold, enjoy, alienate, and dispose of lands situate in the said island, or money, cattle, implements or utensils of husbandry or household furniture, or other effects of such or the like nature, of what value or amount soever, and to bring, maintain, prosecute, and defend any suit or action in any court of justice, for or in respect of any such property, as fully and amply to all intents and purposes, as if he or she were of free condition.

Usage permitting Slaves to hold property free from control of their Owners confirmed.

Slaves competent to acquire Land, Money, or Cattle, and to maintain an Action to defend it.

25. And it is hereby further ordered, That Savings' Banks shall be established within the said island, for the better preserving the property of any such Slaves; and that interest, at and after the rate of five pounds *per centum per annum* shall be allowed upon the amount of every sum of money which may be deposited in any such Savings' Banks, which interest shall be a charge upon the general revenues of the said island. And any Slave making any deposit of money in any such Savings' Banks, shall be at liberty to make a declaration of the manner in which, and the names of the person or persons to whom in the event of his or her death the amount of his contributions to the said Savings' Banks shall be paid, applied, and disposed of; and

Savings' Banks to be established allowing Interest of 5 per cent. to be charged on the Island Revenue. Slaves depositing to be at liberty to declare in case of death the appro-

priation of his deposit. Such declaration to be as a Will in absence of any other. Marriage to revoke such declaration. On Slaves dying intestate, &c. Property to go according to Statutes of Distributions.

such declaration shall be recorded in a book to be kept for that purpose at the Savings' Banks, where such deposit may be made; and upon the death of the Slave making such declaration, the same shall be deemed, and taken to be, the last will and testament of such Slave, in the absence of any other last will; and in case any such Slave shall marry after having made any such declaration, such marriage shall be, and be deemed, and taken to be, a revocation in the law of such declaration: And it is further ordered, that in case any Slaves or Slave in the said island shall die intestate, and without having made any such declaration as aforesaid, which may remain unrevoked at the time of his death, then, and in every such case, the property of such Slave shall go, and be disposed of, to and in favour of such persons or person, as by virtue of the several Acts of Parliament for the distribution of intestates' estates, would according to the law of England, be entitled to any such property.

Savings' Banks to be under control of Protector. Governor to appoint proper Officers, and make Rules and Regulations; to be sent to Secretary of State.

26. And it is hereby further ordered, That the Savings' Banks throughout the said island shall be under and subject to the control and inspection of the protector of Slaves; and that the Governor or Acting Governor for the time being for the said island, shall, and is hereby authorized to appoint such proper and necessary officers, and to make such rules and regulations as may be best adapted for managing the business of the said banks, and for ensuring order and punctuality therein, and for preventing any misapplication of the monies therein to be deposited; provided that such rules and regulations be not repugnant to this present order, and that the same be forthwith transmitted for His Majesty's approbation, through one of His Majesty's Principal Secretaries of State.

No Deposit to be received at one time, or in a week, exceeding 20 dollars from any Slave without consent of Owner. On refusal by Owner of consent to such deposit above 20 dollars, Protector to issue summons;

27. And it is hereby further ordered, That no deposit of money shall at any one time, or within any one week, be received at any of the said Savings' Banks, from any Slave, exceeding the sum of twenty dollars in the whole, unless such Slave, at the time of tendering any such deposit, shall produce the consent in writing of his owner or manager to such deposit being made; and in case any Slave shall be desirous at any one time, or in any one week, to make any such deposit of money, exceeding the sum of twenty dollars, and the owner or manager of such Slave shall refuse his consent to such deposit being made, then, and in every such case, the protector and guardian of Slaves, upon application to him for that purpose made, shall issue a summons under his hand and seal, requiring the owner or manager of such Slave, or the person under whose direction such Slave may be, to appear before him, by themselves or their agents, at some convenient time and place to be for that purpose appointed; and if such owner or manager, or other person as aforesaid, being duly cited, shall fail to appear before the said protector of Slaves, or appearing, shall fail to lay before him good and sufficient cause why such deposit ought not to be made, then, and in every such case, the said protector and guardian of Slaves shall issue an order under his hand and seal, requiring the manager of the Savings' Bank to receive the amount of such deposit, and the same shall be received by him accordingly.

and cause not being made out, to require the amount to be received.

No duty, fee, tax, or impost in future on Manumissions, save 20s. sterling to the Registrar of

28. And it is hereby further ordered, That no duty, tax, or impost of any nature or kind whatsoever, and that no fee of office shall be hereafter paid or payable within the said island, upon, for, or on account, or in respect of the manumission of any Slave, or the enrolment or registration of any deed of manumission, saving and excepting a fee not exceeding twenty shillings sterling British money, which

shall by the said protector and guardian of Slaves be paid to the registrar of deeds of the said island, for enrolling and registering every such deed of manumission, and which fee shall be repaid to such protector or guardian of Slaves out of the public revenue of the said colony. And if any person within the said island shall hereafter take, demand, or receive any such tax, duty, impost, or fee of office, save as aforesaid, the person so offending shall incur and become liable to the payment of a fine not exceeding fifty pounds, and not less than ten pounds sterling British money.

Deeds to be paid by Protector out of Revenue of the Colony.

29. And it is hereby further ordered, That in case any Slave within the said island shall be desirous to purchase the freedom of himself, or of his or her wife, or husband, or child, or brother or sister, or reputed wife, or husband, or child, or brother, or sister, it shall and may be lawful to and for any such Slave so to purchase the freedom of himself, or of any such other person as aforesaid; and if the owner or proprietor of any such Slave shall be unwilling to effect his or her manumission, or shall, by reason of any mortgage, settlement, or lease, or other charge upon or interest in such Slave being vested in any other person or persons, be unable to execute a valid and effectual manumission of any such Slave; or if the owner or proprietor, or any other person having an interest in any such Slave, shall be a minor, or a married woman, or idiot, or lunatic; or if the real and true owner of any such Slave shall be absent from the said island, or shall not be known; or if any suit or action shall be depending in any court of justice in the said island, wherein the title to the said Slave, or the right to his services shall or may be in controversy; or if the owner of any such Slave shall demand as the price of his or her freedom a greater sum of money than may be the fair and just value thereof; then, and in each and every of the cases aforesaid, the Chief Judge of the said island, on application to him for that purpose made by the protector and guardian of Slaves, shall issue a summons under his hand and seal, requiring the owner or manager of such Slave, or the persons or person under whose direction such Slave may be, to appear before him, by themselves or their agents, at some convenient time and place to be for that purpose appointed; and notice shall also be published by the said protector and guardian of Slaves, in the public Gazette of the said island, on three several days, of the time and place appointed for the purpose aforesaid; and in such notice all persons having or claiming to have any title or interest in or to the Slave proposed to be manumitted, either in their own right, or as the guardians, attornies, trustees, or executors of any other person, shall be required to attend and prefer such claims.

Any Slave desirous to purchase his freedom, or of his or her wife, husband, child, brother or sister, to be authorised. Owners, in cases of objection.

to appear before the Chief Judge on application of the Protector; notice to be given in the Gazette of the time fixed for the hearing.

30. And it is hereby further ordered, That at the time appointed for any such meeting as aforesaid, the Chief Judge of the said island, in the presence of the protector and guardian of Slaves, and also in the presence of the owner or manager of the Slaves or Slave proposed to be manumitted, or (upon proof being made to him, upon oath, of the due service and publication of such notice as aforesaid, then, if necessary), in the absence of such owner or manager, shall proceed to hear in a summary way, what may be alleged by the said protector and guardian of Slaves, and by the owner or manager, or other persons claiming any interest in the Slave proposed to be manumitted; and in case the parties, or any of them, shall refuse to effect any such manumission, or if it shall appear to the said Chief Judge, that a valid and effectual manumission of any such Slave

At such time Chief Judge in presence of Protector and of Owner, to hear in a summary way all objections; and

cannot legally be effected by private contract; or if it shall be made to appear to the said Chief Judge, that the owner or proprietor of any such Slave, or that any person having any charge upon or interest in him or her, is a minor, or a married woman, or idiot, or lunatic, or that the real and true owner of any such Slave, or that any person having any charge upon, or interest in him or her, is absent from the said island, or is unknown, or cannot be found, or that any suit or action is depending in any court of justice in the said island, wherein the title to the said Slave, or the right to his services is in controversy; or if it shall appear to the said Chief Judge, that any difference of opinion exists between the protector and guardian of Slaves of the said island, and the owner or proprietor of any such Slave, respecting his or her price or value; then, and in every such case, the said Chief Judge shall require the protector of Slaves, and the owner, manager, or person having the direction of any such Slave, each to nominate an appraiser of his or her value; and the said Chief Judge shall himself nominate an umpire between such appraisers. And the said appraisers being first duly sworn before the said Judge, to make a fair and impartial appraisement, shall, within seven days next after such their appointment, make a joint valuation of the Slave proposed to be manumitted; and shall certify such their valuation to the Chief Judge, under their hands and seals. And in case such joint certificate shall not be delivered to the said Chief Judge within the said term of seven days, then the said umpire, being duly sworn in manner aforesaid, shall, within the next seven days, certify his valuation, under his hand and seal, to the said Chief Judge, and the valuation to be made in manner aforesaid, either by the said joint appraisers, or in their default, by the said umpire, shall be binding and conclusive, and shall be entered and enrolled in the office of registry in the said island.

Chief Judge to require parties to nominate an appraiser, and himself an umpire. Appraisers to be sworn, and in 7 days appraise and certify their valuation; and in default, umpire to value, and valuation of umpire to be conclusive.

31. And it is hereby further ordered, That upon payment to the treasurer of the said island of the appraised value of any such Slave as aforesaid, after deducting therefrom the expense of the appraisement to be allowed by the said Chief Judge, the said treasurer shall grant to the protector of Slaves a receipt for the money so to be received by him; and such receipt shall be duly enrolled in the office of registry in the said island, together with a declaration under the hand and seal of the said Chief Judge, that the proceedings required by law for the manumission of the Slave, by or on behalf of whom such money was paid, had been duly had before him, and thereupon such Slave shall be, and be deemed, taken, and reputed to be free to all intents and purposes whatsoever.

On payment to treasurer of appraised value, expenses of appraisement, to be allowed by Judge, being deducted, treasurer to give receipts, and on a declaration of the Chief Judge of proceedings had, slave to be free.

32. And it is further ordered, That the money to arise from the manumission of any Slave by virtue of the proceedings before-mentioned, shall and may be laid out and invested under the authority of the Chief Judge, on the application of any persons or persons interested therein in the purchase of any other Slave or Slaves; or if no such application shall be made, then such money shall remain in the hands of the public treasurer of the said island at interest, at and after the rate of five pounds per centum per annum, such interest to be borne by, and defrayed out of the revenues of the said colony, and the Slave or Slaves so to be purchased with the said money as aforesaid; or, in case of no such purchase being made, then the said money in the hands of the said public treasurer, and the interest from time to time accruing due thereupon, shall be the property of the persons who were the proprietors of such manumitted Slave or

Money arising from Manumission to be laid out by Chief Judge.

If Money remains with treasurer, to bear interest at five pounds percent. payable from Revenues.

Slaves, and shall be held upon, under, and subject to all such and the same uses, trusts, limitations, conditions, mortgages, claims, and demands of what nature or kind soever, as such Slave or Slaves was or were held upon, under, or subject unto, at such the time of his, her, or their manumission; and the said treasurer shall hold the said money, and the interest accruing thereupon, subject to such order as the Chief Judge of the said colony may, upon a summary application of any person interested therein, see fit to make; and such principal money and interest shall by the said treasurer be paid, applied, and disposed of in pursuance of and obedience to any such order.

Before Manumission of a Slave by private contract, notice thereof to be given by owner toprotector, who will ascertain the title of owner, and prepare a deed to be executed before him, or some proper witness, and be enregistered within one month; in default, protector to forfeit.

33. And it is hereby further ordered, That before the manumission of any Slave by virtue of any private contract for that purpose between such Slave and his owner, notice of such intended manumission shall by the owner of such Slave, be given in writing to the protector or guardian of Slaves, who, on behalf of the said Slave, shall be bound to ascertain that such owner has good right and title in the law, and is competent to effect such manumission; and the said protector and guardian of Slaves shall also, without fee or reward, prepare the proper deed of manumission, and the same shall in all cases be executed in the presence of the said protector or guardian of Slaves, or of some proper witness, to be by him appointed for that purpose, and being so executed, shall by such protector and guardian of Slaves be enrolled in the office of registry in the said island within one calendar month next after the date and execution thereof: And in case any such deed shall not be left for enrolment at the said office of registry within the said period of one calendar month, the said protector of Slaves shall incur and be liable to the payment of a fine not exceeding fifty pounds, nor less than ten pounds sterling English money.

In Manumissions voluntary without payment, Slaves to appear before protector, and if Slave be under six or above fifty, or sickly, owner to give bond for maintenance.

34. And it is hereby ordered, That in case any such deed of manumission as aforesaid shall be executed voluntarily, and without any valuable consideration passing to the owner or other person effecting such manumission, the Slave or Slaves so to be manumitted shall, before the actual execution of any such deed, appear before the said protector and guardian of Slaves, or before the Commandant of the quarter in which such Slave may happen to be resident; and if it shall appear to the said protector and guardian of Slaves, or to such Commandant, as the case may be, that the Slave about to be so gratuitously manumitted, is under the age of six years, or above the age of fifty years, or is labouring under any habitual disease or infirmity of mind or body, the owner or other person about to effect such manumission, shall, at the time of the execution of the deed of manumission, execute and deliver under his hand and seal a bond to His Majesty, in the penal sum of two hundred pounds, with a condition thereunder written, for the defeasance thereof, if the said slave shall be properly fed, clothed, and maintained, until the age of fourteen years, in the case of infants, or during the term of his or her natural life, in the case of adults of the age of fifty years, or labouring under any such sickness, disease, or infirmity as aforesaid; and no such manumission shall be valid and effectual in the law, or shall be received for enrolment at the office of registry, until such bond as aforesaid be duly executed and registered, and deposited in the said office.

Clergy to deliver to Com-

35. And it is hereby further ordered, That every clergyman of the established Church of England, and every minister of the Kirk

mandants certificates of names and abode of Slaves they consider sufficiently instructed to understand the nature of an oath.

Commandants to transmit said Certificates to the protector, who is to register them in a book.

Limitation to persons qualified to give certificates.

of Scotland, and every priest or minister professing the Roman Catholic religion in the said island, and every other person being a public teacher of religion within the said island, shall, and is hereby authorized to transmit or deliver under his hand to the Commandant of the quarter in which he may be resident, certificates setting forth the names or name and places or place of abode of any Slaves or Slave, who, in the judgment and belief of the party so certifying, may be sufficiently instructed in the principles of religion to understand the nature and obligation of an oath. And the Commandants of the several quarters in the said island shall, and are hereby required to transmit such certificates as aforesaid to the protector and guardian of Slaves, who shall, and is hereby required to register the same in a book to be kept by him for that purpose, therein stating the date of every such certificate, and the name and place of abode of the person by whom the same may be granted, and of every Slave mentioned and included therein; provided nevertheless, that no priest, minister, or public teacher of religion, not being a clergyman of the Church of England, or a minister of the Kirk of Scotland, shall be competent to grant any such certificate as aforesaid, unless His Majesty's Principal Secretary of State, having the department of the colonies, or the Governor, or Acting Governor for the time being of the said island of Trinidad, shall have granted to such priest, minister, or public teacher, a licence in writing to grant such certificates; and, unless such license shall be in force, and have been first registered at the office of the said protector of Slaves.

No person rejected as a witness, although a Slave, producing such certificate from protector, who is to grant a certificate.

36. And it is further ordered, That no person shall henceforth be rejected as a witness, or considered as incompetent to give evidence in any court of civil or criminal justice in the said island, by reason of his or her being in a state of slavery, if the person or persons producing or tendering him or her as a witness, shall produce and exhibit to the court a certificate under the hand of the said protector and guardian of Slaves, that such proposed witness is registered in the before-mentioned book; and the said protector of Slaves shall, and he is hereby required to grant without fee or reward, to any person making application for the same, a certificate of the fact, whether any such proposed witness is or is not registered in the said book: Provided nevertheless, that no person being in a state of slavery shall be admitted to give evidence in any civil suit or action in which his or her owner is directly concerned, or in any case where any white person may be charged with or prosecuted for any offence punishable with death; provided always, that nothing herein contained shall extend to take away or diminish any power and authority which any court of criminal jurisdiction in the said colony now hath to admit in any case the evidence of persons being in a state of slavery; provided also, that nothing herein contained shall extend, or be construed to extend, to render any Slave a competent witness in any case in which such Slave would be incompetent to give evidence if he or she were of free condition.

Proviso, that no Slave give evidence where his owner isdirectly concerned, or where any white person is charged with a capital offence, or where incompetent if of free condition.

Salary of protector to be in lieu of all fees, advantage, or emolument.

37. And it is hereby further ordered, That the salary of the protector and guardian of Slaves shall by him be taken and received in lieu and in full satisfaction of all fees, perquisites of office, advantages, and emoluments whatsoever; and that if the said protector and guardian of Slaves shall take or receive directly or indirectly any fee, perquisite of office, advantage, or emolument, other than besides his said salary for or in respect of any act, matter, or thing, done or performed by him in the execution of such his office, he

shall incur and become liable to the payment of a fine equal to twice the amount of what he may so receive, and shall morever become disqualified from holding such his office.

Protector twice a-year to make report of discharge of his duties.

38. And it is hereby further ordered, That the said protector and guardian of Slaves shall on the first Monday next after the twenty-fifth Day of December, and on the first Monday next after the twenty-fourth day of June in each year, deliver to the Governor or Acting Governor for the time being of the said island, a report in writing, exhibiting an account of the manner in which the duties of such his office have been performed during the half year next preceding the date of such his report, and especially stating the number of the actions, suits, and prosecutions in which he may have acted as the protector of any Slave or Slaves, with the dates and effect of all the proceedings therein, and the particulars of all the returns which by virtue of this order may have been made to him by the Commandants of the several quarters within the said island; and the names of the persons, if any, against whom he may have instituted any criminal prosecutions, under and by virtue of this order, together with a statement of the names of all Slaves who may have been certified to him as being competent to give evidence in any court of justice, together with the number of licences which may by him have been granted for the marriage of any Slaves, with the number of marriages appearing to have been solemnized in pursuance thereof, together with the amount of the sums of money deposited in the Savings' Banks in the said island, together with a statement of the names of all the Slaves manumitted under the authority of this present order; and the Governor or Acting Governor for the time being of the said colony, shall thereupon administer to the said protector of Slaves an oath that such report contains a true and accurate statement of the several matters and things therein referred to; and when and so soon as the said protector of Slaves shall have made such his half-yearly report, and shall in manner aforesaid have been sworn to the truth thereof, then, and not before, the said Governor or Acting Governor shall issue to the said protector or guardian of Slaves, a warrant upon the treasurer of the said island for the amount of his salary for the half year next preceding the date of such report; and the said Governor shall, and he is hereby required, by the first convenient opportunity, to transmit such report as aforesaid to His Majesty's Principal Secretary of State having the department of the colonies.

Number of suits and actions, with date and effect.

Particulars of returns made to him of persons criminally prosecuted.

Slaves competent to give evidence.

Licences given for marriages.

Amount paid into Savings' Banks.

Slaves manumitted.

Sworn to before the Governor.

Governor to issue warrant for salary, and report to Sec. of State.

Erasures or falsification of books to be a misdemeanor.

39. And it is further ordered, That if the protector and guardian of Slaves, or any Commandant of any quarter in the said island, or any other person shall wilfully and fraudulently make, or cause, or procure to be made, any erasure or interlineation in any of the books, records, or returns herein before required to be made, or shall wilfully falsify any such books, records, or returns, or shall wilfully make, or cause or procure to be made, any false entry in any such book, record, or return, or shall wilfully and fraudulently burn, cancel, or obliterate the same, or either of them, or any part thereof, the person or persons so offending shall be, and be deemed, adjudged, and taken to be guilty of a misdemeanor, and being thereof convicted, shall suffer punishment as is hereinafter directed.

Quakers to affirm.

40. And it is further ordered, That any of the people called Quakers, who may be resident in the said island, being required to take any of the oaths prescribed by this present order, may, and they are hereby authorized to make their, his, or her solemn affirm-

ation in lieu of such oaths; and that any person taking any oath, or being a Quaker, making his solemn affirmation, under or in pursuance of this order, who shall be convicted of swearing or affirming falsely, shall incur and suffer such punishment as by the law of the said island may be inflicted on any persons guilty of wilful and corrupt perjury.

Persons convicted of misdemeanor to forfeit not more than 500l., nor less than 50l., and be imprisoned not more than six months nor less than one month.

41. And it is hereby further ordered, That any person who may be convicted of any act hereby declared to be a misdemeanor, shall, if of free condition, be and become liable to a fine not exceeding five hundred pounds, and not less than fifty pounds, sterling English money, or to imprisonment for any time not exceeding six months, nor less than one month, or both to fine and imprisonment at the discretion of the Court, by which any such person may be convicted; and in case any person shall be so convicted of any cruelty to any Slave, the said Court shall, and is hereby authorized, at their discretion, to declare the right and interest of the person so convicted in and to any such Slave to be absolutely forfeited to His Majesty; and all such offences as aforesaid shall be heard, tried, and inquired of, by and before the Court for Criminal Prosecutions in the said island; and all such pecuniary fines as aforesaid, and all other pecuniary fines imposed by this order, shall be recovered in the said Court, and shall be paid and payable in equal moieties, one half to His Majesty, and the remaining half to any person or persons who may commence any suit or prosecution for the same.

Trials to be heard before Court of Criminal Prosecutions.

Two convictions to incapacitate owners to own, or managers to superintend, Slaves, and Slaves of Persons so convicted to be forfeited.

42. And it is further ordered, That if any person shall be twice convicted before any tribunal in the said island, of inflicting upon any Slave any cruel or unlawful punishment, the person so convicted shall, in addition to the penalties hereinbefore mentioned, be declared by the Court before which such second conviction may take place, absolutely incapable in the law to be the owner or proprietor, or to act as the manager, overseer, or superintendent of any Slaves or Slave within the said island; and all and every the Slaves or Slave, of which, at the time of such second conviction, any such person may be the owner or proprietor, shall thenceforth become, and be absolutely forfeited to and vested in His Majesty, his heirs, and successors.

Order to be published in one month after receipt by proclamation, to be in force one month from proclamation.

43. And it is further ordered, That the Governor or Acting Governor of the said island, shall, within one month next after this present order shall be received by him, make known the same by proclamation throughout the said island; and that the said order shall be in force in one calendar month next after the date of such proclamation, and not before.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, having the department of the Colonies, is to give the necessary directions herein accordingly.

C. C. GREVILLE.

The foregoing Order in Council was duly proclaimed and published in the town of Port-of-Spain, on the twenty-fourth day of May, one thousand eight hundred and twenty-four, by the Alguacil Mayor.

RALPH WOODFORD,
Governor.

HERBERT MACKWORTH,
Alguacil Mayor.

APPENDIX H.

BY THE KING.

A PROCLAMATION.

WHEREAS by the thirteenth clause of the Royal Order in Council, of the Tenth day of March, now last past, after reciting that it was necessary that effectual measures should be adopted for punishing such offences as might hereafter be committed by female Slaves, within the island of Trinidad, it was ordered that any female Slave who should commit any offence, within the said island, which by the laws in force was punishable by flogging, should for such her offence be subject and liable to imprisonment, or be confined in stocks, or to such other punishment or correction, as might be necessary for the effectual suppression of such offences, and as might be specially sanctioned in and by any Proclamation to be thereafter issued by the authority and in the name of His Majesty, in the said island: and the Governor or Acting Governor was thereby authorised to make and ordain such Rules and Regulations as might be necessary for preventing any excess in such punishments, or any abuse in the mode of inflicting the same, provided that such Rules and Regulations should not be in any wise repugnant to the said Order.

Be it therefore, and it is by this Proclamation, ordered, proclaimed, and declared, That from and after the promulgation of this Order, in the said island, the following punishments for the suppression of such offences, as may hereafter be committed by female Slaves, within the said island, which by the laws in force, were heretofore punishable by flogging, shall be, and the same are hereby declared to be specially sanctioned, that is to say,

SOLITARY CONFINEMENT, with or without work, in any fit or proper place, on any Estate, or in any place in the said island, provided that the same be approved by some duly licensed Medical Practitioner in the said island, and by the Commandant of the quarter by certificate in writing, under their hands; such certificates to be duly entered in the Record Book, on every Plantation, if in the country; and if in town, by some duly licensed Medical Practitioner and the Chief of Police of the said town, to be duly recorded in the Office of the said Chief of Police; and provided that for each offence, the period of detention, in such solitary confinement, shall not at any time exceed three days.

FIELD-STOCKS, for confinement of the hands during the hours of labour in the field, provided that for each offence, the period of confinement, shall not at any one time, exceed thirty minutes.

HOUSE-STOCKS, for the hands and feet; or either of them, with or without seats, during any period of the day, provided that for each offence, the period of confinement shall not exceed six hours.

BED-STOCKS, for confinement of the feet during the night.

HAND-CUFFS.

DISTINGUISHING DRESSES, to be used either with or without the Stocks.

DISTINGUISHING MARKS, to be suspended from the neck, by col-

lars, and secured by padlocks. The collars and marks to be made of tin, and to be of the form now approved by the Government, and as well as the hand-cuffs, to be very light, so as not to injure the skin.

CONFINEMENT, either solitary or otherwise, during one of the hours of noon, with or without task-work, during such confinement.

Provided always, and it is hereby ordered, that in all cases of punishment either solitary or otherwise, where such confinement shall exceed the period of twelve hours, the Slave in confinement shall be supplied with a sufficient quantity of prepared farinaceous food, at the least once in every twelve hours: and with a proper supply of good water.

2. *And it is hereby ordered and declared*, that in all cases where it shall seem proper to any Owner or Manager to impose any or either of the foregoing punishments, upon any male Slave or Slaves, for any offence to be hereafter committed by such male Slave or Slaves, in lieu of the punishment of flogging, it shall be lawful for such Owner or Manager so to do, complying in all respects with the provisions aforesaid.

3. *And it is hereby further ordered and declared*, that if any offence to be hereafter committed by any male or female Slave in the said island, shall be of such a nature and of such an extent, as in the opinion of his Owner or of any Person under whose charge such Slave may be placed, to require greater punishment and correction than such Owner or Person is empowered to inflict, such Owner or Person shall cause the Slave offending together with any witnesses necessary to substantiate the complaint, to be carried, if in the country, before the Commandant of the quarter in which such offence shall be committed, or his Adjoint; or if in the Town of Port of Spain, before one of the Alcaldes in ordinary, or before the Chief of Police, or before one of the Alcaldes of Barrio; which said Commandant, Adjoint, Alcalde in ordinary, Chief of Police, or Alcalde of Barrio, as the case may be, is hereby authorized and empowered to entertain and investigate such complaint, to examine any witness or witnesses, that may be produced before him, either in substantiation of the charge, or in defence against the same; and to sentence the same, imposing such punishment on the accused, as may appear commensurate with the offence complained of; either by an extension of some one or other of the modes of punishment hereinbefore provided, or by imprisonment in the Royal Gaol, with or without hard labour in the Tread-Mill, provided the same does not for any one offence exceed the term of one month, or in case the offender be a male by forty stripes; or by confinement in the public stocks, with or without a distinguishing dress or mark, in any public place approved by the Governor or Acting Governor, for such purpose; in case, however, the offence complained of shall appear to the Commandant, or his Adjoint, or the Alcalde in ordinary, Chief of Police, or Alcalde of Barrio, as the case may be, to exceed the limits of his jurisdiction, he shall report the same, as directed by the 7th Clause of the Royal Order in Council of the 16th of September, 1822, to the Judge of Criminal Inquiry, who shall give notice in writing of such report to the Procurador Syndic.

4. *And it is hereby further ordered and declared*, That the Commandants of the respective quarters, or their Adjoints if in the country, or the Alcaldes in Ordinary, Chief of Police, or Alcaldes of Barrios, if in the Town of Port of Spain, or the Procurador Syndic in all cases either in town or country, shall have full power and

authority to hear and determine all complaints of Slaves against their masters, or against any other person or persons; and in all such cases of complaints, it shall be lawful for the Commandant of the quarter in which the offence shall be committed, or his Adjoint, for the Alcalde in Ordinary, Chief of Police, or Alcalde of Barrio, if in town, or for the Procurador Syndic, to cite before him the person against whom the complaint shall be made; or any person or persons whose testimony may be necessary for the investigation of the truth of such complaint; and after investigation thereof, in case the same shall be established, to sentence the party accused to the payment of such penalty not exceeding ten pounds, as to such Commandant, Adjoint, Alcalde in Ordinary, Chief of Police, Alcalde of Barrio, or Procurador Syndic, may seem proper; and in case such complaint shall be groundless, or appear to have been maliciously invented, the magistrate before whom the complaint shall have been made, shall return the said Slave to his or her Master, together with his sentence in writing, declaratory in either of the aforesaid terms, of the dismissal of the charge, in order that the Owner or Manager, or person entrusted with the care of the said Slave may impose such punishment on the said Slave as may be commensurate with the nature of the charge such Slave may have preferred and may not be inconsistent with the provisions, either of this present Order or of the said Order of the tenth day of March last, or lay his or her complaint before the Commandant, or his Adjoint, if in the Country; or before one of the Alcaldes in Ordinary, or the Chief of Police, or one of the Alcaldes of Barrio in the Town of Port of Spain, under the provisions of the third Clause of this present Order or Proclamation.

5. *And it is hereby further ordered and declared,* That in case any person or persons against whom any complaint may be made by any Slave or Slaves, shall neglect or refuse to appear before the Commandant, or his Adjoint, Alcalde in Ordinary, Chief of Police, Alcalde of Barrio, or Procurador Syndic, as the case may be, for a period of fourteen days after citation in writing duly served, the Magistrate before whom the complaint may have been brought, shall proceed to hear the complaint *ex parte*, and to pronounce sentence therein and duly enforce the same against the accused. And in all cases in which any person shall be duly cited as a witness before any such Magistrate, and shall refuse to pay due obedience to such citation, it shall be lawful for any such Magistrate, Chief of Police, Alcalde of Barrio, or Procurador Syndic, as the case may be, to fine such person in any sum not exceeding Forty Shillings, currency, for each and every default; and to enforce payment thereof by warrant under his hand, which warrant any Alguacil is authorized and hereby required to execute either by levying the amount on the property of the party against whom the warrant may be issued, or by the commitment of such party to the Royal Gaol, there to remain until the same be recoverable and the amount be duly paid.

6. *Provided always,* that in all cases in which the complaint, made to any such Magistrate as aforesaid, be such as may subject the party accused to public prosecution or punishment under the Royal Order in Council of the 16th September 1822, or under the provisions of the Royal Order in Council of the 10th day of March last, the complaint shall be passed, with the evidence in support of it, to the Judge of Criminal Inquiry, by whom notice shall be given to the Procurador Syndic, who in these as well as in all other cases, shall provide for the care and maintenance of the Slaves in such manner

as may appear to him necessary and proper; and shall be entitled to recover from the Owner all reasonable expences for the said services provided that in disputed cases the accounts be submitted for the approval of the Governor.

Witness His Excellency Sir RALPH JAMES WOODFORD, Bart., our Governor and Commander-in-Chief in and over the said Island of Trinidad and its Dependencies, and given under the Great Seal of this said Island, at the Government-House in the Town of Port of Spain, this twenty-third day of June, in the Year 1824, *and in the fifth year of our Reign.*

RALPH JAMES WOODFORD.

By His Excellency's Command,

FREDERICK HAMMET,

Assistant Secretary.

APPENDIX I.

TRINIDAD.

SIR,

HAVING submitted to the consideration of His Majesty's Secretary of State for the Colonies, those parts of the Order in Council of the 10th of March last, that appeared either ambiguous in their construction, or that had become the subject of representation, I have now the honour to acquaint you, that I have received Earl Bathurst's authority to instruct you as follows: —

The seventh clause of the order, in giving new powers to the Commandants, has not, either directly or by implication, taken away the powers with which they were previously invested.

As regards the 10th clause, it is to be understood, that Slaves are to be allowed to work upon their own provision grounds upon that day, but that they are not to hire themselves out to labour on Sunday, either to their master or to any one else, although for their own benefit. It is apprehended, that to permit it would occasion endless evasion; the object of government being to secure Sunday as a day of rest, and of religious improvement.

His Majesty's Government are, however, aware of the necessity that may exist, on some estates, for providing, during certain periods of the year, due care for the preservation of that portion of the crop that may be in process of cure on Sundays; and until directions be given upon this subject, you will permit a reasonable number of Slaves to attend this service.

In like manner, it was not within the intent of the order that proprietors should be punished for requiring the attendance of their servants after sunset on Saturday evening; and I am, therefore, to instruct you not to proceed against any proprietor for employing Slaves in domestic occupation at any period of the week: this is equally to apply to any labour undertaken for the maintenance of the public peace, or for the security or preservation of any public or private property.

The prohibition contained in the 11th clause is intended to prevent the use of the whip as the immediate impulse to labour, and as such, it is to be strictly construed; but it is not to be inferred therefrom that Slaves refusing to work are thereby screened from punishment.

It having been objected to the 13th clause, that female Slaves, being thereby no longer exposed to punishment by the whip, are placed in a better situation than the female free inhabitants, I am to acquaint you, that His Majesty's government do not see therein ground for withdrawing the protection granted to the slaves, but rather for extending the like security to the sex in general, by some further order of His Majesty to such purpose.

His Majesty's government do not anticipate any of those evils which the 12th clause is represented as likely to create; and that, as the Slave is to be duly examined by the Court, and to make a particular, consistent, and probable statement of all circumstances attendant upon the punishment, before even the presumption of guilt will arise, the danger that has been anticipated from this clause does not appear to His Majesty's government to rest on sufficient foundation. It also appears that this principle was established in the island of Dominica by the 14th clause of the Slave act, dated the 22d of April 1818.

In the next clause, namely, the 22d, the power of election given to the Slave is to be considered as providing for cases of sickness or absence on the part of the Commandant or Assistant Protector, or where the Commandant might be the master; and not as giving or implying a power to quit the estate against the master's consent. This application on the part of the Slave may also be made either by a message, or by obtaining a letter to be written, as the duties of the plantation or other circumstances may render most convenient.

The power conferred by the 24th clause, by which Slaves are permitted to acquire lands, is not to be held as exempting them from the existing restrictions as to the mode in which lands may be cultivated by persons of their class and condition. They are therefore not authorized, by the mere acquirement and tenure of land, to cultivate, for their own profit, the staple commodities of the island.

The obligation required by the 34th clause in the cases of voluntary manumissions, to give security to the crown for maintenance of the Slave, does not apply to testamentary manumissions; and, in other cases, it is not considered probable that the party disposed to confer the benefit of freedom would withhold the boon merely because he will have to enter into a legal obligation to carry his own purposes into effect.

As respects the 42d clause, and the penalties attendant upon it, I have the satisfaction to acquaint you, that, for the purpose of allaying any apprehensions that have been entertained of this enactment, it has been directed, that the penalty on the second conviction shall never be enforced until the whole case has been referred home for the consideration of His Majesty; and you will observe, that in this special instance, the forfeiture is to the benefit of the Crown, and therefore would not be enforced unless the offence were of a grave and serious character.

Having also submitted the inconvenience that some of the Commandants might suffer by being required to come to Port Spain every

quarter for the purpose of swearing to their returns, I am further to acquaint you, that the returns of punishments by Commandants upon their own estates will be required only every six months from those officers.

(Signed) RALPH WOODFORD.

APPENDIX J.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, the 16th September, 1822: Present, the King's Most Excellent Majesty, in Council.

No person or persons whatsoever after the promulgation of this order, shall be exempt from arrest and imprisonment in any civil case — and personal property of every kind, except wearing apparel, bed and bedding, may be taken in execution.

WHEREAS by the laws in force in the island of Trinidad, women, artizans, and certain other persons therein mentioned, are exempted from imprisonment for any civil debt, and also by the same laws as by custom, the arms, horses, mules, of certain persons of character and quality, as well as the books of students and lawyers, and the tools of artizans are not liable to be taken in execution in satisfaction of any debt, His Majesty is pleased, by and with the advice of His Privy Council, to order, that from and after the promulgation of this order in the said island, no person or persons whatsoever, male or female, of whatever rank or condition, shall be exempted from arrest and imprisonment in the ordinary places of confinement, in any civil case or proceeding; and that the personal property of every kind and description belonging to a debtor, save and except his or her wearing apparel, bed and bedding, shall be capable of being seized, or taken in execution, any thing contained in the said laws to the contrary notwithstanding.

Not to extend to authorize arrest of married woman, the Governor, Lieutenant Governor, the members of Council, or the Judges, or any officer of the courts, or witnesses.

Provided always, That this order shall not extend to authorize the arrest of any married woman, or of the Governor, Lieutenant Governor, or other person administering the Government of the island for the time being, or any Member of the Council, or any of the Judges, or any officer of the Courts of Justice in the said island, or any witness during the attendance of such officer or witness in the court, or when going to or returning from the same. And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG,

Administering the Government.

Government House,
Trinidad, 16th January, 1823.

APPENDIX K.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, the 16th of September, 1822: Present, the King's Most Excellent Majesty, in Council.

All property of every kind belonging to married women to be liable for the debts contracted by them in respect of their separate trading.

WHEREAS a custom has prevailed in the island of Trinidad, whereby married women have claimed the right of carrying on trade, and acquiring property in their own names and on their own account, while their dotal and other property, has not been considered, or held liable to the payment of debts, incurred by reason of such trading; *And whereas*, such a custom is prejudicial to the rights of *bonâ fide* creditors, His Majesty is pleased, by and with the advice of His Privy Council, to order and declare, *And it is hereby ordered and declared*, That from and after the promulgation of this order in the said island, all property of any kind whatsoever, which shall have been brought by married women at their marriage, or received by them, or by their husbands on their behalf, either at that time or afterwards, be the same by inheritance, donation, bequest, or by any other manner, shall be, and the same, as far as the interest or interests of the said married women are concerned therein, is declared to be liable for all debts contracted by such married women, in consequence and in respect of such separate trading, and may be taken and told in satisfaction thereof.

All property in the island purchased and acquired by married women during marriage, except as herein mentioned, to be subject to debts previously contracted.

And His Majesty doth hereby further order and declare, That all property in the said island of Trinidad, that from and after the date of the promulgation of this order in the said island, shall be purchased and acquired, by any married persons whatsoever, during the marriage, otherwise than by descent, donation of parents, or of strangers, or by devise, shall be subject to the payment of all such lawful debts of the husband and wife as shall have been incurred and contracted by both, or either of them, previous to the purchase or acquisition of such property, and not otherwise, notwithstanding that such property be acquired or held in the name, and for the benefit of the wife or husband separately, or in that of their child or children, or in the name of some person or persons in trust for them, or either of them: and that all donations from and between husbands and their wives to each other, during marriage, shall be void as against *bonâ fide* creditors, without reference to the time at which their debts may and have been contracted.

Donations between man and wife.

All deeds of settlement in contemplation of marriage to be enregistered in the office of registry—and the

And His Majesty doth hereby further order and declare, That all contracts, deeds, settlements, conveyances, or assurances whatsoever, that shall or may at any time or times hereafter be made or entered into in contemplation of marriage, whereby any property, right, or interest, claim or demand whatsoever, shall or may be intended to be secured for the separate benefit of the intended wife, shall be

previous settlements to be registered within a certain time, otherwise to be void, as against creditors.

made, executed, attested, and be in the office of registry, enregistered, previous to the solemnization of the marriage, in default whereof the same shall be void and of none effect, as against just and *bonâ fide* creditors. And with respect to all contracts of marriage and settlements which shall or may at any time have heretofore been made and executed relative to, or concerning any property in this island, or whereby the right and title therein may be affected, His Majesty doth hereby further order and direct, That from and after the promulgation of this order in the said island, the same shall be entered and enregistered in the said office of registry within four months, if the same shall have been executed in the said island, or within fifteen months, if the same shall have been executed beyond seas; in default whereof, such marriage contracts or settlements shall be null and void as against *bonâ fide* creditors. And the Right Honourable Earl Bathurst, one of His Majesties Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG,
Administering the Government.

Government House,
Trinidad, 16th January, 1823.

APPENDIX L.

A PROCLAMATION.

WHEREAS, it appearing that a great proportion of the Titles to Land in this Colony are defective and absolutely void; either as arising from the neglect of the parties themselves, or from an abuse or violation of their respective grants, or from want of some specific declaration of the royal pleasure thereupon, His Royal Highness the Prince Regent taking these circumstances into his consideration, as well as the advantages that the inhabitants now and hereafter will derive from a secure tenure, and unmolested possession of their Lands, has been pleased to declare as it is hereby proclaimed and declared,

That in all and every case, where, previous to the date of this Proclamation, the Lands occupied or granted either under Spanish or British authority (excepting those hereinafter-mentioned), have been put and now are in a state of cultivation, the same shall be confirmed, together with such further proportion as shall be equal to the quantity in cultivation, provided always, that in case the Lands so occupied, granted, and cultivated, shall be required for the public service, the same shall be retained, and the owner or occupier thereof shall receive in land a full equivalent to those of which he has been deprived; and provided always, that from and after the date of this

Proclamation, the persons holding or claiming to hold such Lands shall, in the month of June in the ensuing and every succeeding year, pay into the Colonial Treasury, for and in consideration of such confirmation, the sum of five shillings currency for every quarree of Land confirmed and granted; the said sum to be a perpetual charge and incumbrance on the Lands so held and confirmed.

And His Royal Highness has also been pleased to declare, That nothing herein-before declared shall extend to such grants or titles of Land as have been made and registered in strict conformity to the Royal Cedula of his Catholic Majesty, dated San Lorenzo, 24th November 1783, and previous to the surrender of the island to His Majesty's arms.

And whereas amongst the grants or titles herein last-recited, there are found to be many, the Lands whereof are entirely uncultivated or abandoned; contrary to the spirit and letter of the above-mentioned order, and to the present and future disadvantage and inconvenience of the colony at large: His Royal Highness the Prince Regent has been further pleased to declare, That unless the said Lands shall within the space of two years from and after the date of this Proclamation, be put into a state of cultivation, in a proportion of one-fourth part at least, to the whole extent of the land held, and be so continued; and unless there shall be placed by the owner and be employed thereon a number of Negroes or labourers, amounting at least to the proportion of one Negro or labourer to every five quarrees of land so held, the owners thereof shall pay to the Colonial Treasurer, in the month of June next after the determination of the said term, and in the said month of every succeeding year, the sum of five shillings currency per quarree: and in case the said annual payment shall not be made at the first annual period next succeeding the determination of the said term, the said Lands shall be considered as abandoned, and shall be returned and seized as forfeited to His Majesty, his heirs and successors.

And whereas among those persons who from time to time obtained permission from the several British Governors of the Colony to occupy Lands under certain restrictions and conditions, there are many who have violated the same, His Royal Highness the Prince Regent has been pleased to give a power to his Excellency the Governor, to confirm the grants of such parts of those Lands as are cultivated with the reserve of such portion of them as may be wanted for the public service in manner as aforesaid, on payment by the occupiers thereof into the Colonial Treasury, of the sum of one hundred pounds currency, the conditions and restrictions of their several permissions, of occupancy, the said Lands being also held subject to the annual quit rent or charge of five shillings per quarree, payable in the same manner and period as herein more particularly described.

And whereas permissions have also been obtained from the several British Governors to occupy Lands in the Colony, which said Lands have remained and are now uncultivated; His Royal Highness the Prince Regent has been pleased to declare, That all such grants and permissions shall be considered and taken as they are hereby declared to be, void, with a reservation nevertheless to such nominal occupiers, to pray for a grant of the same on such conditions as are hereinafter declared, in the case of new settlers.

And His Royal Highness the Prince Regent having taken into his gracious consideration the great benefit that might be derived to the

inhabitants, and others, from a cultivation of many parts of the most fertile Lands of this colony, has been further pleased to authorize His Excellency the Governor to confer grants upon the following conditions: —

I. That it be shewn to the Governor that the persons applying for Lands are possessed of the means of cultivating them, and rendering them valuable.

II. That no new grant to a resident of the island shall exceed in the first instance one hundred quarrées, except in cases where the nature of the intended cultivation shall render a relaxation of this condition indispensable.

III. That if strangers shall be desirous of settling with any great number of Slaves from other British colonies, and requiring any greater extent of Land than is herein-before limited, they will be recommended to His Royal Highness's gracious favour.

IV. That the said grants of new Lands shall, in all cases, be given upon condition of cultivating one-fourth part of the same, within the period of five years from the date of the grant; and in failure thereof, all title of dominion, and of occupancy, or otherwise, shall revert to the Crown.

V. That the right of His Majesty to all minerals, as well as quarries, timber, and water when required for the public service, with free ingress and regress to and from the same be reserved.

VI. That the three chains on the sea coast, (comprehending fifty paces) from the height of the spring tides, be held and reserved for the use of His Majesty and the public service.

That to avoid any differences or disputes in this respect, no building, of whatsoever description, shall be erected in the line of this chain, without express permission of the Government first obtained through the Commandant of the Quarter, and the Commissary of Population: and in all such permissions, the right to demolish and abate, at will, shall be reserved.

VII. That the right of tracing and directing new roads, canals, or other means of communication, to be opened, be preserved to His Majesty.

VIII. That all Lands granted to new settlers shall, in like manner as all other Lands hereafter to be cultivated, be held subject to the payment of the annual quit rent of five shillings currency per quarree.

IX. That in case any of the Lands now to be confirmed and granted, or hereafter to be granted to new settlers, shall cease to be cultivated according to the proportion herein-before described, for and during the space of three years; then, and in such case, and after notice given by the Attorney-General, or law officer of the Crown for the time being, and judgment of abandonment given in the Court of the Intendant; the said Lands shall be resumed by the Crown, and become absolutely forfeited to His Majesty, his heirs and successors.

And it is hereby further ordered and declared, That in default of payment of the quit rent hereby imposed on all Lands hereby granted and confirmed, or hereafter to be granted into the Treasury of the island in every month of June, the said quit rent shall be sued for, levied, and recovered in the same manner as all other debts of His Majesty now are recoverable, and under the same privileges, rights, and preference, which by the laws in force are provided and declared, in respect of debts contracted to the Crown, and in default of

other property than the Lands so granted, the said Lands shall revert to the Crown.

And it is hereby also declared, That if any one shall feel himself aggrieved by any matter or thing that may be done in the execution of the orders of His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, herein set forth, such persons may present and prefer his petition to His Excellency the Governor, in his Court of Intendant, where the same shall be exclusively heard and determined, under the provisions of the Proclamation of 19th June 1813.

All applications for confirmation of grants, or for new grants, are hereby directed to be made, by petition, to His Excellency the Governor, according to the tenor of certain Instructions which will be filed in the Office of the Commissary of Population.

And, lastly, I do hereby, in the name and on the behalf of His Majesty, will and require, and strictly charge and command, the Judges of all the courts and tribunals of the said island, the Law Officer of the Crown, the Commandants of Quarters, the Commissary of Population, the Public Treasurer, the Alguazil Mayor, and all the Magistrates and Alcaldes de Barrio, all Land Surveyors, and all other His Majesty's loving subjects within the said island, duly to obey and observe these Presents, and to govern themselves accordingly.

In witness whereof I have hereunto set my hand, and caused the great seal of the island to be hereunto affixed, at Government House, in the Town of Port of Spain, the 5th day of December, in the year of Our Lord 1815, and in the fifty-sixth year of His Majesty's reign.

(L. s.) By command of His Excellency,

(Signed) P. REINAGLE,
Secretary.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island, and its Dependencies, and Vice Admiral thereof, &c. &c. &c.

Instructions to the Commissary of Population of the said Island, under and by virtue of the Proclamation of the fifth of December, one thousand eight hundred and fifteen, relative to the confirmation of old grants of Lands, and the granting and cultivating of the new Lands of this Colony.

WHEREAS to give effect to the gracious intentions of His Royal Highness the Prince Regent, as declared in the said Proclamation, as well as to revise the instructions given to the Commissary of Population by Governor Chacon, it is expedient that one uniform mode should be adopted, in giving confirmation of old grants, and validity both in form and substance, to such new grants, as may, henceforth,

be demanded, and that every practicable security be afforded for the preservation and due registration of the same, for the prevention of any future disputes or litigation, either as to the quantity or boundaries of the Lands so confirmed and granted.

In virtue of the powers and authorities in me vested, I have resolved to declare and establish the following Rules, Regulations, and Instructions in that behalf.

I. All persons requiring confirmation of Lands, not being a Royal Grant, registered in conformity to the Royal Cedula of the 24th of November 1783, or persons requiring confirmations of the tenure of lands assumed by them, or of those granted by former Governors, or new grants of uncultivated lands, must present a petition, addressed to His Excellency the Governor, as Intendant of the Royal Treasury and Judge of Crown Lands; and in which must be described, with accuracy, the lands prayed for, the time when, and by whom originally acquired, and by what authority.

II. The present cultivation of the lands in extent and kind, must be attested by the Commandant of the quarter and two witnesses, neighbours of the petitioner; together with a certificate or return of the Slaves from the registrar's office, in proof of the property in the said Slaves; and where new lands are prayed for, the certificate of the Commandant as to their actual state of uncultivation, and as not interfering with any free settlers, together with the means of the petitioner to render the same available, must be duly set forth.

III. The petition will be then passed to the Commissary of Population and Surveyor General, who will certify from the records in his office the quantity of land possessed by the petitioner, and the proportion of new land to which he is entitled under the Proclamation, together with such further remarks as may appear necessary.

IV. The petition will afterwards be referred to the Attorney General, or Law Officer of the Crown, whose duty it will be, in the conservation of His Majesty's rights, to submit to His Excellency the Governor as Intendant, any observations or objections that he may have to make, upon or against the prayer of the petition, as he may deem expedient; and he will accordingly prepare and submit the Royal Grant.

V. If in the grants hereafter to be made, the quantity of land so granted shall be greater or less than the surveys actually made; or if any doubts shall arise therefrom, or upon the boundaries, a new survey shall take place by orders of the Commissary of Population, and with citation to all the neighbouring owners whose rights may be involved in or affected by the new boundary line.

VI. The grant being approved by the Governor's signature, and that of the Attorney General, and the great seal of the island being affixed thereto, will be enrolled by the Deputy Secretary, and registered at length, in a proper book of registry to be provided for that special purpose, together with all the documents appertaining thereto; and a certificate of such enregistration, and of the number of pages that the same may occupy in the book of registry, will be endorsed, by the Deputy, Secretary, and Registrar, upon the grant.

VII. The same will be passed to the Commissary of Population for the like purpose of registry; and will be by him abstracted and noted in the Libro Becerro, as provided by the former instructions to the Commissary of Population; and on payment of the fees,

according to the subjoined docket, the original grant will then be delivered to the grantee, or his duly authorized attorney.

VIII. The present regulations will not extend to poor settlers, peons, or free men of colour, who have already cultivated any portion of land, or established *canucos* or gardens not exceeding five quarrees of land; and it will only be required of them to produce to the Commissary of Population a certificate from the Commandant of their respective quarters, of the quantity of land occupied by each and in actual cultivation. This certificate will be submitted to the Governor, and, when approved by His signature, will be deemed and taken as a confirmation to such occupiers of their property and tenure of the quantity of land they hold, subject to the payment of the annual quit rent. No fees will be demanded or taken for such certificates or sanction; but if the persons to whom this indulgence shall be granted, may hereafter wish to dispose of such quantity of land as they now possess and occupy, either by sale or bequest, or exchange, they shall first obtain the sanction and licence of His Excellency the Governor.

The Commissary of Population is authorized, whenever he shall deem it necessary, to call for the production of any deeds, titles, or documents relative to any lands petitioned for, or plans or diagrams of the same; which are hereby directed to be delivered to the Commisssary of Population, on his granting a receipt for the same.

It is hereby declared to be the especial duty of the several Commandants of quarters, and the Commissary of Population, to report to the Governor in writing, from time to time, the abandonment of the cultivation of old grants, or of lands assumed in their districts, as well as the non-observance of the conditions of tenure contained in the Proclamation of the fifth of December last past.

Every proprietor of land is hereby ordered, from this date, to keep the boundary lines between his own lands and that of his neighbours clear and open, and to preserve the land marks; and whenever the same shall be neglected, the Commissary of Population shall have the lands remeasured and surveyed again at the expence of the party neglecting the same.

All sales and transfers of lands must continue to be accompanied by a certified description of the extent and boundaries thereof, from the Commissary of Population, who will note and register the same in his office.

The Petitions of the Commandants of Quarters whom the Proclamation of the fifth of December may affect, will be disposed of in the first instance: and after that the petitions will be considered by quarters.

RALPH WOODFORD.

Government House,
1st February 1816.

By His Excellency's Command,

GEO. MARTIN,
Acting Secretary.

TRINIDAD.

ORDER OF GOVERNMENT.

Government House, Port of Spain.

RALPH JAMES WOODFORD.

WHEREAS an order has been issued by His Royal Highness the Prince Regent in Council, bearing date the twentieth day of March last past, confirming the Proclamation issued by His Excellency the Governor, on the 5th day of December also last past, and the said order having been this day promulgated in the usual form,

NOTICE

Is hereby given that all persons whose lands are liable to quit rent, imposed by virtue of the before-recited Proclamations, or either of them, are required to present their respective petitions within the period of four months next ensuing, to the tribunal of His Excellency the Governor, exercising the powers of Intendant, according to the instructions filed in the office of the Commissary of Population where the schedule of fees is now exhibited.

Given under my hand and seal at Government House, in Port of Spain, this 19th day of June, in the year of our Lord one thousand eight hundred and sixteen.

By His Excellency's command,

(Signed) GEO. MARTIN,

Acting Secretary.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its Dependencies, Vice Admiral thereof, Intendant of the Royal Treasury, and Judge of the Crown Lands.

RALPH JAMES WOODFORD.

(L. S.)

A PROCLAMATION.

WHEREAS in consequence of a representation made by His Majesty's Council to His Royal Highness the Prince Regent, through His Majesty's Principal Secretary of State for the Colonial Department, on the expediency of exempting all lands that had been held, granted, or occupied previous to the conquest of the island by His Britannic Majesty's arms on the 18th of February 1797, from the payment of the annual quit rent of five shillings currency per quarree, that was

imposed by the Proclamation of the 5th December 1815, however defective the grant, tenure, or occupation of the said lands may have been; His Royal Highness has been pleased to signify His Gracious command that the said annual quit rent on the lands herein-before particularly mentioned should be repealed.

It is, therefore, hereby ordered, proclaimed, and declared by virtue of the aforesaid Royal Command, That the said annual quit rent of five shillings currency per quarree shall be as the same, is hereby repealed, and declared to be of no effect in respect of all such lands as shall have been granted, held, and occupied previous to the conquest of the island by His Majesty's army as aforesaid: Provided always, that the present occupiers of such lands shall, within the period of two months from the date hereof, pray for a confirmation of the same: And provided always that nothing herein contained shall be held to exempt the said occupiers, their heirs or assigns, from the obligation of conforming to the third clause of the said Proclamation of the 5th December 1815, and from putting the said lands into a state of cultivation within the period of two years from the date of the said last Proclamation, in a proportion of one-fourth part, at least, to the whole extent of lands held, granted, and occupied; and from placing and employing thereon a number of Negroes or labourers amounting, at least, to the proportion of one labourer to every five quarrees of land so held, granted and occupied; and that in failure thereof the said quit rent of five shillings currency per quarree be exacted, and the penalty of resumption of the said land inforced in failure of payment.

In witness whereof I have hereunto set my hand, and caused the great seal of the said island of Trinidad to be hereunto affixed at Government House, in the town Port of Spain, the seventh day of November, in the year of our Lord one thousand eight hundred and sixteen, and the fifty-seventh year of His Majesty's Reign.

(Signed) GEO. MARTIN,

Acting Secretary.

By His Excellency's Command.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island, and its Dependencies, and Vice Admiral thereof, Intendant of the Royal Treasury, and Judge of Crown Lands, &c. &c. &c.

RALPH JAMES WOODFORD.

(L. S.)

A PROCLAMATION.

WHEREAS by a Proclamation issued on the fifth of December 1815, Provisions were declared for the confirmation of titles to the lands then in cultivation, as well as for the distribution of new lands in the Colony. And whereas by another Proclamation, issued on the seventh day of November 1816, it was notified that His Royal Highness the Prince Regent had been graciously pleased, in the name and

on the behalf of His Majesty, to relieve from the payment of Quit Rent to the Crown, all lands held, enjoyed, or occupied previous to the surrender of this Island to His Majesty's arms; and His Royal Highness, being desirous of further promoting the cultivation of the fertile lands of this Colony, has been graciously pleased to command that it be as it is hereby declared to be proclaimed as follows: —

I. That the fine imposed by the third Clause of the Proclamation of the fifth December 1815, upon such settlers as departed from the tenure of the Grant of Occupancy, conceded to them by His Majesty's former Governors shall be limited to fifty pounds currency.

II. That the Quit Rent, to be paid on all lands hitherto occupied by virtue of the permission of His Majesty's Governor, and which may be confirmed under the Proclamation of the fifth December 1815, shall not exceed three shillings, currency, per quarree, the same to be payable into the Treasury annually.

III. That it shall be competent to all Proprietors desirous of redeeming the Quit Rents of their lands, to purchase the same by a payment not exceeding fifty shillings, currency, per quarree, by any one payment within the periods of annual payments into the Colonial Treasury, in consideration whereof such Proprietor will receive a title of dominion, free from all future charge of Quit Rent.

And, whereas, there are certain lands held by virtue of grants given by His Catholic Majesty's Governors under the Royal Cedula of 1783, which were not enregistered in obedience to the third Clause of that Order, and others which having been granted previous thereto are equally unrecorded. His Royal Highness has been further pleased to direct that all such grants shall be as they are hereby declared to be equally as valid as if the same had been duly registered, provided they be presented for that purpose within six months from the date hereof, to the Commissary of Population for the time being, which officer is likewise hereby strictly authorized and directed to comply, and carry into effect, such instructions as may be issued to him, in addition to those of the first of February 1816, in this behalf; in witness whereof I have hereunto set my hand, and caused the great seal of the Island, to be affixed at Government House, in the Town of Port of Spain, this first day of December, in the year of our Lord one thousand eight hundred and eighteen, and in the fifty-ninth year of His Majesty's reign.

By His Excellency's Command,

(Signed) P. GELLINEAU,

Assistant Secretary.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its Dependencies, Vice Admiral thereof, and Intendant of the Royal Treasury, &c. &c. &c.

(L. S.) RALPH JAMES WOODFORD.

A PROCLAMATION.

WHEREAS, notwithstanding the several Proclamations from time to time promulgated for the grant and confirmation of the lands of this island, occupants of certain allotments, holden under the Spanish Government, have neglected to complete their titles to the same within the periods limited by the said Proclamation, by which neglect such lands have been and are now exposed to forfeiture and resumption by the Crown; and whereas His Majesty having taken the same into his royal consideration, has been pleased to afford a further opportunity to such parties, to complete their respective titles in and within the period hereafter declared and limited: — It is therefore hereby ordered, proclaimed, and declared, —

I. That in all cases in which grantees or occupants of any of the lands of this Colony shall have omitted to pray for and complete their titles within the term limited for that purpose, by the Proclamation of the 7th of November 1816, applications shall be received in the Tribunal of the Intendant and Judge of Crown Lands, for such confirmation and grant; provided that all petitions for such confirmation be presented within twelve calendar months from the date of this Proclamation, and that payment be made by the petitioners into the public treasury of all arrears of quit-rent due in respect of such lands, from the 5th of December, 1817; and upon the production of the certificate of such payment, under the hand of the public treasurer, titles shall be granted, subject to the quit-rent from the date of such payment, unless redeemed under the authority of the Proclamation of the 1st of December, 1818.

II. And it is hereby further ordered and declared, That no application shall be received for the confirmation and grant of any such lands, after the expiration of the said term of twelve calendar months, from the date of this Proclamation; at which period, all such lands, the titles to which shall not have been prayed for, and the quit-rent paid within the time herein-before limited, shall become forfeited to, and resumed by the crown.

III. And whereas, under the third, fourth, and ninth Clauses of the Proclamation of the 5th of December 1815, and under the several grants or confirmations of title, made and issued under the authority thereof, the lands therein mentioned and referred to, were in the cases therein respectively provided for, declared to be taken and considered as abandoned, and subject to be resumed and seized, as forfeited to His Majesty, his heirs and successors; and whereas such a provision, which was intended to secure the means of recovering the expenses that might be incurred by reason of any neglect of labour

due from estates to the public roads, or other local assessments, has, under the Order in Council of the 5th of August, 1822, now become unnecessary.

IV. It is hereby further ordered, proclaimed, and declared, That from and immediately after the date and promulgation of this Proclamation, the said third, fourth and ninth Clauses of the said Proclamation of the 5th of December 1815, and so much of the said Proclamation of the 7th of November 1816, as provides for resumption by the Crown, shall be, and the same are hereby declared to be repealed.

V. And in all cases in which titles to any lands mentioned and referred to in the said Proclamations of the 5th of December 1815, and of the 7th of November 1816, shall have been completed under the authority of the said Proclamations, or that shall be completed under the first Clause of this present Proclamation, the said lands shall be holden by the respective grantees thereof, or their assigns, freed and discharged of and from all right or claim of forfeiture, or resumption by the Crown; either in respect of want of cultivation, of the employment thereupon of the number of Slaves prescribed by the said Proclamations, of non-payment of quit-rent, or on any other account whatever.

VI. Provided always, That all lands, granted or confirmed, under the authority of this or any other Proclamation, heretofore promulgated, the quit-rents whereof, where chargeable, shall not have been redeemed, shall be subject to, and remain chargeable with such quit-rents, and all lands, under whatsoever tenure, shall be subject to the charges of maintaining in proper repair the roads and bridges, according to the regulations in that behalf; and where it shall be deemed reasonable and expedient by the proper tribunal, to cause new roads to be opened, or bridges to be made, the lands for the convenience or utility of which such roads and bridges shall be intended, shall be held subject to the obligation of contributing in due proportions, to the expense of opening, making, and keeping in repair such roads or bridges; and all lands, under whatsoever tenure, whether cultivated or abandoned, shall, and are hereby declared to be subject to the alguacil tax or such other local taxes and assessments, imposed or to be imposed in respect thereof, and all such quit-rents, charges for repairs of roads, taxes, and assessments, shall be recoverable by due course of law in the Court of Intendant or in any other competent tribunal of this island.

VII. And whereas His Majesty was pleased by his instructions, through one of his Principal Secretaries of State, to authorize and permit the sale for the benefit of the colonial revenues, of the preference to such portions of the crown lands as might be set apart for that purpose; in consequence of which, various allotments have been disposed of for valuable considerations; His Majesty is further pleased to declare, that wherever any lands that were occupied or granted under British or Spanish authority, previous to the Proclamation of the 5th of December 1815, shall be required for the public service, and where no other stipulation shall have been made, that in such cases the value of the lands so required, being ascertained by appraisement, under oath of persons mutually named by the Crown and the holder of the lands, shall be paid for in such manner as may be agreed upon between the parties.

VIII. And in order to afford further encouragement to the settling of the crown lands, His Majesty is further pleased to dispense with

the reservation of the article of timber, to which all lands, titles of dominion whereof have been, or may hereafter be granted, by virtue of the several Proclamations in this behalf, have been declared subject.

Given under my Hand and the Great Seal of the island, at Government House, in the Town of Port of Spain, in the said island, this twenty-second day of May, One thousand eight hundred and twenty-three, and in the fourth year of His Majesty's reign.

By His Excellency's command,

PHILIP DOTTIN SOUPER,

Secretary.

TRINIDAD.

By his Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its Dependencies, Judge of Crown Lands, &c. &c. &c.

(L. S.) RALPH JAMES WOODFORD.

ORDER OF GOVERNMENT.

WHEREAS by the first Clause of the Proclamation, dated the 22d day of May, 1823, it was ordered: that all petitions for confirmation of lands held under the Spanish Government, and then omitted to be prayed for, should be presented within twelve calendar months from the date of the said Proclamation:

And whereas by the Order of Government of the 8th day of May, 1824, the said term was declared to be extended to the 22d of May, 1825; and it is necessary to grant an additional period for the same:

It is hereby ordered that the said term be further extended to the 22d of May, which will be in the year 1826, under the same provisions and penalties as are declared in the first and second Clauses of the said Proclamation; of which all persons are required to take notice, and to govern themselves accordingly.

Given under my Hand and Seal of Office, in Port of Spain, this fifteenth day of April, 1825.

By His Excellency's command,

FREDERICK HAMMET,

Acting Secretary.

APPENDIX M.

TRINIDAD.

By His Royal Highness the PRINCE REGENT in Council, at the Court at Carlton House, the 8th June, 1816: Present, His Royal Highness the Prince Regent in Council.

WHEREAS it is expedient to remove all doubts concerning the validity of wills and testaments made and to be made within the island of Trinidad, as far as regards the number of persons required by law to attest the same; and to remedy the inconvenience that may arise from the difficulty of procuring, on a sudden emergency, the same number and description of witnesses as are required by the first and second laws of the 18th Title and 10th Book of the Novisima Recopilacion of Castille, it is hereby ordered and declared, by His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty's Privy Council, That all wills, testaments, and codicils thereto, attested by *three male witnesses*, domiciliated and inhabitants of the place and quarter wherein the same shall have been made; or of two such witnesses as aforesaid, and the Commandant of the Quarter, shall be, as they are hereby declared to be, good and valid, in respect to the attestation of the same.

And it is hereby ordered and declared, That all wills and testaments made and executed previous to the promulgation of this Order, that shall have been signed and attested by three male witnesses as aforesaid, shall be considered good and valid in respect to such signature and attestation, provided they shall not have been administered to, nor declared null and void for that defect alone, by a competent tribunal previous to the promulgation of this order: And it is hereby ordered and declared that any will, testament, or codicil thereto, that shall not be attested and signed by the number and description of witnesses herein-before mentioned and required, shall be deemed and taken as they are hereby declared to be, void and of no effect.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) JAMES BULLER.

A True Copy.

(Signed) RALPH WOODFORD.

APPENDIX N.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief, in and over the said Island and its Dependencies, Vice-Admiral thereof, and Intendant of the Royal Treasury, &c. &c.

(L. S.)

RALPH JAMES WOODFORD.

Additional Rules for the Court of First Instance of Civil Jurisdiction, on Testamentary Proceedings, and in Proceedings of Cases of Persons Dying Intestate.

RULES.

I. All testamentary proceedings, and all proceedings in cases of persons dying intestate, which were heretofore pending in the late tribunal of his Honour the Chief Judge and of the Judge of property of deceased persons; and all testamentary proceedings which were heretofore pending in the late tribunal of their Honours the Alcaldes in Ordinary; and all testamentary proceedings, and all proceedings in cases of persons dying intestate, to be hereafter instituted, shall be proceeded in the Court of First Instance of Civil Jurisdiction.

II. The testamentary executor shall, within one month after the decease of the testator, or within one month after he shall have notice of the decease of the testator, and of his appointment as executor, make application to the said Court by petition, with a duly certified copy of the will annexed thereto, praying for the inventory and appraisement of the property of the testator, setting forth the time and place of his death, and the place in which the property is situate, and nominating in such petition some person as appraiser in his behalf; and in default thereof the Court, upon the petition of any party interested under the will, shall cause the person so making default, to be summoned to declare his acceptance or renunciation of the executorship; and if he shall appear and declare to accept thereof, he shall proceed within seven days after acceptance to make application to the Court in manner herein-before directed, unless he shall shew good and sufficient cause to the contrary, to be adjudged by the Court, in default whereof he will be subject and liable to all costs to be incurred by his neglect. But in case no such executor shall be named in the will, or being named therein, shall be absent from the island, or being present shall neglect to appear, or shall renounce the execution of the will, or after acceptance, shall fail to proceed within seven days as above directed, the Court shall appoint some proper person as *Albacea Dativo*, who shall proceed as aforesaid, within seven days after his appointment, or shew good cause to the contrary, to be judged of by the Court.

III. Upon presentation of any petition under the foregoing rule, a writ of summons shall issue from the Court to the several parties interested under the will, to appear before the Court within such time as the Court, with reference to their place of residence, shall

appoint and nominate, or concur in the appointment of persons for the purpose of proceeding to the inventory and appraisement of the testator's property; the defender of the absent or the guardian of any minors, or in their default, the Father General of minors, being summoned on behalf of the parties for whom they may be respectively authorized to appear. And if any party cited, shall neglect to appear within the period limited by the summons, or to nominate or concur in the appointment of such persons, the party neglecting shall forfeit his right of appointment, and the Court shall, upon the application of any of the parties interested, by motion as of course, name some person as appraiser on behalf of the party so in default, or concur in the appointment of such persons as may be named appraisers in the proceedings.

IV. When the period limited by the Court for the appearance of all parties interested under the will, shall have expired, an order shall issue upon the application of any party so interested, by motion as of course, directing the inventory and appraisement to be proceeded in by the appraiser named by the executor, or *Albaceo Dativo*, together with such persons as shall be nominated by any other parties interested under the will, or by the Court, as the case may be; and the person so appointed shall proceed in the inventory and appraisement (at which the attendance of the Escribano or Commandant of the Quarter shall not be necessary), they being previously sworn before the Court, or either of the Judges thereof, or before the Commandant of the Quarter in which the property may be situate, to make a due inventory of, and duly to appraise the same. And the testamentary executor, or person charged with the execution of the will shall make oath before the said Court or either of the Judges thereof, that he will duly point out to the appraisers all the property of the testator.

V. The inventory and appraisement shall be concluded and returned into Court by the executor or person charged with the execution of the will, within two months after the order, directing the same to be made, unless good and sufficient cause shall be shewn to the contrary, to be judged of by the Court; such executor, or person charged with the execution of the will, giving notice to the several parties interested under the same, of such return, and proving the due service of such notice by affidavit before the Court, or one of the Judges thereof; and the said executor, or person charged with the execution of the will, shall then also make oath before the Court, that the same contains a true inventory of the property of the testator, and that in case any further or other property shall come into his possession or knowledge, he will render into the Court a true inventory and account thereof; and in default thereof, he shall be subject to all the pains, penalties, forfeitures and damages provided by the laws against executors neglecting to make true inventories according to law.

VI. The inventory and appraisement shall be open in the office of the Escribano, for one month after the return, for the inspection of all parties interested therein; and in case no objection shall be made thereto within that term, and no further application made in the proceedings, the same shall be approved, and the proceedings declared concluded and passed to the proper office, the costs being first taxed and paid; and the Escribano will give notice to the colonial treasurer, or to the officer appointed for the collection of the duties upon bequests and inheritances, of the order decreeing the approval.

But in case all parties interested under the proceedings shall join in an application to the Court for an earlier and more immediate conclusion of the same, it shall be competent for the Court so to order. And in case any minor or minors shall be interested in the property contained in such inventory and appraisement, the proceedings shall at the expiration of the said month, or at such earlier period as by the consent of the parties interested, so to be signified as aforesaid, may be agreed upon, be laid before the Court, which shall order the same to be passed by the Escribano to the Judicial Referee, Liquidator and Partidor, for the purpose of ascertaining and establishing the rights and interests of such minors, in order that the same may appear and be duly registered and recorded in the book of registry of the property of minors, and in case any objection shall be made to the inventory and appraisement, or any further application in the proceedings be made by the parties interested, the same shall be submitted to the Court by motion, upon which the Court shall make such order as the case may require.

VII. In all cases of persons dying intestate having heirs resident within the jurisdiction, application shall be made by the said heirs to the Court of First Instance of Civil Jurisdiction, for the inventory and appraisement of the property of the deceased, within such time and in such manner, and subject to the same pains, penalties, forfeitures and damages, as in the foregoing rules are directed with respect to executors or persons charged with the execution of the will of any deceased testator; and to all other penalties provided against heirs entering unto the possession of the property of their ancestors without inventory. But if no such heir shall be resident within the jurisdiction, or being such, shall fail to proceed as hereinbefore directed, the Court, upon the report of the decease of any such intestate, shall direct the inventory and appraisement of the property of such intestate to be proceeded in, in such manner as may appear to it most conducive to the interests of any parties that may be entitled to the property.

RALPH WOODFORD. ANTONIO GOMEZ.

Before me, JOHN CARTER,
Escribano de Camera.

March 22. 1823.

APPENDIX O.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its Dependencies, and Vice-Admiral of the same, &c. &c. &c.

(L. S.) RALPH JAMES WOODFORD.

A PROCLAMATION.

WHEREAS for the better preservation and security of the properties of all His Majesty's loving subjects within the said island, and others interested therein, and for the more effectual registry and authentica-

tion of such deeds and other instruments as are herein-after mentioned and referred to:

It is expedient to order and ordain in, as it is hereby ordered and ordained, that from and after the date and publication of this my Proclamation, the following

RULES, ORDERS, AND REGULATIONS,

shall be in force, and be observed in the said island.

I. That all deeds, acts, contracts, mortgages, and leases, and every and any other instruments of writing, except wills or testaments, hereafter to be made or drawn within the said island, by which any interest in any real or immoveable property shall or may be passed in any manner whatsoever, or by which any Slave or Slaves shall or may be mortgaged or otherwise incumbered, shall be drawn and made by any Advocate practising, or who shall be admitted to practise in the tribunals of the said island, or by any Escribano who shall or may hereafter obtain the special licence and authority of His Majesty's Governor and Commander-in-Chief of the said island, or of his Lieutenant-Governor thereof, for the time being, for that purpose.

II. That neither the Advocates nor the Escribanos, who may be so licensed or authorized as aforesaid, shall on any account, or under any pretence whatsoever, make, or cause to be made, or executed, any such deed, act, contract, or other instrument as aforesaid, but in the presence of three credible witnesses at least, to the making and executing of which such Advocate or Escribano shall set and subscribe his name, and the legal character in which he may make the same, at the bottom or end thereof respectively at full length, in testimony of the validity and legal effect thereof, and that the same doth express and contain the true intent and meaning of the parties thereto.

III. That such deed or other instrument as aforesaid, when the same shall be so made, executed, attested, and subscribed as aforesaid, shall be taken, carried, and delivered by the party or parties thereto, or by the Advocate or Escribano who may have drawn or made the same, to the office of the Secretary or Registrar of the said island, before whom, and in whose presence, the said parties to such deed, or their duly constituted attorney or attornies for the purpose, shall acknowledge and declare the same to be their several and respective acts and deeds, which acknowledgment the said Registrar, or his deputy, shall certify on the back thereof, and shall by himself, or his lawful deputy or deputies, thereupon number the same in numerical order at the top of the first page or folio thereof, at the time the same shall be brought and delivered to him, and shall immediately afterwards page such deeds or other instrument as aforesaid, in numerical order, observing always that the last number and page of the preceding deed or other instrument aforesaid, shall be succeeded by the next progressive number or page of the following one in numerical order, as the same shall be brought and delivered into the office of the said Secretary and Registrar.

IV. That where such deed or instrument shall be so brought, delivered, numbered, acknowledged, and paged as aforesaid, the said Secretary, or his lawful deputy or deputies, shall make and certify at the bottom or on the back thereof, in words at full length, the day and hour, month and year, on, at, and in which the same may be ac-

knowledged before and delivered to him, in manner and form, or to the effect following, viz. —

'I *A. B.* Secretary and Registrar, (or Deputy Secretary and Registrar, as the case may be,) of the Island of Trinidad, do hereby certify that the above (or the within) written deed or instrument, dated the day of was brought and delivered to me on the day of at o'clock in the fore (or afternoon) and was then acknowledged by the said party (or parties) thereto, and that the number of pages contained therein, from page to page both inclusive, is five, six, seven, eight, or nine (as the case may be,) and that the said deed or instrument has been entered, noted, and registered in folio of Book A. (or other letter) in the manner prescribed by law, to which I give faith accordingly, this day of One thousand eight hundred and .

'*A. B.* Secretary and Registrar.'

which said certificate shall be prepared and written in blank on the deed or other instrument aforesaid, by the Advocate or Escribano who may have drawn the same.

And thereupon such deed, or other instrument aforesaid, shall be taken and considered as fully proved and executed according to law.

V. That when such certificate shall be made and subscribed in manner aforesaid, the deed or other instrument aforesaid, to which the same shall be affixed, shall be sewed, attached, and fixed firmly together, according to the numerical order and priority of date, in which the same shall respectively be brought and delivered into the said office. But previous thereto, the said Secretary or Registrar, or his lawful deputy or deputies, shall note, enter, and register every such deed or other instrument aforesaid, in a proper book to be by him for that purpose previously provided, in manner and form, or to the effect following, as the case or the nature of the deed may require, viz. —

'On this day of a certain deed or instrument in writing, bearing date the day of and entered into, or made, or expressed to be made between *A. B.* of and *C. D.* of whereby the said *A. B.* sold to the said *C. D.* for and in consideration of pounds, all that dwelling-house, situate, &c. (or as the case may be); was brought and delivered to me, which is hereby noted, entered, and registered according to law, which I certify and subscribe accordingly.

E. F.

'Deputy Secretary and Registrar.'

And at or immediately after the time of acknowledging, noting, entering, and registering every such deed or instrument as aforesaid, the said Secretary and Registrar, or his lawful deputy or deputies, shall enter the name or names of the party or parties thereto at full length, in an index book, to be by him prepared, provided, and kept for that purpose, in manner following, viz. —

The name of the person or party who shall be first named therein in alphabetical order, according to the first letter of the surname of such person, and then the name or names of the other party or parties hereto, without any regard to alphabetical arrangement, with

notes or references to the book and folio or page thereof, in which the registry may be made.

VI. That when the deeds or other instruments as aforesaid, shall be sewed, attached, and fixed together, and registered as aforesaid, the said Secretary and Registrar, or his lawful deputy or deputies, shall at the request, costs, and charges of any party or parties thereto respectively, or of any person or persons interested therein, make and deliver a true and faithful copy or copies thereof respectively, and certify the same accordingly, for which copy or copies, he shall receive the sum of two shillings and sixpence currency, for every folio of ninety words contained therein; and the sum of nine shillings of like money for certifying the same, and for the certificate to be subjoined to or indorsed upon every such deed or instrument as aforesaid; and for acknowledging, entering, noting, and registering the same in manner aforesaid, the sum of eighteen shillings of like money, and no more.

And in case the said Secretary and Registrar, or his lawful deputy or deputies, shall refuse, neglect, delay or omit to do, execute, and faithfully perform any or either of the duties which he is hereby required to do, execute, and perform, relative to his said office, in any manner whatsoever, he and they, on the same being substantially and satisfactorily proved before His Majesty's Governor, or Lieutenant-Governor of the said island for the time being, shall and may be suspended and prohibited from exercising the said office, and fined at the discretion of the said Governor or Lieutenant-Governor; and moreover shall be amenable to any person or persons according to law, for any loss, damage, costs, prejudice or injury, which he, she, or they shall or may suffer, sustain, or incur by reason of such refusal, neglect, delay, or omission.

VII. That in order to preserve due uniformity and regularity in the Book or Books of Registry aforesaid; such deeds and other instruments as shall be so drawn or made as aforesaid in the Spanish language shall, respectively, be accompanied by a translation or translations thereof in English, to be made and certified by a sworn interpreter or translator; which translation or translations shall be also entered and noted in the Book of Registry by the said Secretary and Registrar, or his lawful deputy or deputies, immediately after the registry of the original thereof; but no deed or other instrument in writing whatsoever (except wills or testaments), which shall be drawn or made at or in the island, shall be made in any other language than English or Spanish.

And if any such deed, or any other instrument in writing shall be made in any other colony or place other than that of the said island, in any other language than English, the same shall be translated into English language by a sworn and licensed interpreter or translator, before it be received or allowed to be registered.

VIII. That all wills, testaments, codicils, or other testamentary papers, may be made and drawn either in the English, Spanish, or French language, at or in the said island; and the same shall be proved before the Governor of the said island, or Lieutenant-Governor thereof, for the time being only; and when so proved, the same shall be respectively translated if made in Spanish or French, into the English language, by such sworn and licensed interpreter or translator as aforesaid, and entered, and noted, and registered, together with the translation and proof thereof, at full length, in the book or books appointed for the registry of deeds and other instruments aforesaid; and shall be indexed and certified to have been registered in such

manner and form, as far as circumstances will admit, as is hereinbefore directed and contained with respect to such deeds or other instruments aforesaid.

IX. That all deeds and other instruments, and all powers of attorney which shall be made in the United Kingdom of Great Britain and Ireland, or in any other place, country, and colony than that of the said island, and which shall or may relate to or concern the selling, alienating, transferring, mortgaging, leasing or otherwise disposing of any real property, or the mortgaging of any personal property within the said island, shall be certified, entered, noted and registered, and sewed, attached, and fixed firmly together, but separate and apart from deeds made in the said island by the said Secretary and Registrar, or his lawful deputy or deputies, in the same manner and form, and according to the directions in that behalf contained and expressed in and by the third, fourth, fifth, and sixth Articles of these Regulations.

And for which purpose, the said Secretary and Registrar shall also provide proper and separate books, with a proper index thereto; and for such registry, as well as of all wills that may be registered as aforesaid, and all other matters relating thereto respectively, the said Secretary and Registrar shall have and receive the same fees, allowances and payments, and shall be subject, in case of any neglect, default, delay, or omission on his part, or of his deputy or deputies, as to any matters relative to, or which may arise out of this Article, to the same pains and penalties as are mentioned, ordained, and expressed in and by the sixth Article of these Regulations.

X. That no contract, deed, mortgage, or agreement whatsoever, by which any claim, estate, right, title, or interest of, in, or to any Slave or Slaves, at or in the island, shall be transferred or passed in any manner whatsoever, shall be taken to be good, valid, or effectual in law, unless the name or names, by and in which such Slave or Slaves may have been returned into the office of, and registered by the Registrar of Slaves of the said island, under and by virtue of the order of His Royal Highness the Prince Regent in Council, of the 26th of March, 1812, shall be contained and respectively inserted in such contract, deed, mortgage, or agreement.

XI. That all deeds, acts, mortgages, *contracts*, and other instruments aforesaid (except wills and testaments), as may be hereafter drawn or made at or in the said island, shall be written or engrossed in a fair legible hand, on good paper, in the form and manner of a book, the size of which paper, as the same is usually folded in quires, shall not be more than thirteen inches in length, nor less than eight inches in breadth.

XII. That certified copies by the said Registrar and Secretary, or his lawful deputy or deputies, of all or any of such deeds, wills, or other instrument in writing, as shall be so registered, noted, and certified under and by virtue of these Regulations, shall be given, taken, received and allowed in evidence in all courts or tribunals of the said island, in the same manner and form as any copy or copies of any public instrument or instruments, now is or are, or by law ought to be received and allowed therein, as full proof of the original or originals thereof, any law, cedula, ordinance, or order to the contrary notwithstanding; save that in case any objection shall be taken to the correctness or authenticity of such copy or copies, the person or persons making such objection, shall be at liberty to compare and examine the same with the original or originals thereof,

in the office of the said Secretary and Registrar, without any fee or reward whatsoever.

XIII. That if any such deed or act, contract, mortgage, lease, or other instrument as aforesaid, shall, from and after the day of the date hereof, be made or drawn at or in the said island, contrary to all, or any, or either of the directions and orders herein-before contained for the making or drawing thereof the same, the same shall not only not be allowed, suffered, or received to be registered by the said Secretary and Registrar, nor by his deputy or deputies, under pain of suspension from his said office, but shall be, as the same are hereby respectively declared to be, null and void to all intents and purposes whatsoever.

And further, I do hereby will and require, and strictly charge and command His Majesty's Chief Judge of the said island, and all other Judges, Courts, and other officers of justice, the Secretary and Registrar aforesaid, and his lawful deputy or deputies, and all other persons whom it doth concern, duly to observe, fulfil and obey this my Proclamation, and to cause the same to be strictly obeyed and observed by all persons within the said island, as to them may respectively appertain, and as they shall answer the contrary at their peril.

And lastly, I do hereby ordain and declare, that this my Proclamation, shall, in virtue of the Proclamation of His Royal Highness the Prince Regent, of the 18th day of December last past, be enregistered in the Book of Records, thereby directed to be kept by His Majesty's Governor and Commander-in-Chief, the Chief Judge, and the Judges of the tribunals established in the said island.

In witness whereof I have hereunto set my hand and seal-at-arms, at Government House, in the Town of Port of Spain in the said island, this fifth day of February, in the year of our Lord One thousand eight hundred and fourteen, and fifty-fourth year of His Majesty's reign.

By His Excellency's command,
PHILIP REINAGLE,
Secretary.

GOD SAVE THE KING.

APPENDIX P.

At the Court at Carlton House, the 6th April, 1818:—*Present, His Royal Highness the Prince Regent, in Council.*

(L. S.)

WHEREAS it is expedient to remove all doubts that may arise respecting the valid execution or registration of deeds, acts, or instruments, whether executed within the island of Trinidad, or out of the said island, and that are intended to take effect within the said island, and to make further provisions for the security and rights of mortgages, and of the purchasers of real property within the same:

And whereas the abstract entry of deeds and instruments containing a mortgage, charge or incumbrance on real property, as required

by the first, second, and third Laws of the 16th Title of the 10th Book of the Novisima Recopilacion of Castille, is no longer requisite, by reason of the establishment of one office only of registry of deeds, in which the accumulation and deposit of all public acts and instruments, as well of mortgage as otherwise, and the recital thereof at length in the protocol kept and preserved in the office of the Secretary and Registrar of the illustrious board of Cabildo, of the Town of Port of Spain, afford full notice of the nature, existence, and date of all such charges, mortgages, and securities on real estate, and property in Slaves, to parties interested therein, without exposing them to the penal consequences of not making, or causing to be made, an abstract note of such mortgages or incumbrances within the time prescribed by the within-recited laws; His Royal Highness the Prince Regent, is pleased, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order and declare, and it is hereby ordered and declared, that from and after the promulgation of this Order in the said Island of Trinidad, no abstract note, or entry, of deeds, acts, contracts, or instruments, shall be required or taken; but that in lieu thereof, and from and after the promulgation aforesaid, three separate books or protocols shall be kept by the said Secretary and Registrar, or his lawful deputy, of nearly the same size and form as is now observed in the protocols of his office: viz. one for receiving and keeping all original wills, made and executed within the said island of Trinidad, and original wills or attested copies of original wills executed out of the said island, and by and under which any estate or interest within the said island is devised and bequeathed, and duly proved according to the law and custom of the place where the will was executed, another book or protocol of all acts, or instruments of mortgage, of what nature or kind soever the same may be; and one other book or protocol for all other acts or instruments required to be protocoled and registered, or which the parties to any act or instrument, may, for their greater security, require to be so protocoled and registered in the said office.

And it is hereby further ordered and declared, That all and every deed, act, or instrument of mortgage, or containing a clause or clauses of mortgage, and all wills, or attested copies of original wills executed out of the said island, and acts of sale, transfer, or alienation of real or personal property, entered, acknowledged, and protocoled, or which shall hereafter be respectively entered, acknowledged, and protocoled in the office of the said Secretary and Registrar, or his lawful deputy, shall and may be inspected and seen by any person requiring the same, on payment of the sum of ten shillings.

And it is hereby further ordered and declared, That all deeds, and other instruments, that in future shall be executed out of the said island of Trinidad, and that are intended to take effect within it, shall, if executed in any part of Great Britain, or its colonies and dependencies, or the United States of America, be executed by the party or parties in the presence of two witnesses, which said execution shall be proved by the oath of one of the said witnesses, at least, before a judge or magistrate of the said countries respectively; and in all such deeds, acts, or instruments, as last aforesaid, as are intended to charge, mortgage, incumber, alienate, or transfer any property in the said island of Trinidad, there shall be contained a power and authority to one or more persons in the said island, jointly or

severally, to appear before the Secretary and Registrar of the illustrious Cabildo, or his lawful deputy in the said island, and in the name of the party or parties thereto, to acknowledge and declare the said deed, act, or instrument, to be the act and deed of the person or persons, party or parties to the said deed, act, or instrument.

And it is hereby further ordered and declared, as to all deeds, acts, or instruments, executed and acknowledged in any other part of the world, and in cases where it is required by the laws and customs of the country wherein such deed, act, or instrument is acknowledged and executed, that the original should be kept and deposited in any protocol, archive, or office in the said country, that then or in such case an authentic copy of the original, certified to be so by a public notary, or other public officer, whose character shall also be certified by a judge or magistrate nearest to the residence or domicil of such notary or public officer, shall be deemed and taken as of equal validity as the original, and shall be admitted to be registered and protocoled in the office of the said Secretary and Registrar of the illustrious board of Cabildo, or his lawful deputy.

And it is hereby further ordered and declared, that from and after the promulgation aforesaid, all such acts and instruments of mortgage, or others containing clauses of mortgage, and acknowledged, admitted, and registered as aforesaid, shall be considered, and are hereby declared, to be duly registered, and to have full force and validity as mortgages, as well against the party mortgaging and encumbering his property, as against third persons claiming by any subsequent title from the day and hour of the delivery and acknowledgment of the same to and before the Secretary and Registrar, or his lawful deputy, and no sooner.

And it is hereby further ordered and declared, That all deeds, acts, or instruments of mortgage, executed out of the said island, but intended to take effect within it, and that have been entered and registered in the office of the Secretary and Registrar, or his lawful deputy, from and after the 5th day of February, 1814, to the day of the promulgation aforesaid, inclusive, shall have, and are hereby declared to have force and effect, and to take rank and privilege as mortgages, from the day and hour in which they were entered and noted in the abstract entry of mortgages in the book kept by the Secretary of the illustrious Cabildo, or his lawful deputy.

And for the greater security and convenience of persons whose deeds, acts, or instruments shall or may be executed out of the island of Trinidad, and are intended to take effect within it, and to remedy the inconvenience to which they may be exposed, by depositing the originals in the office of the Secretary and Registrar of the island, or his lawful deputy, it is hereby ordered and declared, That when, and as soon as an acknowledgement has been taken by the Secretary and Registrar, or his lawful deputy, of such deeds, acts, or instruments by the party or parties, or their duly constituted attorney, or when a copy of any deed, act, or instrument, certified as aforesaid, has been received for registration, then, and in all cases where the party or parties, or their attorney shall so require, and when the original deed, act, or instrument of mortgage, or certified copy as aforesaid, cannot, by reason of its form or structure, be inserted in the protocol or book of mortgages, then it shall be lawful for the Secretary and Registrar, or his lawful deputy, to proceed, with all practicable expedition, to cause an exact and literal copy to be made of such deed, act, or

instrument, together with the acknowledgment of the same, in cases where the acknowledgment of the deed can be had or taken, and to insert the said copy in its due numerical order in the said protocol or book of mortgages, certifying also under his hand, that the same is a true and correct copy of the original, and returning to the parties the said original, with the certificate of registration endorsed thereon, containing the number of the folios, and the number or letter of the book or protocol, or date in and on which the same shall have been acknowledged, admitted, and registered.

And for the more convenient access to, and more general notice of all deeds, acts, or instruments of mortgages, or acts containing clauses of mortgages, or incumbrances, as well as for the more easy reference to wills, or other deeds or instruments, it is hereby further ordered and declared, That the Secretary and Registrar, or his lawful deputy, shall keep three regular and accurate indexes, one containing the names of the parties to all acts or instruments of mortgage, acknowledged and protocoled in his office, with numerical references to the page and year of the protocol in which the same is entered, one referring in like manner to all other deeds, acts, instruments, and contracts, and one other referring to all wills protocoled from and after the promulgation aforesaid; and for the same purpose, it is hereby further ordered, that the books or protocols of wills, or instruments of mortgage, and of other deeds and instruments, shall be concluded at the end of every year, and shall then be durably bound and deposited in the said office, with the year marked on the outside, together with a title descriptive of their respective contents, and that the numerical notation of the folios of each volume shall end with the year to which it belongs.

And it is hereby further ordered and declared, That all powers of attorney, except those for the institution or defence of judicial proceedings only, and made and executed within the said island, shall be entered and recorded in the same manner as is prescribed in this Order, as well as in the Proclamation bearing date the 5th of February, 1814, under the penalty of being considered null and void; and no power of attorney but such as shall have been duly entered and registered as aforesaid, shall be received or presented judicially before any tribunal in the colony.

And it is hereby further ordered and declared, That no erasure shall, on any pretence, or for any cause whatsoever, be at any time permitted to be made in any of the said protocols or books of record; but if any clerical error shall on comparison occur, or any words be omitted in the copying of any original deed or instrument of writing into the said books, that then a line of red ink shall be drawn through the word or words improperly inserted, so as to leave the original word or words legible, and the correction thereof, or any word or words which may have been erroneously omitted shall either be interlined, or written in the margin with red ink, and always, when practicable, by the same hand as the rest of the same writing; and the Secretary and Registrar, or his lawful deputy, shall either under such word or words written in the margin, or under a mark of reference there made to any such interlineation, subscribe his name at length; and as to the deeds, acts, and instruments of every description, that shall be made, drawn, and executed in the said island, and to which a foreigner or foreigners shall be a party or parties, it is hereby ordered and declared, that a sworn interpreter of the colony shall be present at the execution thereof, who shall previously read

over and explain the same in the language known to, or spoken by the said foreigner or foreigners, and in testimony thereof, the said interpreter shall sign the act or instrument.

And it is hereby further ordered and declared, That nothing contained in this Order shall repeal or be taken to repeal the provision and the rules of the Proclamation of the 5th of February 1814, as far as they respect the form and manner in which deeds, acts, and instruments are required to be drawn, entered, acknowledged, and executed, save and except as far as the said provisions are herein specially altered.

And for the further security of purchasers of real property within the said island, and for the prevention of concealment and fraud in the sale and transfer thereof; it is hereby ordered and declared, That whenever any writ or order of execution shall issue and be levied on any such property, from any of the tribunals of the colony, and returned and reported thereto, the Escribano of the court and tribunal in which such writ or order of execution shall have been issued, shall forthwith transmit the original thereof to the Secretary and Registrar, or his lawful deputy, who shall cause the same to be entered and protocoled in the book and protocol of mortgages in his office, and to be indexed in the same manner as other acts and instruments of mortgage are herein-before directed to be entered, protocoled and indexed, the said Escribano first making an authentic copy of the said writ or order, which he shall attach to the autos and proceedings in and by virtue of which the same was issued; the costs of such copy, transmission, and entry, being chargeable against the party or parties against whom, and whose property, the execution was issued, and to be included in the taxation of costs.

And it is hereby also ordered and declared, That when the debt, for which the execution has issued, or any part thereof, has been duly satisfied and noted in the judicial proceedings to which it appertains, the Escribano shall, at the request of the party, defendant or defendants, give a certificate thereof to him or them, who shall then cause the same to be noted in the margin of the said original writ or order of execution by the Secretary and Registrar of the illustrious Cabildo, or his lawful deputy.

And it is hereby further ordered and declared, That at the end of the present, and every future year, the books or protocols of all deeds, acts, and instruments, shall be inspected by one at least of the Judges of the Tribunals of the First Instance in this island, who shall attest the said yearly inspection and approval thereof, by his or their signatures at the end of each book or protocol.

And it is hereby further ordered and declared, That if the Secretary and Registrar of the illustrious Cabildo, or his lawful deputy, shall enter into his protocol, any deed, act, or instrument, requiring acknowledgment, before the same shall have been duly acknowledged, or shall neglect to perform his duty in the execution of any of the matters or things required therein, or commit, or suffer to be committed any undue or fraudulent practice in the execution thereof, then the said Secretary and Registrar, and Secretary of the illustrious Cabildo, on due proof of the same before any competent tribunal, shall be condemned and held liable in double the sum that shall be decreed to be paid in the shape of damage, loss, or prejudice to the party injured, by reason of any such undue and fraudulent practice.

And it is hereby further ordered and declared, That fees of the

Secretary and Registrar of the illustrious Cabildo, or his lawful deputy, shall be taken, and regulated according to the following schedule, and a copy of the same shall be placed in a conspicuous part of his office; and it shall be lawful for the said Secretary and Registrar of the illustrious Cabildo, or his lawful deputy, to demand and have all his fees, before he receives any act or instrument to be entered and protocoled, and before he takes and attests the acknowledgment, or he may refuse to receive the same.

	Currency.
For every acknowledgment or entry of mortgage, or instrument of sale of property, or wills exceeding in value 500*l.* currency	£. 3 0 0
For every like instrument, or will, where the value is under 500*l.* currency	2 0 0
For the acknowledgment and entry of all other deeds and powers of attorney	1 10 0
For the certificate and attestation of the acknowledgment and entry of a foreign or other instrument, or attestation, or certificate of copies, exclusive of the usual fee for the copy	1 0 0
For the acknowledgment of deeds, acts, or instruments, not required by two parties to be registered	1 0 0
For the protocoling a writ of execution	2 0 0
For the noting of payments made in part satisfaction or cancelment thereof	1 0 0
For the Escribano, for a copy of a writ of execution, and attestation thereof	1 0 0

And it is hereby further ordered and declared, That if any deed, act, contract, mortgage, or other incumbrance, executed in the said island, shall, from and after the promulgation hereof, be made or drawn contrary to all or any of the directions or orders contained in the Proclamation of the fifth day of February, 1814; or that if made out of the said island shall be presented for registration, and that shall not be in conformity to the several provisos, directions, and orders, contained in this order, the same shall be deemed and taken, as they are hereby respectively declared to be, null and void to all intents and purposes whatsoever.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

CHETWYND.

A True Copy.

RALPH WOODFORD.

Government House,
30th June, 1818.

GOD SAVE THE KING.

APPENDIX Q.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, 16th September, 1822; present, the King's Most Excellent Majesty, in Council.

Recital of evils in the practice for the trial of civil causes in the tribunals of First Instance.

WHEREAS the present practice prescribed and sanctioned by the laws in force in the Island of Trinidad, for the trial of civil causes in the Tribunals of First Instance established therein, is found to produce great delay and expense; and it is therefore deemed expedient to provide a shorter and less expensive mode of proceeding, and one more comformable to the practice which prevails in the civil tribunals of Great Britain; His Majesty, by and with the advice of His Privy Council, doth hereby order and declare, as it is hereby ordered and declared,

Ordered therefore, that there shall be but one Court of First Instance.

I. That from and after the publication of this order in the said Island, there shall be only one Court of First Instance for the trial of civil matters, those of the Chief Judge and Alcaldes in Ordinary being from henceforth united, and composing only one Court, to be called "The Court of First Instance of Civil Jurisdiction."

How to be composed.

II. The said Court shall consist of, the Chief Judge,
The Judge of Criminal Inquiry,
(when the duties of his office will permit),
and the Alcaldes in Ordinary;
of which said persons, two shall form a Court, but in which case the Chief Judge, or the Judge of criminal inquiry, shall always be one: and this Court shall have full power to hear, try, and determine all civil actions and suits now depending, whether before the Chief Judge or the Alcaldes in Ordinary, as well as all civil suits and actions hereinafter to be instituted in the said Island; the Chief Judge, or in his absence, the Judge of Criminal Inquiry, presiding in the said Court.

When such Court shall be holden.

The said Court shall be holden in the Court House in the town of Port-of-Spain, on the first Tuesday in every month, and shall sit from day to day, until all the actions, ready and standing for trial, shall be disposed of and determined, except in the month of August, and from the 20th day of December to the 1st day of February in every year, during which periods no such Court shall be holden.

How actions instituted shall be entered in the office of the Escribano.

III. All the actions so instituted shall be entered in the office of the Escribano, within the first four days of every month, and all parties defendant shall be bound to appear and answer to any action that may be commenced against them, within nine days after the service of citation; and in case of default being made in such appearance by any such defendant, the cause will, upon the application of the plaintiff by petition, be declared contested, without further notice, and will then be received for proof, and proceeded in accordingly, the defendant nevertheless being at liberty to offer

proof, and to be heard upon the general merits; and in the event of any plaintiff not proceeding in his action within six days after notification of any petition having been put in by any defendant of any action, such action will, upon the application of such defendant, be declared contested, and received for proof, or dismissed, as the case may be.

Directions as to proceedings in all actions in the ordinary process.

And in all actions in the ordinary process, the plaintiff shall be entitled to present two petitions, and the defendant two petitions, and no more: Provided always, that all exceptions, whether peremptory or dilatory, that may be made to any action in the ordinary process, by virtue of the laws now in force, excepting the case provided for in the fifth clause of this order, shall be made in the first petition of the defendant, and not afterwards; and the Court shall either proceed to determine upon the validity of the said exceptions forthwith, or in case that proof thereof should be required, the same shall be admitted, and given in the manner and form prescribed in the fourth and next clause of this order.

All petitions to be signed by advocates.

And no petitions in any stage of the cause shall, upon any pretence whatsoever, be received by the Escribano, unless signed by one of the advocates practising in the tribunals.

Names and places of abode of witnesses to be lodged with the Escribano within three days after the process is declared to be contested, &c.

IV. As soon as a civil action in the ordinary process shall have been declared contested, each party shall, within three days after such contestation, lodge with the Escribano a list, containing the names and places of abode of their respective witnesses, and the same being laid before the Court, and citation being duly issued to such witnesses, the cause shall be set down for trial on the first convenient day, (reference always being had to the actual residence of the witnesses summoned, and notice of the day of trial being given by the Escribano to the parties and their advocates), on which day the witnesses, being first duly sworn, shall be examined, and their answers taken in open Court, and correct minutes thereof shall always be taken by one, at least, of the Judges, and by the Escribano of the cause: the proofs being concluded, and, unless the Judge presiding in the Court shall deem it necessary to require written allegations of proof, the advocates of both parties being heard in support thereof, the Court will proceed to give sentence forthwith, or in case that they should signify their wish to deliberate, a term, not exceeding six days, inclusive, is allowed for that purpose, and for the delivery of the sentence.

In all trials the majority of voices to determine, and in points of law the Judge to decide.

And in all such trials, the majority of voices shall determine the question at issue, provided always that in cases of equal number, or of points of law, the opinion of the Chief Judge, or of the Judge of Criminal Inquiry, when presiding in his absence, shall prevail.

Regulations as to the proceedings in the executive process.

V. That in all proceedings in the executive process, in which the personal appearance of the defendant is by law required for any judicial acknowledgment, such defendant failing to appear within three days after citation duly served, if an actual resident within the town or suburbs, or within nine days, if resident in the country, unless a longer time shall from his residence in a very remote part of the Island be appointed by the Judge, the plaintiff shall, on application, be allowed to establish his demand in a summary manner *ex parte*, without any further citation to the defendant, and upon such summary proof, the Judge shall issue his decree for payment without further notice; but that upon citation to the sale of the property taken and levied on in execution, the cause shall be proceeded in, in the same manner as causes in the ordinary process, and subject

to all the rules and regulations hereinbefore contained, respecting proceedings of that nature: Provided always, that in alleging their exceptions to the sale of the property taken in execution in actions that have been originally proceeded in in the ordinary process, parties shall be confined to the allegations of such exceptions only as relate to the right or title of the defendant, to the property taken in execution, but shall not be again heard on the merits of the cause.

Nullities of sentence pronounced, not allowed to be alleged.

And from and after the promulgation of this order in the said Island, parties in suits shall not be allowed to allege any nullity against any sentence to be pronounced by the said Court; but all nullities which parties in suits might heretofore lawfully allege or assign in any manner or for any cause whatsoever, shall and may be alleged or assigned by such parties, as cause and by way of appeal from any definitive sentence, or such as may have the force and effect thereof, to be pronounced by the said Court, in the manner, time, and as admitted in cases of appeal by the laws, ordinances, and proclamations in force in the said Island.

The service of citations on parties or witnesses regulated.

VI. All citations, whether to parties or to witnesses, shall be served in such manner and within such period, and the witnesses shall appear, of whatever rank or condition they may be, under such penalties or compulsory process as the Governor exercising the powers of the Royal Audience, or in his absence the Lieutenant-Governor or Officer administering the Government, shall proclaim and publish; such witnesses being indemnified by the parties in such manner and to such extent as the Court shall direct; and a witness shall not be bound after such appearance in Court, to give his evidence until his reasonable expenses to be adjudged by the Court, be, if required in open Court, paid by the party that summons him, unless the said witness shall be ordered by the Court to give his evidence.

Provisions as to incompetent witnesses.

VII. And whereas by the several laws now in force in the said Island, many persons are declared to be incompetent witnesses in respect of relationship or consanguinity to the party in whose favour they may be called, and for other causes mentioned in the said laws, and that two competent witnesses, and not less, shall be required to constitute full and complete proof; with a view, therefore, of facilitating such proof in all civil actions to be hereafter instituted in the tribunals in the said Island, His Majesty doth further order and declare, that from and after the promulgation of this order in the said island, the positive testimony on oath of any one free credible person competent according to the law of England to give evidence in such case, shall be received in the tribunals of civil jurisdiction, as good and sufficient evidence in support of the matters in proof whereof such witness shall have been called, any law or practice to the contrary notwithstanding; it being always understood that the competence of every witness, as well as the degree of credit that is to be given to his testimony, are questions that are open for examination as well as argument, and that are finally to be decided by the Court.

Fines and penalties imposed by the civil or criminal tribunals to be deposited in a chest, and ac-

VIII. And His Majesty doth hereby further order, declare, and direct, that all fines and penalties imposed by the civil or criminal tribunals, either under the authorities under which they are now to be established, or by virtue of the laws in force, shall be deposited in a chest to be applied to the payment of the ex officio criminal inquiries and prosecutions, and such other services as the

law directs under the authority of the respective Courts, an account of which shall be kept by the Escribano, and such account shall be audited and passed annually by the Chief Judge, and presented to the Governor exercising the powers of the Royal Audience, on or before the first day of February in each and every year, for his approval and confirmation; and in case of any default or neglect on the part of the Escribano, in not making up and presenting such account, within the period herein-before limited, such Escribano shall be subject to a fine not exceeding two hundred pounds currency of the said Island, to be imposed by the Court or by the said Governor.

counted for as herein mentioned.

IX. And whereas, it is impossible to provide specially for every case that may happen, or to determine all points of practice in the body of this order, it is hereby further ordered, declared, and directed, that in cases not herein or hereby sufficiently provided for, it shall be in the power of the Judges of the tribunal, or the majority of them, with the approval of the Governor exercising the said powers of the Royal Audience, to make and establish such rules, for guiding the practice of the said Court, as shall be found most conducive to the more speedy and better administration of justice; all such rules being published, or entered by the Escribano in a book to be kept by him for that purpose, which book the Escribano shall always produce in Court; and provided that such rules be duly transmitted to one of His Majesty's Principal Secretaries of State, for His Majesty's confirmation or refusal, such rules being nevertheless valid until His Majesty's pleasure thereon be signified.

Judges of the tribunals to establish rules of practice.

X. And as it may be found expedient that the practice of taking out copies of petitions filed in the Court, or of documents attached thereto, should be introduced, power is hereby given to the Chief Judge to make any special, or with the consent of the Governor, any general order therein, as circumstances may appear to them to warrant, such general order being in like manner duly notified to one of His Majesty's Principal Secretaries of State.

Practice as to taking out copies of petitions filed in Court regulated.

XI. And whereas the laws in force, invest the Oidors with a discretionary power to correct any excessive charges of advocates or solicitors practising in the tribunals; His Majesty deems it fit, not not only to continue such authority to the Judges presiding in the several Courts, but also to direct that the charges taxed to either party in the judicial costs of any civil action, shall not in any case exceed the sum set down in the annexed Schedule, and that there be a corresponding tariff likewise established for the solicitors, that may be licensed to practice in the said tribunals.

Fees allowed to advocates and others practising in this Court.

SCHEDULE of FEES for Advocates practising in the Civil Tribunals of Trinidad.

For the first petition - -	£. Cur.	20	0 0
Answer or contestation - -		20	0 0
Duplica - - - -		15	0 0
Replica - - - -		15	0 0
Estrados.			
Attendance, examination of witnesses, and argument for either party - -		20	0 0
In Concursos.			
For attendance on behalf of each creditor		4	0 0

No petitions to be presented for the sight of proceedings or for declarations of contumacy, but applications for the same to be made verbally in open Court, and for every such motion the advocate will be allowed £2.

COURT OF APPEAL.

For the first petition - - -	£	4	0 0
Escrito of agravios - -		50	0 0
Reply - - - -		50	0 0

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG.

Government House,
Trinidad, 16th January, 1823.

GOD SAVE THE KING.

The foregoing order was duly proclaimed and published in the town of Port-of-Spain, on the sixteenth day of January, 1823, by the Alguacil Mayor.

ARETAS WILLIAM YOUNG.

APPENDIX R.

TRINIDAD.

By His Excellency Sir RALPH JAMES WOODFORD, Bart., Governor and Commander-in-Chief in and over the said Island and its dependencies, Vice Admiral thereof, exercising the Powers of the Royal Audience, &c. &c. &c.

RULES for the Court of First Instance of Civil Jurisdiction.

RULE FIRST.

ALL petitions of actions shall describe the parties and the character in which they sue or are sued, and shall also declare their respective abodes. They shall be accompanied by the instruments, documents, or accounts, upon which they shall be founded.

The Escribano shall number the petition, and thereupon enter the said number, together with the names of the plaintiff, his advocate, that of the defendant, and the time of filing the petition, in a book of record, to be kept for that purpose, and sign his initials to the said entry: and thereupon he shall prepare a writ of citation or summons, in the name of the King, tested in the name of the Chief Judge, or, in his absence, of that of the Judge of Criminal Inquiry, signing the same; which summons shall be directed to the Alguacil Mayor, in the following form,—that is to say:

" *GEORGE the FOURTH, &c.*

" *To the Alguacil Mayor of the Island of Trinidad*—GREETING:

" *We command you, that you do cite and summon* A. B. [describing the party defendant, and his residence], *to be and appear before our Court of First Instance of Civil Jurisdiction, within days from and after the service of this writ, then and there to answer a certain action commenced against him by* " C. D. [the Plaintiff, describing him,] *by his Petition, a true copy* " *whereof is hereunto annexed.*

" *And hereof you will not fail, as you will answer the contrary at your peril.*

" *Witness Judge of our said Court,* " *at Port of Spain, the day of in the* " *year of our reign.*

" *By the Court, Escribano.*"

Which writ of citation or summons, together with one true copy thereof, as well as a copy of the petition, presented on behalf of the plaintiff, or in case of there being more defendants than one, in such action, as many copies of the citations as there may be defendants shall be forthwith prepared by the Escribano, and shall be delivered by the Escribano to the Alguacil Mayor, within four days after the entry of such action: and the Alguacil Mayor will cause the copy of the summons to be served upon the defendant in such action; or upon each and every defendant, if more than one, at the same time minuting upon the original, the date of such service; which service having been duly made, the Alguacil Mayor will return the original summons into the office of the Escribano, to be by him immediately attached to the petition filed by the plaintiff.

And the said Alguacil Mayor shall at the time of returning such summons, be sworn before one of the Judges of the Court, to the truth of the certificates minuted by him or by his assistants upon such summons, and of the due service of the action.

RULE SECOND.

Every writ of summons or citation shall be served on the party defendant, personally, or be left at his usual place of abode; but in case such party defendant shall be absent from the jurisdiction, but shall have left a power of attorney (recorded in the Secretary and Register's office), the said summons or citation shall be served upon such attorney; but in case such absent defendant shall not have left any power of attorney authorizing any person to represent such party, then the summons or citation shall be served upon the defender of the absent, and such service shall be made by the Alguacil Mayor within such periods as are declared by the Schedule annexed.

RULE THIRD.

When in all actions commenced in the ordinary process in which defendants are required to answer by petition within nine days after service of the action, the defendant shall put in his plea in answer to the action, the same shall be filed by the Escribano, and attached to the original proceedings, and the date of filing thereof shall be minuted by the Escribano, upon the said plea or answer, and notice thereof be given forthwith by the said Escribano to the plaintiff, by delivering to the said plaintiff a copy of the answer, and minuting such delivery upon the original proceedings.

To the plea or answer of the defendant, the plaintiff shall reply within six days after the receipt of such answer, and the plaintiff shall file his Replica within the like term, in the office of the Escribano, a copy whereof shall be forthwith served on the defendant, who shall rejoin thereto within six days, in default whereof and upon the application of the plaintiff by motion, the cause shall be declared, contested, and proceeded in.

RULE FOURTH.

All writs of summons or citation to witnesses shall issue in the name of the King, tested in the name of the Chief Judge, or, in his absence, in that of the Judge of Criminal Inquiry, and be signed by the Escribano; and the same shall be in the form following:—that is to say,

"*GEORGE the Fourth, &c.*

"*To E. F. and G. H. &c.*—GREETING.

"*We command you, each and every of you, that laying aside all* "*business and excuses whatsoever, you, and each and every of you be* "*and appear in your own proper persons before our Court of* FIRST IN- "STANCE OF CIVIL JURISDICTION, *to be holden at the Court House in* "*Port-of-Spain in the said Island, on the day of* "*now next ensuing, then and there to testify* "*the truth, according to your knowledge in a certain cause now depend-* "*ing in our Court, wherein C. D. plaintiff and A. B.* "*is defendant, for and on behalf of the said plaintiff or defendant,* "[as the case may be] *in the said cause; and this you, or any of you,* "*shall in no wise omit, under the penalty of fifty pounds.*

"*Witness, the Honourable our Judge of* "*our said Court, at Port of Spain, the day of* "*in the year of our reign.*

"*By the Court.*

Escribano."

Which said writ of summons or citation, together with as many copies thereof as there may happen to be witnesses therein named, shall be delivered by the Escribano to the Alguacil Mayor, upon the application of the party on whose behalf such witnesses shall be summoned: and the said Alguacil Mayor shall serve a copy of such writ of summons or citation upon such witnesses, and upon each and every such witness, within such and the same times after the delivery of such summons to him by the Escribano, as are by the second rule directed and provided with respect to citations of the parties defendant with reference to the respective place of residence of such parties. And the Alguacil Mayor shall note every such service, with the respective dates thereof, upon the original writ of summons or citation; and when all the witnesses whose names shall be contained in such writ of summons or citation shall have been duly cited by the Alguacil Mayor in manner herein-before directed, the said Alguacil Mayor shall forthwith return the original writ of summons or citation into the office of the Escribano, who at the time of such delivery shall swear him to the truth of such return.

And the original writ of summons or citation shall be attached by the Escribano to the proceedings in the cause: and in all cases, whether of principals or witnesses, the return of the Alguacil

Mayor, duly sworn, shall be received and taken as full proof and notice of service of summons or citation.

And if any witness who shall have been duly cited shall neglect or refuse to attend, not being sick or otherwise disabled, of which sickness or disability due and sufficient proof must be afforded to the satisfaction of the Court, such witness shall not only be subject to a fine at the discretion of the Court in a sum not exceeding fifty pounds currency, but be brought up in custody of the Alguacil Mayor at the expence of such witness, and such witness shall also forfeit all right or claim to the repayment of any expenses he may incur, or to any allowance on account of loss of time to which he might have claimed to be entitled had he attended, the cause being in the mean time suspended.

RULE FIFTH.

In all cases where application shall be made by any party to postpone a trial on the grounds of the alleged absence of any witness stated to be material, the party applying for such postponement shall make oath before the Court, that the testimony of such witness is material in proof of his case, and that he cannot safely go to trial without such testimony, and further that the application is not made for the mere purpose of delay; the point of the case in support whereof the evidence of the witness is alleged to be material, being also stated; and the party shall also shew that citation to such witness was duly issued.

RULE SIXTH.

In case any judgment or decree to be pronounced by the Court shall not be duly and in all respects complied with or fulfilled by the party or parties against whom the same shall have been pronounced, within fifteen days after such judgment or sentence have been pronounced, execution shall issue upon motion of the party in whose favour such judgment or decree was given; and affidavit made by him of the amount justly due and owing under or by virtue of such judgment or decree; and all property whatsoever taken in execution, shall be sold in such manner and at such time as shall be directed by the Court, subject to the several laws and ordinances in respect thereof in force in this Island.

RULE SEVENTH.

All citations to sale shall be made upon the return of the writ of execution, and motion made as of course by the party in whose favour such execution shall have issued; and all such citations shall be served upon the party whose property may have been taken in execution, by the Alguacil Mayor, in the same manner and form, and within the times directed respecting the service of any original summons or citation, according to the Schedule.

RULE EIGHTH.

That for the future no original proceedings whatever shall be permitted to be passed from the office of the Escribano to any party whomsoever; but the Escribano will permit access to be had to them in his office during office hours, by any party requiring the same, or his advocate.

RALPH WOODFORD. ANTONIO GOMEZ.

Before me, JOHN CARTER,
Escribano de Camara.

28th February, 1823.

SCHEDULE FOR THE SERVICE OF THE WRITS.

Whether of Parties or of Witnesses.

In Port of Spain and the suburbs	3 *Days.*
Between the suburbs of Port-of-Spain and Chaguaramas or the islands forming the Bocas	10 *Days.*
Between the suburbs of Port-of-Spain and Guanapo	10 *Days.*
Between Port-of-Spain and Guapo	14 *Days.*
Between Port-of-Spain, Hicacos, and Erin	20 *Days.*
Between the Bocas and Toco by sea, and between Toco and Guayaguayare	30 *Days.*

FEES.

To the Escribano.

	Currency.
For the first petition and recording the action	£0 10 0
For the copy of any petition or document, for 120 words	0 1 0
For filing the return of witnesses	0 10 0
For receiving, dating, filing, and attaching every subsequent petition	0 5 0
For every notice of trial or argument	0 5 0
For attending a Court, per hour, when not otherwise remunerated	0 5 0
For taking minutes of evidence, each witness	0 5 0
For recording a motion in Court, with the Order thereon	0 6 0
For writ of execution	0 10 0
For recording a sentence	1 0 0
For every affidavit or declaration of acknowledgment	0 5 0
All acts of security	0 10 0
For sales of estates	1 0 0
———of houses	0 10 0
For sales of Slaves, or of personal property	0 5 0
Printed summons or citation	0 2

Alguacil Mayor.

For serving a writ in Port of Spain or the suburbs	£0 6 0
For every mile within 10 miles from Port-of-Spain, an addition of, per mile	0 1 0
For 10 miles and within 20 miles	0 1 6
Beyond 20 miles, for every mile	0 2 0

RALPH WOODFORD. ANTONIO GOMEZ.

Before me, JOHN CARTER,
Escribano de Camara.

APPENDIX S.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, 5th August, 1822; present, the King's Most Excellent Majesty, in Council.

Order in Council of the 8th of June, 1816, recited,

WHEREAS by an Order in Council, bearing date the 8th day of June, 1816, the privilege of tacit mortgage that had been allowed to creditors of refaccion and supply in the Island of Trinidad, by virtue of the twenty-eighth law of the thirteenth title of the fifth Partida, was limited to two years preceding judical demand for the same; and whereas the preference that such privilege affords to the said creditors of supply over creditors by special mortgage has been found to be prejudicial to the interests and credit of the inhabitants of the said island, and subversive of the good faith by which public credit can alone be supported.

and repealed,

His Majesty, by and with advice of his Privy Council, is thereupon pleased to order and declare, that from and after the publication in the said island of this order, all privilege or preference in favor of any article of supply that shall be furnished subsequent to the date of the said publication, and all privilege and preference that has hitherto been accorded by virtue of the Spanish law, or of any custom prevailing in the said island, in the nature of lien and tacit mortgage, whether as arising from the nature of the debts themselves, or the character of the parties claiming the same, (except as hereinafter excepted) shall, as matter of right and privilege, cease and determine.

except as hereinafter excepted.

But this is not to affect the preference and tacit mortgage accorded to debts due to the King, the Cabildo, Widows or Minors, if duly registered —nor claim of preference for debts of supply within two years before the date of this order, or any privileged creditor already adjudged.

Provided always, that nothing herein contained shall affect, or be construed to affect, the preference and tacit mortgage accorded by the Spanish law, to all debts due, and to become due, to his Majesty, his heirs and successors, of whatever nature the same may be; nor the preference and tacit mortgage of all debts due and payable to the Illustrious Cabildo of the town of Port-of-Spain, in the said island; nor the preference and tacit mortgage accorded to widows for their dotal property, and to minors for their property, provided that the acts or instruments, by which the same have been conveyed or secured, shall be duly registered: and provided always, that nothing herein contained shall be construed to affect any claims of preference for such debts of supply and refaccion, as have arisen under and by virtue of the existing laws and regulations, within two years next preceding the publication of this order: and that may have been, or that may be judicially demanded at or before the expiration of the said two years, nor affect any such claims of privileged creditors already adjudged by any of the courts of the said island, and that yet remain due and unsatisfied, or any such claims as are now depending therein: provided always, that the Court or Courts before whom any claim of privilege or preference either in favor of any debt or of any person, shall hereafter be prayed (save those claims hereinbefore specially excepted), shall have full powers to consider and decide the same according to the principles of equity and good conscience.

Order in Council of 9th March, 1815, recited,

And whereas, by an Order in Council, bearing date the 9th day of March, 1815, it was ordered and declared, that from and after the 1st day of June, 1816, whenever it should appear that any estates in the Island of Trinidad used or employed altogether, or in parts, in the cultivation of sugar canes, cocoa, or coffee, should, at the time of an execution made for debt, be found indebted to one or more person or persons to the amount of two-thirds of the just and true value of the said estates, the said value to be taken according to the directions of the said order, that execution might then lawfully issue against such estates: and whereas, by another Order in Council, bearing date the 27th day of November, 1815, further directions were issued respecting the manner in which the value of the said estates should be taken: and whereas, the provisions of the said several orders have not been found effectual in giving protection to just creditors, and have obstructed and too much delayed the recovery of their demands: and whereas, it is expedient to afford the same protection and facilities for the recovery of debts in the said Island of Trinidad, that exist and have prevailed in the other islands of the West Indies, as far as circumstances will permit; it is hereby further ordered and declared, by and with the advice aforesaid, that from and after the first day of January, 1825, it shall and may be lawful to proceed to issue execution against sugar, cocoa, coffee, or other estates, within the said Island of Trinidad, or against any parts or portions of the same, whether they consist of Slaves, machinery, utensils, or any other description of property, found and being thereon at the time of execution; and after citation lawfully made, to proceed to the sale of the whole, or such parts or portions as shall be found sufficient for the satisfaction of the said execution, without reference to the value of the said estates, or to the amount in which they may be indebted: provided always, that it shall be lawful for the Court out of which such order of execution shall have issued, to give such orders for levying the same as shall appear to the said Court to be the least prejudicial to the future cultivation of the said estate, and to the welfare of the slaves that are attached thereto: and provided always, that it shall in no case be lawful to proceed to the sale of the whole of an estate, its slaves, machinery, and appurtenances, when taken in execution as aforesaid, until after the expiration of three months from the date of the return of the said execution to the Court, from whence the same shall have issued: and provided always, that nothing herein contained shall prevent or be understood to prevent the Court or Courts, out of which execution shall have issued against the said estates, from considering any equitable ground or circumstances for staying the sale of the whole or any part thereof.

and another order of 27th Nov. 1815, recited, both of which have been found ineffectual.

It is therefore ordered, that after the 1st of January, 1825, it shall be lawful to issue execution against sugar, cocoa, coffee, or other estates, &c.

But the Court may give orders for levying in the least prejudicial manner, the whole of an estate not to be sold till after the expiration of three months.

Court may stay sale.

Temporary care and support of Slaves pending any action or process.

And whereas, it is expedient to provide for the temporary care and support of Slaves pending any action or process brought against their owners and proprietors, and to protect the said Slaves from the consequences of the embarrassment and inability of their owners to support and maintain them: it is hereby further ordered, that it shall be lawful for the Court before which such action or process shall have been brought, or be depending, and upon the application of the proprietor of the Slaves or estates, or of the official defender of Slaves in the said island, to make order for the subsistence, clothing, and medical attendance of the Slaves of the said proprietor, and for the payment of the salaries of the managers and overseers; and it is hereby declared, that all such charges that shall have been so ordered, and that have been incurred between the commencement of the actions

and the sale of the said Slaves or estates, and that shall have been approved by the Court as reasonable, customary, and moderate, shall be a lien and incumbrance upon them respectively, and shall be paid and satisfied out of the proceeds in preference to all and any incumbrances whatever.

Certain Spanish laws contrary to this order repealed.

And it is hereby ordered and declared, that the 5th law of the 14th title of the 5th book of the Recopilacion de las Leyes de los Reynos de las Indias, and all or any other laws and usages, and so much of the said herein-recited orders in Council as are contrary to the provisions of this order, shall, from and after the first day of January, 1825, be, as they are hereby declared to be, repealed. And the Right Honourable the Lords Commissioners of His Majesty's Treasury, and the Right Honourable Earl Bathurst, one of His Majesty's principal Secretaries of State, are to give the necessary directions herein as to them may respectively appertain.

C. GREVILLE.

A True Copy.

ARETAS WILLIAM YOUNG.

Government House, Trinidad,
16th January, 1823.

GOD SAVE THE KING.

The foregoing order was duly proclaimed and published in the town of Port-of-Spain, on the ninth day of December, 1822, by the Alguacil Mayor.

ARETAS WILLIAM YOUNG.

HERBERT MACKWORTH, *Alguacil Mayor.*

APPENDIX T.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

A PROCLAMATION.

WHEREAS, by our commission, or letters patent, under the great seal of England, bearing date at our Court at St. James's, the 31st day of October last past, we did, in the name and on the behalf of His Majesty, constitute and appoint our trusty and well-beloved Sir Ralph James Woodford, Bart. to be our Governor and Commander-in-Chief in and over His Majesty's said Island of Trinidad, as well as of all our forts and garrisons within the same, as in and by the said in part recited commission or letters patent, and our instructions therein mentioned and referred to will more fully appear. And whereas we, acting in the name and on the behalf of His Majesty, have thought fit to issue

this our proclamation: we do, therefore, hereby, in the name and on the behalf of His Majesty, publish, declare, and proclaim, that for the present, and until our pleasure shall be further signified, the administration of justice and police, in our said island should, as nearly as circumstances will permit, be exercised by our said Governor, in conformity to the ancient laws and institutions that subsisted within the same, previous to the surrender of the said island to us, subject to such alterations, regulations, and improvements, as may have been since made and approved of by us: and subject, also, to such directions as our said Governor shall have received, or may hereafter receive from us, under our signet, or sign manuel, or by our order in our Privy Council, or through one of our principal Secretaries of State; or to such deviations in consequence of sudden and unforeseen emergencies as may render a departure therefrom manifestly expedient. But it is, nevertheless, our special command, that all the powers of the executive government within the said island, shall be vested solely in our said Governor, or in the person having the government of the said island for the time being; and that all such public acts and judicial proceedings which before the surrender of the said island to us were in the name of His Catholic Majesty, shall henceforth be done, issued, and performed in our name: and that the same Courts of Judicature which subsisted in the said island previous to the surrender thereof to us, shall be continued in the exercise of all the judicial powers belonging to them, in all criminal and civil cases, and that they shall proceed according to the laws by which the said island was then governed, and that such judicial powers, as previous to the surrender of the said island to us were exercised by the Spanish Governor, shall be exercised by our said Governor in the like manner as the same were exercised previous to the surrender of the said island. And our said Governor is authorised, in all cases, civil and criminal, where the due administration of justice requires it, to exercise the authorities and jurisdiction whether appellant or original which were heretofore exercised by the Court of the Audiencia in the city of Caracas. And whereas, it appears to us expedient that our said Governor should form a court of civil jurisdiction for hearing and determining appeals within our said island: our will and pleasure, therefore, is, and we do hereby further proclaim and declare, that our said Governor do, in all civil causes, on application being made to him for that purpose, permit and allow appeals from any of the inferior Courts of law in the said island unto him. Provided nevertheless, that in all such appeals, the sum or value appealed for do exceed the sum of two hundred pounds sterling, and that security be first duly given by the appellant, to answer such charges as shall be awarded, in case the first sentence be affirmed: and in case any litigant party shall not rest satisfied with the judgment of our said Governor, they may then appeal unto us in our privy council, provided the sum or value so appealed for unto us, exceeds five hundred pounds sterling, and provided that such appeals be made within fourteen days after sentence, and good security be given by the appellant, that he will effectually prosecute the same, and answer the condemnation; and also pay all such costs and damages as shall be awarded by us in case the sentence of our said Governor be affirmed. Provided nevertheless, where the matter in question relates to our prerogative or to the taking or demanding any duty payable to us or any fee of office or annual rent, or other such like matter and thing where our rights in

future may be bound, in all such cases, our said Governor is to admit an appeal to us in our Privy Council, though the immediate sum or value appealed for be of less value.

And that in all cases where our said Governor is to admit appeals to us in our Privy Council, execution shall be suspended until the final determination of such appeal, unless good and sufficient security be given by the appellant to make ample restitution of all that the appellant shall have lost by means of such judgment or decree, in case upon the determination of such appeal, such decree or judgment shall be reversed, and restitution awarded to the appellant.

And our said Governor is also to permit appeals unto us in our Privy Council, in all cases of fines imposed for misdemeanours, provided the fines so imposed, amount to, or exceed the sum of one hundred pounds sterling, the appellant first giving good security that he will effectually prosecute the same, and answer the condemnation of the sentence by which such fine was imposed in the said island, if it shall be confirmed.

And that justice may be duly and impartially administered to all the inhabitants of the said island, our said Governor shall take especial care in the appointments of the persons who are to be judges or officers of the said Courts, that the same be fit and proper persons, and cordially disposed to our person and the government of the said island, as established by our said commission and instructions; and well and duly qualified to execute the duties of their several stations. And we do particularly require our said Governor to take especial care that all disorders, delays, and other undue practices in the administration of justice, be effectually prevented in the Courts established within the said island; and that all judges and other persons therein concerned, do perform their several duties without delay or partiality. And lastly, we do hereby, in the name and on the behalf of His Majesty, will, and require, and strictly charge and command all courts, tribunals, judges, justices, alcaldes, magistrates, and all other officers and ministers of justice, and all other his Majesty's loving subjects within the said island, to duly obey and observe the same, and to govern themselves accordingly.

Witness his Excellency Sir Ralph James Woodford, Bart. our Governor aforesaid at Port-of-Spain, in the said Island of Trinidad, and given under the great seal thereof, this nineteenth day of June, in the year one thousand eight hundred and thirteen, and in the fifty-third year of His Majesty's Reign.

(Signed) RALPH WOODFORD.

By his Excellency's command,

(Signed) PHILIP REINAGLE,

Secretary.

APPENDIX U.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

(L. S.)

A PROCLAMATION.

WHEREAS, doubts have arisen, and may in future arise, respecting the nature and extent of the jurisdiction, civil as well as criminal, to which all persons serving in his Majesty's regular army, and stationed in our Island of Trinidad, are amenable and liable to; for the removal of the same, and the evil consequences arising therefrom,

We having taken those circumstances into our consideration, at a Court held at Carlton House, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and fourteen, have thought it expedient in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order, proclaim, and declare, as it is hereby ordered, proclaimed, and declared, that from and after the promulgation of this our proclamation, the cognizance of all civil acts, actions, contracts, inheritances, wills, inventories, obligations, and all other civil acts, executed, made and entered into by all or any such person or persons so serving and stationed as aforesaid, or in which they shall be in any wise interested or concerned, shall belong and appertain to the several tribunals of ordinary jurisdiction now established in our said Island of Trinidad, and that in all and every such cases, the said persons are to be deemed and taken, and are hereby declared to be amenable and answerable for the same. And we do hereby further order, proclaim, and declare, that the cognizance of all criminal offences not provided for or made punishable by the several mutiny acts passed, and to be hereafter passed by the Parliament of the United Kingdom of Great Britain and Ireland, of and with which any person so serving, and stationed as aforesaid, shall be charged and accused, or suspected, shall in future exclusively belong and appertain to the tribunal of our Governor and Commander-in-Chief of the said Island of Trinidad for the time being, or Lieutenant Governor of the same, accompanied by his assessor, and to no other tribunal.

And we do hereby further order, and proclaim, and declare, that the several exceptions created and made by the Spanish law in such criminal cases as aforesaid, whereby they become cognizable by the civil jurisdiction, be as the same are declared to be henceforth repealed and annulled.

And we do hereby further order, and proclaim, and declare, that these our presents be in virtue of our proclamation of the eighteenth day of December, one thousand eight hundred and thirteen, enrolled and registered in the books of record that are thereby directed to be kept by our Governor, and by the respective judges of our several courts or tribunals, established and in force, or to be hereafter established and in force, within our said Island of Trinidad.

And lastly, we do hereby, in the name and on the behalf of His

Majesty, will, and require, and strictly charge and command our Governor, or the officer that may now, or at any time hereafter, have the command of His Majesty's troops in the garrison in our said island, the judges of all our courts, and tribunals thereof, the Commandants of quarters, all our officers civil and military, and all other His Majesty's loving subjects within the said island, duly to obey and observe these presents, and to govern themselves accordingly.

Witness His Excellency, Sir Ralph James Woodford, Bart., our Governor, and Commander in Chief, in and over the said Island of Trinidad, at Port of Spain, and given under the Great Seal of the said island, this ninth day of February, in the year of our Lord one thousand eight hundred and fifteen, and in the fifty-fifth year of his Majesty's Reign.

RALPH JAMES WOODFORD.

By His Excellency's command,

P. REINAGLE,
Secretary.

GOD SAVE THE KING.

APPENDIX V.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

(L. S.) A PROCLAMATION.

WHEREAS, by Royal Instructions of His Catholic Majesty, bearing date at Aranjuez, June 20, 1776, paragraph 52 of the same, reciting, that it was customary for many persons to make application to the regents (*oidores regentes*) for expediting causes, which, from their nature, do not require the formalities of a regular process, and especially in the causes of poor persons:

It was thereby ordained, that it should be lawful for the said Regents to entertain such summary processes, and to decide upon them in all cases when the matter in dispute did not exceed the sum of five hundred dollars.

And whereas, we have deemed it expedient that His Majesty's Chief Judge of our said Island of Trinidad, should have similar jurisdiction over all cases of the like nature, wherein the matter in dispute shall not exceed the sum of one hundred dollars:

We, therefore, acting in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, have thought fit to issue this our

PROCLAMATION;

And we do hereby order, declare, and decree, that from and after

the day of the date hereof, His Majesty's Chief Judge of our said Island of Trinidad, shall have such jurisdiction as above mentioned, over all civil causes wherein the matter in dispute shall not exceed the sum of one hundred dollars, and shall decide all such cases in a summary and verbal manner; and the said Chief Judge is hereby authorised to make such rules and regulations for the said Court of Complaint as he may judge proper, subject, however, to the approval of our Governor and Commander in Chief of our said island.

And further, we do hereby, in the name and on the behalf of His Majesty, will and require, and strictly charge and command, all courts and tribunals, our said Governor and Commander in Chief, our Chief Judge, the Alcaldes in Ordinary, and all the officers and ministers of justice, now or hereafter to be appointed, and all other His Majesty's subjects within the said island, duly to observe the same, and to govern themselves accordingly.

And lastly, we do hereby further order and declare, that these our presents shall, in virtue of our former Proclamation of the 18th of December last past, be enregistered in the book of records, directed thereby to be kept by our said Governor, the Chief Judge, and the Judges of the Tribunals established in our said island.

Witness His Excellency Ralph James Woodford, Bart., Governor and Commander in Chief in and over our said Island of Trinidad, and given under the Great Seal thereof, this fifteenth day of February, one thousand eight hundred and fourteen.

RALPH JAMES WOODFORD.

By His Excellency's command,

PHILIP REINAGLE,

Secretary.

GOD SAVE THE KING.

APPENDIX W.

At the Court at Carlton House, 17th of September, 1817: Present His Royal Highness the Prince Regent in Council.

WHEREAS, His Royal Highness the Prince Regent was pleased, by his Order in Council, bearing date the 2nd of November, 1813, in the name and on the behalf of His Majesty, to order and appoint that His Majesty's Chief Judge of the Island of Trinidad, should have jurisdiction to entertain summary processes in all civil causes wherein the matter in dispute should not exceed the sum of one hundred dollars; and whereas, for the convenience of suitors, and the reduction of expenses to them in the recovery of debts, it has been found expedient that the jurisdiction so given by the above recited Order, should be extended to all civil causes wherein the matter in dispute should not exceed the sum of five hundred dollars; His

Royal Highness the Prince Regent is thereupon pleased, by and with the advice of His Majesty's Privy Council, to order and appoint, and it is hereby ordered and appointed, that His Majesty's Chief Judge in the said Island of Trinidad shall have such jurisdiction as is mentioned in the said recited order over all civil causes wherein the matter in dispute shall not exceed the sum of five hundred dollars.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) JAMES BULLER.

A True Copy.

(Signed) RALPH WOODFORD.

GOD SAVE THE KING.

APPENDIX X.

(L. S.)

At the Court at Brighton, January 31st, 1823: Present, the King's Most Excellent Majesty in Council.

WHEREAS, by an Order in Council, dated the 2nd day of November, 1813, and proclaimed in the Island of Trinidad, on the 15th day of February, 1814, it was declared, that it should be lawful for His Majesty's Chief Judge of the said island, to entertain summary processes, and to decide upon them in all cases, when the matter in dispute should not exceed the sum of one hundred dollars:

And whereas, by an Order in Council dated the 17th day of September, 1817, and duly proclaimed and published in the said Island of Trinidad, on the 8th day of November following, it was deemed expedient for the convenience of suitors, and the reduction of expenses to them in the recovery of debts, that the jurisdiction so given by the aforesaid Orders in Council, should be extended to all civil causes, wherein the matter in dispute should not exceed the sum of five hundred dollars:

And whereas, it is now deemed expedient for the greater facility of suitors in the recovery of debts due to them, further to extend the jurisdiction granted to His Majesty's said Chief Judge, by the above recited authorities.

His Majesty is therefore pleased, by and with the advice of his Privy Council, to order and appoint, and it is hereby ordered and appointed, that the jurisdiction of His Majesty's Chief Judge in the said Island of Trinidad, shall be extended over all civil causes wherein the matter in dispute shall not exceed the sum of one thousand dollars, with power to decide in all such causes in a summary and verbal manner.

And the said Chief Judge is hereby authorized to make such rules and regulations for carrying this order into effect as he may judge

proper; subject, however, to the approval of the Governor and Commander in Chief of the said island.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) JAMES BULLER.

A True Copy.

RALPH WOODFORD,
Governor.

Trinidad, May 21st, 1823.

APPENDIX Y.

TRINIDAD.

At the Court at Carlton House, this 18th day of May, 1822: Present the King's Most Excellent Majesty in Council.

WHEREAS, the number of festival or feast days, ordered to be observed by the laws in force in the Island of Trinidad, has been found to be inconvenient and prejudicial to His Majesty's subjects in the said island, by reason of the suspension on such days of all judicial proceedings in civil causes; and whereas, by a rescript from Rome, bearing date the 25th February, in the present year one thousand eight hundred and twenty-two, permission or authority is given to the Right Reverend Doctor James Buckley, Bishop of Gerren, and Vicar Apostolick of the British, Dutch, and Danish Islands and Colonies in the West Indies, to dispense with the observance in the said Island of Trinidad of the said festivals or feast days; and whereas, it is expedient that the observance of the said festivals or feast days, in the said Island of Trinidad, should be dispensed with, His Majesty is therefore pleased, by and with the consent of his Privy Council, to order, and it is hereby ordered, that the number of festivals or feast days on which the despatch of business in the tribunals of justice is at present suspended, shall be reduced, and that the said tribunals in the said Island of Trinidad, shall, and may be, held and opened on each and every day, except Sundays, Good Friday, Christmas Day, the first of January, and the day appointed for the celebration of the festival of Corpus Christi, throughout each and every year, any law, custom, or usage, heretofore in force in the said Island of Trinidad, to the contrary notwithstanding: provided always, that nothing herein contained shall extend, or be construed to extend, to prevent the Governor and Commander in Chief of the said Island of Trinidad, or the person having or administering the Government of the said island for the time being, from ordering or directing the said tribunals to be closed upon any occasion or occasions, upon which it shall appear to him necessary or expedient.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to take the necessary measures herein accordingly.

(Signed) C. GRENVILLE.

A True Copy.

(Signed) ARETAS WILLIAM YOUNG.

This Royal Order in Council, was duly published and proclaimed, in the town of Port of Spain, in the said island, on Saturday, the twentieth day of July, in the year of our Lord one thousand eight hundred and twenty-two, by the Alguacil Mayor.

(Signed) ARETAS WILLIAM YOUNG,

Administering the Government.

HERBERT MACKWORTH,

Alguacil Mayor.

APPENDIX Z.

TRINIDAD.

Government House, Port of Spain, 16th February, 1814.

ORDER OF GOVERNMENT.

His Excellency Sir Ralph James Woodford, Baronet, Governor and Commander in Chief, has decreed that the following rules and regulations be duly observed in the tribunals of appeal, as established in and by the Proclamation of His Royal Highness the Prince Regent, of the nineteenth of June, one thousand eight hundred and thirteen.

I. That all appeals, either from the Ordinary Tribunals to the Governor, or from the Governor to His Majesty, must, in conformity to the above Proclamation, be made within fourteen days after sentence in the respective tribunals.

II. That no appeal will be allowed, unless security be given by the appellant in manner prescribed and decreed by the said Proclamation of the nineteenth of June, one thousand eight hundred and thirteen.

III. That in all civil causes in the inferior tribunals, and under two hundred pounds sterling, and when either of the parties may think themselves aggrieved, either he, she, or they, may present a petition to the *Audiencia*, when that tribunal, after a perusal of the *autos*, will, if the due administration of justice may require it, admit or refuse the appeal; and if admitted, the party appealing will give approved security to pay all costs and charges, should the sentence of the Ordinary Tribunal be affirmed.

IV. All causes that were pending in the *Audiencia* before the late

Chief Oidor, as judge thereof, will be determined therein according to their priority of entry in the said tribunal; provided the due administration of justice may require it, otherwise they will be transferred to the Tribunal of Appeal, of civil jurisdiction.

V. That in all civil causes of appeal, where the same may be granted in the devolutive effect, the party appellant shall lodge in the tribunal an authenticated copy of the proceedings.

VI. That in all civil causes of appeal, in the suspensive effect, the original *autos* will be delivered by the Escribano of the respective Ordinary Tribunals, to the Escribano of the Tribunals of Appeal, the former certifying on the last page of the *autos*, the whole number of pages contained therein.

VII. That Tuesday and Friday in each week, between the hours of nine and twelve, are the days for presentation of all petitions and proceedings, and should those days be holydays, then on the days succeeding.

VIII. That the Escribano shall not receive any representation whatsoever, without the signature of an advocate thereto.

IX. That only two petitions will be allowed on the merits of an appeal, that is to say one by the appellant, and the other by the respondent, and in definitive cases, an interval of eight days will be allowed the respondent.

X. That two petitions will also be allowed in all appeals from interlocutory sentences, with an interval of four days to the respondent.

XI. That in all causes, the law on which the party may rely in support of his case, may be cited, in a clear and concise manner, in the margin of the petition or representation.

XII. That the advocates will be allowed to argue such causes as the Governor and Commander in Chief may judge necessary; but only after every explanation shall have been given by the petition, and where it may appear that any doubts can be solved, or the question better elucidated by a verbal hearing.

By His Excellency's command,

HENRY MURRAY,

Esc. de Camara.

APPENDIX AA.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, the 16th of September, 1822: Present, the King's Most Excellent Majesty in Council.

Regulations respecting the issuing writs of Execution.

WHEREAS by the 10th law of the 28th title of the 11th book of the Novisima Recopilacion of Castille, it is directed, that in all executions issuing upon judgments obtained in any tribunal, the writs for such

executions shall be deliverable by the Escribano of the tribunal to the parties in whose favour such judgments shall have been issued: and whereas, delays and inconveniences have arisen thereby in the tribunals of First and Second Instance of the Island of Trinidad; for remedy thereof, his Majesty doth hereby order and declare, by and with the advice of his Privy Council, that such writs of execution so issuing as aforesaid, shall not in any future case, be deliverable to the parties upon whose application and in whose favour the same shall have issued, notwithstanding the aforesaid law; but that from and after the publication of this order in the said island, all such writs shall be delivered by the respective Escribanos to the Alguacil Mayor, upon the application of the party or parties in whose favour such judgments shall have been respectively obtained, at any time after the expiration of the term allowed by the Court for the satisfaction of such judgments.

Within what time such writs of execution shall be returned.

And His Majesty doth hereby further order and declare, that all executions issuing from the said courts, against parties resident within the Town of Port of Spain of the said island, be returned by the said Alguacil Mayor, into the tribunal from whence the same have issued, within fourteen days: and all executions issued against parties resident within any other part of the said jurisdiction of the said island, within one calendar month from the date of the delivery of such executions respectively to the said Alguacil Mayor of the aforesaid island, unless good and sufficient cause be shewn to the contrary, to the satisfaction of the tribunal from which the execution issued: and in case executions so issued shall not be duly returned into the said tribunals respectively, within the times herein-before limited, or within such periods as may, in special cases, be expressly named by the tribunal from which the writ may issue, that then, and in such case, the Alguacil Mayor shall be liable to a penalty not exceeding fifty pounds currency, for every execution upon which he shall fail to make such return; such penalty to be enforced by the Court from whence such writ may have issued in a summary manner; and shall be liable to the party for any loss or injury that may be occasioned by his wilful neglect or default; and all fines and penalties imposed under the authority of this order, will be applied in the manner directed by the laws in force.

Penalty of 50*l.* currency in default of making such return.

To be enforced in a summary manner.

Applications of penalties.

Writs already issued to be returned within one month from the promulgation of this order.

And His Majesty doth hereby further order, that all writs that shall have issued previous to the promulgation of this order in the said island, and which shall be in possession of the parties in whose favour such executions shall have been obtained, shall be by the said parties returned into the respective tribunals, within one month from the promulgation of this order, under the penalty of the same being, as they are in such case, hereby declared to be, null and void. And the Right Honourable the Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG,
Administering the Government.

Government House, Trinidad,
16th January, 1823.

APPENDIX BB.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

(L. S.)

A PROCLAMATION.

WHEREAS it has become necessary to facilitate the means of recovering debts within our said island, and its dependencies, and to prevent delays of form in the several processes in use therein.

And we having taken the same into our consideration, at a Court held at Carlton House, on the 9th day of March, in this present year, have thought it expedient, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order, proclaim, and declare, as it is hereby ordered, proclaimed, and declared, that from and after the promulgation of these our presents, within the said island, no petition for pregones or public outcry of property, whether moveable or immoveable, levied upon in execution, shall be allowed or admitted in any process, now or hereafter to be instituted in the said island; but that upon all executions lawfully had and returned, into any of the tribunals of justice of our said island, citation to remate or sale shall forthwith issue upon the petition of the party or parties at whose instance such execution shall have been issued.

And we do hereby, in the name and on the behalf of His Majesty, will and require, and strictly charge and command our Governor, and Commander in Chief, His Majesty's Chief Judge, the Alcaldes in Ordinary, and the Escribanos of all our courts and tribunals, and all other His Majesty's loving subjects within the said island, duly to obey and observe these presents, and govern themselves accordingly.

Witness His Excellency Sir Ralph James Woodford, Bart., our Governor and Commander in Chief in and over the said Island of Trinidad, at the Town of Port of Spain, and given under the Great Seal of the said island, this twelfth day of May, in the year of our Lord one thousand eight hundred and fifteen, and the fifty-fifth year of His Majesty's Reign.

(Signed) RALPH JAMES WOODFORD.

By His Excellency's command,

(Signed) P. REINAGLE,

Secretary.

GOD SAVE THE KING.

APPENDIX CC.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

(L. S.)

A PROCLAMATION.

WHEREAS, by the Fifth Law, and Fourteenth Title of the Fifth Book of the Recopilacion de los Reynos de las Indias, it is provided and ordered, "That no execution of debt can be made on "sugar estates, their Slaves, implements, and utensils appertaining "thereto, unless the debt should amount to the whole value of the "same, and unless the debtor should not possess any other property "wherewith to satisfy his creditor; and that in case of sale under "these circumstances, and adjudication to a purchaser, he should be "bound to give full security for the sustentation, and continuance of "the estate in the same condition in which it was held by the "debtor."

Now, We having taken the said law into consideration, at a Court held at Carlton House, on the 9th day of March last past, and for facilitating and enlarging the remedies of creditors in the premises have thought proper, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order, proclaim, and declare, that from and after the first day of June, which will be in the year of our Lord one thousand eight hundred and sixteen, in all cases where estates situate within the said island and its dependencies, actually and really, in parts or altogether, used or employed in the cultivation of sugar canes, cocoa, and coffee, or either of them, shall, in due course of law, at the time an execution is made for debts, be found to be indebted, to one or more person or persons, to the amount of two-thirds of the just and true value of the said estate, the said value to be taken from the quantity of produce raised upon the said estate, on an average of five years next preceding the date of the said execution, if the said estate shall have been so long in cultivation, and with reference also to the number of years' purchase at which estates are usually sold at the time in the said Island of Trinidad, and its dependencies; and if such estate shall not have been five years in cultivation, then the said value to be taken from the actual means of cultivation possessed by the proprietor or owner of the said estate, whether in stock, slaves, or in other respects, then, and in such cases, execution may be lawfully made upon all such estates.

And we do hereby further order and direct, that from and after the date aforesaid, it shall not be a condition of the purchase of any such estate, that it shall be continued in the same condition in which it was held by the debtor, nor shall the purchaser be bound to give security for the sustentation and continuance of the estate in

such condition as aforesaid; nor shall the purchaser of any such estate so sold, be bound to pay the purchase money thereof in specie, unless so specially ordered by the Court before whom the said sale shall have taken place, but in such mode, and within such times as the creditor or creditors, of the larger part of the sum so levied in execution, who have been cited to the sale or remate of the said estate, shall then agree to accept, under the sanction of the court before whom the said sale shall have taken place.

And we do hereby, in the name and on the behalf of His Majesty, will and require, and strictly charge and command our Governor, for the time being, or Lieutenant-Governor, His Majesty's Chief Judge, and the other judges of all our courts and tribunals thereof, and all other His Majesty's subjects within the said island, duly to obey and observe these presents, and to govern themselves accordingly.

Witness His Excellency Sir Ralph James Woodford, Bart., our Governor, and Commander in Chief in and over the said island, at the town of Port of Spain, and given under the Great Seal of the said island the eleventh day of May, in the year of our Lord one thousand eight hundred and fifteen, and in the fifty-fifth year of His Majesty's Reign.

(Signed) RALPH JAMES WOODFORD.

By His Excellency's command,

(Signed) PHILIP REINAGLE,
Secretary.

APPENDIX DD.

TRINIDAD.

At the Court at Carlton House, the 27th November, 1815: *Present, His Royal Highness the Prince Regent in Council.*

WHEREAS His Royal Highness the Prince Regent, by his Order in Council of the 9th of March, 1815, in the name and on the behalf of His Majesty, with a view to facilitate and enlarge the remedies of creditors in the Island of Trinidad, was pleased, among other things, to order and direct, that the value of estates therein directed to be taken in execution should be estimated from the quantity of produce raised from the estate on an average of five years next preceding the date of such execution, if such estates should have been so long in cultivation:

And whereas doubts have arisen, whether in estimating the value of the said produce for any one year, for the purpose specified in the said order, any deduction should be allowed upon the gross value thereof; His Royal Highness the Prince Regent for the purpose of removing such doubts, is therefore pleased, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order and direct, and it is hereby ordered and

directed, that in all cases in which it may be necessary for the purposes of the said Order in Council of the 9th March, 1815, to estimate the value of the produce raised on any estate in any one year; the said value shall be estimated by making a deduction from the sum at which the gross annual produce of the estate would sell, calculated according to the current prices of the said produce in the Island of Trinidad at the time, of one-third part thereof, in order to meet the expense incurred by the cultivation and supply of the said estate; and that the sum remaining after such reduction of one-third shall have been made, shall be, for all intents and purposes, of the said order of the 9th of March, 1815, considered as the true value of the produce of the said estate for one year.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) CHETWYND.

A True Copy.

RALPH WOODFORD.

APPENDIX EE.

TRINIDAD.

At the Court at Carlton House, February, 2d, 1825: Present, the King's Most Excellent Majesty in Council.

WHEREAS, by an Order in Council, bearing date the 5th day of August, 1822, it was, among other things, ordered and declared, that from and after the 1st day of January, 1825, it should and might be lawful to proceed to issue execution against sugar, cocoa, coffee, or other estates, within the Island of Trinidad, or against any parts or portions of the same, whether they consist of slaves, machinery, utensils, or any other description of property, found and being thereon, at the time of execution; and after citation lawfully made, to proceed to the sale of the whole, or such parts or portions, as shall be found sufficient for the satisfaction of the said execution, without reference to the value of the said estates, or to the amount in which they may be indebted: and it is by the said order provided, that nothing therein contained, shall prevent or be understood to prevent the court or courts, out of which execution shall have issued against the said estates, from considering any equitable ground or circumstances for staying the sale of the whole or any part thereof.

And whereas, doubts have arisen whether, according to the true intent and meaning of the said order, it is competent to any court in the said island, out of which execution shall have issued against any estate therein situate, to stay the sale of the whole or any part thereof, on the ground that such estate hath, by the operation of political events, or occurrences of a public nature, become materially

depreciated in value; it is therefore for the settling and removal of all such doubts, ordered and declared by the King's Most Excellent Majesty, by and with the advice of his Privy Council, that if it shall be made to appear to the satisfaction of any court in the said island, out of which execution shall have issued against any estate therein situate, or against any part or portion of any such estate, that such estate, or such part or portion thereof as aforesaid, hath, by the operation of any political event, or of any occurrence of a public nature, materially fallen in value, and that such event or occurrence was beyond the control of the owner or owners of such estate, or of such part or portion thereof, as aforesaid; and that there is reasonable cause to expect that such depreciation as aforesaid will not be permanent, but will at some future time be wholly or partially removed and repaired; then, and in every such case, according to the true construction and intent of the said Order in Council of the 5th day of August, 1822, it shall and may be lawful for the court out of which execution shall have so issued, in its discretion to stay the sale of the whole or any part of the estate, or of the parts or portions of the estate, against which execution may have so issued.

Provided nevertheless, and it is hereby ordered, that it shall not be lawful for any such court, upon the ground, or by reason of any such depreciation as aforesaid, to stay the sale of the whole or of any part of any such estate as aforesaid for more than six calendar months at any one time, or by any one order, or for more than two years in the whole, by any successive orders.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

(Signed) JAMES BULLER.

The foregoing Order in Council was duly proclaimed and published in the town of Port of Spain, on the fourteenth day of April, one thousand eight hundred and twenty-five, by the Alguacil Mayor.

RALPH WOODFORD.
Governor.

HERBERT MACKWORTH,
Alguacil Mayor.

APPENDIX FF.

TRINIDAD.

At the Court at Carlton House, the 8th of June, 1816: *Present, the Prince Regent, in Council.*

WHEREAS it is expedient to facilitate and enlarge the remedies of creditors in the Island of Trinidad, and to make some provision for the rights of persons who have advanced money upon mortgage within the same, it is hereby ordered and declared by His Royal

Highness the Prince Regent, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, that in six months from and after the date of the Promulgation of this order in the said island, all property moveable or unmoveable, save and except sugar, coffee or cocoa estates, when duly levied upon and taken in execution according to law, shall and may be sold in ten days after sentence by the Provost Marshal, or his lawful deputy, or any other person duly authorized, at public auction to the highest bidder; and that all such sales of such property as aforesaid, the highest bidder shall be declared to be the purchaser of the same, without reference or regard to the amount in and at which the same may have been appraised; any usage or custom to the contrary notwithstanding; the produce of such sales being deposited in the colonial treasury subject to the further order of the court from which the said execution was issued; and subject to such fees to the Provost Marshal, or his lawful deputy, or other person duly authorized to conduct such sale, as shall be appointed and directed in a Schedule to be framed and approved by the Governor or Lieutenant-Governor of the island; and it is hereby ordered that a certificate of every sale so made and had, shall be approved and signed by the Judge of the Court from which the execution issued.

And in cases required by the existing laws, shall be duly registered in the office of registry within the said island, and a copy thereof shall be delivered to the purchaser.

And whereas it is found expedient to limit the privileges allowed by the 28th Law, 13 Title of the 5th Partida to creditors of refaccion and supply; and to prevent the frauds and prejudices which may arise to mortgagees, and others, from the indefinite period in which the said privileges are now claimed; it is hereby ordered and declared that no person shall hereafter be deemed to be entitled to such privilege in respect of any article or subject of refaccion and supply known and described by the said law, except the same shall have been advanced and furnished within two years next preceding the day of judicial demand.

And whereas it is expedient to facilitate the proof of mercantile debts, and to legalize the testimony of clerks, book-keepers, and others employed by merchants; it is hereby ordered and directed, that the declarations on oath of such persons in all civil proceedings wherein their employers are parties, shall henceforth be taken to be good and admissible evidence in favour of such their employers: any law to the contrary notwithstanding.

And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) JAMES BULLER.

A True Copy.

RALPH WOODFORD.

GOD SAVE THE KING.

APPENDIX GG.

TRINIDAD.

(L. S.)

Port of Spain, 4th October, 1813.

(Signed) RALPH JAMES WOODFORD.

ORDER OF GOVERNMENT.

WHEREAS for the more effectually enabling suitors to proceed in their suits or processes, now or hereafter to be instituted in the tribunals of justice, and for regulating the offices and the duties of the Escribanos; it has been deemed expedient to order, publish and decree that the following Rules and Regulations be duly observed and complied with by all the Escribanos of the said island, under pain of dismissal from office, and utter disability to fill the said appointment in future.

No. 1. That all and every the Escribanos shall, within one month, or such further time as may be granted for that purpose, make separate annual indexes of all suits, civil or criminal, distinguishing the same, up to the 31st day of December last, that are now in their respective offices, or under their charge, keeping, or possession, in alphabetical lists, and commencing with number one, according to their priority of date, in conformity to the Schedule subjoined.

No. 2. That they do make up an index within one week, of all suits that have been instituted in their several offices since the first day of January, one thousand eight hundred and thirteen, under the foregoing penalty.

No. 3. That from the day of the date hereof all suits to be hereafter instituted or filed, shall be immediately,at the time of delivery, entered in the index book as aforesaid last mentioned, and in the manner pointed out in the Schedule.

No. 4. That the different processes shall be numbered in the front folio of each suit as follows :—The Number, the Judge before whom the cause is instituted, whether Civil or Criminal, the names of the Plaintiff and Defendant, the Escribano of the cause, the Advocate and Solicitor, the time received, and when presented to the Judge.

No. 5. That from the day of the date hereof, all petitions to be received, shall, at the time of delivery to an Escribano, be by him numbered in the margin, corresponding to the number of the suit, the time he received it from the party presenting it, the fees received therewith, and the time of presentation to the Judge.

No. 6. That all decrees of the Judges being dated the time they are made, the Escribano shall certify, in the margin, the date he receives the same from the Judge, and the Escribano cannot be permitted to receive any decree that is not dated by the Judge.

No. 7. That all petitions, when presented to the Judge by the Escribano, shall be accompanied by the autos, to preclude the

necessity of the Judge calling for the autos to which the petitioner may refer.

No. 8. That all notifications of the Judges' decrees be made to the respective parties within twenty-four hours after the receipt of the decree by the Escribano, who shall also certify the act of notification, and in what manner notified, whether personally to the parties in the cause, or by leaving a copy of the decree at their respective residences, or by sending an official letter to the Commandant of the Quarter.

No. 9. That no Escribano, or clerk of an Escribano, be suffered, on any account whatsoever, to write, prepare, or otherwise make out for the parties, in any suit, any escrito, petition, memorial or representation, under pain of the Escribano's dismissal from office. The Escribano being always held responsible for clerks or persons employed in his office.

No. 10. That one real be paid to the Escribano by any person wishing to inspect the index book, which shall be open at all times t o any person.

No. 11. That the Judges do call for any autos or proceedings, and the index book, whenever they think proper; and in case any suspicion being entertained by them of an Escribano not having duly indexed and entered a suit, or if an Escribano or his clerk having, from and after the date hereof, drawn any petition, they are at liberty to examine, on oath, the parties, and to report the same to the Governor; and, upon the same being proved, the Escribano will be dismissed his office, and rendered incapable of receiving a new license.

No. 12. That should any Escribano delay the presentation of a suit or petition, or the notification of any decree, and the same shall not be satisfactorily explained by the Escribano of the cause to the Judge thereof, the Escribano shall be dismissed his office or employment for ever.

No. 13. That it shall not be lawful for any Escribano to ask, demand, to take from any person or persons more than his established fees by law, on pain of being, when convicted thereof, dismissed his office.

No. 14. No person shall be permitted to remain in the offices of the Escribanos beyond the time necessary for the object of their application; and the Escribanos shall not admit any persons to their offices but on business.

No. 15. The Escribanos shall attend in their offices, personally, from nine in the forenoon until two in the afternoon (Sundays and holidays excepted); nor shall they absent themselves, but with permission previously obtained of either of the Judges. The remainder of the day is to be devoted to the notification of the Judges' decrees.

No. 16. No Escribano shall, under pain of dismissal, permit the parties in a cause, their attornies or advocates, to inspect the proceedings, but by an order from the Judge, in such cases as the law forbids.

No. 17. Each Escribano shall note his charge of fees on all copies or extracts, or other papers furnished from his office; for which the law allows him to make a charge as equally on all wills and deeds drawn up or registered in his office.

No. 18. Each Escribano shall keep a book of deliverance, in which the delivery of each set of proceedings shall be noted, whether to

the parties or their attornies, advocates, assessors or solicitors, shewing the date of delivery, and the number of pages of which the same shall consist.

No. 19. Should any Escribano lose or secrete a set of autos, or any document appertaining thereto, he shall pay the amount of such document lost, within three days, on pain of execution.

No. 20. Should any Escribano refuse a sight of any set of proceedings, or other documents, to any party having a right to inspect them, on his fees being offered him, or through negligence, or any other cause, impede any suit, he shall be dismissed from his office, and rendered incapable of receiving a new license.

No. 21. Each Escribano shall give security at the ensuing Board of Cabildo, himself in the sum of two thousand dollars, and find a security, to be approved by the Board, in an equal sum, for his due compliance with these and all future regulations. In all other points the Escribanos will follow the law.

Lastly, A copy of this ordinance, in both languages, shall be placed in the most conspicuous part of the offices of the respective Escribanos, together with a docket of fees signed by the Judge.

In witness whereof, His Excellency Sir Ralph James Woodford, Baronet, hath hereunto set his hand and seal at arms, at Government House, this fourth day of October, one thousand eight hundred and thirteen, and of His Majesty's Reign the fifty-third.

By His Excellency's command.

(Signed) PHILIP REINAGLE, Secretary.

SCHEDULE referred to.

Number.	Date of Filing.	Civil.	Criminal.	Plaintiff.	Defendant.	Tercero Opositor	Judge.	Escribano.	Settled.	Pending.

APPENDIX HH.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

(L. S.)

A PROCLAMATION.

WHEREAS, we having taken into our consideration the many inconveniences that have arisen, and may in future arise, to our loving subjects of the said island, from the doubts hitherto entertained re-

specting the jurisdictions of the tribunals of justice established therein: for remedy thereof, as well as to introduce such alterations in the same as may tend to expedite the administration of justice, and also such modifications in the laws as our said island, from time to time, may be deemed susceptible of.

And whereas by our Commission, under our Royal Sign Manuel, dated at our Court at Carlton House the fifth day of July last past, we thought fit to appoint our trusty and well-beloved John Thomas Bigge, Esquire, Chief Judge of our said Island of Trinidad:

We, therefore, acting in the name and on the behalf of His Majesty, have deemed it expedient to issue this our Proclamation, and we do therefore proclaim, order, and declare, as it is hereby proclaimed, ordered, and declared, that our said Chief Judge shall have, hold, exercise, and possess free and unrestrained jurisdiction, as a Judge of the First Instance, in all matters, civil and criminal, throughout the island, with full power and authority to hear and determine all causes of whatsoever description, save and except such causes as may, with the consent of the Governor and Commander in Chief of our said island, and where the due administration of justice may require it, be brought, in the first instance, before our Tribunal of Audiencia, and also save and except such as may belong to our Governor, as Intendant of the Treasury.

And we do hereby further order and declare, That the Alcaldes in Ordinary of the first and second election shall, and until our further pleasure be declared herein, also exercise general jurisdiction in all causes, civil and criminal, in the first instance, save and except such causes as are herein-before excepted.

And that all persons who may have heretofore acted as Alcaldes of the first and second election, and have had, used, and exercised general jurisdiction through the island, in any cause, civil or criminal, whatsoever, are, as they are hereby declared to be, indemnified for, and on account of the same, and shall be as they are hereby declared to be, released from all actions, suits, pains, penalties, and forfeitures whatsoever, incurred by him, them, or any of them, in their respective situations as Alcaldes in Ordinary of the first and second election, for having heretofore exercised general jurisdiction over planters, and throughout the island as aforesaid.

And we do hereby further order and declare, That no plea whatsoever to the jurisdiction of the said Alcaldes in Ordinary, either in causes that may have been, or that may hereafter come before them, shall be allowed or pleaded in any of the courts established in our said island, but that the exercise of such general jurisdiction by the Alcaldes in Ordinary as aforesaid, shall be deemed, taken, and considered to be conformable to law, in the same manner as if no doubts had ever been entertained on the question, any law, custom, or usage to the contrary in any manner notwithstanding.

And we do hereby further order and declare, That it shall and may be lawful for any person or persons whomsoever, being a party or parties to any suit or suits, that are now, and may hereafter be pending before either of the Alcaldes in Ordinary, to withdraw from the tribunals of the Alcaldes in Ordinary, or either of them, and to evoke into the tribunal of our said Chief Judge, notwithstanding any law, custom, or usage to the contrary, any process or processes, civil or criminal, that may be now or hereafter therein pending, and in which latter tribunal shall all such suit or suits be determined, reserving the right, however, to all parties of appealing

from the sentence of judgment of our said Chief Judge, to the Tribunal of Appeal established in our said island, and in the manner and form prescribed by our Royal Proclamation of the nineteenth of June, one thousand eight hundred and thirteen.

Provided, however, That the person or persons so desirous of removing any cause, suit or process, civil or criminal, from the Courts of the Alcaldes as aforesaid, shall, in the first instance, present a petition to the Alcalde in Ordinary, before whom the cause may be pending, praying that such cause may be transferred to the tribunal of our said Chief Judge, and which said petition the said Alcalde or Alcaldes in Ordinary, as aforesaid, shall, as they are hereby respectively ordered, grant and allow.

Provided always, That the legal taxed costs, on all such proceedings so to be transferred, be previously paid, and certified so to be, before the said Alcalde or Alcaldes in Ordinary shall transfer any such proceedings to the tribunal of our said Chief Judge; reserving, nevertheless, to any person or persons, in case of any difference arising relative to the amount of costs that may be taxed, the right of giving security for, or depositing in our treasury the amount of such costs so to be taxed; subject always, however, in this instance, to the approval of the Alcalde or Alcaldes, either as to the deposit or security, and which shall be certified on the proceedings, accompanied by a certificate of the receipt, by our said treasurer, of the deposit, or by the bond or deed of security being attached to the suit or suits, as the case may be.

And we hereby further order and declare, That the several protocols or original registries of all deeds, wills, and of all other legal instruments of writing, of whatsoever nature or kind, that have been hitherto kept and enregistered with the several Escribanos of our said island, shall be forthwith lodged and enrolled in the office of the registrar of deeds, and clerk of enrolments of our said island, in whose office, and none other, from and after the date hereof, shall all deeds, wills, mortgages, and all other legal instruments in writing for the acquirement, sale and transfer of property, in the said island, or of whatsoever nature or kind the same may be, and hereafter to be executed, be enrolled, enregistered, and recorded, conformable to our Commission, under our Royal Sign Manuel, dated the twenty-second of September, one thousand eight hundred and nine.

And we do hereby further order and decree, That in conformity to our said Commission, to him the Secretary of our said island, so directed, he shall by himself or his sufficient deputy, take upon himself, and exercise the office of Secretary of the Cabildo, and shall do and perform all and every the acts and duties appertaining to that office, under the laws now in force in our said island.

And we do hereby further order and declare, That it shall and may be lawful to, and for the Commandants of Quarters, and Alcaldes of Barrios, in their several and respective districts in our said island, to entertain all civil causes or pleas of debt, the amount of which shall not exceed the sum of twenty dollars, with an appeal to our said Chief Judge, if made within five days after sentence of the said Commandants and Alcaldes of Barrios respectively, and the decision of our said Chief Judge thereon, shall be final, and that the docket of fees on all such suits, shall be made by our said Chief Judge, and approved by our Governor.

And further, we do hereby, in the name and on behalf of His Majesty, will and require, and strictly charge and command all courts and tribunals, our said Governor and Commander in

Chief, our Chief Judge, the Alcaldes in Ordinary, the Registrar of deeds, and Clerk of enrolments, the several licensed Escribanos, Commandants of Quarters, Alcaldes of Barrios, and all other officers and ministers of justice, now or hereafter to be appointed; and all others His Majesty's subjects within the said island, duly to obey and observe the same, and to govern themselves accordingly.

And lastly, we do hereby further order and declare, That these our presents, in virtue of our former Proclamation, of the 18th of December last past, be enregistered in the book of records, directed thereby to be kept by our said Governor, the Chief Judge, and the judges of the tribunals established in our said island.

Witness His Excellency Sir Ralph James Woodford, Baronet, Governor and Commander in Chief in and over our said island, and given under the Great Seal thereof, this nineteenth day of January, in the year of our Lord one thousand eight hundred and fourteen, and in the fifty-fourth year of His Majesty's Reign.

(Signed) RALPH JAMES WOODFORD.

By His Excellency's command.

(Signed) PHILIP REINAGLE,
Secretary.

GOD SAVE THE KING.

APPENDIX II.

TRINIDAD.

By His Excellency Sir Ralph James Woodford, Bart., Governor and Commander in-Chief in and over the said Island and its Dependencies, Vice-Admiral of the same, intendant of the Royal Treasury, and Judge of Crown Lands, and exercising the powers of the Royal Audiencia, &c. &c. &c.

AN ORDER OF GOVERNMENT.

Government House, Port of Spain, 11th April, 1821.

RALPH JAMES WOODFORD.

WHEREAS the practice hitherto observed in the tribunals of this island, in cases of judicial liquidation and settlement of contested accounts, and of partition and division of property, by the appointment of persons altogether unconnected with, and over whom, the Court before which such cases are pending, has no sufficient controul or authority, has been found to be productive not only of great and injurious delay, but also of very heavy costs and charges to the suitors; and it is thought proper and expedient, for remedy thereof, to appoint a fit person, under the controul and subject to the order

of the Courts, as judicial referee, liquidator, and partidor, to whom all questions of judicial settlement, and liquidation of disputed accounts, and of partition and division of property, shall be referred for investigation and report, in manner hereinafter mentioned.

Now it is hereby therefore ordered and declared, That in all causes which now are, or at any time or times hereafter, may be pending in the tribunals of this colony, in which any liquidation or settlement of disputed accounts, or any partition or division of property may be necessary, the Court, before which such causes are pending, shall, if it may appear to it proper or necessary so to do, by its order or decree, refer the same for examination and report to the person so to be appointed as aforesaid, in such manner, and subject to such directions, as in such order or decree may be expressed or declared in respect thereof; and that no other person whatever shall be appointed or admitted by the Court for those purposes, or any or either of them, any custom to the contrary notwithstanding.

And it is hereby further ordered, That in all cases in which such reference shall be made, the person so to be appointed, as aforesaid, shall have full power and authority to hear the parties on the matter referred, and call for and enforce the production of all mercantile and other books, vouchers, papers, letters, or other documents; and also to compel the attendance of all such persons, as witnesses, as may be necessary to enable him to make up and finish his report, liquidation, partition, or division, to the Court accordingly: and that in all cases of such reference, the report, liquidation, partition, or division, as the case may be, shall be made up and returned to the Court from which the order of reference issued, with the least possible delay; notice being given by the said referee, liquidator and partidor, to the several parties interested in the said report, liquidation, partition, or division, at the time of making such return, and a certificate of such notice having been given, being delivered to the Escribano, under the hand of the said referee, liquidator, and partidor, together with the said report, liquidation, partition, or division, at the time of returning the same.

And it is hereby further ordered and directed, That all such reports, liquidations, partitions, or divisions, shall lay open in the office of the Escribano for a term of twenty days after the return thereof, for objection or exception on behalf of any of the parties interested therein; and in case no such objection or exception shall be made within that period, by either or any of the parties interested, the same may be confirmed by the Court, upon the application of such parties, or either or any of them, without further notice or delay; but in case such report, liquidation, partition, or division, shall be objected to by any or either of the parties so interested, such objections, after communication to all the parties interested therein, and after hearing such parties, shall be decided and decreed upon by the Court, which will make such further order thereupon as may appear to it proper and just.

ANTONIO GOMEZ,

Assessor.

Before me, JOHN CARTER,

Escribano de Camara.

Docket of Fees of the Accomptant and Judicial Partidor.

In Partitions and Divisions of Property.

	£	s.	d.
For every sheet, written on both sides, of documents, accounts, &c. - - - - - -	0	2	0
When the sheet is only written on one side - -	0	1	0
For his return or award, when the property amounts to 3000*l.* his fee will be for every thousand - -	6	0	0
From 3000*l.* to 10,000*l.*, for each 1000*l.* - -	4	0	0
From 10,000*l.* to 20,000*l.* - - - - - -	3	0	0
For the copy of any share of inheritance the charge will be the same as per general docket - -			
For attendance at the Court to make any explanation that may be required, not exceeding two hours -	3	0	0
Ditto, under one hour - - - - -	1	0	0
In case of any error or reformation in the Partidor's first report, in which he shall be called to alter the same, if the reformation does not arise from a mistake, but from the presentation of a new voucher by any of the parties, he will receive for each folio	2	0	0
And in case that he shall write any other folios he will not receive for the whole more than - - -	8	0	0

In Accounts.

For every folio written on both sides, or sheets of books alluding to the account - - - -	0	2	0
When the sheet is only written on one side - -	0	1	0
The fee for his report and liquidation the Judge in Ordinary will assign, according to the trouble and importance of the matter - - - - - -			
For attendance at the Court to make any explanation that may be required, not exceeding two hours -	3	0	0
Under one hour - - - - - - - - -	1	0	0
In any case of any error that may make a reformation necessary in his first report, the error being involuntary, as abovesaid, the judge will also assign his fee - - - - - - -			

RALPH JAMES WOODFORD.

ANTONIO GOMEZ.

APPENDIX JJ.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, the 16th of September, 1822: Present, the King's Most Excellent Majesty in Council.

Order in Council of the 17th August, 1815, recited;

WHEREAS by an Order in Council, bearing date the 17th day of August, 1815, His Majesty was pleased to authorize certain duties and imposts, to be levied in the Island of Trinidad, for the maintenance of the civil government of the said island; and whereas, among other things, it was ordered, that a tax or duty on transient traders, should be levied therein, which duty has been since evaded, His Majesty is therefore pleased, by and with the advice of his Privy Council, to order and declare, That from and after the publication of this order in the said island, the tax levied on transient traders shall not exceed fifty shillings currency of the said island, on every hundred pounds currency-worth of goods imported by them into the island, upon the invoice of the said goods duly made at the port at which the same were shipped, and sworn to as such by the importer; or otherwise such duty to be paid on the market price of such articles in the said island, at the time of their importation.

and ordered, that after the publication of this order, the tax levied on transient traders shall not exceed 50*s.* currency on every 100*l.* currency-worth of goods imported by them.

The duty to be exacted in the recited order; and to extend to wines, strong waters, and the 3½ per cent. on imports and exports.

And His Majesty is further pleased to order, That the provisions for the due exaction of the said duty shall be those which are ordained in the aforesaid order, for the collection of that duty, and which His Majesty is pleased hereby to extend to the exaction and collection of the duties on wines, and on strong waters, and to the duty of three and a half per cent., established on imports and exports in the said island: Provided always, that it shall be lawful for the Governor, Lieutenant-Governor, or Officer administering the government, to appoint by warrant or commission, under his hand and seal, duly recorded, such person or persons as may be necessary, for the enforcement of the said provisions, without prejudice to the authority of the treasurer or his assistant, as therein granted to them; and to any person or persons so appointed, it shall be lawful for the Governor, or Officer administering the government, to assign such reward for their service herein, as to the Governor, in concurrence with the council of the said island shall seem fit.

The Governor or Lieutenant-Governor may appoint Officers;

and assign salaries for their services.

Duties imposed on bequests by will made in the island:

And whereas, it is necessary to make further provision for the civil establishment of the said island, His Majesty is pleased to give authority to the Governor and Commander-in-Chief, or to the Officer administering the government for the time being of the said island, to cause the following duties on bequests by will, made in the said island, or by any testamentary dispositions affecting property therein, or on inheritances therein, to be strictly levied therein, and to esta-

blish such regulations as may be necessary, for the collection of the same, viz.

In the ascending line	£. cur. 2.	per. £. cur.	100.
Collateral line of the first degree	2½	do.	
Of the second degree -	3½	do.	
Of the third degree - -	4½	do.	
To illegitimate or natural children	6	do.	
To all other persons - -	7	do.	

Bequests from the fifth £ cur. 6 per £100.

And on all legacies or inheritances paid to persons, residents of a Foreign Colony or State, an addition of - - - - £2.

and on legacies to residents of a Foreign Colony

Except in the descending line.

Which duties shall be applied, first to the building and endowment of an hospital in or near the Town of Port of Spain, and if such hospital shall hereafter become sufficiently endowed by the pious charity of the inhabitants, then the said duties shall be carried to the account of the general funds of the island.

Duties to be applied in the first place to the building and endowment of an hospital; and afterwards to the general funds of the island.

And whereas, by the said order of the 17th day of August, 1815, it was also provided, that the annual assessments of the rents of the houses liable to duty, in the Town of Port of Spain, should be made, and returned into the treasury previous to the expiration of the month of May in each year, and that the duty on the said houses, and that on the slaves, should be paid into the treasury of the Colony, in the month of June of every year; and whereas, it is necessary to provide for the more regular payment of the annual taxes, His Majesty doth hereby order and declare, That the assessment on the houses shall be returned into the treasury, in the month of March, and that the duties thereon, as well as the duties on slaves, be paid into the treasury, in the months of April and May in every year, and that on the 15th day of June next ensuing such annual periods, the Treasurer shall, as he is hereby ordered and required, to return into the Court of the Intendant, the names of all such persons who shall have omitted to pay their annual assessments, whether on houses or on slaves, and who shall stand indebted to the treasury of the said island at such period, and the Intendant shall on the 1st day of July in each year, issue his writ of execution to the Alguacil Mayor, to levy the sums in default, and all such writs shall be returned within one month, into the Tribunal of the Intendant, in the same manner as any other writs are required to be returned by His Majesty's orders in such behalf; and the Right Honourable the Lord's Commissioners of His Majesty's treasury, and the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, are to give the necessary directions herein, as to them may respectively appertain.

Assessments on houses to be returned into the treasury in the month of March instead of the month of May: and the duties thereon as well as on Slaves, be paid in the months of April and May.

Returns of defaulters to be made on the 15th day of June,

and on the 1st of July, writ of execution to issue.

A True Copy.

ARETAS WILLIAM YOUNG.

Government House,
Trinidad, 16th January, 1823.

GOD SAVE THE KING.

The following order was duly proclaimed and published in the Port of Spain, on the 16th day of January, 1823, by the Alguacil Mayor.

ARETAS WILLIAM YOUNG.

HERBERT MACKWORTH,
Alguacil Mayor.

APPENDIX KK.

TRINIDAD.

By THE KING in Council.

At the Court at Carlton House, the 16th September, 1822: Present, the King's most Excellent Majesty in Council.

No person whatever shall be allowed to recuse the Judges, Officers, or Escribanos of the Tribunals of 1st or 2d instance.

WHEREAS by various laws in force in the Island of Trinidad, a suitor in the Tribunals of First or Second Instance, is authorised or admitted to recuse any or either of the Judges or Officers, or Escribanos in the said tribunals, for the reasons therein expressed: His Majesty is pleased, by and with the advice of his Privy Council, to order and declare, and it is hereby ordered and declared, That from and after the publication of this order in the said island, no person whatever shall be allowed or permitted to recuse any or either of the Judges, Officers, or Escribanos of the said tribunals of First or Second Instance, now or hereafter to be established by His Majesty in the said island, at any time hereafter, for any cause whatever, any law or custom to the contrary notwithstanding. And the Right Honourable Earl Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

JAMES BULLER.

A True Copy.

ARETAS WILLIAM YOUNG,
Administering the Government.

Government House,
Trinidad, January 16, 1823.

APPENDIX LL.

TRINIDAD.

By His Royal Highness the Prince of Wales, Regent of the United Kingdom of Great Britain and Ireland, in the name and on the behalf of His Majesty.

A PROCLAMATION.

WHEREAS we having considered the inconveniences and difficulties which our loving subjects of the said island have hitherto experienced by the proceedings of the tribunals, as well as the records and other proceedings therein, being principally had in a foreign language; and in order to remove those impediments which may have hitherto checked the impartial and speedy administration of justice, we, acting

in the name and on the behalf of His Majesty, have thought it expedient to issue this our proclamation; and we do therefore publish, declare, and proclaim, as it is hereby published, declared, and proclaimed, that from and after the first day of January, which will be in the year of our Lord one thousand eight hundred and fourteen, all the proceedings in the tribunals of justice of our said island, shall be thereafter had and made in the English tongue; and that all records, of judicial or other proceedings, of what nature or kind soever, to be had and made therein, or be used in the said tribunals, shall be used in the English language, and none other; nor shall any proceedings be suffered to be had, made, or presented, in any other language than that of the English tongue.

And we further order and decree, That all documents which may be necessary to be presented in a foreign language to the government, or to any of the tribunals, shall be accompanied by a translation thereof, made by an interpreter licensed by our Governor or Commander in Chief for the time being, at the expense of the party presenting the same.

And lastly, we do hereby, in the name and on the behalf of His Majesty, will and require, and strictly charge and command, all Courts, Tribunals, Judges, Magistrates, and all other officers and ministers of justice, now or hereafter to be appointed, and all other His Majesty's subjects within the said island, duly to obey and observe the same, and to govern themselves accordingly.

Witness His Excellency Sir Ralph James Woodford, Bart., Governor and Commander in Chief in and over our said island, and given under the Great Seal thereof, this nineteenth day of November, in the year of our Lord one thousand eight hundred and thirteen, and in the fifty-third year of His Majesty's Reign.

(Signed) RALPH JAMES WOODFORD.

By His Excellency's command,

(Signed) PHILIP REINAGLE,

Secretary.

GOD SAVE THE KING.

APPENDIX MM.

At the Court at Carlton House, the 8th of June, 1816: Present, His Royal Highness the Prince Regent in Council.

WHEREAS it is expedient to facilitate and enlarge the remedies of creditors in the Island of Trinidad, and to make some provision for the rights of persons who have advanced money upon mortgage within the same: It is hereby ordered and declared, by His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, That in six months from and after the date of the promulgation of this order in the said island, all property, moveable or immoveable, save and

except sugar, cocoa, and coffee estates, when duly levied upon, and taken in execution, according to law, shall and may be sold in ten days after sentence, by the Provost Marshal, or his lawful deputy, or any other person duly authorized, at public auction to the highest bidder: and that at all such sales of such property as aforesaid, the highest bidder shall be declared to be the lawful purchaser of the same, without reference or regard to the amount in and at which the same may have been appraised, any usage or custom to the contrary notwithstanding: the produce of such sales being deposited in the Colonial Treasury, subject to the further order of the Court, from which the said execution issued; and subject to such fees to the Provost Marshal, or his lawful deputy, or other person duly authorized to conduct such sale as shall be appointed and directed in a schedule to be framed and approved by the Governor or Lieutenant-Governor of the island; and it is hereby ordered, that a certificate of every sale so made and had, shall be approved and signed by the Judge of the Court from which the execution issued:

And in cases required by the existing laws shall be duly enregistered into the office of registry within the said island, and a copy thereof shall be delivered to the purchaser.

And whereas, it is found expedient to limit the privileges allowed by the 28th law, 13th title of the 5th Partida, to creditors of refaccion and supply: and to prevent the fraud and prejudice that may arise to mortgagees and others, from the indefinite periods in which the said privileges are now claimed, it is hereby ordered and declared, That no person shall hereafter be deemed to be, or entitled to, such privilege, in respect of any article or subject of refaccion and supply, known and described by the said law, except the same shall have been advanced and furnished within two years next preceding the day of judicial demand.

And whereas, it is expedient to facilitate the proof of mercantile debts, and to legalize the testimony of clerks, book-keepers, and others, employed by merchants; it is hereby ordered and directed, That the declarations on oath of such persons in all civil proceedings, wherein their employers are parties, shall henceforth be taken to be good and admissible evidence in favor of such their employers, any law to the contrary notwithstanding.

And the Right Honourable Lord Bathurst, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

(Signed) JAMES BULLER.

A True Copy.

RALPH WOODFORD.

GOD SAVE THE KING.

The foregoing Orders were duly proclaimed in Port of Spain, on Friday, the 9th day of August, 1816, by the Deputy Alguacil Mayor, and Provost Marshal.

(Signed) RALPH JAMES WOODFORD,
Governor and Commander in Chief.

(Signed) SILVESTER NEWMAN,
Deputy Alguacil Mayor.

APPENDIX NN.

His Excellency the Governor having approved of the following Rules, for the practice of the Court of First Instance of Civil Jurisdiction, and of the Complaint Court, the same are published for the information of the public.

Rules for proceeding in the court of First Instance of Civil Jurisdiction, in cases of Cessions of Property.

I. That every petition which shall be presented to this court, for the admission of a Cession of Property, must be accompanied by the affidavit of the party tendering the cession; and also by schedules setting forth a full and particular account of all the debts, with the names and places of abode, of the several creditors of such party, and the nature of their respective claims; and also setting forth the particulars of all credits, to which such party may consider himself, or may appear by his books to be entitled, and of all property of every nature and kind whatsoever, of, or to which such party shall be possessed or be entitled in reversion, remainder, or expectancy; also of all books, papers, documents, accounts, bills, bonds, notes, deeds, or writings of every nature or kind whatsoever, which may in any respect relate to, or concern his or her proposed cession, or respecting the property proposed to be surrendered for the benefit of the creditors of such party.

II. That upon every such petition for the admission of a cession of property, which shall be filed in the office of the Escribano, a warrant do issue from the Court, for the commitment of the party presenting such petition, to the Royal gaol, there to await its further order, as hereinafter mentioned; and that thereupon, the usual summonses do issue to all the creditors mentioned in the schedules, for the purpose of giving them notice of the cession tendered, and in case any of the said creditors shall be absent from the jurisdiction, and not duly represented by Attorney; the Alguacil Mayor shall make the return upon the absence of such party; and upon the returns of the Alguacil Mayor of all the writs of summons, the proceedings shall be immediately passed by the Escribano to the Judicial Referee, who shall with as little delay as possible, after receipt thereof, address written communications to all such creditors as may be absent, and not represented by any Attorney in the island, advising them of the cession tendered, and requiring them to appear before him, by themselves or by their sufficient Attornies, within six months at furthest, and establish the nature and amount of their demands; and notifying them, that in default thereof, they will be deprived of the benefit of any order of distribution to be made in the proceedings; and moreover, cause to be inserted in the London and Island gazettes, a notice to such effect; whereupon, the Judicial Referee shall forthwith proceed to take possession of all the property surrendered, making sale forthwith, before the doors of the tribunal, of all such part or parts thereof as shall be of a perishable nature, and

depositing the proceeds of such sale in the colonial treasury, to be holden in trust in the said cause; and of all books, papers, documents, accounts, bills, or other writings mentioned or contained in the said schedules under inventory, comparing them at the same time with the said schedules, and reporting his proceedings in respect thereof to the Court, at farthest within thirty days after the cession shall have been made, unless good cause be shewn to the contrary, when the period may upon such cause be extended by the Court.

III. When the Judicial Referee shall have made his report to the Court, which he shall in all cases do with the least possible delay, a meeting of the creditors shall be convened before the Court by public notice, for the purposes of electing Syndics, and determining upon the best mode of disposal of the property ceded, for the general benefit of all, at which meeting the party tendering the cession shall attend for the purpose of examination, as well as of affording any explanations that may be required by the creditors: and that upon the appointment of such Syndics or Syndic, the Judicial Referee shall deliver over to them or him, all the property surrendered, or such part or parts thereof, as may not be sold; and all books, papers, documents, accounts, bills, bonds, notes, deeds, and other writings mentioned in the schedules attached to the petition of cession; he being entitled to receive for his trouble, five per cent, on the value of the property that may have been by him realized.

IV. That upon the appointment of the Syndics, they shall proceed with as little delay as possible, to recover and get in all outstanding property and claims that may belong or be due to the party making the cession; and at the expiration of six months after their nomination, they shall lay before the Court and the Judicial Referee a full and particular account of, and report their proceedings, and of the property in their hands or possession, divisable among the said creditors, they being entitled to charge for their trouble, five per cent. on the value of the property realized by them; upon the receipt of which account and report, the Judicial Referee shall within fourteen days by public notice, call upon all persons, having claims upon such property, to prove their accounts before him, assigning by such notice, a sufficient term for such proof, with reference to the number of creditors, and the amount and nature of their respective claims, and the respective distances of their residences, and at the expiration of such time, he will proceed to the distribution of the property among the creditors, in such manner as may appear to him lawful and just, with reference to the amount and nature of their respective claims.

V. That if any creditor shall be dissatisfied with the distribution made by the Judicial Referee, it shall be competent to such creditor, within twenty days after the report shall have been so made, to except to the order of distribution, by petition to the Court, a copy whereof shall be communicated to the creditor, to whose claim, or to the preference of whose claim, the petitioner may object; which creditor shall answer thereto in writing, within twenty days; after which, the exceptions shall be argued before the Court, which after hearing shall make such further order thereon, as may be just and equitable; the question of costs being in all cases left for the consideration and decision of the Court; the common debtor being in no case discharged until the final sentence of distribution of the property ceded shall have been passed, such debtor being at all times subject to appear before the Court, or the Judicial Referee for examination,

either at the instance of any creditor, of the Judicial Referee, or of the Court.

VI. And it is hereby ordered and declared, that all costs attendant upon the proof of any demand before the Judicial Referee, shall be paid by the party presenting such proofs. If in the course of his enquiry and examination, the Judicial Referee shall find that the cessionario has not concealed any property, that his books have not been fraudulently or incorrectly kept, and that he has not entered into any fraudulent transaction, when he was near about to become a bankrupt; and that in these cases, or any others, in which the Judicial Referee shall be of opinion that the person ceding his property is free from any imputation of fraud, malice, or dishonesty; he will forthwith report the same to the Court, who then may in such case, with the sanction of the major part of his creditors in amount, order the cessionario to be discharged from prison.

ASHTON WARNER,
Chief Judge.

FRANCISCO LLANOS,
Acting Judge of Criminal Inquiry.

JAMES CADETT,
First Alcalde.

A. PINTO,
Second Alcalde.

Approved by His Excellency the Governor, exercising the powers of the Royal Audience,

RALPH WOODFORD.
ANTONIO GOMEZ.

Before me, this 23d day of June, 1825.

GEORGE. F. SOUPER,
Acting Escribano de Camara.

Additional Rules for the Court of First Instance of Civil Jurisdiction.

I. THAT so much of the first rule for regulating the practice of this Court, as directs that all petitions of actions shall be accompanied by the instruments, documents, or accounts upon which they shall be founded, shall be repealed, and that from henceforth, it shall be sufficient for every plaintiff to present his petition of action, reserving the production of any instrument, document, power of attorney, or account, in support of it, until the hearing: Provided, that in the list of evidence after the action shall have been declared contested, a note be made of the deeds, matter, or documentary evidence intended to be produced; that in all cases, an office copy of the instrument, document, or power of attorney duly certified by the Registrar of deeds of the said island, or his lawful deputy, be exhibited, such being in all cases received as full and sufficient evidence, and as good and valid in all cases as the original; and that it shall not in any case be necessary to give proof of the handwriting of the said Registrar, affixed to any certificate of any copy of any deed, will, or other instrument in writing issuing from his office, unless such handwriting, or the contents of any copy so certified shall be expressly excepted to, or contested by any party, against whom the same shall be produced or tendered in evidence.

II. That such part also of the said first rule as directs that the Alguacil Mayor at the time of returning every such summons be sworn before one of the judges of the Court to the truth of the certificates minuted by him, or by his assistants, upon such summons, and of the due service of the action, shall be repealed; and that the certificate minuted by the Alguacil Mayor upon each writ of summons returned by him, shall be sufficient proof of the due service thereof, in manner set forth in such certificate, without the oath heretofore required. The Alguacil Mayor being directed to express particularly in each certificate, the manner in which, or the person upon whom the service was made.

III. That so much of the fourth rule of this Court, as requires that the Alguacil Mayor be sworn to the truth of every return of summons, served by him upon any witness or witnesses cited to appear before the Court, be repealed; and the return of the Alguacil Mayor of every such summons duly certified under his hand, shall be sufficient proof of the service thereof, without the oath required by the said rule. The Alguacil Mayor expressing particularly in each certificate the manner and period of service.

IV. That in all cases of actions founded upon account, bond, bill, note, or other instrument of security, not matter of record, it shall be competent for any defendant to apply to the plaintiff, by notice or writing, for a copy of such account, bond, bill, note, instrument, or other security, upon which such action may be founded, which copy every plaintiff shall be bound to furnish with as little delay as possible; and shall not be allowed to proceed to the trial of his action until the same shall have been furnished. Provided that it shall have been demanded within ten days before the trial; the same right being extended to the plaintiff, in cases of documents pleaded by the defendant.

V. In case any witness or witnesses in any action or suit depending, or intended to be presented in the Court, shall be about to depart from the island, or shall be aged, or otherwise disabled from attending upon the trial of any such action or suit, then the deposition or depositions of any such witness or witnesses taken on oath before either of the judges of the said Court, upon the application of the party producing such witness or witnesses, with notice to the opposite party, such notice to be given at least twenty-four hours before the time appointed for examination; shall be held and taken as good evidence in law, in such proceedings. And the said depositions shall be lodged by the judge taking them, at the expense of the party producing the same, in the office of the Escribano who shall produce the same at the time of trial, when upon due proof being made on oath that the person or persons whose evidence shall have been so taken, is or are absent from the island, or otherwise disabled from attending the said Court, such deposition or depositions shall be read and received as good evidence on the trial.

And it is hereby further ordered and declared, that a summons specifying the cause, and some certain day, hour, and place, shall issue under the hand of one of the said judges, at the request of any party to a suit, or the counsel of such party, to any material witness or witnesses, so about to leave the island, requiring his, her, or their appearance to give testimony according to the tenor thereof, before the judge who shall have signed such summons, which said summons shall be served generally, and shall specify in the body, the day and hour of appearance; and in case such witnesses shall make default, not being aged, or otherwise disabled, then such witness or witnesses shall upon affidavit of the service of such summons, be subject to forfeit and pay a sum not exceeding fifty pounds currency, to be levied by warrant, under the hand of the said judge; and in all cases where any witness or witnesses shall be disabled by sickness or otherwise, from leaving his or her place of abode, then one or other of the said judges shall attend at the place or places of abode of such witness or witnesses, for the purpose of taking his, her, or their examination in manner hereinbefore mentioned.

VI. That in all returns of executions, to be hereinafter made into this Court, the Alguacil Mayor do particularly set forth and specify at length, all the property levied upon in satisfactions of such executions.

VII. That in all taxations it be the duty of the taxing officer to furnish each individual who has been in any wise a party to the suit, with a copy of the said taxation, for each of which copies there shall be included a sum at the rate of half a dollar for every folio to the taxador, and of the usual charge to the officer appointed to make all notifications. That the term of thirty days, after such notification has been served, be allowed to the said parties for making any objections they may have thereto, and that after the expiration of the said period, no objections be admitted by the Court. That in cases of concurso or testamentaria, in place of the aforementioned notification, there be inserted by the taxing officer, an advertisement in the island Gazette, stating the names of those persons, who are in anywise a party to the proceedings, and notifying to them, that in case they make no objection thereto, within the space of thirty days from the date of such advertisement, no objections will be afterwards

admitted by the Court, and that the expense of such advertisement be included in the taxation.

ASHTON WARNER,
Chief Judge,
FRANCISCO LLANOS,
Acting Judge of Criminal Inquiry.
JAMES CADETT,
First Alcalde.
A. PINTO,
Second Alcalde.

Approved by His Excellency the Governor, exercising the powers of the Royal Audience,

RALPH WOODFORD.
ANTONIO GOMEZ.

Before me, this 19th day of July, 1825,
GEORGE F. SOUPER,
Acting Escribano de Camara.

TRINIDAD.

COMPLAINT COURT.

RULE.

THAT no action whatsoever, shall be entertained in this Court, other than in respect of some account, bond, bill of exchange, mortgage, or sum due in respect of some contract: and that none other shall be received by the Escribano.

ASHTON WARNER,
Chief Judge.

Approved, RALPH WOODFORD,
July 16. 1825. Governor.

APPENDIX OO.

Additional Rules for the Court of Appeal.

I. That in all cases of appeal to this Court, from any sentence of an inferior court of law in this island, the amount in currency for which such appeals will be admitted, is declared to be four hundred and fifty pounds currency, or nine hundred dollars, which for the purpose of such appeals will be taken as equal to two hundred pounds sterling.

II. That all petitions for the admission of appeals be presented within fourteen days after the promulgation of the judgment or sentence appealed from, and be accompanied by a bond according to the Form No. 1. hereunto annexed, to be executed by the appellant, and one or more sufficient securities to the respondent, in the presence of, and to be attested by, one witness at the least, in the penalty of four hundred pounds current money, to answer such charges as may be awarded by this Court, in case the first sentence shall be affirmed, in default whereof, the prayer for appeal will not be entertained.

III. That in all appeals to this Court, the party appellant do present his petition of agravios within fourteen days after the date of the decree by which the appeal shall be admitted; in default whereof, and upon the application of the respondent, the appeal shall be dismissed as of course.

IV. That upon the presentation of every petition of agravios to the Escribano de Camara, a copy thereof be forthwith passed by that officer to the respondent, who shall within the further period of fourteen days from the delivery of the said copy, present his answer thereto; in default whereof, and upon the application of the appellant, the cause shall be set down for hearing, and the respondent in such case lose the benefit of making any answer in writing.

V. In either case, notice of the day assigned for hearing the appeal shall be given to both parties or to their counsel, and after such hearing, sentence be in all cases pronounced within thirty days; and in case no appeal shall be interposed to His Majesty in his Privy Council, within fourteen days after the promulgation of such sentence, the proceedings be returned by the Escribano de Camara, to the Court of First Instance.

VI. That the Escribano do permit access to be had to all original proceedings pending in this Court in his office, during office hours, by any party requiring the same, or by his advocate.

VII. That so much of the third rule of this Court as directs that in all civil causes of appeal, where the same may be granted in the devolutive effect, the party appellant shall lodge in the tribunal an authenticated copy of the proceedings; — that the whole of the seventh rule; — so much of the eighth rule as directs that in definitive cases, an interval of eight days will be allowed to the respondent; — and the whole of the tenth and twelfth rules be repealed.

VIII. That in all cases of appeal from any sentence of this Court to His Majesty in his Privy Council, the amount in currency for which such appeals will be admitted, is declared to be eleven hundred and twenty-five pounds currency, or two thousand two hundred and

fifty dollars; and that all petitions for the admission of such appeals be presented to the Escribano de Camara within fourteen days, exclusive of the periods of vacations, after the promulgation of the judgment appealed from; and if the fourteenth day should happen on a Sunday or on a holyday, then on the thirteenth day; in default whereof, the appeal will not be admitted; and that in all such appeals as are last mentioned the amount of security to be given for costs be limited to five hundred pounds sterling, or eleven hundred and twenty-five pounds currency; such last-mentioned sum to be in all cases exclusive of the security required to answer the condemnation and damages; and that all such last-mentioned securities be in the Form No. 2. hereunto annexed.

IX. In case any question shall arise as to the value of any property, in respect whereof an appeal may be interposed, either to this Court or to His Majesty in his Privy Council, the same shall be determined by two persons as arbitrators, one to be named by the appellant and one by the respondent; such nomination to be made within four days after the order for appraisement shall have issued from the Court, and such arbitrators being first duly sworn, shall forthwith value the property, and make their return in writing under their hand, to the Escribano de Camara, within thirty days after they shall have been so sworn; and in case that the persons so appointed should not agree in their valuation, an umpire shall be named by the Court, who shall attend with the appraisers, and whose determination shall be final, and be returned into the Court within the period assigned for the appraisement. And in case either party being duly notified of the order for valuation, shall neglect or refuse to appoint an arbitrator within four days after the notification of such order, it shall be competent to the opposite party to name both arbitrators, who in such case shall be sworn, and proceed in the manner before mentioned.

X. In case any question shall at any time arise with respect to the validity or sufficiency of any security offered for the prosecution of appeals, the same shall be submitted to and determined by the Court.

XI. Three calendar months, to be reckoned from the date of the decree admitting the appeal to His Majesty in his Privy Council, are allowed to the appellant to perfect his security for duly prosecuting his said appeal, and to apply for, and take out within the said time, his appeal papers; and a further period of nine calendar months from the day of delivery of the said papers is allowed to the appellant to produce a certificate from the Privy Council office, of the lodgment therein of the said proceedings; in default of either of which terms, unless the appellant shall show good and sufficient cause for further delay, such cause to be submitted to and determined by this Court, it shall be competent to the respondent to proceed forthwith and without further notice to the enforcement of the appeal-bond, and of the judgment of this Court in his favour. A notice of six weeks to be given to the Escribano to prepare the copy of the appeal-papers, with the deposit of the cost of copying, according to the tariff.

XII. Where any of the periods hereinbefore limited shall terminate during the vacations, the obligation of the party shall be fulfilled within four days after the Court shall be opened, when the term shall be absolutely closed.

XIII. When appeals under the value of two hundred pounds sterling, made within five days from the sentence, are admitted to the royal audience, the course of proceeding will be limited to the pe-

tition of the appellant, so filed with his appeal, being referred to the respondent for his answer, which shall be filed in seven days, and in case of default, the cause will be sentenced and returned.—Security, in these cases, will not be required.

RALPH WOODFORD.

ANTONIO GOMEZ.

Before me, this 27th day of July, 1825,

GEORGE F. SOUPER,

Acting Escribano de Camara.

FORM No. I.

Know all men by these presents, that we, A. B. (the appellant,) *of* *and* C. D. *of* *and* E. F. *of* (the sureties) *are jointly and severally held and firmly bound to* G. H. *of* (the respondent) *in the sum of four hundred pounds of current money of the said Island of* Trinidad, *to be paid to the said* G. H. *his certain attorney, executors, or administrators; for which payment, well and faithfully to be made before the Court, we bind ourselves jointly, and each of us himself severally, and our several and respective heirs, executors, and administrators, firmly by these presents, signed with our respective hands, and dated this day of in the year of our Lord .*

WHEREAS by a proclamation bearing date the 19th day of June, 1813, it was amongst other things declared, that the Governor should in all cases, on application being made to him for that purpose, permit and allow appeals from any of the inferior courts of law, in the said island, unto him, provided that in all such appeals the sum or value appealed for should exceed the sum of 200*l.* sterling, and that security be first given by the appellant to answer such charges as should be awarded in case the first sentence should be affirmed.

And whereas the above-bounden A. B. hath by his petition addressed to His Excellency Sir Ralph James Woodford, Baronet, Governor of the said island, and sole Judge of the Court of Appeal, has appealed to His Excellency from a sentence pronounced by the Court of First Instance of Civil Jurisdiction, on the day of now last past, in a certain cause pending therein, wherein the above-bounden A. B. was and the said G. H. was .

Now therefore the condition of the above-written bond or obligation is such, that if the said A. B., his heirs, executors, or administrators, do answer such charges as shall be awarded in case the said sentence of the day of shall be affirmed, then the above-written bond or obligation shall be void and of none effect: otherwise shall be and remain in full force and virtue.

APPENDIX OO.

FORM No. II.

Know all men by these presents, that we, A. B. (the appellant,) *of* *and* C. D. *of* E. F. *of* *and* G. H. *of* (the sureties) *are jointly and severally held and firmly bound to* J. K. *of* (the respondent) *in the sum of* *of lawful money in* Great Britain, *to be paid to the said* J. K. *his certain attorney, executors, or administrators; for which payment, well and faithfully to be made, we bind ourselves jointly, and each of us himself severally, and our several and respective heirs, executors, and administrators, firmly by these presents, signed with our respective hands, and dated this* *day of* *in the year of our Lord* .

WHEREAS by a proclamation bearing date the 19th day of June, 1813, it was amongst other things declared, that the Governor should in all cases, on application being made to him for that purpose, permit and allow appeals from any of the inferior courts of law, in the said island, unto him, provided that in all such appeals the sum or value appealed for should exceed the sum of two hundred pounds sterling, and that security be first given by the appellant to answer such charges as should be awarded in case the first sentence should be affirmed, and that in case any litigant party should not rest satisfied with the judgment of the said Governor, such party might then appeal to His Majesty in his Privy Council, provided the sum or value so appealed for should exceed 500*l.* sterling, and that such appeals be made within fourteen days after sentence, and good security be given by the appellant that he will effectually prosecute the same, and answer the condemnation and also pay all such costs and damages as should be awarded by His Majesty, in case the sentence of the said Governor should be affirmed.

And whereas His Excellency Sir Ralph James Woodford, Baronet, Governor of the said island, and sole Judge of the Court of Appeal therein, did, by a sentence pronounced by His Excellency in a certain cause pending in the said Court of Appeal, wherein the said or the above-bounden, as the case may be, was appellant, and respondent, bearing date the day of which was in the year admit an appeal to His Majesty in his Privy Council, from a certain sentence pronounced by His Excellency in the said cause, on the day of then preceding, subject to the provisions of the said in part-recited proclamations.

Now therefore the condition of the above-written bond or obligation is such, that if the above-bounden A. B., his heirs, executors, or administrators do and shall effectually prosecute his said appeal, and answer the condemnation, and also pay all such costs and damages as may be awarded by His Majesty in his Privy Council, in case the said sentence of His Excellency the Governor of the day of shall be affirmed; then the above-written bond or obligation shall be void, otherwise shall be and remain in full force and virtue.

APPENDIX PP.

TRINIDAD.

(L. S.)

By His Excellency Sir Ralph James Woodford, Bart., Governor and Commander in Chief in and over the said island, and its dependencies, Vice-Admiral of the same, &c. &c. &c.

RALPH JAMES WOODFORD.

A PROCLAMATION.

I. WHEREAS His Excellency Don Joseph Maria Chacon, formerly Governor of this island, did by a certain order or instruction issued by him on the 20th day of June, 1785, divide this Island of Trinidad into quarters, and define the authorities vested in the commandants of each quarter, which divisions and authorities were confirmed by His Catholic Majesty, who by an order dated El Pardo, January 11th, 1786, was pleased to approve the same, and to grant to the said commandants the powers and authorities of an Alcalde in ordinary;

And whereas His Excellency the late Lieutenant-General Sir Thomas Picton, formerly also Governor of this said island, did by certain regulations issued by his authority, and bearing date the 20th day of August, in the year 1800, alter and extend the said order, and make certain further provisions for the administration of justice, government of the slaves, and the general regulation of the police of the said island;

And whereas certain tribunals have been established by His Majesty in the said island, for the trial of all civil and criminal causes, and it is therefore expedient to explain and define the powers and authorities to be continued to the said Commandants and their assistants, and to repeal so much, and such parts of the before-mentioned instructions as appear inconsistent with the orders by which the said tribunals are established;

Be it therefore, and it is hereby ordered, proclaimed, and declared, that from and after the promulgation of this order, in the said Island of Trinidad, so much, and such parts of the said order of the 20th day of June, in the year 1785, and of the said regulations of the 20th day of August, in the year 1800, as relate to the administration of civil and criminal justice, shall be, and the same are hereby declared to be repealed and annulled.

II. And it is hereby further ordered, proclaimed, and declared, that every Commandant of a quarter shall within six months after the promulgation of this order take the following oath before His Excellency the Governor, for the due preformance and fulfilment of his office; (that is to say,)

"I A. B. do swear, that I will in all things well and faithfully per-
"form and fulfil the duties of the office of Commandant of the
"quarter of to the best of my judgment, skill, and ability.

"So help me GOD."

And that every person who shall hereafter be appointed to the said office of Commandant shall take the said oath within six months from the day of the date of his appointment.

III. Every such Commandant shall be assisted by one or more alguacils, to be appointed by warrant, under the hand of such Commandant; and such alguacils shall previously to their entering upon their office be sworn before the Commandant, to the due and faithful exercise and performance of the duties entrusted to them.

IV. The Commandant of a quarter shall have authority and be bound to keep and preserve the King's peace within his district, and he is hereby authorized and required to apprehend, or cause to be apprehended, all persons concerned in breaches thereof; and either to bind such persons over in recognizances with sufficient securities to keep the peace, or to commit them to some secure place of confinement, until they shall be tried, or to take bail in such cases as may appear to the said Commandants to be of a bailable nature. He shall in case of necessity require the assistance of His Majesty's subjects, who shall be bound to obey his lawful commands; and if the peace of the quarter, or the security of the inhabitants, shall require it, he may demand the services of the militia, and direct the same, provided he be personally present; he is likewise charged with the general police of his district, and is responsible that the laws thereof be duly enforced.

V. Every Commandant shall have power to examine on oath all persons complaining, or giving information of any criminal offence, whatsoever the nature thereof may be, and to bind over such persons in recognizances, in sufficient penalties to ensure their attendance as witnesses when required before any tribunal of the said island, and shall forthwith cause the persons complained of or informed against to be apprehended, and after due hearing, commit them to a place of security, or admit them to bail, as the case may be, and transmit the examination so taken to the Judge of Criminal Inquiry.

VI. Provided always, that in all cases of petty thefts, assaults, breaches of the peace, contravention of the police laws or regulations, now or at any time or times hereafter to be established, or of any other petty offences whatever committed by any person or persons whomsoever, it shall and may be lawful for the said Commandants to enquire into, and examine the matter on oath in a summary way, and adjudge the offending party, if a male, and above the age of ten years, to any punishment by whipping, not exceeding forty stripes; or whether male or female, to imprisonment and hard labour for any term not exceeding two months, or to the levying a fine not exceeding thirty pounds currency, from which decision or sentence there shall be no appeal, unless in case of corporal punishment by flogging, against persons who are not slaves; in which cases the party accused may appeal within five days from the decree of the Commandant to the board of magistrates at their next monthly meeting, and wherein the sentence appealed from shall be approved, revoked, or commuted.

VII. And it is hereby further ordered, that every Commandant shall hold inquests on the bodies of all persons slain, or who may die suddenly within their respective quarters; and for that purpose shall have power to summon and enforce the attendance of all persons necessary for the taking of such inquest, in such and the same manner as the Court of Criminal Inquiry is authorized by law to do, and return all such inquests forthwith to the Judge of Criminal Inquiry.

VIII. And it is hereby further ordered and declared, that in all civil causes arising in any quarter, not exceeding in value thirty pounds currency, and in which the defendant shall be domiciled in the quarter, and in all cases of fines and forfeitures, local rates or assessments, not exceeding that amount, it shall be lawful for the Commandant of the quarter, upon complaint made to him, to summon the debtor or person complained of, to appear before him at a reasonable time to be appointed by such summons; and upon the appearance of the debtor or party complained of, or upon his default, and upon examination on oath of the party or parties plaintiff, and their witnesses, to hear and adjudge such claim in a summary manner, and to issue his warrant under his hand, to an alguacil of the said quarter, authorizing him to levy the amount of the condemnation, with costs not exceeding forty shillings, on the goods and property of the defendant.

IX. And it is hereby further ordered, that as soon as any goods or property shall be levied on, under and by virtue of any such warrant, the same shall be secured as the Commandant that ordered the levy may direct, who shall thereupon cause a written notice to be affixed in some conspicuous place in the said quarter, stating that he will, on a day, and at an hour, at a place to be mentioned in the notice, which shall not exceed ten, nor be less than five days from the date of the notice, sell the same by public sale to the highest bidder for ready money.

X. And it is hereby further ordered, that the said Commandant, or his adjoint shall by his alguacil or officer accordingly sell the goods, and immediately thereupon pay over to the plaintiff the money produced by such sale, or so much thereof as shall be sufficient to satisfy his demand, first deducting thereout the expense of storage and conveyance, and poundage at the rate of 5 *per cent.* for the payment of his alguacil, and pay over the surplus (if any) to the defendant.

XI. And it is hereby further ordered, that the said commandants shall have power and authority to enforce the attendance of witnesses in every cause or complaint pending before them, by summons, and in case of non-attendance upon service of such summons, to fine the person refusing to obey such summons, in any sum not exceeding forty shillings, such fine to be levied on the goods of the party so in default, under and by virtue of a warrant to be issued for that purpose, under the hand of the Commandant, and the goods when levied on, to be disposed of in the same manner as hereinbefore directed, with respect to the goods of any defendant, and the money arising from the sale thereof to be paid into the chest of the quarter.

XII. And it is hereby further ordered and declared, in all cases of the death of any inhabitant of a quarter, intestate, and without leaving any heirs known to the Commandant, such Commandant shall immediately proceed to make provision for the burial of the deceased, and to secure his or her papers and effects, giving notice thereof without delay, to the Court of First Instance of Civil Jurisdiction.

XIII. And it is hereby further ordered, that every Commandant of a quarter shall have power to administer an oath, in every case in which he shall deem it necessary so to do, for the purpose of carrying this order into effect, or for any other legal purpose; and that any person who shall swear falsely in any oath to be administered to him as aforesaid, and who shall be duly convicted thereof, shall be deemed and considered to be guilty of perjury, and suffer accordingly.

XIV. And it is hereby further ordered, that every alguacil shall be

entitled to, and demand, and receive the fees set forth in the schedule hereunto annexed, for his trouble in aiding and assisting the Commandant in the discharge of his duty.

XV. In every quarter shall be kept a civil and criminal register, in which shall be entered the judgments and executions ordered from time to time, with such particulars as may suffice to form a record of the action or offence.

XVI. Every Commandant and any alguacil duly appointed shall have power to seize and commit persons offending, in their view, against any law, ordinance, or regulation, localor general; and any alguacil shall have power to apprehend an offender he may be in search of, although out of the limits of his quarter, upon exhibiting his warrant.

XVII. And it is hereby lastly ordered and declared, that all and whatsoever Commandants of quarters are authorized, empowered, and required to do and perform under this order, shall and may be observed, done, and performed by any adjoint, assistant or acting Commandant; such adjoint or assistant Commandant taking the oath hereby prescribed, for persons holding, or to be appointed to the office of Commandant.

Given under my Hand and the Great Seal of the Island, at Government House, in the Town of Port of Spain, on the 28th day of June, in the Year of our Lord One thousand eight hundred and twenty-five.

By His Excellency's command,

FREDERICK HAMMET,

Acting Secretary.

Schedule of Fees to be paid to Alguacils of Quarters.

For every judicial summons - - - -	4*s.*
For any service out of the quarter, *per diem*, - -	10*s.*
For serving a writ of execution - - -	10*s.*
For any commitment - - - -	6*s.*
For guarding a prisoner, *per diem* of 24 hours, (including his commitment) - - - - -	15*s.*

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