Law of Persons

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LL.B. II

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The organisation plays a pivotal role in law students' academic and social life at the University of Malta. The organisation has also been responsible for publishing the prestigious *Id-Dritt*, and the *GħSL Online Law Journal*.

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CHETCUTI CAUCHI
ADVOCATES

Advice from an Alumna

By Dr Priscilla Mifsud Parker

The law course is a long journey, but one that, if well-travelled, will lead to beautiful destinations. In an industry which is today attracting many young individuals looking to develop their career in law, it is important to stay ON the beaten track and remain focused. It may go without saying that it is of great importance for all students to attain good academic grades, to be dedicated to their work, as well as to be determined in this highly-competitive industry in order to fulfil their dream of becoming lawyers one day. However what is crucial is that as students and later on as professionals we are innovative by being sensitive to the changes around us. These changes might be political, economic, environmental, socio-cultural or others; what is for sure is that they all have an impact on the profession of a lawyer. We are members of a dynamic profession which is very sensitive to its surroundings. The type and 'genre' of advice which is required from us is all affected by what is being experienced by the receivers of this advice.

Work experience is considered as a vital part of the staple diet of any prospective lawyer in order to put into practice and refine the knowledge gained from the theorethical reality of the lecture halls and lawbooks into the skills required for a successful career in law. An internship will not only show future recruiters that you have a genuine interest in pursuing a career in this sector, but that you have the practical knowledge and skills to the succeed in your role.

Here are some personal suggestions that I feel helped me during my journey:

1. *Being Ambitious*

A powerful trait in any competitive industry, ambition will help you in your law course, in your career as a lawyer, as well as in your life. Whilst the law course can be quite intimidating and challenging, an ambitious individual who is dedicated to learning new things has the potential to understand and realize long-term goals. Do not view the journey as one whole insurmountable mountain but focus on the next small goal and once achieved move on to the next and goal by goal you will reach your final target point.

In this respect, gaining valuable work experience through an internship is an important step taken by an ambitious young lawyer who wants to attain certain skillsets, and remain a step ahead of his/her peers. By being inquisitive, analytical and humble enough to accept guidance and mentoring one is guaranteed a fruitful experience in a law firm. It is also not only a means to start focusing on the direction of your career and to build upon your chosen path, but will undoubtedly expose you to the international world. This is crucial, as most of the traditional legal sectors have been intertwined with new areas of legislation and all these together now present much more opportunity for intra-jurisdictional work.

2. Networking

By engaging with counterparty students abroad and in international fora one gains an insight into another reality and is exposed to different cultures, ways of communicating and is able to bridge

the differences between parties to a mundane discussion which will eventually become a transaction or a major project in professional life.

3. *Organisational Skills*

Organisation is key in any industry. Good organisation skills always stand out to a recruiter when considering potential applicants. Such skills can be obtained by gaining experience either through organising one's own work, study plan,student events or cultural/philanthropic events.

Going hand-in-hand with this, is having a study plan. By planning your studies ahead, one will have a sufficient amount of time to meet all the demands, while also being able to participate in productive outside activities. Reviewing notes or case briefs before class can also help you follow and participate in class discussions better , whilst following case-law allows you to apply them for specific situations. In view of the amount of material involved summarising and carving out the most crucial points is essential to then build your argument in papers.

4. *Taking your own class notes*

It is always important to take down your own notes as laws are always evolving and passed-down notes would provide the context but are not ideally used for the detail. Researching the particular topic and comparing Malta's law with that of other jurisdiction gives one a completely different outlook and commenting on these variances in an exam paper, dissertation or assignment would distinguish one student from another. Not to be overlooked are also the consultation papers, commentaries and other official public documents that are issued by local authorities from time to time on different areas of law and industry. Being abreast of what is happening in industry will help putting the particular law or regulation in context.

5. *Participation*

Participation is a main element of the learning process. Being actively involved during seminars and lectures and participating in legal debate sessions, mock trial competitions and moot courts are essential in order to improve your persuasive and presentation skills. If you find this very difficult (all of us have different characters and traits), then try to focus on participation in other events which will expose you to public speaking starting off in smaller groups in a more familiar environment and trying out new experiences and larger audiences as you go along.

6. *Practice is the key to success*

This leads us to our next point – practice. Attaining good grades is undoubtedly an important part of the law course, however, in themselves, they are not enough to show that you have substantial material to succeed. Working within a law firm introduces you to the world of work, and allows you to gainspecific industry-related skills which one will only ever be able to learn in a workplace setting.

Work experience can provide you with valuable insight which will help you decide what your career aspirations are and in which areas you would like to further delve into.

THE ROYAL UNIVERSITY OF MALTA

Notes on Civil Law - Volume 1

By

Professor V. Caruana, O.B.E., J.C.L(Greg.), B.Litt., LL.D.,

(Course of Laws - II Year)

iii) The mutual obligation of the son-in-law and daughter-in-law on the one hand and father-in-law and mother-in-law; on the other ceases" on the death not only of the person from whom the affinity derived, but also of the children born from the marriage by which the affinity was created, and their descendants" (Art. 17)

Title II.

Of Filiation (Art.132 - 154)

Chapter 1.

Of offspring conceived and born during marriage

The previous titles deal with the relations between the married persons and in connection with the relation between them they also cover the obligations and rights of alimentary allowances between blood relations and other kindred. We now pass on to another consideration, that is the relation between parents and children. The subject matter has been distributed in three titles (i) of Filiation, (ii) Adoption, (iii) Patria Potestas, i.e. on parental authority, originally constituting the subject matter of Ord. III of 1869 which was later included in Ord. I of 1876.

Filiation consists in the bond of relationship between parent and offspring. This bond is known as filiation, having regard to the person of the child, paternity or maternity respectively. The natural state of son or daughter, father and mother, is of two kinds. It is cither legitimate or illegitimate. Filiation, as well as paternity and maternity, is known as legitimate when the offspring has been conceived in wedlock'. For the benefit of the law, private and international, legitimate also is the offspring born during the marriage but conceived before its solemnization.

Requisites of Legitimacy.

If we analyse the significance of 'legitimate filiation[1]' we find that it consists of the following elements:-

i. the matrimony between the married parties that are claiming to be the parents,
ii. birth by the woman concerned,
iii. generation due to the man concerned,
iv. the conception of the offspring during marriage, or at least the birth of the offspring marriage, and the fact that the parents were free to contract matrimony since the time when conception was effected.

The first and the second conditions are capable of a direct proof, not so the other two conditions i.e. "fatherhood, (or paternity) at the time of* conception". The tine as well as the author of the facundation cannot be tested by the senses. Hence the necessity to establish these two elements by means of presumptions based on common and general experience. "Presumptio sumitur in eo quod plerunquo fit". The presumption regarding fatherhood was ably established

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by Roman Law thus: 'Pater est quem juste ruptiae demostrant' which has been reproduced in Art.80 "a child conceived during marriage has the husband for his father". The basics of the presumption is the family condition of the married woman having regard to her obligation of fidelity towards the husband which she is presumed to observe and respect as happens in the majority of marriage relationships. However, the obligation of fidelity does not begin before matrimony and the presumption therefore applies only to the offspring that has been conceived in wedlock. Therefore it is necessary to establish the date when the conception took place as may be necessary in the case of a child born during marriage but conceived before it took place, when both parents or either of them were previously united in another marriage. In the first case the child must prove that it was conceived during marriage and in the second case that his parents were free at the time of conception. No proof would have been easier had nature affixed a fixed time and period to gestation. If that were the case, knowing the exact date of birth, we could easily calculate the time of conception and thus establish whether the offspring was conceived during matrimony or before it. But as the time of pregnancy is subject to variations more or less long, our laws, following the results of the Science of Physiology, has established a maximum and a minimum period between which conception and birth must have taken place. Already Roman law recognized as legitimate the offspring that was born not before one-hundred-eighty-one days after the solemnization of marriage. Common Law accepted the principle that conception cannot be presumed to have taken place later than one-hundred-eighty-two days before birth and at the earliest possible three-hundred days before. In the French Civil Code the minimum period is six months and the maximum period ten months, reckoned according to the Republican Calendar in force at the time of its promulgation and that is one-hundred-eighty and three-hundred days respectively. This principle has been accepted by our laws which have adopted it as an absolute presumption in Art.81, running as follows: "A child born not before one-hundred and eighty days from the celebration of the marriage nor after three-hundred days from the dissolution or annulment of the marriage is presumed to have been born during marriage."

In so far as this disposition establishes one-hundred-eighty days as the minimum period of pregnancy it can be considered as favourable to legitimacy because it is agreed that no viable offspring can be born before one-hundred-eighty days since conception, so much so that in the science of Obstetrics, the minimum period is two-hundred days. On the other hand unfavourable to legitimacy is the maximum period of three-hundred days because pregnancy, though very rarely, may exceed that period. The German Civil Law, para.1592, Sec.1, lays down as a possible period of conception the interval between the one-hundred-eighty-first day and the three-hundred-second day before birth including the first and last day of both periods; but while it excludes the proof showing that conception may have taken place later than the one-hundred-eighty-first day, it admits the proof showing that conception may have taken place prior to the hundred and two days before birth.

In only one case under our system does our jurisprudence admit this presumption as absolute and that is when the widow has given "birth to a child a short time after the death of her husband and again gives birth to another child within the three hundred days after the dissolution of marriage. It would be simply preposterous to attribute the second birth to the deceased husband because it took place within the limit of the maximum period.

Not so absolute is the presumption concerning the child's paternity, because our law admits proof against it in four cases, by means of an action of denied paternity.

Our legislator has been careful to indicate exactly the conditions for which paternity may be denied as well as the person by whom or against whom such action nay be put forward, the time limit wherein it may be exercised the exceptions or objections that may be alleged, thus showing that the action in question is admitted only by way of exception against the presumption of paternity to be exercised and understood in a restricted sense in accordance with the saying "Exceptio est strictissime interpretationis. We may now pass on to an examination of Arts 83, 94, 85, 86.

Art.83 considers the case of the husband who can prove non-access to the mother owing to the physical impossibility of co-habiting with her on account of distance or in consequence of any accident during all the time in which conception might have taken place, that is to say between the period of one hundred twenty one days between the maximum and the minimum period before birth.

Art.34 regards the legal separation of the married parties and the legal period of conception and Art.85 that of the husband's physical impotence whereas Art.86 deals with adultery of the wife who conceals the birth from her husband at a time when husband and wife would not possibly have access to each other.

i) It is obvious that in the first case, if cohabitation has been impossible during all the legal period, the child cannot be considered to belong to the husband. If, on the other hand, the married persons live together even for a short time, the husband cannot disown the child, because in this case the law applies the principle that "pater est quem nuptiae juste demonstrant".

But so strict is the law that it does not consider physical impossibility alone a sufficient reason and it requires two determinate conditions which are (1) absence or (2) an accident. For example, a birth has taken place on the 20th December. The husband left for Australia on the 2nd February and returned on the 10th October. It is obvious that the conception cannot have been due to the husband's fecundation, because this cannot have taken place on the 10th October or after, since from the 10th of October to the 20th of December, fewer days have elapsed than the legal period of one hundred eighty days. Conception cannot have taken place on the 2nd February or because from the 2nd of February to the 20th of December more than 300 days have passed, i.e. more days than there are in the maximum legal period. Distance as a condition must not be understood in the sense that it cannot have been travelled with in the period of 121 days during which concupation may have taken place, because nowadays there are no such distances, but even before the achievement of contemporary speed any distance was

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considered sufficient for the purpose, provided it was established for certain that neither of the married parties has left his or her house, in the above said period, for example as in the case when if the wife has always been in Malta and the husband in Syracuse.
Besides the word distance need not be taken in its literal sense. Distance in the sense of our law includes any separation making co-habitation impossible during the legal periods, such as to give an example when both the married persons arc the inmates of two different institutes. The other cause of physical impossibility of co-habitation is "any other accident". Such nay bo a wound, mutilation, surgical operation and, in the opinion of many, also a serious disease. Both distance and "an accident" may occur together, thus together establishing the period of physical impossibility of co-habitation, such as would happen if in the example we have already given, the husband had returned to Australia on the 6th June and was immediately arrested and detained at the Lazzaretto until the 30th.
Another case of physical impossibility of co-habitation arises from the manifest physical impotence of the husband previous to the 300th day before the birth and existing up to the 180th day after the birth. Manifest physical impotence is by itself a perpetual cause of physical impossibility of co-habitation giving rise to an action of denied or disowned paternity (Art.85) and the Italian civil Code, but not in the French Code (Cfr Art.313a, 1st line of the F. C. Code)

iii) The action for the rejection of a child may be exercised also in the case when, in the period within which conception may have taken place, the married persons were legally separated, provided that there was no re-union between them even for a short timo, which might have given rise to intimacy between them (Art.84).
From this article we may argue "a contrario sensu" that separation by itself even if of a permanent nature does not give rise to an action for repudiation.

iv) The fourth case occurs when the wife has committed adultery, or when the married persons were in the moral impossibility of co-habitation. For the prosecution of the appropriate action in this case the following conditions must be fulfilled;-

a) the adultery must have been committed during the legal period of conception;

b) adultery alone does not constitute sufficient cause for the exclusion of the husband's paternity "cum possit mater adultera esse et imputans maritum patrem abuisse".

It is further necessary in this case that the wife shall have concealed the birth from her husband, naturally also her pregnancy. It is not sufficient that she shall have hidden him her condition of pregnancy for some tine if afterwards she disclosed the birth to him. If she behaves in this way, the wife makes her moral conduct open to suspicion, but it nay also happen that she was induced to behave in this irregular way by the fear of her husband's jealousy, and at times this may have been done with the consent of her husband in order to attribute the birth of the child to her paramour. These two conditions, i.e. adultery and the concealment of birth, only enable the husband to commence an action for the repudiation of the child, but to win his case he has to prove non-access to his wife during the time of conception for a good cause, such as

his old age, his bad health, his quarrels with his wife, and his separate home. The law does not ask him the impossible proof on non-paternity but only the proof of facts which make it very probable that he is not the father of the child. Such proof would be the child's resemblance to the wife's paramour the colour of the skin, if the wife's lover is a coloured man and no on, but in order to avoid but in order to avoid the error into which the French Jurisprudence has fallen it is necessary to point out that these facts alone are not considered sufficient to invalidate the general presumption of paternity, or as we might say in other words, to constitute an indirect proof of the wife's adultery, because this in the wording of art 86. is indicated as the cause of disavowal. It is only when such probability that the husband is not the father of the child is further corroborated by the mother's concealing the child's birth from him that it gives rise to the proof of the facts showing that the husband is not the father of the child. The proof of the three conditions of this case is essential as is expressed in art 86, laying down that such proof cannot be replaced by the more confession of the mother, who attributed the child's paternity to another man. The proof of adultery, concealment of birth and other facts tending to prove the moral impossibility of legitimate paternity may be made in a separate judgment or the same judgment in which the action for disavowal of the child has been proposed. We have already said that the requester of legitimacy is that the offspring be conceived during marriage or, at least, or that it be born during marriage provided that the parents were free at the time of conception. In the second case legitimacy is a benefit of the law which the majority of jurists base upon a legal fiction of legitimacy. Therefore the child born during matrimony, tough conceived before, is considered to have the mother's husband for his father and if the latter does not want to acknowledge the child, he must have recourse to the same action for the repudiation of the child but in this case the moral and social basis of the presumption of paternity are absent and therefore the action for the repudiation of the child as a rule belongs to the husband, and it is only in the following cases that he is denied it's use

i) When he knew of the wife's pregnancy before he married her, because in this case the

ii) When he himself has made the necessary declaration required for the act of birth in

iii) When the child was considered non-viable. The offspring that is born non-viable is fact that he married her is taken her as a proof of confession that he is the child's father. which he described himself as the father of the child considered as if it were born dead, as it was never included in "rerum natura" and therefore incapable of rights so that it would be sheer waste of time to discuss its legitimacy. An action for child repudiation in this case would lack the proposer's interest or advantages which is the basis of any action. Its only aim is the dishonour of the mother and this far from being considered a "juridical interest" was stopped and opposed by the legislator. This impediment to the prosecution of such action although admitted only in the case of the child conceived before marriage must be extended also to other cases of repudiation because in so doing we are applying a principle of common law.

With these exceptions the legitimacy of the child born after matrimony but conceived before it's solemnization, has little chance of proof because it's mere repudiation put forward by the husband against the mother by means of the usual action has a peremtore effect. All that the husband has got to do is to show that the birth has taken place before the 130th matrimony in order to prove that the child has been conceived before matrimony, and in this way exclude himself as its father and thus prove that the child is illegitimate.

Chapter II.

Proofs of Legitimate Filiation and Other Proofs to the Contrary

oofs of legitimate filiation are those brought forward by the child claiming the state of legitimacy or the proofs brought forward by others in this sense of his behalf. Contrary proofs are those intended to disprove such claim, some of the elements on which the proof of legitimacy is based are capable of a direct and full proof whereas others are based on mere presumption. Thus the day of conception is a matter of legal presumption, taking the date of birth as a point of departure which is subject to direct proof. The most important means of the proof of legitimacy is the act of birth that formal act prescribed by the law to record births in which are indicated the parents of the child, the time of births and the names given. It is made in writing and recorded in the public registry in the branch devoted to Acts of Birth, Marriage and death, designated as the registry of Civil State. Records kept in the Parish Baptismal registers are considered as the equivalent of the act of birth. As the act of birth constitutes a document, it is for the purpose of the law, and the claim of legitimacy advanced under it, considered a sufficient title proving such legitimacy. If it is alleged that the document in question does not concern the person claiming legitimacy, the claimant must give proof of the contested identity. This document serves to supply a direct proof of the claimant's mother only because only this proof may be obtained directly. But, indirectly this document serves to establish also the child's paternity. Having established the child's mother it is taken for granted that conception took place in wedlock and, therefore it is presumed that the child's father is the husband of the ther. The presumption of the child's paternity remains in spite of any expression or omission of paternity that may be contained in these documents. Just as the document only would not be enough to make good the omission of any of the conditions necessary for the legal presumption of the child's legitimacy. In default of a title (Art.93) the position of continuous possession of the status of legitimacy is considered sufficient. This possession consist in the various facts which, taken together, serve to establish the relations of son, mother and father between the child and the family

to which he claims to belong. The principal facts from which such possession of status results have been thus summarized in the formula " Nomen, trattatus et fama ", which art.94 expands as follows laying down:

1. That the person concerned has always borne the surname of the man whom he claims to be his father
2. That the alleged father has always treated the claimant as his son, having provided for his education, maintenance and position
3. That the claimant has been always recognized as the child of the alleged father
4. That the alleged father's family has also recognized him as such.

These facts are enumerated by the law only by way of example and, therefore they are not the only facts available for the purpose, nor are they all indispensable in order to establish the possession of the status of legitimate son. It should be noted that the possession of statue must be established in regard to both parents since the law admits this proof only in the absence of the usual title, considering that the child has been treated as their legitimate offspring by the parents, and that the child has been so recognized by the family who might have reason to oppose such acknowledgement and that society has accepted the parents and family attitude towards the child as a proof of its legitimacy. But, if judging from appearances, these facts apply only in the case of one of the parents, it is probable that the child belongs to that particular parent only and, far from presuming the parentage of the other party, it is justly presumed that the child does not belong to the wife or to the husband concerned, as the case may be. Failing the proof of maternity or paternity one falls also to establish the condition of legitimacy since this depends on filiation with regard to both parents. The person claiming the condition of legitimacy by means of this proof must also prove that his parents were united in matrimony. Indeed, the necessity of this further proof occurs also when one can advance the usual title because all these facts serve to establish filiation only, but the further proof of the matrimony between the alleged parents must be made to establish the legitimacy of such filiation. In the absence of a title, the child may claim the state of a legitimate son by means of the proof of the possession of status, which is considered sufficient to establish legitimate filiation, , But when there is disagreement between the title and the possession of such status, the latter ceases to have any importance since it carrot serve to invalidate the stronger proof of the written document, but, of course, the child or the person representing him can always impugn the regularity or genuineness of such title.

When the title and the possession of status agree in their common evidence, then the child's status is absolutely established, so that he cannot claim a different status, nor can other contest it. The Act of Birth, the Parish Register and the possession of a status are the better, that is, more reliable, proofs.

In such a delicate and important matter the law seems to have insisted on a formal proof of status in order to establish such status beyond doubt or the possibility of error or uncertainty. However, the desire to favour legitimacy has to some extent been achieved at the expense of absolute certainty, since in default of the latter, or more reliable proof, we have already mentioned as well as the agreement between the Act of Birth and the possession of a status, the law as in other particular cases admits all other proofs for the purpose that are admitted by the law to prove other and different facts. Thus, according to Art. 96 legitimate filiation may be proved by any other means admissible according to law, such as witnesses, confessions, declarations, written or made verbally by the father or the mother, and that in the following cases:-

(1) In the absence of an Act of Birth and the possession of a status. If we compare this position of the law with the section immediately preceding it, we immediately draw the conclusion that in order to make the means of ordinary proof possible, it is not necessary that both the Act of Birth and the possession of a status should be wanting but that it is enough to have one of them missing, or that there is contradiction between the title and the possession of s status. It is true that it is laid Som in Art. 95 in the last mentioned case the proof of the title prevails, but this is only when, there is no proof to the contrary showing that filiation as described in the Act of Birth does not agree with the facts,

(2) When the child was registered in a false name or described as born of uncertain parents. In both these cases there is a title, but it is not considered valid as a proof.

(3) When there has been supposition or substitution of the child. Supposition is that act of fraud whereby a woman pretends to have been pregnant and given birth to a child. In substitution fraud consists in substituting one child for another. In the case of a substitution of child, one may have the Act of Birth and the possession of a status, but these are both the result of a fraud: so also the substitution of child that may have taken place either fraudulently or erroneously, with the result that both the title and the possession of a status are also useless as evidence of legitimacy. In these two cases, far from the claimant being able to prove his legitimacy by means of the titles, he is bound to prove the contrary, and for this reason he is allowed to make such proofs by all the means available such as will throw light on his real status, in spite of the fact that both his title and the enjoyment of his status agree.

Of Contrary Proofs.

Art 97 which contemplates proofs contrary to the state of legitimacy does not express a general norm of application. It is rather the continuation of Art. 96 so that it refers only to the cases mentioned in this Article. When someone has been admitted to prove the status of a legitimate child then his contestants may avail themselves of the same proofs

used by the claimant himself in order to prove that the child is not the son of the alleged mother or the alleged father. In this case, therefore, one departs from the usual legal presumption of paternity for the reasonably explained by Bigot-Preameneau in his commentaries on the French Civil Code quoted by the Court of Appeal in the judgment of the 24th October, 1914, in re Huber vs. Mattei to the effect that when the child cannot claim the position of a status or a title or has been registered in a false name or as son of uncertain parents, a strong presumption arises that the child was not born in wedlock, which presumption must, if not neutralize, at least weaken that of paternity, thus enabling the husband to impugn it more easily than in other ordinary cases and without the limitations that are proper to the action for child repudiation.

In order to avoid the consequences of the legal presumption it is enough for him to prove by any means the moral Impossibility of non-excess without the necessity of the circumstances mentioned by Art. 86.

In the mentioned Judgement, the Court of Appeal maintained that from Art. 97 we may argue a general departure from the principles for the repudiation of the child for which when the child's mother cannot be known from the Act of Birth and the possession of a conformable status, the presumption of parentage may be impugned by any person concerned and by all kinds of proof, and that, therefore, the very child conceived in wedlock may in this case repudiate the state of legitimate filiation and by the available ordinary means of proofs establish an illegitimate parentage.

Concerning Actions of Legitimate Filiation.

These actions belong to the category of a Person's status, that is to say, to that class of actions whereby a person asserts a status that he does not possess but to which he believes himself entitled. In the first case we have an assertive or affirmative action intended to vindicate one's status, in the second case we have a negative action or an action for the contestation of one's status.

These actions may apply to any kind of personal stittue such as that of husband or wife, son or daughter and a citizen. In Roman law such actions applied also to the status of liber, generus, libertus, patronus, etc. Nowadays they are mostly applied to legitimate or illegitimate filiation. Actions regarding legitimate filiation are:

(a) The action claiming the status of legitimacy;

(b) The action contesting the status of legitimacy, which is known under two special names in two different cases (1) An action of repudiation or disowned paternity and it takes place when, with all other conditions of legitimacy fulfilled, it is only the identity of the child's father that is contested and (2) the action repudiating the child's legitimacy on the ground that at the time of the conception matrimony had already been dissolved or annulled, or on the ground of physical impossibility of co-habitative access because the husband was away all the time when the conception took place or some other particular cause. Outside these cases, the action for the repudiation of status bears no

special name.

Concerning the Action Claiming the Status of Legitimacy.

According to Art, 95, a person cannot claim a different status of legitimacy from that described in the Act of Birth and the conformable social repute. From this disposition of the law we may conclude that everybody may claim the status of legitimacy in regard to the married parties that are claimed to be the parents when that is a status which one does not possess but which one claims to be entitled to, so long as this is not made impossible by a different status already enjoyed as the result of a title and the conformable repute. Indeed, in this case, while it would have been extremely unlikely that the enjoyed status was not the real one, the action claiming a different parentage would have the effect of shaking and undermining the very basis of the status of legitimate children to the detriment of family security and good social order. As we have already pointed out, the only departure from this rule takes place in the case of supposition or substitution of child only.

The action claiming legitimate parentage belongs to the child and, so long as it lives, to no one else, because the enjoyment and possession of a status constitutes a moral and material interest exclusively or, at least, principally affecting him alone. Contrary to the general principle granting all actions belonging to the debtor to his creditor by way of surrogation, in this case creditors are not allowed, to avail themselves of this action, the moral quality and personal implications of which must be preferred to the merely financial interest of the creditors. But, according to Art. 99 if the child has died a minor, or within the five months after it had attained majority, this action may be brought forward by its heirs or by the descendants whether these are heirs or not.

The heirs may have proprietorial rights in the matter and, therefore, an interest to bring forward such action, but in the case of the descendants there may be the additional interest of moral vindication of their family status.

Failure on the child's part to enter such action within five months after attaining its majority results in the law arguing from such inaction the child's acquiescence in its status, a kind of implicit renunciation to the right to claim a status other than that it enjoys or, at least, the material benefits that might accrue therefrom. In this case it is agreed that as the party principally concerned has renounced the action no one else can claim to bring it forward instead or on behalf of the child. When, however, the action has already been entered by the child who died pending the suit, such action may be continued by the heirs or the descendants (Art. 99).

As one's personal status cannot form the subject matter of a commercial transaction, it cannot therefore be made the condition of an agreement, compromise or renunciation, nor is it subject to prescription in

regard to the child since prescription partakes of the nature of a tacit renunciation, but the fact that such personal action is not subject to prescription, in so far as it regards the vindication of one's personal status, it is not imprescriptible also with regard to the financial effects connected therewith, because just as financial interests may be renounced, so may they be likewise barred by time. As a matter of fact, if the child falla to enter the action, five years after the attainment of its majority, the law argues and admits that thereafter the child's heirs or descendants' eventual material claims have been renounced.

Concerning the Action of Disowned Paternity.

The action of disowned paternity as a rule belongs only to the mother's husband, because none better than he can say if the child is his own or not; also because the matter affects his personal honour as well as that of his family. By way of exception, legitimate or testamentary heirs are allowed to bring forward this action out of consideration of their financial interests in the event that the husband died without having entered this action, but before the legal or prescribed time has elapsed. It need hardly be repeated that they can always continue it if the husband dies while the suit is pending.

The action must be brought forward against the person whose legitimacy is being contested. The husband is the plaintiff whereas the child whom the husband wants to repudiate is the defendant. If the child has attained majority and is legally fit, that is capable of legal acts, the action must be entered against him personally: but, if he is a minor or otherwise legally incapable to be a party to a suit, he must be represented by a special curator, nominated for the purpose by the Court which may at its discretion nominate the child's guardian if such one has already been provided (Art. 89, para. 1). Therefore, the guardian who is the representative of the ward in all other cases is not so "ex officio" in this case, the reason being that as the guardian is a member of the ward's family he might have an interest to exclude the child's legitimacy. The mother must also be summoned in this judgement, because she is in a position to furnish all the necessary information for the defence of the child's personal status, also because she must be given the opportunity to defend her own honour. The law prescribes the time-limit of three months for the exercise of the action of disowned paternity. This short time-limit is justified considering that while on the one hand the father will lose no time in re-acting against the outrage suffered, on the other the child's true status must not be kept in suspense for a longer time. The time-limit runs from the date of the birth if the husband was on the island, and from the day of his return if he was away. When the action belongs to the heirs, the time-limit is that of three months which, when the goods have already passed into the child's hand, run as from the day when this transference of goods happened which, in practice, means the time-limit begins to run from the date of the

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husband's death. On the other hand, when the goods have passed into the property of the heirs, said time-limit will begin from the day that the child begins to question their title to these goods (Art, 88). From which we see that the action of disclaimer, that is, of disowned paternity when it is brought forward by the heirs has a purely financial character.

Concerning the Action for the Repudiation of Legitimacy

This is the special description of the action contesting legitimacy in the following cases:

(1) In the case of a child born three hundred days after the dissolution or annulment of marriage (Art, 90).

(2) In the case of the child who, though born in wedlock, could not possibly have the mother's husband for its father, because he was away during the legal period of conception. This disposition is particular to our laws only.

The action disclaiming legitimacy may be brought forward by anybody having moral or financial interest in the matter. This is in accordance with the principle in the first instance of contestation because its subject matter is the contestation of the existence of marriage at the time of conception. However, it is irregular in the second case, the subject matter of which is paternity because it departs from the general rule whereby third parties may not question the mother's husband's fatherhood.

In the first instance, according to the more general theory contestation is peremptory. Having proved that the birth took place after three hundred days since the dissolution of the marriage, the child must be declared illegitimate straight away, and the judge may not reject the impugnation for the reason, for instance, that the birth may have taken an unusually long time, and that conception may have taken place prior to three hundred days before the time of birth (Baudry-Lacantinerie, op. cit. p. 805 note). This strict criterion unfavourable to legitimacy of birth and contrary to the results of science has been rejected by the German law, which allows such a proof even by means of a technical expert who examines, and reports, on the maternity of the offspring.

The German law does not admit the nearly absolute presumption of the paternity of the child conceived during marriage because in any case and without any limitation it permits the production of proofs contrary to such presumption. These dispositions have made it possible for the German law to admit the proof of non-paternity resulting from the differential diagnosis, i.e. analysis of blood. According to the more recent biological studies, human blood may be divided into four hereditary groups, so that, after the examination of the blood of the two persons concerned one could establish whether there is a case of parentage or not, Italian jurisprudence is rather distrustful of the result of such blood tests. The individual blood proof with a view to the determination of parentage is too uncertain in its result to invest a Court judgement with a decisive nature. Thus the Court of

Appeal of Turin in the judgement summarised in the "Repertorio di Giurisprudenza Italiana, 1930, under the title Filiation No. 17. The judgement of the Supreme Court of Appeal (Corte di Cassazione) a passage from which has been reproduced in the "Giurisprudenza Italiana, 1931, Section 9, Part I, Lesson 2, page 434, is unfavourable to the admission of such proofs in certain circumstances.

To return to the actions repudiating legitimacy, we refer again to the law expressed in Art. 95 according to which one cannot call into question the legitimacy of a person who enjoys a status conformable to the Act of Birth. As this stops the child from claiming a different status so, for a stronger reason, it stops any member of the family or any other interisted person from calling into question the legitimate status that results from the Act of Birth as well as the enjoyment or possession of such status.

We conclude this treatise with the remark common to all such sections. Jurisprudence teaches that judgements in connection with actions of status as well as the relative judgements have an effect not only in regard to the parties to a suit but also in regard to third parties in accordance with the general principle expressed in Lex 3, Dig. "De agnoscendis et alendis liberis" lib. 25, tit. 3 Col. Placet ejus rei judicem jus facere. This exception to the general rule governing the subjective limits of the authority of res judicata has been specially asserted with respect to the action of disowned paternity proposed by the husband or the wife against the child. If the husband loses his case, the fact that there has been a judgement delivered, that is, that there is a res judicata makes it impossible for the husband and for anybody else to enter the same action again. In this case one might say that it is not the Court judgement that attributes to the child the condition or status of legitimacy in regard to everybody else, but the law itself by means of the presumption established in Art. 80.

In the opinion of other jurists (cp. Chiavenda Elementi di diritto processuale, Ediz. 1928, pag. 92), the decisive effect of the authority of a res judicata in actions concerning one's personal status is nothing but the application of the general rule whereby the given judgement constitutes a principle of authority with regard to every other person, and not only in the relations between the parties to a suit. In the relations between the parties to a suit the Court judgement is binding on everyone, even if not a party to the suit. Consequently, the judgement in a suit of disowned or disclaimed paternity, governing in a direct way the relations between father and child, must necessarily be considered final and decisive by everybody, even outsiders, because this judgement of its very nature cannot be prejudicial to the rights or claims of third parties, who, by an express disposition of the law, are not permitted to bring forward or take part in this judgement (Cp Pacifico Massoni, Istituzioni, Vol. VII, para. 189, Nota 1).

In order to make the treatise as exhaustive as possible, we now make a reference to the effects of legitimate filiation with which we shall deal in due course. These are:

1. The right of the child to bear the surname of the father
2. The mutual right of maintenance
3. The daughter's right for the assignment of a dowry
4. Paternal authority (patria potestas); and
5. Mutual right of succession

Illegitimate Filiation - Acknowledgement - Requisite Effects - Impugnment - Action for the Declaration of Paternity or Maternity - Effects

Chapter III.

Section 1, Concerning Illegitimate Filiation.

Illegitimate filiation may be of two kinds: (1) Illegitimate or simply natural, which is the condition of a child generated by two persons between whom at the time of conception the state of matrimony could have existed: "ex soluto et soluta"; and (2) Qualified illegitimate, which may be adulterous if the parents or one of them at the time of conception were united in marriage with another person; incestuous if the parents were bound by blood ties, and sacrilegeous if the parents or one of them had received Holy Orders, illegitimate children of any kind may acquire a legal status with rights and obligations in regard to their parents by means of the institutions of "acknowledgement" or "a Judicial declaration of maternity or paternity". Those merely legitimate may achieve such status even by means of legitimization "per subsequeus matrimonium" or by a decree of the Court, and children that are incestuously illegitimate by means of legitimization "per subsequeus matrimonium" solemnized after the dispensation from the impediments regarding their relationship.

Regarding the Acknowledgement of an Illegitimate Child - Conditions of such Acknowledgement.

Acknowledgement is that voluntary act with which a man or a woman declares himself or herself to be the natural father or mother, respectively, in accordance with the formality prescribed by the law. It is only the father and the mother that can make such acknowledgements, because it regards their intimate life and third parties cannot be allowed to interfere. Such acknowledgement may be made by the parents jointly or separately or by one of them. In the last case, the legal status of the child has effect only in regard to the parent that has acknowledged it. Any kind of illegitimate child may be acknowledged, whereas in the French and Italian Civil Codes acknowledgement is only possible in the case of children that are merely illegitimate, thus excluding from the benefit of such acknowledgement for reasons of public morality children of adulterous or incestuous parents. Our legislator

however, has attached more importance to the welfare of the child who should not be penalized for the offence committed by ite parents. In this, as in other dispositions, regarding the rights of illegitimate children, our legislator has shown a liberality of outlook ahead of the times. However, our system on the whole is retrograde when compared with that which has been adopted in modern laws. Thus the Swiss Civil Code attributes to acknowledged illegitimates the same rights that are enjoyed by legitimate children there being the father's surname, nationality, parentage with his blood kins, right of succession with the only limitation that when the rights of succession are also claimed by legitimate children, the rights of succession of illegitimate children are reduced by half. The Norwegian and Soviet Codes make no difference between legitimate and illegitimate children; so also the Greek laws of 13th January, 1927, except as regards the right of succession.

Art. 121 of the Constitution of Weimar lays down the principle that the law must provide for illegitimate children the same conditions for their physical, moral and social development as for legitimate children.

Acknowledgement as a voluntary act must be the result of a free and deliberate will, unaffected by error, fraud or violence. As for the legal qualification to make such acknowledgements, French and Italian jurisprudences lay down that it is not necessary to have the capacity to enter upon a contract, but the mere ability to express one's will and intention, because though the act of acknowledgement may involve financial consequences, it is essentially an act of pure morality. This is also the system adopted in our laws with the one exception mentioned in Art. 100, declaring null and void the acknowledgement made by a minor describing himself as the father of the child. It is certain that for the complete effect of an acknowledgement it is by no means necessary to obtain the acquiescence of the child who has, if he is not satisfied, the right to impugn the acknowledgement (Art, 116).

The acknowledgement of a child may be effected not only at the time of its birth but, since it is a question of the child's welfare, also before "Infans conceptus pro nato habitur quoties de ejus commodis agatus".

The anticipation of such acknowledgement is a matter of prudence on the part of the father and the mother who might die before the child is born. The acknowledgement may also take place after the child's death, in the interest of its descendants (Art. 108).

It is open to question if one can acknowledge a child after its death when it has left no issue since in this case such an acknowledgement could have no other scope than that of securing its inheritance. However, of a favourable opinion are Pacifico Mazzoni, in the quoted work page 149 and Baudry-Lacantinerie, also in the quoted work, page 169 — for the reason that no law prohibits such posthumous acknowledgements.

But, jurisprudence in general is against this opinion in order to make it impossible to derive advantage from such posthumous acknowledgement when the parents may have failed to make the acknowledgement before in order to avoid the consequent responsibilities. The law lays down that the acknowledgement must be made by a formal act. It must be recorded in the Act of Birth or in some other public document before or after the birth. Every other declaration of paternity or maternity otherwise made does not constitute acknowledgement in the sense of the law though it may serve to provide a means of evidence of parentage in a suit that the child may commence against the person who has made the declaration.

Concerning Acknowledgement,

1. The illegitimate child acknowledged by the father may not assume his surname. He takes up his mother's condition and, therefore, may bear her surname provided that it has been recognised by her (Art, 107)
2. Between parents and acknowledged child there subsists the mutual obligation of providing maintenance. The father (Art, 108) must maintain and educate the child till the latter becomes capable of earning its living, and will remain bound to provide him maintenance also after if he will need it. If the child has been acknowledged by both parents, the obligation of maintenance falls on both, though the father is the person first held to provide maintenance and the mother only when the father cannot do so himself (Art. 110).

The extent of such maintenance, even with regard to the obligation of the father, depends upon the condition or the mother and not on the means of the father or the need of the child. "A father is under the same obligation towards the legitimate descendants of a predeceased legitimate child, when their mother or maternal ascendants are unable to provide for them"(Art. 108). When the acknowledged child demands maintenance with other legitimate children or ascendants of the father who cannot supply it to all claimants, the claim of the illegitimate child comes after that of the legitimate, legitimised or adopted children as well as that of the legitimate ascendants (Arts,113,114), but is otherwise preferred to all other relatives and kindred.

This obligation ceases in the cases contemplated by Arts, 111, 112, that is, if the child refuses without a just cause to follow the instructions of the parents with regard to his conduct and education; if he refuses to live in the house of his parents which has been approved for him by a judgement of the Court and, in any case, in which, according to our laws, maintenance may be refused to the legitimate child.
On the other hand, the obligation of the parent to provide maintenance to the child that has fallen into poverty after having been able to obtain his living ceases if the child is married or has descendants who are in a position to provide the maintenance themselves (Art, 108).

A propos of the residence of the illegitimate child, one should note carefully Art. 103, which prohibits any of the two parents to bring into the house without the consent of the other party his or her natural child born before the marriage but acknowledged during the marriage.

The prohibition is inspired by consideration for the unpleasant feeling that the husband or the wife, as the case may be, will experience in the presence of a child that does not belong to them both.

The child that has been acknowledged (Art. 113) is also bound to provide maintenance to his parents that are in a condition of poverty and cannot obtain relief from the husband or the wife, as the case may be, or from its ascendants or legitimate descendants.

3. The law attributes legal guardianship to the parents in order to enable them to direct the conduct and the education of the children. Such legal guardianship corresponds to the paternal authority (patria potestas) exercised by the father in regard to his legitimate children. It belongs to the father who has made the acknowledgement, and, if this has been made by both parents, it belongs by preference to the father. However, in the case of qualified illegitimacy our legislator for reasons of public morality as well as the spiritual welfare of the child has not thought it fit to entrust the child to the parent who has been guilty of adultery, incest or sacrilege. Legal guardianship being thus debarred, qualified illegitimates are given instead in ordinary guardianship called dative guardianship (tutela dativa), which occurs in the case of children who have lost their father.

Legal guardianship, though it bears a different name, is very much like paternal authority, ascribing to the father the same power as is entrusted by "patria potestas" to the legitimate father as it is in any case always a question of the relationship between father and son. It is only the right of usufruct over the child's goods enjoyed by the legitimate father that is denied to the father who makes the acknowledgement, so that he may not make such acknowledgement for motive of gain. Legal guardianship ceases for the same reason as paternal authority. It ceases "ipse jure", as soon as the child has attained majority provided that when it is exercised by the father like paternal authority the authorization of the father shall be still required for certain acts, till the child has completed 21 years.

If the child marries before having attained majority, the Court of Voluntary Jurisdiction may emancipate him by means of a decree (Arts. 104 and 187).

The parent may also be deprived of legal guardianship completely or partially for the same offences for which the legitimate father may forfeit the right of paternal authority (Arts. 104 and 181).

Once legal guardianship ceases, the parent who has exercised such guardianship must give an account of the administration of the child's goods both as regards the child's property and as regards the legal produce thereof.

Acknowledgement serves to declare, and not to attribute, filiation and, therefore, its effect is retroactive from the date of birth and, where necessary, from the day of the child's conception. Acknowledgement once effected becomes irrevocable, because the certainty of one's personal status concerns public order and the law cannot tolerate a change of mind in the matter. This rule applies also when acknowledgement has been made by means of a will, even if this was revoked later, because acknowledgement, although made in a will, is quite a different matter from the other testamentary dispositions in which the testator disposes of his goods for the time after his death (cp. Baudry-Lacantinerie, idem page 880 and Pacifico Mazzoni, idem, page 202). Of a different opinion are Planiol and Ripet (Diritto Civile, Vol. V) for the reason that all that is contained in a will, so long as the testator is alive, belongs to him or her alone. The will is an expression of his intimate thought and, though it is written, it must remain secret for all the time of the testator's life, who will remain the absolute master of the statement made as if he had made no such declaration. Although acknowledgement is a unilateral act which is effective independently of the child's consent, the latter is free to impugn it, as, for instance, when the child wants to vindicate the status of a legitimate child. It may also be disclaimed and contested by other persons interested in the matter, such as other legitimate or illegitimate children of the parent, who may want to exclude the acknowledged child from the heirship.

Concerning the Judicial Declaration of Paternity or Maternity.

To the illegitimate son who has not been acknowledged the law provides the means of obtaining the. status of a son by means of the action for the establishment of paternity or maternity with which the illegitimate son may establish that he is the son of two definite persons who deny to be his father or mother respectively. The laws which do not provide an action for the acknowledgement of qualified illegitimate children deny for a similar reason also the action for the compulsory acknowledgement.

Indeed, the French Civil Code, up to the amendments of 16th November, 1912, did not even permit or allow any enquiry to be held with regard to the child's parentage, and that because of the difficulty inherent in the nature of the relative proofs as well as to avoid scandal and the necessity of protecting honest men against calumny or blackmail. However, jurisprudence agrees, with very little exception, that enquiry into parentage should be admitted in principle, because by rejecting it to avoid one kind of evil, we incur another evil that is far more serious.

As we have already pointed out, modern laws are very favourable to illegitimate filiation. These not only permit enquiry into the child's parentage, but also admit the "exceptio plurium" which, being admitted in modern legislation rather loosely, more often than not neutralizes the possible result of such

enquiry. Thus in the case Buhagiar vs. Galea decided in the Court of Appeal on the 21st April, 1884, it was laid down that the loose conduct of the child's mother, even before the time of conception, justifies a serious doubt as to the child's paternity.

The laws of Austria, Sweden, Finland and Russia expressly disallow such exception. Those of Denmark, Norway and Ukraine hold all the "plures concubentes" responsible for the child's maintenance in solidum.

The effects of the judicial declaration are merged into those relative to voluntary acknowledgement as far as the child's surname or the mutual obligation of maintenance is concerned. In view of the doubt that always remains with regard to the child's declared paternity, the father's obligation has been restricted to the minimum maintenance needed by the child, thus excluding the expenses of education and the child's heirs from the benefit of such obligation. Whenever the father takes advantage of this legal exemption from the payment of education expenses and these are defrayed by the child's mother, it is likewise the mother, and not the father, that has the right to govern and direct the child's conduct and education. Ordinary guardianship is provided for the declared son because the legislator for a good reason has not deemed it advisable to entrust the child's education to its declared parent.

Legitimation - Its Effects and Kinds,

Of Legitimation,

By means of acknowledgement and judicial declaration illegitimate children attain to a legal status in regard to their parents, but the status so obtained is that of illegitimate children and so their rights are considerably reduced as compared with those of legitimate children. Legitimation, on the other hand, not only confers a legal status on illegitimate children, but it also transforms them into legitimate children. The origin of this institution goes back to Roman Law by which it was limited to children born of concubinage only in view of the fact that it is difficult to establish the child's father in unions or intercourses of a transitory or fugitive nature.

In Canon Law and in Civil Law the benefit of this action was extended to all kinds of illegitimate children on condition only that the illegitimates must not be qualified. The motive of this limitation reproduced also in our laws is based on the fact that the judicial basis of this institution is the fiction that the child has been conceived in wedlock and again such fiction is based on the possibility of marriage at the time of conception. The institute of legitimation is intended to make up for the unlawfulness of the union from which the illegitimate child has been born; and Baudry-Lacantinerie says (para. 841) :"this institute offers the parents, by way of a marriage present, the legitimation of their children, inviting them to transform their concubinage into a lawful marriage".

One can say that the institute has "been universally accepted even in the English Laws by means of the Legitimacy Act of 15th December, 1926, in force since the 1st of January, 1926, in force since the 1st January, 1927

Requisites and Effects of Legitimation by Subsequent Marriage

The judicial basis of legitimation makes it impossible to apply this institute to adulterous illegitimates and children that have been born of parents both, or one of whom, was not free to contract matrimony, as when there is an impediment arising from Holy Orders.

Therefore it is necessary that the parents be free at the time of conception. This condition is expressly laid down in Art. 130, according to which we cannot even accept the less harsh disposition of Canon Law which admits legitimation provided that at some time between the child's conception and its birth the parents were free to contract matrimony. An exception is admitted only in favour of children born of an incestuous union. These may be legitimated by means of the parents matrimony once the latter have obtained the necessary dispensation (Cp. Art 130, 131). The reason is that as the dispensation authorizes marriage between relatives and kindred, and once the dispensation has been obtained, blood kinship and affinity cease to be an obstacle to the legitimation of the children born during the marriage. So also they cannot be of obstacle to the fictitious legitimacy of the children born before the marriage. So that the solemnization of marriage may affect the child's legitimation, the legal filiation of the child must be definitely ascertained first, that is, we must establish beyond error that the child whose legitimacy is in question is indeed the child of the man and woman united in Matrimony. For this reason it is necessary to have the voluntary or enforced acknowledgement of the child's father or mother. If the acknowledgement has taken place before, or at the time of the marriage itself, legitimation produces its effect right from the day of that acknowledgement.

With these exceptions and without the necessity of the parents' express will in the matter or any decree of the Court, legitimation takes place "ipso jure", and may be recorded in the Register of Civil Status in the margin of the Act of Birth (Arts. 328, 329. The effects of such legitimation are retroactive also in regard to predeceased children in the interest of their legitimate descendants or descendants that have been legitimated by subsequent marriage, so that they may, in the absence of their predeceased parent, enjoy the rights of legitimate nephews towards their progenitors (Art. 123).

By means of legitimation through subsequent marriage, illegitimate children are placed in the same condition as legitimate children, obtaining all the rights mad obligations not only in regard to their parents but also in regard to the legitimate parents of the latter. But this does not mean that there may

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be other judicial institutions reserved in the exclusive interest of legitimate children.

Of legitimation by a Decree of the Court.

This form of legitimation has been preserved in our laws and in the Italian laws in accordance with the tradition of Roman Law, but it has not been included in the French Civil Laws. It is applied only to children that are merely illegitimate, in other words, illegitimate but without further qualifications excluding also the offspring of an incestuous union, since, there being no marriage in this case, there can be no fiction permitting the legitimation of incestuous offsprings by means of a subsequent marriage after having obtained the necessary dispensation. Legitimation is also effected by operation of the Court of Voluntary Jurisdiction by virtue of the Proclamation of the 25th May, 1814, with which the functions of this Court formerly exercised by the Grand Master and thereafter by the Governor as the representative of H.M. the King, were transferred to the Court of Voluntary Jurisdiction.
The Court can grant legitimation only after a petition for the purpose made by both parents or one of them.
If such petition has been made by one of the parents only that is already united in marriage, it is also necessary to have the consent of the other party. If the child has attained his majority, it is also necessary to have his consent and, if he is a minor, the child's greater interest and advantage must be taken into account. The Court may not at its discretion refuse the decree of legitimation when the applicant is in a position to bring about the child's legitimation by subsequent marriage, and also when the applicant has other legitimate or legitimated children or other descendants (Art. 125). The decree of legitimation is recorded in the Public Register by means of annotations in the Act of Birth that may be applied for by any person interested in the matter. The Registrar of the Court must "ex officio" see that such legitimation has been so recorded within fifteen days from the date of the decree unless it has been already registered at the demand of others (Art. 126).

Concerning the Effects of Legitimation of a Decree of the Court.

Legitimation by a decree of the Court also produces the effects of legitimate filiation, but not as fully as in the case of legitimation by subsequent marriage. The fundamental limitations of these effects have been expressed in Art. 128. These take place only between the parent and the legitimated child. In this relation the mutual rights and obligations are equal to those obtaining between the parent and his or her legitimate child. The child takes the surname of the parent at whose request it has been legitimated; the mutual right of maintenance, is established between them as well as the daughter's right to a dowry, and paternal authority if the applicant is the father. The

only exception occurs in the mutual righto of succession which are reduced when concurring with those of legitimate children as well as with the rights of other relatives of the parents. Outside this relation between parent and child, legitimation by a decree produces no effect. The child legitimated by a decree remains outside the circle of the parents' family, and as a consequence "he does not acquire any of the rights depending on such relationship" and so also the parents of his father or mother do not acquire any right in his regard (Art. 128). This disposition has been taken from the Civil Code of Austria (Art.162), which laid down that this legitimation must not produce effect with regard to the other members of the family. The different wording used by our legislator comparing the notes of Sir Adrian Dingli has been understood to deprive the child legitimated in this way of the right of legal retratto by virtue of consanguinity.

Legitimation by decree of the Court must be requested by the parent, but in the case contemplated in Art. 29, that is, when the parent has expressed an intention to legitimate the child in a will or in some other public document, the latter may after the death of the parent apply for his own legitimation which is subject to the same condition, in go far as applicable, of legitimation at the request of parents and producing the same effect.

Concerning Adoptive Filiation - Requisites and Effects of Adoption.

Of Adoption and Civil Filiation (Ordinance III of 1819)

Adoption is a solemn, act by means of which the civil relation of filiation is created between the person adopted and the adopter without destroying natural filiation. Adoption has been instituted in order to offer consolation to those whom nature, or misfortune, has deprived of children, and also to afford help and support to orphans and children of unknown parents. A very important institute in Roman Law, especially that before the time of Justinian, when adoption was resorted to mitigate the rigidity of the prevailing Civil Laws by introducing "cognati" into the family who were not members thereof as well as illegitimate children, to give them a status, began to lose its importance in the course of time, and about the end of the last century there was a movement in favour of its abolition. As a matter of fact in several laws formulated at the time adoption was left out altogether. Nowadays, and especially since the Great War of 1914, opinions in the matter have been undergoing a change, and adoption is being considered as an institution of the greatest importance in view of the increasing number of illegitimate children. For this reason, it has been included in the more recent laws of Denmark, Sweden, Austria, Turkey, Switzerland, Finland and in England, by virtue of the Adoption of Children Act of 1926, in force since the 1st January, 1927.

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But in order that adoption may achieve its aim and especially to avoid prejudice to the legitimate family and to safeguard the interests of the adopted child, the law prescribes several internal requisites, and subjects adoption to the Court of Voluntary Jurisdiction, imposing a solemn form.

Internal Requisites relative to the Adopter

These are:-

(1) That he must have completed fifty years, the reason being that if a smaller age limit was requested some would prefer not to marry. The tendency is to reduce this age limit to at least the age of 40, and the French Civil Code has been amended in this sense by a law of the 29th June, 1923. In the laws of Sweden and those of England of 1926 the age limit has been reduced to 25 years.
(2) That he must have no children or descendants that are legitimate or legitimated (Art. 133), who might suffer prejudice in consequence of adoption. He must not have even other adoptive children (Art. 134). But this article permits that more than one child be adopted by the same act,
(3) That he be at least 16 years older than the person he is adopting, as otherwise it would be impossible to establish that relation between them on a moral footing, like that between parent and child.
(4) That he be not bound by a solemn vow taken on religious profession or in Holy Order (Art. 133).
The priest and the monk have renounced marriage and, therefore, also the right to create a natural family; so that it would be absurd to permit them to create a fictitious one.
(5) That he must enjoy good reputation.

Requisites regarding the Adopted Child.

These are:-

(1) He must not have been already adopted by another person (Art. 135). The aim is to avoid rivalry between various adopters. One exception is made in favour of the husband and wife, who may adopt the same person either at the same time or after, because in this case there is no fear of such rivalry,
(2) The child whom one wants to adopt must not be bora of an adulterous, incestuous or sacrilegious union of the adopter himself, because this would be a public scandal.
(3) That the ward or the interdicted person cannot be adopted by the guardian or curator before the latter have given full account of their management and administration (Art. 137). The aim of this disposition is to make it impossible for the guardian or curator to avoid making a statement of accounts of his administration by means of adoption.
(4) That if the person whose adoption is being sought has completed 14 years, he must give his consent (Art, 133), and it is further required that if he is a minor,

both his parents give their consent; and if one of them is dead, such consent must be given by the surviving spouse; and if both parents are dead, by the guardian.
If the person whom one wants to adopt has lost both parents, but has no guardian, it is enough to have the authorization of the Court of Voluntary Jurisdiction that is always necessary in adoption in order to secure the observance of the laws as required for adoption, and in order to make sure that it is in the interest of the person whom one is seeking to adopt. If the latter is in a public institute, the Court shall always hear the head of that institute (Art. 152).

External Requisites.

Cancelling all difference between adoption and arrogation by Art. 132, adoption is always effected by means of a notarial act with the intervention of the judge of the Court of Voluntary Jurisdiction (Art.123), and notice thereof must be given to third parties by inscribing it in the Public Registry of Civil Status, in the margin of the Register of the Act of Birth.
Any person interested may obtain such inscription, and on the Registrar of the Court fails this obligation within 15 days from the act of adoption (Arts. 154,328 and 329).

The Effects of Adoption.

The principle governing the subject matter of the laws of adoption is that adoption creates a new civil relation of filiation, paternity or maternity, without destroying the natural relations of parentage, since the person adopted remains in his natural family and in the same condition as before. It is for this reason that adoption produces the effects of maternity, paternity and legitimate filiation only as far as compatible with the rights and obligations that the adopted person has in regard to his own family (Art.149). The legislator's aim has further been to frustrate any attempt to effect adoption for selfish or greedy motive. For this reason the adapted person assumes, and adds to his own, the surname of the adopter (Art. 139) against whom he obtains the rights of maintenance without losing those to which he is entitled from his original family. And the adopted girl likewise acquires a right to a dowry. Further, the adopted person acquires the same rights as that of a legitimate child on the inheritance of the adoption. All these effects are compatible with the rights and obligations of legitimate filiation. However, as a double submission to the authority of the adopter and to that of his parents is impossible, paternal authority does not belong to the adopter unless both parents of the adopted person have died. In order to ensure that adoption has not been inspired by selfish motives, the adoptive father who has been given the rights of paternal authority, does not thereby acquire a right to the legal usufruct nor any right of inheritance on the property of the adopted person, whether the latter

has died Intestate or testate, save and except the disposition that the adopted person, who is free to dispose of his property, may have made in favour of the adopter.

However, the obligation to supply maintenance is reciprocal. If the adoption has been of footed by the husband and the wife, both are bound to provide maintenance, or a dowry in the case of an adoptive daughter, it being provided that the mother is only so bound when the father cannot provide the maintenance himself, or cannot provide the adequate amount. In the latter case, the mother is bound to make up the difference only.

Though the obligation of the natural parents continues, however, it comes only after the obligation of the adoptive parents. When the adopter has other legitimate children, born after the adoption or illegitimates, these, as far as the right to maintenance is concerned, are in the same condition as the adopted children.

Of Legal Reversion in Adoption.

The principle whereby the adopter is absolutely excluded from the right of inheritance on the property of the adopted person would be unjust in the case contemplated by Art. 105. The adopter has given some goods to their adopted person. The latter dies without issue, leaving in his inheritance the goods which had been given him by the adopter. It would be most unjust if under these circumstances the goods originally belonging to the adopter passed into the hands of somebody else, or into the hands of the legitimate parents of the adopted person, who may be complete strangers to the adopter. In order to obviate a similar injustice and to safeguard the interests of the adopted person, favouring the donations made by adopters, it is laid down that if the adopted person dies without issue and having disposed of these goods, these are taken out of his succession and form the subject matter of an anomalous succession known as legal reversion in favour of the adopter, in accordance with Art. 105 and others following. The subject matter of this reversion consists in all goods given by the adopter at any time and by any title, inclusive of those given after the adoption as well as those given before, since the latter are deemed to have been given "intuitu futurae adoptionis", whatever the title of the donation, so that goods constituting the dowry are also included because also for these goods there obtain the same motives for which the legislator set up this institution, on condition that the same goods still exist in kind in the inheritance of the adopted person. If the latter alter their nature by means of his work, or he has alienated them, acquiring others in their stead, the reversion in question does not take place. An exception is made in the case when the price of the goods sold is still outstanding at the death of the adopted person, or when he or she can still claim the recovery of the thing sold. In these

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two cases the price or the action comes in "locum rei" and forms the subject matter of a legal reversal. A condition of the reversal is that the adopted person has died without issue and is survived by the adopter or his descendants or that the issue left by the adopted person has also died without leaving offspring or is still survived by the adopter.

So long as the adopted person leaves issue it is presumed, that the children must enjoy the benefit of the adopter's generosity.

When the adoptive person has died without leaving an issue the reversal operates in favour of the adopter and, if this has been predeceased, in favour of the descendants. In the second case, that is, when the adopted person dies leaving issue, but which dies also childless, legal reversion has been established in favour of the adopting person only; but if the latter predeceases the children left by the adopted person the reversion does not take place in spite of the fact that the adopter has left descendants. In this second case, the right of reversion is inherent in the person of the adopter and the descendants, even if these are not his heirs, since the presumption of the law regarding the tacit will of the adopter subsists only in favour of the descendants and not also in favour of the heirs, who may be at times complete strangers to him, not less than the heirs of the adopted person.

A third condition is necessary to make reversion possible, and that is that the adapted person must not have already disposed of the goods given him by way of legacy, because in this case the legacy ordered by him must prevail against legal reversion, of which the adopter or his descendants cannot avail themselves against the legatees, otherwise the adopted person would have been deprived of the freedom to dispose of the goods that have been given him by an act of last will which cannot be presumed to have been the intention of the donor. Further, things or goods given freely cannot be considered to be existing in the inheritance of the adopted person because at the death of the testator the ownership of the legacy passes straight away to the legatee.

The goods forming the subject matter of reversion do not enter into the inheritance of the adopted person; they do not pass on to his heirs, but, by an interpretation of the intention of the parties concerned, are attributed to persons other than the heirs. The judicial consequence should be that the persons in whose favour reversion has taken place, must be burdened with the debts of the inheritance, since these, "stricto jure", must be borne by the heirs only. But Art.145 supports the contrary solution, imposing on the adopter or his descendants, as the case may be, the obligation to contribute to the payment of debts chargeable on the inheritance in proportion to that which they obtain from the reversion.

The reason is that the adopted person might instead of contracting debts alienate the goods received by way of donation, and, in this case, the adopter or his

descendants would either have received a smaller proportion of the goods or none at all.

The effects of adoption, including reversion, may be otherwise governed by an agreement either in the act of adoption or in another public act made after it with the authorization of the Court, without prejudice, in this case, to the rights that third parties may have acquired in the meantime (Art. 148).

Even paternal authority may be transferred to the adopter by the legitimate father with the consent of the mother, either in the very act of adoption or in some other public act to be recorded in the Public Registry as the act of adoption. We conclude this treatise by calling attention to the principle expressed in Art. 144. The effects of adoption are limited to the relations between the adopted person and the family of the adopter or to the relations between the adopter and the family of the adopted person.

According to Art.144 "an adopted child does not acquire any right of succession to the property of the relations of the adopter, nor on property depending on family ties, such as "beni fidicommissari" possessed by the adopter.

Concerning Paternal Authority and its Effect on Minors.

Paternal Authority after Minority and its Cessation. The Right of Usufruct granted to the Mother.

Paternal Authority (Ordinance No. Ill of 1869),

In the previous titles the legislator dealt with the constitution of the family, in this he deals with domestic authority without which it is not possible to have a family at all. Before Ordinance III of 1869 the authority of the head of the family was based on Roman Law as modified by Canon Law. The new laws, following lines different from those of Roman Law, have been based on French Civil Law, that had established the system prevailing in the countries consuetudinary rights in which, according to the well-known maxim "Droit de puissance paternelle on a lieu", because we cannot exactly describe as authority the various powers granted to the father in order to enable him to take charge of his children pending the time they are unable to look after themselves. So that though the same name has been preserved as in Roman Law, its meaning is completely different, and indeed, is laid down in the first article of this title, that is, Art. 155, "a legitimate child is subject to the authority of the father for the effects determined by the law", while in Roman Law there was no limit to such subjection. The authority of the head of the family over the persons and the respective belongings subjected thereto was so absolute that it did not tolerate the interference of any other authority, including the authority of the law itself. The government of the family was absolutely uncontrolled by the

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Political organisation of the civitas since, according to the fundamental principles of Roman Law, it was only in this way that intimate family relations could subsist in harmony. Roman law simply exerted a disciplinary control over the powers granted to the father in regard to the children so long as those were incapable to look after themselves and take charge of their own goods. It is not more absolute neither as regards the extent of its duration because it ceases altogether on the completion of 21 years, nor as regards its subject matter because the powers attributed by it to the head of the family were granted for a definite purpose and were determined by the law. It is only in one respect that our legislator has remained more faithful to tradition than the French and Italian laws in that he reserved paternal authority the father without conceding it to the mother even after the father's death. In the latter, event she has only the right of preference in the appointment of guardianship to the child.

In the more modern laws, the principles of absolute equality between father and mother obtain in the government of the family (Cp. Guardianship of Infants Act, 1925) so much so, that some countries (Denmark and Sweden) attribute equal, authority over the children to both parents concurrently.

According to the wording of Art.155, subject to paternal authority is the "legitimate child", which includes, as already pointed out, children legitimated by subsequent marriage or by a decree of the Court and, in some cases, also adoptive children, but not subject to paternal authority are children acknowledged or declared by judgement of the Courts, retaining legal guardianship of the unqualified illegitimates, whose right of legal guardianship is perfectly identical with parental authority except in name, with the only difference that it does not attribute legal usufruct to the father ot to the mother.

The Effects of Paternal Authority

The title dealing with paternal authority is divided into three headings, the first of which deals with the effect of paternal authority in regard to minors or infants, the second with the effect of paternal authority in regard to children or full age, and, third, with the various ways in which paternal authority may come to an end.

It is necessary to give an explanation of this division since it seems to be contrary to the principle that subject to paternal authority are children only so long as, on account of their age they are unable to provide for themselves. Strictly speaking we must assume that such incapacity ceases when a child has attained its majority, so that the effects of paternal authority after that age sees to be a contradiction, as well as Art.147 of Chapter 3 of this title according to which paternal authority ceases when the child has completed 21 years, whereas a child attains its majority when it has completes 18 years.

As a matter of fact the other institute in favour of persons legally incapable because they are minors or fatherless or for some other reasons are not subject to paternal authority, that is to say, guardianship ceases to produce its effect as soon as majority has been attained.

When dealing with paternal authority the legislator out of consideration for the father's authority has preserved for him such authority up to the age of 21, but in a limited way, since it regards only certain acts, which, if the child was allowed to make them without his father's consent, would be the likely cause of his ruin. Art. 175 of the Ordinance of 1873, according to the Court of Appeal in the cause Mallia Tabone, collection Vol.18, page 25, is justified only on moral grounds whereby the child must continue to respect its father even after it has attained its majority, but has not yet completed 21 years of age. This law has been based on the laws of the Two Sicilies (Arts. 295, 296), which have been literally reproduced by our legislator in Arts.175 and 176.

Pending minority, paternal authority exercises its effect fully over the person of the child and its belongings.

Effects on the Minor's person.

As already pointed out, the child's subjection is by no means absolute, and the legislator makes it a point to repeat this fact for the second time in Art. 156, which runs "a child must obey his father in all that is permitted by the law", substituting the corresponding disposition in the French and Italian laws. Art.371 and 220, respectively, according to which "the child, whatever its age, must honour and respect its parents". This Article has been criticized by our legislator (Cf. the comments on Art.156) because it is of a purely moral nature. The comment is quite right but we cannot say that the correction made by our legislator is a happy one, both because it is couched in general terms without judicial consistency and also because it seems to restrict the obligation of obedience to infants only.

Paternal authority affects the child's person especially as regards the right of custody and upbringing. The father could not possibly do his duty by his children were he not provided with this power. The child may not abandon the father's house or the place destined for him by his father except in the case of the child who, having attained his majority, joins the Army or His Majesty's Navy. The sanction for the infringement of this obligation is the father's power to call him back to his house, if necessary, also through police assistance, straightaway, and without the necessity of a Court judgement. In one case only can the child be authorized by the Court of Voluntary Jurisdiction to leave his father's house or the house destined for him by his father, and that is when the child's moral welfare is in danger (Art. 157) and, in case of great urgency, the Magistrate may issue the necessary instructions making a report thereof to the

Court of Voluntary Jurisdiction not later than one working day after. This Court, may confirm, revoke or modify the Magistrate's measures. In order to safeguard the intimacy of family relations the usual formalities of judicial acts are dispensed with. The remedy may he applied for verbally and the Court in its decree may omit to mention the cause of the provision. This is a singular exception to the rule that the decisions of the Court must he motivated.

The father has the right to correct his child and to inflict all reasonable punishments that he may think necessary. As a consequence, the father failing to restrain his child from irregular conduct (Art. 158) may have him removed from the family, assigning to him according to his means the maintenance that is strictly necessary; and he may also when necessary, with the authority of the said Court, place the child for a period established in the decree in any public institution, which, according to circumstances, the said Court may consider suitable, to he maintained at the expense of the father, treated in the manner which the same Court may deem to be conducive to his correction. The above-mentioned authority may he applied for even verbally, and the Court shall provide without any formality of acts and without expressing the grounds of its decree.

Effects of Paternal Authority on Goods.

In regard to the child's goods paternal authority affects

(1) the right of representing minors in all acts of a Civil nature;

(2) the administration of their goods; and

(3) the right of legal usufruct over the child's goods, which devolves to the mother when the father is dead.

Of Representation

All Civil acts relative to the child's goods are made by the father as the legitimate representative. His function does not consist in authorizing his son or daughter to carry out the Civil act personally, but only, so to say, to integrate their legal capacity because the acts are not actually fulfilled by the child but by the father.

These acts are usually divided in two classes:- (1) judicial acts, and (2) extra-judicial acts, and representation takes place in both cases. In civil acts it is the father that acts as plaintiff when representing the child, and it is against the father in his capacity that a suit must be entered by anyone seeking his right in a judicial way. Representation applies similarly to all extra-judicial acts such as contracts of letting, emphyteusis, sale and so on. The only exception are those acts which require the personal consent of the child, such as in a case of donation, a will, betrothal and marriage. Marriage agreements as well as nuptial donations, that is,

donations made in view of a forthcoming marriage, are entered upon by the child personally with the assistant and consent of the father (Arts, 949, 1568 of Ord. VII of 1868).

Of Administration.

The rule that the infant cannot carry out any Civil act unless represented by the father does not mean that the father may freely enter upon any Civil act affecting the goods of his child, because with regard to extra-judicial acts we must make a distinction between acts of mere administration and acts which exceed such administration.

In the acts of administration we include such acts of management as are necessary for the conservation and utilization of the child's goods, such as the repair of his immovables, renting them, investing his money as well as taking charge of the immovables and receiving the fruits thereof. We include also the right to collect credits, because this is an act intended to conserve the child's property. The father may freely carry out all judicial acts and operations of management but he is no longer absolutely free in such acts as exceed mere administration and such acts as, in some way or other, involve the disposal of the child's property. The father, therefore, may not, except in a case of necessity or other obvious benefit of the child and after the opportune authorization of the Court, alienate or hypothecate the child's property, nor contract loans or obligations in the name of the latter exceeding the limits of simple administration; except in the case of things that are movable by nature (Art. 160, para. 1), which the father may alienate in order to invest the capital thereof in a profitable way without any previous authorization from the Court, such as in the case of the acquisition of "stabili, titoli di rendita," or "prestiti ad interessi".

As for inheritances devolving to the child, the father must accept them with the obligation of an inventory thereof (Art. 161) , unless this has been dispensed with by the Court. If the father cannot, or is not prepared to accept the inheritance, the Court may authorize the acceptance of the inheritance by means of a special curator appointed for the purpose, or it may authorize the child itself if it has completed 14 years of age (Art. 161). If the father exceeds the limits of his powers, the act so done by him is null and void. But the nullity in question is not absolute.
It may be pleaded in the following instances only (1)by the father, but it may not be opposed by his heirs, because such right belongs to him personally in so far as he has the right of paternal authority; (2) by the child or the heirs or parties claiming under him (Art. 162)

The right of administering the child's goods is natural, but by no means essential, to the concept of "patria potestas", so that the father has no such right of administration in regard to:-

(1) property that has been bequeathed to the child on

condition of its being administered by others (Art. 15; ;
:
(2) property that has been inherited by the minor from the inheritance of an ascendant in consequence or the father[1] s unworthiness or disinheritance.

Of the Rendering of Accounts.

The administration of somebody else's property involves the obligation of giving an account thereof, that is to say, the obligation of accounts for one's stewardship and management. The father is not exempted from this obligation. According to Art.159, he must render an account of the property and the administration of all the goods without distinction of which he has taken charge. The obligation of rendering or making a statement of accounts means that the person in charge of the administration must deliver all the capitals and other immovables, pay the value of those sold or lost, in the latter case only if the administrator is guilty of culpable negligence. Rendering an account of the administration involves responsibility thereof and the obligation of indemnifying damages caused through culpable negligence such as neglect of repairs and culpable deteriorations. As for the fruits of the goods, the father is not bound to give an account thereof if the goods in question are subject to his usufruct. But if he has no right of usufruct over them he must give an account of all the fruits received or what he might have received if he had taken proper care of them.

As laid down in Art. 184, this account must be made when the child has attained its majority, because that is the time when the right of administration ceases, although the right of paternal authority for some legal effects subsists till the child has completed 21 years of age. But if paternal authority ceases before the child has attained its majority for any of the causes laid down by the law, the account must be rendered when paternal authority has ceased.

In the first case the account would be rendered to the child itself on attaining its majority. But when paternal authority has ceased in consequence of the child's death the account must be rendered to the heirs. In case of another cause putting an end to paternal authority so that another representative has been assigned to the manor, such as a guardian on the death of the father, the account must be rendered to the new representative.

The father's obligation to give and close accounts and his responsibility to make good any loss or damage is guaranteed by general legal hypothecation of all his property, which arises from the very date the goods have devolved to the child. This hypothecation, as in the case of any other legal convention or judicial hypothecation, is in our laws subject to inscription in the Public Registry, intended to safe-guard third parties' rights. The father is bound to have such inscription made in the Public Registry within 15 days from the time the goods devolved on the

Child, under the penalty of forfeiting the right of paternal authority. The father's powers in regard to the child's property do not apply to the children already born only, but also to the children who may be born in the course of time, even if they have not been conceived yet. It may happen that in a certain act the father and the child may have conflicting interests so that it would be highly imprudent for the father to represent the child in that act. In this case the court of voluntary jurisdiction appoints a special curator to represent the child in the act in question. (Art.163)

Likewise, if the children have conflicting interests in the matter. In this case the father may choose to represent some of them or to represent none. In the latter case it would be necessary to have the nomination of a special curator to represent the children and the Court shall nominate as many curators as are necessary for the purpose.

Of the Legal Usufruct

The right over the child's person is necessary because otherwise, the father would be quite unable to control his child's conduct or to educate him properly: the right to represent the child and take charge of his property is necessary considering that the child is unable to provide for himself properly before he becomes of age. The right of usufruct granted to the father over the child's property might be considered to constitute an advantage to the father and a disadvantage to the child who, on reaching his majority will not receive the legal produce of his property; however, strictly speaking, legal usufruct though not essential is very necessary in order to ensure and maintain the child's respect towards his parents and provide for his education.

Legal usufruct after the father's death devolves on the mother and, far from being prejudicial, it must he considered in the greater number of cases to be quite in their interests, even economically, because it helps to facilitate the administration of the property and provide the means of improving the goods themselves. In actual experience it does not often happen that children have property of their own during their minority: it more often happens that they acquire personal property after the death of one of the parents, whose inheritance passes to them. Further. the expenses incurred in the maintenance and the education of children far exceed the legal produce of their property. Under the circumstances the importance of the right of legal usufruct consists principally in dispensing the parents from the obligation of keeping accounts of the legal produce of their children's property and of the expenses incurred for their education. In this way the intimate relation between parent and child is preserved by avoiding the possibility of adverse criticism of the expenses incurred. For this reason, the right of legal usufruct is attributed not only to the father but, after him, also to the

mother, and the right of maternal usufruct is governed by the same conditions as the paternal usufruct (Art. 172). It must he noted, however, that the fact that the mother succeeds the father in the right of usufruct does not mean that she necessarily acquires the right of administration of the goods subject to her usufruct. She may sometimes acquire the right of administration if she is appointed the guardian of her children.

Goods subject to Legal Usufruct.

The nature of legal usufruct is that of a universal usufruct, because it includes all the children* s property of any kind and of whatever origin, with the exception of the goods that the child has obtained by his own work and industry. Included therein are not only those goods that have been inherited from one of the deceased parents but also those that have been inherited from any other person, relative or not, or that have been obtained by way of donation, even under the title of fidei commissum. Included therein are also those goods which the child has acquired by a stroke of good fortune, such as the unearthing of a treasure trove or a win of a lottery stake. The following goods, even if obtained by a lucrative title, are not subject to legal usufruct

(1) Goods bequeathed or donated to the child excluding the parents- usufruct thereof: quite a possible contingency since the right of usufruct is by no means essential to the exercise of parental authority. So that this possible condition is by no means contrary to public order. However, such condition is null and void when it affects bequests or donations made in settlement of the legitim, and the reason is that the legitim is due without any condition. But this reason is -not at all convincing because that norm is intended in the exclusive interests of the person entitled to the legitim, whereas this disposition that purports to be an application thereof prejudices him financially;

(2) In the case of an inheritance, a legacy or donation that have been accepted in the interest of the child against the father's consent, for the obvious reason that if the father had his way he would have deprived himself of the usufruct thereof;

(3) The goods bequeathed or donated to the child to take up a career, an art or a profession, since in this case the contrary condition is implied;

(4) The legitim devolving on the child from the inheritance of an ascendant in consequence of the unworthiness or disinheritance of its parents (Art.305, 306 and 324, Ord. VII of 1868) , and the legitimate succession devolving on the child from its ascendant on account of the unworthiness of its parent (Art. 498, Ord. VII of 1868) the reason being that if the unworthy or disinherited parent was allowed to retain the usufruct, the penalty incurred by him would be proportionately reduced.

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Goods that have been acquired by the child by his own work and industry are not subject to the father's right of usufruct in order to encourage and stimulate individual enterprise and savings. In this case the child's work must be in a separate task, because the child that helps the father in his work is simply doing its duty and is not entitled to a remuneration. Indeed the remuneration that the father at times gives him must be considered as a mere act of generosity which according to the general rule falls under the right of usufruct.

Rights and burdens inherent in Legal Usufruct.

The rights and burdens of legal usufruct are as a rule the same as those of ordinary usufruct. As for the right, French and Italian jurisprudence (Cf. Pacifico Mazzoni, Vol. VII, para. 249) lays down that, considering its special character as an accessory right of patria potestas it cannot be alienated or hypothecated, and, therefore, the creditors cannot even ask for its auction. The creditors can only exercise their rights over the legal produce pertaining to the usufructuary after having taken from it a sufficient amount to satisfy the relative burdens.

As for obligations and burdens, the first in order come those imposed on the ordinary usufructuary according to Art.187 all the obligations to which usufructuaries are subject. It, therefore, includes the obligation of making an inventory carrying out the ordinary reparations, paying the rents and other burthens inherent to particular goods and, in the case of an inheritance, to pay the interests on debts and annual rent charge's. There is only one obligation imposed on the ordinary usufructuary from which the parents are exempted and that is the obligation to provide a security that the goods will be enjoyed properly, the legislator must have considered it excessive to demand such a security from the child's parents. There are other obligations that are proper to the legal usufruct and which do not occur in ordinary usufruct. These are

(1) The obligation of paying the annuities or the interest on capitals falling due before the commencement of the usufruct. These must be arrears which should have been borne by the child, because this obligation imposed on the usufructuary is intended in the interest of the child only;

(2) The obligation of defraying funeral expenses and those of the last illness of the person from whom the property has devolved on the child where otherwise such expenses would have been chargeable to the said child. Here again, as we have already said in (1), this obligation is imposed on the father in the exclusive interest of the child only and never in the interests of other persons, who sometimes might be responsible for the payment of these expenses;

(3) The obligation of paying the expenses of the

Child's maintenance and education, because it would be most unjust if the father who is enjoying the legal produce of the child's property debited the child with the expenses of his education.

The Cessation of Usufruct.

Legal usufruct is inherent in paternal authority and therefore, comes to an end for any reason that puts an end to paternal authority, such as the death of the child. The right of usufruct ceases with the loos of any of the rights of paternal authority. Even before paternal authority comes to an end, the right of usufruct ceases when the child attains its majority. It also ceases when either of the parents marries again. The second cause is intended to avoid that the legal produce of the property of the children of the first marriage be used in favour of the children of the second marriage. The father who continues to receive the legal produce after the right of legal usufruct has expired must in strict law render an account thereof, to his children restoring the excess if any has been left over, if he has incurred expenses in their maintenance and education. But we find this severity tempered in Art. 169. The father or the mother, as the case may be, is not bound to render an account of the legal produce already consumed but only to restore and deliver those still existing at the time of the demand made by the child when, on the cessation of the usufruct for any cause, either of the parents has continued to enjoy the property of the child living with him without mandate but without opposition, or with a mandate but without the express condition of the obligation of giving an account thereof. Under these circumstances, we can presume that the parties did not intend that there should be a rendering of accounts. The child continues to live with his parents at their expense while he does not put forward any claim for the legal produce, which, though it belongs to him, is received by his parents. That simply means that he wants his parents to continue receiving the legal produce of his goods, and it would be most unjust to allow the child to claim the recovery of the consumed produce of his own goods when he himself acquiesced in the free consumption thereof by his parents. Therefore he can only claim the recovery of the legal produce still existing when he makes the demand.

The Effects of Paternal Authority in regard to children who have attained their Majority.

The effects of paternal authority on children who have attained their majority but who have not yet completed 21 years of age to the acts indicated in Art. 175 are:-

(1) He cannot hypothecate or alienate immovables not acquired by his own work;
(2) He cannot take money or other things on loan.

The origin of this disposition occurs in the Senatus

Consultus Macedonianus, and it is intended to restrain possible habits of prodigality;
(3) Receive capitals not acquired by his own work and give a receipt or discharge for them.
It must be noted that when the child has attained its majority the father is no longer its legitimate representative. He cannot carry out the above-mentioned acts in the name of his child but the latter must first obtain the consent of his father or ensure his presence on the act. Nor is the father free to withhold his consent or to refuse to appear on the contract unreasonably because if the father's opposition .cannot be justified by a good cause the child will be allowed to carry out the acts without his father with the authorization of the Court of Voluntary Jurisdiction. But such authorization is not required in acts of alienation or hypothecation made by the child in favour of his father in the case of loans made by the father to the child, because in this case the condition required by the law is fulfilled by the father's participation in the act (Cf. Mallia Tabone utrumque, Vol. XVIII, Part 2).

The Cessation of Paternal Authority.

Of the various causes bringing about the cessation of paternal authority some operate "ipso jure", other require a judicial procedure, and another depends on the will of the father.

A. In the first category we have the following causes enumerated by Art. 177:-

(1) The death of the father or the child, it being understood that if the father dies and the child is still a minor a guardian must be appointed instead.
(2) When the child has completed the age of 21 years. If the child carries out a trade, paternal authority ceases completely as soon as it has attained its majority.
(3) The marriage of the child contracted with the consent of the father. This regulation comes down from the Code of de Rohan, Book III, Chapter V, para.18, that had established an ancient custom of the country conforming with another prevailing in Sicily ("In insula Melitae unde origo erat Francisci Bianchi legis et consuetudinis receptae sunt quae habentur regno Siciliae qui ilia id jacet, antiqui mores in regno Siciliae vigent quibus filli familias sive masculi si ve f eminae, ob matrimoni urn quod contrahunt a nexu patriae potestatis soluti redduntur" — Nota Romana: Anno 1800).
(4) If the child, with the consent of the father, lives on his own in a separate house. This is also considered as a case of tacit emancipation and at common law it was known as "emancipatio juris germanici", because in German Laws the "mund" ceased as soon as the child carried on an economically independent life.
(5) If the father omits to make in favour of the child the registration contemplated in Arts. 1803 and 1809 of

Ordinance VII of 1868, concerning the legal hypothecations attributed to the child on the general property of the father according to Arts, 1789 and 1790 of the said Ordinance. The hypothecation contemplated in Art, 1789 is relative to the goods devolving on the child during his minority and, therefore, falling under the father's right of administration. As a guarantee of his obligation of rendering accounts and making a restitution, the law grants in favour of the child the hypothecation of the general property of the father, on whom it imposes the obligation of having it inscribed within 15 days after the goods have devolved on the child. The hypothecation attributed to the child by the said Art, 1790 is intended to guarantee the obligation of the father who has married for the second time to make a restitution of all nuptial acquisitions. Our laws do not countenance second marriage when there are children of the previous marriage.

The party that enters on a second marriage when there are children or descendants from the first one either common or particular to the predeceased party, is penalized with the loss (Arts, 335* 336 and 526, Ord.VII of 1868) of the property of all which it had acquired gratuitously from the predeceased spouse, including, if the surviving party is the wife, the dotarium and also the quarta uxoria, of which the surviving husband or wife who is marrying again retains the usufruct only. But the property passes to the children of the first marriage or to the common children who, on the cessation of the usufruct, are entitled to the restitution of the goods forming the subject matter of the liberality of their predeceased parent. The personal obligation of the father to restore such goods is better guaranteed with this legal hypothecation in Art, 1790 affecting all the property of the father, whom the law binds to see that his second marriage be inscribed in the Public Registry within 15 days after, under the penalty of forfeiting the paternal authority, which takes place "ipso jure" as soon as the time limit for the fulfilment of such obligation has expired. But as this obligation has been enforced exclusively in the financial interests of the children, and as such obligation is often contravened through sheer ignorance, the law provides also the remedy whenever it is necessary to do so in the interests of the children: the father can apply to the Court of Voluntary Jurisdiction for the complete or partial restoration of paternal authority, naturally on condition that he will fulfil the neglected obligation.

(6) If, after the death of the mother, the father contracts another marriage without having previously made an inventory of the property of the child and obtained the authority of the Court to continue exercising the right of paternal authority. The law is very strict when it is the question of minors who have lost one of their parents of whom the surviving spouse enters upon another marriage, because, as common experience shows us daily, affection for the children of the second marriage replaces the affection

For the children of the first marriage. Before the new marriage has been solemnized, the father who wants to retain his right of paternal authority must demand the analogous authorization from the Court, who shall judge if under the circumstances it is in the interests of the children that he should be allowed to retain the rights of paternal authority.
The father must further make the inventory of the child's Property, that is to say, he must make a solemn description thereof by means of a public instrument confirmed on oath, unless he has been authorised by the Court to make instead a simple description by means of a note, also confirmed on oath.
Such description of the child's property is necessary because without it would be extremely difficult to distinguish in many cases in the liquidation of the inheritance of the parents the property existing already at the time of the first marriage from that acquired later during the second, marriage. The Court may at the request of the father, instead of preserving; him all the rights of paternal authority allow' the exercise of some of them only. For instance, it might grant to the father the rights over the person of the child, but appoint a curator for the administration of his property. But also this forfeiture of paternal authority might be remedied provided that the Court shall deem it in the interest of the children to restore the rights of paternal authority, naturally after the formation of the inventory or the description of the child's property. Such restoration as the authorization to continue exercising parental authority in spite of the second marriage does not revive the legal usufruct lost when the father contracted the second marriage, because Art.168 is absolute and the law cannot depart from it.

B. In the second category of causes which put an. end to paternal authority we include the wrongs committed by the father and mentioned in Art.180, for which the Court may deprive him partially or completely of the rights of paternal authority in the following cases:-
(1) If, exceeding the limits of a moderate correction, he treats the child cruelly;
(2) If the father's conduct is such as to undermine the child's education;
(3) If he neglects the child's education;
(4) If he does not manage the child's property properly;
(5) If the father is interdicted or incapacitated.
When the cause of the privation has ceased, the Court way in any of these cases restore the father to the right of which it had deprived him.
In the case of Art.173, that is when the father has been condemned to a punishment which deprives him of his personal liberty, the Court may give a curator to the children with all the faculties or powers that it deems necessary either at the request of the further or without his request, and even in

spite of his opposition, whenever it deems it necessary for the good of the children. Similarly, in the case of the absence of the father that leaves minors as contemplated in Art.272, the Court may give them one or more curators, and this can be done at the request of anyone since "interest reipublicae res pupilli salvas esse". The rules of guardianship apply also to the guardianship of the minors of an absent person in so far as they may apply.

C. By the father's will "patria potestas" ceases with "emancipation", which is that solemn act whereby the father releases the child from paternal authority. The content of the act is the father's spontaneous declaration to free the child from paternal authority.

It cannot be effected before the child has attained its majority so that its effect is limited to dispensing with the consent of the father or his intervention for the acts indicated in Art, 175 s No. 1,2 and 3. It must be authorized by the Court of Voluntary Jurisdiction and drawn up in a public act (Art. 183). In order to facilitate commerce the law admits also a less formal emancipation called commercial emancipation. It does not require majority but it can be granted on attaining the age of 16 and it consists in the father s authorization to allow his child to carry on a trade or some acts of commerce. This authorisation must be granted by means of a public instrument to be registered in the acts of the Court. If the father is dead, interdicted or absent one has recourse to the judge of the Commercial Court which issues a decree that will, by itself, operate the emancipation. A precis of the authorization or the decree must be made public in a notice published in the Chamber cf Commerce, the Government Gazette or some other publication (Art. 185, Ord. of 1873 and Arts. 10 to 12 of Act XXX of 1937). If the father refuses his authorisation it can be granted by the Court. On obtaining this authorization the minor is considered as "major" that is, legally capable and emancipated from paternal authority for the purposes of its trade or for some determined acts of the trade that it has been authorised to carry on (Art. 185); and may burden, hypothecate and alienate his own goods in connection with his trade without the necessity of his father's consent (Arts. 11 and 12 of Act. XXX of 1927). But he remains legally incapable and subject to paternal authority for all other acts. He acquires complete emancipation on attaining his majority.

Of minority - Guardianship - Nomination - Incapacity - Exemption - Powers and Obligations of the Guardian - The Cessation of Guardianship

In Maltese Law, as in other modern laws, a man's age is divided into two periods having regard to his civil capacity: (1) Minority, and (2) Majority.

A major is capable of all the acts of civil life with the exception of those acts indicated by

law (Art. 225). The minor is incapable of exercising his rights. In Maltese Law minority is the period prior to the completion of eighteen years of age, the time after that being known as the period of majority.
In other laws the line of demarcation is generally placed at the age of 21. The particular characteristic of Maltese Law derives from Chapter 76 of the Capitulation of the Kingdom of Sicily of Charles II, who reduced minority to that limit (Vide Lamantia - Leggi Civili del Regno di Sicilia, pag. 26, Vol. III, Ediz. 1895 — Nota Romana, 3 Luglio 1800, Bianchi utrumque, volante, Anno 1797, Vol. unico). Minors are incapable judicially because they are so also by nature, owing to the fact that their mind has not yet reached maturity, and that they lack experience. A major may also be subject to some pathological conditions such as talee away or reduce his capacity, for instance, mental debility, prodigality, and some physiological defects, such as blindness and congenital deafness, which affect one's mental development. In order to provide for minors naturally incapable or for majors subject to such disabilities as bring about their legal incapacity, the laws provide the necessary institutions, because it is the duty of the state to protect the person in the interests of its citizen. The first of these institutions is patria potestas for minors whose fathers are still alive. The other institutes are the guardianship of minors whose fathers are dead and the curatorship of majors affected with incapacity. Minority and guardianship are dealt with by Ordinance under Title V (originally Art. 105 in Ord. Ill of 1869) divided in to two chapters, the second of which is divided into two sections, the first dedicated to the appointment and removal of guardians and the second to the exercise of guardianship. Guardianship is the institute created by the law to provide for the person and the property of the minors who are not subject to paternal authority. It is a function of public order because it is the State's duty to provide for those who are unable to look after themselves. The State delegates its function to a person that is trustworthy, subjecting it to the continual supervision of judicial authority. Anybody may apply for the nomination of a guardian and the appointed person is bound to accept the nomination unless there is some urgent reason for not doing so. Por this reason laws governing guardianship are considered of public order and cannot be departed from by private individuals, not even in their matrimonial conventions (Art, 946, Ord. VII of 1868).
There are two main kinds of guardianship, that is, (1) family guardianship, and (2) State guardianship. Our legislator preferred the second system. The French and the Italian legislators have given a great say in the matter to the members of the family, and have organized the so-called family council, already existing in the old consuetudinary French Laws, attributing to it the function of directing, watching and controlling the acts of the guardian. The usefulness of this family council has been subject to great controversy in France and Italy. Side by side with the guardian and

The family council, the French, Italian and German Laws have instituted the office of proguardian (Fr. Subroge, Tuteur), whose duty is to watch the administration of the guardian and to represent and act on behalf of the minor when the interests of the latter come in conflict with those of the guardian, or when the guardianship has become vacant or has been abandoned.

Chapter II.
Section 1.

The Constitution of Guardianship (Arts. 188 - 208)

Of the three kinds of guardianship of Roman Law contemporary laws have preserved (1) Testamentary Guardianship, and (2) Dative Guardianship.

A. Of Testamentary Guardianship

Testamentary guardianship takes place when the father appoints a guardian for euch of his children as are still minors at his death, that is, still subject to his paternal authority Art.189). The rule of Roman Law whereby the father or the paternal ascendant may not nominate a guardianship for such of his descendants as mu3t fall again under the maternal authority of another at the time of his death, is still applied in the case of a child adopted by a man to whom after the death of the natural of the natural father belongs the right of paternal authority on the adoptive child (Art.150). The father may also nominate a guardian for his posthumous child, and it is understood that the guardian nominated for children already born is also nominated for those posthumous. He may also nominate more than one guardian for one child (Arts. 189 and 190). The guardian-nominate can by no means carry out the guardianship before he has been confirmed by judicial authority, because the wisdom of paternal discretion and the effects of paternal authority which form the basis of testamentary guardianship are subject to the interests of the minor, in whose interest judicial authority intervenes in order to establish the fitness of the nominated person. The court may, while confirming the guardian nominated by the father, nominate another with him (Art.193).

B. Of Guardians - Dative.

Guardianship dative talees place in the following cases:-

(1) If no guardian has been nominated by the father;
(2) If the nominated guardian has not been confirmed or more than one guardian has been nominated but none has been confirmed;
(3) If for any reason and at any time the guardian or guardians-nominate cease;
(4) If the father who is still alive has forfeited the right of paternal authority;

(5) If several guardians have been nominated, with a vision of work between them, but one or some of them not been confirmed or have ceased to exercise guardianship. When there has been no division of function between the various guardians of one or some of them have not been confirmed or have ceased to exercise the guardianship, the same guardianship shall continue to be exercised by the others, saving the right of the Court "ex ufficio", that is, of its own authority, or at the request of anyone to substitute another or re guardians for those who have ceased. The Court may provide a guardian "ex ufficio" not only in the case expressly laid down in Art.191, but in general in any of the cases in which guardianship dative may occur, since the right that every citizen has to have a guardian appointed cannot be denied to the judge who does not thereby cease to be also a citizen. In Art.195 laying down that "in guardianship dative the child's parents must be preferred as long as they are fit", preserves an evidence of legitimate guardianship. In case more relatives put forward their claims, the following order is followed:-

(1) The widow, who is also the child's mother, is preferred to all other relatives, because none better than she can look after the child;
(2) The paternal ascendant, other relatives in their order of relationship. The court may also nominate more than one guardian for the same minor.

Persons capable to assume the Guardianship.

The incapacity of assuming the guardianship may be (a) absolute, or (b) relative.

A. Absolute Incapacity, Absolutely incapable to be nominated guardians by the father or by the Court are

(1) Women, because guardianship is a public office, the only exception being the mother;
(2) Those who have not yet completed 21 years of age for the same reason, again with the exception of the mother;
(3) Those who have no right to manage their own goods freely, such as interdicted or incapacitated persons or persons who are nororiously incapable to manage their own goods;
(4) Bankrupts who have not been rehabilitated;
(5) Those who have been condemned to hard labour for any time or to imprisonment for more than one year or for any punishment for crimes against the order of the family or for crimes of fraud;
(6) Persons whose conduct is notoriously evil or who have been known to be untrustworthy or careless;
(7) His Majesty's Judges, the Magistrates, and, at a time, when they still existed, the Sindaci, because otherwise they would be unable to take cognisance of the causes involving the interests of the ward. This

incapacity causes with the cessation in cases of guardianship of relatives is the direct line in any degree and in the collateral line up to the degree of cousin, because in this case the Judge or Magistrate would in any case be precluded from taking cognisance of the cause.

B. Relative Incapacity

Relative incapacity is the incapacity of those persons who have, or are going to have, a litigation with the minor involving the status of the said minor or a considerable portion of his goods (Art.199, No.4). This incapacity extends to the parents and relatives as well as to kindreds up to the degree of uncle or nephew or the person who is actually involved in a litigation against the ward. The acts carried out by the guardian who is absolutely or relatively incapable are not null and void and cannot, therefore, be impugned or opposed even by the minor (Art.224). On the other hand, those acts carried out in contravention of the other dispositions regarding guardianship may be annulled in regard to the minor, the heirs, or those having a claim under him.

The Obligation to assume Guardianship and the relative Exemption.

The law does not lay down expressly that the person nominated by the Court is bound to assume the guardianship, but this principle is implied in the wording of Art. 192. No one is obliged to assume the guardianship simply because he has been appointed by the father of the minor, but from the implications of the system of exemptions enumerated in Art. 201, because if everybody was free to accept or refuse the guardianship, there would be no necessity to establish the cases of exemption of a non-existing obligation.
The following are entitled to be exempted from assuming guardianship or the obligation to continue therein

(1) The Members of the Council of Government;
(2) Heads of Departments and any other Government official in charge of a particular branch of public service;
(3) Soldiers on active service
(4) Those who have completed the age of 60, or who suffer from a permanent physical disability such as makes it impossible to assume the guardianship without serious prejudice;
(5) The father of five living children;
(6) A person who has already assumed another guardianship; and
(7) Any person who is not a relation of the minor or who is a distant relation, when there is in these islands a relation of the minor or, as the case maybe, a nearer relation better qualified to assume the guardianship, provided the latter is not exempted therefrom. In the case of a disqualified or exempted

nearer relation who later ceases to be so, the extraneous person or, as the case may he, the near relation appointed instead may he asked to he relieved from the guardianship.

Powers of the Guardian.

The authority of the guardian affects the person as well as the goods of the minor (Art. 209) and he must therefore provide for the child's maintenance and education; if the person appointed to the child's guardianship is the mother or the paternal grandfather, either is free to look after the child as he or she thinks best without any interference from the Court as regards the place where the child must be brought up, the education that it must receive, as well as the relative expenses (Art. 201). But if the guardian is an extraneous person or some other relation, he must receive instructions from the Court regarding the minor's education and maintenance as well as the relative expenses.

So that the guardian may fulfil his first obligation the law concedes him the same power to enforce obedience, obliging the minor to yield him this obedience and submission in all things permitted by the law as between father and son (Art. 212), and therefore, in the case of the minor's disobedience, the guardian may have recourse to the following disciplinary measures equal to those which Art.158 confers on the father with regard to the child subject to his paternal authority:-

(1) He may remove the minor from the family;
(2) He may give him only those aliments that are strictly necessary;
(3) He may, with the authority of the Court, place him in any public institute.

As regards the property of the minor, the guardian represents the child in all the acts of civil life and administers all his property (Art. 209). Therefore, the guardian is in the first place entrusted with the "negotiorum gestio", that is, the management of the child's property; he has a general mandate in virtue of which he represents the ward in all the acts of civil life regarding its property, whether these are judicial or extra-judicial, with the exception, of course, of those acts which must be the spontaneous expression of the minor's will, such as making a will, entering into marriage agreements as well as making donations in view of a forthcoming marriage. Exception is also made for those acts in which the guardian, either personally or as the representative of some other minor, may have conflicting interests. In these cases, in default of the institution of a proguardian as in other laws, a special curator is appointed instead (Arts. 158 and I63).

The second duty of the guardian concerns the administration of the minor's goods. It consists in preserving the minor's property and providing that it

yield the greatest interest possible. Concerning this duty, it is necessary to remind of the distinction. already explained in connection with paternal authority between acts of mere administration and acts which exceed such administration, since, although the guardian represents the minor also in these acts, he is not free to undertake them on his own, but must first apply for the authority of the Court* Without such authority the guardian may not undertake any of the following acts (Art. 217)

(1) Receive or transfer the capital of the minor, since, as these acts are not always acts of preservation, it is but fair that the Court should supervise the employment of the minor' s capital;

(2) Take money on loan, except in urgent cases;
(3) Accept or renounce an inheritance;
(4) Accept donations or legacies subject to burthens;
(5) E nter upon transactions or compromises, because both involve the surrender of rights. Transaction is the definition or settlement of a legal claim still at issue made by means of a contract wherein the parties concerned reach an agreement between them, each relinquishing part of his controversial claims, whereas the compromise submits the claim or pretension at issue to arbitrators or private judges other than those of the Law Courts of the Country. Speaking of arbitrators (referees) or private judges, Boudrey-Lacantinerie and Naha (cited work Vol. I. p. 1086), say that they did not enjoy a very respectable opinion since it was said of them that they were not real judges but "apes of judges" - "non judices sed simmiae judicum".

(6) Alienate, hypothecate or grant immovable property in emphyteusis ;

(7) Grant leases for long periods, that is, leases exceeding the normal period of eight years for rural property, and, four years for urban property; and, as for movable property, exceeding the usual period. The excessive period for which the minors property may be abusively rented may be reduced to the legal term counting it from the day of the contract (Art. 217). The Court in the act confirming or nominating the guardian or in a subsequent decree may accord him a general authority for some or all the above-mentioned acts. As for the acceptance of an inheritance, this must not only be authorized by the Court but, even supposing it has been granted such authorization, must be accompanied with the obligation of drawing up an inventory of the child's goods as a guarantee against the debts which may burden the inheritance wherever the obligation to pay the debts is restricted to the inheritance, excluding the property of the heir. The Court may order the guardian to produce instead of the inventory a descriptive note of the inherited goods confirmed on oath. When more than one guardian has been appointed without a proper distribution of office between them, the Court may at any time "ex ufficio" or at the request of the guardians themselves, distribute the various duties between them. Similarly, if

in confirming a testamentary guardian, the Court appoints another with him, the same Court may allocate their respective duties for so long as the respective duties have not teen so assigned. All or any of the guardians has the right and may on his own account without the intervention of the others, fulfil any act connected with the guardianship, all the guardians concerned being responsible "in solidum" for the acts completed by any of them. If, on the other hand, the duties have been assigned, none of them may exceed his sphere of action and each is responsible for his own actions only.

Concerning the Duties of the Guardian.

The duties of the guardian may be divided into duties ante-dating the management of the child's goods or, in the words of Art. 203, "anterior to the confirmation or appointment of the guardian, duties that are contemporaneous to the function of guardianship, and duties arising from the cessation of guardianship.

A. Duties Anterior to the beginning of the exercise of Guardianship.

Before the appointment or confirmation of guardianship, the person nominated by the father in his will or the person whom the Court intends to appoint, or any other person, if the Court so orders, must draw up an inventory or, according to circumstances, a sworn descriptive note, giving an account of the child's property.

The inventory is a description of property drawn up by a public deed which must be preceded by the oath of the person drawing up the inventory to render a faithful description thereon. Any dispensation from the fulfilment of this obligation, even if it is made in the father's will, is held as null and void (Art. 204).

Further, before being appointed or confirmed as a guardian, he must undertake a formal obligation in the acts of the Court to manage the property properly and render a just account when the guardianship has expired. Strictly speaking, this obligation is not necessary because the duty to administer the child's property conscientiously and to render an account thereof is the natural duty of any person who administers somebody else's goods. However, the law expressly enforces this obligation, which must be contained in an appropriate statement drawn up by the Registrar and undersigned by the guardian in his presence in order to give him a formal knowledge of the importance of the office he is undertaking. For the-same reason, the guardian is required to subject in explicit terms and in the same statement all his goods without exception to a hypothecation thereof, for a specified sum, to safeguard the interests of the minor, which will hind the guardian to manage the property conscientiously and to render a fair account

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Notwithstanding that such hypothecation is by law (Art.1791, Ord.VII of 1868) attributed to the minor on the guardian's property. This hypothecation must be inscribed by the Registrar "ex ufficio" within four days from the date of the obligation under the penalty of damages and interest (Art. 1808, Ord. VII of 1868) and (Art. 1567 of the Laws of Organization and Civil Procedure). The Court may further order the testamentary guardian or the person who offers himself to assume the guardianship (Art. 205) to produce a guarantor wherever the said Court does not consider the guardian's hypothecated goods sufficient for the purpose. But this does not apply to the guardian spontaneously appointed by the court, because such person must be presumed satisfactory in all respects, so that it would be quite absurd to ask him to produce a guarantor. It may happen that some of the acts involved have to be completed without delay in the interest of the minor himself, but as the sale of perishable goods or cattle for slaughter, while the drawing up of an inventory may take some time. In this case, in order to avoid prejudice and hardship, the court may authorised the person required to draw up the inventory to proceed with the sale of the minor's good forthwith.

B. Duties contemporaneous to the exercise of guardianship

The fundamental duty of the guardian consists in the conscientious administration of the minor's property, keeping it in good condition, making the necessary repairs and employing it in a way to increase its value. Under this fundamental duty various other particular duties come in, of which the following are expressly obligatory:-

(1) He must sell the minor's property of which the Court has not authorized the preservation (Art. 214); because movable goods constitute an idle capital which it would be advantageous to convert into a fruitful capital, The sale, unless the Court has otherwise disposed, must be made by auction within three months after the confirmation or appointment which may he prorogued by the Court. If amidst the movable goods of which the Court has authorised the preservation there are precious articles or "titoli a portatore", the Court may order that they be deposited in the place reserved for judicial deposits of similar things or in some other safe place such as a bank, with the right of making further provisions about them at any time.

(2) Alienate, wind up commercial or industrial concerns that may be found in the minor's property according to the instructions of the Court (Art. 216), in the view of the risk involved in commercial speculation, However, the Court may authorize the continuation of such industrial or commercial concerns if it deems it necessary in the interests of the minor or in the

interests of the mother if she is a usufructuary, but having always the greatest regard to the greatest advantage of the minor. We must bear in mind that the legal usufruct to which the widowed mother may be entitled does not give her the right to stop the said provisions from being carried into effect, just as it does not give her the right of the administration of the goods subject to her usufruct contrary to the general rules of usufruct. If she has been appointed guardian and in this quality will have the right of administration, in the fulfilment of said administration she must abide by the rules of guardianship and not by those of usufruct, because she is not administratrix in her capacity as usufructuary but in her capacity as guardian.

(3) He must-invest the minor's capital and other money after having deducted the necessary expenses, in a profitable way if the balance exceeds £50. The penalty if the guardian infringes this obligation is that he will have to pay the interests himself unless he proves to the satisfaction of the Court that he sought to invest them somewhere without success. He is also responsible for any loss consequent on his failing to invest them with the necessary care and foresight that one would expect from the guardian if he were investing his son's capital.

(4) He must exercise all necessary economy and, therefore, must not incur unusual and unnecessary expenses having regard to the condition and the means of the minor (Art. 219).

(5) He must keep a cash-book containing debit and credit entries so that he may render a correct account. The Court may in the decree of confirmation or appointment, wherever it deems it necessary, oblige the guardian to, submit periodical accounts of his administration to the same Court.

C. Duties on the Cessation of Guardianship.

The guardian must render an account of his administration and, if he had rendered periodical accounts, must render the final one. The account must be given to the minor himself on attaining his majority or to his heirs if he died while still a minor. If the guardianship has ceased for any other reason, the account must be rendered to his successor in the guardianship.

The account must be accompanied with all due justifications, especially as regards the expenses. Concerning sums of some importance the receipts serve as documents; and if these have been lost or mislaid, the guardian must prove the expenses made by means of witnesses. But if it is a case of small expenses, the guardian's hook or register confirmed on oath is enough. In order to prove the expense it is not enough to show that it has been made: the guardian must further prove that it was necessary to make it. Unnecessary or excessive expenses, like those unaccounted for, maybe cut out from the account. On the cessation of the

guardianship the guardian must also hand back all the property that was under his charge including the balances of accounts made. He must pay the interests on those capitals which begin to run "ipso jure" from the very day that the guardianship has ceased without the necessity of any special notice. In this way the minor is safeguarded against the danger of an excessive timidity for which he may hesitate to demand accounts and the guardian will all too quickly render the necessary accounts himself without delay. This restitution includes all indemnity for which the guardian may have incurred responsibility through loss or neglect

Concerning the Rights of the Guardian,

The guardian has the right to a moderate fee which the Court may accord him at any time (Art. 208) and to the restitution of all legitimate expenses incurred by him exceeding the income, but the balance which remains in favour of the guardian will not begin to produce interest before a notice by means of a judicial act.

Concerning the Cessation of Guardianship.

The causes for which guardianship comes to an end are distinguished according as they affect the person of the minor or the person of the guardian.

A. "Ex parte minoris". Guardianship ceases on the minor attaining his majority, on his death and on his contracting matrimony even before attaining his majority if the Court has released him from guardianship (Art, 187).

B. "Ex parte tutoris". Guardianship ceases with his death, his appointment to an incompatible post, his release from the continuation of guardianship for some unforeseen reasons or some other just cause at the discretion of the Court, which may relieve him from guardianship either permanently or for some time. The guardian may further be removed for any of the following reasons:-

(1) Incapacity after the appointment;
(2) Failure to present accounts in due course, dishonesty in the account rendered;
(3) For some other just cause at the discretion of the Court of Voluntary Jurisdiction.

The removal or discharge is granted by the Court of Voluntary Jurisdiction by means of a decree, and the same Court may, pending inquiries into the conduct of the guardian, or pending the sentence in a judgement of the Court of contentious jurisdiction in case of the guardian's opposition, order suspension of the guardianship.

The guardian may lodge an appeal to the Court of contentious jurisdiction against the decree of

removal or suspension (Art. 306). like any other person deeming itself unduly aggrieved by a decree of the Court of Voluntary Jurisdiction, in accordance with Art.48 of the Laws of Organization and Civil Procedure. In any case, the Court shall have the greatest regard to the interest of the minor. If the guardian abuses authority or neglects his duty, the minor himself or any person on his behalf may submit its complaints to the Court, who shall warn the guardian and give all the necessary provisions. The widowed mother loses her guardianship "ipso jure" on marrying again whenever she has not been previously authorized to retain the guardianship (Art. 197). If she continues to administer without having previously obtained the Court's authority, her husband becomes responsible with her not only for the administration from the time of the second marriage but also for the wife's administration before the second marriage with the legal hypothecation of all his goods (Art. 179, Ord. VII of 1868). The mother's guardianship that has ceased for this cause may be restored to her by the Court having regard to the greatest interest of the minor and making the necessary conditions for the purpose. When the guardianship ceases "ex parte tutoris", guardianship will be continued in the interest of the child who is still a minor and a new guardian is appointed if the previous one was alone or if the cause for which guardianship has ceased affects all the previous guardians. If there have been more than one guardian and not all have ceased, one must distinguish whether there was a division of functions between them or not. If there has been such a division, one or more guardians may be appointed to replace those that have ceased. In the second case the functions of the failing guardian will be taken over by the others unless the Court "ex officio" at the request of any other person will not have appointed another.

Regarding the Prescription of Actions arising from Guardianship.

The minor's action against the guardian and the guardian's action against the minor are barred by the end of five years, computable from the attainment of majority or the death of the minor, according to Art.223 governing the exercise of these actions.

There is one exception against this rule and this regards the action for the statement of accounts against the guardian or his heirs; this action is barred by the time limit of five years from the cessation of the fact-in-law or within a year from the day of the guardian's death (Art. 1931, Ord. VII of 1868), and the time limit of this prescription, whether annual or quinquennial, runs also against the minor, saving his action against the new guardian. Thus we have an anticipation of the lapse of the prescription and the time limit is shortened by a year in the case of the guardian's death: because as time passes it becomes more difficult for the guardian personally, and still more for his heirs, to render the accounts.

the former because he may have mislaid the necessary documents, and the latter because they may lack the necessary information in the matter.

Of the Curator to Pregnant Widow. (Art. 207).

The law in this title deals also with the curator ship of the unborn child considering its similarity with the ordinary guardianship. The office of a curator to the unborn child takes place when at the death of the father there are no born children, but the widow declares herself to be pregnant. The office of this curatorship is intended to obviate the possibility of fraud till the birth of the child, after which the ordinary guardian is appointed. This institute aims at the interest of both the unborn child, in the case it is born alive and viable, as well as in the interests of the husband's heirs in the case there is no posthumous child, and it is especially intended to obviate the fraud of a suppositious birth. The curator is appointed by the Court at the instance of any interested person, and the Court may also appoint a woman to this office in order to control the progress of the pregnancy as well as the childbirth, and give to another person the administration of the goods under appropriate provisions. Sven the curator of the unborn child is entitled to a moderate fee, which the Court may accord him at any time.

Interdiction and Incapacitation. It's causes — Cessation — Curatorship — Appointment. Powers and Duties of the Curator.

Concerning the Curatorship of Interdicted or Disabled Persons.

Local laws on this subject are found in the Laws of Organization and Civil Procedure Arts. 530 and 538, Title VI, Ordinance I of 1873, which originates from Ordinance III of I869. The Title is divided into two chapters, the first of which is entitled "Concerning Majority", and the second "Concerning Interdiction" or Disablement". In the first chapter (Art. 225), majority is fixed at 18 years completed, and the Article continues "the person who has reached majority is capable of doing all the acts of civil life saving the exceptions laid down in special dispositions".

It is debated whether majority must be calculated day by day or moment by moment, but the second opinion prevails and it is based on the disposition that requires the exact hour in the Act of Birth, which seems to have been requested as a point of departure from which to calculate the completion of majority. According to Art. 225, for those who have attained majority capacity is the rule and incapacity the exception, and for this reason the latter must be proved. The special disposition of

the articles which follow immediately under Chapter II deals with the more important exceptions of the capacity of persons who have attained their majority arising from interdiction or disablement. The law as a rule takes the case of a normal person completely sane and responsible for his actions, since civil acts are the products of a free will. Mental weaknesses more or less serious affect the capacity of persons who have attained their majority. Therefore, every act accomplished by a person whose mind suffers from an infirmity must be examined individually in order to establish the extent to which the weakness has affected the will of the person concerned. This system might have provoked a number of difficult processes without constituting a sufficient protection in the interest of the person mentally infirm, because, according to common law, in doubtful cases a civil act must be considered as valid. So, our legislator, following the French legislator, organized for the protection of the mentally infirm two kinds of remedies proportionate to the degree of incapacity, and these are:-

(1) The interdiction of the insane and the spendthrifts, and

(2) The incapacitation of weak-minded persons.

Interdiction and incapacitation are described by the one general word inhibition, which may be defined as "that procedure of the judicial authority by which it recognizes that the person concerned is unable to carry out the acts of civil life, or is unable to do so without the assistance of curators. Interdiction completely takes away a person's judicial capacity and it corresponds to that degree of mental infirmity which deprives a person of the ability to carry out any of the acts of civil life, so that all acts accomplished during interdiction are null and void. Incapacitation is a less severe provision. It does not take away a person's ability to exercise the acts of civil life, but subjects the incapacitated person to the assistance of an outsider. It takes, place when the person concerned possesses a certain mental ability but not that sense of responsibility or understanding which is necessary to estimate the consequences of one's actions. According to Art.434 of the Laws of Organization and Civil Procedure, whenever the Court judges that there are not sufficient causes for interdiction, it may, if the circumstances so require, incapacitate a person from the exercise of the more important acts of civil life, without the assistance of a curator. These more important acts are:-

(1) To be party to a suit;
(2) To enter into compromises or transactions;
(3) To take money or something else on lean;
(4) To receive capital;
(5) To issue a receipt or give a discharge;
(6) To alienate and hypothecate goods, and, in general, to do all the other acts which exceed mere administration. The Court may also incapacitate

a person completely or partially from the administration of his goods which it may entrust to a curator-nominate.

Persons Subject to Interdiction or Incapacitation.

Not only persons who have attained majority and emancipation from paternal authority through the father's death or forfeiture of his rights, but also those who are still unmarried and "filii familias", may be subject to interdiction or incapacitation, because paternal authority is a sufficient protection only for those who are still under age, since as regards majors it has been reduced to a strict minimum. Likewise, these measures may be applied to minors emancipated from paternal authority for reasons of commerce or to carry on certain acts of trade. Minors as a rule are not liable to interdiction or incapacitation. Only in the last year of minority may a minor be interdicted or incapacitated, when it already shows the necessity thereof, so that the minor may be provided with a curator as soon as he has attained his majority without the possibility of carrying out any prejudicial act in the interval. But in this case curatorship begins only after the cessation of curatorship or paternal authority. According to Art, 228, the Court may appoint as curator the tutor himself or some other person.

Causes of Interdiction or Incapacitation.

These are:-

(1) Imbecility or some other weakness of the mind, permanent or temporary, continuous or intermittent;

(2) Prodigality that has been at all times compared to madness, "prodigus ut furiosus; nani furiosi faciunt rerum suarum exi turn neque tempus negus finora expensarum habentes". French and Italian laws admit only the institute of incapacitation but not the interdiction of the spendthrift, because this particular mental weakness is not considered sufficient to constitute such a lack of mental balance as to incapacitate him from all acts of civil life.

Apart from these two causes? The only ones that are contemplated in the Laws of organisation and Civil Procedure Ordinance VII of 1868 amalgamated with this title, two more clauses are added and these are:-

(1) Deafmutism, and

(2) Blindness, when they are congenital, chat is, when the person concerned has been so born. The law presumes in this case that these weaknesses have interfered with the full development of the person's mind and, therefore, does not require other proofs of incapacity (Art. 227).

Procedure

The procedure in order to establish the causes of incapacitation open with a petition to the Court of Voluntary Jurisdiction. Although even the protective laws governing this class of incapacity must be considered as belonging to public order, still not every person may request the inhibition of another, because this power is liable to abuse such as might subject a third party to the humiliation of the procedure. Therefore it might be requested only by the husband and blood relatives for their obvious moral and economic interest in the matter; it may be requested also by other relatives who might be held responsible for the maintenance of the person concerned (Art. 226), and when it is a question of insane or other weak-minded persons who are a danger to society, interdiction may be also requested by the Attorney General (Art. 531, Laws of Organisation and Civil Procedure). On the receipt of the application the court may summon the person concerned to examine him or commit the case to a psychopathist (Art.532, Laws of Org. and Civil Proc.) and may appoint a provisional curator to administer the estate of, and look after the person concerned. When all the proofs have been examined, if the result is that there is a just cause for interdiction or incapacitation, the court pronounces either one or the other by means of a decree. In the case of opposition from the person against whom the petition has been made, the court of voluntary jurisdiction will send the case before the contentious court.

Effects

Inhibition produces the legal incapacity to exercise the acts of civil life and, therefore, the nullity of the acts completed during the interdict] or incapacitation, independently of the nullity that may at times arise from a natural cause. Legal incapacity begins from the moment the decree is pronounced and finishes as soon as it is revoked (Arts. 536 & of the cited Laws). On the other hand, natural in capacity may have begun before, may have been intermittent in the interval and may have ceased before the revocation of the decree.

Consequences of the difference between one form of incapacity and the other are:-

(1) The validity of the acts entered upon before decree of interdiction may not be impugned on the grounds of legal incapacity, but these acts may be annulled if the cause of interdiction or incapacitation existed at the time when the same acts were completed (Art. 536). This rule has been applied in local law even to acts of prodigality made before interdiction especially if the person entering on the on tract had sufficient motives to know the prodigality of the other party;

(2) The acts anterior to the revocation of interdiction are null and void for reasons of legal incapacity in spite of the fact that natural incapacity had already ceased;
(3) Nullity arising from legal incapacity is relative to the curator of the inhibited person, to the inhibited person himself, and to those having a right under him (Art. 224).

The Publicity of Inhibition.

Interdiction or incapacitation must be made public to outsiders in order to protect their good faith against possible surprises so that they will know that they may not enter into any contract with the interdicted person. The decree of the Court must therefore be published not less than two times in the Government Gazette which, when it is a case of incapacitation, must specify the limits thereof. This publicity will be considered sufficient notice for all the purposes of the law (Art. 538, Laws of Org. and Civil Proc.), and especially as regards Art. 12 of Notarial Laws, Act XI of 1927, which forbids Notaries to receive the acts of inhibited persons. Notaries are informed also by means of a circular sent by the Court, of which, they must take note in an appropriate book. Another means of publicity is the Book known as the Register of Inhibitions and Incapacitation, kept by the Registrar of the Court of Voluntary Curlsdiction and accessible to everyone (Art. 528, Laws of Org. and Civil Proc.).

The Curatorship of the Interdicted or Incapacitated Person.

Curatorship in this case may be dative only, and it may not be conferred by means of a will, since, failing paternal authority, there can be no reason for testamentary guardianship. To this curatorship, especially that of interdicted persons, we apply the ordinary rules of guardianship as far as they go (Art. 533), and, therefore, the relatives must be appointed in the same order as for ordinary guardianship, provided they are suitable, in preference to outsiders.
The same rules apply also in so far as they apply to the capacity to assume this office or to be exempted therefrom.

The Authority of the Curator.

As a general rule, the authority of the curator affects the estate and the person. The interdicted person may be cared for in his residence or in a hospital or elsewhere according to the different circumstances and the nature of the disease, following the orders of the Court, which has also regard to the financial means of the patient. The functions regarding the estate refer to the administration thereof.

and to the patient, representation in the acts of civil life. In order to decide whether there is the necessity of a special authorization for the purpose one must distinguish whether the acts in question are merely administrative or exceed the limits of mere administration. The functions of a curator of an incapacitated person are different because they are limited to the curator's assistance at the act to be completed by the incapacitated person himself. The curator has the "negotiorum gestio" in the case only when the incapacitated person has been also deprived of the right of dealing with his own property. In this case only in so far as concerns the administration of the estate, because for other acts one applies the rule that they are completed by the incapacitated person with the assistance of a curator

Rights and obligations of the curator.

The curator of the interdicted person has the same obligations and rights as the guardian as they apply. The curator of the incapacitated person must give him all the necessary assistance and all the care and diligence of a good "pater familias".

Cessation of Curatorship.

Curatorship may cease for the same reasons as guardianship which take place in the person of the curator himself or in the person of the interdicted person. Under this second aspect, curatorship may cease also by means of the revocation of the decree of interdiction or incapacitation.

The Curatorship of an Absent Person and His Minor (Title VII. Ordinance I of 1873)

The fundamental basis of the state of a person is existence, which begins from the tine of birth and ends at the time of death. Between a certain existence and inexistence there is an intermediate state which constitutes what in law is known as absence. In ordinary language absence merely indicates the state of a person who is not where he should be, but in the judicial language "absence" indicates the state of a person whose existence is uncertain because this person has been away from the country and for a long time has failed to give information about himself. According to Art.231, "absent is the person who has ceased to appear in these islands and about whom there are no news". As it is uncertain whether this person is dead or alive, it is necessary to look after his property in the first place in his own interest, in the second place, if he is dead, in the interest of his heirs. When absence has been long enough to justify presumption of the death of the person concerned, it is also necessary to regulate the succession to the goods of the absent person who is presumed dead. Side by side with the institute of the absent, recently

another judicial figure has been created regarding a person's disappearance, that is to say, disappearance of a person of whom no more news were had following some accident in which it is very likely that the person concerned lost his life. When this presumption is justified one may, by means of a decision of the Court after a certain time - relatively short - has passed, obtain a declaration that the disappeared person is dead. This judicial figure, still unknown in our laws, was introduced into foreign legislations first in the case of shipwrecks, secondly it was applied to analogous cases, and on a large scale especially during the Great War. The institute of the absent was organized in Ordinance I of 1873, forming the subject matter of Title VII, which is divided into the following five chapters

I. Concerning the curatorship of the absent.
II. Putting of the heirs into provisional possession of the property of an absent person.
III. Putting the heirs into the definitive possession of the estate of the absent person.
IV. Effects arising from absence in regard to eventual rights which may accrue to the absent person.
V. The curatorship of the minors of the absent person.

Before this Order the state of the absent persons was regulated by usages which were re-ordered by our legislator, who followed such modifications as were suggested by other laws.

Chapter I.

Concerning the Curatorship of the Absent.

The first chapter of this title deals with the conservation and administration of the property of the absent person. The law provides for this by means of a curator to look after the property of the absent person and also by means of the superintendence exercised by the Court of Voluntary Jurisdiction. One must carefully distinguish between this kind of curator whose office is permanent and "ad omnem rem", similar to that of the guardianship or the curatorship of an interdicted person, from that of a curator "ad litem", appointed by the Court to represent an absent person in a suit according to the laws of procedure. It is obvious that when the absent person has left a procurator (Art. 241) no such provision can take place except for those acts which cannot be completed by an attorney by virtue of his mandate or the laws. The Court of Voluntary Jurisdiction competent to appoint a curator is that of the island where the absent person is known to have resided last, thus applying by analogy the general principle that succession opens in the place where the deceased person resided last, because

These provisions are meant to conserve the property of the absent person and serve as a prelude to the heirs' admission into his property, which is equivalent to a succession to the property of the absent person. The curatorship is always active and it must be requested by the heirs or other persons interested in the property of the absent person. Not everyone may request such a nomination as in the case of the guardianship of minors, because those interested in the property of the absent person are in a different position from that of the minor, who cannot have recourse to the judicial authority. After the request made by means of a petition, a procedure of investigations begins in order to give publicity to the request and to obtain information about the absent person, and especially in order to ascertain if he has made any provision with regard to conservation of his estate. According to Art. 2232, the court shall order the publication of an edict with which every one who has information of the absent person is requested to communicate with the court through the registrar within a month from the publication of the edict (Cf. Form A annexed to Ord. I of 1873). These banns are published in the government gazette and put up in the entrance hall of the court and in any other place where the court may so order, such publication to take place twice with at least one month's interval between the first and the second publication. Any person having news of the absent person may communicate it either in writing or verbally. In this case the registrar makes a written statement in the acts. No notice is taken of anonymous latters of communications sent by unknown persons who do not give their address. On the expiry of the term of the second publication, whenever no news of the absent person has reached the court or information about the place where he is, the court issues a second decree with which it order the formation of an inventory of the various goods forming the estate of the absent person (Art. 234), but the court may, instead of an inventory, order a mere description thereof to be confirmed on oath by the person making the description. The court in appointing this person who must draw up the inventory or make the description gives it a time limit in which to do so. When the information collected after the publication of the edict though not very enlightening makes further investigations advisable, the court ay order such investigations before appointing the person to draw up the inventory. On the completion of the inventory the court issues a third decree with which it concludes the procedure by appointing the curator. When necessary the court may at any time authorise any suitable person to carry out such acts as do not admit of delay (Art. 235) as it may make any provision for the better safe keeping of the property. For instance it may order the issue of a warrant of description of all movables, a warrant of sequestration of valuables goods and the deposit thereof in a safe place.

The conditions regarding the capacity of the office of a curator of an absent person are the same as those of guardianship with this modification to the rule which excludes women from guardianship, excepting the mother. Prom the curatorship of the absent person the wife, the daughter and the sister of the absent person are not excluded. The rule that makes the assumption of the office obligatory on the person appointed by the Court (Art. 227) does not apply. More than one curator may be appointed and they may at any time divide between them the various functions of their office. So long as this division is not made, each of them has all the duties and all the functions .attached to curatorship, and they are all jointly responsible for the acts of each of them.

The authority of the curator is limited to the administration of the goods that are entrusted to him. He also represents the absent person in the acts of civil life and may not carry out such acts as exceed mere administration without the authorization of the Court. The obligations of the curator are classified into (1) Anterior, (2) Contemporary, and (3) Posterior to the office.

Anterior Obligations.

These are obligations that must be undertaken before the effective functioning of curatorship, viz. (1) the formation of the inventory, and (2) the formal undertaking in the acts of the Court of an obligation to administer the property and to render accounts in due course, which obligation is safeguarded with a hypothecation of his goods in general for a determined sum and, when the Court deems it necessary, with a guarantor.

Contemporaneous Obligations.

These are similar to those of the guardian to which we refer in Art. 238. The curator of the estate of an absent person has further the obligation to continue investigations in order to ascertain whether the absent person is still alive, where he is staying and to submit any information obtained to the court.

Posterior Obligations,

These obligations are those connected with the rendering of final accounts and the restitution of the goods as well as the payment of any indemnity that may be due with interests on the balance still outstanding without the necessity of being summoned to do so. The accounts must be rendered to the absent person if he has returned to the island or to his attorneys otherwise, according to Art. 239, to those who have been put in the possession of his goods. The causes whereby the curatorship of an absent person terminates are the same as those which apply to the cessation of guardianship.

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from the part of the absent person it may cease on his return, or on his appointing an attorney: it may also cease with the admission of his successor to the possession of his goods.

Chapter II.

Concerning the Eventual Rights that may Accrue to the Absent Person,

After having dealt with the conservation of the goods of an absent person existing at the moment when the latter's absence has been ascertained and the nomination of the curator, we now take up the study of the eventual rights that may arise subsequently in favour of the absent person - eventual rights, that is to say, rights that are subordinate to the existence of the person entitled to receive them. It is uncertain whether the absent person is still alive or otherwise, and this uncertainty affects the acquisition of such rights because it depends on whether the absent is still alive at the time when the right has come into being. Let us take, for instance, a legacy bequeathed to an absent person in a will the testator of which died after the legatee has been declared absent. Must the legacy in question be declared to have failed to have effect on account of the legatee being predeceased to the testator, or must we say that the legatee has obtained the said legacy? Art. 258 says "No one is acquitted to claim a right in the name of a person whose existence is unknown unless it is proved that the absent person was alive at the time the right in question came into being". Nobody, that is to say, neither the curator of the absent person nor the heirs or others claiming a right under him by a particular title, such as his creditors.

Failing a proof to the contrary, the absent person is considered dead and, therefore, he does not acquire rights since the acquisition of rights is subordinate to the fact that the absent person must have been alive. Art.v269 further bears out the import of Art. 268. It runs as follows: "When an inheritance is opened in favour of a person, partly or wholly, whose existence is uncertain the inheritance shall pass to those with whom the absent person had the right to compete or to those entitled to the right in question in his absence, saving the right of representation". Indeed it is so true that an eventual right is not acquired by an absent person that it passes to those who would acquire it if the absent person were dead. When there is no place for the right of representation or the right of accretion, the inheritance to which the absent person is called accrues to those to whom it would have accrued if the absent person were deceased.

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Those, however, who succeed to a right belonging to an absent person must, according to Art. 269 draw up an inventory of the goods which they receive or, if the Court deems it more advisable, make a description thereof. Indeed, they have acquired these goods only on the assumption that the absent person was dead when the right came into being, but the contrary may happen and it may be shown that the absent person was still alive at the lime when the right in question came into existence, and, naturally, the goods will have to be restored. And it is to safeguard this eventual restoration that Art.269 orders the formation of an inventory or a description of the goods of the absent person. However, the possession on which they have entered on the assumption that the absent person was dead constitutes a possession of good faith, so that if later it is proved that the absent person was still alive, according to Art. 271, they are not bound to restore the fruits or benefits that they have received therefrom. Further, the rights of an absent person or of those making a claim under him are subject to prescription. Therefore, if the absent person or his heirs institute the "actio rivendicatoria" after the prescribed time-limit, this action may be set up against them. When it is a question of an inheritance and ten years have passed since its devolution, the legal time-limit for the recovery of the inheritance is prescribed. Those who possess the goods of an absent person possess them subject to prescription, and the absent person who returns after the prescription of that time-limit will have forfeited the right to reclaim them. The time-limit runs against him as if he were present.

Chapter V.

Concerning the Curatorshin of the Minors of an Absent Person.

It is necessary to provide also for the upbringing and the maintenance of the minors of an absent person as well as the administration of his estate for which, in accordance with Art. 272, a curator is nominated at the request of anyone. This is completely a case of guardianship different in name only, so that the relative laws apply to it. [4]

Principles of "Ius Transitorium" as regards Marriage, Coniugal Relations. Filiation. Legitimation.- Acknowledgement. Adoption - The Relations between Parents and Children. And Personal Capacity.

The fundamental principle governing the effect of the law at different times and which eliminates all

conflicts between a new law and the preceding one as regards the application of the one or the other is that the new law must be applied consistently, however with the rights already acquired under previous law. Rights so obtained are inviolable with one modification in the application of the new law when this applied to personal right, the reason being that the new law aims not so much at the particular good of the person concerned as at the general good of society. In this case personal right suffers a limitation in the interest of the major and more general rights of society. We now pass on to a study of the principles of transitory laws, to the various institutes of the law of persons.

1. Matrimony.

The conflict between the old and new law may affect the requisites of matrimony such as the capacity of the contracting parties, the absence of impediments and the form of its solemnization. It is obvious that social and individual interests equally demand that the validity of matrimony be regulated by the laws prevailing at the time of its solemnization. Nothing would be more injurious to social stability than that a matrimony validly contracted under one law may be later declared voidable under a subsequent law, which may require other conditions than those laid down when the matrimony took place; or otherwise that the matrimony that was nll and void under the law prevailing at the time it was contracted because it lacked some essential condition may be later declared valid under a new law dispensing with the omitted condition,

1, The Dissolution of Marriage.

In our laws marriage may be dissolved by the death of either the husband or the wife. But as it is possible that new laws may introduce new causes for the dissolution of marriage, such as divorce, the question arises whether these new causes must apply also to marriages solemnized previously. The difficulty is resolved by the unanimous opinion that the divorce introduced by the new law applies also to previous marriages, because the reform may be supposed to be intended for the general good, but the cause giving rise to divorce must have happened after the promulgation of the new law. There is also, however, a contrary opinion which has also its supporters which extends the retroactive effect of the new law further back in time than its reasonable limit in the sense that the new law is made to apply to previous marriages, even if the cause justifying the divorce took place before the new law's enactment.

3. Conjugal Relations.

The rights and duties of a person in nature arising from marriage are governed by the laws in force at the time, and, therefore, they change with the changing of the laws because these laws are not intended to confer particular benefits on the married persons themselves hut to ensure the moral well-being of the family and of society.

4. Personal Separation.

For the same motive of social interest the new law applies where it is a question of the causes justifying separation or the effects of a personal nature arising therefrom. One must, however, distinguish between a law which introduces a new cause of separation and a new law which abolishes a cause of separation. In the latter case the laws have a fully retroactive effect even if the guilt giving rise to separation took place under the new law. In the former case, however, although the now law applies also to marriage previously solemnized, and in this sense it is retroactive, yet one can apply for separation on the strength of the new law if the fact in question has taken place after the promulgation of the new law; else one must prove that it is a fact of a permanent nature which, having taken place under the old law, continues to exist under the new law. The new law applies also in the case of change of laws taking place after the fact which gave rise to separation, and that sometimes during the course of the suit.

Filiation,

Legitimate Filiation.

The acquisition of a status of legitimate child is subject to the law prevailing at the time of its birth. This is done both in the interest of the individual concerned and of society in general in order to maintain the stability of one*8 personal status. When the law changes between the time of conception and of birth some writers think that of the two the law more favourable to legitimacy must be applied. Gabba, however, opines that we must invariably apply the law prevailing at the time of the child's birth, and his argument is that the acquired right of a personal status comes into being only after the child's birth. On the other hand, the laws relative to the rights and obligations arising from filiation are applied immediately because these aim at the preservation of family and social order. For this reason Ordinance IV of 1869, which abolished the

paternal authority of the grandparents was immediately applied to all the grandparents and to all the nephews.

Illegitimate Filiation.

The status of an Illegitimate son or daughter may he obtained either by means of acknowledgement or by means of a judicial declaration. When there is a change of law regarding the admissibility of one or the other means as well as the relative conditions and effects, one must always have regard to the law prevailing at the time of the acknowledgement, of the judicial declaration and not of previous laws especially those in force at the time of the child's birth. As regards acknowledgement, the reason for this retro-activity is that the new law may be applied without any violation of acquired rights. No such right belonged to the parent who had only the power to acknowledge the son; nor to the son (or daughter), who has not the power and much less the right to be acknowledged by his parents. The same rule applies also to a judicial declaration because it is either a law which restricts the investigations of paternity or maternity, and in that case the new law must be applied immediately, but such restriction must be presumed to be inspired by motives of public interest such as family harmony, the suppression of scandalous Court oases as well as because illegitimate children so long as they have not instituted an action by means of a judicial declaration cannot claim any acquired right because in this case it is not an acquired right that they have but merely a right to institute an action to acquire such rights. Or it may be that the new law admits the enquiries into parenthood or abolishes the restriction of the previous law, and in this case also the parents may not plead that they have an acquired right in the matter in order to evade the new law. Illegitimate filiation is also liable to legitimation and the same rules are applied to it.
The conditions required for its validity are the same as those required by the law in force at the time that legitimation is being sought.

As to the effects, that is, regarding the rights and obligations between parents and legitimated children, the new law is applicable not only for future legitimations, but also for previous legitimations.

Adopted Filiation.

The requisites for the validity of adoption depend upon the law of the time in which such adoption is sought; the interests of society require that, once the state of adoptive parent and child is validly

Brought into being it should remain valid without any danger of its being invalidated by a subsequent law. as to the rights and duties arising out of adoption, we must distinguish those which are determine by law from those which may be determined by agreement. It is to the latter order of effects that the principle proper to the transitory law of obligations and of the inviolability of contacts is applied. On the contrary, those effects that depend on the law will remain within the domains of the law; in fact, all changes in such a law are applied also to regulate future effects of previous adoption.

Capacity

In order to find an apt solution to the problem arising out of jus transitorium in relation to capacity, we must first consider:-

1. Capacity to act does not constitute a vested right; so long as such capacity is not deduced through the exercise of a given right, it remains within the ambit of a merely abstract faculty, and is regulated by law.
2. Laws regarding incapacity or regulating institutes that aim at the protection of the interests of incapable persons, whether such incapacity be due to age or to mental infirmity, are the result of one of the noblest functions of that state, viz: that of protecting those citizens who are incapable to provide for themselves.

The following are corollaries of such considerations:-

1. That the laws relating to capacity are of their very nature retroactive, and that capacity changes with the law.
2. That the capacity to perform a certain act depends upon the law of the time when such act is to be performed.

These principles are applicable to all kinds of incapacity whatever be the cause that gives rise to it: minority, interdiction, inhabilitation.

A great difficulty arises when a law prolongs the term of minority of those who at the arrival of the new law had already become of age. Some writers are in favour of retroactivity, for the reason that laws regarding incapacity are inspired by the general interest of

society and not by individual interest. In the province of Utrecht, however, where the case arose in 1659 (a new law had laid down that a person became of age at 35 years, abolishing the previous custom that determined that males become of age at 22 and females at 24), and in France when the Code Napoleon laid down that people became of age on the completion of 21 years and abolished the different local customs, the contrary opinion prevailed, and such opinion was approved by other writers amongst whom Gabba, who teaches that while from the individual point of view majority is the object of a vested right arising out of the law in force at the time when it is reached, the interests of society at large not only remain unprejudiced through the preservation of such vested right, but even gain inasmuch as such preservation prevents the disorder which would mar social relations if a person already considered of age and therefore possessing capacity, should then become incapable through his being thrown back into minority (cfr. Art. 153 of the German Civil Code).

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FACULTY OF LAWS

LLD I AND LLD II YEAR (2009/10)

JUNE 2010 EXAMINATIONS

EXAMINATION: CML 4010 – International Economic Law: The Law of the World Trade Organisation

DATE: Thursday 3 June 2010

TIME: 9.15 am – 10.15 am

ANSWER ONE QUESTION ONLY:

1. The General Agreement on Tariffs and Trade (GATT) contains a number of basic rules on international trade in goods.

Comment on these basic rules, in particular, on the general Most-Favoured-Nation-Treatment and the National Treatment on internal taxation and regulation.

2. Under the General Agreement on Trade in Services (GATS) there are general obligations and specific commitments.

Outline the main features of GATS, in particular the four modes of supply of a service, the general obligations including the Most-Favoured-Nation principle and general exceptions, the specific commitments on market access and national treatment in the WTO Members' schedule of commitments and the modification of schedules of commitments.

3. The WTO's Understanding on Rules and Procedures governing the settlement of disputes provides for a common system of rules and procedures with respect to the disputes that arise under the WTO agreements. Identify and comment on the main elements of the WTO dispute settlement process, in particular, the two-instances system of adjudication.

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FACULTY OF LAWS

LLD I AND LLD II YEAR 2011/2012

JUNE 2012 EXAMINATIONS

EXAMINATION: CML 4010 – International Economic Law: The Law of the World Trade Organisation

DATE: Thursday 21 June 2012

TIME: 9.15-10.15 am

ANSWER ONE QUESTION ONLY

1. Briefly outline the World Trade Organisation's dispute settlement process, as envisaged in the Understanding on Rules and Procedures Governing the Settlement of Disputes, focusing on the Panel and Appellate Body procedures.

2. Analyse the basic principles of the General Agreement on Tariffs and Trade (GATT), in particular the rule of trade according to the Most-Favoured-Nation clause (MFN) and the rule on National Treatment.

UNIVERSITY OF MALTA
FACULTY OF LAWS
LLD I AND LLD II YEAR 2013-2014
JUNE 2014 EXAMINATIONS

EXAMINATION: CML4010 – International Economic Law: The Law of the World Trade Organisation

DATE: Wednesday 18 June 2014

TIME: 10.30am-11.30am

ANSWER ONE QUESTION ONLY

1. The General Agreement on Tariffs and Trade 1994 (GATT) is the principal multilateral agreement regulating international trade in goods.

   Analyse the main provisions of this agreement, in particular the Most-Favoured-Nation Treatment (MFN) principle, the National Treatment principle and other key articles, including the prohibition of quantitative restrictions and exceptions to the agreement. (100 marks)

2. The General Agreement on Trade in Services (GATS) consists of a framework of general rules regulating international trade in services.

   Analyse the main provisions of this agreement, in particular the modes of supply of a service, the Most-Favoured-Nation Treatment (MFN), the specific commitments of market access and national treatment, exceptions, the schedules of specific commitments and their modification (100 marks)