# Law of Property

**Prof. V. Caruana Galizia**

LL.B. II

GħSL
Għaqda Studenti tal-Liġi

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# ABOUT GĦSL

Għaqda Studenti Tal-Ligi (The Law Students' Society) is a faculty-based, non-profit organisation at the University of Malta that represents all law students within the Faculty of Laws.

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*.

Moreover, GħSL boasts its own Thesis Library, located at the GħSL office in the Faculty of Laws. Additionally, GħSL is the only law organisation responsible for the distribution of authoritative law notes and past papers.

For further queries on this set of notes, as well as any other, please feel free to contact our **Resources Officer** at **resources@ghsl.org**.

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.

Għaqda Studenti Tal-Liġi

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**GħSL Executive Board 2014/15**: Francesco Refalo, Dirk Urpani, Patrick Gatt, Rebecca Mercieca, Gaynor Saliba, Joshua Chircop, Jacob Portelli, Luisa Cassar Pullicino, Kelton Mizzi, Pier Luca Bencini, Rebecca Cassar, Charles Mercieca.

## SUB-COMMITTEE FOR THE REFORM OF STUDENT RESOURCES

It was set up in April 2014 under the auspices of the GħSL Academic Office. Its intention was to embark on the challenging project of reforming the resources available to law students. The aim of the committee is to discuss all available avenues for the development of both short-term and long-term solutions pertaining to student resources. GħSL is committed to providing students with the best possible tools to facilitate their studies. As part of this project, the GħSL Authoritative Notes have been scanned and digitised in collaboration with the Faculty of Laws and GANADO Advocates. This project was led by Joshua Chircop, Luke Hili and Dirk Urpani.

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Printed by: Papier plus Studio
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stationery | gifts | print | copy | scan | bind

These notes were proof read by Daniela Attard.

Fenech & Fenech ADVOCATES

**What skills do law firms look for in accepting students for work experience?**

Landing work experience or enrolling in a vacation scheme in a law firm are undoubtedly the first steps towards developing skills that will eventually assist in the recruitment rat race.

However good grades - although undeniably important - are not in themselves sufficient in indicating you have the raw material required to succeed and today's competitive environment means that law firms are on the lookout for students that distinguish themselves head and shoulders above their class mates in terms of attitude, initiative., competence, practical skill and outlook.

Given that work experience is commonly viewed as a stepping stone to a training contract, it is important to know what to focus on during student life and how to show case it in preparing an application for acceptance for work placement or a vacation scheme:

**Teamwork**

Forming part of a law firm means spending more time with your colleagues than you do with family and friends. You may also find yourself working on a large project involving several areas of law which would entail you collaborating with partners and associates within different departments to those you are directly assigned to.

Add to this work pressure, tight deadlines and hectic schedules and the importance of being a team player will win you significant brownie points in your work environment. These skills can be built on and refined through membership and direct involvement in student organisations, while sport – and we are here not referring to time spent on a cross trainer - is the prime example of how you can hone your team skills.

**Analytical skills**

One of the main culture shocks in entering the work environment is that it is not enough to be able to cite entire paragraphs of legal text from memory – you need to know how to apply them to cases in practice. It is true that it is only by working that one learns how to become a lawyer, however the possession of analytical skills and the ability of looking at a situation from a 360 degree angle distinguishes a mediocre lawyer from a brilliant one.

How to hone these? Some are naturally more gifted than others; however participation in moot court and mock trial competitions, legal debate sessions and making a conscious effort to focus on the facts of case law when preparing for exams will go a long way in training your brain to be more analytical.

### An international outlook

Today's work environment is predominantly international. Even those areas which were traditionally associated with local litigation, such as civil and family law, have been distinctly tinged with an international flavour due to the application of EU and cross border legislation. Interest in foreign cultures including language is a definite plus point when working in a law firm that deals with foreign clients on a daily basis. Participation in student bodies which allow the opportunity of exchange trips and organisation of events overseas stand out in an application as a welcome advantage.

### Commercial know-how

This is a tricky one and entails a maturity that often comes with work experience itself. However developing as early as possible your general knowledge of what is happening in the country you live in and in the world around you can serve as a valuable tool in sniffing out new markets to target. It can also help you notice developments in legislation which will ultimately translate in the provision of new legal services to clients. Reading up on local and international news is one way of keeping abreast with current affairs, while tying these up with existing and emerging legal sectors in article writing, assignments and dissertations significantly raises the quality of the material you produce.

### Impeccable writing

Though obvious, the bad use of the written language and the inclusion of spelling mistakes render even the most star-studded application, together with its author, look sloppy and careless. Take time to draft your application properly, checking spelling when in doubt. This will indicate to the reader whether you have the necessary writing skills and eye for detail which are crucial in working in a law firm. The review of legal documents and agreements requires precision since even the slightest mistake or oversight can prove costly to your client and ultimately, your career.

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Employment with a law firm is not limited to the carrying out of legal work per se, there are clients to manage, meetings to organise and social events to help out in. Highlight your involvement and experience in organising student events and work events during your summer job experience as a student since these tend to stand out to a potential recruiters' attention.

# CIVIL LAW NOTES

## LAW OF THINGS

By

Prof. V. Caruana Galizia

PUBLISHED BY

THE LAW SOCIETY

for University Students
GHAQDA STUDENTI TAL-LIGI

2nd Year

CIVIL LAW NOTES (2nd Year)

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## Real Rights - Rights of Ownership - Actions to which such Rights give rise - Expropriation

1. We now pass to consider a new order of ideas, namely, patrimonial rights.

Patrimonial rights are directly intended to satisfy the needs of the holder of the rights, saving of course the moral obligation of making use of such rights in a way which is not in conflict with the true interests of society. In our legal system patrimonial rights are divided into real patrimonial rights, and personal patrimonial rights; a more complete division would be this:-

(a) real rights
(b) rights on "res incorporales"
(c) rights arising out of obligations
(d) rights of succession

### Real Rights

Real rights give to the holder an immediate interest in the thing; the subjection of the thing to the holder of the right may be total both with regard to enjoyment and to the right of disposal (ownership), and it may be total or quasi-total with regard to the enjoyment of the thing but not with regard to the right of disposing thereof (rights of usufruct, use, habitation, emphyteusis, superficies); or it can be limited to a particular kind of enjoyment (servitude) or to a particular way of disposing thereof (rights of pledge and hypothec).

### Ownership

This title was first introduced into our legal system by Ordinance VII of 1868 now incorporated into the Civil Code and Article 14 of said Ordinance (Art. 357 of the Civil Code) defined property as "the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law". This definition corresponds substantially to the rational concept of ownership as a right in virtue of which a thing is subject to the will and activity of a person in the most absolute and exclusive manner.

### Elements of the Right of Ownership

Ownership consists in the fullness of right on the thing - a fullness in which are included

all faculties and activities imaginable, of which the afore-quoted section mentions only, as the most important, the right of enjoyment and the right of disposal. A more minute analysis will enable us to discover in the concept of ownership the following rights;-

1. The right of using the things ius utendi, which is to be distinguished from the right of enjoyment, because a person may make use of a thing even without acquiring its fruits, when such thing bears fruit.

2. The rights of use and of enjoyment are commonly reunited under one heading, namely, that of right of usufruct: jus utendi fruendi.

3. The right to possession - jus possidendi i.e. the right of having under one's physical control the object of ownership.

4. The right of disposing of the thing by means of alienation in full ownership or by means of the transfer of any right over the thing as, for example, by the imposition of a servitude.

5. Jus abutendi - i.e. the right to destroy the thing, both materially and juridically by abandoning dominium; the right of changing the state and the shape of the thing, of improving or of causing deterioration to it.

## Characteristics of the Right of Ownership

The characteristics of ownership are: absoluteness, exclusivity, perpetuity. The law explicitly enunciates the absoluteness of the right of ownership by affirming that it does not matter if, through the exercise of his right, the owner causes inconvenience or damage to others, because "qui suo jure utitur neminen laedit"; this absoluteness, of course, does not imply the fact that the law cannot put limitation both by reason of similar or equal rights pertaining to others, and in the general interests of society.

The absoluteness of ownership is no bar to the possibility that from the sum total of the rights which it confers on the proprietor, one or more of such rights may, through some special legal procedure, be assigned to a third party, who thus comes to acquire certain rights over a thing belonging to another. Such concessions do not deprive the owner of his quality as such: his

rights, also with regard to the benefits attributed to a third party, are not extinct, but only suspended; so much so that, as soon as the rights of the third party cease, those of the owner return to their full efficacy without the need of any re-assignment; this shows that the owner still retained a right over the thing in its totality. Thus, although the expression is not, strictly, exact, ownership is designated as full when it suffers no restrictions because of rights conferred upon third parties: less full when such rights of third parties exist: and bare when a third party enjoys the usufruct.

Characteristic of Exclusivity

The owner has an exclusive right on his thing and can prevent any other person from exercising any act upon such thing; S. 358 acknowledges such exclusivity in the text:

> "No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose and upon payment of a fair compensation".

From these two characteristics of the right of ownership, and especially from the second, there emerges a third, that is, its irrevocability or perpetuity. "Dominium perpetuam causam habet". If ownership is an exclusive right, no person can be made to transfer against his will. A most important corollary of this characteristic is the fact that ownership is not extinguished or lost by lack of use.

These characteristics of ownership do not imply that it is unlimited: in fact, S. 358 gives a hint of the possible limitations of the right of ownership which may derive:

1. From the Law. - because the law- must guarantee the rights of all, and, therefore, it must bring about a conciliation between the rights of different owners in order to prevent the exercise of the rights of one owner from being of obstacle to the exercise of an equal right by another; this is the "raison d'être" of the

so-called legal limitations of the right of ownership which should rather be called rules co-ordinating the rights of the different owners: such as the laws regulating urban property, key plans for streets and other urban communications, and rules regarding the construction of factories.

2. From the will of the owner by virtue of the absoluteness of his dominium; since he can dispose of his thing in the most absolute manner, it follows that he can impose limitations upon himself and upon his successors: such are voluntary servitudes imposed by the owner on his tenement by means of an act inter vivos or causa mortis. This is only an apparent derogation from the rights of the owner because in reality it simply constitutes a manner in which it can be exercised.

3. From the interests of society at large that can impose compulsory expropriation for reasons of public utility.

So long as the existence of such limitations is not proved, the absolute and exclusive character of ownership is to be affirmed because such is the nature of this right: "quilibet fundus presumitur liber servitute donec probetur servitus ".

## Object of the Right of Ownership

From the definition which we have given and from the concept of the right of ownership, it is evident that all material things both taken singly and united together into an "universitas facti" can form the object of ownership.

The rather vague and generic diction of the provision of law which contains the definition of the right of ownership prompted some writers to include among the objects of ownership incorporeal things. Such interpretation appears to be incorrect because it tends to cause an application of the rules governing ownership to other rights which are governed by quite different principles. As to the case of rights of a proprietary nature, it is obvious that it would be highly improper to use such an expression as

"A has the ownership of such and such a right".

Such an expression could have no other meaning but that

"such a right belongs to A"

that is, a right which is different from that of ownership.

Incorporeal rights of a proprietary nature have an autonomous existence and a value of their own. A literary or musical or scientific work constitutes something autonomous which includes a particular "bonum" apt to satisfy certain needs and aspirations of man. Modern laws have acknowledged this right of exclusivity which is exercised upon products of the intellect and ensures the enjoyment of same by means of their publication, reproduction, and representation. Such rights in German law are designated as "Guther recht" or immaterial rights; in Italian law for want of a better expression, they are called intellectual ownership or "diritti di autore", because the rights in question are attributed to the author of the work or other intellectual production.

There can be no doubt that these rights recognized by modern laws are true rights, subjective and private, as is clearly to be seen from the fact that they are "in commercio", hereditary, and enjoying the protection of the law by means of judicial actions; although, however, they are patrimonial rights, they cannot be considered real rights because a poem or symphony or an invention are not "things" in the strictest sense of the word.

The special laws governing these rights in our legal system are the Copyright Act of 1967 (Act VI of 1967) and was brought into force on the 1st January 1970 by L.N. 109/69; Ordinance No. XI of 1899 relative to Industrial Property, to Patents and Trade Marks which is Cap.48 of the Laws of Malta. In International relations copyright is also governed by the Convention of Berne of the 9th September, 1886, modified by that of Paris of the 4th March, 1896, and then by that of Berlin of the 13th November, 1908, published in the Government Gazette of the year 1912 at page 708, together with the Orders-in-Council which rendered these Conventions effective in the Dominions beyond the Seas including these Islands and ns revised by the Rome Convention of the 2nd June, 1928 (Vide Treaty Series No. 5) Moreover on Copyright Convention, the relative instrument being deposited at U.N.E.S.C.O.

Extension of Ownership

Our law in this regard contains two rules, of which one is general and applicable to any thing which can be the object of ownership; the other special, relative to ownership of land. The first rule is to be found in S. 264 under the title of Accession, which lays down that the person that has the property of a thing makes his all that it produces or that is united to it or that is incorporated with it both naturally and artificially: the ownership over the principal thing attributes also the ownership of all which it produces or which is joined to it, as we shall explain more fully when dealing with the title of "Accession", which our legal system considers as one of the special ways in which property is acquired. The second rule is contained in S. 19: "he who has the ownership of the land, has also that of the space above it, and of everything on or over or under the surface" - "qui dominus est soli, dominus est coeli et inferorum". Ownership of the ground, therefore, includes four elements:-

1. The surface or the visible level of the ground;

2. The overlying space which the Romans called "coelum" and which we popularly call "arja";

3. All things that exist above the surface, e.g, trees, land, constructions; this element corresponds to the "superficies" of the Romans which was a real right having for its object the things existing over the surface: trees and edifices;

4. All things existing beneath the surface, and, therefore, all the substance enclosed within the womb of the earth, viz. metals, minerals, water sources.

From the above it follows that: -

a. Since the owner of the ground has a right of property also of the overlying space, he can raise on his soil any construction or plantation (S. 19); on the contrary, no other person can carry out any works over the soil,

because in this way he would be usurping the right of the proprietor which includes within its domain also the space overlying the soil; thus, nobody could construct a house or raise any port of his own construction on to the property of others, as, for example, by opening balconies, etc.

b. Since the proprietor owns also the underground, he can carry out any excavation beneath the ground and extract from it all possible products, for example, by means of the opening of a stone quarry' or a mine ,

Such rights of carrying out any kind of works both above and underneath the surface, as also in the space overlying it, are facultative rights, elements of the right of ownership, and like ownership they are not subject to loss through simple lack of use. Art. 360 contains an express exception with regard to praedial servitudes or to the laws relative to fortifications and all other means of military defence. Where praedial servitudes exist, it is quite natural that they are to be respected; thus, if the land is subject to a servitude "non aedificandi" the owner is deprived of the right of constructing buildings on his own land. If a third party acquires a "servitude proiciendi vel protegendi", the owner of the ground is bound to suffer or tolerate all projections jutting out on his ground from the contiguous building.

c. Any construction, plantation or other work executed over or under the land is presumed to be carried out by the owner at his own expense and to belong to him (Art. 361), saving proof to the contrary, and saving such rights as third parties may have acquired. The basis of such a presumption is the fact that only the owner has the right to carry out such works, and therefore it is presumed that they belong to him; it may happen, however, that such works are carried out by a third party at his own expense, either by agreement with the owner or abusively; the relations which would follow in this case form the subject matter of the treatise about "Accession".

PROTECTION OF OWNERSHIP

The rights and actions which the law gives to an owner for the protection of his dominium are: -

1. The right to enclose the tenement (Art. 363). The owner has an exclusive dominium and, therefore, in order that he may efficiently exclude any person from his property, he should be granted the means to enclose his tenement by means of any suitable device. This is a facultative right, and therefore it is not subject to extinction because of any lapse of time, saving, however, all rights of servitude pertaining to others: thus, if the owner of the neighbouring tenement has a right of way, in case the tenement is enclosed, he is to be allowed access to it in order that he may exercise the servitude in question e.g. by means of a key.

2. In case of two contiguous tenements, either of the owners has a right of action tending to establish the limits or boundary line between the adjacent tenements, so that they may be kept constantly distinct from each other. Such an action is not subject to prescription. Each of the owners exercises such right by means of visible and permanent signs that define the boundary line, e.g. a wall, a row of trees or of stones. These signs are to be placed upon the boundary line and each of the neighbouring owners can compel the other to reimburse him the necessary expenses, because it is a work useful to both and which, therefore, is to be carried out at the expense of both. In case such line of demarcation has already been established i.e. if there already existed a sign of division between the two tenements which has been removed or destroyed, the re-establishment of the line of demarcation can be demanded by either of the owners at the expense of both.

So far we have taken it for granted that the boundary line between the two tenements is certain and that only the signs of demarcation are lacking. In case the boundary line is uncertain there is a different action which is called

"actio finium regundorum". The object of this action is (1) the ascertainment of the boundary line, and, therefore (2) the establishment of such boundary by means of visible and permanent signs. This action is purely an "actio finiun regundorum" where there is confusion and uncertainty as to the boundary line, that is when the adjacent space is in the possession of both the neighbouring owners promiscuously. In case an exclusive possession existed or was alleged to be existent on the part of one of the neighbouring owners in spite of the claims of the other owner that the area in question belongs, partially or totally, to him, the action assumes the character of an "actio reivindicatoria", because the plaintiff alleges that part of the land possessed by his neighbour belongs to him. In opposition to such an action, the party having exclusive possession can, if the necessary circumstances exist, raise in his favour acquisitive prescription of the area in question.

3. The third and most important means for protecting ownership is the "actio reivindicatoria" by which the owner of the thing demands against the possessor the acknowledgement of his right of ownership and, consequently, the restitution of the thing "cum omni causa".

SUBJECTS OF THE "ACTIO REIVINDICATORIA"

The plaintiff in this case is the owner allegedly dispossessed of the thing; the defendant is the possessor i.e. the person holding the thing in his own name as if he were really the owner. Such an action, however, can be proposed also against the person holding the thing in the name of another party, because also such a person is in a position to be condemned to restitution. The holder of the thing in the name of another person, however, can ask to be put out of the suit "nominando auctorem" (Art. 1642 e.g.)

The defendant must be the person who possesses or holds the thing at the moment of notification of the act by means of which the demand is made: if he possessed at a certain time, but ceased doing so before the serving of such act, the action cannot be proposed against him, because he is no more in the position to be condemned to

restore the thing, saving, of course, in such case, any other action against him in case of damage, as we shall see in the Treatise dealing with "Possession".

But if the defendant possessed the thing at that moment, this would be enough in order that the "actio reivindicatoria" may be continued against him, in such a way that if he ceases to possess the object willfully, he cannot evade the suit and its consequences by bringing forward the plea that he is not the possessor: he is bound (Art. 359(2)) to regain possession of the thing at his own expense in favour of the plaintiff, and if he is unable to do so, he is bound to make good its value, unless the plaintiff elects to proceed against the actual possessor.

OBJECT OF THE "REIVINDICATORIA"

All things that are the object of ownership can be the object of the "actio reivindicatoria". Article 359, however, makes a reservation as to any plea established by law. There are cases, therefore, in which one's own thing cannot be claimed back, such as the case contemplated in Article 595 relating to possession in good faith of things movable by nature and of titles to bearer. Here we limit ourselves to elucidating in what way it affects the "actio reivindicatoria". The third parties mentioned by the above-quoted provision of our law are those that have acquired the thing by means of an act capable of transferring property "a non domino" e.g. the purchaser, who has bought a thing from a person who was not its owner; such a purchase does not confer on him the ownership of the thing, because the vendor, not being the owner, could not transfer it to him. If, however, he acquired possession of the thing in good faith, in the belief, that is, that the vendor was really the owner, then he acquires by means of possession coupled with good faith, that ownership which he did not acquire in virtue of the purchase; both through immediate prescription in virtue of a provision of law and by an absolute presumption of ownership.

Thus the possessor in good faith having become owner, it is to be held that the right of ownership of the previous owner ceases, end there also ceases any possibility for him to exercise the "actio reivendicatoria", because "duorum

in solidum dominium esse non potest'. As to the effects of the "reivindicatoria", we shall deal with them in the Treatise on "Possession", whereas the term within which it may be exercised will be dealt with under the title of "Prescription".

4. The other action which protects ownership is the "actio negatoria", which is granted to the owner in order that he may be protected from all those violations of his right that do not actually imply a deprivation of possession of the thing, and which are commonly known as molestations. The most common but by no means the only application of this action takes place in case of alleged servitudes (e.g. easements). In this case the object of the action is triple:
   a. to cause the violation to cease
   b. to obtain an indemnity for damages caused by such violation
   c. to obtain a guarantee against future violations.

## COMPULSORY EXPROPRIATION FOR PURPOSES OF PUBLIC UTILITY

"We shall now deal with the rules concerning the greatest derogation affecting the rights of owners, that is, of compulsory expropriation for reasons of public utility. "No person can be compelled to give up his property", Article 358 lays down, "or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation". Here in one provision of law we have an affirmation of the characteristics of ownership, i.e. absoluteness, exclusivity and perpetuity on the one hand, and on the other the derogations to all these characteristics. The rights of individuals are not only to be organised in regard to their inter-relations, but are also subject to the preeminent right of society. Expropriation can have for its object both the ownership and the use of the thing; in the first case it amounts to a sale which the citizen is compelled to effect in favour of the State, and in it the price takes the place of the indemnity; in the second case, it is a forced assignment of the use of the thing. The condition of this power exercised by the State is public utility, which, according to our system of laws, must be the result of a declaration on the part of the

President of the Republic which cannot be enquired into by the Courts.

Apart from Art.358 of the Civil Code, S.38 of the 1964 Constitution provides that there shall not be any deprivation or dispossession of property or proprietary rights or interests unless provision is made for the payment of adequate compensation. The same provision appeared in the 1961 Constitution which also required "prompt" payment of the compensation. No mention is made in the 1964 Constitution about promptness of payment. However, the Constitution did not disturb the provisions of the Expropriation Laws operative before the enactment of the Constitution. Therefore, assessments of compensation made in accordance with the rules of the Expropriation Laws cannot be impeached on the grounds of inadequacy. Similarly although there is no right of appeal from the assessment made by the Board, the position is not subject to attack, despite the fact the Constitution provides that persons affected by a forced deprivation or dispossession shall have the right of appeal to the Court of appeal. There is a specific exceptive provision in regard to the Expropriation proceedings. However, if the Expropriation laws were to be amended and made more onerous by the Legislature, all the provisions of the Constitution will have to be respected.

In this manner, the "status quo ante" was maintained.

The law regulating Expropriation of land is Chapter 136 of the Revised Edition of the Laws of Malta (Ord. XL of 1935) as amended by Ord. X of 1945, Ord. XLV of 1946, Ord. XXXI of 1947, Act V of 1949, Act XXVII of 1956, Ord. IV of 1961, and XIV and XXXI of 1966 and XXIX of 1969. In regard to immovables, the indemnity must correspond to the price which the thing would fetch in case of a real and free sale, without any increase due to the fact that the sale in question is compulsory. The state of the tenement at the moment of notification of expropriation will be taken into consideration, and no ameliorations of any kind made afterwards will be taken into account (Art.25). Such indemnity is subject to increase or decrease according to circumstances. An additional indemnity is granted to the owner in compensation for any damage suffered by him as a consequence of the segregation of any part of the expropriated tenement or as a consequence of any act carried out in accordance with the law of expropriation; if however, the damage is caused by any work carried out in that tenement, as a result of which the value of

the tenement is increased, such increase of value is taken into account in establishing the indemnity; the indemnity diminishes when, after a part of the tenement has been expropriated, the remaining part increases in value as a result of works carried out in its vicinity within the last eighteen months preceding the notice of expropriation: or it may increase in value as a result of works to be executed within eighteen months after such notice.

If the tenement is let, the lessee has no right to any indemnity for the premature dissolution of the lease or for the ensuing eviction, provided he is given one year's notice for such eviction. In case the time limit is shorter, the lessee has a right to an indemnity which shall be established regard being had to the time remaining for the dissolution of the lease and to the particular circumstances of the case up to an amount which is never to exceed two years' fair rent. In case of rustic tenements, the lessee has always a right to an indemnity for value of fruits still hanging, as well as for works of tilling, manuring and other such works the benefit of which has not yet been exhausted. (S.19)

The owner of a house or other edifice cannot be compelled to suffer partial expropriation of same (S. 13). He can also put forward opposition against partial expropriation of a building site (as defined, in accordance with this Ordinance, in Article 17), when the remaining part measures less than 50 square canes and is unsuitable for building purposes in accordance with building laws and regulations, so long as the owner has not other tenements contiguous to the one in question, to which such part may conveniently be annexed.

Such right of opposition is enjoyed also by the owner of any tenement when the portion to be expropriated exceeds three-fourths of the total extension, and when the remaining part is less than one tumolo, and when the person expropriated does not possess a contiguous tenement. In all such cases when there is opposition on the part of the owner against partial expropriation, the whole of the tenement is to be expropriated.

Expropriation may have for its object not only ownership on immovables, but also any kind of servitude or other real right imposed on immovables, or the possession and use of immovables for a determined or undetermined period, so long as this affects public utility (S. 5 and 23); in the latter case of expropriation of possession or use for an indeterminate time, after the lapse of ten

years from such expropriation, the owner has the right to request the Board to order expropriation of property or acquisition on public tenure in default of release of tenement in favour of the owner within a year from the order (Art 18).

Besides, before expropriation, and in order to carry out the necessary ascertainments relative to some, any person, by means of a special or general authorization given by the Competent authority has the right of access to any tenement, to take the necessary measurements, carry out excavations, define the limits, mark them out or mark out the works which it is intended to execute and, in general, to perform any act necessary to verify the suitability or otherwise of the tenement for the purpose in view (S. 7). In case access is required to a house or a yard or a garden annexed to a house, the tenant has the right of being notified 7 days in advance. Any damage caused is to be indemnified, and in case of difference of opinion, the relative amount is to be liquidated by the Board at the demand of the person allegedly suffering damages. Such decision cannot be appealed from.

S. 17 which contains the definition of a building site for the purposes of the assessment of compensation, is of particular significance. According to that section, land is deemed to be a building site if it has a frontage on an existing street and is situated within a built-up area or, subject to ss. (2) hereunder, within a distance of not more than 100 yards of a built-up area measured along the axis of the street. Ss. (2) provides that in applying the provision on the said distance of 100 yards, regard shall be had to the probable immediate expansion of the built-up area in the direction of the land in question. Land falling within this definition of a building-site shall be deemed to be a building site to a maximum depth of twelve canes; with this purpose in view, the decision must be made as to whether a tenement be a building site, or whether it be agricultural or waste land. Since this is a case of a special jurisdiction, any other aspect, of the question is to be considered as extraneous and, therefore, beyond the jurisdiction of the Board. In order to eliminate all doubts, S. 24 lays down that in case that other questions of law or fact arise, the Chairman is to reserve the proper decision thereanent to one of the Judges sitting in the First Hall of the Civil Court, according to the Laws of Organization and Civil Procedure; the Board, however, without awaiting a decision on such questions may order that the person in question be vested with possession of the tenement; and the Competent

authority nay disregard any question which may have arisen among the co-owners, and is not to bear any part of the expenses caused by questions regarding the distribution of the price among the co-owners or other persons claiming under them, or any persons enjoying any real right (emphyteutae, creditors enjoying privilege or hypothec), or personal rights (lessee) on the expropriated tenement. All such persons are included under the general name of-"owners" (S. 2).

It is also the duty of the Board to decide who is to bear the costs of the proceedings; normally the Competent Authority bears the costs in case the indemnity offered turns out to be less than it should have been; and vice-versa, the owner pays the costs, if his claims turn out to be excessive; but the Board may depart, when it deems it just, from this rule and establish in what proportion the expenses are to be paid. The jurisdiction of the Board includes also the execution of its own decisions (S. 23 sub-sec. 1, f).

The Board has also the same rights pertaining to the First Hall of the Civil Court.

PROCEEDINGS

When a declaration has been issued by the President to the effect that the tenement is required for reasons of public utility (S. 4),a copy of such declaration is to be notified, by the Competent Authority, to the owner together with an intimation, if necessary, to give all the requisite information, regarding the origin of the tenement and all other details required for a proper valuation of the tenement in accordance with the form annexed to the Ordinance. If any one of the owners is unknown, or absent, or a minor or interdicted person without a legitimate representative, curators shall be chosen to represent him. At the same time as such notification is presented and as early as possible the owner is to be notified by means of a judicial act of the compensation which would be paid to him according to a valuation annexed to the notice. This is called "notice to treat". He will likewise be invited to declare what compensation he claims, within the term of twenty-one days.

If an agreement is reached as to the indemnity, the Board will sanction it as we have said above. If the owner allows the term of twenty-one days lapse without answering by means of a judicial act, he will be held to have accepted the amount offered by the competent authority; and, on the Authority

applying to the Board for the relative order, the Board shall declare that the compensation is the one in the notice to treat and will give any other order which may seem necessary (S. 20, sub-sec. 2). If, on the contrary, the owner, within the above time-limit refuses the compensation offered by means of a judicial act, the Competent Authority must apply to the Board in order that it may take cognizance of the case and decide thereupon.

All acts are to be filed, sent and notified according to the Laws of Organization and Civil Procedure, which are, as much as possible, applicable in all cases to the procedure of this Board (S. 23, sub-sec. 2, c). The acts are issued in the name of the Board and signed by the Chairman. Upon application on the part of the Competent Authority, the Board will fix the day for the hearing of the case. The decision is based on the opinion of the majority of the members, and it cannot be appealed from. This inappellability relates the questions brought before the Board and not those reserved to the Chairman in order that he may decide thereanent as Judge of the First Hall of the Civil Court.

The decision of the Board does not imply the obligation on the part of the Competent Authority to carry into effect the acquisition of the tenement; so long as it has not already been vested with possession, it can within a month after the decision, declare to the Board that it does not intend to take steps in order to effect acquisition; if a month has elapsed and no such intimation has been sent, the acquisition of the tenement on the part of the Competent Authority becomes compulsory (Art. 31). In case of renunciation, the owner is to be reimbursed for all expenses incurred and indemnified for any damage suffered; in case of difference of opinion, the amount shall be determined by the Board (S. 31 last para.).

PAYMENT OF INDEMNITY

In case the tenement happens to be dotal or it was held under an individual entail, or belongs to an interdicted person, to a minor, or to a person who is physically incapable, no particular judicial or other authorization is necessary. In these cases, together with the compensation granted according to the criteria stated above, an additional indemnity of 3 per cent will be granted, and both will be deposited in the Second Hall of the Civil Court, the authorization of which shall be necessary in order that they may be withdrawn.

PENAL SANCTION

Any contravention against this Ordinance, which consists of hindering a duly authorized person from having access to a tenement, from taking possession of it, or from using it, or in any molestation or obstacle to such person, is punishable with a fine not exceeding £50 and with imprisonment. not exceeding three months.

VACANT PROPERTY

The provisions of Article 364 attributing to the Crown the ownership of vacant property, can be considered as another exception to the perpetuity of ownership, because this Article affords a case of cessation of property through causes independent of the will of the owner. Vacant property consists in those things of which the owners are either dead or absent, and nobody can claim to be their successor. Such goods are to be distinguished, as Aubry and Rau observe in their comments on the provisions of S. 539 and 716 of the French Civil Code, from "res nullius" and from "res derelictae" which belong not to the State but to the first occupier. Baudry Lacantinerie and Wahl (op. cit. para. 1304) and Planiol et Ripert (op. cit. Vol. III para. 63) consider that such a provision applies only to immovable things, including inheritances, with respect to which the individual right of occupation would be incompatible with the welfare of the community, at large.

COMMUNITY AND PARTITION OF PROPERTY

Community, or co-ownership or condominium or consortium, is that state of being of a thing or of another right over a thing when it belongs to several persons jointly, and, in the wording of Article 526, "it exists where the ownership of one and the same thing, or of one and the same right, is vested pro indiviso in two or more persons". "Pro indiviso" means that the property or the right belongs to the "consortes" not in real or material parts, but only by abstract and intellectual parts; "pro partibus utinque indivisis ut intellectu magis partes habeant quam corpore". (L. V. Dig. Lib. 45 Tit. 3). If the individual owners had parts which are materially and concretely separate, it would no longer be a case of an ownership common to all, but there would be as many distinct properties as

material parts into which the thing is divided. There must be, however, intellectual and abstract parts because it is impossible that several persons should individually enjoy ownership of the whole, because the dominium of one would exclude that of the other.

Community is not a real right "sui generis", but is in reality the right of ownership modified in so far as instead of belonging to one person only it belongs to several persons pro indiviso. The same may be said about community in emphyteusis, or other real rights. The state of community indicates the existence of a special state of being of such rights, but does not constitute a different category of rights.

As to the modifications which community gives rise to in the obligations and the rights emanating from ownership or from some other real rights through the concourse of several co-partners, we will deal about them under the heading of "The Effects of Community".

The elements of community are:-

1. Plurality of subjects i.e. of the owners or co-partners in any other right, as, for example, in emphyteusis, usufruct, servitude, etc.

2. The object, which may be anything capable of being owned or subject to any other real right, both corporeal and incorporeal. If the thing is corporeal we have co-ownership or condominium "stricto sensu"; if it is incorporeal, i.e. a real right over a thing, we have community or consortium in such right. Community takes place according to S. 526 not only when the property of a thing belongs to several persons pro indiviso, but also when another right belongs in the same way to several persons. The object may be either one or several particular things or a universality of fact (e.g. a flock), or a universality of rights (e.g. an inheritance or the estate of a dissolved partnership).

3. That the object be owned pro indiviso - i.e. that the individual condomini or co-partners have in the property or other right, not real or material but only intellectual and abstract parts. It does not matter if such parts be equal or otherwise, because also unequal intellectual parts can exist. The object of the right of the individual owners is the whole thing and each and every part of it; everyone has a right "in toto et in qualibet parte": the right of each affects the thing in its entirety and in every part of it, however small, but only for the respective

intellectual part. It is a "jus in toto sed non totaliter", since there is not one part of the thing, however insignificant, in which every one of the condomini has not got a right, but at the same time there is no such part over which one of the condomini can exercise an exclusive right; the thing and each and every part of it belongs to all.

Kinds of Community

1. As regards its origin, community may be voluntary or incidental. It is voluntary when it arises by agreement of the co-owners; incidental, when it comes into being independently of the will of the co-owners, as in the case of an inheritance which has devolved by law or by an act of last will to several heirs, or in certain cases of accession and specification.

2. With regard to its object, community is to be distinguished into Particular and Universal. It is particular when the object consists of one or more things considered individually, or of a universality of fact; universal, when the object is a universality of rights.

Extension of the Right of the Individual Co-Owners

The shares of the co-owners may be equal or unequal, but by law are to be presumed equal. (S.527). This presumption is a simple presumption which does not exclude proof to the contrary, because inequality both in voluntary as in incidental community, can very easily be met with. Thus, A and B may have bought together in common a tenement and A had furnished two-thirds of the price while B had furnished only one-third. In spite of this, they may have agreed that the tenement is to belong to them in the same proportions. In any case, inequality has to be proved by him who alleges it, because in each case it must be due to special motives which can be proved. The condomini partake of the advantages and of the burdens of the community in proportion to their respective shares, whether they be equal or otherwise.

After having premised the above, we shall now divide the treatise into the following three parts: -

1. Effects of Community - i.e. rights and obligations of the individual consortes;

2. Administration of the common thing;

3. Cessation of community.

A. Effects of Community

i. Rights of the individual consortes

The rights of each co-owner are those same rights which any exclusive owner of a thing has upon it, modified, however, by reason of the concourse of the other owners, and, therefore:

(1) Each one of them has full ownership of his share and of the respective profits or fruits of any kind (S. 532). He may freely dispose of such share in whole or in part; he may alienate it, impose hypothecs on it, grant the usufruct of it, and so on. He can dispose of it by any title and in any way, both by act "inter vivos" or by an act of last will, both under gratuitous and under onerous title. All this he can do independently of the other co-owners, but as no one can transfer a right which is greater than that which pertains to him, the acquirer succeeds in the same rights which the alienating co-owner had. The material effect of alienation is to be reduced to what the right of the alienating co-owner would be, had he not alienated it. In the text of S. 532 the effect of alienation is limited to that portion which may come to the co-owner on a partition. That section contains two exceptions to the free disposability of the share of co-owners:

a. the first refers to personal rights, i.e. those rights which are strictly inherent to the person to whom they belong; this is not a rule special to community, because a personal right is always inalienable independently of its being possessed in common or otherwise.

b. The second exception is relative to pre-emption granted to heirs (Retratto successorio), of which s. 953 speaks: when the estate of a person devolves on several persons of whom one has assigned his share to a third party not being a co-heir, the other co-heir or any of them may take over the share transferred, and this right is called "retratto successorio". In reality it does not prevent a co-heir from disposing of his share, but subjects the alienation which he makes to the right of preference

of the co-heirs

> As to the right, pertaining to co-owners, of imposing servitudes and of giving the thing on lease, when such a thing is held in common, we will deal about the subject "in sede propria".

(2) Each of the co-owners (S. 528) is entitled to make use of the common property provided the right of each is in harmony with the equal right of the others, and therefore each one can make use of it so long as such use is in full accordance with the destination which it is apparent that the thing is intended for; thus no one of the co-owners can make use of the thing against the interests of the community, or in a way which would hinder the other consortes from exercising their right as co-owners.

No one of the co-owners can make innovations without the consent of all the others, even if such innovations are alleged to be advantageous to all(Sec. 530), because "in pari causa melior est conditio prohibentis". The person opposing alterations is exercising a right, and if all the co-owners do not agree, it is natural that the thing should remain as it is. Besides, alterations imply expenses, and no one can be compelled to incur expenses against his will; this, of course;' does not mean that any of the co-owners can have such alterations carried out at his own expense without the consent of the others.

Obligations of Individual Co-Owners

The obligations of the co-owners may be reduced to contribution to the expenses necessary for the preservation of the thing; each of the co-owners may compel the others to contribute to these expenses, because it would be unjust if any one of them should continue to enjoy the fruits of the common thing without shouldering the relative burdens. If any co-owner refuses to pay his share in such expenses, he can free himself from such obligation by abandoning his right as co-owner.

ii. Administration of the thing held in common

Administration belongs primarily to the co-owners themselves, who are to see that all means leading up to a more perfect enjoyment of the common thing are employed. Therefore, the co-owners themselves may agree to nominate an administrator, and establish the rules which are to govern the administration.

But since the right of all the co-owners is equal, in case of disagreement, the function of the judicature becomes necessary, and in this case the judicial authority has the faculty to give out requisite orders at the instance of one or several of the co-owners against the others. In all cases when the disagreeing co-partners are not likely to suffer any damage, the Court must give preference to the opinion of the majority; so that the opinion of the majority does not de jure bind the minority, but recourse to the Law Courts is necessary in order that they may decide the question according to law. Majority is calculated regard being had to the total number of the co-owners, and not to the value of the respective shares.

iii. Cessation of Community

The principal and most natural way to cease from being in a state of community is Partition, which is a contract by means of which the common thing, or the universality of common things, is spilt up into as many real and material portions as there are intellectual and abstract shares belonging to the individual consortes; and each of these obtains one of such portions by lot or by assignment.

The right to ask for a partition belongs to each of the consortes independently of the others, even against their will, nay, even in spite of express refusal on the part of all the others. S. 533 lays down: "No person can be compelled to remain in the community of property with others". This rule is applied in all cases of community, and, therefore, also in cases of incidental community which has arisen independently of the will of the condomini. This rule has as its "raison d'être" both the private and the general interest. It is imposed for reasons of private interest because very often community gives rise to disputes and law-suits, and because no one of the co-owners, when in a state of community, can draw from the thing all the profits which it can yield. It is justified by the exigencies of the community, because common property is lacking in the quality of economy, because it constitutes a hindrance to the bettering of things, since each one of the consortes has the faculty of opposing any innovation. For these reasons the above-mentioned rule has been elevated to a principle of public order, to which no derogation is admissible, either by agreement or through an act of last will (Ss. 553,947). Nevertheless, the law admits of three exceptions against this rule, exceptions arising out of a special consideration in each of the following cases i.e.

a. A testator may forbid the partition of his estate among the co-heirs instituted by him, when all of them or some are still minors, until the lapse of one year from the day in which the youngest becomes of age. (S.947) The law sanctions this prohibition of the testator because it considers it based on a plausible motive, which is that the co-heirs, when they are all of age, may carry out the partition between them, so that each one of them may be capable of protecting his own interests personally instead of having to depend on a tutor or other legitimate representative.

b. The testator may suspend partition for a time not exceeding five years, even if no one of the heirs is a minor (S.947) The testator, in fact, nay have plausible motives for delaying the partition, e.g. in order to give the necessary time for the liquidation of the estate, or in order that the common estate may increase, or in order to allow the heirs to run in common some industrial establishment.

c. The condomini can agree to retain the community for a determinate time not exceeding five years, and this for any one of the motives, of which we have spoken about (S. 533).

The first two exceptions affect community in case of an inheritance, the third may refer to any kind of community, and, therefore, also co-heirs, independently of any provision laid down by the testator, can agree to remain in a state of community for a period not exceeding five years. This suspension both if ordered by the testator and if agreed to by the parties among themselves, cannot exceed the term of five years, consequently, a disposition or an agreement for a term longer than five years, is null and void as to the excess. At the expiration, however, of the first five years, the agreement can be renewed. In spite of the above prohibition or suspension, the dissolution of the community may be demanded when such dissolution is required by reason of grave and urgent circumstances (S.534). The efficacy of the will of the testator and that of the co-partners themselves is not so absolute as to prevent any co-partner from demanding partition when he is moved by-grave motives that make the immediate partition necessary. Any renunciation to the right of demanding a partition in such cases is null and void.

When the causes that call forth for an immediate partition of the common property are due to the fault of any of the co-owners, the Court, while ordering the partition, may condemn such party to refund the damages.

When Partition may be Demanded

Partition may be demanded at any time, because it is a facultative right; in spite of any lapse of time for which an original owner or his heirs or successors have remained in community, both the successors and their heirs have the right to demand partition. It cannot be demanded only in those cases contemplated in S. 535.

1. If there has already been a partition;

2. If there has been a possession capable of causing prescription.

This leads us to speak about prescription of the action of partition. Generally, such action is to be held free from prescription, because the possession of common things, exercised by one of the co-owners, is usually not an exclusive possession, but a mixed possession, i.e. a possession which he exercises in the name of all the co-owner. Even if one of the co-owners has exercised possession not in the name and on behalf of all the co-owners, but in his own name exclusively, yet such possession is to be held as based on the tolerance of the other co-owners, and, therefore, being equivocal, such possession cannot bring about prescription, as prescription required a legitimate and not an equivocal possession. If, however, there has been such legitimate possession, that is, a possession that has all the characteristics required by law, and especially if such possession has not been equivocal, and has lasted for the time determined by law, then the hypothesis contemplated by S. 535 arises: "When any of the co-owners has possessed in an exclusive way some part of the thing or things owned in common, and his possession contains all the characters established by law, in such a way that it is certain that he wanted to exercise such possession as if he were the only owner, and not as an administrator in the interest of the others, and this for the time established by law - in such case the action of partition is lost by extinctive prescription. Such co-owner, having become exclusive

owner of the portion possessed by himself, cannot be deprived of possession, and cannot, therefore, be made to submit to partition. In this case, it is rather the property of the thing, than the action of partition, which is subject to prescription. The co-owners have lost the dominium over their share and the possessor has gained ownership of such share or shares by usucapio. The time for prescription is generally 30 years; if the immovable property belongs to churches or other pious institutions the period is 40 years (S. 2249).

Kinds of Partition

A. With regard to the object, partition can be universal or particular. It is universal when the object is an estate or universality of rights; it is particular when the object is one or more particular things, or a universality of fact. In the first case, the relative action is still known with the Roman Law designation of "actio familiae erciscundae", and, in the second case, it is known as "actio de comuni dividundo".

B. The partition is judicial if the co-owners cannot agree, and extrajudicial or voluntary, when the parties come to an amicable settlement.

C. With regard to its purpose and its effect, partition is definitive or provisional. Partition is definite when it causes community of property to cease and to be substituted by individual ownership, ownership, that is, exercised singly by the single co-owners. Provisional partition is that which can be considered as a partition only with regard to the administration or enjoyment of the thing, and which leaves the ownership in common. The object of such a partition is to put each of the co-owners in a position which will enable them to receive the fruits of a distinct part of the thing. Such a division causes the community to cease as regards enjoyment, but it does not take away the possibility of a partition regarding ownership, because no one of the condomini can be compelled to remain in a state of community, and, therefore, each of them can demand partition of that with regard to which community still exists, thus S. 535 lays down that partition can be demanded at any time when one of the condomini has separately enjoyed a part of the thing possessed in common. The enjoyment of part of a common thing, although exclusive, is not valid for prescription, because

it is a possession by title of enjoyment and the usufructuary does not retain a thing in his own nane, but in the name of the owner. Now, in provisional partition (promodale), all the co-owners are in the condition of usufructuaries of the portions assigned to each, and, therefore, no one of them can acquire the ownership of such a share by prescription.

Elements of Partition

Partition is a contract, and, as a contract, it has to contain the usual elements of a contract, which elements are divided into internal and external.

The internal requisites are:-

1. The capacity of the parties. As regards this requisite, in the contract of partition there is a special rule, i.e. if among the co-owners there is one who is subject to tutorship or curatorship, or if there are absent persons represented by Curators appointed by the Court, the authorization of the Second Hall of His Majesty's Civil Court is necessary, since a partition is an act of great importance. Besides, in such cases, the assistance of the Judge or Magistrate of that Court is necessary on the act of partition, so that every possibility of fraud or prejudice to the person who cannot personally look after their own interests may be avoided. In the absence of such authorization and assistance, the act is null and void. The draft of the partition deed is to be countersigned by the Judge or Magistrate so that he may be certain that that is the deed for the execution of which he has intervened (S. 548).

In judicial partition, the judgment takes the place of the above-mentioned authorization, and the assistance of the Judge or Magistrate at the publication of the deed is not necessary, because all the particulars of the partition have already been established in the judgment itself.

2. Consent. In judicial partition, in which it is supposed that there be opponents, the judgment makes up for lack of consent of the objecting party, who is represented on the relative contract by special curators appointed by the Court to represent all persons who do not appear on the public deed.

3. Object, - which, in the case of a partition, consists of the thing held in common.

4. Cause, - that is, the juridical reason for which the parties appear on the deed. In partition this reason or purpose is the acquisition of a concrete share of the thing held in common, corresponding to the ideal share of each co-owner.

External Elements

When the object of a contract of partition is an immovable, the contract must be made by public deed, and it begins to be operative with reference to third parties only when it is registered in the Public Registry (S. 536).

Rules to be observed in Contracts of Partition

If all the co-owners are present and capable of alienating their property, they can effect partition in any way which they think fit (S. 537). They can, therefore, leave aside certain rules dictated by law, waive aside certain rights granted by law, and take over obligations which go beyond those imposed by law. Unless otherwise agreed, however, the rules laid down by law are to be observed, and any one of the co-owners may compel the others to observe then. Besides, there is one rule which the co-owners cannot ignore, not even by common agreement, and it is that which imposes a public deed in the case of immovables, because this rule is imposed not in the private interest of the consortes, but in the interests of society at large. In case all the consortes are incapable or absent, the rules laid down by law (Art. 207 - Rev. 548) for the protection of the interests of such persons are to be observed, because such rules are to be considered as apt to secure justice and fairness in the deed of partition and to prevent any deceit. When, however, the partition is made with the assistance of the Judge or Magistrate, it cannot be impugned for lack of observance of the said rules, because the intervention and the surveillance of the Judge or Magistrate is to be held as a certain sign of the validity of the partition both for the other co-owners and for any interested third parties.

Partition is affected by the completion of the following stages:-

1. There must first be a valuation of the thing to be divided (S. 538), in order to establish a common basis with reference to all the objects, in such a way that the shares of the individual co-owners may be measured and determined. Such valuation is to be made by means of experts chosen by the parties or appointed by the Court, according to whether the partition is voluntary or judicial.'

2. When the assets have been valued in this way, they must be divided into portions representing the intellectual shares which the individual co-owners had when in a state of community.

The plan of partition is to be formed by the experts themselves, who have previously valued the things, because no one can know and value their importance more than they can; they are the persons most opt to form shares with fairness. If, however, such experts are not competent to make a plan of partition, such plan is made out by one of the co-owners, or by some other person chosen by common agreement, or, where such agreement is lacking, appointed by the Court (S.546).

In forming the portions, the experts or persons appointed are to observe the following rules (S. 539):-

a. Each of the consortes may claim his share of the property in kind; if, however, there are assets of a different nature such as immovables, movables, jewellery, silver, etc., or else house furniture, bonds, money, agricultural produce, or animals, each *of* the co-owners has the right to have in kind a proportional part of each type (S. 541 ). This is a rule of strict justice, because the objects in kind form the subject matter of the right of each of the co-owners. Therefore, it would not be just to assign to one or to some of the co-owners the objects in kind, while assigning to the others something of equal value, e.g. money.

b. A co-owner possessing immovable property by nature which is adjacent to any of the immovables in the community about to be divided, may demand

that such immovables be assigned to him upon a valuation in total settlement of his share (S.540). This is called right of option, because substantially the co-owner has the right of option, that is, he chooses his portion or part thereof. The logical basis of this rule is economical, and it serves to encourage consolidation of immovables and property on a large scale which is in itself an incentive to effect improvements. This second rule based on reasons of economy, is subordinate to the first which has, as a raison d'être, the exigencies of justice; and, therefore, the right of option can be exercised only if there are other immovables held in common from which the other co-owners may receive an approximately equivalent portion (S.540)

c. In forming and making up the shares, the dismemberment of tenements or the creation of easements shall be avoided (S. 541). The dismemberment of immovables is anti-economical and apt to create inconveniences and disagreements among the co-owners and the occupiers of the dismembered parts. Besides, by reducing the size and importance of a tenement, such dismemberment prevents ameliorations. The prohibition of creating servitudes is but a repetition of the provisions of S. 524, according to which, in case of a partition of property, each of the co-partners has a right to demand that all servitudes between the tenements which are to be divided are to cease before partition. We will comment on this provision in the treatise on servitudes.

d. It is to be understood that such rules are to be observed so-long as no considerable damage is caused. Thus, in a special way, the dismemberment of tenements and the creation of easements cannot always be avoided, because in many cases they are imposed by the fact that in no other way can each of the co-partners have a share of the goods in kind.

Now, we come to deal with the methods to be used where there is inequality of the shares in kind. Such, inequality is, as far as possible, to be avoided; because each co-partner has the right to have a portion equal to that of the other. But, in case such equality cannot be attained for reasons pertaining to the nature of the things held in common, there are two remedies:-

1. Payment of a sum of money (ekwiparazzjoni or owelty) (S.542).

2 The imposition of a rent charge (S.543)

1. Owelty is a sum of money equal to the difference between the larger and the smaller share. It is a sum which is added to the smaller portion and subtracted from the larger.

2. The imposition of a rent charge on the larger portion in favour of the smaller is another method which may be used to counter inequality of portions. Such rent charge is imposed when the inequality is too great and therefore it would be too hard to pay owelty. The rent charge is a yearly payment the value of which, established by capitalization at so much per cent, is equal to the difference between the actual value of the smaller share and that of the larger share on one side, and the value due in respect to them on the other. Such rent charge may be imposed by the Court instead of owelty when the following conditions concur (S. 543):-

a. When the inequality is over £50;
b. When the inequality exceeds one-fourth of the larger share

Under such conditions it is the Court that decides whether or not to impose a rent charge. Therefore, the imposition of such rent charge is not absolutely compulsory, because it may be more convenient to order a licitation of the goods, when they are not easily divisible.

The sum of the annual rent is to be fixed by experts who are appointed to prepare the partition. The payment of the rent charge must be made good by means of a hypothec of one or more immovables that form part of the larger share. Besides, such payment has a better type of security provided by the special privilege granted by S. 2114.

The imposition of a rent charge takes place also in another case, that is, when the common immovables are incapable of being partitioned in such a way that a part can be included in each portion. In such a case some portion will have to remain without any immovables included in it. Such a portion can be formed by means of a rent charge on the immovables included in the other shares (S. 544) but, of course, the Court has discretionary powers to order a licitation, if it is deemed more convenient.

A rule common to both cases is that contained in S. 545, according to which no rent charge can be

imposed over any immovable when such rent charge is greater than one-fifth of the estimated annual value of the immovable itself. rental

5. The third stage in a partition is the allotment of the individual portions to the individual co-owners. In ancient times there existed among us a custom according to which the plan of partition was formed by the larger co--owner. Afterwards the co-owners proceeded to choose the portions; the smaller co-owner picked out his own portion in such a way that the larger co-owner was the last to choose. This custom by means of which a just plan of partition was secured, is no longer in use. If the co-owners are all present and capable of alienating, they can proceed to effect the distribution of the portions in the way which seems best to them, that is, they can allot portions either by lot or by assignment, or in any other way, as for example, by having recourse to the above-mentioned ancient custom. But, if any of the co-partners is either incapable or absent, of if they are not all of the same opinion, then the provisions laid down by law-come into operation. Such provisions are to be distinguished into two hypotheses, - are the co-owners to have equal portions or not? If they are to have equal portions, and therefore if the shares are equal, such portions are to be assigned by lot, because this is the best way to ensure justice and impartiality in a partition. If, however, the shares are unequal, it is the Court that must decide whether or not the partition is to be carried out by means of extraction by lot or by assignment, or partly by lot and partly by assignment. It is to be noted that the ballot system can be resorted to also when the shares are unequal. Thus, if A and B are co-owners, A having two-thirds and 3 one-third, three equal portions may be made out of which two are to be given by ballot to A and one to B.

When the portions have been allotted to the individual co-owners, the partition is complete. All the co-owners that, before were owners pro indiviso, have now become owners of a concrete part of the object which once was owned in common.

Effects of Partition

The object matter of this part of our inquiry constitutes one of the most interesting theories in this regard. The law, in S. 554 refers us to partition in the case of an inheritance, that is,

to S. 987 et seq, because it is in that part of our legal system that the legislator has dealt with the effects of partition.

There are two orders of effects of partition. They refer (1) to the ownership of the goods, and (2) to the reciprocal warranty of the co-owners against Molestations and evictions and against insolvency of the debtors, or, in other words, against the inexigibility of the debts thus divided.

Effects relative to Ownership

In Roman Law, according to the prevalent opinion, it was considered that partition was capable of transferring property, as if it were a reciprocal sale or rather an exchange between the co-owners. Suppose, for example, that A and B are owners of two tenements, C and D. During the period of community each of them has the ownership of the undivided half of the tenement C and tenement D. By partition tenement C goes to A, whereas tenement D becomes the property of B. In Roman Law it was considered that, by means of such a partition, an exchange had taken place, in virtue of which B transferred to A on undivided half of tenement C, of which the other half already, belonged to A, while A, in exchange had transferred to B the undivided half of tenement D, of which the other half had already belonged to B. Partition, therefore, was regarded as a means of transferring property.

In contemporary case-law and legislation, the contrary principle has prevailed: partition does not affect a transfer of ownership, but is an operation which merely determines or declares the object of ownership.

When we say that partition has not got the object of transferring ownership, we mean that the right of ownership of each co-owner in regard to the goods which have come to his share by means of a partition, does not take rise from the partition itself. The co-owners do not acquire the right of ownership upon the goods which have come to each of them by partition by means of a transfer made by the other co-owner. Each of them already have such a right before partition and in virtue of a cause which already existed. Thus, in the partition of an inheritance each of

the co-owners claims his right of ownership in virtue of his quality as heir, whether he be a testamentary heir or an heir-at-law. Partition serves merely to determine the object of the right of each co-owner, because it materially designates the goods that constitute the object of the respective dominium of the co-owners. It determines in one concrete and material share of the common goods the object of each of them which, during community, was a merely incorporeal and abstract portion. Partition transforms the ideal portion into a material portion, but it does not create the right of ownership of the individual co-owners upon the portions which come to them.

The origin of this theory is generally considered as going back to feudal jurisprudence, by which it is supposed to have been created with the object of a practical expedient having for its aim a means of keeping partition free from the prohibition of alienating feudal estates and from the payment of those rights claimed by the overlord in order that he might give his consent to alienation.

According to this new notion, the present legal systems have come into being. In fact, Sec. 987 lays down "each co-heir is deemed to have succeeded alone and directly to all the property comprised in his share or come to him by licitation, and never to have had the ownership of the other hereditary property". Considering this rule generically we may conclude that each co-heir is held to be the sole owner of his share "ab initio", and in virtue of a right which already existed. He is held never to have had any right upon the shares which have come to the other heirs. Thus, the co-heirs do not reciprocally transfer ownership nor are they reciprocal successors but each of them is held to be claiming under the common predecessor.

If partition could transfer ownership, the shares accruing to each co-heir ought to be considered as transferred by the members of the community. This would have as a consequence that each of the co-heirs would have to respect the alienations made and the burdens imposed by the others before partition, because "nemo plus juris in alium transferre potest quam ipse habet". If, however, we exclude this character from partition, and if we take it for granted that the co-heirs are not reciprocal successors, but have a claim independently of each other, we come to the following conclusions : -

a. No one of the co-heirs is held to respect hypothecs, servitudes, burdens, or other real rights contracted by the others;

b. Each of the heirs receives the share which comes to him through partition as free and exempt from any alienation or burden which may have been contracted by the other co-partners.

The effect of any alienation made by any of the co-owners after partition is restricted to the share which has come to the co-owner and which is reputed to have belonged to him always and "ab initio". This consequence is in complete harmony with the provisions which we have studied when dealing with the effects of community, that is, with the fact that each of the co-partners can dispose of his share, but the effect of such disposal reflects only on the share which comes to him by partition.

Such is the nature of partition according to our legal system which, in case when immovables are divided, imposes the solemnity of the acts by which the ownership of immovables is transferred. Partition is to be made by public deed, and is operative with regard to third parties only when it has been registered in the public Registry.

Jurisprudence extends this merely declarative character to any other act which has the aim of putting an end to community in an absolute way among all the co-owners. This is also the notion given in our law which in Section 987 applies the same rule to licitation.

Effects of Reciprocal Warranty among Co-Owners

Co-owners are under the obligation to make the following reciprocal warranties: -

1. Against molestations and evictions which each of them may suffer with regard to the share accruing to him by partition.

2. against the inexigibility of debts partitioned.

Warranty against Molestation and Eviction (Sec. 988)

Molestation may be any pretension of a right over a share accruing to a co-owner, by any third party; or the opposition against the exercise of a right relative to such share.

Eviction (evincere est aliquid vincendo afferre) is the material deprivation (spolium) suffered by one of the co-owners with respect to his share or part of it or to a right relative to it. When such molestation or eviction of the co-owners against the others takes the shape of the right which the co-owner who has suffered molestation has, to call the other to defend him; and in case that eviction has already taken place, it takes the shape of the right of the co-owner who has been evicted to be indemnified by the other co-owner. The logical basis of this reciprocal right and obligation is the absolute and proportional equality which is to obtain among the co-owners. Such equality would be destroyed if one of the co-owners, having been deprived, wholly or in part, of the share which has come to him by partition, had no right of redress against the other. By such right of redress instead, the evicted co-owner is indemnified by the others for his loss, which is borne by all in equal or pro rata in such a way as to re-establish equality.

Such collective warranty cannot exist, unless the following conditions concur:-

1. That there be a molestation affecting a right, or an eviction; the simple fact of a molestation which does not affect a right is not enough. In such a case the co-owner can sue the person responsible for the molestation in order to effect cessation of same and reparation. Such molestations ("molestie di fatto") do not in the least affect the equality of the co-partitioners because they do not put in doubt the right which has come by partition to the one who is the victim of the molestation. On the other hand a molestation accompanied by a legal claim is generally the precursor of an eviction. When a third party who is causing such molestation claims a right upon the thing, e.g. that he is not subject to the right which has accrued to one of the co-partitioners,

/ takes place, the right of warranty belonging to each

"ipso facto" the doubt arises whether or not the thing possessed by the co-partitioners or by their common predecessor was possessed free from the right which the third party now claims to be entitled to exercise; from that very moment the responsibility of the co-partitioners arises.

2. That the cause of the molestation results from a fact existing previously to the partition (Section 988) The right, therefore, on which the molestation is based must have existed at the time in which the common property was still in the possession of the common predecessor of the co-partitioners, or at least at the time in which the co-partitioners were still in a state of community. The co-partitioners, in fact, must answer for any defect of right at the moment of partition, because it is in that moment of partition that equality between co-partitioners must exist. Such cause of molestation previous to partition would exist e.g. in a servitude imposed by the common predecessor or by the condomini, or arising out of prescription which had matured at the time of the partition. Evictions and molestations suffered by a co-partitioner through causes following partition are to be borne by the co-partitioner in question, and he has no right to sue the others for warranty.

When a molestation actually takes place, the effect of the warranty is the obligation to defend the co-partitioner who is the victim of the molestation and to do one's best in order to free him from it. If he is freed and the molestation is thus caused to cease, the obligation arising out of the warranty is extinguished. If, however, the molestation is not repelled, but, on the contrary, eviction takes place, a second obligation arises, which is that to indemnify the evicted co-partitioner for the loss suffered. The effect of the warranty does not consist in the right of the evicted co-partitioner to rescind the partition in order to give birth to a new partition, but only in the right of indemnity, i.e. in the right of obtaining the equivalent of what has been taken away from him. Such indemnity is due by the individual co-partitioner in proportion to their respective shares, in such a way that the evicted co-partitioner is to shoulder his own share of the indemnity, because such would have been the condition of all the co-partitioners had the thing evicted not been partitioned. If among the co-partition-

there happens to be someone who is in a state of insolvency, his share of the indemnity is similarly shared by all the others including the evicted co-partitioner, in the same proportions.

This warranty is safeguarded in the first place by a hypothec on all the estate of the co-partitioner in proportion to their shares (Sect. 990). Besides this personal obligation there is another safeguard consisting in a privilege over the partitioned immovables. In case of immovables, the share according to each of the co-partitioner is subject to this special privilege as a guarantee against molestations and evictions, in addition to owelty (Sect. 2114).

The right to warranty nay cease for the following causes

1. If the co-partitioner has suffered eviction through his own fault (Sec. 988). Thus, if he has failed to produce those proofs which would have saved him from eviction and by means of which he would have been able to repel the suit put in motion against him by a third party. The co-partitioners may in such case refuse his demand for indemnity, by showing that the evicted party could have avoided eviction by raising pleas and bringing evidence which he had omitted to produce through negligence or ignorance. It is therefore highly to be recommended that the co-partitioner threatened with molestation or eviction should call into the suit the other co-partitioners, in order that these may raise all suitable methods of defence and lest they should later on accuse him of fault or negligence.

2. Warranty may cease also in virtue of a contrary agreement, that is, by agreement among the co-partitioners that they are not to be held reciprocally responsible for warranty, because the obligation of warranty affects the private interests of the co-partitioners who, of course, have all the right to renounce thereto. As regards the effects of such an agreement, the law refers us to the contract of sale, because also in the contract of sale there is the warranty of the vendor in favour of the purchaser, an obligation which may be excluded by means of an agreement to the contrary.

5. By prescription according to the general principles of extinctive prescription and those particular to prescription of the action of warranty.

Warranty against Inexigibility of Partitioned Debts

In order that such warranty may arise, it is evidently necessary that partition must have included debts or that the partition consisted entirely of such debts. By law, debts are to be partitioned among the several creditors and among the heirs of the creditor according to the principle "concursus partes fiunt". When dealing with this warranty, however, we are to take it for granted that the co-partitioners have partitioned the debts in some other way, by assigning one or more distinct debts to each of the co-partitioners ,or by partitioning the debts in shares different from those laid down in the provisions of the law.

In fact, when a partition is carried out according to the provisions of the law, there is no place for warranty, because each has a share of the debt corresponding to his hereditary share; and if the debtor is insolvent, the loss is suffered and partitioned among all the co-heirs in proportion to their share in the inheritance. But if the heirs effect partition in some other way, the loss may be sustained wholly by the co-partitioner to whom the inexigible debt has been assigned. In this case the equality which is to reign in all partitions is violated. In order to call back such state of equality, it is necessary that such co-partitioner should have the warranty and the right of redress against the others. The essential condition necessary for the existence of this obligation of warranty is that the state of insolvency should have existed at the time of the partition and that it should not have supervened afterwards, because the basis of warranty is always the same, i.e. the equality which is to exist at the time of the partition. If, at that time, the debtor was solvent, the partition is just, and supervening insolvency cannot make it unjust.

This rule contained in Section 993 is in direct conflict with that contained in Section 991, c.v. according to which the warranty of the solvency of the debtor lasts for the time necessary for the requisite procedures for the recovery of the debt. This means that the warranty has for its object the solvency of the debtor not only at the moment of the partition, but also afterwards for all the time taken by the aforementioned procedures.

Thus, according to the sense of Section 991, warranty takes place not only when the state of insolvency exists previous to partition, but also if it supervenes during the time required for the recovery of the debt or during the lapse of the term or of the condition to which the debt assigned to one of the co-partitioners was subject. This discrepancy, between sections 993 and 991 is to be net with only in our legal system. In the French Code as also in the Italian Code only the first rule (993) is to be met with - the other one (991) does not exist. It existed only in the Codice del Canton Ticino, in which, on the contrary, the first rule was absent. Our legislator has reproduced the two rules without becoming aware of the discrepancy.

In case the debt consists in an annuity, warranty lasts for five years following the partition. In this case, the object of the warranty is not only the initial insolvency but also the successive insolvency, because the annuity is to be paid either "in perpetuo" or at a certain time. It exists, however, only during the five years immediately following the partition and not for all the time in which the annuity is due, because it would be highly detrimental to the interests of the co-partitioners if that co-partitioner to whom such annuity was assigned were to have a warranty of the exigibility of the annuity from year to year every time the debtor became insolvent.

Documents Relative to Things Partitioned

With regard to preservation and the right of access of the co-partitioner to such documents, section 549 enumerates three cases:-

1. The documents relative particularly to a thing or to things which have come to the share of one of the co-partitioners, are to be handed to him;

2. The documents relative to a thing divided among several co-partitioners are to be entrusted to him who has the larger share, with the obligation, however, to communicate their contents to the others having interest, whenever they ask for such communication.

3. The documents relative generically to all the estate are to be entrusted to a depositary, because they are common documents that equally interest

all the co-partners. The depositary is chosen by the co-partitioners and if they cannot come to an agreement the depositary is appointed by the Court. The depositary has the obligation of communicating the documents when requested.

Impeachment of Partition

Partition, as a contract, can be impugned for those causes for which any contract may be impugned. Such causes may be due to violence or dolus. In similar cases the general rules regarding contracts and rescission are to be applied.

The original wording of section 551 (*k*) contained a rule relating to the case of violence or dolus. The rule was that if the co-partitioner who was the victim of violence or dolus alienated, wholly or in part, his portion after that dolus was evident or after that violence had ceased, he could no longer bring about the action of rescission because the fact of his alienating his own portion after the cessation of the violence or the discovery of the dolus entailed a tacit renunciation to the right of impeaching the partition. As a matter of fact rescission can be obtained only by returning the shares accruing to the different co-partners, to the community. Voluntary alienation prevents the co-partitioner from returning his share to the community, and shows his will not to impeach the partition. The wording of that rule seemed to imply that it was a rule special to partition, but logically it ought to be applied to all contracts, as e.g. to the contract of sale in case the purchaser who demands rescission had already alienated the thing bought.

S. 551 (4) was deleted by Act LVIII 1975, because as will be seen, the nature of the action has now been charged. It is no longer an action of rescission but an action to claim compensation. Besides the "vitia" which are general to all contracts, there is one which is particular to partition via. lesion "ultra quartum" (Sect. 551)

The equality between the co-partitioners would be severely infringed if one of the co-partitioners were to suffer a lesion out of which the others would profit. One co-partitioner would thus receive less than his just share, while the others would gain a portion considerably larger than their due. A remedy is given by the Law if the just value of the share accruing to the co-

partitioner suffering lesion is less than three-fourths of the just value of the share due to him, in such a way that he suffers a deficit exceeding one fourth of such share.

Example:- In a community a tenement is valued at £1,000 the other tenements are collectively valued at £4,000 in such a way that the total value of the different tenements is £5,000. Suppose the co-partners are 5. The share of each would be £1,000. Now suppose that A gets the immovable valued at £1,000 and that the other co-partitioners get the other shares, and that, after partition, it is discovered that the first tenement was not really worth £1,000 but only £500, so that the just share of each co-partner should be £900. A, on the contrary, has get a tenement worth only £500 i.e. worth less than £675, corresponding to three-fourths of the share due to him. In cases where the lesion is less than one-fourth, the law gives no remedy, because it is only too natural that such flaws should occur in partitions.

As regards value, the time of partition must be taken into consideration, because equality and justice of a partition are to be sought with relation to the time in which such partition is made. If there is no lesion, then all changes and modifications which come after partition, both if due to natural causes or to the activity of man, are of no importance.

It is indifferent whether the goods partitioned consist of movables or immovables, because this remedy is applied in both cases.

The remedy based on lesion can be applied to all acts of which the object is cessation of community (S. 551). The principal and most common way of putting an end to community is partition, but there are other acts which may lead up to the same results, as e.g. sale made in favour of one by all the other co-partners, an exchange, a transaction in virtue of which the common estate is assigned to one of the co-partners. If all these acts have the same effects of partition, to all of them the remedy of lesion can be applied, because in all cases equality is similarly infringed; also in those cases it is indifferent whether the object consist in movables or immovables.

Effects of the Action

If an action of rescission is exercised for any of the causes common to all contracts, the effects thereof are those of rescission in general. Such effects follow also in the case of judicial partition. If partition is rescinded, the state of community is revived and a new partition may take place.

The effects of the action based on lesion are regulated by the special rules that have been explained.

Extinction of the Action based on Lesion

1. If, after partition, or after any other act by which community has ceased to exist, there has been a compromise settling the difficulties arising out of the former, the action for a supplement is no longer admissible even if, in the wording of section 551, no suit had been commenced in relation thereto. Compromise produces the same effects of a "res judicata" with no right of appeal. Just as a judgment which has been given execution to is absolutely unimpeachable, in the same way a compromise is no longer revocable. By means of compromise the material difficulties which the partition presented, have been settled. Also, the matter of lesion has been regulated. It is not necessary that a suit should already have begun "a propos" of such matter, because, in order that a compromise be valid, it is enough that there be the mere possibility of a law-suit.

2. If the act by means of which a state of community has ceased to exist is a sale of the right of community made in favour of one of the co-owners by another co-owner or by all the others, without fraud and at the risk of the purchaser, no action for a supplement may be made on the grounds of lesion. In the case under review, a sale is supposed to be made by one or several of the condomini of their abstract share. The sale must have been made at the risk of the purchaser without any regard as to the extent or value of the things forming part of the community. It is to be supposed that the parties ignore the extent or value of the common property. This is a case which can be very easily met with in hereditary community which has not been liquidated, and of which the co-heirs themselves ignore the consistency, whether active or passive. In such circumstances, as neither the one nor the other of the contracting

parties has an exact idea of the consistency of the object of sale, the price is fixed without any fixed criterion, and the purchaser therefore buys at his own risk with the hope of having some kind of profit but always with the possibility of his suffering a loss. In this case the remedy of lesion is not admitted because the idea of lesion, which is based on the notion that the parties should have a just idea of the value of the thing, does not exist. The purpose of the hazardous sale is that the purchaser makes use of the rights which he has acquired at his own risk, with all the profit or loss, as the case may be.

Such a sale can constitute an obstacle to the action for a supplement only when it has been made without fraud. Fraud in this case would consist in the fact that one of the parties had an exact notion of the state of things while the other had no notion whatsoever. Under such circumstances the parties are not in an equal position: one may make profit from his own knowledge and from the ignorance of the other party and it is in this factor that fraud consists.

3. Renunciation.

4. Prescription of two years.

We must make one final observation: the simple omission from a partition of an object belonging to the community does not give rise to a new partition but only to a supplementary partition of the assets which have been omitted, while the partition which has already been made remains operative (Sec. 551(4)).

Licitation

Licitation is another way of putting an end to a state of community and is second in importance only to partition. It consists in the sale of the thing held in common which is given to the highest bidder in order that the price thereof may be divided among the co-partitioners. The word licitation derives from the Latin "licitari", which means "to offer by auction" and from the word "liceo" which means "to be in sale".

If the co-partitioners are capable to alienate and willing to do so, they can proceed to licitation at their own will. By law licitation takes place, however, in two cases:-

1. If the things held in common cannot be divided conveniently and without disadvantage, and if they cannot be compensated for by other common things of different nature but equal value (Sect. 552).

2. If in a partition of things there are some which no one of the co-partitioners can or is willing to receive (Sect. 552).

It is indifferent whether the things be movable or immovable,

The right of asking for licitation, under these conditions, belongs to any one of the condomini, whatever be his share. This is an application of the general principle that no one can be compelled to remain in a state of community. If community cannot cease by means of partition it can be made to cease by means of licitation.

When licitation has been asked for, is it to be carried out under judicial authority or is it to be carried out without the intervention of any authority, or is it to be subject to any formality? If all the co-partitioners are capable, present and willing, they can carry out the licitation by means of any person appointed by them without the necessity of any judicial authority and they can proceed in any manner which they choose (Sect. 555) The same obtains when, although the co-partitioners do not agree as to licitation, this has been ordered by a judgment. Having decided on this point, the co-partitioners who are capable and present agree among themselves as to the way in which they are going to carry out the licitation in question. Licitation is also exempt from any formalities even if any of the co-partitioners be subject to tutorship or curatorship or be absent and represented by a curator appointed by the Court when the object of licitation consists of movables of a value not exceeding £30.

In other cases licitation is to be performed under the authority of the contentious Court if there is disagreement among the co-partitioners; it is to be carried out by the Court of Voluntary Jurisdiction, if any of the co-partitioners be a minor or an interdicted person or an absent person represented by a curator. If the object of licitation is an immovable, the formalities of judicial sales are

always to be observed. By means of the intervention of the Court the interests of incapable or absent persons are secured, and frauds and abuses are thus avoided. By means of the formalities of judicial sales the best price is fetched and the greatest number of bidders is ensured.

The Court, however, in each of these cases, can, in the interests of the parties, order that licitation be carried out even with the total or partial absence of the solemnities observed in judicial sales.

Admission of Outsiders as bidders

When licitation takes place under the authority of the Court, outsiders must always be invited when minors, interdicted or absent persons are involved. If the co-partitioners are all capable, present, and willing, they can agree to limit licitation among themselves to the exclusion of outsiders. Each one, however, has the right to demand that outsiders be invited because each has a just and legitimate interest that the thing held in common should fetch the best possible price (Sect. 554) Outside bidders are called by means of a notice published in one or more local papers at least six days before that on which the sale is to be held.

In licitation, whatever be the way in which it is made, the following two rules are always to be observed:-

1. There is no sale until the highest offer has been accepted. This rule is important because the bidder can withdraw his offer so long as there has been no acceptance by the person who has been charged with the sale by the co-vendors. The bidder may, of course, be also one of the co-vendors.

2. If the object is immovable, the sale does not exist so long as a public deed relative to same has not been made, because the general principle is that immovables or rights relative thereto cannot be transferred except by public deed.

When licitation is made under

judicial authority, both contentious and voluntary, the following two rules are to be observed:-

1. No offer is binding so long as it has not been admitted by the Registrar or by the auctioneer in charge of the judicial sale. An offer in a judicial sale becomes binding as soon as admitted. From the admission of the tender there arises a unilateral bond which ties the bidder in relation to the co-vendors and not vice-versa.

2. The adjudication made by the Registrar takes the place of the contract of sale, even if the object consists of immovables (Sect. 558). Adjudication ("liberazione") is a public deed by means of which the Registrar declares that the thing has been sold to the highest bidder. On adjudication the thing sold is released from the jurisdiction of the Court (hence the word "liberazione"). When the object consists of movables, this jurisdiction begins when the movables are seized. When the object consists of immovables the jurisdiction in question begins when the Court issues the decree ordering the judicial sale.

It is important to note that the principle that partition has a merely declaratory effect and not the effect of transferring ownership, is not to be applied in the case of licitation where, adjudication is made in favour of an outsider. The relations which arise between such bidder and the co-vendors are those of an ordinary sale, and thus the highest bidder is considered as acquiring the object not from the predecessor of the co-vendors but direct from the co-vendors. This is to be implied from the wording of Section 987, which in the case of licitation restricts the declarative effect of partition only to the case in which the highest bidder is one of the co-vendors. If adjudication has been made in favour of an outsider, we must distinguish the relations between such outsider and the co-vendor, and the relation between the co-vendors themselves. In the first case, licitation is a sale, whereas in the second order of relations it is only a partition and it has the same declarative effects of partition in general.

Acquisition of Ownership - Occupation - Accession by Production or by the Union of Things Movable and Immovable - Other Ways

The diversity of the ways in which ownership can be acquired depends on the diversity of facts to which such acquisition refers. It is good to start from the principle that the majority of things already have an owner. It is for this reason that the most frequent ways of acquiring property entail a transfer of ownership of the thing and have as their cause the will of the owner expressed by either an act "inter vivos" or by an act of last will. In these cases acquisition is based on the ownership which, until then, has existed on the thing. Yet there may be things that have no owner either because they never had one or because the owner has lost his right. In this case there is acquisition by an original title. Things that have no owner generally belong to the person who takes possession of them. Besides, new things are continually coming into existence either organically or through the activity of man. The first category of things belong generally to the owner of the "res" which has produced them. The second belong to the producer.

Section 597 enumerates the following modes of acquisition: -

1. Succession
2. Agreement
3. Prescription.
4. Occupancy ("occupatio")
5. Accession

To which we may add:-

6. Delivery - "traditio"
7. The law

Here, we shall deal only with occupancy and accession which are modes of acquisition of ownership only and not of other real rights.

Occupancy

Section 597 defines occupancy thus: "Occupancy consists in taking possession of a corporeal thing which is not, but can be, the property of any one, with the intention of becoming the owner of it". "The occupant"

adds the said Section, "shall acquire the ownership unless the law provides otherwise".

In occupancy there are objective and subjective elements. The objective elements are: -

1. That the thing be "in commercio", that is, capable of being subject to private ownership;

2. That the thing be "corporeal", because only corporeal things can be subject to apprehension, in which occupancy materially consists.

3. That the thing should have no owner.

Such things are-

(a) Common things, that is those things the enjoyment of which belongs to all and which are found in nature in such quantity that they cannot become the object of exclusive ownership. Individuals can condivably only own fractions of such things (e.g. the air, the sea), subject to any particular law applicable to each case.

(b) Res nullius, that is, those things which may be the object of exclusive property but that until acquired by occupancy, have no owner. Such would be birds and fishes.

(c) Res derelictae, that is, those which the owner abandons with the intention of never making them his again. To such things we may compare animals lost through escape, contemplated in our laws. Our laws have kept the principles of Roman Law regarding wild and domestic animals which have escaped, but they differ from Roman Law only with regard to tamed animals that have escaped. They lay rules based on a spirit of greater equity in favour of the owner. If the owner can in any way or by any means take possession again of the animal which has given up the habit of returning, he is by law allowed to claim it back. This same principle regulates the two following provisions of which one is special and regards swarms of bees, and the other is general and regards the other tamed animals. The rule relative to swarms of bees is this: that the owner has the right to follow the swarm which has abandoned the hive, even on the tenement belonging to other persons, with the purpose of making it return to his own tenement. It is to be understood, of course, that the owner of the swarm must indemnify the owner of the other tenement for any eventual damages. This right is limited to the term of ten days from that in which the owner of the swarm knew the place where such swarm is. It is

enough that he has begun following the bees within such term because this pursuit can be extended, so long as the owner of the swarm does not desist from following it for a term exceeding ten days. If a third party takes possession of the swarm within the above term, the owner can claim it back because he has not yet lost ownership.

The second rule relative to all other tamed animals gives to the owner of the animal which has fled and has lost its habit of returning, the following two rights:-

1. The right of pursuit in tenements belonging to others saving his obligation to make good damages, if any.

2. The right to claim back the animal from the person in whose possession it is found, and this up to thirty days from that in which the owner of the animal knows the place where it is. Thus the owner, instead of following the animal, can wait until he gets to know the person in whose possession it is in order that he may claim it back from such person.

The owner, therefore, does not lose ownership through the mere flight of the animal and through the loss of the latter's habit of returning. Thus, the loss of ownership on the animal which has been tamed depends in both the abovementioned cases on the will of the owner himself rather than on other conditions. When ownership has been lost by dereliction, the animal becomes "nullius" and, therefore, "primo occupanti cedit". As regards swarms of bees, Section 599 lays down that the owner has the right to pursue them over the tenement of any other person; where the owner has not pursued the bees within ten days to be reckoned from the day on which he became aware of the tenement on which they had settled, or has discontinued the pursuit for ten days, the possessor of such tenement shall be entitled to take and retain them. But it seems that no derogation is made in our laws to the rights of the first occupier. Our laws have only contemplated the case of more frequent occurrence, i.e. that the owner of the tenement should have been the first to take possession of the swarm.

The subjective elements of occupancy are: -

1. The external material element, or Apprehension i.e. the act by means of which a person subjects a thing to his power.

2. The internal or spiritual element, i.e. the will to acquire ownership

Apprehension

This element is to be studied especially with relation to the chase and to fishing. Apprehension must be effective. In chase, in order to acquire ownership on the animal, it is not enough to have discovered, followed and hit it in any way, but it is necessary that the animal must have been caught and rendered unable to escape. Therefore the moment in which apprehension is achieved is that in which the animal is killed or in which it has fallen into the trap or into any contrivance from which it cannot get free. To have wounded the animal is not enough, so long as the wound is not mortal. The same principle is applicable to acquisition of ownership in case of fish.

It is here useful to recall certain important provisions of the Police Laws concerning acquisition of property. The right of chase belongs to all according to our legal system, even if the quarry happens to be on a tenement belonging to a third party. The hunter, therefore, can hunt on somebody else's tenement unless entrance thereto is expressly forbidden by the owner, possessor, or holder of the tenement, or implicitly when the tenement has been cultivated and sown or contains hanging fruits or plantations. Nevertheless, if a hunter kills an animal which happens to be on somebody else's tenement the hunter is the owner of the animal, saving damages.

Fishing in the open sea as a right belongs to all, saving the following exceptions

1. No person can fish in areas occupied by other fishermen by means of hawsers or other signs (Police Laws); such hawsers can be placed with the permission of the Port Superintendent.

2. No person can fish for coral or similar objects which grow in the sea, without the permission of the Head of the Government (Seco. 602, Civil Laws).

Treasure - Trove

In connection with occupancy, the laws deal with ownership of treasures and of lost things.

Section 600 defines treasure-trove as an expression including "any movable thing, even though

not precious, which is concealed or buried, and of which no one can prove himself to be the owner". The object must, in the first place, be a movable. Therefore, any object forming part of the ground or incorporated in it in such a way as to become part of it, is not a treasure. Thus, the Hal Saflieni Hypogeum cannot be considered a treasure-trove. The thing forming the object of treasure-trove need not necessarily be precious, i.e. having an intrinsic value. It is enough that it should have an extrinsic value. It is to be understood, however, that it must have some value, because otherwise there would be no motive in trying to determine ownership. The object of treasure-trove must also consist of buried or hidden things. Therefore the natural products of the soil, precious metals and minerals cannot form the object of treasure-trove.

Similarly things on the surface of the soil, which may easily turn out to be lost things, or res derelictae, are not treasure.

Lastly, it is necessary that no one can prove himself the owner of the thing in question. If a thing has been discovered underground or extracted therefrom, and it turns out that some person can be the owner, the rules relative to treasure-trove cannot be applied, because the person who can prove ownership can claim the thing back.

Ownership with reference to treasure-trove is regulated by the provisions laid down in Roman Law. If the treasure has been found by accident, the ownership belongs as to one half to the person discovering it and the other half belongs to the owner of the tenement where the treasure was found. Half of the ownership belongs to the discoverer even if the treasure is not really a res nullius. A thing whose owner is unknown is similar to a thing that has no owner. Nevertheless, it is the owner of the tenement that has rendered the discovery possible, and this in virtue of a presumption that _the_ treasure must have been owned originally by the original-landowner.- If the treasure has been found as a result of excavations to the purpose, it belongs entirely to the owner of the tenement. This provision of law exists in order to discourage greed.

Juridical Nature of Treasure-Trove

Treasure-trove is a moveable by nature: it does not form part of the tenement in which it is found because it is absolutely independent from it; nor can it be considered as a fruit of the tenement, because it is not the tenement that has produced it. Treasure-

trove, therefore, does not belong to the usufructuary or to the possessor in good faith, but it belongs to the emphyteuta because he has the enjoyment of the tenement and of all utilities which the tenement can render. Baudry-Lacantinerie argues, from this nature of treasure-trove, that in the system of community of acquests, that part of the treasure-trove belonging to the owner is to form part of such community. Our legislator, however, has countenanced the opposite opinion (Sect. 1365). A very important corollary of this notion of treasure-trove is that a special hypothec on the tenement does not affect the treasure found therein.

Lost Things

Lost things cannot be considered as res derelictae because the latter are those things of which the owner has voluntary given up ownership. On the other hand, when an owner loses a thing, he does his best to find it. The provisions of law, in this regard all aim at making the thing return to its owner, and it is for this purpose that the law begins by imposing on the finder the obligation to restore the thing to its former owner if he knows him. If he does not, the law puts the finder under the obligation to hand the thing over to the Police without delay. The law speaks of "former possessor" because it is he who has lost the thing even if he were not its owner. When the thing is handed over to the Police, the latter must publish the consignment at least twice in the Government Gazette in order to bring the fact to the notice of the person who had lost the thing.

The owner who presents himself with the purpose of taking back the thing must show that he has right to do so. He must pay a reward to the finder, which reward is determined according to circumstances, but which must in no case exceed the tenth part of the value of the thing lost.

The owner, besides, is held to reimburse the expenses incurred by the Police for the publication of the notice and for the preservation of the thing. The owner is expected to present himself within one year from the publication of the second notice. At the expiration of this term, if the owner has not appeared, the thing belongs to the finder, who is to reimburse the above-mentioned expenses. Thus, the owner does not

lose his right by the simple fact of his having lost a thing, nor by the mere lapse of time, but only because during that time he has not appeared to claim back his thing while he could easily have done so. His omission to do so for over one year is considered by law as a sign of "derelictio".

When the owner has thus abandoned the thing, the thing or the price thereof belong to the finder in force of the provisions of the law. The Police are authorized to sell the thing when circumstances make this convenient, as, for example, in case of things that are perishable by nature or things to preserve which considerable expense is to be incurred. When the thing has been sold the price belongs to the owner or to the finder, as the case may be.

If also the finder fails to present himself, the Police are to publish another notice and wait for three more years. If neither the owner nor the finder appear during the term, the thing belongs to the Crown as owner of "bona vacantia" (Sect. 601).

A lost thing can belong to the finder in the cases mentioned above, if he has carried out the obligation of handing the thing over to the Police, In case he has not done so, the owner never loses his right. The holder will be regarded as holding it in bad faith and the thing in his hands is never subject to prescription. (Sect. 2260).

These provisions of law regarding things which have been lost, do not affect the following objects in the absence of special provisions of law: —

1. Things thrown or fallen into the sea, to which Ordinance I of 1874, as amended by Ordinance II of 1910, applies (Chap. 27 of the Laws of Malta)

2. Things thrown back by the sea, which are to be considered as objects of occupancy;

3. Plants or herbs or other things that grow on the banks or in the bottom of the sea, which things are also objects of occupancy.

Accession

Accession is a mode of acquisition of ownership whereby the person who has the property of

the thing acquires the property of all that the thing produces, or that becomes united to, or incorporated with it, whether naturally or unnaturally (Sec. 603).

In accession, therefore, we must distinguish two things: the principal thing which has produced the other, or to which the latter is united; and the accessory thing, which is produced by the former or which is united to it.

It is discussed whether accession is a mode of acquisition of ownership or merely an effect of the right of ownership; whether it gives rise to a new ownership or merely increases the object of a pre-existing ownership. This question may have a practical importance, especially in solving the problem whether a special hypothec on a tenement includes relative accessions or not; if it is a case of new ownership, it would not be subject to a special hypothec. The majority of jurists hold the opinion that accession brings about a mere increase of the object of the pre-existing ownership, and this is the notion contained in the Italian and French Codes, that do not consider accession as a mode of acquisition but as one of the effects of ownership.

Accession may take two principal aspects: accession by production - and - accession by union or incorporation. Accession, whether in its former or in its latter aspect, is of two kinds: natural accession, which takes place by virtue of nature only, and industrial accession, which takes place through the activity of man. Then there is also mixed accession, which is the outcome of both the forces of nature and the activity of man.

The provisions of law regulating this subject can be reduced to the principle that "accessorium sequitur principale". In cases of accession by production the "raison d'être" of this principal lies in the right which the owner has of making his all the fruits which the thing yields. In accession by union or incorporation the rational basis lies in the impossibility of separating the accessory from the principal; and, as it is contrary to all principles of law that of two inseparable parts, of one thing one should belong to one person and the other to another person, it is necessary that one of the parties should yield to the other, and it is natural that the accessory should yield to the principal in such a way that the whole thing becomes subject to the same owner ship to which the principal is subject.

Accession, however, is not to be used as a means through which one party receives a benefit at the expense of another party. Thus, the owner of the principal thing is to reimburse the owner of the accessory thing the value of the latter when accession takes place through the work or with the materials of another.

Accession by Production

All the fruits of a thing belong to its owner, who is bound to reimburse third parties for expenses incurred by them for the production or preservation of the fruits themselves (S. 604). Fruits can be natural,industrial, or civil. Natural fruits are those which nature produces without the concurrence of the activity of man; spontaneous vegetation of the soil, products and offspring of animals, products of quarries or of mines. Industrial fruits are those obtained from the soil through cultivation or those obtained by means of any other industry. Civil fruits are those which are obtained by conceding the enjoyment or use of a thing to another person for a reward, e.g. rents, in respect of urban or rustic tenements, ground-rents, interests on capitals.

The offspring of animals belong to the owner of the female animal according to the rule of Roman Law (Book V, par 2, Dig. "De rei vindicatione" Lib. VI, Tit. I). Not only periodical fruits ("quod ex re nasci et renasci solet"), but also all other products which are not periodical, e.g. minerals extracted from the soil are fruits according to law.

Fruits belong to the owner of the thing even when they are produced through the activity of a third party. AS a matter of fact it is in this case that the effect of accession gains importance. The owner, however, who avails himself of the right of accession must reimburse the expenses incurred in the production and preservation of the fruits. This rule is subject to certain modifications, in cases, when the third party has some right on the thing, e.g. when he is usufructuary, tenant, emphyteuta, or when he is a possessor in good faith. But at the termination of the emphyteusis, usufruct, tenancy, or good faith of the possessor,the rule must be applied with reference to the fruits which at that time were still hanging. These fruits belong to the owner who, in taking possession of them, is under the obligation to effect reimbursement of the expenses incurred for them for production or preservation. In practice, in case of rustic

tenements the settlement of accounts relative to these expenses is generally made between the old and the new tenant, because it is to the latter that the fruits belong and, therefore, he is bound to reimburse the former for expenses.

Accession by Union

Our Code takes into consideration only two kinds of such union: the union of movables to an immovable, and the union of a movable to another movable. It takes into consideration also SPECIFICATION i.e. the transformation of a movable thing through the activity of man.

The other form of accession i.e. the accession of movables to immovables which takes place as a consequence of certain natural phenomena (floods, avulsion; islands that spring out in rivers), is not taken into consideration because such phenomena do not normally take place here,

We shall divide this part of our study into two sections:-

a. Union of movables to immovables;

b. Union of movables to movables and specification.

Union of Movables to Immovables

The union of movables to immovables takes place in plantations, buildings, and other works on land which belongs to some third party.

The rules of accession apply only to cases in which the owner of the materials is not the owner of the land, and in which no agreement between the parties exists; as a matter of fact, if the owner of the land raises a building with his own materials, the construction belongs to him not by accession but because he is the owner of all the elements forming such construction. If, on the other hand, there has been an agreement, it is this agreement which regulates the relations between the two owners.

The three cases contemplated by our legislator are the following:-

1. That the plantation, construction, or other work be made by the owner of the land with somebody else's materials.

2. That it be made by a person who uses his own materials on the land which belongs to somebody else.

3. That it be made on somebody else's land by a person who uses materials belonging to yet another person.

In each of these three cases the principal "accessorius sequitur principale" is to be applied, and in cases of plantation, constructions, or other works carried out on somebody else's land, this principle takes the shape "quod solo inaedificatur, solo cedit". A plantation, construction, or other work belongs always to the owner of the land even if made with materials belonging to somebody else and in bad faith. Hence it follows that the owner of the materials cannot claim them back. As a matter of fact, he could not take them back without destroying the work which has been made, nor would it be of any use to him to be able to take mere fragments or trunks or bushes.

In the first hypothesis, however, the rule that the materials cannot be claimed back by the person who was their owner does not apply, if they can be easily detached without damage to the materials themselves. In the other two cases, on the contrary, the above rule holds good. It is to be supposed, in fact, that the owner of the land had no part whatever in the union of the material to his tenement. Nay, in the second hypothesis, it is the owner of the materials himself that has united them to the tenement of a third party, and if he is deprived of his ownership it is he himself who is to blame.

Supposing the construction or other work is afterwards demolished before the owner of the materials has been reimbursed for their value, Roman Law attributed the owner of the materials as "actio reivindicatoria", because he is held never to have lost ownership but that only an obstacle had arisen against his right to exercise the "actio reivindicatoria" "non desinere dominum esse, sed tantisper neque vindicate rem posse, neque ad exhibendum de ea re agi" (Leg. 29 of the Institut. under Title "De rerum divisione") This opinion still holds good under the present legal system.

The other question which arises in all cases of accession is that relative to the indemnity due to the owner of the accessorything which passes to the ownership of the owner of the principal thing. Accession must not serve as a means of absolute enrichment, because "nemini licet locupletari cum aliena jactura".

In the first hypothesis, therefore, the owner of the land is bound to pay the owner of the materials their value. He cannot offer in exchange other materials of the same quality and quantity. Nor can the owner of the materials claim them. One is under the obligation to pay, and the other has the right to receive only the value of the materials. In cases of

bad faith, the owner of the soil is bound to make good all damages.

In the second hypothesis, if the third party possessed the soil on which the plantation, construction, or other work has been made by himself, the rules relative to possession are applied in order to determine if and to what extent he has the right to be reimbursed for value of the materials and for expenses in general. It will be necessary, therefore, to distinguish whether he was a possessor in good or in bad faith, besides the quality of the work and of the expenses, whether such expenses were necessary, useful, or voluptuary. If the third party was not a possessor in terms of law, he is considered as a possessor in bad faith, that is, the law grants him the minimum of reimbursement. In cases of relations between direct or bare owner and emphyteuta, or usufructuary, or between lessor and lessee, the special rules relative to each of such legal institutes are applied.

In the third hypothesis, the owner of the land must reimburse the value of the materials and the expenses to the person who has made the plantation, construction or other work, according to the rules applied in cases of possession. The owner of the materials has in this case no direct relations with the owner of the land, but only with the third party who has used his materials. Nevertheless, the owner of the materials may have against the owner of the land the "actio surrogatoria" in order to obtain from him the payment of the value of the materials due to him.

A. case may arise in which the rule "quidquid solo inaedifientur, solo cadit" is not only discarded but inverted, and this is the case contemplated in Section 608,that is, when, in the construction of any building a portion of a contiguous tenement has been occupied in good faith. Under the conditions contemplated by the law it may happen that such part of the tenement be adjudicated to the person making the construction. The conditions which justify such inversion of the rule are the following: -

1. That the work carried out in part of somebody else's tenement be a building.

2. That not all the building, but only part of it, be constructed on somebody else's tenement.

3. That only a portion of the contiguous tenement is occupied by such construction.

It has seemed to our legislator to be an exaggeration to extend this derogation to the fundamental principles of law to cases in which all the tenement belonging to a third party is occupied.

4. That the occupation of the tenement belonging to a third party took place in good faith. The law has admitted this exception to the principles expounded above not only with the purpose of saving buildings from disintegration, but also as a reward of good faith. If the complainant is in bad faith, he is to blame for the consequential disintegration of the building and for damages.

5. That the construction should have been carried out with the acquiescence of the owner of the contiguous tenement.

When these conditions concur, the ownership of that part of the building constructed partially on somebody else's soil, and such portion of the soil which is thus occupied, may be adjudicated in favour of the builder of the construction, but they do not belong to him by right. The law has entrusted the power of adjudication in favour of the person who builds the construction of the judicial authority both because it is necessary to see whether the conditions laid down by law concur or not, and because in case they concur there always remains the duty of balancing the interests of the owner of the land and those of the builder of the edifice.

When the Court adjudicates the ownership to the builder of the edifice, the owner of the occupied land has the right to claim the value of the land occupied besides damages. In case the conditions laid down by law are absent, or in case in spite of their concurrence, the Court does not think it fit to adjudicate the ownership of the land to the builder of the edifice, this must remain disintegrated, saving reimbursement according to the rules explained above.

Union of Movables to Movables

This consists in the union of two or more movables belonging to different owners in such a way as to form one whole, but remaining at the same time distinct one from the other (Sect. 610). Thus two elements are requested

1. A relation between the things united together, by means of which they form one whole in their complexity, in the shape of something which is new and unique: e.g. the handle and the sword, the frame and the picture, the gem and the ring, the paper and the writing,

the canvas and the painting;

2. In spite of the fact that from their union there results one whole, it is necessary that the two or more things remain distinguishable one from the other, like the handle and the sword. This requisite distinguishes "adjunctio" (the case in point) from "admixtio", in which the things united are no longer distinguishable. Questions to which "adjunctio" gives rise refer to the ownership of the new thing which is thus formed and to the reimbursement of the value due by the party profiting from such accession.

Section 610 makes a distinction between cases in which the two or more things can be separated without considerable damage to any of them or not. If they are separable without any ensuing damage, each of the owners retains the property of the thing and he can, therefore, reclaim it and ask that it be separated from the other. In such cases accession is not imposed, nor is it necessary that one of the things be incorporated in or absorbed by the other. If the two things are not separable without considerable damage to the one or to the other, the whole falls to the ownership of the owner of the principal thing, saving reimbursement to the owner of the accessory thing. In this case accession is imposed by law, because it would not be expedient to allow one of the owners to separate his thing whether it be accessory or principal, from the other, when this cannot be done without causing damage to one or both of them.

The criteria which are used to determine which of the two things is to be considered principal, are laid down in Sections 611, 612 and 613. A thing is considered principal:- If it is that part to which the other has been united merely for the use, adornment, or completion of the former; thus, the handle is united to the blade to facilitate its use and to render it more complete and the frame serves to complete the picture.

2. When this criterion is not applicable, that part of the thing is held to be the principal which is of higher value. (Sect.613).

3. In case the parts forming the whole are of approximately the same value, that part is held to be principal which has the bigger volume.

That part of the two or more things united together which according to what has been said above is held to be principal, includes the other thing or things accessory to it, in such a way that the whole belongs to the owner of the principal thing, saving his obligation for reimbursement. This rule, however, which gives prevalence to the principal thing, suffers exception in the following case provided for by S. 612:

1. When the accessory is much more precious than the principal thing, as in the case of a diamond encased in a ring; and

2. When the accessory is united to the principal thing without the consent of its owner.

(Then these conditions concur, the rule of the law is inverted: the accessory draws the principal, hence the owner of the accessory can make the whole his, with the obligation, however, of paying to the owner of the principal the value of sane. The owner of the accessory can, at his choice, demand the separation of his thing even if the principal were to suffer deterioration, contrary to the general rule. If, however, the union has been made with the consent of the owner of the accessory, this is presumed to be a sign that he is willing to acquire the whole, and, in this case, he cannot demand separation unless such separation causes no harm to any of the things.

Specification

We have specification when a person exercises his trade or industry on the material belonging to another person, transforming it in such a way as to form a new kind of thing; e.g. when from a block of marble a statue is made.

As regards ownership, the question which arises is whether it is the matter or the form which is accessory. Roman jurists known as the Proculians used to give preference to the form, basing their opinion on the fact that the new thing created never belonged to anyone: "quia quodfactum est ante nullius fuerat" (L. VII para. 7 Dig. Lib. XLI, Tit. 1). Other Roman jurists, known as the Sabinians, held that matter was the principal: "quia sine materia nulla species fieri potest" (Digest, loc, cit.).

Justinian distinguishes the case in which the new species can be reduced to its former state from the case in which it cannot. In the former case matter is the principal, in the latter, the form is the principal.

Section 614 has not followed this distinction, nay, it has expressly laid it aside with the words "independently of whether the materials can be restored to their primitive condition or not". This section has put forward another rule according to which the world is accessory to the matter, thus, the new thing belongs to the owner of the matter. A difficulty arises in case the material belongs in part also to the person who gives it its new shape. Section 615 considers the possibility that although neither one nor the other of the two kinds of material be entirely transformed, they cannot be separated without damage. In this case the new species belongs in common to both owners. The owner who is not responsible for specification will have a part proportional to the value of the material, whereas the specificator will have a part corresponding to the value of his materials and of his work.

The other hypotheses, i.e. that one or both of the materials are transformed and that they can be separated without damage are not contemplated or resolved in our law.

The law which attributes a new species to the owner of the material is subject to an exception, when the work is of such value that it surpasses the value of the material. In this case the new thing created belongs to the artificer, saving his obligation to reimburse the owner of the material for value of same.

Commixture

Commixture consists in the confusion of several materials belonging to different owners in such a way that one cannot be distinguished from the other. It is called mixture or "commixtio" when the materials mixed together are of a dry nature, e.g. grain with grain. It is called "confusio" when the materials are liquid, e.g. wine with wine. Section 617 distinguishes two principal hypotheses according to whether the materials in question can be separated without damage or not. In case they can, the owner who did not consent to the admixture taking place has the right to demand separation; in case they cannot, we must distinguish according to whether one of the materials can be considered as principal or is highly superior to the other in value. In this case this Superior material attracts to it the other thing, saving the obligation to pay to the owner

of the other material the value of same; otherwise the commixture becomes the common property of the two owners in proportion to the value of their respective materials (S. 617).

The following rules are common to all cases:-

1. When the thing which is the outcome of "adjunctio" , "specificatio " or "admitio" becomes, according to the rules explained above, common to two or more persons, each of them can demand sale by licitation, because it is a fundamental principle that no one can be compelled to remain in a state of community and, in this case, community cannot cease to exist by partition (S. 619).

2. When the owner of the material which has been used without his consent can, according to the above rules, make his the thing, he has the right to choose between (1) having the new thing and (2) receiving the same quality and quantity of material by transferring to the other party the ownership of the thing in question. The "raison d'être" of this right is that such person, in order to have back his material, must necessarily acquire the whole and pay the value of the material and of the work of the specificator contrary to the general principle that no one can be compelled to acquire property: "beneficium domino invito non adquiritur" (S. 620).

3. If a person employs materials belonging to other persons without the consent of the latter, he can be condemned to make good the damages,saving any penal action to which he may be subject (S. 621). Where cases not contemplated in the law Arise , S. 609 lays down that such cases are to be resolved according to principles of equity and to the general rules of law.

## Usufruct. Use and Habitation. Acquisition and Termination. Rights and Obligations of the Usufructuary, Usury end Habitator.

(Title III, Chapter 25 Civil Code)

The right of Usufruct. Use and Habitation constituted in Roman Law the most important personal servitudes.

It will not be out of place to refer to the notion of servitude and to the distinction between real and personal servitudes. Tenements are by nature free, that is to say, all the benefits which the tenement can provide belong to the owner. Then some of these benefits are made over to a third party, we have a servitude which can be personal or real according to whether it is granted to a determinate person or is constituted in favour of another tenement and, therefore, granted to an indeterminate person i.e. to the owner of the tenement. The former are temporary, because they cease to exist with the death of the person enjoying them, or even before; the letter are presumed perpetual, just as ownership is perpetual, because they are accessory to the property of the dominant tenement.

### Usufruct

Usufruct is defined by Paulus (Dig. L. I, Tit. I, Lib. VI) "Ius alienis rebus utendi fruorli salvo eorum substantia"; and Section 365 defines it as "the real right to enjoy things of which another has the ownership, subject to the obligation of preserving their substance with regard both to matter and to form".

This kind of usufruct is called formal and is to be distinguished from casual usufruct, which appertains to the owner upon an object which belongs to him. The latter kind of usufruct is called casual, because it is united to its cause or root. The right of a usufructuary is hemmed in by his obligation to preserve the substance of the thing both as regards matter and as regards form; in such a way that he is not only forbidden to destroy the object-matter of which the thing consists,but also to change its form.

Object of Usufruct

Strictly speaking only things which are not consumed by use can be the object of usufruct. Nevertheless in Roman Law a Senatus consultu of the early Empire laid down that the usufruct of an estate is valid also with regard to things which are "consumabiles e.g. money, grain,liquor. In case of usufruct left as a legacy, the usufructuary is bound to give back an equal quantity, and quality of the 'res consumabiles" covered by such usufruct. This was called "quasi-usufruct" or improper usufruct, and it was included in our laws in Section 366:- If the usufruct includes things which cannot be used without being consumed, such as money, grain or liquids, the usufructuary has the right to make use of them subject to the obligation of paying the value thereof according to the valuation made at the commencement of the usufruct; in the absence of such valuation, he has the option either return things in like quantity and of like quality, or to pay their value at the current price at the end of the usufruct.

It is impossible to enjoy things which are consumed by use and at the same time preserve their substance. Hence the obligation of preserving the substance of the thing becomes in this case an obligation to give back things of equal quantity and quality or to pay their value.

Kinds of Usufruct

With regard to the object, usufruct can be proper and improper The most frequent case of improper usufruct is that of an inheritance this explains the wording of Section 366.

Usufruct can, with regard to the object, be also universal or particular, according to whether the object be a universality of right, or one or more particular things, even including a universality of fact.

With regard to its origin or to its mode of constitution, usufruct is legal, i.e. granted by law, or voluntary , i.e. constituted voluntarily either by on act inter vivos or by an act "causa mortis".

With regard to the way in which it can be exercised, usufruct can be casual i.e. united to ownership, or formal i.e. separated from ownership.

How Usufruct can be Constituted

Formal usufruct can be constituted in two principal ways, namely, by law or by the will of man (Sect. 367)

Examples of the first kind would be the usufruct granted by law to the parent by reason of his or her "patria potestas"; the usufruct granted to the surviving spouse on the estate of the deceased spouse by' title of succession ; the usufruct granted to the husband on the dowry of the wife.

Usufruct is constituted by the will of man when the owner deprives himself of the usufruct of his own things by granting it to another person. The owner, in consequence of the absoluteness of ownership, can impose upon himself and upon his successors such limitation of his own right. This can be effected and brought to bear on any person by means of the acts by which man can dispose of his own property, acts inter vivos or causa mortis, acts having a gratuitous title or those having an onerous title.

In each case, however, the conditions imposed by law for the validity of the act are to be observed, i.e. the requisites of contracts and of wills. Such requisites are: capacity of the person in favour of whom it is constituted, the same capacity which is requested in other acquisitions made by contracts or by an act of last will. The same may be said of the external requisites, and, therefore, if the usufruct affects immovables, registration in the Public Registry is an essential requisite. Section 367, therefore, in affirming that an act inter vivos constituting a usufruct over immovables is to be registered, is merely applying to usufruct the general rules regarding transfer of immovables and rights thereanent.

Usufruct can be constituted in favour of one or more determinate persons (S.368). In favour of several persons it can be constituted in three ways:-

1. Cumulatively or conjointly, when several persons are called to enjoy usufruct simultaneously by means of one disposition and without partition: e.g. usufruct of a person's estate left to those daughters of the decujus who shall be spinsters at the time of his death.

2. Disjointlv, when the usufruct is left or granted to several persons who are to enjoy it simultaneously but who are not simultaneously called: e.g. when such usufructuaries are called by means of separate dispositions or by partition, e.g. a usufruct left in legacy to A and to B as to one-third

to A and as to two-third to B.

3. Successively, when it is constituted in favour of several persons who are to enjoy it not simultaneously, but one after the other, e.g. usufruct of on estate to be enjoyed by A, and after A's death, by B.

This third case requires particular attention when it is considered in relation to the restrictions imposed by law in conformity with the principle of modern legislation regarding the free circulation of property. The constitution of a successive usufruct without limit of time would degenerate into an entail, because every usufructuary would, in this case, have to preserve the objects in substance and form in order to transmit them to the next person called to the usufruct, and the property would thus be taken away from circulation indefinitely. Roman Law, which abolished fideicommissum as anti-economic could not permit it to reappear under another form, and, therefore, S. 368 lays down that "where the usufruct is granted to several persons to be enjoyed by them successively, it shall be operated only in favour of those persons who are alive at the time when the usufruct devolves upon the first usufructuary". In order to establish which is the moment to be taken into consideration we must distinguish between acts inter vivos and acts causa mortis. The former have effect as soon as they are drawn up, in such a way that the right of the first usufructuary begins at the moment in which the act is made, and it is at that moment that one can determine who are the persons who can be called as future usufructuaries. On the other hand, acts of last will have effect only after the death of the decujus,and it is therefore, at the death of the decujus that the right of the first usufructuary becomes operative, and it is at that moment that one can determine who are the persons who will successively be entitled to enjoy the usufruct in question.

Usufruct can be pure and simple or under a suspensive condition, or under resolutive condition, or subject to a term which can be extended, or to a peremptory term.

Effects of Usufruct - Rights of the Usufructuary

The rules which we are about to explain are common to legal and voluntary usufruct. The person constituting the usufruct can, of course, modify these rules, so long as they do not go against any principle of public order; but where no restrictions or modifications are expressly mentioned in the act constituting the usufruct,these rules are to be applied

also to voluntary usufruct.

(A) Rights existing at the delivery of the thing.

The usufructuary cannot use or enjoy the object of the usufruct without having then under his physical control. He is, therefore, entitled to have delivery of the thing (Section 386) saving certain conditions and formalities which are to-take-place before he can ask for such delivery. The usufructuary receives the thing in the state in which it is at the moment when usufruct begins. He cannot claim any repairs and in this he is different from the lessee, who has the right to obtain delivery of the thing given on lease to him in good state of repair. Here we have a manifestation of the principles of servitude: "servitus consistit in patiendo vel in non faciendo, numquam in faciendo".

(B) Right of enjoyment.

This is the right which forms the principal characteristic of usufruct, as delivery is but a means of enjoyment. Enjoyment here includes the right of using the thing and to draw the fruits whether they be natural, industrial or civil; and this without limitations as to quantity, that is, without any regard as to the needs of the usufructuary. Also those fruits which are not periodically produced, e.g. products of quarries and offspring of animals, are included here. Treasure-trove does not belong to the usufructuary, because it is not a product of the-thing forming the object of the usufruct.

As regards the modes of acquisition of fruits on the part of the usufructuary, we must distinguish natural and industrial fruits from civil fruits.

Natural and industrial fruits are acquired by the usufructuary on maturity and when they are separated from the branches or from the roots. This rule is applied in case of fruits existing at the beginning and at the termination of the usufruct.

Fruits which are hanging or attached to the ground at the beginning of the usufruct belong to the usufructuary, because it is he who acquires them by separating them from the trees or from the soil, whether they be mature or not at the commencement of the usufruct. If it is the usufructuary who separates the fruits, they belong to him; if, however, the owner has already separated them before the commencement of the usufruct, the usufructuary cannot out forward any claim to them, even if they were separated before maturity. Section 371 makes an express reservation of the fruits due to the tenant under a metayer lease ("colonia partiaria") in case the tenement has already been let to a third party under such a lease. The fruits which are not yet separated at the time when the usufruct comes to an end

will belong to the owner, saving the portion due to the tenant under a metayer lease and saving reimbursement of expenses to the usufructuary or to his heirs for the production of such fruits. It matters not whether the fruits be nature or otherwise, so long as the usufruct has ceased without the usufructuary separating such fruits. If they have been separated before the termination of the usufruct, they belong to him only if they or were mature when he separated them, because the usufructuary must enjoy the thing as a bonus pater-familias, and, therefore, he is not to separate fruits before maturity. If he has gathered the fruits when they were still immature, but the usufruct lasted until the time of their supposed maturity, no problem arises because the usufruct suffers the prejudice of his having gathered the fruits too early. On the contrary, if the usufruct terminates before the fruits would have matured, the usufructuary is to indemnify the owner. This theory is to be traced back to Gotofridus in his Glossa to Lex XLVIII, P. I,Dig. De Usufructu.

It is customary in our Islands to sell hanging fruits, in order to ensure sale before the fruits come to be separated. If the usufructuary has made such a sale, and usufruct comes to an end before harvest tine the sale still holds good (S. 379). This is indeed a custom of very frequent occurrence, and if the owner were allowed to disregard the sale, a confusion would arise in the relations between usufructuary and purchaser, and between the purchaser and the owner. The price is divided between the usufructuary and the owner in proportion to the preceding harvest and in relation to the harvest succeeding the termination of the usufruct. In case the purchaser has paid the usufructuary in advance, the owner has no action against the purchaser in order to compel him to pay him his share of the price but he must sue the usufructuary or his heirs.

Civil fruits, unlike natural and industrial fruits, are not produced by the thing but only by means of the thing, when the use of such thing is granted to a third party for a compensation. They are only fictitious fruits by determination of the law, and, therefore,they are civil fruits. They consist in periodical yields, generally of money (rent, ground rent, interest on capitals, and sometimes also in payments in kind). Besides being periodical they are also divisible because they are to be paid at so much per term by agreement. Thus,the annual rent of £120 *is* divisible not only in 12 equal parts for each month of the year, but also in 365 parts for every day of the year. They can therefore be assessed "dietim" and are considered to be acquired in this way. The assessment between the

usufructuary and owner is made in proportion to the number of days. If, after the commencement of the usufruct, the usufructuary acquires a civil fruit paid in arrears for the term running at the time when the usufruct commences, he will not keep the entire sum but will have to reimburse the owner his share, and vice-versa, in case the owner received the civil fruits in arrears for the term running when the usufruct commence.

(C) The usufructuary enjoys all the rights which an owner would enjoy, and he enjoys them as if he were the owner. Thus, in case of a usufruct of a tenement enjoying an active servitude, the usufructuary has the right to enjoy such easements which are considered as accessory to the tenement (Sec. 380) .

(D) The usufructuary can institute proceedings and exercise all real actions which the law grants to the owner, e.g., the actio finium regundorum, the action reivindicatoria, confessoria and negatoria (Sec. 385).

The rules we have dealt with so far are general, that is, applicable to all cases whatever the object of the usufruct. Now the law goes on to deal with special cases and to solve the difficulties which may arise. The first case is that concerning the usufruct of a life annuity. In terms of Section 374,"the usufructuary of a life annuity is entitled to receive the payments which fall due from day to day during his usufruct; but he is bound to restore any surplus which he may have received in advance".

This special provision of law was necessary in order to solve the difficulty which might arise in case the annuity consists not only in fruits but also in part of the capital. "Stricto jure", the usufructuary ought not to acquire the whole annuity, but only that part corresponding to the fruits. In order to avoid this the law gives to the usufructuary of a life annuity the whole annuity, considering it as a civil fruit.

The second case which the law takes into consideration is that of a usufruct having fro its object a dominium directum, which, in terms of Section 373,includes not only the ground rents, but also all the laudemia, as these are considered as a civil fruit of the dominium directum.

The third case which the law takes into consideration is that of usufruct of things which can be consumed by use (Sec. 366).

Since the usufructuary cannot make use of such things without destroying their substance, he acquires the ownership thereof and his right is transformed into a right of ownership saving his obligation to restore the things or their value according to a valuation made at the commencement of the usufruct, or, in the absence of this valuation, according to the price current at the time of restitution or by means of the restitution of objects of the same quantity and quality. The same takes place in case of usufruct of "res fungibiles", particularly in the usufruct of a business. A business is enjoyed by a person if he has the right to sell articles and to buy others with the intention of selling them. The person granting the usufruct of a business or of an estate containing a business, naturally intends granting to the usufructuary the benefit of making use of the business in question by means of the sale of goods and receipt of the profits. Hence, in this case the usufructuary has a right of dominium over the goods with which the business is stocked saving his obligation to make restitution of the business stocked with similar goods of a value corresponding to that of the goods existing at the commencement of the usufruct,

The fourth case contemplated by S. 375 refers to usufruct of things which, though not immediately consumed, are subject to wear and tear through use, e.g. chattels and linen. The usufructuary has the right to use such things according to their destination and at the end of the usufruct he is to restore the same things without being held to any indemnity for deterioration through legitimate use.

The fifth case takes into consideration the usufruct of fruit-bearing trees or of tenements containing such trees. If the trees die or are uprooted or broken by accident, they belong to the usufructuary with the obligation of putting others in their stead (S.376).

The sixth case is that of the usufruct of tenements in which there are quarries of stone. I11 this case the usufructuary has the right to enjoy those quarries which are already opened and working at the time in which the usufruct commences. The usufructuary, therefore, can extract the stones from the quarry which is working and sell them or use them or his own. Thus usufruct is here changed into ownership. As a

matter of fact, the owner who, after having opened and worked a quarry, grants to another person the usufruct of the tenement in which the quarry is to be found, is presumed to have the intention of granting to the usufructuary the right to run the quarry. The usufructuary, however, is to use such a quarry as a "bonus paterfamilias" and he cannot extract stones in a way contrary to what is customary in such works, but must keep the same measures which the owner before him had kept._ The usufructuary cannot open new quarries (Sect. 381 c.v.),because he is to preserve the substance of the thing. He cannot even put into working condition a quarry which had been put out of use by the owner, because in this case he would be going against the presumed will of the owner, which is the basis on which all rights of the usufructuary in this case are based.

In what Manner Usufruct is to be Enjoyed

Usufruct essentially consists in the right of enjoyment, that is, in the right of using the thing and acquiring the fruits thereof. Hence the usufructuary can grant to others his own usufruct, whether by onerous or gratuitous title, because also this is a way of enjoying a thing.

"A usufructuary", according to section 377,"may assign the enjoyment of his right whether gratuitously or for valuable consideration". If we follow the literal interpretation of this Section as upheld by some commentators of the analogous provision in the Italian Civil Code (Art. 492),we would be led to hold that the usufructuary can assign only the exercise of his right and not the right itself. The upholders of this theory adduce in support of their assertion the personal character of the right of usufruct. The opinion upheld by Pacifici Manzoni and others, however,(Codice Civile Italiano commentato,Vol I p. 416) seems more plausible. They assert that the diction of our law as that of the analogous provision in the Italian Civil Code and in the Neapolitan and Sardinian Code, and in that of Parma, is not due to a mistake into which the translators of the Code Napoleon fell, when they tried to correct the diction of Article 595 of that Code (the usufructuary can also sell or assign his right by gratuitous title) without any intention of altering its meaning. There is not question, here, of mere words, because if we follow the opinion of Pacifici Mazzoni,the assignee will have the right, in case of immovables, to hypothecate the usufruct assigned to him, and his creditors will have the right to ask for judicial sale;

whereas if the assignment were to be intended as limited only to the exercise or enjoyment of the usufruct,such consequence would not logically follow. There is no juridical reason to render the right of usufruct not subject to assignment, as all other rights.

The personal character of the right of usufruct means only that it is not to be transmitted through succession "causa mortis" for the motive of public order "ne in universum inutiles essent proprietates semper abscendente usufructu" ; similarly, the transfer of the right of usufruct itself would not imply,as some contend,the creation of a new right in favour of the assignee, because the usufructuary assigns "his right" in the sense that he assigns the usufruct which belongs to him and which, after assignment, remains what it was before, especially that it comes to an end with the death of the assignor.

The right of enjoyment brings with it also the right of administration and, therefore,the right of giving the object on lease. According to general principles,leases granted by the usufructuary ought to come to an end with the termination of the usufruct,because "nemo plus juris ad alium transferre potest quam ipse habet". The application of this principle,considering that the term for which usufruct is to last is so uncertain, would hinder the usufructuary from exercising his right to grant leases, especially of immovables, because every lessee requires that the enjoyment of the thing let be guaranteed for a determinate time. For this reason lease is considered as an act of administration, and the law, in order to make the interests of all parties meet, upholds the validity of the lease made by the usufructuary even if such lease is to last after cessation of usufruct, so long as it had been made on just conditions and for a term not exceeding that normally used in leases, that is, 4 years for urban tenements, and 8 for rustic tenements, and the ordinary term according to use in case of movables (S. 378 and 1619).

## Obligations of the Owner Towards the Usufructuary

The owner has no positive obligations towards the usufructuary, because usufruct is a servitude which, according to general principles "non consistit in faciendo". He is under the obligation to abstain from any act which would hinder the enjoyment of the usufruct. He is under a passive obligation to tolerate the enjoyment of the usufruct. The owner may not by his own act or in any other manner whatsoever prejudice the rights of the usufructuary (Sec. 383).

He cannot, against the will of the usufructuary, demolish a building or any part of a building subject to usufruct; he cannot renounce to an easement thus prejudicing the rights of the usufructuary. On the other hand, the usufructuary cannot put forward any claim for compensation for improvements of any kind which he may have made, even if he has thereby considerably augmented the value of the object. These improvements accede to the tenement to the benefit of the owner, according to the rules of accession and without any right to reimbursement. It seems to be contrary to equity that the owner should enjoy such improvements gratuitously, but the law intends to avoid controversies which may arise at the termination of the usufruct, especially vexations which the usufructuary may cause to the owner. This provision of law, however, is somewhat mitigated by the following rules: -

1. If the usufructuary has caused damages,the improvements made by him may be taken into consideration in his favour. As a matter of fact, he causes no harm to the owner except in the measure in which the diminution of value caused by deteriorations exceeds the increase of value resulting from the improvements.

*2.* If there is no place for such set-off, the usufructuary has the jus tollendi,that is, the right to take sway the improvements in question, if the following, three conditions concur:-

(a) that, by taking them away, the usufructuary can profit in some way;

(b) that no damage is caused to the thing by the fact that the usufructuary takes away the said improvements;

(c) that the owner does not prefer to retain the improvements, paying a sum corresponding to the profit which might accrue to the usufructuary in case he were to take them away.

Obligations of the Usufructuary

All the obligations of the usufructuary are founded on the fact that he enjoys a thing belonging to another person and that he is to give it back to its owner in the state in which he has received it.

All the other obligations have as their aim that of ensuring the observance of this fundamental obligation. The obligations of the usufructuary are divided into three classes, according to the moment in which they are to be considered operative:-

(a) Obligations contemporaneous to the commencement of the usufruct;

(b) Obligations during usufruct;

(c) Obligations contemporaneous to the termination of the usufruct.

A. Obligations contemporaneous to the commencement of the usufruct.

The usufructuary cannot take possession nor ask for consignment of the object on which his right is to be exercised so long as he has not observed the following obligations:-

1. To make an inventory of the things subject to usufruct, so that the things in question may be known and so that persons having an interest may know in what state they are to be given back (Sec. 367).

2. To give security "de bono utendo et fruendo" in order to guarantee restitution and the observance of all the other secondary obligations (Sect. 389)

Inventory

The inventory is to contain the description of all the objects movable and immovable. Movables are to be described according to their value because otherwise it would be difficult to prove the valua of movables which have been lost or transformed. In the case of immovables, the indication of the value is not necessary, the indication of their actual state is sufficient. The inventory is to be drawn up in the presence of the owner who is to have been called, also by means of an official letter, to assist. It is in the interest of the owner to be present at the inventory, so that he may ascertain himself whether it be exact or not. If he is not willing to be present he can, of course, not intervene, so long as his absence does not hinder the formation of the inventory and,therefore, the exercise of the right of usufruct. It is enough that the usufructuary have called on him judicially to attend.

The inventory is to be made by public act or by private writing only if such faculty has been granted to the usufructuary in the act constituting the usufruct, and if the owner (if he is a person different from that who has granted the usufruct) consents. The expenses of the inventory are to be borne by the usufructuary, usufruct being a servitude. An exception is made if in the act constituting usufruct an express exemption is inserted.

The security consists in the surety offered by a third person who assumes the obligation to carry out all the principal duties of the usufructuary in case the latter failed to do so. These are:-

1. The obligation "de bene utendo et fruendo" and to make good damages caused through the "culpa" of the usufructuary to the objects whether they be movable or immovable.

2. The obligation of resorting the movables including capitals and credits. This security does not extend to the restitution of immovables. Because in the case of immovables the proprietor has the benefit of the "actio reivindicatoria". Such security is not limited to the personal principal obligation of the person giving surety, but must be secured by means of a general hypothec on his estate for a determinate sum. At the beginning of the usufruct it is impossible to establish if, and up to what amount, the usufructuary will be responsible at the end of the usufruct,and, therefore,the "cautio" and the relative hypothec ought to be unlimited in order to cover any eventual future debt of the usufructuary. On the contrary, the law asks for a determinate amount in order that the estate of the person giving surety may not be burdened by a general hypothec for an indefinite amount. The hypothec, therefore, is limited to the following sums: -

1. To the sum of the capitals given to the usufructuary at the beginning of the usufruct, or which are to be given to him during the usufruct.
2. To the value of the movables.
3. To the costs of probable repairs of immovables for the period of five years; that is, those repairs which are to be held as burdening the usufructuary. If the debt of the usufructuary at the termination of the usufruct is greater than the sum determined as above,the surety will be liable for any excess.

The Court can also, according to circumstances, fix a lesser sum for the hypothec. But, in such case, if the security fails or is insufficient, the usufructuary must reintegrate the original "coutio" with a new one. In case the usufructuary does not give security at the commencement, or if he fails to reintegrate the one, already given if called upon or condemned to do so, the law proposes a means of reconciling the interests of the bare owner and that of the usufructuary, thus : The things subject to usufruct are subjected to the administration of a third party. This is a very sure means of defending the interests of the bare owner without depriving the usufructuary of the enjoyment to which he is entitled. He is deprived only of the detention and administration of the thing. Such an administrator is appointed by the Court at the demand of the bare owner after that the Court has given a term in which the usufructuary has to give sufficient security and this term has elapsed. Such an administrator has, generally speaking, all the duties of an ordinary mandatary who is administering the estate of another person. He has, besides, special duties deriving from the circumstances of the case, which are :-

1. To seal the movables, thus converting them into a capital bearing fruits, otherwise the usufructuary will not be able to enjoy them being deprived therefrom through detention. This provision of law lays aside the interests of the bare owner to preserve the movables in kind. Article 602 and 603 of the French Civil Code, and Articles 498 and 499 of the 1865 Italian Civil Code contain better provisions in the sense that they provide that objects of merchandise are to be sold by the administrator, whereas other movables that are deteriorated but not consumed by use cannot be sold except at the demand of the bare owner.

2. To invest, for the purpose of obtaining interest, any sum of money existing at the commencement of the usufructor accruing later, including the price of the abovementioned movables, so that the usufructuary may receive such interests.

The administrator may act in a way different from that explained above either by the consent of both parties or by judgment of the Court at the demand of one of the parties for a just cause, so long as the other party suffers no prejudice.

Among the general obligations of every mandatory administering property, there is that of rendering accounts of the administration. The administrator in the case under review is to render accounts to the usufructuary every year. At the termination of the administration he is to render accounts to the usufructuary regarding

the fruits and the expenses, and to the bare owner regarding the property of the capitals and of the expenses which are to be borne by him (S.396).

End of Such Administration

This administration may cease:-

1. In an absolute way if the usufructuary gives security, a thing which he can do at any stage (Ss 397-399).

2. Relatively, it may cease by the fact that the administrator can be removed by the Court for a just cause at the demand of any of the parties, at any time. It may similarly cease in a relative way for other causes regarding the person of the administrator. In case the administrator is removed; a new administrator is appointed.

This administration by a third party ensures to the usufructuary the right of acquiring the fruits, although it deprives him of the direct use of the thing. Thus,if the usufruct includes a house, the usufructuary will not be able to inhabit it - a thing which for him might be highly inconvenient. In view of this, the law provides that even though the usufructuary does not offer security, he can demand and obtain from the Court an order that an urban tenement and the necessary furniture be given to him for his use and for the use of his family, provided the usufruct includes such tenement and furniture, and this under condition of giving only juratory caution i.e. a declaration, confirmed on oath, that he did not succeed in finding a person to stand surety. It is of course to be understood that at the termination of the usufruct the usufructuary is to make restitution of such urban tenement with all the furniture with which it is furnished.

As regards the sanctions to these obligations prior to the commencement of the usufruct, we must correlate and reconcile the provisions of ss. 387,389 and 399. The first two sections lay down that the usufructuary cannot begin to exercise his usufruct before having conformed to these two obligations. S. 399 lays down that delay in giving security shall in no case deprive the usufructuary of the fruits to which he may be entitled: such fruits arc cue to him from the time of the vesting of the right to the usufruct. From the above we are to argue that the sanction of the obligations consists in the deprivation due to detention and administration, and not in the enjoyment of the fruits that are always due to the usufructuary from the beginning of the usufruct and which he has the right to ask for as soon as he has made the inventory and given security.

There are certain cases in which these obligations of inventory and security or that of security alone are not observed.

Both these obligations can be done array with by means of dispensation in the act constituting the usufruct (Ss. 387 and 389)

As to the obligation of giving security it can be omitted in the following cases:-

1. When usufruct is granted by law, e.g. legal usufruct of the father or of the mother, of the surviving spouse on the estate of the predeceased spouse, of the husband on the dowry, and this by reason of the relation of intimacy existing between the owner and the usufructuary.

2. In cases of "constitutum possessorium" when somebody makes over to some other person a thing of which he keeps for himself the usufruct, thus continuing to have a right on it no longer "uti dominus", not in his own name, but in the name of the other party. In this case dispensation from this obligation is implied because it would be highly improbable to suppose that the owner would have wished to impose security upon himself.

3. In case of things which are or which ought to be administered by others: thus, if a husband leaves the usufruct of his estate to his wife, appointing at the same time an administrator.

4. The bare owner can no longer demand security after that the usufructuary has exercised his rights for a year, because if the owner fails to do so for the above mentioned period he implicitly shows that he has faith in the financial means and in the moral character of the usufructuary. Nevertheless, the owner can ask for security even after the lapse of one year if there is a change in the financial state or in the conduct of the usufructuary.

Obligations of the Usufructuary During the Exercise of his right.

1. He must enjoy the object as a "bonus paterfamilias' i.e. with that care and diligence which a good father of a family observes in the management of his things.

He is,therefore, held answerable for all the damages which occur through his negligence, and, for this reason, he must give security before he is vested with his rights.

2. The usufructuary is to preserve the substance of the thing both as regards matter and as regards form. He cannot, therefore, destroy the object matter. If the object of the usufruct is a building, he cannot demolish it, nor "can he convert a vineyard into an orchard, nor a wood into arable land. Besides, he must preserve the substance of the thing also as regards form. "Apud nes", writes Bartolo Da Sassoferrato , "rei substantialis forma est id in quo ipsa consistit, id unde denominationem accipit,loquor de denominatiene nominis appellativi"; in other words, the substantial form of the thing is that "modus essendi" from which it takes its distinctive features,its denomination. Thus,if a building is destined for habitation, its denomination is house - whereas if it is destined for the exercise of an industry, it will be called factory; if destined to serve as a store for merchandise, its name will be a store or warehouse and so forth. The usufructuary must maintain the "modus essendi" which the thing has at the time of the vesting of the right.

These are the general obligations of the usufructuary. There are other obligations which are special: -

3. The obligation to carry out the ordinary repairs of which the thing may be in need. Repairs are generally intended to mean any expense necessary in order that a thing which is deteriorated may be restored to a state which will enable it to serve the use for which it is destined. Repairs may be of two kinds:ORDINARY and EXTRAORDINARY. Ordinary expenses are those which become necessarily regularly and periodically in such a way that they can easily be foreseen e.g. in case of an urban tenement,such works as whitewashing,plastering, the painting of woodwork,repairs of roofs,etc. Extraordinary repairs may become necessary through an unusual or accidental cause, and cannot, therefore, be foreseen; e.g. repairs necessary after an earthquake, a hurricane and so on. Such repairs may become necessary through the crumbling of a wall, the breaking of a beam. These are extraordinary damages,and the relative repairs are called by the same denomination.

Among the ordinary repairs as also among extra-ordinary repairs, there is a great difference with regard to the duration of their effects, that is, with regard to the benefit which derives from them. The duration of ordinary repairs is limited for the simple reason that such repairs have to take place periodically.

Thus, whitewashing keeps a tenement in good condition, but only for a time varying between two and four years, after which it must be renewed. The effect of extra-ordinary repairs has an unlimited duration. Ordinary repairs, therefore,serve only for the enjoyment of the usufructuary,whereas extraordinary repairs benefit also the bare owner, because in the ordinary course of events they hold good indefinitely even after cessation of the usufruct, provided no new extra-ordinary events occur.

The law gives examples of extraordinary repairs (S. 401). These are:- Repairs to walls and vaults, the substitution of beams and the entire renewal of a roof, of a staircase, a pavement or any part of a building. Note that, in cases of repairs to a roof, a pavement, or a staircase, such repair is not extra-ordinary unless it consists in the total renewal. If it is only partial, e.g. repair or substitution of some titles of a pavement or of some stair in a stair-case, it is not extraordinary, because such renewals are periodical and ordinary.

It follows that ordinary repairs only are to be borne by the usufructuary. Such ordinary repairs are tc be borne by the usufructuary for two reasons : -

1. Because they produce an effect of limited duration which wears off in the enjoyment of the usufruct itself, and, therefore, the owner is not supposed to receive any direct advantage therefrom;

2. Because these repairs, being recurrent and periodical can be provided for by every good paterfamilias, and the usufructuary is to enjoy his usufruct like a good pater-familias.

The obligation of the usufructuary to carry out ordinary repairs is to be applied also in case of repairs necessary at the commencement of usufruct, because the usufructuary must receive the thing in tile state in which it is at such a time. Ordinary repairs include also the whitewashing of a building, the cleaning of cesspits in case they are ordered by the Police (S. 406 ).

Extraordinary repairs are not as a rule to be borne by the usufructuary, but by the bare-owner who is to furnish the capital for such repairs,while the usufructuary pays the interests. By way of exception also extraordinary repairs may be borne by the usufructuary in case they become necessary through his not having carried out ordinary repairs including those which ought to have been carried out at the commencement for the

reason that the usufructuary is,in this case,responsible for his having failed to carry out his obligations. With the exception of what has just been said, the rule is that extraordinary expenses are to be borne by the bare owner as regards capital, because their effect is to be presumed capable of lasting even after the cessation of usufruct, that is, after the bare owner has again began enjoying the object himself. But during usufruct the advantage of such repairs accrues also to the usufructuary; therefore, it is only just that he who enjoys the fruits produced by the thing which has been repaired should also bear the burden of the interests on the expenses during his usufruct. Thus, the burden of repairs is divided between the one and the other: the usufructuary is to bear those which are by nature a burden on the fruits, namely the ordinary expenses; the extraordinary repairs are to be borne by the bare owner because they are to be carried out by the capital belonging to him while the usufructuary pays interests thereon. There is, however, a notable difference between the obligation of the one and that of the other; the usufructuary can be compelled by the bare owner to carry out the repairs which he is bound to make, whereas the bare-owner cannot be compelled by the usufructuary to carry out the repairs which he is supposed to carry out and this for the reasons explained above, that usufruct resembles servitude and therefore the bare owner is not bound to do anything, but only to tolerate the exercise of the usufruct. This does not mean that if the bare owner wishes to carry out extraordinary repairs, the usufructuary can hinder him therefrom. The usufructuary cannot put any obstacle,so long as the bare owner carries out such repairs with the least possible inconvenience to the usufructuary (S. 405).

If the bare owner carries out such repairs he has the right to ask for the interest on the expenses which he can prove to have incurred, such interest running from the day of approval of the bills by the usufructuary or, in case the latter does not agree, by the Court at the demand of the bare owner by means of a writ-of-summons served on the usufructuary. In this way the bare-owner has a strong reason to present his bills without delay and to hasten their approval.

If the bare owner refuses to carry out extra-ordinary repairs, the law, conciliating this right of the owner with the right of the usufructuary to enjoy the object, gives to the latter an action in order to obtain authorization by the Court to carry out the extraordinary repairs himself, saving right of redress in due time against the bare owner. Ho cannot proceed

to effect the extraordinary repairs on his own initiative but only after being authorized by the Court, that, after taking cognizance of the case, decides as to the necessity and extent of the repairs in question. This is necessary in order to prevent disputes which it would be difficult to solve at the time in which the action of redress takes place i.e. at the cessation of the usufruct. It is then that the usufructuary has the right of redress against the bare owner for the expenses incurred provided, of course, that the utility deriving out of the repairs still subsists, (S. 402) In fact, it is only in this case that the repair benefits the bare owner.

The usufructuary shall have the right to ask for the entire sum spent because the bare-owner would have, spent the same sum. He must, however, present to the bare owner the bills with all details within six months after the repairs are carried out, in order that the bare owner may verify the bills at a time reasonably near to that in which the repairs took place. The bare owner has the right to impeach such bills, and, in this case, the sum due shall be that assessed by the Court. But the bare owner must declare his intention to impugn the bills within two months after presentation, otherwise he will be held to have accepted the bills.

If, on the contrary, the usufructuary fails to present the bills within six months from the termination of the repairs, he loses his right to reimbursement of the amount spent by him but shall be entitled to recover only the value of the repairs according to a valuation, regard being had to the time of the demand. The redress does not include interest on the sum spent or on the value assessed for the time of the duration of the usufruct, because during this time it is the usufructuary who has taken the advantage resulting from the extraordinary repairs; besides, according to the rule already studied, if the expenses had been already incurred by the bare owner he would have had the right to ask for interest during the usufruct. These rules relative to extraordinary repairs are applied also in the following cases, both if the repairs become necessary through antiquity, or through a fortuitous case; -

1. If a building constituting a necessary accessory to the tenement subject to usufruct falls partly or wholly (e.g. a farmhouse forming a necessary accessory to a rustic tenement),the rebuilding of it is considered and with as an extraordinary repair; it must be a building constituting an accessory and not the principal object of the usufruct, because in such case if the object perishes, the usufruct is extinguished.

2. If a part accessory to the building which forms the principal object of the usufruct falls, the rebuilding of such a part is also considered as an extraordinary repair. S. 404 lays down the following criteria for determining whether the part which falls is to be considered accessory or principal

a) The destination of the part fallen;

b) The expense necessary in order to rebuild it compared with the expense necessary to rebuild the whole edifice.

Certain expenses sometimes imposed by law are not to be confused with extraordinary repairs. Also expenses ordered by administrative authorities in execution of the law are to be considered as having nothing to do with extraordinary repairs: e.g. the making of cesspits, the communication with the public drainage system, the demolition of buildings that threaten to fall down. All these works are at the charge of the bare owner, and if the usufructuary has been compelled to execute them, he has right of redress against the bare owner.

4. The fourth obligation of the usufructuary is that he is held to pay ground-rents and other annual burdens imposed on the tenement. We have here burdens that are recurrently to be paid out of the proceeds; they diminish the enjoyment, and, being burdens imposed on particular tenements, they are considered as a deduction from the fruits rendered by such tenements.

5. A universal usufructuary is bound to pay interests on credits, and annuities as well as all other burdens imposed on the entire estate,including maintenance and life annuities (S. 409). Note that such an obligation is not imposed on all usufructuaries but only on those enjoying either a whole estate or an abstract portion of it. I7e are therefore to distinguish between universal and particular usufructuaries. A particular usufructuary is not bound to pay annuities or interests but only those burdening the particular objects of which he is the usufructuary for the reason that it is only the fruits of these latter that he enjoys. A universal usufructuary enjoys the whole estate, and, therefore, he must bear all annual payments and burdens in general. His liabilities and his enjoyment have the same extension.

A particular usufructuary of one or more objects or Tenements is not bound to bear any burdens imposed on the generality of the estate, although sometimes the tenement or tenements forming the object of the usufruct are subject to a hypothec for a certain debt because hypothec is accessory and the debt is principal; and it is the debt that is supposed to burden the whole

Estate. Therefore, if the usufructuary of such a tenement, because of a hypothec, is compelled to pay interests or an annuity in order to free himself from the actio hypothecaria. he has a right of redress against the bare owner or against any other person bound to effect the payment of such debts (S.408). Usufructuary is held to pay such interests and annuities in proportion of both the enjoyment of his share of the whole estate and of the time or duration of the usufruct, because such interests and annuities being due in money or in kind are subject to calculation dietim like civil fruits. -

As to the capital which forms the object of the debt, this is certainly at the charge of the bare owner. Every debt, diminishes the estate: "bona non intelliguntur nisi deducto aere alieno"; and so all debts are to be borne by the person to whom the estate belongs. The usufructuary is not bound to pay the capital, not even if he is a Universal usufructuary. A universal usufructuary, in fact, is to bear such burdens as interests and annuities, whereas a particular usufructuary is free also from interests. Nevertheless, a universal usufructuary enjoys the whole estate and, estate, as we have said, is what remains after the deduction of liabilities. Therefore, if the debt diminishes the estate for the bare owner, it must diminish the enjoyment also for the universal usufructuary. The latter suffers a diminution of enjoyment just as the bare owner suffers a diminution of ownership, and this by means of any of the following three ways:-

1. By payment made by the usufructuary of the amount of the debt, saving reimbursement at the cessation of the usufruct, and with the loss of interests on such sum during usufruct.

2. By payment made by the bare owner out of his own money saving his right to withdraw interests due to the usufructuary during usufruct. If the bare owner pays the sum due out of the estate subject to usufruct, he will not have the right to make his the interests due to the usufructuary, because in this case the usufructuary will already have borne his share of the debt, having been deprived of the enjoyment of the money employed in the extinction of the debt.

3. By means of the judicial sale of a portion of the objects subject to usufruct up to the amount of the sum due. We have here a case of the sale of full ownership and not only of nudo proprietas, because the usufructuary must bear his part of the debt.

The choice of one of these three means belongs in the first place to the usufructuary in the sense that he can choose to pay in advance and with his own money the sum due, sowing his right to reimbursement at the termination

of the usufruct. If the usufructuary does not avail himself of this choice, the bare owner may choose one of the remaining two ways. It is to be borne in mind, however, that no sale is to take place so long as the estate includes sums of money with which the debts can be paid. In such a case neither the usufructuary can oppose payment with such sums, nor can the bare owner ask for a sale of a portion of the estate. Where there is no agreement between the bare owner and the usufructuary as to which of the objects, are to be sold, it is the Court which decides.

6. The usufructuary is under the obligation to contribute to the expenses of law-suits referring to the objects of which he enjoys the usufruct. S.410 considers the different cases which may arise: "the cost of law suits relating to the usufruct exclusively shall be borne by the usufructuary."

> "The costs of law-suits relating to the ownership exclusively are at the charge of the owner".
>
> "The casts of law-suits concerning both the usufruct and the ownership shall be borne by the owner; but the usufructuary shall pay to the owner the interests thereon during the usufruct".

7. The usufructuary is to inform the bare owner without delay of all usurpations and other facts which may cause prejudice to the right of the bare owner because the usufructuary holds the estate belonging to another person and is to take care of it with all diligence. He is responsible for damages and interests in case he fails to observe such a duty. For the same reason he is to prevent the maturing of any period of prescription and is to see that hypothecary registrations are renewed.

During the usufruct, besides these special obligations, the usufructuary has certain particular obligations in the following cases:-

1. Usufruct of several animals forming a herd. The usufructuary is under the obligation of substituting those that perish by the newly born, that is, by means of the fruits of the herd up to the number of newly born existing under his control at the moment in which

the herd begins to diminish in number, and of these that are born afterwards (Sect.413).

Several animals can form the object of usufruct in two ways: uti sinouli or uti universitas. In the first case there are as many objects of usufruct as there are animals; in the second case the one object of usufruct is the whole herd if it is considered as on intellectual unity, although it consists of a plurality of material entities: "Est gregis unum corpus ex distantibus capitibuc sicut aedium unum corpus ex coherentibus lapidibus". (para.17 inst. Lib. II. Tit. 20).

The obligation of which we are dealing exists in cases of a usufruct on a herd because in usufruct on animals uti sinouli, each herd is subject to a separate usufruct, and, if it perishes, the relative usufruct is extinguished and the usufructuary is not bound to substitute it, so long as he is not to blame. Also in case of a usufruct or a herd which perishes entirely through no fault of the usufructuary, the usufruct is extinguished through lack of object, and the usufructuary is not bound to substitute the herd. If, on the contrary only one or several heads of the herd perish, the usufructuary is under the obligation of substituting them, because such a loss is considered as a deterioration to the one and only object of the usufruct; and, as the usufructuary is generally held responsible for ordinary repairs, so the usufructuary of a herd is held to fill up the gaps in case of similar deteriorations. Repairs in the latter case are carried out by means of the fruits of the herd themselves.

The same rules are to be applied in case of heads which become useless, unproductive or sterile, because the herd is a body essentially destined for the reproduction of the animals of which it is formed, and, therefore, the usufructuary is to substitute such heads up to the number of heads existing at the moment in which the herd begins to suffer deterioration. In this way the obligation of the usufructuary is modified in the sense, that he is to substitute those animals that become useless only by means of those born of the herd, and which he has not consumed or sold.

2. Usufruct of fruit-bearing trees. If such trees die or are uprooted or broken by accident, the usufructuary is to replace them and the trees which existed before such replacement belong to him.

3. Usufruct of a vessel. The usufructuary is under the obligation of insuring the vessel at his own expense against the risks of navigation, because insurance is one of the means for preserving the value of the vessel, and the usufructuary is bound to preserve the thing. Besides, insurance is made with the payment of a premium tendered periodically or for every trio, and the premium as well as the other expenses ordinarily necessary are to be borne, by the usufructuary.

If the usufructuary fails to observe this obligation, he is held responsible for loss and averages. If, on the contrary, he has carried out such on obligation, he remains free of all responsibility in case of loss or overages by assigning to the bare owner his rights of action against the insurer. He is free, of course, up to the amount covered by insurance and remains responsible for damages exceeding such amount.

Obligations of the Usufructuary at the Termination of the Usufruct

At the termination of usufruct the usufructuary has the following obligations

1. He is to restore the things subject to usufruct to the bare owner in the state in which they are, saving deteriorations that have taken place through his fault (S. 386). In case of deterioration owing to a forfuitous circumstance, or to wear and tear, the usufructuary is under no obligation.

2. He is to indemnify the bare owner for the deteriorations for which he is responsible through the violation of his obligations. In case of quasi-usufruct, the restitution is to take place by paying the value of the thing as per valuation , if there had been such a valuation at the commencement. Where no valuation was made, the usufructuary can choose between giving back the same quantity and quality of things and paying the value at the price current when the usufruct ceases.

Termination of Usufruct

Usufruct can come to an end either ipso jure or officio judicis.

A. Causes of termination of usufruct ipso jure:

1. The death of the usufructuary, because usufruct is a personal servitude, constituted in favour of a determinate person. It is, therefore, inherent in the person to whom it is granted, and it is extinguished at the death of such a person, even if constituted for a determinate time which, at the time of death, has not entirely elapsed. In case a usufruct is constituted in favour of several persons of whom one or more are dead and another or more survive, you must distinguish between disjunctive and conjunctive usufruct. If several persons are conjointly called, at the death of one or more of them his share of the usufruct goes to increase that of the surviving usufructuary or usufructuaries. Such a usufruct is extinguished only at the death of the last usufructuary.

Usufruct is called conjunctive:-

1. When it has been constituted in favour of several persons by means of the same provision and without distinction of parts;

2. If it has been constituted in favour of several persons even separately, that is by means of separate provisions or sections of the same need, when the thing which forms the object is not divisible without deterioration, e.g. usufruct on a horse, or a vehicle.

On the contrary, when usufruct is disjunctive, at the death of one of the usufructuaries the usufruct comes to an end with regard to his share, which goes to consolidate the estate.

Usufruct of a moral person in Roman Law became extinguished after one hundred years: "longissime vitae cursus"; in modern legislations it is extinguished after thirty years, and, if constituted for a longer term, it is to be reduced (S. 417). The time for which usufruct is established can be determined, saving always the rule that a usufruct granted to a juristic person cannot last for more than 30 years.

If usufruct is constituted for a time which is to last until a third party reaches a certain age (e.g. I leave the usufruct of my estate to my wife until such time as my son shall be 25 years old), a difficulty may arise whether this is merely a term or whether it includes a condition. This difficulty was solved by Justinian with his Ccnstitutio XII Cod. de Usufructu ed Habitatione, in the sense that it establishes only a term: "neque enim vitam hominis inspexit sed certa curricula". The person constituting such a usufruct had not in view the wish that the person concerned should live up to a certain age, but only that the usufruct was to last up to a certain timo, and, therefore, he is not to be held as having granted usufruct under a condition that the person in question should live up to that age. Even if such a person dies before reaching the age indicated, the usufruct continues to subsist up to the day in which that person would hove come of the age designated, had he not died. This is the solution adopted by S.418; such a presumption does not apply if the person constituting the usufruct shows that his will was otherwise either implicitly or explicitly.

The consolidation of the usufruct with the property or their fusion in one and the same person. In fact, "nemini res sua servit". When the usufructuary succeeds the bare owner in the ownwership, both by an act inter vivos, and causa mortis, this consolidation or fusion takes place, as also by succession ab

Intestato, or, in case the bare owner succeeds the usufructuary, by an act intervivos.

4. Non-use for thirty years. This is on application of the general role that all real rights, except property, are extinguished if not exercised for a term of thirty years, during which time extinctive prescription takes place. The non-use must be total and continuous, and there must be no suspensive, cause of prescription, e.g. minority, or the interdiction of the usufructuary. Usufruct may also be lost by acquisitive prescription in case a third party has possessed the thing subject to usufruct as if it belonged to him, free from all servitudes. In this case prescription operates against the usufructuary and the bare owner. Acquisitive prescription is accomplished by the lapse of ten years in favour of a third party in good faith who acquired a tenement by virtue of a just title as free from all burdens and servitudes.

5. Total loss of the thing by a fortuitous event or through "force majeure".

Two conditions are necessary in order that the usufruct may be extinguished through such a cause:-

a. The total loss of the thing. If only a part is lost, usufruct remains with regard to the part that does not perish . (S. 422). This is an application of the general rule governing the loss of real rights.

b. That the loss be not due to a default of the usufructuary or of the bare owner but only to a fortuitous event or to "force majeure". If the loss is due to a default of the usufructuary, the latter must indemnify the bare owner, he must bring the thing to its former state or acquire o similar thing in such a way as to reintegrate the property. After such reintegration he has the right to continue enjoying the thing as usufructuary until the termination of the usufruct. If, on the contrary, the thing has perished through the default of the bare owner, the usufructuary can compel him to reintegrate it.

Special emphasis is to be put on the following applications of the above extinctive cause:-

a. Usufruct of an edifice, In this case three hypotheses are possible:-

i) If the building constitutes the only object of usufruct, and it falls down entirely through antiquity or owing to a fortuitous event, usufruct is extinguished. It is true that the ground and the material of which the building was composed remain; but the object of the usufruct consisted not in the ground and in the materials, and, therefore, when the edifice foils usufruct is extinguished altogether, one the usufructuary has no right to enjoy neither the ground nor the materials.

ii) If the building is only a part of the tenement forming the object of usufruct, and it perishes entirely through old age or owing to a fortuitous event, the usufruct still subsists with respect to the rest of the tenement end also on whet remains from the fallen building and of the underlying ground (S. 423).

iii) If in both cases, that is, both in case that building forms the object of the usufruct end in case it forms only part of the object of the usufruct, if it perishes only partially, usufruct is not extinguished but still subsists, not only with regard to the rest of the building and of the ground, but also on the remains of that part of the building which has fallen.

b) In case of usufruct over animals, we must distinguish whether the animals are taken uti sinouli or as a herd. In the first case, the loss of each separate herd brings about the extinction of usufruct with regard to such a herd, but usufruct still subsists with regard to the herds that remain. In the second case, the usufruct ceases only if the whole herd perishes; if only one or several herds perish, this is considered as an ordinary deterioration. In both cases, when usufruct is extinguished, the usufructuary cannot pretend to enjoy the remnants: "caro et corium mortui pecudis in fructu non est" (Dig. Lex XXX, Lib. VII, Tit. IV). This offers an explanation to the rule laid down in ss. 412 and 413: where the subject of the usufruct is one or more animals, not forming a herd and such animals perish without default of the usufructuary, he shall only be bound to account to the owner for the skins or their value. He must render account of what remains because such remains are not his, since when the animal dies the usufruct is extinguished. He must account to the owner for the remains if they exist. It may happen that the animals were drowned or burned through a fortuitous event, and in such a case, the usufructuary is not bound to restore either their value or the remains.

c) Usufruct on a vessel is extinguished not only if the vessel is lost but also if she is reduced to such a state that she can no longer be repaired.

Causes of Extinction of Usufruct Officio Judicis

The causes for which usufruct can come to an end officio judicis may be reduced to one kind: abuse of usufruct both by causing damages to the things subject thereto, and by letting them deteriorate through lack of ordinary repairs. The judge must make sure of the facts and inquire into the gravity of the abuse in order to form a judgment.

Yet even if the usufructuary deserves such a penalty, the law admits of two mitigations:-

1. The Court can, according to circumstances, instead of pronouncing on the loss of the usufruct have recourse to two remedies which, without depriving the usufructuary of his enjoyment, protect the interests of the owner and this either by appointing an administrator or ordering the restitution of the things to the bare owner imposing on the latter the burden of paying, to the usufructuary a given sum of money every year during usufruct. Substantially in this way, the rights of the usufructuary are preserved because the highest advantage of usufruct is the acquisition of fruits, while at the same time the interests of the owner ore safeguarded.

2. The second mitigation admitted by law, which is also more noteworthy, consists in the benefit granted to the usufructuary to avoid his being deprived of the usufruct, together with the administration of a third party or the restitution of the things and this by means of making him observe his obligations. In such a case he is to premise such observance within a certain time fixed by the Court and he must offer a surety. The usufructuary can ask the Court to grant him such benefit tendering at the same time the said promise and offering the surety. The promise can be made not only before judgment, but also after until the lapse of fifteen days from the day in which such judgment has become final and absolute. The demand may be made by means of a request to the same Court that has given the judgment or that has named the administrator or ordered the restitution of the things. Not only the usufructuary can ask for this benefit but also any creditor of the usufructuary can exercise this faculty, assuming upon himself the performance of the obligation, because it is in the interest of creditors that the usufructuary should preserve the usufruct so that they may acquire payment from the fruits accruing to the usufructuary.

This brings us to the end of the causes which extinguished usufruct, but it will be useful to remember that besides the special causes there are other causes of a general nature common to all real rights, and others common to all rights in general. These are:-

1. The renunciation on the part of the usufructuary. If, however, such a renunciation is made by the usufructuary in prejudice to his creditors, they con impeach it by means of the actio pauliana (S. 1189).

2. Resolution of the right of the person constituting the usufruct because "solute jura dentis, selvitur et jus accipiantis". If the person constituting the right was not the absolute owner but had only a temporary right, if his right comes to an end, the right of the usufruct constituted by him ceases as well.

3. The law solves certain difficulties which may arise among the cessation of usufruct:-

Usufruct does not come to an end for the following reasons:-

(a) Because of the sale of the thing subject to usufruct. Usufruct is a jus in re which is valid quoad omnes, and, therefore, also vis-a-vis any third party who buys the thing as free from the bare owner, because such a sale is for the usufructuary a res inter alias act.

(b) In case of an annuity or of a debt, the restitution of the capital does not bring about the extinction of the usufruct. Usfruct still goes on with respect to the capital thus restored, and the usufructuary can thus go on using it in order to acquire and enjoy its fruits. So long as the debt existed, the object of the usufruct was a res non fungibilis, which could not be exchanged for another, whereas, with the restitution of the capital a transformation in the object of the usufruct has taken place; what before was a res non fungibilis has now become a res fungibilis. i.e. a sum of money which is capable of improper usufruct; hence o difficulty may arise whether after such a transformation, the usufruct is to be considered as extinguished. Our legislator considering the probable intention of the party constituting the usufruct to preserve in favour of the usufructuary the enjoyment of the capital, has decided that such restitution causes no extinction of usufruct.

Effects of Extinction of Usufruct

These are:-

1. The consolidation of usufruct with the property. To say that usufruct is extinguished means that it exists no longer as detached from property and that it is joined again to the property in the person of the bare owner.

2. The obligations which must be performed by the usufructuary or by his heirs at the extinction of usufruct with which we have already dealt.

Use and Habitation

Use is the right of making use of a thing and not of acquiring its fruits - this was the concept of it in Roman Law: "nudus usus id est sine fructu, cui usus relictus est usi potest, frui nutem non potest" (Dig. Fragment I and II de Usufructu). Nevertheless, in certain cases, the right of use was considered as including also a more or less extensive right of usufruct, in cases of rights granted by liberality (Pietotis causa), in which case the will of the party granting the right was interpreted in a wide sense.

Such cases become more and more numerous through the work of the interpreters and of medieval jurisprudence, from which derived the modern concept of usus, which includes, besides the right of using of the right, also that of acquiring its fruits, but in a limited way as to amount and quality and therefore the right of use is considered as a sort of restricted usufruct. This is the notion given by Section 429: "use is the real right of a person making use of a thing belonging to another, or of taking the fruits thereof, but only to the extent of his own needs and those of his family. the person in favour of whom this right is granted is called usuary.

Object of this right can be all things, both movable and immovable. When the object is a house, the right of use becomes the right of habitation, in such a way that use, in this case, does not include the right of acquisition of fruits (Sect. 425).

In case of res consumabiles, there can be no use of them as distinct from usufruct or quasi-usufruct (Sect. 429).

Habitation

The right of habitation has necessarily for its object an immovable which serves this purpose. The Romans discussed whether the right of habitation was to be considered as a servitude or use, that is, whether it was limited to mere occupation, or whether it was o usufruct, comprehending also the right of giving the thing on lease end acquiring its fruits. Justinian solved the question by attributing to the right of habitation a special character, carrying with it some of the rights proper to usufruct and discarding others. Thus, according to Justinian's opinion, the usuary had the right to give the thing on lease, but not that of ceding the use or habitation of a house gratuitously. In modern law, the right of habitation has been narrowed down to mere use, and it is thus defined in Section 430: "habitation is the real right of a person to live with his family and according to his condition, in a house belonging to another".

The following features are common to both use and Habitation:-

1. They are real rights on a thing belonging to a third party like usufruct;

2. They are personal servitudes imposed an a thing belonging to o third party in favour of a determinate person i.e. of

the usury and of the habitator. They are, therefore, inherent to the person in favour of whom they arc constituted, and at his death they are extinguished.

3. They carry with them, like usufruct, the obligation of preserving the substance of the thing, both as regards matter and as regards form.

4._ Unlike usufruct, the right of use and of habitation cannot be either assigned or let (S. 436). They cannot be assigned for a price which is paid once only, or transferred by a gratuitous title; nor can they be let for a rent which is paid periodically.

The motive of this difference is that, generally these rights are granted to a person in order to provide maintenance, to give him a place of abode, and therefore they are not negotiable. If the usury or the habitator could transfer them to others, he would be running the risk of depriving himself of that maintenance which the grantor wished to give him permanently.

5. For the some reason they are not subject to debts (Sect. 436): the creditor of the usury cannot garnishee_ the quantity of fruits which the usury has the right to acquire.

How the Rights of Use and Habitation are Constituted

These rights are constituted in the same way as usufruct, but with the following modifications:-

1. Use and habitation are never imposed by law, but only as an outcome of the will of man, whereas usufruct may be constituted also by law.

2. According to the wording of section 427, they are to be constituted by public deed always and without any distinction between movables and immovables. This may be an excessive extension of the intention of the legislator in cases of movables, as our legislator prescribes a public deed, in the case of usufruct, only where the object is or contains an immovable. The deed becomes operative with regard to third parties only when it is inscribed in the Public Registry. Also this rule seams too wide and subject to a restrictive interpretation in the case of use of movables.

Effects

Rights of the Usury

1. The usury has the right to use the thing.

2. He has the right to acquire its fruits, but within certain limits. This right is in fact limited both as regards quality and quantity. As regards quality, the usury cannot give on lease his right, and, therefore, he cannot acquire civil fruits, but only natural and industrial fruits. Another limit, it seems, is to be put here, in view of the fact that the usury has the right to acquire fruits in order to satisfy his personal wants and those of his family; if, therefore the tenement produces fruits which cannot serve for personal use e.g. a stone quarry, it seems that the usufructuary has no right to acquire them.

There is, besides, a more important limit; regarding quantity: the usury has the right to acquire fruits only according to his personal wants and to those of his family. The term "family" here includes spouses and offspring existing both at the time of the commencement of use and born afterwards, even if at the time of commencement the usury had not yet entered the matrimonial state (S. 431). It includes also natural children that have been acknowledged, adoptive children, and, finally, servants.

The usury has the right to acquire as many natural and industrial fruits as are sufficient for his family "loto sensu". According to common doctrine, the personal wants of the usury and of his family limit the quantity of fruits also with regard to the kind of fruits which the thing produces. Thus, the usury cannot take a larger quantity of grain than necessary in order to exchange it with some other person.

3. The right of administration belongs to the usury (S. 435) if the ordinary quantity of fruits does not exceed what is necessary for the usury and his family. In case it does, he has no right to administer the thing such right of administration vesting in the bare owner saving the right of the usury to take the necessary fruits in kind.

Habitation

This is limited to simple use, and it does not include the right of acquiring fruits. The habitator has the right to keep his family in the house in the sense already dealt with, that is, the family can include spouses, offspring, and servants, according to the condition of the habitator. If, therefore, the habitation of a palace is granted to a person he cannot claim to use the whole palace, but only that part of it which is necessary according to his condition, saving other provisions in the deed of constitution, since "dispositio nominis tollit dispositianem legis".

Obligations of the Usury and of the Habitator

1. They both have the obligation of drawing up an inventory and of giving caution, like the usufructuary (S. 432). These obligations, however, do not apply in the cases in which they can be dispensed with in case of usufruct, as also in the following special cases:-

a. In case of use of a fruit-bearing tenement, when the administration of it belongs not in the usury but to the bare owner.

b. The Court can grant dispensation from the obligation of giving security according to circumstances and at its discretion.

2. The usury and the habitator are to enjoy the thing uti bonus paterfamilias (Sect. 433).

3. They are bound to carry out ordinary repairs and to pay ground-rents: another periodical burdens inherent in the object in proportion to the quantity of fruits acquired, or, as the case may be, to the part of the house inhabited.

Extinction of the Rights of Use and Habitation

These rights come to an end in the same way as usufruct, i.e. either ipso jure at the death of the person enjoying the rights, or at the expiration of the term for which they have been constituted, or by non-use for thirty years, by consolidation, loss of the object, or officio judicis when the judge deprives the person enjoying them of the right of use or habitation for abuse or enjoyment.

EMPHYTEUSIS

Acquisition - Rights and Obligations of the Dominus and of the Emphyteuta - Extinction of Emphyteusis Alienation - Right of Preference.

The right of servitude, both personal end praedial, entails the enjoyment of a thing belonging to another person, limited in such a way that the thing remains, the property of its owner. There is, however, another real right on things belonging to third parties which, because of the extension of its contents or because of the length of time for which it lasts, leaves to the right of property a very secondary importance, and it is the real right of emphyteusis, which, according to a theory which sprang during the middle ages, produced the decomposition of property in "dominium directum" or superior ownership, and "dominium utile" or inferior ownership. Although this notion is anti-juridical we cannot deny the fact that it was the idea that the dominus utilis is to be considered as owner which brought about the development of the contents of the right of emphyteusis.

We can, therefore, consider the contract which constitutes this right to be a contract of almost complete transfer of ownership: the direct owner as a matter of fact, retains only the ground rent which is paid in recognition of his right, and the possibility of an eventual consolidation. Yet, property remains reserved in favour of the party alienating, since property is a right which pervades the thing in all its relations, in such a way that when certain real rights ore dismembered in favour of third parties, the property returns to the original owner without the necessity of a fresh transfer.

The economic importance of emphyteusis corresponds to its juridical importance, because by its means land is linked to capital by means of a conciliation between the interests of the owner who is without capitol and that of the capitalist. To the latter, emphyteusis ensures a perpetual and long enjoyment of the fruit of his work and of his capitals for himself and for his successors, without depriving the proprietor of all connections with his property, to which generally he is naturally partial. It was for this reason that the contract of emphyteusis, introduced into Roman Law, was preserved in Common Law and in the majority of modern codes. In the middle ages temporary emphyteusis and emphyteusis for a long indeterminate term, were acknowledged, as also emphyteusis for a number of generations or of nominations or of lives, which were admitted also in our former laws. Besides, the transferability of the right of emphyteusis come under the influence of the feudal system. In France, a law of the 18th December, 1798 abolished perpetual emphyteusis and kept only emphyteusis for 99 years or

for three generations. The Civil Code made no mention of it, for which reason many commentators taught that emphyteusis was no longer admitted as a real right, and that the relative contract was to be considered as a contract of lease "ad longum tempus". But jurisprudence did not follow this theory and continued to consider emphyteusis as a real right on immovables, which right may be subject to hypothec.

A law of the 25th June, 1902, which formed part of the French Rural Code(Title V, Book I) confirmed this jurisprudence, giving-special character, as of yore?, to "bail emphyteutique" which can only be temporary and can lost not less than eighteen years and not more than 99. The first projects of the Italian Code similarly made no mention of emphyteusis, which, however, was later on re-introduced. On the contrary, emphyteusis has no place in the German Civil Code, which, however, admits of an analogous right which can have for its object a construction built above or beneath the surface of the soil ("erdbourecht").

When our laws were reformed, the first law to regulate emphyteusis was Ordinance II of 1858, which was then incorporated into Ordinance VII of 1868 (and thence into the Civil Code). Article 1240 of this Ordinance, now S. 1576 of the Revised Edition, defines emphyteusis as that contract whereby one of the contracting parties (grantor, dominus directus, directarius), grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground rent which the latter binds himself to pay to the former, either in money or in kind, as on acknowledgement of the tenure. The words "grants a tenement" show that the rights granted in favour of the emphyteuta are equivalent almost to ownership, and, like ownership, emphyteusis is one and the same thing with its object.

From the definition given by the law we conclude that emphyteusis cannot have for its object movable things, but only immovables:- "a tenement" and that the ground rent which is paid by the emphyteuta cannot be regarded as an equivalent of the rights transferred by the grantor, but only os a sign of the recognition of <u>dominium</u> which remains reserved to the dominus directus.

Having premised the above, we can now pass on to define emphyteusis as a real, perpetual or temporary right, which con be transferred by an act <u>inter vivos</u> or which

can pass ever to successors "cause mortis" over an immovable belonging to a third party, in virtue of which the grantee has full enjoyment, with the obligation of not deteriorating the object and of paying the ground rent to the dominus directus.

The contract of emphyteusis is in some way analogous to that of lease, because both of them constitute a right of enjoyment (a real right as against the dominus - in emphyteusis and a personal right as against the lessor in lease) over a thing belonging to a third party by means of a consideration which in emphyteusis is the ground rent, and in lease the rent; in certain cases a doubt may arise as to whether a contract be one of emphyteusis or of lease. In order to solve this difficulty section 1580 furnishes the following criteria:-

a. If to the contract the name of emphyteusis is given, it will be held to be an emphyteusis no matter how brief the period for which the grant is mada and independently of the nature of the conditions.

b. If to the contract the name of lease is given, it can be held to be an emphyteusis if the term for which it is granted exceeds or can be made to exceed sixteen years, and if the conditions partake of the natural effects of emphyteusis rather than those of lease.

c. If to the contract no name is given, it is to be considered as emphyteusis or lease in accordance with whether or not the above conditions concur.

A contract which was almost identical to emphyteusis was the contract of feudal tenure, with the difference that it could not be granted except by persons having rights of sovereignty and that the tribute of military service or of homage took the place of the ground rent as a recognition of dominium.

Acquisition of the Right of Emphyteusis

Although this right can be constituted by an act of last will; and acquired by prescription, it is generally constituted by virtue of a contract which is the only mode of acquisition, regulated expressly by law which determines its internal and external requisites.

Internal Requisites of the Contract of Emphyteusis

1. Capacity. - By means of this contract there takes place an alienation of quasi-ownership, and it is therefore necessary that the grantor should have not only the capacity which is generally required for entering into contracts, but else the capacity to alienate. A minor under 18 years

could therefore be incapable of granting emphyteusis even if he be over 14 years of age and be not subject to patria potestas or tutorship or curatorship. Besides absolute incapacity, there can be also relative incapacity between persons among whom there subsists the prohibition of buying or selling, established in sections 1416 end 1418 (Contract of sale between husband and wife). (Pacifici Mezzani, Part IX; Ricci, Corso di Diritto Civile, Vol.VIII para. 14).

2. Consent. mustbe valid according to general rules. It is to be noted that the will of the parties can refer to the obligation of creating a future emphyteusis rather then an actual emphyteusis ("convegno"). In which case, there is the promise of emphyteusis which can be unilateral or bilateral and subject to specific execution like a promise of sale. The same provisions regulating promises of sale apply to promises of emphyteusis.

3. Object and cause. - which, as in all bilateral contracts, are twofold, that is, the tenement and the ground rent. The tenement can -(3 illegible words)- and must contain all the requisites of the object of contracts in general and, in a special way, of the object of the contract of sale. Therefore, tenements extra-commercium, as, for example churches and fortifications, and inalienable tenements:, as a dotal tenement and a tenement belonging to another person are excluded. Emphyteusis, however, may have for its object an emphyteutical tenement belonging to the grantor, in which case, there arises a relation between sub-grantor and sub-grantee analogous to that existing between the former and the dominus directus. This contract is called "sub-emphyteusis".

The authorization of the competent authority is required for the granting in emphyteusis of Church property, according to Canon 1532 of the Code of Canon Law. Crown property cannot be granted in emphyteusis without the appropriate authorization.

The ground rent is that consideration which the emphyteuta gives to the dominus directus and which can have for its subject matter both money and payments in kind, unlike the price in case of sale, which must always be a sum of money. As this payment is a sign of acknowledgement of dominium, it is not made once, like the price in the contract of sale, but annually, saving the faculty of paying by installments and of freely establishing the terms of payment.

The unalterability and indivisibility of ground rent are two characteristics which emanate from the above nature of ground rent or else the requisite imposed by Section 1579 which states that "emphyteusis is null if not made by public deed, - if the grant is otherwise than in perpetuity or for a stated time to be reckoned from a certain date:- and if

the amount of the ground rent is not expressly stated in the contract". The contract would be null where the ground rent is not expressly determined in the contract because as ground rent, at least theoretically, cannot be considered as corresponding to the fruits, we have no criterion to determine it "arbitrio boni viri".

4. Duration. - The Present laws permit the constitution of emphyteusis only, in perpetuity or for a determinate time to begin from a certain date, thus abolishing emphyteusis for an indeterminate time, for a number of nominations and generations, or for the lifetime of one or more persons, which was admitted in our previous laws. This reform was begun by the Code de Rohan which abolished emphyteusis for a number of generations (Lib. III, Cap. IX, para. 19).

External Requisites

In Roman Law emphyteusis was a consensual contract and the written form was required by the constitution of Zeno "ad evidentiorem tantum prebotionem". The written form, however, was required for tenements belonging to the Church and in cases when the parties wanted to regulate the contract with agreements derogatory to the law. Our present laws consider any contracts of emphyteusis null if not made according to the solemn form of public deed, in order to render the contract subject to registration in the Public Registry, as without and before such registration the contract can have no effect with regard to third parties according to the general principles regulating the publication of all deeds by which real rights on immovables are transferred.

Effects

Section 1581 recognizes the liberty of the contracting parties to establish the reciprocal rights and obligations in any manner, so long as they do not go against the law. Where no agreement exists the law establishes the rules regulating this contract, laying down three orders of rules, namely:-

1. The rights of the emphyteuta;
2. Benefits and risks of the tenement;
3. Obligations as between dominus directus and emphyteuta.

1. Rights of the emphyteuta:-

In their complexity these rights form the utile dominium, of which we have already given a general notion, considering it by an expression, which perhaps is not strictly to be admitted, as quasi-ownership. In fact, section 1585 gives to the emphyteuta not only the fruits

of the tenement, but any utility whatsoever, including treasure-troves as regards the part which would belong to the owner. The emphyteuta can change the surface of the tenement so long as he does not deteriorate it. It has also been decided that the emphyteuta can open stone quarries and this both in the old as in the new contracts of emphyteusis (v. Borg nee. vs. Berg, F.H., 22.D. 1880). The emphyteuta can similarly change the form of the improvements which he has made in the tenement, because, during emphyteusis, they belong to him; he cannot, however, destroy or deteriorate them, because the rights of the dominus directus, attaching to the principal thing, that is, the tenement or the ground, attach also to the improvements which are accessory and which, at the expiration of the emphyteusis, belong not to the emphyteuta but to the dominus directus. The emphyteuta has the right to exercise all the actions both petitoriae and possessoriae belonging to the owner, and he can exercise them even against the dominus directus, if the latter usurps the tenement or deprives him of possession of the tenement (Sect. 1585). The emphyteuta can dispose of his rights by any title, both by an act inter vivos and by an act of last will (Sect. 1589)

These rights, which in their complexity form the utile dominium, pass to the emphyteuta in modern law from the moment in which the contract is complete. All contracts by which ownership and other real rights are transferred have all their effects immediately at the completion of the act, even before delivery.

The contract in question, in order to be perfect, must be made by public deed.

Benefit and Risk of the Tenement

Under the term benefit are included all accidental advantages accompanying ownership, e.g. accessions. "Accessorium sequitur principale" and, therefore, it stands to reason that, just as the emphyteuta has the full enjoyment of the tenement from the moment in which the contract is complete, he should also hove the benefit of all accessions. But, what about the risk, or the damages which may fortuitously befall the thing during emphyteusis?

In Roman Law it was discussed whether emphyteusis was to be compared to a sale or to a lease, and Emperor Zeno decided that emphyteusis was a contract "sui generis", which was not to be mixed up with sale, which deprived the seller of all his rights on the thing, nor with lease, because the rights of the emphyteuta were much more ample than those of the lessee. He distinguished the periculum interitus from the periculum deteriorationis, attributing the former to

the charge of the dominus directus, because, as he justly observed, nothing remained in favour of the emphyteuta after total loss of the tenement: "hoc non emphyteuticario cui nihil reliquum morat sed rei domino, qui quod fatalitate ingruebat atiam nulle interdedente contractu habiturus fuerat, imputetur"; he attributed partial loss to the charge of the emphyteuta: "sin vero particolare vel aliud laeve damnum contiguit hoc empnytuuticarius suis partibus non-dubitat attribuendum", that is, just as the emphyteuta enjoys all the accidental advantages of the tenement, so he is to bear the brunt of all partial losses.

The modern codes of law, including ours, have followed the first rule which section 1603 expounds in the following terms: an emphyteusis is dissolved "ipso jure" if the tenement perishes in whole by a fortuitous event. This means that in this case the emphyteuta is not at all responsible, neither to make good the damages nor to go on paying ground rent;, The loss is therefore to be borne by the dominus directus, while the emphyteuta, of course, loses the enjoyment of the tenement. The second rule is to be found in the same Section 1603 which lays dawn that in case the tenement perishes in part, and the remaining part is not capable of yielding a rent equivalent to the ground rent, the emphyteuta may not claim a reduction of the ground rent, but he may demand the dissolution of the emphyteusis, restoring to the dominus the tenement with the improvements even if the remaining part of the tenement consists chiefly of such improvements.

Thus, partial loss during emphyteusis is borne by the emphyteuta, but after the emphyteusis has came to an end the dominus takes back the tenement in the state in which it is actually, and has no right to compel the emphyteuta to reconstruct it. The law admits a variation of this rule in case the loss, although partial, is so heavy that the remaining part is not capable of producing a rent equal to the ground rent. In this case the emphyteuta has the right to demand dissolution of the emphyteusis. But he will have to give back the tenement or the remaining portion including all improvements made by him, even if this remaining portion does not consist of anything else but such improvements. He cannot, however, ask for a reduction of ground rent, because even in this case, ground rent remains unalterable.

### 3. Reciprocal Obligations of the Parties

#### Obligations of the dominus directus.

The dominus, as the alienating party, has these obligations which are to be found in all contracts in virtue of which things are transferred by on onerous title because emphyteusis is a contract of this kind. He is, therefore, under the obligatian of making the delivery

or traditio of the tenement from evictions or molestations of any kind, and also of giving warranty against latent defects. The law is silent on these obligations of the dominus because- they are a logical consequence of the very nature of this contract as a contract transferring property by onerous title. These obligations are regulated by the rules governing sale.

Obligations of the Emphyteuta.

These are:-

1. Payment of ground rent to the dominus as recognition of dominium. Ground rent has two natural characteristics although these characteristics are not essential i.e. indivisibility and unalterability. These characteristics are to be presumed unless there is an express agreement to the contrary.

Ground rent during emphyteusis is unalterable (S. 1582). Thus the emphyteuta can never demand reduction on grounds of change of circumstances, even if the rent produced by the tenement does not correspond to the ground rent. Similarly, we cannot demand remission or reduction of ground rent of one year on the grounds of the total or partial loss of the fruits of that year, whether the cause of such loss be ordinary or extraordinary, although this right is granted to the lessee of rustic tenements. On the other hand, the dominus con never demand increase of ground rent for any reason whatsoever. The rational basis of this unalterability is the fact that juridically the ground rent does not correspond to the enjoyment; its purpose is to serve as recognition of dominium, and such recognition is not capable of being measured, reduced or increased. The modern codes have, in this regard, reformed the common law which was much more practical and equitable, because although unalterability was originally one of the characteristics of ground rent, it began to be modified in jurisprudence when the custom was introduced of granting in emphyteusis tenements already in process of cultivation for ground rents corresponding to the rent. It was then that a distinction of dominium and ground rent was considered as equal to the fruits. In the former case unalterability was preserved while in the latter ground rent could be reduced, because it was realized that under such conditions a contract having the name of emphyteusis was in reality a contract of lease in which case the ground rent, like the rent in a contract of lease, was to be considered as corresponding to the enjoyment and, therefore, subject to reduction according to changes of circumstances. This is the doctrine of Fabius and Vinnius and of the general mass of interpreters and commentators of common law. But the new codes, including ours, have rejected this theory. Section 1576, in fact, lays down that the rules of emphyteusis are to be applied to all contracts bearing this name, even when the ground rent is fixed in relation to the value of the fruits which the tenement yields. The new theory was much fairer.

In order to counteract the progressive depreciation of monetary values, the practice has arisen during the last thirty years of agreeing a periodical revision of the amount of the ground rent. (Say, every 50 years) on the basis of the value of currency at the time of the revision as compared to the value of currency at the time of the emphyteutical concession; such clauses may else be expressed as a "gold-clause" which takes into account the comparative value of gold as a basis for revision. The criterion adopted for revision should not entail a re-assessment of the value of the land or buildings forming part of the emphyteusis.

The second natural characteristic of ground rent is indivisibility (5. 1583). Subject to what is hereinafter stated, the ground rent cannot be divided without the consent of the dominus; and until such division takes place, if the emphyteusis is transferred to two or more persons, it shall be lawful for the dominus to claim the whole of the ground rent from any one of the co-possessors, saving the right of such co-possessor to claim reimbursement from the other co-possessors. Also this character derives from common law and was confirmed in the Code de Rohan Lib. III Cap, IX, para. 19. The rational basis of the indivisibility of ground rent is to be traced to the very function of ground rent as a recognition of dominium, because such a recognition is not theoretically capable of being divided. But indivisibility has also a practical purpose, that is, the fact that the dominus can ask for the whole ground rent from one person instead of having to ask for a quota from each of the emphyteuta and sub-emphyteutae among whom the tenement may happen to be partitioned.

Fundamental changes were introduced by Act XXVII of 1976 which provided that where the tenement is transferred or otherwise belongs to two or more persons separately, the dominus may not refuse his consent for the division of the ground rent, if such division is made substantially in proportion to the separate parts held by the persons requiring the consent. Other changes introduced are explained hereunder.

As regards the effects of the indivisibility of ground rent, we must distinguish the relations between the creditor or dominus and the co-debtors or co—emphyteutae, and the relations existing among the co-emphyteutae.

In the first order of relations, the effects of indivisibility are that the dominus can ask for the whole ground rent from any emphyteuta whatever be the portion which the latter may possess, and that the payment made by one of the co-emphyteutae frees all the others from payment. The co-emphvteuta who has been made to pay the entire ground rent has one right to call into the suit all the others in order that the Court may establish what share is to be borne

by each. In the second order of relations, we must apply the principle that the ground rent, being a common debt, is to be divided among the various co-emphyteutae in proportion to the part of the tenement which each possesses. The co-emphyteuta, therefore, who has paid the entire sum has a right of redress against the others for their shares. This redress is, therefore, to be regulated by shares and the emphyteuta who has paid the whole cannot sue another co-emphyteuta for the whole, even if the dominus has expressly assigned to him the right to demand the whole payment from each of the other co-emphyteutae, because such concession is by law ineffective, otherwise there would be no end to redress and lawsuits. In this right of redress which the emphvteuta who has paid the whole sum can exercise, he enjoys the benefit of legal subrogation in the rights of the dominus. He succeeds him in all the warranties and especially in all the privileges and hypothecs enjoyed by the dominus against the other co-emphyteutae. If any one of them is insolvent, the loss caused by such insolvency is borne by all the other co-emphyteutae in the some proportions in which they are to bear the debt of the ground rent.

As already stated the indivisibility of the ground rent comes to an end if the dominus consents to a division. The consent given by the dominus for the transfer of one or more separate parts of the tenement to different persons or the receipt by him of one or more portions of the ground rent shall have the same effect as an express consent given by the dominus for the division of the ground rent.

The second obligation of the emphyteuta is that of not causing any deterioration to the tenement and of keeping same in good state. (S. 1586). All repairs are to be borne by him during emphyteusis whether such repairs be ordinary or extraordinary, or whether they affect the original tenement or the improvements made by the emphyteuta, even if they have been, made by him voluntarily. Just as the enjoyment of the emphyteuta has a larger extension then that of the usufructuary, so his obligation is also more extensive and includes repairs which the tenement may from time to time require. The emphyteuta, however, is under no obligation of improving the tenement, or, at least, he has no such obligation according to the nature of this contract, but, in practice, he may have such an obligation by virtue of an express agreement to the effect that the emphyteuta must, within a certain term, spend a curtain sum in improving the tenement. This is often in the interest of the emphyteuta himself, who only by this means can acquire those gains which he expects to acquire by means of the emphyteusis. At any rate, if he makes improvements, whether by express agreement or without such agreement, the fact always remains that the improvements are accessory to the tenement

and are, therefore, affected by the rights of the dominus and all the obligations which the emphyteuta has with respect to the tenement extend also to the improvements.

At the termination of emphyteusis the emphyteuta is to give back the tenement including all improvements, in good state of repair (Sect. 1586). It fellows that he is to be held responsible for total or partial losses and for deteriorations both in the tenement and in the improvements which happen through his fault. He is therefore, to indemnify the dominus, replacing what has been lost through his fault, repairing what has been deteriorated or paying the equivalent of the expenses incurred in such reconstruction or repair.

The emphyteuta is responsible not only for what he himself does, but also for the deeds of members of his family, servants, guests, tenants, and sub-emphyteutae, who have not been directly recognised by the dominus (Sections 1604 and 1606). This is called indirect responsibility and it boils down to personal responsibility, that is, it consists in lack of due diligence. All damages and deteriorations which take place during emphyteusis are presumed to have taken place through the fault of the emphyteuta or of persons for whom he is held answerable, so that it is up to him to prove that such damages or deteriorations are due to a fortuitous cause or to "force majeure". The emphyteuta, as a matter of fact, enjoys material possession of the tenement during emphyteusis, and it is therefore reasonable that he should be held responsible for damages due to his negligence.

The fourth obligation of the emphyteuta is that to perform what all owners of tenements, both urban and rural, are held by law to perform (Sect. 1588). The law, however, mitigated this obligation in case of temporary emphyteusis when the expense required for the performance of such obligations is considerable, because it would not be just to compel the dominus utilis to bear the whole of it; he is made to pay a share determined by the Court regard being had to the time remaining for the cessation of the emphyteusis, to the sum of the ground rent, and to other agreements as well as circumstances particular to the case (S. 1586).

The last obligation of the emphyteuta is to restore the tenement, including improvements, in a good state of repair at the termination of the emphyteusis.

Warranty for the Performance of the Obligation of the Emphyteuta

The dominus directus has by law the following warranties as against the emphyteuta:-

1. A privilege over the utile dominium of the tenement including improvements and of the fruits thereof, as well as on all objects within the tenement serving for its cultivation or upkeep to whomsoever such fruits and objects may belong (Sect. 2113)

2. The lex commissoria; if the emphyteuta fails to perform his obligations, the dominus may obtain dissolution of emphyteusis and take possession of the tenement with all improvements therein existing. In Roman Law this lex commissoria was understood to be operative in all innominate contracts, and the modern legislations hove extended it tc all bilateral contracts, both nominate and innominate.

Dissolution of Emphyteusis

A. Causes of dissolution

Emphyteusis comes to an end for the following causes:-

1. Through total loss of the tenement due to a fortuitous cause (Sect. 1603) because both the real right of emphyteusis and the contract which has given rise to it would lose their object, and neither the one nor the other may continue to exist once the object is lost. In case of partial loss due to a fortuitous cause, emphyteusis can come to an end if the circumstances laid dawn in Section 1603 concur. The latter dissolution can take place only if asked for by the emphyteuta, whereas the dissolution due to total loss takes place "ipso jure".

2. As a consequence of express or tacit "patto commissario"
known in law as express or tacit resolutive condition. This condition is verified in case one of the parties fails to perform his obligations, whether such party be the dominus or the utilista. The law applies this rule explicitly when dealing with the two principal obligations of the emphyteuta, namely payment of ground rent and deterioration of the tenement. Emphyteusis can cease to exist for the reason that the emphyteuta has not paid the ground rent only if the emphyteuta is guilty of such failure for three years or if, although he has made partial payments, he still remains debtor in an amount corresponding to three yearly payments. No
other condition is necessary, not even is there any need

ecclesiastical emphyteusis, delay for twe years was enough for the Church to be able to avail herself of the privilege granted to her by Justinian in the Novella III, Chap. III In modern law, delay for three_ years is always necessary both if the emphyteusis is ecclesiastical or not, saving, of course, any agreement to the contrary in the original contract.

Both in case of delay for three years and of considerable deteriorations of the tenement or the improvements the other general principles of the "patto commissorio" are applied. In these cases the demand for dissolution is optional with regard to the dominus (sections 1605, 1606).

Because it would be unreasonable that the emphyteuta should turn his default to his own advantage and thus find a way to extricate himself from his obligations, the dominus can therefore, instead of demanding dissolution, insist upon the execution of the obligations which are to be performed by the emphyteuta, strengthening his rights by a general hypothec on all the estate of the emphyteuta, both present and future, in order to obtain payment of ground rents due or to have the necessary repairs carried cut; when the dominus avails himself of the "patto commissorio", he may in the same suit ask both for dissolution and for payment of ground rents due, or for repairs, because the one demand is not inconsistent with the other.

According tn...Earlier law, if the "patto commissorio" is expressed, dissolution of emphyteusis takes place "ipso jure" and the decision of the Court does nothing but declare that dissolution which it cannot prevent. By Act XXVII of 1976, even if there is an express stipulation of automatic dissolution, the Court may grant "purgatio morae". If the "pactum commissorium" is tacit, dissolution takes place "officio judicis" by virtue of the decision, and the Court can grant to the emphyteuta the benefit known as "purgazione della more", that is, it con give him a period of time so that he may perform those obligations which he failed to perform. This benefit bears this name because it removes the effects of delay. If the emphyteuta does net avail himself of this benefit, or if he still fails to perform his obligations within the term given by the Court, emphyteusis comes to an end. The Court may grant a reasonable period of time according to the circumstances of the case and such period may be extended only once. Not only the emphyteuta can ask for this benefit, but also any other interested person e.g. a creditor, who wishes to preserve his rights on the utile dominium. Any interested person can therefore intervene in the suit set in motion by the dominus against the emphyteuta to ask for the grant of this benefit. For the same reason,

any interested person may during the term granted make up for the delay ("purgare la mora") even if the original time limit has been demanded by some other person. The third party who performs these obligations by paying ground rents and furnishing the money for the necessary repairs and for the carrying out of all the other obligations of the emphyteuta, has a right of redress against the latter for sums paid, and in this redress he enjoys the benefit of legal subrogation in the rights of the creditor, that is, of the dominus utilis. This is on application of the principle that when any person having interest pays somebody else's debt, he succeeds to the rights of the creditor (Sect. 1209).

3. Through consolidation, that is, the union of the utile and of the directum dominium in one and the soma person. Both if this reunion takes place in virtue of an act inter vivos or by succession causa mortis.

4. By the lapse of the term, when the emphyteusis is temporary. The emphyteuta has no right to demand a renewal of the grant. In previous jurisprudence many questions used to arise as to whether renewal was to be granted at the expiration of the term, especially if the emphyteuta had made considerable improvements on the tenement. Section 1609 has expressly abolished any action for the renewal of emphyteusis for any cause whatsoever, saving the case in which the emphyteuta has expressly stipulated for such grant in the contract of emphyteusis or in some other relative public deed.

In Roman Law dissolution could also be caused when the utile dominium was alienated by the emphyteuta "irrequisito damino".

B. Effects of Dissolution

As regards the relations between grantor and grantee, the effects are:-

1. The devolution of the tenement with all improvements to the dominus, and, therefore, the obligation of the emphyteuta to make restitution.

2. If dissolution takes place because the emphyteuta leases his right through non-performance of his obligation to make payment or to preserva the tenement in good state, the emphyteuta has the right to receive compensation for improvements (Sect. 1611). The emphyteuta, as a matter of fact, would in this case lose his right. Prematurely one is deprived of the enjoyment of the improvements made by him. It would be against equity to let the

premature dissolution. Compensation is limited to the minor sum between the price of the improvements regard being had to their value at the time of devolution, and the increase in value of the tenement through such improvements. This sum does not, indeed, belong wholly to the emphyteuta, but only a part of it, which is to be determined regard being had to the time remaining for the expiration of the agreed term, because it is obvious that, for example, emphyteusis comes to an end prematurely at a time when the natural extinction of some is approaching, the emphyteuta should not be entitled to receive any compensation, because at any rate he would be supposed to cease enjoying the improvements at the time, approximately. It may happen that the dominus is not in a position to pay the whole compensation and it is clear that he ought not to be compelled to incur serious expenses when his financial means are not good. The law gives him the faculty of making such payment later, without any limit of time, with the interest of three per cent in favour of the emphyteuta. The dominus must, in such a case, offer security by a special hypothec upon the tenement including improvements. Such warranty may be insufficient because the dominus may be bound by preceding hypothecs, and the law, therefore, would have been better if the emphyteuta had been granted a special privilege on the tenement including improvements.

As regards relations between the parties on one hand and third persons on the other, to the dissolution of emphyteusis, all rights of third parties upon the tenement subject to emphyteusis constituted by the emphyteuta, come to an end. There happens, therefore, a dissolution, according to the wording of Section 1610, of all hypothecs, servitudes or other burdens constituted by the emphyteuta upon the tenement or the improvements, and the tenement with its improvements devolves to the dominus free from any such right. This rule extends also to servitudes burdening the tenement independently of the will of the emphyteuta, e.g. acquired by prescription, because neither the action nor the inaction of the emphyteuta can prejudice the dominus. Only leases of the tenement granted by the emphyteuta are to be respected by the dominus, but only for a term exceeding that normally granted, and under just conditions.

## Alienation of the Rights of Emphyteusis

Under the old legal system the emphyteuta could not alienate the utile dominium "sine consensu domini" or "irrequisito domino", saving an agreement to the contrary. He would have to give notice to the dominus of his intention

to alienate the utile dominium giving him a term of two months in order that the dominus might, if willing, acquire the utile dominium himself on the same conditions offered by the others. In other words, the dominus had the right of praelatio, which was to be exercised within the term of tuo months. If the dominus did not avail himself of his right within the above term, the emphyteuta could transfer the tenement so long as such transfer was made in favour of persons allowed by law, and the dominus was bound to recognize such lawful person. Forbidden persons were: persons in power, the fiscus, the Church, the barons, whose power the dominus was justified in fearing. If these conditions were conserved, the emphyteuta could alienate the utile dominium; but if he transferred this right "sine consensu domini" or "irraquisito domino" he lost his right as emphyteuta. In practice, however, jurisprudence always succeeded to find some reason in order to evade the rigour of this rule.

In the Middle Ages, besides these emphyteuses, which could be transferred under the conditions mentioned above, through the influence of the feudal system there arose a new kind of emphyteusis which was not transferable, but which was to be preserved in favour of the descendants of the first grantee. This took place by an express pact in the contract, which pact was called "a pact of investiture", by means of which the emphyteusis was reserved to the descendants of the first emphyteuta without the necessity of any entail, but only in virtue of the provisions and of the solemn and concise forms such as "tibi tuisque discendentibus" or "tibi tuisque successeribus" or "ex tuo corpora legitime, discendentibus". Such contracts were known as "ex pactu et providentia", while the others were called hereditary because they were transferable to all heirs, even if they were extraneous. Section 1589 upholds the liberty and the transferability of the rights of the emphyteuta without any restriction, condition or formality, as regards the dominus utilis; so that a transfer can take place even "invito domino". This is a consequence of the modern economic end juridical principles that uphold that property should be free from all ties. The emphyteuta can freely dispose of all the tenement including improvements, or part of it; he can transfer the whole of his rights or a part of them e.g. by constituting a right of usufruct, or of use, or habitation, or a servitude, or by giving the tenement in sub-emphyteusis (an institute which has been abolished in Italy). All these transfers of utile dominium are null if not made by public deed, because it is a case of the transfer of real rights over immovables. They are also subject to the usual formalities of publication and registration, otherwise they will have no effect as regards third parties.

Effects of the Transfer of Utile Dominium

With reference to the relation between the party alienating and the acquiring party, the obligations of the former pass on to the latter when the deed of transfer is complete, because such is the nature of acts transferring property and other real rights. From that moment, therefore, saving any agreement to the contrary, the ground rent begins to run as against the acquirer as also the damages are to be borne by him. If the emphyteuta pays those ground rents or repairs these damages, he has a right of redress against the new possessor.

With reference to the relations between the dominus and the emphyteuta, and sub-emphyteuta, the effects of the transfer are: -

1. If the dominus utilis gave his consent to the transfer, the acquirer becomes by novation his debtor instead of the emphyteuta, as is to be argued "a contrario sensu" from Section 1590 which lays down that if the emphyteuta transfers his rights without the consent of the dominus he does not free himself from his obligations towards some. It must be a case of a consent for alienation in favour of a determined person; no novation comes into being by a general and indeterminate consent.

In the absence of such consent, the transfer is an act which has taken place between the emphyteuta and the acquirer and which is a "res inter alios acta" in so far as the dominus is concerned: therefore, novation does not take place except in case and from the moment the dominus acknowledges the acquirer as emphyteuta (Sect. 1590). Hence, the following rules which are to be applied where there has been no consent on the part of the dominus and so long as he has not acknowledged the new acquirer:-

a. The first emphyteuta remains bound towards the dominus; he is to bear ground rents and to make good damages even if such damages take place after the alienation, saving redress against the acquirer.

b. Also the acquirer, though still not acknowledged, is personally bound towards the dominus for the whole ground rent which falls due and for the damages that take place during his possession. He is bound not only indirectly, that is, so far as he is bound to the old emphyteuta, who, in his turn, is responsible with regard to the dominus, but also directly for such ground rents and damages falling due or taking place after alienation. The law, therefore, in order to avoid the plurality of suits has sanctioned the principle that the dominus can direct his action straight against the acquirer (S. 1590).

c. The acquirer, by means of this direct and personal action is not bound to pay ground rents or to make good damages which have fallen due or taken place prior to the transfer, but he is bound to do so by means of the real action; saving the rights, even in respect of such ground rent and damages, of the dominus on the emphyteutical tenement, on the fruits and on the value of all things which serve for the furnishing or stocking or for the cultivation of the tenement, to whomsoever such things may appertain. If, however, the acquirer, in order to avoid expropriation, pays the debt of the alienating party or if he suffers expropriation as a consequence of the actio hypotecaria, exercised by the dominus to obtain payment of such ground rents or repairs of such damages, he has redress against the alienating party.

After acknowledgement, the alienee is the only debtor as regards the dominus, and the emphyteuta, by novation, is free. The dominus is bound to acknowledge the alienee if he is o competent person to carry out the obligations arising from the grant. If, on the contrary, the acquirer is not a competent person, the dominus can refuse to acknowledge him and keep the old bond with the emphyteuta, because this does not deprive the emphyteuta from freely disposing of his utile dominium; as a matter of fact, if the alienee is not acknowledged, the alienation made in his favour still holds good.

2. Also the alienee must acknowledge the dominus, who has the right to ask that the acquirer be personally bound to perform all the obligations arising out of the emphyteusis; it will not be out of place to point out that if the first emphyteuta has subjected his estate to a hypothec in warranty of such obligations, the dominus has the right to ask for a similar hypothec upon the estate of the alienee.

In earlier law, the form of the deed of acknowledgement was null unless it was made by public deed. This formality is now no longer required. Acknowledgement may be either express or implied. The payment or receipt of ground rent or of laudemium by or from the alienee shall operate as an implied acknowledgement unless an express reservation is made by a judicial act.

LAUDEMIUM

In ancient times the domini used to extort large sums of money in order to acknowledge the alienees. Justinian imposed as a maximum 1/50th of the price of value of the tenement (Costitutio III, para. iv. Cod De Jure Emphyteutico).

This compensation was called ''laudemium" ("a laudande") which, in common law, was included as one of the natural effects of emphyteusis. It was regulated in different ways in the different countries in which there grew customs that were at variance with the rule laid down by Justinian. Thus in Malta "laudemium" was regulated on the basis of one year's ground rent by a custom which became later "jus scriptum" in the Code do Rohan (para. 26 Cpo. ix, Lib. III). According to the present laws (Sect. 1594), "laudemium" is no longer considered as one of the natural effects of emphyteusis: it is to be paid only when expressly agreed upon. Laudemium may not be in excess of one year's ground rent. and no laudemium is due, if the emphyteusis is for a period of less than 20 years.

Abolition of the Right of Preference

According to earlier law, when the "directum dominium" or the "utile dominium" was alienated, in whole or in part the direct owner or the emphyteuta had the right to take over the rights acquired by refunding the purchase price and relative costs to the acquirer. This right was described as the right of preference in some cases and as the right of Pre-emption (i.e. legal retratto) in other cases. By conferring such rights the law aimed at the consolidation of the "directum dominium" with the "utile dominium", and at the elimination of the responsibility for the debts of others arising from the bond of responsibility in the payment of the ground rent. Such rights arose automatically "ex lege" but they were often also stipulated or regulated in the contract creating the emphyteusis or sub-emphyteusis.

By Act IV of 1961, the rights of Preference and Pre-emption, whether arising "ex lege" or "ex contractu" were abolished with retrospective effect. The reason for such addition was that they caused a serious restriction to the free disposal of immovable property. One feature of the earlier law which was that the period for the exercise of the right of Preference was one year reckonable

"a die scientiae" i.e. from the day when the person entitled to the right became personally aware of the transfer having taken place. The necessity of personal knowledge occasionally resulted in the exercise of the right of Preference, many years after the transfer, to the consequential prejudice of the acquirers of such property.

The abolition of the Right of Preference brought about a considerable decrease in the value of "directa dominio" which now have very limited potential value and are regarded principally as an investment with a fixed return. The unalterability of the ground rent is also a seriously limiting factor in the disposal of "directa dominio". Commercially they are regarded as having a value on the basis of a capitalization of 5, 6 or 8 per cent or even lower. For Succession Duty and Donation Duty purposes capitalization is made at 8 per cent.

TRANSITORY PROVISIONS

Until 1876 the provisions introduced by Ord. II of 1858 (as incorporated into the Civil Code) were as a rule, not applicable to the old contracts of emphyteusis, that is, to those contracts which were drawn up prior to March 15th, 1858. Such contracts remained subject to the previous laws under which they came into being, and this in conformity with the principles of ius transitorium, both if the emphyteusis is considered in itself as a real right, and if considered as a contract, because both real rights and rights and obligations arising out of contracts are subject to the laws existing at the time of their creation. An exception was made by certain provisions which section 1613 considered retrospective

1. Those of sections 1583 and 1584 relative to indivisibility of ground rent and of the relative effects.

2. That of section 1590 relative to the effects of transfer of utile dominium with regard to the relations of the transfer or with the dominus so long as the latter has not acknowledged the transferee.

3. That of section 1607 relative to the mode in which emphyteusis could come to an end through the fault of the emphyteuta in the payment of ground rent or through deteriorations of the tenement.

In 1976 s.1613 was substituted. As it now stands, all the provisions of the Civil Code now obtained concerning Emphyteusis are applicable to all contracts of emphyteusis, irrespective of the date on which they had been entered into. The only exception relates to contracts that had been terminated by agreement or by judgment constituting "res judicata" before 1st July, 1976. In regard to such cases, the law applicable at the time of their termination or dissolution shall, insofar as necessary continue to apply.

## POSSESSION

The right of ownership and other real rights are the judicial representations of the power of man over the things. Possession, instead, is a mere fact of man, a case of mere physical control. In jurisprudence, it is defined as the physical power which a person exercises over a thing with the intention of putting into action a real right. This definition takes it for granted that the object of possession is a corporeal thing. Yet, also with regard to things incorporeal a state of fact may arise which is analogous to possession of corporeal things; and this state of fact is known as "possessio juris" or "quasi possessio".

Such physical control is to be accompanied by an intention of exercising over the thing in question a real right. Therefore, possession entails a notion of right, and this notion is not the cause, but the purpose of possession. In doctrine, this element of possession derives from the works of Savigny, who considered it as the preponderant element; hence his system is known as the system based on the "subjective theory".

Modern doctrine, however, is more in favour of the "objective theory" expounded by Ihering, according to which possession exists whenever physical control is voluntarily exercised over a thing, saving those cases in which it is clear that there is a "causa possessionis" of such a nature as necessarily implies detention of a thing by one person on behalf and in the interest of another person. In such cases, this accidental element has a negative function, namely, that of excluding possession "propria dictu" in favour of simple detention. But, where such exclusive cause of possession is absent the judge is to decide in favour of physical control as generally understood. Section 562 seems to conform to this theory, it is presumed that a person possesses on his behalf and as owner when it is not clear that he has begun to possess on behalf of another person. The law reserves to possession the most important juridical effects, but such effects are reserved also in favour of simple detention as we shall see when dealing with "actiones possessoriae".

Possession and Ownership

Ownership is the right of exercising an absolute power over the thing; possession is the effective exercise of such power, hence, "de facto" possession is what ownership is "de jure". The owner has the right to possess, the possessor exercises this right which the owner has.

Possession can be joined to ownership or to another right, and it can also be disjoined from such rights. This is immaterial for the existence or otherwise of possession and for the realization of its effects. Hence, a possessor who acts without right is, from the point of view of possession, similar to that person who exercises a right which in reality he has. Thus it may happen that:-

1. Possession is united to ownership, possessor and owner being one and the same person;

2. That an owner is not the possessor of the thing he owns; and

3. That a possessor is not the owner of the thing he possesses.

Although possession is a state of fact existing sometimes in a person who has no right, yet it produces certain juridical effects, and may give rise to certain rights. Thus, with regard to acquisition of fruits, possession, although not united to ownership, con attribute to the possessor the property of the fruits. As regards "actiones possessoriae" against molestations and spoliations, the law gives to the possessor such actions even when he is not the owner and even if the person responsible for molestation or spoliation be the owner himself. The sum of these rights goes to constitute the "jus possessionis" which is to be distinguished from the "jus possidendi", which is the right of the owner to possess the thing.

Possession can also be a mode of acquisition of property or of another right by means of prescription; what was a mere state of fact can be covered into a state of right, thus causing the former owner to lose his right .

Subjects and Objects of Possession

It is obvious that those persons who are capable of ownership or other rights are capable of possession because possession is nothing but the exercise of the fact of ownership or of other real rights. Therefore, infants and persons of unsound mind as well as juridical persons are capable of possession although they are incapable to will

to exercise their rights, because the will of their representatives makes up for the defect of will in such persons.

The law in section 561, defines possession as "the detention of a corporeal thing or the enjoyment of a right, the ownership of which may be acquired, and which a person holds or exercises as his own". Objects of r possession, therefore, can be:-

1. Things corporeal; and

2. Other real rights which are also capable of an effective control.

Besides, jurisprudence extends quasi-possession to all the other patrimonial rights, and this is in harmony with the provisions of section 1196, which lays down that payment made in good faith to a person who is in possession of the debt is valid, even though the possessor has subsequently suffered eviction in respect of the debt. It is for this reason that section 561 defines possession "sensu lato" including not only possession of things corporeal but also the enjoyment of any right.

The object of possession in all cases must be such that property thereof can be acquired; it must be therefore "in commercio", because possession is "de facto" what ownership is "de jure". Such things as the air, the sea, the streets, squares, churches, and such like cannot be objects of possession. If a person has exercised acts of possession over such objects he can be entitled to no one of the juridical effects of possession.

Legitimate and Illegitimate Possession

Possession is legitimate if the following characters concur:-

1. That it is continuous;
2. That it is not interrupted;
3. That it is peaceful;
4. That it is public; and
5. That it is not equivocal.

1. Possession is continuous when the possessor has not willingly desisted from exercising acts of possession to which the thing is subject according to its kind. It is discontinued when the possessor has willingly neglected the exercise of those acts in such a way that he may be said to have_ given up the will of acting uti dominus or of exercising any other right over the thing. Acts of possession to which the thing

is subject according to its kind imply that not all things are subject to a constant possession; some things are capable only of an intermittent possession, e.g. the possession of a timber wood which is exercised by means of the falling of trees which can be carried out from time to time; or a servitude of aqueduct, which is exercised only when irrigation is necessary.

II. Possession is not interrupted when it has not been given up through an act either of the possessor himself or of a third person. Possession can be interrupted through an act of the possessor himself if he acknowledges a right of ownership in another person. It must be an act of civil interruption; such act is a positive act of the possessor whereas non-continuous is an act of omission. Facts performed by a third parser, and interrupting possession may be natural or civil. Natural would be the fact that the possessor has been deprived of possession for a term exceeding one year, whether such act is done by the owner or by a third person. Civil acts of interruption are certain measures laid down by law in favour of the owner in order that he may protect his right against prescription. Such measures are a judicial demand or any other judicial act (Sections 2233-2237). These measures cannot be brought to bear against the possessor by any other person except the owner because they have been created by law exactly to protect, the rights of ownership. Therefore, if the person performing these acts is not the owner, possession remains uninterrupted: althoughinourlegalsystem (Sect. 2212) non-interruption is considered as one of the qualities which legitimate possession is to have and although interruption is considered as an element vitiating possession, yet, strictly speaking, interruption does not affect the general theory of possession but only that of prescription.

It is not a simple element which undermines possession but it implies the loss of possession itself, it renders previous possession useless although it does not prevent it from commencing afresh.

III. Possession is peaceful when it has been acquired without physical or moral violence according to the general principles of law. This quality is required because the law must guarantee right against violence. Such a vitiation is relative to the person suffering violence, that is, to the former possessor who has suffered spoliation with violence. Note that according to our present system of law, unlike Roman Law, initial violence does not perpetually vitiate possession as this can be recommended legitimately when violence has ceased. (Sect.564)

IV. Possession is public when it has been acquired by means of visible acts, especially with regard to that person against whom the author of these acts wants to acquire possession. It is not necessary that such acts should have been actually witnessed; it is enough that they could have been. Thus, possession would not be public but clandestine when acquired by a person who has dug underneath a tenement belonging to a third party in such a way that the owner of the overlying tenement could not have been him. Also, this vitiation is relative to the person regarding whom possession has been clandestinely acquired; not is it perpetual since legitimate possession may begin as soon as it is no longer clandestine but public (Sect. 564). Possession must be public because clandestine usurpation is fraudulent and it is therefore to be suppressed by law.

V. Possession is equivocal when the "animus" of exercising a right is not certain, that is, when by the conduct of the possessor and other circumstances it is not clear that the possessor detains the thing as his own or that the person exercising certain acts corresponding to a given right over a thing exercises them with the idea of exercising a right. Such is the possession of common objects exercised by a co-heir or co-owner because the others may reasonably believe that he possesses the thing in the interests of the community since by law each of the "consortes" can make use of the common thing so long as he does not hinder the others from using it likewise. His possession, therefore, is promiscuous. Equivocal possession is that resulting from the exercise of facultative rights or based on tolerance, or, in the words of section 563: "acts which are merely facultative or of mere sufferance cannot found the acquisition of possession". Doctrine is very uncertain as to the meaning of "acts which are merely facultative". Pugliese (Presc. Acquisitivo, pp. 163, 164) understands by this expression those acts of enjoyment which a neighbour may gain through the fact that the other neighbour abstains from performing certain acts which by right he may perform e.g. the enjoyment of prospect so long as the neighbour does not build, the enjoyment of the use of a fountain so long as the neighbour does not deviate the source. This enjoyment cannot constitute possession of the right to hinder the neighbour from the exercise of such faculties because it is unstable, and depends not on the will of the person who had constituted such enjoyment but on the caprice of another person.

French authors (vide Baudry-Lacantinerie, Vol. I, Precis do Droit Civil, para. 1410; and Planiol et Ripert, Droit Civil, Vol. III, para. 962) consider as facultative acts those which a person has the faculty to exercise according to law and the exercise of which does not imply the usurpation of another person's right. Thus, in French and Italian law a neighbour has the faculty of opening windows in a partition wall which belongs to him. By opening such windows he causes no lesion to the rights of his neighbour; but

the exercise of such faculties con never take the shape of a servitude of opening windows ("servitu di finestro") over the neighbouring tenement, and windows which have thus been opened have sometimes to be closed in case the neighbour acquires a right of community on the partition wall.

Another example of the exercise of facultative acts intended in this sense and which might take place under our legal system would be the following: -

The owner of an inferior tenement makes use of the water coming from the source which is in the higher tenement without having made any works to facilitate the course of the water from the higher tenement into his own. This would constitute the exercise of a faculty which can never give rise to prescription as against the owner of the higher tenement. Baudry-Lacantinerie criticizes the interpretation of Pugliese because if we understand facultative acts in this sense, the provision under discussion would refer to the impassibility of extinctive prescription regarding ownership and the faculties which form the contents of this right which is by nature perpetual, rather than to the requisites of possession for purposes of acquisitive prescription.

Acts of simple tolerance are those which a person permits another person to exercise for reasons of familiarity and "bon voisinage", and, therefore, without the intention of transferring a right or of allowing the acquisition of a right. Thus, a person who avails himself of such benevolence is not to be understood as a usurper of a right and his will is not only not certain but it is the opposite of the will of a person exercising a right which belongs to him.

Also the fact that a possession is equivocal is relative to the person by whom possession has been precariously obtained, but it is a permanent vitiation, because it is to be found at all times together with the acts of possession in question. These characters which form legitimate possession are important especially with reference to acquisitive prescription, and some of them, that is the fact that possession must be public, peaceful, and non-equivocal, are important also with reference to the "actiones passesoriae".

Possession in Good Faith and in Bad Faith

Good faith, with reference to the possession of a thing or of a right belonging to another person, is the conviction, justified by probable grounds, which the possessor has that the thing possessed by him is his, or that the right which he exercises belongs to him.

A possessor in bad faith, therefore, would be the person who knows or who ought to presume that the thing or right possessed by him belongs to another person.

Thus it is a question of fact whether a possessor be in good or bad faith; but good faith is to be presumed (Sect. 569) because "nemo malus nisi probetur". This distinction does not affect legitimacy of possession but affects the acquisition of fruits, the measure of reimbursement for expenses, the measure of indemnity for which the possessor is responsible, vis-à-vis the owner, and the time necessary for prescription.

## Direct and Indirect Possession

Possession is direct when exercised by a person who keeps a thing in his own name end exercises the relative rights. Possession is indirect when exercised by means of another person who keeps a thing or exercises the relative rights in the name and on behalf of the former. Such is the possession of the lessor who by means of the lessee possesses a tenement and exercises servitudes which may exist in favour of the tenement given on lease. One is a simple holder because he holds the right in the name of another person, and the other is the real possessor although his possession is indirect.

Whether possession be direct or indirect, it always produces the same effects (Sect. 561).

## Acquisition, Continuation, Union and Loss of Possession

### Change of the Title of Possession

Acquisition - Possession is acquired by the concurrence, of its two constituent elements, viz: corpus possessionis (physical fact) and animus possideni (intention). In other words, possession of a thing is acquired by subjecting it to one's own physical control and by manifesting the intention of exercising a real right over a thing. The acquisition of possession, like the acquisition of property, can be original and derivative. A derivative mode is occupation, which is the act by means of which a person takes hold of a thing and subjects it to his physical power "animo domini". It is necessary that the thing be not already possessed by another person, either because it was never possessed by anybody or because the former possessor has lost possession. Derivative is traditio which takes place when the possessor of a thing transfers his possession in favour of another person. In order that traditio may be complete, it is not necessary that the accipiens should take material possession of the thing as there are various kinds of "traditio".

Kinds of tradition. The same distinctions which were applicable in Roman Law in cases of transmission of ownership are today applicable in traditio of possession. It can be real, symbolic, and 'brevi manu', and it can also come into being by means of the ''constitutum possessorium".

In "traditio brevi manu" and in "constitutum possessorium" there is a change in the title of possession.

In the former the possessor of the thing transfers possession in favour of the person who already held it "nomine" and now continues to hold it "proprio". It-is - ~ - celled "traditio brevi manu" because the thing remains in the power of the same person and it is not necessary that the acquirer should hand over the thing to the alienating party in order that the latter may make a rei "traditio". This change of title is called "conversion of possession".

In "constitutum possessorium" there is a change of title of detention in the opposite sense: the alienating party possesses the thing first "proprio" and then, having transferred possession in favour of another person, he continues to hold it "nomine", that is, in the name of the new possessor.

Continuation of Possession

This consists in the transfer of possession from the decujus to his successor by universal title. It takes place at the death of a person and includes all the things which were subject to the material control of the decujus. It becomes operative "ipso jure" and "ope legis", onci it was called by the ancients "successio possessionis".

Union of Possessions

The ancients called it "accessio possessionis" and it consists in the union which the successor by particular title can make of the possession of his predecessor with his own possession in order that he may enjoy the effects thereof. The practical importance of continuation and of union of possessions refer to:-

1. The duration of acquisitive prescription for the purposes of which the successor by universal or particular title, by virtue of continuation or union of possessions, can add to the duration of his own possession also that of the possession of the decujus.

2. The continuation of possession has also another practical effect which is that of vesting the heir of the possessor with all that which was possessed by the decujus, in such a way that each particular successor of the decujus must demand the traditio of an object bequeathed to him to the heir, because

the possession of the whole estate passes on to the heir and the legatee who takes possession of his legacy would be violating the possession of the heir who, in such a case, can make use of the "actiones possessoriae".

Loss of Possession

Since possession consists of two elements i.e. "corpus possessionis" and "animus domini", it is lost when one or the other of these elements is lacking. Possession, therefore, can be lost both through an act of the possessor himself, and through on act of a third party against the will of the possessor.

Possession is lost through on act of the possessor himself if he abandons the thing, or ceases to hold it and to exercise upon it physical control, with the intention of not regaining possession of it.

Possession can also be lost by an act of the possessor by means of a traditio which brings about a transfer of possession in favour of a third party.

Possession can be lost against the will of the possessor through spoliation which lasts for a term exceeding one year because after the lapse of this term he can no longer exercise the "actiones possessoriae" (Section 571).

Interversion of the Title of Possession

A change of title is generally any fact in virtue of which a title is altered both if a detention on behalf of another person is changed to a detention in one's own name, and if possession is changed into simple detention, or if o form of precarious detention is altered into another form of detention on behalf of another person (e.g. when detention by title of lease is changed into a detention by title of "commodato").

The general rule regarding these alterations or interversions of titles is that nobody can change with regard to himself the cause by virtue of which he holds the thing (Sect. 2226). This rule is traditional in jurisprudence: "illud quoque a veteribus praeceptum est neminem sibi ipsum causam possessionis mutare posse" (L. 3, p. xix Dig. De Acquirende vel Amittenda Possessione" Tit. 41, L, xi).

It stands to reason that this rule should forbid the change of a title by virtue of which a thing is held when such change is apt to cause prejudice to other persons because this rule is supposed to have been introduced with the intention of protecting the rights of other persons against the holder of a thing. It is therefore supposed to forbid the person who holds the thing in the name and on behalf of another person from changing the cause of detention to a

cause "propria". Similarly, this rule forbids the person who holds a thing in the name of another person by virtue of a certain title from changing such title, because by so doing he would prejudice the rights of the owner in whose name he holds the thing.

The rule, however, cannot be understood to forbid the holder in his own name from changing his detention to one in the name of another person because by so doing he would be only exercising his right of disposing of his own-thing, and this entails no prejudice to anyone.

No person can change the cause by virtue of which he holds a thing, by a mere act of his will, by simply wishing or willing to held the thing as his own whereas so far he has held it in the name of another person, because as a mere act of the will is not enough to constitute possession. Hence, if a person has begun to held the thing in the name of another person, he cannot possess the thing in a different way for the simple reason that he wishes so to do.

A new and exterior act is necessary, nay, a new act of "apprehensio" corresponding to the new act of the will, which is to be rendered obvious to third parties especially to the interested party. It is for this reason that Section 2226 lays down that the lessee, the depositary, the usufructuary, and, in cenerai, all those persons who hold a thing in the name of another person cannot gain possession of it by prescription.

They cannot make the thing their own by prescription because they hold it in the name of another person, whereas possession of a thing produces acquisitive prescription only if the thing is held as one's own.

In this sense they cannot acquire prescription against their title which is a title of mere precarious detention.

The same prohibition with all the consequences following thereto extends to the heirs who succeed their decujus in the same juridical position.

This rule suffers the following three sections:-

1. When the cause of the detention is changed by virtue of an act of a third party who transfers to the simple holder of a thing the property thereof. From the moment of such transfer the holder can begin to possess in his own name because the change of title has come about not by a simple act of the will but through an external act capable of transferring ownership in favour of the holder. The interversion of title takes place even if the person

transferring property in favour of the holder is not the real owner, because from the moment when transfer takes placo he begins to hold the thing in his own name, in case the possessor in whose name the thing is held, is the person who makes the transfer in favour of the holder, there is no real interversion of title but only a conversion of possession by virtue of "traditio brevi manu".

2. When the cause of detention is changed by virtue of oppositions made by the holder himself against the right of the owner. Also in this case it is not the simple change of will that changes the title of detention but there concurs also the exterior act by means of which the holder opposes the rights of the proprietor, e.g. when the lessor demanding the lessee to give back the thing at the termination of the lease, the latter refuses on the grounds that the thing belongs to him and that he intends to hold it as his own. This may constitute a molestation giving rise to the possessory action, but it constitutes opposition for the purposes of "intercessio possessionis Note that the mere negative fact of the holder who fails to perform the obligations imposed on him, e.g. payment of rent - is not enough to constitute the opposition in question.

3. When the person who formerly held the thing in the name of another person alienates it in favour of a third party in virtue of a particular title capable of transferring ownership. Thu change of title in this case is operative because it is made by the holder not with regard to himself but in favour of the party to whom he transfers ownership of the thing by particular title. This limitation does not take place with regard to a succession by universal title because he succeeds his decujus in the letter's juridical condition.

These rules regarding the possibility of alteration of possession considerably undermine the principle of the indelibility of the vitiation of "precarium". A possessor by precarious title cannot acquire prescription if he possesses the thing "etiam per mille annos". This perpetuity of the vitiation of precariousness is generally criticised in jurisprudence because it is contrary to the social purpose of prescription which is that of forbidding "rivendicationes" from going back to very remote times. Precariousness, in fact, rests principally on the consideration that the holder by precarious title is under the obligation to give the thing back. But this obligation is generally extinguished by prescription of thirty years, and on the extinction of the obligation, precariousness ought to be logically considered as repaired and supplemented, and useful possession for acquisitive prescription ought to begin running in favour of one possessor (vide Planiol et Ripert, Vol. Ill, para. 629).

Effects of Possession

There are two orders of effects, namely, GENERAL, whatever be the thing possessed, and SPECIAL, if the thing possessed is movable by nature or a title to bearer

The general effects are the following:-

1. Protection of Possession;
2. Acquisitive Prescription;
3. Acquisition of fruits granted to the possessor in good faith; and
4. The obligations between possessor and proprietor in case of an 'actio reivendicatoria'

Protection of Possession

The rational basis of this protection is not only the necessity of forbidding violence and arbitrary molestations against the possessor, but also the principle of public order according to which no person can take the law into his own hands, as well as the presumption that the possessor is the owner of the thing which he possesses. This rational basis of the protection of possession defines also its limitations: it is to be restricted to the protection of the possessor from molestations and aggressions, but must not go so far as to deprive the owner of his right of claiming the thing in the lawful manner. It is for this reason that the law grants to the possessor who has been molested in his possession or who has been deprived of possession the so-called "actiones possessoriae" which are to be distinguished from the actions which can be exercised by persons having a real right over the thing, namely, "actiones petitoriae".

The "actiones petitoriae" defend the right of ownership or other real right over the thing against a usurper.

The "actiones possessoriae" defend possession both if it is joined and if it is separate from the right, and they defend it against any person even against the owner himself. Our legal system enumerates four "actiones possessoriae":

1. Action for the maintenance of possession;
2. Action of recent,violent or clandestine spoliation;
3. "Novi operis nuntiatio"; and
4. "Actio de danno infecto".

The first two actions are "actiones possessoriae" in the real sense of the term because they can be exercised only by the possessor; the other actions can be exercised not only by the possessor but also by the owner even if he is not the actual possessor. They are enumerated among the "actiones possessoriae" because they can be exercised also by the possessor who is not the owner, and also because they tend to obtain a temporary measure like the other "actiones possessoria"

Action for the Maintenance of Possession

This action is granted to the possessor, of whatever kind, who holds an immovable or a universality of movables and who is molested in his possession. By means of this action he asks to be maintained in his possession. The plaintiff is the molested possessor, the defendant is the person causing molestation. This action is a derivation from the "interdictum uti possidetis", and the conditions for its exercise are:-

a. Possession (Section 571). The action is given only to the possessor and, therefore, subject to what is stated hereunder, it cannot be exercised by a simple holder. Any possessor can exercise it, whether he be in good or in bad faith, whether his possession be legitimate or vitiated by clandestinity or violence -precarious title so long as such defect does not exist vis-a-vis the defendant himself, as Section 571 states "provided he shall not have usurped such possession from the defendant by violence or clandestinely not obtained it from him precariously". Therefore, a person who is holding property by precarious title from A may exercise the action against B, because B is not allowed by law to raise the precarious character of this possession (Vella vs. Boldarini Court of Appeal 242. 1967).

b. The object must be an immovable or a universality of movables (e.g. a herd). The immovable can be both corporeal and incorporeal, because the provision of the law includes also immovables of this kind, e.g. a servitude. The action cannot be exercised, instead, in case of possession of one or more particular movables.

c. That the possessor has been molested in his possession. A molestation of law (di diritto) is any allegation of a right contrary to the possession of another person

whether such allegation is made judicially or extra-judicially. Example: Theinjunction made to a neighbour forbidding him from raising a building on the ground of a servitude "non aedificandi". A molestation of law includes all acts which imply an allegation of a right contrary to possession as would be the case if a person began building upon land belonging to another person. The allegation of a right may be made in favour of another person alleging it or in favour of another person; in other words, the defendant need not have claimed anything himself. Molestations of pure fact are not included as the law provides special remedies against; such molestations. A molestation of fact is not only any attempt against possession but also spoliation itself, and thus the word molestation is not to be taken in a restrictive sense but in a wide sense which is to include also spoliation, which is the greatest violation against possession. The "actio manutentionis" therefore has not only got a conservative function but also a recuperative function.

The actio manutentionis must be exercised within one year from the molestation. The term is so short because here we have the protection of a state of fact which may, perhaps, be contrary to law. After the lapse of this term the "actio possessoria" cannot be exercised, saving the faculty of exercising the "actio petitoria", which, however, requires the plaintiff to prove the right claimed by him.

The purpose and the effect of this action consist in keeping the possessor who has been molested in his possession, that is, in giving back to him that possession of which he has been deprived, or in bringing the molestation to an end if the molested person is still in possession. This cessation can be obtained e.g., by means of the destruction of the works which have caused disturbance, by the removal of the obstacles put by the neighbour to hinder the exercise of a servitude.

Action of Recent, Violent or Clandestine Spoliation.

This action is granted to the possessor of whatever kind he be, and also to the simple holder of anything, whether movable or immovable, who has been violently or clandestinely deprived of his possession. It brings about reintegration, and is to be exercised within two months from the spoliation (Sect, 572). It draws its origin from the interdicta "unde vi", "de clandestina possessione""utrubi" but it was

notably modified in Canon Law as also in Sicilian Law. Canon Law introduced the principle "spoliatus ante omnia restituendus". (Canon Redintegrannos. 3 & 4, Causa III, Quaest. Decr. Gratiano, Part II).

The same principle is repeated under the titles "De restitutione spoliatorum" (Lib. II Tit. XIII, Decr. of Gregory IX of the year 1227 and in the Lib. VI of the Decr. of Boniface VIII of 1294. The innovations of the Canon Law were introduced into other laws, particularly the Laws of Sicily: Alphonse I (Cap. 135 of 1457) introduced the "actio spolii privilegiata": "cum enim agitur de spolio infra bimestre tempus perpetratur constitutuo, antequam audiatur adversarium in defensionibus suis fiat restitution et postea audiatur". This restitution rendered the Canon Law rule still more severe because it forbade any plea by the person guilty of spoliation before he has restored the thing in question.

Ferdinand II (Cap. LIV of 1515) restricted this action to spoliation committed with violence or clandestinely or with interversion of possession. Section 572 confirmed these laws, reproducing them almost verbatim. The conditions of the action of spoliation can be summed up in the following famous sentence:- "Actor docere debet possedisse, spoliatum fuisse, infra bimestre deduxisse".

The requisites of the action, therefore are:-

a. Possession or detention. Unlike the action of maintenance which requires the element of possession, this action of spoliation is granted also to the simple holder even if the defendant is the owner of the thing and the plaintiff holds the thing in the name of the owner. Thus not even the owner can deprive either by violence or clandestinely the holder of the possession of the thing, even if possession is vitiated through violence or clandestinity. The plaintiff cannot be heard before he has made restitution.

b. Violent or clandestine spoliation. Violent spoliation is that which is committed through private force against the will of the possessor. Violence can be exercised not only against the person of the possessor (in which case violence can be physical or moral) or exercised on the thing in question. "Violence", as Pacifici Mazzoni observes in para. LI of his famous "Istituzioni","can be also private force, arbitrarily directed against the thing itself, e.g. displacement of boundary marks. Clandestine spoliation is that which is carried into effect without the knowledge of the possessor".

c. The term of two months. Unlike the action of maintenance, this action is to be exercised within two months, at the expiration of which term only the action of maintenance can be exercised. This latter action, however, requires other elements because it is not granted to the simple holder, it is not given in respect to the possession of particular movables,

nor against the person responsible for spoliation when the possession of the plaintiff is vitiated vis-a-vis the defendant.

Effects of the Action of Spoliation

When spoliation has been proved to the satisfaction of the Court, the defendant is condemned to restore the thing to the_ plaintiff ("Purgare lo spolgio"). The defendant (vide Section 794 C.O.C.P.) is not allowed to bring forward pleas other than dilatory pleas e.g. incompetence of the Court. Not only may he not plead ownership but he is debarred even from pleading "vitia" in the possession of the plaintiff. He has been guilty of a violent or clandestine spoliation and the law, almost by way of punishment, deprives him of the right to defend himself so long as restitution has not taken place. The inquiry of the Court in actions of spoliation must limit itself simply to the fact of possession or detention, and to the fact of spoliation. The inquiry cannot extend to other circumstances as, for example, "vitia" of possession.

This privileged reintegration obtained without the defendant having been able to bring forward his pleas, does not exclude the exercise of the other "actiones possessoriae" on the part of any possessor, including also the party cast in the action of recent spoliation, in such a way that what such party could not obtain by means of pleas in the action of spoliation, he may be able to obtain by means of the action of maintenance.

Section 574 contains a rule relative to "actio possessoria" in cases of easements (i.e. servitudes). The questions which may arise on the extension which is to be given to the possession of servitude which is being maintained or which is to be reintegrated, is to be established according to the practice of the year preceding molestation or spoliation, and in the case of an easement which is exercised at longer intervals, the practice of the last enjoyment is to be observed.

"actiones possessoriae" have this common characteristic, namely, that they do not prejudice questions of ownership or other right. The party cast in an "actio possessoria" can exercise the "petitoria" and the successful plaintiff in the "possessoria" may become the cast party in the "petitoria". The judgment of an "actio possessoria" is distinct from a judgment in an "actio petitoria" and the defendant in the "possessoria" cannot plead a judgment given in an "actio petitoria" or vice versa. The "actiones possessoriae" serve to maintain or recover possession and, therefore, they have the effect of defining the position of the parties in an "actio petitoria" in which, the plaintiff is the party cast of thè "possessoria", in such a way that the "onus probandi" rests on him.

"Novi Operi Nunciatio"

(Dig. Tit. I, Lib XXXIX).

This action is exercised when new works are being undertaken by some person in a tenement which belongs to himself or to some other person, and when such works are apt to make the neighbour fear damage to an immovable which belongs to him or which is possessed by him. The object of the action is to obtain provisional prohibition against the continuation of such works. Conditions of this action are:-

a. That new works have been undertaken, of which the execution has been begun but not brought to an end.

b. That the neighbour should be laboring under a reasonable fear of suffering damage as a consequence of such works. It must be a case of fear of damage and not of an actual damage, because in this case the action to be exercised would be that to ask for the demolition of the works which have caused the damage and compensation for damages suffered.

c. That the new works must be undertaken in the construction of an immovable end that the damage which can ensue is to the detriment of another immovable.

This action is to be exercised before the termination of the works, and before the lapse of a year from the commencement of such works, because it tends to bring about a provisional interruption and it would not be just or expedient that such interruption should be ordered when the works have been going on for a period exceeding one year. The suspension of the works is to be ordered only provisionally until a final judgment is given as to whether the person undertaking the works in question is to continue or not.

It is, therefore, a case of provisional judgment which is to leave the position open for a definitive judgment. The two judgments are known in the conventional language of the Courts as "inibitorio" and "remissorio", respectively. "Hoc edicto promittitur ut sive jure sive injuria opus fiere pernunciationem inhiberetur; deinde remitteretur prohibitio hactenus, quatenus prohibendi jus his qui nunciasset non haberet" (L. Ia, princ. Dig. hoc. tit.)

The provisional judgment can be confirmed or reversed in the definitive judgment. In the inhibitor judgment, if the party denouncing the works obtains interruption, the person undertaking the works has the interest of exercising the remissory action in the hope of obtaining remission to continue the works. If, on the contrary, the party denouncing has lost the suit in the inhibitory judgment he has the interest of exercising the remissory action in order that he may obtain definitive discontinuation of the

works and demolition of the part which has already been done,''denegata executions eperis novi nihil honinus integrae legitimas actiones manere sicut in his quoque causis nar.ont in quibus afc initio operis novi denunciationem praetor denegat" (L. XIX, Dig. Hoc. titulo lib. XXXIX).

The rules governing "novi operis nuntiatio" are the following:-

1. The Court takes summary cognizance of the facts in order to make sure whether there is the beginning of new works, whether or not the plaintiff has reason to fear damage and whether or not such party has a "prima facie" right to ask for the interruption of the works.

2. If, after such inquiry, the Court decides to order the discontinuation of the works provisionally, the Court imposes on the plaintiff the obligation of giving security for making good the damages caused by the suspension in case his opposition turns out to be without foundation.

3. If, on the contrary, the Court decides that it would not be just to order the discontinuation of the works it imposes on the person undertaking such works, the obligation of giving security for the demolition of works and for the damages which the party denouncing could eventually suffer. It is to be noted that in such provisional judgment if the denunciation is accepted only the continuation of the works is prohibited and no order is issued for the demolition of what has already been constructed.

A characteristic common to "novi operis nuntiatio" and the "actiones possessoriae" is the fact that they all tend to obtain the maintenance of "status quo". The "novi operis nuntiatio" tends to obtain a transitory judgment and leaves place for a definitive judgment in which the prohibition may be revoked.

"Actio De Damno Infecto"

(Lib. 39, Dig. Tit. II).

This action is given to the person who has a reasonable ground for fearing that a building, or trees, or other object of the neighbour is apt to cause severe damage to a tenement or, object belonging to or possessed by him. This action has the purpose of obtaining the remedy against the danger or of enjoining the- neighbour to give security for the damages which the plaintiff nay eventually suffer. The conditions for the exercise of this action are:-

a. That there be a reasonable ground of fearing severe damage which is supposed to be imminent but not actual, in which case there would not be place for a preventive action but for an action asking for the removal of the cause producing the damage and for compensation in respect of damages suffered. The origin of this action is to be traced back to the Lex Aquilia.

b. This damage is to be threatened by a building, a tree, or other object of the neighbour, e.g. a beam, a stream of water, a quarry.

c. The damage must threaten a tenement or another object (e.g. a plantation) belonging to the neighbour. The action has the object of preventing the damage by means of the execution of the works which, in the opinion of the Court, are necessary to prevent such damage; the Court is also to enjoin the neighbour to give security for any eventual damage. This is not an "actio possessoria" in the strict sense of the word, because it can be exercised also by the owner who is not at the same time a possessor. It has been included among the "actiones possessoriae" because, like the latter, it tends to obtain orders of a temporary nature.

## Obligations which are Reciprocal Between Possessor and Owner with regard to "Rei Vindicatio".

The obligations of the possessor towards the owner who has successfully claimed back his thing are those of restitution of the thing and of the fruits, and of making good deteriorations caused to the thing in question. The obligations which the owner can have towards the possessor refer to reimbursement of expenses which the possessor may have incurred for the benefit of the thing.

### A. Obligation of the Possessor to Give Back the Thing

This obligation becomes a source of difficulties when the possessor no longer has the thing in his possession either because he has willingly given up possession of it by dereliction, or because he has alienated or destroyed the thing because he has ceased to possess it involuntarily through the fact that the thing has perished, or is lost, or has been stolen. In such cases, since the possessor cannot give the thing back, we must examine whether he is under any obligation or not.

Here we must distinguish four hypotheses:-

1. A possessor in good faith who has ceased to possess the thing before the notification of the "actio rivendicatoria".

2. Possessor in good faith, of a universality of rights who has ceased to possess the universality of the things included in his right, and which were included before the judicial intimation.

3. A possessor in bad faith who has ceased to possess before intimation.

4. A possessor who has ceased to possess the thing after intimation, both if he be in good or in bad faith by particular or by universal title.

1. Although the first case seems to be distinct from the others, yet it does not form the object of any special rule. Our legislator has not made any express mention of it.

As regards a possessor by universal title and in good faith, we have a repetition of the rule of the "Senatus Consultum Juventianum", in the sense that, in case the possessor has enriched himself by ceasing to possess a thing belonging to an inheritance, he is in no way responsible.

The Austrian Code which was already in force in the provinces of Lombardy and Venice, and which was the first code to provide for questions on possession, and from which our legislator drew the greater part of the provisions contained in our laws, provides in Article 299 in the sense that the possessor in good faith of a single thing can use and dispose of it at his pleasure and that he can also consume it or destroy it without any responsibility. It seems that this was the idea of our legislator who, in his annotations to Section 590, writes:- "II possessore di una cosa singola a titolo non ereditario, se ogli non possiede nulla della cosa non e' tenuto a testituire nulla; se possiede la cosa e coll'alienazione di qualche accessorio di essa ha profittato, restituisce questo profitto. La ragione mi sembra che in questo caso il proprietario non ha che 1'azione rivendicatoria, la quale non e' esercibile se non contro chi possiede, e se costui, possedendo la cosa, ha distratto degli accessori, la restituzione del prodotto di questi in quanto egli ne ha profittato e' dovuta come un accessorio della rivendicazione, come la chiama il
Pothier".

2. In case a possessor has ceased to possess anything forming part of a universality of rights or of an inheritance which he possessed in good faith, before a judicial demand, he is bound to restore the value of the thing alienated up to the amount of his enrichment. If, in exchange of the alienation he has made some profit, e.g. the price in case he has sold the thing in question, and if the price is still to be found as forming part of his estate, he is bound to

restore such price. This rule owes its origin to the "senatus consultum Juventianum" of the year A.D. 129

Section 589 of our laws is in agreement with the "senatus consultum" which runs thus:- "eos qui justas causas habuissent quare bona ad se pertinere existimassent, si ante litem contestatur fecerim quominus possiderent usque eo duntaxat contemnandos quo locupletiores ex ea re facti essent", Section 592 extends the same rule to any universality of rights. It follows that the universal possessor in good faith is bound to restore nothing if, by ceasing to possess, he gains no profit.

In reality, we have here a case of a possessor in good faith who deemed himself to be the owner and was justified in deeming himself to be such. If he has destroyed the thing or given: it away, or otherwise disposed of it, he is not to be blamed. So long as he possesses the thing he is bound to make restitution. But, if he has ceased to possess it and has thereby made some profit, he is bound only to restore such profit not, perhaps, by title of justice, but simply by title of equity which applies the famous dictum "nemini licet
locupletari cum aliena jactura". A possessor is deemed to have enriched himself in any of the following cases, laid down in Section 590:-

a. If the subject of the benefit so derived is found, at the time of the judicial demand, to exist separately from the things belonging to the possessor;

b. If, where the subject of such benefit has been intermixed with things belonging to the possessor, his estate is found, at the time of such demand, to have been enhanced thereby;

c. If, where the subject of such benefit has been consumed by the possessor, such possessor has in consequence saved his own things, and such saving still exists.

In all these cases the estate of the possessor is augmented and in the measure of such enrichment he is bound to restore the equivalent to the proprietor. He can, however, keep the profit, paying to the proprietor the greater sum between the value of the things at the time of their transfer and that which they have at the time of the demand.

3. <u>The possessor in bad faith ceased to possess before intimation of judicial demand.</u> In this case he is bound to give back the equivalent: as a matter of fact he was in bad faith and, therefore, under the obligation of giving back the thing to its legitimate owner and also of preserving it until such restitution, and, therefore, under the obligation of not destroying it, transferring it or otherwise

cease to possess it willingly and culpably. Even if he has ceased to possess through a fortuitous event, he is bound to give back the equivalent (Sect.594). This seems to be in contradiction to the principle "casus sentit dominus", but the apparent contradiction can be explained having regard to the bad faith of the possessor and on the consideration that if he had restored the thing to its owner, as he was bound to do, the fortuitous event would perhaps not have affected the thing. It is for this reason that the law requires the proof that the thing would equally have perished in the possession of its owner (Sect. 594) This section contains the following words which require an explanation: ".Whatever the manner in which he may have obtained possession of the thing". The reason for which our legislator included these words seemed to be that in Roman Law it was doubtful if this rule was applicable always or only when the possessor had acquired possession through theft or violence.

Our legislator wished to solve this difficulty and to impose this responsibility, even in case of a fortuitous event, on the possessor in bad faith, whether his bad faith is simple or qualified (criminal). In order to determine the measure of responsibility of the possessor we must distinguish two hypotheses and see whether the possessor in bad faith has ceased to possess voluntarily or through his own fault, or else involuntarily and without fault. In the first case he is bound to restore at the choice of the person exercising the "reivendicatoria" either the profit which he may have made, or the greater value between that of the thing at the time when he ceased to possess it and that at the time of the demand.

In the second case he is always bound to make good all damages, and, therefore, according to general principles, to make payment of the value of the thing at the time of the demand.

4. <u>The possessor, whether in good or bad faith, whether singular or universal, ceased to possess of his own accord, after intimation of judicial demand.</u> In this case the possessor is bound to recover the thing at his own expense for the owner and if he is not able to recover it he is bound to restore the value (Sect. 359). This is a general rule which leaves no place for any distinction between good and bad faith, because after intimation there is no possibility of good faith. It is also indifferent whether the possessor has made any profit from the transfer or whether the possession was of a single thing or of a universality.

The one condition in order that the possessor be held responsible is his own fact, that is, that he has ceased to possess it either willingly or through his own fault. This rule cannot make the condition of the possessor in bad faith better after intimation than it was before, and, therefore, these obligations are imposed on him as an addition to these which he would have had in case he had ceased to possess before intimation. The owner has the right to demand both the profit and the greater sum between the value of the thing at the time in which the possessor ceased to possess, and that at the time of the demand.

B. Indemnities due by the possessor to the owner as compensation for deteriorations caused to the thing.

Here we must distinguish possession in good faith from possession in bad faith. A possessor in good faith is not held responsible for such deteriorations except in case he had enriched himself thereby and in proportion to such enrichment, because he considered himself in good faith to be the owner and could, therefore, destroy or deteriorate the thing without incurring, into any responsibility. But if he has enriched himself, he is under the obligation to indemnify the owner in proportion to such enrichment in conformity with the rule "nemini licet locupletari cum aliena jactura", As to such obligation the cause of deterioration does not matter, that is, it is indifferent whether the deterioration was caused voluntarily or through default or through a fortuitous event; and it is also indifferent whether the object of possession was a single thing or a universality.

The possessor in bad faith knowing himself not to be the owner and having reason to doubt of his right, is under the obligation to restore the thing to its owner or to see whether his doubt is founded or not, while at the same time he is bound to preserve the thing with the diligence of a "bonus pater familias". He is, therefore, responsible for all deteriorations, whatever their cause nay be, whether they be voluntary or culpable or fortuitous, excepting his right to show that the thing would equally have deteriorated if it were in the owner's possession. (Section 594)

In such cases he is bound to indemnify the owner independently of the profit which he has gained. The measure of indemnity, therefore, is not necessarily that of the profit but is to be equivalent to the deterioration. In case the profit exceeds the damage it stands to reason that the condition of the possessor in bad faith cannot be better than that of the possessor in good faith.

C. Restitution of fruits by the possessor to the owner.

Here again we must distinguish between possessor in bad faith and possessor in good faith. The possessor in good faith deems the thing to belong to him and, therefore, he considers the fruits his own, and therefore he acquires them. The possessor in bad faith just as he ought to restore the thing to its owner, ought to abstain from acquiring its fruits and, if he has acquired them, he must equally restore them to the owner of the thing.

He is, therefore, answerable for all fruits from the day of his unjust occupancy (Sect. 578) not only of fruits de facto acquired but also of those which he would have acquired with the diligence of a "bonus pater familias", because if he had restored the thing to its owner it is to be expected that the latter would have acquired its fruits. The possessor in good faith, on the other hand, both in our legal system and in Roman Law;, makes his all fruits acquired so long as his good faith lasted. Section 577 does away with the Roman Law distinction between the possessor of an inheritance and possessor of one or more particular things. In Roman Law, from the principle "fructus augent haereditatis" was drawn the corollary that after "petitio haereditatis"
the possessor was bound to restore both the inheritance and its fruits. But in terms of section 577 also the possessor of an inheritance makes his the fruits acquired during his good faith.

Another difference between Roman Law and our legal system is that relative to the mode and moment of acquisition of fruits. In the Roman system acquisition took place not by mere "perceptio" but by consumption. The possessor in good faith made his all fruits acquired and consumed up to the moment of the "litis contestatio", and he was therefore bound to restore not only the fruits acquired afterwards, but also those which were acquired before but were still not consumed (Cost. XXII, Code de rei vindicatione). In our law, simple "perceptio" is not enough to enable the possessor to make the fruits his. This right in Roman Law lasted until, the "litis contestatio"; in our laws it lasts until the intimation
of judicial demand (Sect. 577), because the judicial demand attacks the good faith of the possessor. In terms of section 577 the possessor in good faith is not bound to restore except those fruits which he acquired or could have acquired after judicial demand. These words, in re "Farrugia vs. Debono", (Appeal, 20.4.1880) were interpreted to mean that the

cessation of acquisition of fruits or the part of the possessor in good faith does not take place necessarily from the day of the demand but from the day in which the good faith would effectively be considered to have ceased as an effect of the production of fruits upholding the right of the person exercising the "rei vendicatoria", because the basis of this rule is the proving the possessor to be in bad faith, and this is not the effect of the demand, but of the evidence adduced.

Hence, the possessor who is already in good faith ought not to be condemned to restore the fruits acquired or which could be acquired from the day of the demand, but from a later date, that is, from the day when the plaintiff has conclusively proved his right.

This decision, however, was not followed by the same Court of Appeal in the suits "Caruana vs. Garcin" (11.12.1882) and "Adami vs. Sciriha" (29.1.1890).

In case a possessor in good faith sells hanging fruits, and receives the price thereof before judicial demand, and if at the time of such demand the fruits or part thereof have not yet been detached by the purchaser, the possessor is not bound to restore the price already received or any part of it in proportion to the part of the fruits which have not yet been taken by the purchaser. Although the possessor in good faith is not bound to restore the fruits acquired before judicial demand, yet, if he happens to be creditor with regard to expenses, he is bound to make compensation of such fruits, which have been acquired in the last five years prior to the demand with his credit for expenses.

This rule has the object of helping the owner who, by reason of such expenses, might find himself compelled to pay a considerable sum which perhaps may be superior to his financial means. The whole system of the rules regulating the relations between possessor and the person exercising the "rei vindicatoria" is based on equity.

The right of acquisition of fruits itself is an effect of equity rather than of justice and equity requires that the owner be not aggravated too much. This compensation to which the possessor in good faith is subject is limited to the fruits of the last five years and the possessor is bound to make such compensation only with his credit for expenses; he is never bound to give back that part of the fruits which exceeds such credit.

The obligation of restitution of fruits in the cases in which it is to be performed, does not extend to the fruits of the improvements made by the possessor, whether he be of good faith, because such fruits represent the enjoyment

of a capital belonging to the possessor himself. This rule holds good also when the possessor has a right to be reimbursed for expenses incurred in such improvements and in case he actually obtained such reimbursements. It holds good also if the possessor has the right to take back and has actually taken back the materials of such improvements because the reimbursement for expenses is a reimbursement of the capital whereas the fruits represent only the interests thereon. Nevertheless, the owner can ask for such fruits by paying to the possessor the interests on the costs of the improvements; saving of course the fact that the owner has this right only when he is entitled to restitution of fruits.

Obligations of the Person Exercising the "Rei vendicatoria" towards the Possessor.

The obligations of the owner towards the possessor refer only to the reimbursement of expenses which the possessor may have incurred. Also this right of the possessor as well as all the effects of which we have spoken so far, are based on equity rather than on strict justice. As a matter of fact, it would not be equitable that the owner by claiming back his thing should enrich himself to the detriment of the possessor. For the purpose of the application of this rule we must distinguish whether the expenses are necessary, useful, or voluptuary, and whether the possessor was in good or in bad faith.

The distinction between the different kinds of improvements owes its origin to Roman Law, which gives also the definition of each of these kinds of expenses (L. 79 Big. de Verborum significatione, Lib. 50 Tit.16):- "impensae necessariae sunt quae si facta non sunt res aut peritura aut deterior futura sit", and in terms of Section 582 the necessary expenses are those without which the thing would perish or deteriorate e.g. construction of a roof, expenses of whitewashing, painting of beams and woodwork.

"Utiles impensas esse, Fulcinus sit, quae meliorem dotem faciant et deteriorem esse non sinant", i.e. those which improve the thing and prevent deterioration. Two characters concur to render expenses useful:one positive, i.e betterment of the thing, the ether negative i.e. the omission of which is not such as to cause damage to the thing.

''Voluptuariae sunt quae speciem dumtaxat ornant non etiam fructus augent", i.e. those the effect of which consists in adnorning the thing without rendering it capable of yielding more fruits, and which, if omitted, would not cause loss or deterioration e.g. construction of fountains, etc.

Expenses which, generally speaking, ought to be considered as voluptuary, can be considered as useful in the following two cases:-

1. Considering the condition of the owner because the criterion of utility and luxury is subjected;

2. Through the concurrence of particular circumstances which furnish the owner occasion to make profit from such expenses.

The other distinction is that whether the owner was in good or in bad faith, because it is natural that the position of the former is better than that of the latter. Bad faith can be simple or criminal: the possessor who is guilty of criminal bad faith is that who has acquired possession by means of theft or other crime which is not a mere contravention: the criminal possessor not only does not deserve the protection of the law but ought also to be punished; and one of the punishments by which the law affects his financial position is the fact that he has no right of reimbursement for expenses which he may have incurred.

The possessor in good faith, where the expenses are necessary, has a right of reimbursement of the sum which he has spent even if at the time of "rei vindicatio" the effect of his expenses no longer exists, because if the things have been possessed by the owner he would have spent the same sum and the effect of such expense would equally have ceased.

As to useful expenses, the possessor in good faith has a right for the minor sum between the expenses and the improvement. If the minor sum is that of the expenses, the possessor has right only to such sum because thus he would be suffering no detriment to his estate. If the minor sum is that of the improvement, the owner is not bound to pay more, because his estate has increased only up to that amount.

As to voluptuary expenses, the possessor in good faith has the right to take back the things in kind if he shows that he can draw some benefit therefrom, and that he can pay them without causing damage to the thing, and so long as the proprietor does not choose to keep them, paying a sum corresponding to the relative profit.

The possessor of simple bad faith is generally dealt with in the same manner as the possessor in good faith, with the difference that, in respect of useful expenses consisting in improvements which can be taken away without destruction or deterioration of the objects of the improvements themselves

or of the thing, the owner con either keep them or compel the possessor to take them away, If the proprietor keeps them, he is to give the possessor the lesser sum between the improvements and the expenses; if he compels the possessor to take them away, the latter is bound to do so at his own expense and without any right to indemnity. Besides, he must make good all damages which he may have caused.

The possessor guilty of criminal bad faith has no right to any indemnity (Sect. 533), for any kind of expense, nor has he any right to take away the objects which have served to improve the thing, but he may be compelled by the owner to take, at his own expense and without any right to indemnity, the objects which can be taken away, and in such case he is also bound to make good any damage.

From what has been said above it is clear that the owner can be creditor for fruits or for other causes while the possessor can be creditor for expenses. This position can give place to a compensation between them, in fact, as we have already observed, the possessor in good faith who is creditor for expenses must compensate his credit with the fruits acquired by him during the last five years before judicial intimation. Since the amount of the expenses which can be reimbursed to the possessor can be considerable, in such a way that the owner may find himself obliged to spend a rather large sum of money, while such expenses were not incurred with the authorization of the owner himself, the law contains in his favour a modification consisting in the faculty which the Court can use at its discretion, to order, according to circumstances, that the payment be made by means of a rent covered by a special hypothec on the immovable in which the improvements were made, or in some other way which is less inconvenient to the owner.

Finally, the possessor has the right of retention, as a surety of his right to reimbursement of such expenses. He can postpone restitution so long as his credit has not been paid. This, of course, takes place when the Court has not taken the course to the aforementioned modification in favour of the owner. This right of retention is given to the possessor in all cases in which he is creditor for expenses, whether he be of good or bad faith, with the exception of a third possessor who has been expropriated by means of the "actio hypothecaria" (Sect. 2184). Such third possessor has a privilege for the expenses which he has incurred, but he has not the right of retention. In order that he may exercise this right it is necessary that he should have demanded reimbursement for expenses before judgment relating to the "rei vendicatoria" because it has been condemned to restore the thing without having availed himself of such right, he must carry the sentence into execution with the restitution of the thing, and he can no longer retake it. The demand for reimbursement of expenses can be made verbally during the hearing of the case, in which case it is indifferent whether the judgment reserves or not,

in favour of the possessor, the right to reimbursement, because it is the law itself which fronts this right.

Among the expenses which we hove dealt with we have not included those incurred in the calculation and production of fruits, because "fructus non intelliguntur nisi deductis impensis" If the possessor acquired the
fruit he is to bear such expenses because the fruit which he acquires consists in what remains after the deduction of such expenses. If, on the contrary, the fruits are to be restored to the owner, the latter is to compensate his credit against the possessor with the credits of the possessor against him for expenses incurred in the production of fruits.

## II Effects of Possession of Things Movable by Nature and of Titles to Bearer.

These effects are summed up in the principle laid down in Section 597 that the possession of movables and titles of credit to bearer produce in favour of third parties the effect of title. In the words of Article 2249 of the French Civil Code: "En fait de meubles possession veut titre"

A title is an act capable of transferring ownership of things, and the effect of a title, therefore, would be that of transferring ownership, and the effect of possession of such things produces acquisition of ownership. Therefore-, if a third party acquired a thing movable by nature or a title to bearer "a non domino" and he obtains possession by means of delivery, he acquires ownership together with possession. What he could not do by virtue of the act since "nemo plus juris in alium transferre potest quam ipse habet", he can
do in virtue of possession obtained in good faith by obtaining this possession he becomes proprietor and consequently the former proprietor can no longer exercise the "rei vendicatoria" because the thing which he owned is now the property of another partner.

### Historical Origin

This maxim owes its origin not to Roman Law but to the laws of the Franks. Up to the 15th Century French Law, faithful to its Germanic origin, did not grant the "reivendicatoria" in case an owner had lost possession of a movable. He could have recourse to other actions, e.g. the contractual action against the person to whom he had given the thing or loan or in deposit, and the penal action in case of loss of the thing_ or in case it was mislaid. The contractual action could not be exercised against third parties, while the penal action which in time took the shape of an "actio reivendicatoria", followed the thing whoever the actual possessor might happen to be.

With the renaissance of Roman Law, the "reivendicatoria" of movable things began to be admitted and finally it prevailed in such a way that no one of the French jurists who wrote in the 16th century ever put its admissibility in doubt whereas the personal or penal actions of the preceding laws were totally forgotten.
It was not long, however, before the evil effects of such "rivendicatio", exercised against third possessor in good faith, were felt. It caused great harm to commercial security and since the beginning of the 17th century reactionary influences modified the effects of the "rivendicatoria" and finally succeeded in suppressing it altogether with regard to third parties in case the owner had entrusted the thing to a person who subsequently irregularly disposed of it. In other words, the
"reivendicatoria" was not admitted except in case of loss or theft. This maxim was confirmed for the first time in French jurisprudence in the work of "Le droit comun de France" published in 1747 by Bourgeon, who, did not present it as a new principle, but as a rule taught and applied without contrast in the tribunals of the Chatelet of Paris.

The maxim has, under the present legal system, two different meanings:-

1. It exonerates the possessor from the obligation of the production of proof of title vis-a-vis any person contesting his right.

2. It takes the place of title against the proprietor who has been a victim of abuse of trust. It is this last sense that has been given by the tribunals of the Chatelet to the principle "possession vaut titre", which probably had already been applied in the first sense with
the purpose of presuming ownership in favour of the possessor. Understood in the light of this new interpretation, this maxim establishes surety in commercial matters in which it was impossible to admit the principle: "nemo plus juris transferre potest quam ipse habet".

In case of movables that by nature pass quickly from one person to another, it was impossible to admit or to request a written document to verify each transfer and it was necessary to admit that the acquirer was to trust in the possession of the person from whom he acquired and that the fact of his possession was enough to protect him from, any "reivendicatici'.

If, on the other hand, this maxim causes the owner who had entrusted his thing to a mandatory or depository to lose his rights, it is he on the other hand, who is to blame for having put his trust in a person who did not deserve it, while no b l a m e i s to be put on the acquirer.

Some commentators have adduced as a juridical foundation of this rule the idea of instantaneous prescription but this doctrine is no longer followed, prescription always involves a possession which has lasted for a certain tine, and, therefore, the phrase 'instantaneous prescription' is a contradiction in terms. The theory which is generally accepted is that in such transfers there is a special way of acquisition which has become operative "ope regis". It has some analogy with acquisition, because it attributes ownership as originally acquired, but it differs from it because it applies to things which were already the property of someone.

As regards our legal system, the rule is not entirely new because a similar position of law was contained in the o de Rohan (Lib. III, Cap. VIII, para. 16): "non potra' il padrone di nobili, di semoventi , o di altre cose impegnate e vendute pretende ricini terzo e rivendicarle come a lui spettanti mnpagando le somme sborsate nel pegno o in atte della vendita". To this rule there were three exceptions:-

1. If the third party were in bad faith;
2. If the object consisted in stolen things ; and
3. If the object consisted in things given on pledge or sold by servants or other persons who probably could not be the owners.

The conditions for the application of this maxim refer to the objects and to the subjects. The conditions relative to the objects are that the object must be either a thing movable by nature or a title to bearer. Objects can be movables by nature because they are subject to physical control; to material and apparent possession; titles of credit to bearer are considered by law as movables by nature because they are transferred without the need of any solemnities by mere manual delivery. All other titles, namely nominative titles which cannot be transferred except by the formalities required in case of assignment, and those to order, for the transfer of which, besides delivery, endorsement is required, are not subject to the application of this principle. Also vessels, and a universality of movables are excepted. The transfer of ownership of vessels is subject to a particular system of publicity.

2. Conditions relative to the_ person. The principle "possession vaut titre" is intended to protect third parties in good faith. Generally, a third party is any individual who is an outsider to a juridical relation existing between other individuals, and for the purposes of this provision one might say that a third party is any other individual but the owner of the thing and any person who is in relation with the proprietor and bound to deliver or restore the thing.

An essential condition for the application of this rule is that the third party be in good faith because this rule has been introduced as a defence of honest deals and not to protect unfair transactions. Good faith is necessary not only at the moment of the deal but also at the moment of delivery. It is to be understood that the person who was in bad faith at the moment of the deal cannot be in good faith at the moment of delivery. This principle is modified in its application with regard to things which have been lost or stolen. The owner can claim them back from any third possessor, even if in good faith. The law has introduced this new modification because in such a case no blame can be ascribed to the owner. At the same time the law protects the third possessor in good faith by imposing on the owner who claims back his thing the obligation of indemnifying the possessor, in such a way that he suffers no damage, because if on the one hand he loses the thing, on the other hand his estate is thereby not in the least diminished.

The owner of a stolen or lost thing car. reclaim it also without the obligation of indemnity in the following cases:-

a. If the possessor had not acquired the thing by onerous title.

b. If the third party had not received the thing in good faith

c. If he had received it from a person who could not probably be the owner or who could not have been empowered to dispose of it by the owner. In such a case bad faith is presumed.

Legal Presumptions in Connection with Possession

The following rules concerning proof in connection with possession are very important:-

1. It is to be presumed that the person who holds the thing holds it in his own name and not in the name of others, i.e. possession and not mere detention is to be presumed (Sect. 562). This is a simple presumption and does not hold good if it is proved that the holder began holding the thing in the name of another person.

2. When a person has not begun to hold a thing in the name of another person, it is to be presumed that he continues detention in the same way and by the same title, both because this is generally the case, and because the law forbids a change of title, also this presumption is "juris tantum" and can be impeached by proving an effective change of title.

3. The actual possessor who succeeds to prove that he has possessed the thing long before, is presumed to have possessed also during the intervening period (Sect. 563). This presumption helps the person who wishes to prove possession for a short time because it exonerates him from the obligation to prove possession during the intervening cime and imposes on the proprietor the onus of proving discontinuation of possession.

4. Actual possession does not bring about presumption of an ancient title, except in case the actual possessor has a title because in this case it is presumed that he has possessed since the date of the title, saving proof to the contrary. In case there is no title, saving proof to the contrary. In case there is no title, the presumption of ancient possession in view of mere actual possession would be unreasonable because there would be no way of judging up to what time presumption is to go back. But if there is title, it is well to presume possession from the date of such title.

5. A possessor is to be presumed in good faith, and the person alleging bad faith is to prove it.