Succession

Prof. V. Caruana Galizia

LL.B. IV

GħSL
Għaqda Studenti tal-Liġi

GĦAQDA STUDENTI TAL-LIĠI
EXECUTIVE BOARD
2020/2021

ABOUT GĦSL

Għaqda Studenti Tal-Liġi (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**.

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.

FOURTH YEAR

Succession

Prof. V. Caruana Galizia

Għaqda Studenti
Tal-Liġi

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Tal-Liġi

ABOUT GħSL

Għaqda Studenti Tal-Liġi (The Law Students' Society) is a faculty based non-profit organisation at the University of Malta representing law students. GħSL was set up by a group of law students in 1943, led by Joseph Ganado. The organisation plays a pivotal role in the law students' academic and social life at the University of Malta. GħSL is responsible for the distribution of authoritative law notes and past papers. The organisation is also responsible for the publication of the prestigious law journal Id-Dritt and the GħSL Online Law Journal. Moreover, GħSL boasts its own Thesis Library, located at the Faculty of Laws. GħSL has recently undergone a complete revamp, with new blood giving a fresh image to the organisation by building on its already solid foundations. The organisation's yearly social calendar focuses on organizing a variety of parties, which help link the organisation with law students and other university students alike.

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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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.

Organisational skills

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.

O F S U C C E S S I O N S .

The Law of Successions, originally reformed by Ordinance IV of 1864 and later incorporated in Ordinance VII of 1868, is now contained in Title III of Part II of Book Second of the Civil Code. Part II of the said Book is entitled "Of the Modes of Acquiring and Transmitting Property and other Rights ever or relating to Things". More correctly, the law of successions is dealt with separately in the German Civil code, since the transmission and the acquisition of property is not an essential ingredient of Succession: there may, in fact, be an inheritance which contains no property. In the French Civil Code the matter is dealt with in Title I of Book Third under the title "Of Successions", and in Title II of "Wills and Donations": the former establishes the rules governing the transmission "causa mortis" in general, and the latter deals with the special features of succession regulated by the will of the deceased.

Succession is the transmission of the estate or of particular property of the deceased person, or of a person who is considered as such, to a living person.

The estate of a person, which is made up of all the legal relations that may be valued in money belonging to the said person, may only be transmitted to another person "causa mortis". Personality, in fact, has in itself certain indestructible patrimonial factors such as, for instance, the intellectual faculties, suitability to mental and manual work and, in general, the capacity of acquiring property which cease only on the death of the person endowed therewith. The said qualities are inalienable since they are inseparable ingredients of personality around which the estate of a person is centred, and such estate, therefore, cannot be transmitted to others except upon the extinguishment of personality. It is only then that the estate, freed from the personality to which it had been attached, may be united to the estate of another person in whom the two estates are unified. This is the meaning of the traditional expression that the heir steps into the shoes of the deceased. This expression, though not very correct since the personality of a person, even limitedly to his estate, cannot, strictly speaking, be transmitted to others, is still used because it serves to show by means of a metaphor two effects proper to succession, viz. that the heir succeeds to the debts of the

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deceased even "ultra vires hereditatis" and that the possession of hereditary property enjoyed by the deceased continues in the heir. Similarly, the other expression, also frequently used, that the heir represents the deceased, is incorrect since representation implies acts done in the name and on behalf of the person represented, which implication is, in the matter of succession, absurd.

It follows that succession requires the concurrence of the following conditions:-

(i) The death of a person, whose estate or particular property is to be transmitted. Such person is called the "decujus", that is, "is de cujus hereditatis agi tur". Equivalent to death are absence, whenever it gives rise to the presumption of death and, under our law, the taking of solemn vows in a religious order.

(ii) The survival of another person who is to succeed to the person deceased or absent or to the member of a religious order. If the said person has no relations or other persons to succeed him, his estate devolves on the Crown as owner of all vacant property.

(iii) The subject-matter of a succession may be either the entire estate of the deceased or particular property: hence the distinction between universal and particular succession and universal and particular successors. When the succession consists of the entire estate of the deceased, it is called an inheritance (Section 622), and the estate includes the "universum jus quod defunctum habuit" (Fr. 24, Dig. "De verborum significatione").

The inheritance includes all the rights as well as all the obligations of the deceased, considered as one ideal whole, abstraction being made from the particular property of which it is made up and from the particular burdens with which it is charged, which property and burdens are not looked upon as so many independent objects but as integral parts of one whole.

The characters of an inheritance are:-

(i) It is an ideal but not a real unity. In actual fact it consists of several objects, but whenever the term inheritance is used, the said objects or things are considered in their complexity. An inheritance is, therefore, an incorporeal entity: "hereditas etiam sine ullo corpore iuris intellectum habet" (Lex 50 D, "De petitione hereditatis"); and there may be an inheritance even though there be no assets but only liabilities: "hereditatis appellatilo sine dubio etiam damnosam hereditatem continet; iuris enim nomen est sicut bonorum possessio" (Fr. 219, "De verborum significatione"). That an inheritance is a moral entity is expressly recognized by Section 347, where actions for claiming an inheritance are considered to be immovables by reason of the object to which they refer.

(ii) An inheritance is the estate of a person deceased, and it, therefore, includes all the assets and all the liabilities which the deceased had, with the exception of those rights and obligations which are extinguished by the death of the holder or of the obligor.

(iii) An inheritance is, by operation of the law, an incorporeal immovable independently of the property of which it is made up.

The subject-matter of succession may be either an inheritance or particular property: the transmission "causa mortis" of particular property is known as legacy. A universal successor succeeds to all the rights and obligations, that is, to the estate of the deceased; he is known as the heir and the estate to which he succeeds is known as the inheritance; a particular successor is known as legatee and he succeeds to one or some only of the rights of the deceased. The heir is bound to pay all the debts of the deceased, because he succeeds to the estate, which includes the said debts; a legatee succeeds only to the property bequeathed to him and is, therefore, not liable for the debts of the deceased excepting those expressly imposed upon him or which burden the particular property left to him on legacy.

Division of the Subject-Matter.

In universal succession a distinction is to be made between the moment in which it devolves and the moment in which it is accepted, i.e. between the "devolutio" and the "aditio hereditatis". "Devolutio hereditatis inteiligitur quam quis possit adeundo consegui" (L. 151, Dig. "De verborum significatione", T. 16). As a rule, the succession of a person devolves on his death, at which moment his successors become entitled to accept it; a succession, however, may also devolve in virtue of a judicial declaration of absence or of monastic profession. The happening of any of these three events opens the succession and entitles the heirs to acquire it. The "aditio hereditatis" is that act whereby the person called to succeed declares to accept the succession and thereby becomes the heir.

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This matter will therefore he dealt with under two headings, vizi:-

1) The "devolutio hereditatis";
2) The "aditio hereditatis".

"Devolutio Hereditatis" .

An inheritance devolves either by the disposition of man or, in the absence of any such disposition, by operation of law (Section 622). As a rule, the disposition of man is contained in a will, and an inheritance devolving in this way is known as testate succession. By way of exception, a disposition "inter vivos" (viz. a donation in contemplation of marriage) may operate the devolution of an inheritance, and the succession is then known as conventional. Where an inheritance devolves by operation of law it is known as legal or intestate succession.

Under modern law a succession may he partly testate and partly conventional; and in this respect it has departed from the rule of Roman Law "ius nostrum non paritur eundem ex parte intestatum decidere posse: nisi sit miles" (Para. 5, Inst. "De heredis institutione").

Conventional succession has been dealt with under "Donations"; so that this treatise on devolution will be limited to the other two causes of devolution.

French and Italian Law regard testate succession almost as a derogation from succession by operation of the law, and it is therefore dealt with after intestate succession; under our law, on the contrary, an inheritance devolves by operation of law only in defect of a disposition of man, since the rules laid down by law to govern devolution have no "raison d'etre" once the right to make a will is acknowledged.

Testate Succession.

The right to dispose of one's property by will, for a time when one shall have ceased to live, is founded on the right of ownership itself; it is the last and, therefore, the most precious assertion of the right of ownership; and, as Toullier says, it is, after religion, the sweetest comfort to a dying man (Comm, to the French Civil Code, Vol. V, para. 343).

"A will is an instrument, revocable by its nature, by which a person, according to the rules laid down by

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law, disposes for the time when he shall have ceased to live, of the whole or of a part of his property" (Section 625). This definition reproduces, in substance, that of Modestinus: "voluntatis nostrae justa sententia de eo quod quis post mortem suam fieri volit" (Lex 1, D. Lib. XXVIII, T. 110). But the definition given by our law contains an improvement on that of Modestinus in that it establishes clearly that by a will a person disposes of his property and that a will has effect only on the death of the testator and may, therefore, be revoked at will until his death. During the lifetime of the testator the will is, so to say, a draft of his last will which is "ambulatorio usque ad mortem vitae spiritum". In view of the uncertainty of death, it is prudent to express one's will in advance, but such an expression cannot, contrary to the very nature of the will, be regarded as binding on the testator. It is only his death or insanity that seals the will, and turn it from a mere draft into a disposition, since the said events prevent another valid act of the will. This characteristic is so essential that Section 819 provides: "No person may waive the power of revoking or altering any testamentary disposition made by him. Any clause of condition purporting to waive such power shall be considered as if it had not been written" -- "nemo enim iam sibi potest legem dicere ut a priore (voluntate) ei recedere non licent" (L. 22, D. "De legatis", Lib. 32, T. 3).

Consequently, joint wills are not allowed. "It shall not be lawful for any two or more persons, other than a husband and wife, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit" (Section 632). A joint will presupposes an agreement between the two co-testators, and irrevocability, except by mutual consent, is an essential characteristic of contracts. For this reason a joint will cannot be reconciled with the revocability of wills, and could not, therefore, be allowed by the law.

However, a will made by the husband and wife in one and the same instrument, or, as is commonly known, "unica charta", is valid (Section 629). The justifications given for this exception are tradition and the intimacy existing between husband and wife.

Wills "unica charta" were introduced from the usages of Germanic peoples and were admitted by the laws of all the new monarchies (vide Op. omnia, Vol. X, Disputatio 26, De Testamentum coniugum). In Spain they were introduced by the Visigoths (Vide Castillio Soto

Major, "De Testamentis plurium eadem charta confestis"); and they were also admitted in France until their abolition in 1736. In Malta, wills "unica charta" could he made, under the Code de Rohan, by any two or more persons (B. IV, Ch. I, par, 20),

A Joint Will gives rise to two difficulties:

a) Whether the will be revocable by one of the testators in so far as it is his will: a joint will, in fact, contains as many wills as there are testators;

b) Whether, if the will is so revocable, such revocation affects or not the will of the other testators.

The solution of the first difficulty is generally given in the affirmative, and this view is upheld by our legislator who, in Section 629 (2), presupposes the revocability of the will by one of the testators with regard to his or her estate, without the consent or even the knowledge of the other testator, and even notwithstanding his or her opposition. On the contrary, the general opinion is that such a revocation leaves the will unaffected as regards the estate of the other testator. This is also the system adopted by our law (Section 629 (2)), saving the provisions of Section 630, Which lays down that "where, however, by a will "unica charta", the testators shall have bequeathed to each other the ownership or the usufruct of all their property, or of the greater part thereof, the survivor who shall revoke his will with regard to his or her estate, shall, unless the predeceased shall have otherwise ordained, forfeit all rights which he or she may have had in virtue of such will on the estate of the predeceased spouse". But the will shall continue to be valid with regard to all other dispositions. Where such a will is made, what is bequeathed by one of the spouses to the other is considered to be the consideration for what is bequeathed to him or her by the other, and, therefore, the revocation of the will by one of them ought to bring about automatically the revocation of the dispositions made by the other in favour of the former.

The conditions are:-

1) The testators must have bequeathed to each other the ownership of the usufruct of the whole or of the greater part of their property; otherwise the reciprocal bequests cannot be regarded as the consideration of one another.

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2) The survivor must have revoked the will with regard to his or her estate; it must be the case of a survivor, as otherwise the provision of the law is not applicable.

3) The deceased must not have otherwise, ordained.

Under the Municipal Law by a Rescript dated 26th March, 1808, the Notary by whom a will "unica charta" was received was bound to ask the testators whether they wanted to grant the faculty of revoking the will to one another and to write down their reply in the will itself. Under the laws in force the grant of the said faculty may be expressed in any adequate way.

The forfeiture of the said rights takes place also in any case in which, although the surviving spouse has not revoked the will, yet such will, by his or her own act, cannot be effectual with regard to his or her estate. Consequently, if the surviving spouse contracts a new marriage and children are born of the said marriage, and the will thereby ceases to be effectual, the said spouse will be bound to return all the bequests left to him or her by the other spouse, together with the fruits as from the day of the opening of the succession, to those persons whom the said spouse may have called to succeed to such bequests in the event of forfeiture, or to his or her testamentary heirs or heirs-at-law (Section 631).

According to the definition of a will given by our law, the testator may dispose of the whole or of a part of his property; further, a will may contain dispositions by universal as well as by singular title, or dispositions by singular title without any disposition by universal title; finally, a subsequent will may be added to a previous one without destroying its efficacy. This constitutes the abandonment of three fundamental principles of Roman Law. Under Roman Law, the institution of heirs was essential to the validity of a will -- "institutio heredis caput est totius testamenti"; if only a part of the property was disposed of by universal title, the said disposition extended to the remaining property since "nemo pro parte testatus pro parte intestatus decedere potest"; and a subsequent will revoked a previous one -- "posteriores dorogant priori".

By Section 623 "it shall not be lawful to dispose of an inheritance, either wholly or in part, or of any sum of money or particular subject belonging to an inheritance otherwise than by a will". And "the denominations 'codicilis'and "donatio mortis causa' are hereby abolished"; saving, however, the provisions relating to donations made in contemplation of marriage.

Intrinsic conditions for the validity of a Will.

I. The Capacity of Disposing by Will.

Any person not subject to incapacity under the provisions of the Civil Code may dispose of property by will (Section 633). The causes of incapacity may be natural, such as the insufficient development of the will, or civil, such as prodigality.

The following persons are incapable of making wills (Section 634):-

(a) Those who have not completed the fourteenth year of their age. The development of the natural faculties of such persons is necessarily limited; such persons, moreover, cannot, for natural reasons, be sufficiently experienced to exercise their rights properly or sufficiently independent to express their will freely and spontaneously. Roman Law recognised a " testamentificatio pubertatis"; puberty, however, was not sufficient -- it was further necessary that the testator should have been "sui juris". Under the Code Napoleon, a person who has completed his sixteenth year of age may make a will, but, until the attainment of 21 years, limitedly to one half of his estate. The maturity required by Roman Law was certainly insufficient, but in practice it was very rare that a "puberus" was "sui juris". The system of the French Code is criticized on the ground that if a person, sixteen years of age, may dispose of one-half of his property, there should be no reason why he should not be able to dispose of the other half as well. As a matter of fact, where a minor of a certain age may by law make a will he is, in respect of such will, considered to be a major (Section 763 of the Italian Code; para. 2229 of the German Code; Art. 467 of the Swiss Code, and Art. 1663 of the Spanish Code).

Those who have not completed the eighteenth year of their age cannot make by will other than remuneratory dispositions (Section 635 (1)). The capacity is a nominal one since remuneratory dispositions are, in reality, the payment of a debt. A person, therefore, becomes capable of making a will as soon as he completes the eighteenth year of age. So much so that where a remuneratory disposition, regard being had to the means of the testator and to the services in reward of which it is made, is found to exceed a reasonable amount, it may be reduced by the Court to such an amount (Section 635 (2)).

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(b) Congenital deaf-mutes who do not know how to write. These persons, apart from the deficient development of their mental faculties, cannot express their will adequately and are, therefore, disabled by law unless they know how to write.

(c) Those who are interdicted on the ground of insanity. Directly, the ground for this disability is civil, viz. the decree of interdiction; indirectly, it is natural viz. insanity. Consequently, disability starts as soon as the decree is given and lasts until the revocation of the decree; and a will made during a lucid interval is equally void, since the decree of interdiction is not thereby suspended. If a will is made by a person who is subsequently interdicted, the validity or otherwise of the will, will depend on the soundness or otherwise of the mind of the testator at the time.

(d) Those who, not being interdicted, are not of sound mind at the time of the will. It must be noted that a will is only invalid if made by a person who is really insane, and a nervous temperament or awkward behaviour is not sufficient. Insanity may be permanent or habitual, in which latter case a respite may occur, and it may also be accidental, such as that produced by drunkenness. What is important is that the testator be of unsound mind at the time of the will. All the classifications of insanity made by psychiatrists are given very little importance by the Courts, perhaps owing to excessive distrust.

Although, strictly speaking, it should be necessary to prove that the testator was insane when he made the will, it is generally agreed that evidence showing a permanent or habitual mental disease at a time near to that of the will is sufficient. And, if this is proved, it will rest with the person upholding the validity of the will to prove that the testator was, at the time of the will, in a lucid interval.

As to monomaniacs, it is generally held by the Courts that this form of one-sided insanity should not be sufficient to invalidate a testamentary disposition unless there be a connection between the particular mania affecting the testator and the disposition. The opinion of psychiatrists, on the contrary, is that the mind is one and is not susceptible of division.

What of a will made under the influence of a violent passion ? Although modern Codes have abolished the ''actio ab irato", jurists are of opinion that under certain

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circumstances, passion, anger in particular, may be so violent as to deprive the testator of the power of acting intelligently and freely. This must be proved in every case; but the existence of such circumstances alone do not give rise to the presumption that the passion was unjustified.

(e) Those who are interdicted on the ground of prodigality. The cause of this disability is civil, viz. the decree of interdiction, and the indirect natural ground on which it is usually based, does not appear to apply to the capacity of making a will, since even a prodigal can only dispose by will for a time when he shall have ceased to live. Rather than a disability, therefore, this is a case where a person's right of disposing of his property by will is restricted in order to protect his heirs-at-law. It has been preserved by our law in view of tradition, but it has been abolished in Italy and in France. However, even under our law a person so interdicted may make a will if he has been authorized to dispose of his property by the Court which had ordered his interdiction, which would thus be partially revoked. Under Roman Law, by Nov. 39, Emperor Leo argued from the principle that an act of the prodigal was valid unless it was determined by his prodigality, that a prodigal could "hereditarum suis reliquere aut pauperibus sua distribuere". And our law provides that "a person interdicted on the ground of prodigality may, even without the authority of the Court, revoke any will made by him prior to his interdiction"; since such a revocation would open the way to intestate succession.

(f) The members of monastic orders or of a religious corporation of regulars. By effect of the solemn vow of poverty and of the provisions of Canon Law, "quidquid monachus adquirit non sibi sed monasterio adquirit". Consequently, such persons cannot have any property of which they could dispose by will. The cause of this incapacity is, therefore, the legal and economic status of the said members arising out of the vows taken in the religious order or corporation; and the incapacity, therefore, starts as soon as the said vows are taken. Where such persons are lawfully released from their vows, they again acquire the capacity to dispose of such property as they may have subsequently acquired (Section 648 (1) and (3)). That property the use of which may have been allowed to them becomes the subject of "spolio" and remains the property of the monastery; such property, in fact, does not belong to the member of the religious order and cannot, therefore, pass to his heirs-at-law.

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The moment in which the testator must be capable.

It is clear that the testator must be capable at the time of the will; and if he was so capable, any supervening incapacity will not invalidate the will. On the other hand, "any will made by a person subject to incapacity is null, even though the incapacity of the testator may have ceased before his death" (Section 636). The fact that the testator allowed the will to stand, after the cessation of his incapacity, cannot be construed as a tacit confirmation thereof. A person's last will must be contained in a valid instrument and cannot be argued from a tacit confirmation of a void instrument.

The effect of incapacity is the nullity of the will.

On whom does the burden of proof rest ? Once incapacity is an exception, the onus rests on the person impeaching the will on the ground of the testator's incapacity. Moreover, it must be shown that the testator was incapable at the time of the will, saving what has been said in respect of insanity.

The declaration, often contained in a will, that the testator was of sound mind, is not sufficient to prevent the production of evidence tending to prove the testator's insanity, since a notary can only give credit to the contents of the will. Similarly, the fact that the testator has disposed of his property wisely and fairly does not exclude evidence of his unsoundness of mind, since such dispositions may have been the effect of clever suggestions.

As regards unsoundness of mind, Maltese Courts do not, as a rule, allow references after the death of the testator, since the opinion of psychiatrists, under the circumstances, can be of very little value. The Courts decide the point at issue on the facts proved by other means.

II. The Valid Will of the Testator.

The will may be vitiated by mistake, duress, or fraud. The law deals with the vices of the will in the matter of contracts, and reference is here made to the rules laid down by law in respect of consent. Jurists, however, agree that the said rules must not be too strictly applied to wills in view of the fact that by a contract a person acquires a right, as a rule, on an onerous title, whilst a will contains only gratuitous bequests; for which reason stricter conditions should be

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required to deprive a contracting party of the rights acquired under a contract than to deprive an heir or a legatee of what may have been bequeathed to him by will. Moreover, a person is usually less careful in making a will than in entering into a contract since a will is always revocable, whilst a contract is irrevocable.

(a) Mistake.

Mistake may refer to the person benefiting under the will, or to the reason for which the bequest is made, or to the subject of the bequest.

A mistake in respect of the person to whom the bequest is made may refer:

(i) to the identity of the said person -- "error in corpore hominis", as Ulpian calls it (Pr. 9, D. L 28, T. 5): "quotiens volens alium heredem scribere alium scripserit, veluti frater meus scribere volens scripserit patronus meus". Such a mistake, evidently, annuls the disposition, which cannot operate either in favour of the person mentioned or in favour of the person to whom the bequest was meant to be left. As Ulpian says: "neque eum heredem esse placet qui scriptus est quoniam voluntatem deficitur, neque eum quem voluit, quoniam scriptus non est" (ibid);

(ii) to the qualities, social status or relationship by consanguinity or affinity of the said person; such as the testator appoints as heir a person in the belief that such a person is his son. In such a case the disposition is null only if the testator would not have made the bequest in favour of the said person had he been aware of the true facts; however, a mistake in respect of the relationship of such person to the testator is generally held to annul the relative disposition.

(iii) to the name or other designations of the said person: such as if the testator designates his mistress as his wife. Section 731 provides that "if the person of the heir or of the legatee is erroneously designated, the testamentary disposition shall have effect if the identity of the person whom the testator meant to designate is otherwise certain".

A mistake in respect of the cause or consideration of the disposition, viz. the reason for which the testator makes the bequest, may or may not bring about the nullity of the disposition according as to whether the said cause is the only one and without which the bequest would not be made, or one the inexistence of which would not prevent the testator from making the bequest. The former is known as the final or ultimate clause; it is determinant and exclusive and it brings about the nullity of the disposition on this ground, does not depend on the express indication of the false consideration; Italian Law, on the contrary, requires that the cause should have been expressed in view of the difficulty of ascertaining otherwise which was the real final cause (Section 223). However, even if the cause has been expressed and is found to be false, the disposition is only null if the mistake in regard to it was such that the testator would not have made the disposition had he been aware of the true facts, because the mere intention of making a bequest is sufficient in law to determine the will of the testator.

A mistake in respect of the subject of the disposition. With respect to a disposition by singular title, Section 731 provides that the testamentary disposition shall have effect where the thing forming the subject of the legacy shall have been erroneously indicated or described, if it is otherwise certain what thing the testator wished to dispose of. If the mistake refers to the division of the inheritance or of the legacies between the heirs or legatees, the rules of Roman Law are observed except that, under the laws in force, if the testator disposes of a part only of his estate, the remaining portion devolves on his heirs-at-law, whilst under Roman Law it devolved on the heir instituted by will.

(b) Duress.

Violence is physical or moral. Moral violence is known as duress and it acts on the will by inspiring fear of damage to property or persons. In view of the forms and conditions required by law, physical violence is hardly conceivable in respect of wills; duress, on the contrary, is more than possible. It may be exercised either to compel the testator to make a will or to prevent him from making one.

A contract is only voidable if the duress is such as to produce an impression on a reasonable person and to create in such person the fear of having his person or property or the person or property of persons related to him unjustly exposed to serious injury (Sections 1021 and 1022). But jurists agree that these strict conditions should not be required in order to regard the will of a testator as extorted by violence, and that it is sufficient if, had such violence not been exercised,

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the testator would have disposed of his property differently. The disposition extorted by violence is equally null if the violence had been practised by a person other than the heir or legatee and even if such heir or legatee is not an accomplice, since the infliction of nullity is not meant to punish the offender but to protect the testator.

(c) Fraud.

In wills, fraud consists in artifices practised by a person in order to deceive the testator into making or abstaining from making a disposition.

Fraud is determinant when the testator would not have disposed of his property, or would have disposed of it differently, or would have altered his disposition, if fraud had not been practised. It is incidental if it had no effect on the testator's dispositions (Section 1024). Fraud, if determinant, voids a contract and, therefore, "a fortiori", it voids a testamentary disposition. But it is necessary that the fraud should consist in fraudulent and deceitful artifices which determine the will of the testator. Under such circumstances the will cannot be said to be the testator's and is, therefore, null.

If, on the other hand, the artifices had no effect on the testator, the will remains his and, therefore, valid. Moreover, no means, however determinant, can void a testamentary disposition unless they are fraudulent: consequently, a person who takes care of, flatters or fondles the testator or requests him, even insistently, to make a disposition in his favour, or attempts to win the affection of the testator, provided such acts are not accompanied by artifices, is not guilty of fraud. On the contrary, calumnies, excitement to hatred or vengeance and lies are fraudulent means.

In legal jargon a distinction is made between "captazione" and "suggestione": "captazione" means acts or words intended to mislead the testator and to induce him to bequeath his property in favour of a given person; "suggestione" means to suggest a disposition. This distinction, however, has lost its importance since both forms of fraud are subject to the same rules and it is necessary, in either case, to examine whether the means used were fraudulent and determinant.

In connection with fraud as a cause of nullity of wills, reference should be made, in respect of the special case of persons living in concubinage, to Ricci, Vol. III, par, 108, "Corso di Diritto Civile" and to the decisions given by the Court of Appeal in re Borg utrunque (Vol. XII, p. 217, and Vol. XIII, p. 1) and in re Milliet vs. Bezzina.

Mistake, duress and fraud, given the conditions stated above, void the will or the testamentary disposition thereby affected. Duress and fraud, besides, are causes of unworthiness which, in its turn, is a cause of incapacity to receive by will or "ab intestato" (Section 642 (c) and Sections 834 and 835). The "onus probandi" rests on the person impeaching the will.

III. The Capacity of Deceiving by Will.

Any person not subject to incapacity under the provisions of the Civil Code may receive property by will (Section 633).

Incapacity is absolute if the disabled person can not receive property by will from any person; it is relative if the disability is restricted to property bequeathed by a specified person. Relative incapacity is partial if the disabled person can only receive a certain amount of the property belonging to the testator; total if he cannot receive any property by will from the person in respect of whom the incapacity is established.

(1) Absolute Incapacity.

The following persons are absolutely incapable of receiving by will :-

(a) Those who at the time of the testator's death or of the fulfilment of a suspensive condition on which the disposition depended, were not yet conceived (Section 637 (1)). One who is not yet conceived is not a "subjectum juris" and cannot, therefore, acquire property. Strictly speaking, "subjectum juris" should be only those who are born and viable; however, "antiqui libero ventri ita prospicierunt ut omnia ei jura resorvarent", provided he was born viable. A person, therefore, can only receive by will if he was at least conceived at the time of the testator's death.

It is discussed in this connection whether the legal presumption established, in respect of the legitimacy of a child, by Section 81 on the duration of pregnancy, is applicable here. Pollacco is of opinion that the said presumption, which is meant to ensure legitimate filiation to children conceived or born in wedlock and to protect the family, should not be extended to other cases where only pecuniary interests are involved, unless there is such a connection between the question of legitimacy and the right of succession that the moment of conception cannot be established without affecting indirectly the question of legitimacy.

What if the disposition is made under a suspensive condition ? Must the heir or legatee be already conceived at the time of the testator's death or at the time of the fulfilment of the condition ? E.g. A institutes B's children as heirs on condition that A's son dies without issue. As a general rule the fulfilment of a suspensive condition operates retrospectively as from the time of the opening of the succession; consequently, B's children should be only capable of succeeding if they were conceived at the time of A's death. However, Section 637 (1), following Roman Law, has departed from this principle in order to favour testamentary liberalities, and provides that those who at the time of the fulfilment of a suspensive condition on which the disposition depended were already conceived, are capable of receiving by will.

It is now discussed whether, in view of the frequency of bequests of a public character which are meant to be enjoyed by future persons, this disability should not be abolished. Our law provides the following remedies to the inconveniences resulting therefrom :-

The provisions of this Section -- Section 637 (2) provides -- shall not apply to the immediate children of a determinate person who is alive at the time of the death of the testator. So that if A institutes his son's children as his heirs, if the said son is alive at the time of A's death, his children will succeed to A's inheritance even though they are not yet conceived and even though A's son is not even yet married. The law makes this exception, which appears to have been recently introduced, in order to enable the testator to omit, if he so desires, his immediate children and leave his inheritance to his grandchildren. This provision is usually resorted to when the testator's child is overburdened with debts.

Nor do the said provisions apply to persons who may be called to the enjoyment of a foundation. The law wants to favour the creation of foundations and as these are meant to be permanent they are necessarily enjoyed by persons who were not conceived at the time of the foundation.

Closely connected is the question whether a bequest made in favour of an entity which exists "de facto" but which has no juridical personality, is valid or not. An argument against validity is the incapacity of persons who are not yet conceived, to which the said entities are very similar, and the absence of a person who could succeed to the property immediately. It is, however, suggested that the existence of a person who could succeed to the bequest immediately, though it be the rule is, as is shown by the above exceptions, not essential; moreover, once it is acknowledged that a burden imposed by the testator on the heir in favour of a similar entity is valid and enforceable it would be against the anti-formalistic spirit of the laws in force to deny validity to a direct bequest (Planiol et Ripert, Vol. V, paras. 818 and 819; and Pollacco, op. cit. p. 206 et seq).

(b) Those who are not born viable (Section 638). Viability is an essential condition for the acquisition and transmission of rights. Section 638 mentions only those who are not born viable, but it includes stillborn children since "qui morti noscuntur ncque nati neque procreati videntur" (Fr. 229, "De Verborum significations"). Viability is not always easy to establish and for this reason it is dispensed with in several foreign Codes. Thus, the Swiss Code (Art. 544) provides that it is sufficient if the foetus is born alive; the Spanish Code (Art. 30) requires that the foetus should have a human shape and live for at least 24 hours completely separated from its mother. However, even under our law, "in case of doubt, those who are born alive shall be presumed to be viable" (Section 638 (2)).

(c) Members of monastic orders and of religious corporations of regulars. These are incapable of receiving by will and even "ab intestato" by reason of the vow of poverty and of the will of Canon Law "quidquid monachus adquirit non sibi sed monasteris adquirit". According to the provisions of Canon Law, a man is capable of succeeding but whatever he requires passes through him to the Order. Now, it is this acquisition of property by the Order that Civil Law wants to prevent by disabling the members thereof. The disability operates as from the day on which the vows are taken in the order or corporation. But where such persons are lawfully released from their vows, they again acquire the capacity to receive under a will subsequently made. It is necessary that the will should have been made after the release from the vows; any bequest made in their favour before such release remains ineffectual even though such persons are released from their vows before the death of the testator. This rule goes against the general principle in the matter of succession that a

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person need only be capable at the time of the opening of the succession.

Members of monastic orders and of religious corporations of regulars may, however, receive by will small life pensions, known as "livelti", saving any prohibition laid down by the rules of the order or corporation to which they belong (Section 648).

(2) Relative Incapacity.

The following are relatively incapable:-

(a) Illegitimate children even though acknowledged or legitimated by decree of Court, cannot receive by will beyond a certain portion of their parents' inheritance, where the testator leaves legitimate issue. Former laws punished illegitimate children for the fault of their parents; modern law aims merely at protecting the legitimate family.

Under Roman Law, illegitimate children could receive only a twelfth part of the inheritance in case there were legitimate children, and under the Code de Rohan they were only entitled to maintenance; qualified illegitimate children, under Roman Law were incapable of receiving by will even a maintenance allowance, and under the Code de Rohan they were only entitled to maintenance.

Under the present laws an illegitimate child, even if born "ex soluto", is incapable of receiving by will beyond a certain amount unless he has been legitimated by a subsequent marriage. Acknowledgement, however, and even legitimation by decree of Court are not sufficient since by law the only means whereby an illegitimate child may be put on the same footing with a legitimate child is legitimation "per subsequens matrimonium". But as the ground for this disability is the necessity of protecting the legitimate family of the testator, an illegitimate child is only incapable where the testator leaves legitimate issue.

Legitimate issue includes: legitimate children or descendants; children or descendants legitimated by subsequent marriage, adopted children and their descendants, legitimate or legitimated as aforesaid (Section 639).

The disability is only partial: in other words, an illegitimate child cannot receive by will more than

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that to which he is entitled under para. (a) of sub-section 1 of Section 677, viz: one-third part of the legitim to which he would have been entitled if he had been a legitimate child. Now the legitim, when the number of children is less than five, is one-third part of the inheritance, and one-half where the number of children is five or more. Our law is, therefore, more generous than French and Italian Law: according to French Law, adulterous and incestuous children are only entitled to maintenance, even if there are no legitimate children, and under Italian Law qualified illegitimate children are totally incapable even if there are no legitimate children, and illegitimate children are incapable even in concourse with the ascendants of the testator.

(b) The surviving spouse cannot receive, in ownership, more than one-fourth of the deceased's property, where the testator leaves children or descendants as above (Section 640). This disability is proper to out law: it was unknown to Roman Law and is not found in Continental Codes. It appears to have been introduced by custom and was recognised by the Code de Rohan in S. IV, Ch. I, para. 24. The purpose of this disability is to protect the children since the testator could otherwise be easily induced by the other spouse to prefer him or her to the children, especially if the children were born to the testator from a former marriage. The law, however, makes no distinction, and the disability applies in all cases.

The disability is partial and is limited to property left on a title of ownership, so that the whole estate may be bequeathed in usufruct. If, therefore, besides the right of usufruct, the testator grants to the surviving spouse the right to dispose of the property, the bequest may be impeached as being made in violation of Section 640. The Court of Appeal, in fact, in re Caruana vs. Micallef (24th December, 1891), held that if the testator bequeaths in ownership to the surviving spouse more than one-fourth of his or her estate, the bequest will be reduced to one-fourth in ownership and the remaining portion in usufruct. Such impeachment and reduction can only be demanded by the children since the surviving spouse's disability is established in their favour.

(c) Where a spouse having children or descendants as above, has contracted a second or subsequent marriage, such spouse cannot bequeath to his last wife or her last husband or to any of the children of the second or subsequent marriage, more than that to which the least favoured of the children of any former marriage will receive (Section 641). This disability is, therefore, conditional and partial. It derives from Const, VI, "Hac edictali lege", Cod, "De secundis nuptiis", L. V, T. 9) of the Emperors Leo and Hutennius of the year 472.

This disability applies only where there are children of the previous marriage, but it operates in favour of all the children born of a former marriage or of former marriages.

Originally this disability was established with the object of discouraging persons from passing to a second or subsequent marriage; under present laws its purpose is the protection of the children of a former marriage against the greater affection which a person usually has for the last husband or wife and for the children of the last marriage. Consequently, the disability does not operate against the children of a former marriage, but only in their favour. Under the Const. "Hac odictali lege", as well as under French and Italian Law, the disability referred only to the last spouse; but as the children of the second or subsequent marriage were expressly included under our Municipal Law (Code de Rohan, Bk. IV, Ch. 1, p. 54), Section 641 of the Civil Code extended the disability to such children as well.

Our Courts held that a testamentary disposition made in contravention to Section 641 may be impeached not only by the least favoured of the children of any former marriage but by any of the children of any of the marriages. The reason being that the reduction of the disposition operates in favour of all the children indistinctly, who succeed to the excess "ab intestato" (Micallef vs. Borg, Civil Court, First Hall, 31st Jan., 1898).

On this point the law of Justinian underwent numerous modifications: originally the excess was attributed to all the children indistinctly, but was later reserved to the children of the first marriage. Under Intermediate Law it was lawful, under certain circumstances, for a testator to prefer the children of a second or subsequent marriage, in derogation to the Constitution "Hac edictali lege". In Malta, a Bando dated 26th February, 1788, interpreted in this sense the above-quoted provision of the Code de Rohan, and the said Bando was applied by the First Hall of the Civil Court in re D'Amico vs. Laferla (9th August, 1881): in that case the father had, "arbitrio boni viri", preferred the children of a second marriage to a child of a former marriage who had inherited sufficient property from his mother. This was exactly one of the cases in which such preference was allowed by

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Intermediate Law. However, the succession to which that Judgement related had been opened at a time when the Code de Rohan was still in force. Section 641 of the Civil Code does not appear to admit any exception to the rule therein contained, as was decided by the Court of Appeal in a partial Judgement delivered in re "Busuttil vs. Cachia Zammit".

(d) Unworthiness, i.e. the commission of a serious offence against the "decujus", has for its consequence the incapacity of receiving by will, both because of the presumed intention of the "decujus" that the unworthy heir or legatee should forfeit the bequests left to him and because of public morality, which cannot allow a person who has grievously offended the testator to enjoy the property left by the testator. The following are unworthy of receiving by will (Section 642) :-

i) Any person who has willfully killed or attempted to kill the testator;

ii) Any person who has charged the testator before a competent authority with a crime punishable with death or hard labour, of which he knew the testator to be innocent;

iii) Any person who has compelled or fraudulently induced the testator to make his will, or to make or alter any testamentary disposition;

iv) Any person who has prevented the testator from making a new will or from revoking the will already made;

v) Any person who has suppressed, falsified or fraudulently cancelled the will.

Incapacity on this ground applies also to the person who has been an accomplice in any of the said acts (Section 642 (2)).

This incapacity is total because it is inflicted as a punishment, and it extends also to the legitim. A punishment, however, should not affect the descendants of a guilty person and, therefore, the legitim forfeited by the person excluded as unworthy devolves on his descendants (Section 645. The person excluded as unworthy, however, is not entitled to the rights of usufruct and administration granted by law to parents over the portion of the estate vested in his children (Section 645). Since the incapacity of receiving by will inflicted on the unworthy operates as from the moment in which the succession

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is opened; he is bound to restore any fruits or revenues which he may have received since the opening of the succession (Section 644).

Unworthiness and the consequent disability is meant to make amends for the offence received by the testator who, therefore, may forgive the offender by a will made subsequently to the occurrence of the acts giving rise to disqualification: evidently it is necessary that when the new will is made, the testator be aware of the cause of unworthiness and that the will itself be valid, i.e. free from fraud or duress.

Apart from incapacity, fraud and duress give rise to another effect, viz. the nullity of the testamentary disposition. Incapacity is general and it refers to any will made by the "decujus"; nullity is relative to the disposition extorted by duress or fraud; incapacity affects only the doer and his accomplice, nullity affects also the person benefiting, even though not guilty.

(c) Tutorship and Curatorship.

This incapacity is relative since it applies only to a will made by the person under the charge of the tutor or curator. The purpose of this incapacity is to ensure faithfulness in the management of those persons' property, by means of the absolute obligation of rendering an account of such administration. This obligation could be evaded if the tutor or curator were capable of being instituted heirs or of being exempted in virtue of a legacy from the obligation of rendering the said account.

By Section 646 "a tutor or curator cannot benefit under a will made during the tutorship or curatorship by the person under his charge". Relatively to such person, therefore, the tutor's or curator's incapacity is total; but it is temporary since it ceases upon the termination of tutorship or curatorship, or rather by the rendering of the final account (Section 647 (2)). According to the Italian Code (Art. 669), the incapacity lasts until the approval of the account and it seems that the same rule is applicable to us because it is only by its approval that the account becomes final and definitive. A tutor or curator remains incapable of receiving by a will made during the tutorship or curatorship even if the testator dies after the approval of such account without having revoked his will. This disability affects only those curators who manage the property of a disabled person, and it does not extend

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to those curators who are appointed for particular acts, such as the "curatorxes ad litem". Furthermore, it does not apply to a tutor or curator who is an ascendant, descendant, brother, uncle, nephew, cousin or spouse of the person making the will: blood relationship prevails over all other considerations.

(f) Participation in the making of the will. The ground of this disability is the danger of fraud or surprise, and the fear that the testamentary dispositions may be written out or made by such persons in their favour without the knowledge of the testator. The Senatus-Consultum Libenianum, confirmed by an Edict of the Emperor 'Claudius, both of them reproduced in Lex 5 Dig. "De Falsis", had extended the provisions of the "Lex Cornelia" "De Falsis" to the person who, having been called to draw up a will or a codicil, made any disposition in his favour.

The Edict of Claudius added that the general signature of the testator at the end of the will was not sufficient to exempt the person by whom the will may have been written out from the provisions of the Senatus-Consultum. For such exemption the signature of the testator immediately following the disposition in question was necessary.

Our law, in Section 647, following Roman Law, declares that the following persons are incapable of benefiting under a will:-

(i) The Notary by whom a public will has been received. The said disability extends to the wife of the Notary and to persons related to him by consanguinity or affinity up to any degree in the direct line, and up to the degree of uncle and nephew in the collateral line.

(ii) The person by whom a secret will has been written out.

(iii) The person who has received a privileged will, i.e. a will made at sea or in a place with which communications have been interrupted (Sections 710 and 713). In respect of such wills, besides, there is the fear of duress.

(iv) With regard to privileged wills, the witnesses as well as the father, mother, husband or wife and the descendants of such witnesses are incapable. In Italian Law, the witnesses of a public will are also incapable. Under our law, "in public wills, the heirs, legatees or other relations by consanguinity or affinity within the degree of uncle or nephew inclusively shall not be competent witnesses" (Section 707).

According to Section 647, the Notary by whom a public will has been received and the person by whom a secret will has been written out, may benefit under such a will if, immediately after the disposition made in their favour, there be affixed the signature of the testator; and the person by whom a secret will has been written out may benefit under such will whenever this is made with the assistance of a Judge or Magistrate, as provided in Section 700. However, Ordinance XI of 1927 (Cap. 92) provides that Notaries cannot receive a will containing a disposition in their favour.

(g) The fear of duress in respect of a testament made at sea. This cause of incapacity affects any member of the crew, and the father, mother, spouse or descendant of any such person (Section 718).

Section 633 mentions churches and other pious or religious institutions, with regard to which it expressly reserves the provisions of the Mortmain Law (Chapter 2). Strictly speaking, the said institutions are not incapable of disposing of or receiving property by will: they cannot retain immovable property in any way it may have been acquired, for more than one year.

These are the passive causes of incapacity acknowledged by our law: all other disabilities imposed by former laws, such as that which related to foreigners or to civil death, have been implicitly abolished.

<u>The Moment in which the Capacity of Receiving must exist.</u>

Under Roman Law, the capacity of receiving by will was required at three different moments:

1) "Testamentificatio ut constiterit institutio"(Lex 50, Dig, "De Heredibus instituendis");

2) "Mortis testatoris ut effectum haberet institutio";

3) "Et cum adibit hereditatem, nam ius heredis eo vel maxime tempore inspiciendum est quo adquirit hereditatem".

Under Modern Law, the capacity of receiving by will is required only at the opening of the succession, and it is immaterial whether the heir or legatee was capable or not at the time when the will was made or becomes incapable after the opening of the succession or at the time of the "aditio hereditatis", because the property of the "decujus" devolves on the heir or legatee on his death: it is then that the succession has its effects, and that is, therefore, the moment in which capacity should be required. The heir need not be capable at the time of the "aditio hereditatis", though it is by his acceptance that he acquires the inheritance, because the "aditio hereditatis" simply actuates the right which the heir has already acquired by effect of devolution. Capacity is, therefore, only required at the time of the opening of the succession; and this principle is confirmed by Section 637, where it is laid down that those persons who, at the time of the testator's death were not yet conceived, are incapable of receiving by will. The following are exceptions to this rule:-

1) Members of monastic orders or of religious corporations of regulars cannot, after taking vows, receive under a will; and where such persons are lawfully released from their vows, they only require the capacity to receive under a will subsequently made, even though the release from the vows takes place before the testator's death (Section 648);

2) With regard to tutors and curators, the rule is inverted: a tutor or curator cannot benefit under a will made during the tutorship or curatorship, or even after the termination thereof, but before the rendering of the final account; but he may benefit under a will previously or subsequently made. There are, however, legal writers who hold that capacity is also required at the time of the devolution of the inheritance in view of the danger that the testator may be unduly influenced.

At which moment is capacity required in respect of a conditional disposition?

Under Roman Law, as is commonly held, regard was had to the moment of the fulfilment of the condition rather than to the opening of the succession; and this seems to be the view upheld by our law, at least in the case of the incapacity of "non-concepti", since it is sufficient, in terms of law, that the person be capable, i.e. conceived, at the time of the fulfilment of the condition. In other laws regard is, as a rule, had to the moment in which the succession is opened, on the ground that the fulfilment of a suspensive condition operates retrospectively.

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Once capacity is the rule and incapacity the exception, the burden of proving a person to be incapable rests on the party alleging incapacity.

The effect of incapacity is the nullity, total or partial as the case may be, of the disposition made in favour of the disabled person. As to unworthiness, it has already been said that it can be pardoned by the testator and that such pardon heals the relative disposition.

Fraudulent Means used in order to evade the Laws on the capacity to receive by Will.

The incapacity of receiving by will implies a restriction of the power of disposing by will, and it is natural that attempts be made to evade such restrictions.

A will, unlike a donation, cannot be disguised under the form of an onerous contract, and, therefore, the only possible means of evading the provisions which restrict the capacity of receiving by will is the use of intermediaries: the bequest is apparently left to a person capable of receiving it but is in actual fact made in favour of a disabled person. The intermediary is the one mentioned in the will and is, in appearance, the heir or the legatee; but the bequest or inheritance is really meant in favour of an incapable person for whom the intermediary acts as a screen. The intermediary merely lends his name and undertakes on his honour to pass over the property to the disabled person.

This is also known as "interpositio personae", and its effect is the nullity of the disposition, which can not stand either in favour of the disabled person, in view of his incapacity, or in favour of the intermediary, since otherwise the provisions establishing incapacity would remain ineffectual.

Section 648 mentions illegitimate children, the second spouse, the children born of a second marriage and the surviving spouse, as the persons in whose favour a disposition may be made in the name of intermediaries; and Sections 107 and 108 add the tutor or the curator, the Notary and the person by whom a secret testament has been written out. This list leaves out the following incapable persons: those who are not yet conceived, those who are not born viable, members of monastic orders or of religious corporations of regulars and those persons who are unworthy of receiving by will. As to the first two, "interpositio" is impossible; as to persons unworthy of receiving by will, the testator need not resort to "interpositio", since he is free to pardon the offence committed against him; as to members of monastic orders or of religious corporations of regulars, their omission is justified by the fact that the family tie is loosened as soon as the vows are taken and that "quidquid monachus adquirit non sibi sed monasterio adquirit".

Sir Adrian Dingli in his Notes states that Section 648 was not included among the sections enumerated in Section 649 because otherwise the father of a member of a monastic order would be incapable of receiving by will from any testator; this reason justifies the omission of this class of disabled persons in respect of "inter-. positio de jure"; but this reason alone is not enough to explain their omission in respect of "interpositio de facto"; and Sections 310 and 311 include both kinds of "interpositio".

The burden of proving that a disposition has been made in the name of an intermediary rests on the person alleging it. But in this case the law allows the use of any means of evidence, including those extrinsic to the will, notwithstanding the rule that the will is the only evidence of the testator's intention and that no evidence can be brought to disprove it; the reason being that fraud could not otherwise be detected, since the will is the very instrument used for the purpose of evading the law.

Whether the person in whose favour the disposition is made is or is not an intermediary is a question of fact to be decided by the Court according to the circumstances of the case; "interpositio" must, however, be excluded in case of doubt according to general principles.

But by Section 311, "the father, the mother, the descendants, and the husband or wife of the person under any such incapacity, as the case may be, shall be deemed to be intermediaries". Evidence is, therefore, dispensed with and "interpositio" is presumed. Such "interpositio" is known as "de jure", in contrast to "interpositio de facto", which must be proved.

The ground for this presumption is the relationship existing between any of the said persons and the person under a disability, wherefrom it is reasonable to argue that the disposition is, in actual fact, made in favour of the disabled person, though in the name of an intermediary.

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This presumption is "juris et de jure" "by virtue of the rule contained in Section 1279 that a presumption is such when on the ground thereof the law annuls certain acts. Jurists, however, make exception for remuneratory legacies, which in fact are not gratuitous bequests and to which, therefore, even incapacity should not apply, and for those cases where "interpositio" is impossible, such as if a legacy is left to the mother of a natural child who was already dead at the time of the will. There are also jurists who exempt from the operation of this Section a maintenance allowance bequeathed to an indigent person, provided it is reasonable regard being had to the estate of the testator.

FORM OF WILLS.

The Law of Justinian acknowledged two ordinary wills: the public and the private will, each of which could be "nuncupativum" or "scriptum". There were, then, privileged wills such as that made by soldiers, the"testamentum ruri conditum" and the "testamenti pestis tempore"; and a Constitution of Theodosius and Valentinian of the year 439 "Hac consultissima lege", had introduced secret wills. Under Intermediary Law importance was, for the first time, given to the intervention, in the formation of wills, of a person vested v/ith public authority or credit; and thus we have the "testamentum coram paracho et duobus testis", recognised in the Decretali (B. III, T. 26, Ch, X, "De Testamentis"). Incidentally, it may be stated that there is evidence pointing to two such wills having been made in Malta.

Similar were the "testamentum coram graphiarum et duobus scabinis" and the "testamentum coram tabellione et duobus testibus".

The importance of secrecy was recognized by Customary Law and the secret will introduced by Theodosius and Valentinian was perfected under the name of "testamentum clausum et indorsatum" which was presented to the witness as closed and was signed by them on the back. Custom also introduced the "testamentum per implicitam nuncupationem vel per relationem ad schedulam", whioh is dealt with by Bartolus in his comments on Law 38 "De conditionibus et demonstrationibus". This form of will consisted in a solemn declaration that the testator had made a will in a schedule and deposited it with a trusted person such as his lawyer or the Prior of a convent, but it made no mention of the heirs or legatees or of the way in which the property had been disposed of. Bartolus

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and his opinion was followed by other jurists and the Courts upheld the validity of such will. In France custom introduced the holograph, i.e. a will written out entirely by the testator and signed by him without the intervention of any public officer or of witnesses, and kept by the testator himself. Other forms of privileged wills were also introduced such as the "testamentum per pias causas", which required only the presence of two witnesses, and wills made at sea.

Our Municipal Laws recognised two forms of ordinary wills and codicils, i.e, the "nuncupationis et sine scriptas" and the "solemnis et in scriptis".

1) The "testamentum nuncupationum et sine scriptis" took the place of Justinian's "testamentum privatum nuncupationem": it had to be drawn up in writing so that it was not a pure "testamentum nuncupationum" but "in scripturam redactum". It had to be contained in a public deed, published in the presence of seven witnesses and signed by the testator, or, if the testator could not write, by an eighth witness, who signed the will instead of the testator. Moreover, the signature of the majority of the witnesses was necessary. With regard to the "codicilli nuncupativi", five witnesses were sufficient, and the signature of at least three of them. With regard to wills or codicils "ruri conditi", the signature of two witnesses was sufficient.

2) The "testamentum solemne et in scriptis" was the "testamentum clausum et indorsatum" of Customary Law. The testator had to present it closed and sealed to the Notary in the presence of seven or five witnesses, according to circumstances, and to declare that it contained his will or his codicil, which declaration had to be written out by the Notary on the back of the will. Persons who could not write could not make a "testamentum solemne et in scriptis", except with the assistance of a Judge. The Notary was bound to preserve the will until the death of the testator, and to present it in Court on the happening of such an event, where it was opened and published by means of an act known as "atto di apprizione". It was then handed to the Notary for preservation together with the deed of publication.

Besides these ordinary forms other special forms were recognised, such as the wills made aboard a ship or galley on the high seas, according to Statute XII of Order V, B. IV, Ch. 1, para.9 of the Municipal Code.

The Laws In force.

The laws in force recognize only ordinary wills and privileged wills. Ordinary is that form which can be made

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use of by any person under all circumstances; privileged is that form which can only be resorted to under special circumstances; viz. when a person is at sea or in a place with which communications have been interrupted. Such wills are called privileged because they are exempted from some of the conditions required for an ordinary will in view of the conditions under which they are made.

The formalities imposed by law have a dual purpose: that is, to ensure that what is written out corresponds exactly to the testator's will and to ensure the preservation of the will.

The only ordinary forms recognized by our law are: the public and secret will (Section 691). No other form is possible under our law, including the holograph, which has never been recognized by our law.

PUBLIC WILLS.

A public will is that which is received and published by a Notary in the presence of two witnesses in the same manner as any other notarial instrument, in accordance with the provisions of the Notarial Profession and Notarial Archives Act (Chapter 92). Its historical-antecedents are the "testamentum nuncupativum privatum" of our Municipal Law, and the "testamentum nuncupativum privatum" of Roman Law.

It is public because it is received by a Notary and it is published by him in the presence of witnesses. It is not, however, public in the sense that it is accessible to all; on the contrary, during the lifetime of the testator it can only be shown to the testator himself and to other persons with his consent. The public will satisfies the two purposes for which the legal formalities are required.

As to the form of a public will, a distinction has to be made between the general formalities and those required in the special case of a will made by a deaf person.

General Formalities,

The testator may make his will known to the Notary either by word of mouth or in writing, and the Notary, after giving it due form, will publish it in the presence of the testator and of the witnesses. The will is kept by the Notary and enrolled like any other notarial instrument. It must also be registered in the

Public Registry within fifteen days from the day on which it was received (Section 48 of Chapter 92).

The Notary is liable for non-compliance with any of the said obligations but the will may, this notwithstanding, be valid and opposable to third parties.

The formalities prescribed by the Notarial Laws for notarial deeds in general apply to wills. However, only the more important rules will here be mentioned:

1) The Notary cannot receive a will containing dispositions in his favour or in favour of his wife or of any person related to him by consanguinity or affinity to any degree in the direct line and within the third degree, inclusively, in the collateral line (Section 12).

2) Under the Code de Rohan, in respect of a "testamentum nuncupativum", if the testator could not or did not know how to write, an eighth witness had to sign in his stead. This rule was not altered by Ordinance V of 1855, which was promulgated when the said Code was still in force; but Ordinance IV of 1864 applied to wills the general rule applicable to all notarial instruments that whenever either of the parties or both of them do not know how to, or cannot write, the fact that they cannot or do not know how to write, as well as the cause thereof, must be stated in the instrument, and that such statement takes the place of the signature (Section 26).

3) Ordinance V of 1855 also left in force the provisions of the Code de Rohan relating to the number of witnesses: under that Code the presence of seven or five witnesses and the signature of the majority was required. By Ordinance IV of 1864, the general rule that two witnesses are sufficient (Section 25 of Chapter 92 and Section 692 of the Civil Code) was applied to wills. However, the signature of the witnesses is in no case dispensed with, whatever may be the value of the thing disposed of by the will (Section 363). The Ordinance of 1855 had dispensed with the signature of the witness, in respect of acts "inter vivos", if the value of the thing forming the subject-matter of the act did not exceed five pounds (£5). This provision was implicitly abrogated by Section 28 of Chapter 92, which Act, besides, implicitly abrogated Ordinance V of 1855 "in toto".

By Section 368 "In Public Wills, the heirs, legatees or their relations by consanguinity or affinity within the degree of uncle or nephew, inclusively, shall not be competent witnesses". To this provision must be added that contained in Section 15 of the Notarial Laws, whereby the relations of heirs or legatees in the direct line to any degree are not competent witnesses.

4) In public wills, every page must be signed in the margin by the testator, interpreter, witnesses and the Notary, unless there is a duly signed marginal note. The last page, however, need not be so signed. Moreover, if the will is signed by the testator or co-testators, the signature of the witnesses at the foot of the will is sufficient.

Special Formalities.

The law prescribes certain formalities in respect of a will made by a person who is totally deaf, which are meant to ensure that the contents of the will agree with the testator's intentions,

a) "Where a person who is totally deaf, but can read, desires to make a public will, he shall read such will himself in the presence of the Notary and the witnesses, and the Notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will has been so read by the testator" (Section 706 (1)).

b) "Where such deaf person cannot read, he himself shall declare the will in the presence of the Notary and the witnesses, and the Notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will is in accordance with the will as declared by the testator"(Section 706 (2)).

Non-compliance with these requirements renders the will null and void (Section 709).

SECRET WILLS.

The secret will ("clausum vel mysticum") derives indirectly from the Constitution of Theodosius and Valentinian, and directly from the "testamentum clausum et indorsatum" of Intermediary Law and the "testamentum solenme et in scriptis" of our Municipal Law.

A secret will may be written out either by the testator himself or by a third person, but it must be signed by the testator if he can write. The paper on which it is written or the paper used as its envelope is closed and sealed and delivered by the testator to a

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Notary, or in the presence of a Judge or Magistrate sitting in the Court of Voluntary Jurisdiction, to the Registrar of such Court. A secret will has the advantage of leaving no trace of its existence when it is revoked by withdrawal.

The general formalities are:-

1) A secret will may be written either by the testator himself or by a third person.

2) Where the testator knows how to, and can write, the will must, in all cases, be signed by him at the end thereof. Where the testator does not know how to, or cannot write, the provision of Section 700 will apply.

3) The paper on which it is written or the paper used as its envelope must be closed and sealed. It may then be delivered either to a Notary or to the Registrar of the Court of Voluntary Jurisdiction. In the latter case it must be delivered in the presence of a Judge or a Magistrate sitting in the said Court, and the testator must declare that the paper delivered by him contains his will. The Registrar will then draw up what is known as the note of particulars on the paper or envelope containing the will; such note of particulars must state the date on which the will is delivered, the name of the testator and the fact that it was delivered by the testator himself, and must also contain the testator's declaration that the paper delivered by him contains his will and a declaration to the same effect by the Judge or Magistrate in whose presence it was delivered. The memorandum must then be signed by the Registrar and counter-signed by the said Judge or Magistrate.

The Notary who receives a secret will must draw up the act of delivery, recording therein the testator's declaration that the paper contains his will, on the paper itself on which the will is written or on the paper used as its envelope. The act of delivery is a notarial deed and must comply with all the formalities prescribed therefor, except in respect of the paper on which it is drawn up. It must, therefore, state the date thereof and be published in the presence of two witnesses and signed by the testator, the witnesses and the Notary. Where the testator declares that he does not know how to, or can not write, the Notary will enter such declaration at the foot of the act, and such entry will be equivalent to the signature. A copy of the act of delivery must also be kept in the records of the Notary (Section 696 of the Civil Code and Section 30 of Chapter 92).

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A Notary who has received a secret will is bound to present such will within four working days to be reckoned from the day of the delivery, to the Court of Voluntary Jurisdiction for preservation by the Registrar (Section 697). If he acts in contravention to the foregoing provision he will, upon civil proceedings instituted at the suit of the Attorney General be condemned to interdiction from his office for a period not exceeding two years, or to a fine of not less than £5 nor exceeding £50; provided that if the delay does not exceed two days, the contravention will be punishable with a fine not exceeding two pounds (£2), as provided in Chapter *92* (Section 98); saving in all cases the provisions of the Criminal Code (Section 698 (3)).

The presentation of the will to the Registrar by the Notary must also take place before the Judge or Magistrate sitting in the Court of Voluntary Jurisdiction; and the note of particulars must also be drawn up on the paper containing the will, and countersigned by the Notary. The Judge or Magistrate may not allow the presentation of a secret will by a Notary if the act of delivery is wanting or does not contain the testator's declaration as required by Section 694 (2).

A secret will is deemed to have been made on the date on which it is delivered to a Notary or to the Registrar (Section 695 (2)). It is preserved by the Registrar and kept in the Registry until the testator dies or withdraws his will. Upon the death of the testator, the will is opened according to the procedure established in the Code of Organization and Civil Procedure for the opening of secret wills.

Special Formalities.

(a) Secret will by illiterate persons.

If the testator cannot read, the sincerity of a will written out by a third person will depend on the honesty of the latter, and if the testator cannot write, an essential formality, viz. the signature, cannot be complied with. Consequently, it is provided by Section 700 that "it shall not be lawful for any person who does not know how to, or cannot write, to make any disposition by a secret will without the assistance of a Judge or Magistrate". The Judge or Magistrate required to give his assistance will read out and explain to the testator the contents of the paper which the testator declares to be his will and will enter at the foot thereof a declaration to the effect that he has complied with

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such requirements and that he is satisfied, that the contents of the paper are in accordance with the intention of the testator. Such declaration must he dated and signed by the Judge or Magistrate (Section 701). The will is then duly closed and sealed, and the Judge or Magistrate will enter on the paper itself on which the will is written, or on that used as its envelope, a declaration to the effect that it contains the will of the person making it, and will append his signature to such declaration. This formality is meant to ensure that the paper is not exchanged, through the testator's Illiteracy, for another. The said declaration does not dispense with the act of delivery or the note of particulars (Section 702 (1) and (2)).

Where the testator cannot sign his name, a declaration to this effect must be made in the act of delivery and in the note of particulars.

The assistance of any Judge or Magistrate may be applied for, even of one who is temporarily in the Island or place in which the assistance is required.

(a) Secret will by a deaf-mute.

Section 705 provides that "(1) a person who is deaf and dumb, or dumb only, whether congenitally or otherwise, may, if he knows how to write, make a secret will, provided the will is entirely written out and signed by him, and provided he himself, in the presence of the Court or of the Notary to which or to whom he presents such will, and of the witnesses of the delivery, writes down on the paper which he presents that such paper contains his will; (2) the Notary, in the act of delivery or, as the case may be, the Registrar, in the note of particulars referred to in Section 699, shall state that the testator wrote the declaration mentioned in sub-section (1) of this Section, in the presence of the Notary and the witnesses or in the presence of the Court".

This is the only form of secret will recognized by our Law, and, in particular, "any testamentary disposition made by what is commonly known as implied nuncupation, or "per relationem ad schedulam", is void" (Section 723). French and Italian Law recognize what is known as a holograph, which is a sort of private will written out by the testator and signed by him. Though this form ensures the utmost secrecy, it presents a number of disadvantages, since such a will can easily be lost or destroyed. Moreover, in case it is forged, it is difficult to prove forgery.

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PRIVILEGED WILLS.

A will is privileged when it is made in a place with which communications have been interrupted by order of the public authority, or at sea.

1) The first form derives from the "testamentum pestis tempore". In view of the circumstances under which it is made, several of the formalities required for ordinary wills are dispensed with.

It may be written out by any person and received in writing in the presence of two witnesses, by a Judge, Magistrate or Notary, or by the Parish Priest, or other ecclesiastic in holy orders. In any such will any person of either sex, provided he or she has attained the age of eighteen years, may act as a witness. The will must, on pain of nullity, be signed by the person receiving it, the testator and the witnesses. If, under the circumstances, the signing of the will by the testator or the witnesses, is not practicable, there must, on pain of nullity, be entered in the will a declaration stating the reason for which such signatures have not been affixed (Section 710).

Any such will must be deposited by the person receiving it in the Registry of the Court of Voluntary Jurisdiction within a month from the day on which communications were re-established, unless it has been withdrawn by the testator. Any contravention is punishable as provided in Section 698 in so far as it is applicable (Section 712).

Any such will becomes void on the lapse of, two months from the day on which communications were re-established, or from the day on which the testator was removed to any place with which communications were not interrupted, provided the testator is still alive after the lapse of the said time (Section 711).

2) A will made at sea (i.e. on the high seas and not while the ship is in port), on board any ship registered in Malta, may be received in writing by the Master or the person acting in his stead. A will made by the Master may be received by the person who, in his absence, would have command of his ship. In all cases the will must be received in duplicate and in the presence of two male witnesses who have attained the age of eighteen years (Section 713). The will must be signed by the testator, the person receiving it, and by the witnesses. Where the testator or the witnesses do not know how to, or can

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not write, an entry must be made in the will stating the reason for which such signatures were not affixed (Section 714). The Master, or the person keeping the log-book and the ship's papers shall, under penalty of a fine,not exceeding ten pounds (£10), make and sign an entry relating to the receipt of such, will, both in the log-book and in the master-roll (Section 715).

As to the presentation of the will, a distinction must be made:

(a) Where the ship returns to the port of Malta, the will must be presented, within eight working days, to His Majesty's Civil Court, Second Hall, unless such will has been withdrawn by the testator;

(b) If the ship touches at any port outside the Island of Malta and its Dependencies, one of the duplicates must be deposited with the British Consul, or, in his absence, with some trustworthy person, being a subject of His Majesty, and the other duplicate must be transmitted with all possible despatch to the Superintendent of the Ports at Malta who will then, within eight days, present it to the said Court (Section 716).

Non-compliance is punishable with a fine and interdiction.

Any such will shall have effect only if the testator dies at sea or within two months after he shall have landed in a place where he could have made another will in the ordinary form (Section 717).

Rules Common to Ordinary and Privileged Wills.

1) The provisions governing the form of wills are of public policy. Consequently:-

(a) A will is null and void unless it is made in one of the forms recognized by law;

(b) No privileged or special form may be used except under the circumstances expressly mentioned by the law;

(c) The testator may choose either the public or the secret form, but he must comply with the formalities proper to the one chosen by him;

(d) A declaration made by the testator to the effect that the will is to stand notwithstanding any non-compliance with the law is without effect.

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2) That the law has been on complied with must result from the instrument itself, and no evidence external thereto is allowed. In particular, it is from the instrument that it must result that the will was read and explained by the Notary to the testator in the presence of the witnesses; similarly, the act of delivery and the note of particulars must contain the declaration that the paper or envelope delivered by the testator contains his secret will; and, in general, whenever the law requires the mention of some fact, this must result from the instrument itself.

By Section 709, "non-compliance with the requirements of Sections 692, 693, 694, 695, 696, 700, 706 and 707, shall, saving the provisions of Sections 710 to 719 inclusive, relating to privileged wills, render the will null and void".

Such nullity, however, may be remedied by the testator or his successors.

As to ratification by the testator, it is generally held that an act whereby the testator declares to ratify a will which is null, even though the said act be vested with all the formalities required for wills, is not sufficient: it is necessary that it be made afresh.

A will which is null may, however, be rendered valid by the successors either expressly or tacitly: in fact, the will cannot be re-made after the testator's death and the nullity of the will, under such circumstances, is a matter affecting the private interests of the successors. Such a ratification amounts to a renunciation of the right of impeaching and is, therefore, valid only if the persons waiving such right are aware of the nullity of the will.

3) A secret will may be written in any language. Public wills, on the contrary, must comply with the rules governing notarial deeds, but they can be written, at the testator's request, in any language known to the Notary. The said request must be mentioned in the instrument.

4) By Section 720, "any testamentary disposition, whether made under the designation of institution of heir, or under the designation of legacy, or under any other designation whatsoever, shall have effect, provided it be so expressed that the intention of the testator may be ascertained, and it be not contrary to the provisions of this Code".

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5) The last will of a person can only be proved by means of a will; it cannot, therefore, be proved if there is no will or if the will is null. Oral declarations are without any effect. Similarly, evidence tending to disprove a testamentary disposition is not admissible. The only exception is when a disposition is impeached on the ground that the institution or legacy therein contained was made through intermediaries in favour of persons under disability (Section 729).

6) Notwithstanding the preceding rule, for the purposes of interpretation extrinsic evidence is allowed. It is necessary, however, to distinguish between interpretation proper and disproving: interpretation is necessary where the disposition is obscure or inconsistent with other dispositions, but where it is clear in itself and in the context there can be no resort to interpretation which, in fact, would amount to an alteration of the will expressed in the instrument. Extrinsic evidence is, therefore, allowed only where the disposition is either not clear or inconsistent(Vide "Grima vs. Caini 1-leri", 10th March, 1884).

The Family's Right of Succession.

As a rule the right to dispose by will has no restrictions since it is an clement of the right of ownership itself which includes, besides the "jus utendi et abutendi", also the "jus disponendi": any person may, therefore, dispose by will or donation of the whole of his estate in favour of any person capable of receiving under a will or by donation.

Where, however, the testators has descendants, ascendants, spouse or illegitimate children, he can only dispose of such portion of his estate as remains after deducting the share which is due to the said persons under the provisions of Section III, sub-title 1 of Title 111 of the Civil Code. The estate, under these circumstances, is divided into two portions, one of which is reserved to the above-mentioned persons and devolves on them by operation of the law, and the other is the disposable portion, of which the testator may freely dispose.

Where the testator has no descendants, ascendants, spouse or illegitimate children, he may dispose by universal or singular title or by donation of the whole of his estate in favour of any person (Section 651 (1) and (2)).

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This restriction imposed by law on the right to dispose freely of one's property is founded on the very functions of property; property, in fact, serves amongst other purposes to enable the owner to fulfil his obligations. It is true that, once man is a free being, he should be the one to see that his obligations are fulfilled and that the law, therefore, cannot interfere without destroying the very conception of the right of ownership as well as the freedom of the owner. But, on the other hand, when the testator has persons who are closely related to him by consanguinity or affinity, his duty towards them is a positive and not a hypothetical one founded on social and domestic relationship: this duty is, therefore, raised by law to a legal obligation. "Chiamare un'essere all'esistenza -- says Franch in his "Memorie della Accademia delle Scienze Morali" (Vol. VIII, p. 443)-- e prendersi l'impegno di essere la sua previdenza e di allontanare da lui ogni sofferenza ed ogni bisogno". It is equally certain that a person is bound to provide for those to whom he owes his existence as well as for the spouse.

The historical origin of the institute of legitim has already been given in the study of Roman Law. Under our Municipal Law children and descendants were entitled, under the system of "societa' coniugale", to the "terzo figliale" and under the system of Community of Acquests to the legitim according to the "jus commune". Also entitled to a reserved portion were the ascendants, in defect of descendants and the "parentado povero o miserabile" to the third degree inclusively, in defect of descendants (Code do Rohan, B. I and IV).

Under the system of the "societa' coniugale" the surviving spouse was entitled to the "terzo materno o paterno". In defect of the "societa' coniugale", the surviving spouse was entitled, if indigent, to a portion of the estate of the predeceased spouse fixed by the Court according to the circumstances of the case.

Under the laws in force the persons entitled to the legitim are the children and the descendants of the testator, and, in failure of descendants, the ascendants of the deceased. The surviving spouse and illegitimate children are entitled to reserved portion or "legitima portio". On failure of such persons, the entire estate may be freely disposed of.

1. <u>Legitim due to descendants.</u>

Legitim is a portion of the property of the deceased which is saved by law to the descendants and, on

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failure of descendants, to the ascendants of the deceased.

The descendants referred to are the legitimate descendats which include:-

(a) legitimate children, children legitimated by a subsequent marriage and adoptive children;

(b) the legitimate descendants of the children, as well as those legitimated by a subsequent marriage, but excluding adoptive descendants who remain extraneous to the family of the adopter.

The descendants of the children of the deceased succeed to the legitim "jure rappresentationis", whenever the child from whom they descend is dead, disinherited or excluded as unworthy (Sections, 645,663). In these three cases representation is allowed in respect of the legitim; on the contrary, the descendants of a child who has renounced his legitim, cannot succeed "jure rappresentationis". Similarly, representation is not admitted where the child is under disability, except where he has been excluded as unworthy.

As to renunciation, the rule is consistent with what takes place in intestate succession, where the share due to a child who has renounced it does not pass to his descendants. On the contrary, the rule in respect of the causes of disability is against the principles of intestate succession, where the "jus rappresentationis" is admitted in all cases of disability; and it is difficult to see why the said principles were not applied to the legitim, which is a form of intestate succession.

The children and descendants of a putative marriage are entitled to the legitim even in respect of the parent who was not in good faith (argued from Section 847).

Children and their descendants are entitled to the legitim, just as they succeed to their father or mother or ether ascendants, without distinction of sex, and whether they are the issue of the same marriage or of different marriages (Section 846).

Portion assigned as Legitim. Under Roman Law, in the pre-Justinian period, the amount of the legitim was fixed and did not depend on the number of the descendants entitled to it: the portion saved by law was one-fourth of

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the deceased's estate. The same system has been adopted by the Italian Code, according to which the legitim is always one-half of the deceased's estate.

Justinian introduced the "progressive system" in his Novel 118, according to which "quatuor vel infra natis dant Jura trentem, quinque vel supra natis dant Jura aemissam". The same system was followed under Intermediary Law, and has been adopted by our legislator. Under the Code de Rohan, however, the "terzo figliale" was a fixed portion. By Section 653, "the legitim shall be a third part of the property of the deceased if such children are not more than four in number, or one-half of such property if they are five or more in number".

This is also the system of the French Code. Under French Law, however, the legitim is one-half if there is one child only, two-thirds if there are two children, three-fourths if the children are more than two in number. This system is certainly more equitable since the needs of the children increase in proportion to their number.

The following are the rules for determining the number of children for regulating the legitim:

(a) Descendants succeeding "Jure rappresentationis" count as one child;

(b) Children or other descendants who are incapable, or who have been disinherited, or have renounced their share, are also taken into account, whether they are succeeded to or not "Jure rappresentationis". If there are descendants entitled to succeed "Jure rappresentationis", such descendants are counted as one instead of the person whom they represent; if there are no descendants, or if the descendants are not entitled to succeed by right of representation, the child who is incapable or has been disinherited or has renounced his share, is taken into account, and his share will increase that of the others. In this way disability, disherison, and renunciation cannot operate in such a way as to increase the disposable portion.

(c) children who predecease the testator without children, or whose children have also predeceased the testator, are not taken into account.

As to the manner in which the legitim is divided, the rules of intestate succession apply:

(a) The immediate children succeed "per capita" or "in partes viriles".

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(b) The descendants who take by representation, succeed "per stirpes". In other words, each stock representing a predeceased, unworthy or disinherited child succeeds to what such child would have received. Such descendants succeed "per stirpes" in all cases, even if they compote with their uncles and aunts, and even if all the immediate children of the deceased are represented by their descendants.

(c) The share due to a child under disability, except if he has been excluded as unworthy, or who has renounced his share, increases the share due to the other children, between whom the legitim is divided as if there were no such children, notwithstanding that such children are taken into account for the determination of the amount of the legitim. The same rule applied to the share of a child who has been disinherited or excluded as unworthy and who has left no descendants.

(d) A child or other descendant who has been instituted heir shares the legitim with the others (Section 655 (3)). As he is the heir, the disposable portion devolves on him; but to it is added, in his favour, the share of the legitim to which he is entitled as a child of the deceased.

2. Legitim due to Ascendants.

On failure of descendants the legitim is saved in favour of the ascendants of the deceased even if the deceased is married or leaves illegitimate children. The legitim is attributed to the legitimate ascendants or to the ascendants who legitimated the deceased by a subsequent marriage. But it is not attributed to the person who may have adopted the deceased, notwithstanding that an adoptive child is put on the same footing, as legitimate children. The reason for the difference is that adoption is allowed by law in favour of the adoptive child.

Under Roman Law, before Justinian's Novel 118, the amount of the "legitima ascendentalis" was one-fourth; by Novel 118 it appears that the same rule that regulated the "legitima descendentalis" was made applicable to the ascendants. Under the laws in force (Section 656), as well as in Italian Law (Art. 817), the amount of the legitim due to ascendants is always the third part of the deceased's property, independently of the number of the ascendants entitled to it. Under French Law if there are ascendants in one line only, the amount of the legitim is one-fourth, and if there are ascendants in both lines, the legitim is one-half, vis. one-fourth for each line of the deceased's property.

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The division of the legitim due to ascendants is regulated by the rules governing intestate succession: consequently the legitim is competent to the "proximiores" to the exclusion of the "remotiores", and an ascendant cannot succeed "jure rappresentations". By Section 656(2), the legitim is distributed as follows:-

(a) Where both the mother and father survive, the said third part shall be divided between them in equal portions;

(b) Where only the father or only the mother survives, the legitim shall belong entirely to the surviving parent;

(c) Where the testator is not survived by either his father or his mother, but only by other paternal and maternal ascendants, in equal degree, the legitim shall be due, as to one-half to the paternal ascendant or ascendants, and, as to the other half, to the maternal ascendant or ascendants;

(d) Where such ascendants stand in different degrees, the legitim shall entirely belong to the ascendant nearest in degree, irrespective of whether such ascendant is paternal or maternal.

Rules applicable to both Legitims.

Legitim is a right of succession "causa mortis"; consequently:-

1. The right to the legitim arises on the death of the testator.

2. No person may claim the legitim before the succession of the deceased is opened. Until the said succession is opened, no person may impeach any act done by the "decujus" in prejudice of the legitim, notwithstanding that such acts consist of inofficious donations which have already taken effect.

3. It is not lawful to make agreements of renunciations relating to the legitim during the lifetime of the testator, since the future succession of a living person cannot form the subject-matter of an agreement or of a renunciation. This rule, as already seen, suffers certain exceptions where the renunciation is made in contemplation of marriage or upon the taking of religious vows (Section 1027). Donations made by the deceased in favour of a person entitled to the legitim are not only

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outside the operation of this rule but are considered as made on account of the legitim.

4. It is, necessary that the person entitled to the legitim survives the testator saving the effects of representation.

Under Roman Law, even under the system introduced by Novel 118, the legitim had to he left under the title of heir; under the present system the legitim is attributed directly by the law without the necessity of the testator's intervention, independently of the nature of the disposition by which it is left, and even if the will contains no dispositions in respect thereof. It has, therefore, been said that, under Roman Law, legitim was a form of testate succession having a legal cause -- testate, because it had to be left by the deceased, and legal, because the testator was bound by law to do so; under the present system the legitim is a case of intestate succession -- intestate, or legal, because it is attributed by law independently of the will of the testator; in testate succession, because it constitutes a limitation of the testator's power of disposal by will. Consequently, all those persons who are incapable of receiving under an intestate succession are also incapable of receiving the legitim.

Another difference between Roman and present Law is that under the law of Justinian the legitim was a right of succession by universal title. This rule, it appears, derived from the jurisprudence of the "Centumvires", according to which the deceased could only institute the person entitled to the legitim as his heir or disinherit him expressly -- "vel heredem vel ex heredem scribere"; and since by the law of Justinian children could no longer be excluded or disinherited without a lawful cause, the testator could not but institute them his heirs at least in respect of the legitim. This system was followed by the Italian Civil Code (Art. 808) where the legitim is a "successio universalis". Under our law, on the contrary, the legitim is a "para bonorum", and is, in fact, defined by Section 652 as "a portion of the property of the deceased which is saved by law to the descendants, and on failure of descendants, to the ascendants of the deceased". It follows that:-

(a) _ The person entitled to the legitim is not liable for the debts of the inheritance; though such debts, of course, are taken into account in establishing the amount of the legitim, since "bona non intelliguntur nisi deductis impensis, nisi deducto aere alieno". Similarly,

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he is not entitled to the "possessio de jure" of the property of the inheritance: such possession is by operation of the law transmitted to the heir from whom the person entitled to the legitim will have to demand the possession of the property forming the legitim.

(b) He may renounce the inheritance, whether it has devolved on him by will or by law, and keep the legitim.

How i3 the legitim due? The following rules are important:-

(1) The legitim is a portion of the property of the deceased and it is, therefore, due in kind; in other words, it is made up of a portion of the property of which the testator has not disposed or which is returned to the estate as a result of the reduction of inofficious liberalities. As it is due in kind, the legitim is not a mere debt due to the person entitled to it from the heir, but it is a right of ownership. The heir cannot choose any property he likes and tender it in payment of the legitim, because the person to whom it is due is entitled to a portion of each of the different things of which the deceased's estate is made up, including any property disposed of by the testator in violation of the right to the legitim. The law does not specify the kind of property which is to make up the legitim: it simply states that it is "a portion of the property of the deceased". On the other hand, the person to whom the legitim is due may not claim any portion of the property disposed of by the testator, either by donation or by will, unless he has thereby disposed of more than he is by law allowed. In other words, the descendants' or ascendants' right to the legitim limits the testator's power of disposal in respect only of the amount, and not of the kind, of the property which he owns.

(2) The legitim is due in full ownership, and it is not lawful for the testator to encumber it with any burden or condition (Section 657 (1)). A burden, in fact, diminishes the value of the property as well as the benefits accruing therefrom, and a condition makes the right to the property uncertain.

To this second rule there is an exception, known in practice as "cautio Socini vel Gualdensis", established in Section 658, which runs as follows: "Where the subject of a testamentary disposition is a right of usufruct or a life annuity, and it appears to the persons entitled to the legitim that the value of such usufruct or life-rent surpasses the disposable portion of the estate of

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the testator, they shall only have the option to abide by the testamentary disposition or to take the share due to them by way of legitim free from every charge, on abandoning in favour of the disponees of the usufruct or life annuity the full ownership of the disposable portion. Where any of the persons entitled to the legitim elects in his own interest to abide by the testamentary disposition, it shall, nevertheless, be lawful for any other of such persons to elect to take the legitim on abandoning, as aforesaid, the disposable portion".

Socinio and Gualdense upheld the validity of such a disposition provided the condition was added that if the person entitled to the legitim refused to abide by the disposition, he had to abandon the full ownership of the disposable portion. Section 658 has not only accepted the opinion of these jurists but has regarded the said condition as included even though not expresslyly mentioned.

The person to whom the legitim is due, is, therefore, given an option: he may elect either to abide by the testamentary disposition or to claim the legitim in full ownership and free from every charge, but if he chooses the second alternative he must abandon the full ownership of the disposable portion. This exception is justified by the fact that although, on the one hand, the legitim is burdened by a usufruct or a life annuity, it consists of a larger portion of the deceased's property than is saved by law in favour of the persons entitled to it; and, in any case, the person to whom the legitim is due may always claim the legitim, the only right to which he is entitled, on abandoning the disposable portion.

Computation of the Legitim.

This important matter is regulated by Section 657 and 684, et seq.; it will be dealt with briefly here and more fully under the title on the abatement of testamentary dispositions exceeding the disposable portion.

Section 657 (2) provides that the legitim is computed on the whole estate, after deducting the debts due by the estate, and the funeral expenses. By para. 3 of the same Section there shall be included in the estate all the property disposed of by the testator under a gratuitous title, even in contemplation of marriage, in favour of any person whosoever, with the exception of such expenses as may have been incurred for the education of any of the children or the descendants.

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The legitim cannot he diminished either by testamentary dispositions or by acts "inter vivos" under a gratuitous title, and it is therefore computed on the whole estate as if no donations had been made.

Section 684 calls this computation a fictitious addition --"any property shall then be fictitiously added". If, upon such computation being made, it is found that the property disposed of by way of donation exceeds the disposable portion, the said property is actually added to the remaining estate: in other words, it is recovered from the donees and so much of it as is necessary to reinstate the legitim is attributed to those persons to whom the legitim is due, regard being had to their number and to their quality of ascendants or descendants.

The person to whom the legitim is due must impute to it all such things as he may have received from the testator and as are subject to collation under any of the provisions of Sections 954 to 979 (Section 657 (4)).

Extinguishment of the Right to the Legitim.

The said right is extinguished:-

(a) by disability, to which are applicable the rules governing intestate succession;

(b) by renunciation, which is only valid if made after the opening of the succession;

(c) by payment in advance of the legitim, either by way of donation or by testamentary bequests imputable thereto; and

(d) by disherison.

Disherison is a declaration made in the will whereby the testator deprives of the "legitima portio" the persons entitled thereto as a punishment for certain acts specified by the law. Disherison was introduced in Roman Law consequent upon the recognition of the family's right to a portion of the testator's estate; it could only be exercised for a lawful cause. And this right, which has been abolished in French and Italian Law, has been preserved by our law. The grounds for the abolition of this institute in Italian Law are given by Pisanelli in his report on the Draft Code: "The main grounds for disherison -- he says -- render a person unworthy to inherit; unworthiness, however, is pronounced by the law and a person unworthy to inherit may

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be pardoned by the testator; in respect of disherison, it is not the law which punishes the guilty person but the testator himself, who, in his last act of civil life, in the solemn hour of death, proclaims, through vengeance, the dishonour of his children". It is true that disherison is not meant to enable the testator to avenge himself or to satisfy passion, but to mete out punishment, and that it is rather a preventive than a means of repression as is shown by the insignificance of the number of cases of disherison; yet it is undeniable that the institute is odious and that, in most cases, it defeats its very purpose owing to the reluctance of parents to inflict it on their children. It appears, therefore, advisable to abolish disherison and to increase the causes of unworthiness.

Conditions.

These are:-

1. The concurrence of a lawful cause, since disherison is a punishment and cannot be inflicted arbitrarily. Under Roman Law it was, originally, in the discretion of the Judge to assess the seriousness of the cause; the grounds for disherison, however, as established by jurisprudence, were grouped by Justinian in Novel 115, ch. 3 and 4.

Our Civil Code enumerates separate grounds according as to whether the disherison refers to descendants or to ascendants.

The grounds on which a descendant may be disinherited are the following only:-

(a) If the descendant has without reason refused maintenance to the testator;

(b) If, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care;

(c) If, where the descendant could release the testator from prison, he has without reasonable grounds failed to do so;

(d) If the descendant has struck the testator, or has otherwise been guilty of cruelty towards him;

(e) If the descendant has been guilty of grievous injury against the testator;

(f) If, in the case of a daughter or other female descendant, she is a public prostitute without the connivance of the testator;

(g) In any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of sub-title II of Title I of Book First of the Civil Code, declared free from the obligation of supplying maintenance to such descendant (Section 680).

The grounds on which ascendants may be disinherited are the following only:-

(a) If the ascendants have entirely neglected the education of the descendant or have without reason refused him maintenance;

(b) If, where the descendant has become insane, the ascendants have abandoned him without in any manner providing for his care;

(c) If the ascendants have attempted to take the life of any of their descendants, i.e. not only the life of the testator, but that of any of their descendants;

(d) If one of the ascendants have attempted to take the life of the other or has grossly outraged him (Section 681).

2. The ground of disherison must be stated in the will. This condition is meant to show that the testator, at the moment in which he pronounced disherison, had a sufficient reason for so doing, and that such pronouncement was not made for reasons other than those for which the law allows it.

3. The grounds for disherison must be proved by the party alleging such disherison; but where more grounds are stated, the proof of one is sufficient (Section 682).

The last two conditions are in accordance with the provisions of Novel 115 whereby the principles of the former law, in terms of which the person disinherited had to prove his innocence, were inverted.

Where the ground of disherison is not stated, or is not proved, or though stated and proved is not one on which the law allows disherison, the person disinherited will only be entitled to the legitim (Section 666). The same rule applies if the testator passes over one of the persons entitled to the legitim, without disinheriting him; unless the testator is unaware of the

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existence of such person, in which cese the latter may impeach the will by virtue of Section 787.

Effects.

The following rules govern the matter:-

(1) Disherison affects only the guilty person and its effects do not extend to the children or descendants, to whom the legitim is due "jure rappresentationis" (Sections 662 and 663). It is immaterial whether the person disinherited predeceases or dies after the testator; in case of survival, however, the person disinherited will not have over the legitim the usufruct or administration to which he may be entitled by law.

(2) Where representation is not applicable, the legitim of which the person disinherited is deprived, increases the share due to the other persons entitled to the legitim.

(3) Where the person disinherited has no other means of subsistence, those who in consequence of his disherison will benefit by his legitim will be bound to give him maintenance to the extent of the fruits of the legitim, saving any other right to maintenance competent according to law (Section 665).

Roman Law recognized, and modern Codes have preserved another kind of disherison -- disherison on the ground of prodigality -- known as "bonamente", because it is ordered by the testator in the interests of his descendants. Section 667 provides that "where the person entitled to the legitim is interdicted on the ground of prodigality, or is so burdened with debts that the legitim, or at least the greater part of it, would be absorbed by such debts, it shall be lawful for the testator by an express declaration to disinherit such person, and to bequeath the legitim to the children or descendants of such person". Such person, however, will be entitled to maintenance as aforesaid: such right, in fact, is competent to him even if guilty and, moreover, this was the rule under Roman Law.

Disherison and Unworthiness are two separate institutes, and the following are the main differences:-

(i) Unworthiness is pronounced by the law and it takes effect "ipso jure"; the heirs may take advantage of it even if the testator has not revoked the dispositions made in favour of the person unworthy to receive

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under a will, provided he has not been reinstated. Disherisen must he declared by the testator;

(ii) A person unworthy to receive under a will may only receive by virtue of reinstatement; a person who has committed an act for which he could be disinherited needs no reinstatement, because the silence of the testator is a sufficient pardon;

(iii) Unworthiness applies generally to any person in whose favour a testamentary disposition has been made or whom the law calls to the succession of a person; disherison can only apply to those persons to whom the legitim is due.

Section 652 (2) contains a transitory provision which runs as follows: "The provisions of this Section shall not supersede the provisions contained in Sections 12 and 13, Chapter I, Book III of the Municipal Law of Malta, commonly called Code de Rohan, with regard to children born from marriages contracted before the 11th of February, 1870, according to the custom referred to in that Code, in which case the provisions of such Code shall apply". The legitim, under that Code, consisted in the "terzo figliale", which arose out of a contract -- the marriage contract -- and, which, therefore, according to transitory law, should be governed by the law in force at the time of the contract. The matter will be dealt with more fully under transitory law in the matter of successions.

3. "Legitima portio" saved in favour of the Surviving Spouse.

Married life should be one of mutual affection and support. However, in our law, it is not merely the relationship of affection that is the ground for this institute but rather a humanitarian feeling for the surviving spouse where such spouse is poor and the deceased relatively wealthy. The provisions of our law in this matter are also influenced by tradition, since under Roman Law a portion of the property of the deceased was saved in favour of the surviving spouse under the same condition, viz. indigence.

Early Raman Law saved no portion of the predeceased's property in favour of the surviving spouse unless the marriage took the form of a "conventio in manu", in which case the wife succeeded to the husband "uti filia". It was in Novel 53, Ch. VI, that Justinian attributed to the widow who was poor and had no dowry the fourth part of her husband's property, which right came to be known, and is still known as "quarta uxoria". Under the same condition of indigence, the same right was also granted to the husband. The reason for the said condition is given in the Novel itself, where it is stated that it would be unfair to deprive the children of the property corresponding to the "quarta uxoria" where the surviving spouse has sufficient means of subsistence of his or her own. Under Novel 53 the amount saved by law was not affected by the number of the children; but by Novel 117 the "quarta uxoria" was reduced, in case the testator had three or more children, to a "pars virile", so that the surviving spouse would not receive a greater portion than each of the children. Moreover, if there were common children, the surviving spouse was entitled only to the usufruct of the portion due, the ownership whereof was attributed to the children.

A Novel of the Emperor Leo Isanrius, of uncertain date, reintroduced the rule of the previous law in terms of which the "quarta uxoria" was competent in full ownership even if the testator had no children; but as this law was not accepted in the Western Empire, the law of Justinian remained in force in our Islands.

Under our Municipal Law the law of Justinian was reproduced in respect of marriage contracts "ad usua Graecorum" (B. IV, Ch. 1, para. 41). In marriage contracts "ad usum regionis", the "terzo materno" was attributed to the wife "pro dote et quocumque suo jure", and she was not, therefore, entitled to the "quarta uxoria".

The conditions of indigence on the one hand, and of sufficiency of means on the other, were maintained. The surviving spouse was considered to be poor if he or she had no means of subsistence even though capable of earning a living; the predeceased spouse was considered to be wealthy if, after deducting the debts and the portion saved in favour of the surviving spouse, a considerable amount of property remained, regard being had to his or her social standing and to the duty of providing maintenance to the children.

The portion due to the surviving spouse was not a fixed one, but it had to be sufficient for his or her maintenance; it could not, however, exceed the fourth part of the deceased's property in case there were children; in which case, moreover, only the usufruct over the portion saved was competent, though such portion could be subjected to debts and even alienated where this was required for urgent needs, and for death-bed end funeral expenses.

The said Code provided also for the case of a surviving spouse who, having sufficient means of his own at the time of the opening of the succession, became indigent afterwards: under these circumstances, the surviving spouse could claim maintenance from the heirs over the property of the inheritance as well as the death-bed and funeral expenses.

Under the present law, the "legitima portio" is due to the surviving spouse, validly married to the deceased, and, according to the prevailing opinion, to the spouse in good faith in the case of a putative marriage (Pollacco, op. cit. Part I, page 105). The conditions of indigence and of sufficiency of means, which have been abolished in Italy, are required under our law.

Section 671 establishes the manner in which the existence or otherwise of the said conditions is to be determined. It provides: "(1) Where the surviving spouse has property, the income of which is at least equal to the usufruct mentioned in Section 668, the provisions of that Section shall not apply. (2) Where the surviving spouse has property the value of which is at least equal to the value of the fourth part of the estate referred to in Section 670,the provisions of that Section shall not apply. (3) For the purposes of sub-sections (1) and (2)of this Section, there shall be taken into account, in determining the property of the surviving spouse, the portion of the community of acquests belonging to such spouse, the legacies which may have"been bequeathed to , him or her by the predeceased spouse, and, where the surviving spouse is the wife, the dowry and the dower. (4) Where, in any of the cases referred to in sub-sections (1)and (2) of this Section, the. income or value of the property of the surviving spouse is not equal to the usufruct or the property referred to in Sections 668 and 670, the surviving spouse shall be entitled to talee out of the inheritance so much as is required to make up what is due to him or her" .

Where the deceased spouse is survived by children or other descendants, the surviving spouse is entitled to the usufruct of a fourth part of the estate of the deceased; on failure of children or descendants, the surviving spouse is entitled to a fourth part of the estate in full ownership (Sections 668 and 670).

The present system differs from Novel 117 and from the Code de Rohan in the following points:-

(a) The Novel and the Code de Rohan mention common children; Sections 668 and 670 mention children and descendants of the deceased spouse.

(b) Under Novel 117, the "quarta uxoria" was reduced to a "pars virile" if the deceased was survived by at least three children; under the present system the "legitima portio" is always one-fourth of the estate. Under the Italian Civil Code the "legitima portio", which is always competent in usufruct, varies according to the number of children, since it is equal to a "pars virile" of the legitim divided by the number of children plus the surviving spouse; moreover, on failure of descendants and in concourse with ascendants, it is a fourth part of the estate; on failure of ascendants a third part of the estate.

The surviving spouse to whom the "legitima portio" is due in usufruct enjoys the following two rights:-

(1) It is lawful for the Court to authorize the surviving spouse, in order to provide for his or her maintenance, to hypothecate or alienate, wholly or in part, the portion due to him or her from the deceased spouse (Section 669), where the fruits are not sufficient for this purpose;

(2) Such portion is subject to the expenses of the last illness and to the funeral expenses of the spouse who has enjoyed such portion (Section 668 (2)). These rights derive from the principle that the portion saved in favour of the surviving spouse is meant to provide for his or her material support.

Like the legitim, the said portion is a "pars bonerum" and not a portion of the inheritance: the surviving spouse is, therefore, a successor by singular title, in not entitled to the possession "de jure" of the property forming the "legitima portio", and is not directly liable for the debts of the inheritance. The "legitima portio" is computed after deducting the debts due by the estate, and, as it is a "pars bonorum", it is not a mere debt claimable from the heirs of the predeceased spouse, but is due in ownership.

The right of the surviving spouse ceases:-

(a) if the conditions of indigence and of sufficiency of means, as established in Section 671, do not concur. However, Section 672, which reproduces a provision of the Code de Rohan, provides: "nevertheless, the surviving

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spouse who, by reason of the property referred to in the last preceding Section, has not received the portion of the estate saved to such spouse under Sections 868 and 670 may, if he or she, without any fault on his or her part, ceases to possess such property, demand maintenance out of such property of the predeceased spouse as may still be in the possession of the heirs of the latter, to the extent of a fourth part of the usufruct or, as the case may he, of the value of such property, without prejudice to the rights of the creditors of such heir". This right is available only against the heirs and may not, therefore, he exercised against third parties in possession, or against the legatees or to the prejudice of the creditors of the heirs. If the property of the predeceased spouse which had passed to the heirs had been alienated, the surviving spouse may not pursue such property, nor can the other property belonging to the heirs be attached. However, the same Section adds that the property which is still in the possession of the heirs "shall in such case (i.e. under the same circumstances as above) be also subject to the expenses of the last illness and to the funeral expenses of the surviving spouse".

(b) If, at the time of the death of one of the spouses, the spouses were separated by a judgement of the Competent Civil Court, and the surviving spouse had, in terms of Sections 56 to 60, forfeited the rights referred to in those Sections;

(c) If, in regard to the surviving spouse, there exists any of the grounds on which such spouse would be unworthy or incapable of receiving by will;

(d) Where the predeceased spouse has, by his will, on any of the grounds mentioned in paras, (a), (b), (c), (d) and (e) of Section 660, expressly deprived, the surviving spouse of the "legitima portio", and such ground or, where more grounds are stated, any of such grounds is proved.

The rights of the surviving spouse in marriages contracted under the system of the "societa' coniugale" before the coming into force of Ordinance IV of 1867, are included in the "terzo paterno" or "materno" and the rules established by the Code de Rohan are applicable thereto, even if the succession of the predeceased spouse is opened under new laws.

Re-marriage of the surviving spouse.

Where the surviving spouse enters into a second or a subsequent marriage, and, at the time of such marriage,

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there are still children or descendants, as stated in Section 668, even if such children or descendants are not heirs of the deceased spouse, the surviving spouse forfeits the ownership of all things which he or she may have received under a gratuitous title (known as "lucri nuziali") from the predeceased spouse, including donations in contemplation of marriage, and only retains the usufruct thereof, unless the predeceased spouse has otherwise ordained. In such cases the ownership vests in the said children or descendants of the predeceased spouse. The provision which is contained in Section 674 derives from Consts. III and Iv (Codex "De Secundis Nuptiis") and from the Code de Rohan (Book IV, Ch. 1, paras. 25 and 51).

This provision is founded on the presumed intention of the donor or testator that the property donated or bequeathed to the other spouse should, in the event of a second or subsequent marriage of the latter, revert in ownership to his or her children or descendants rather than passing into the family of his or her wife or husband. The so-called "lucri nuziali" include all things received under a gratuitous title in contemplation of, or during marriage, as well as the dower which, although due by virtue of an express or implied agreement, is to seme extent a donation, and, therefore, covered by the provision of Section 674.

The ownership of the said things vests in the children of the predeceased spouse as such and not as heirs; and, on the death of the surviving spouse, the usufruct is consolidated in their favour. As security of their rights, the law grants to the children or descendants a general hypothec over the property of the surviving spouse, which has already been dealt with.

This provision, as already stated, is founded on the presumed intention of the predeceased spouse and it, therefore, operates only in the absence of an express declaration to the contrary; conversely, the forfeiture of the rights of the surviving spouse may be extended to the usufruct.

4. <u>"Legitima portio" saved in favour of illegitimate Children</u>."

Parents are bound, by the laws of nature, to provide for the well-being of their children, even if illegitimate. This duty is not contested; but it has been found necessary, in order to protect society and the legitimate family, to mete out a different treatment to illegitimate

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children. Under early law, the condition of illegitimate children was a hard one indeed: they could never succeed to their parents unless they were legitimated. If legitimation took place "per subsequens matrimonium", they received the same treatment as legitimate children; if they were legitimated "per oblationem curiae", they acquired the same rights as legitimate children whenever they were presented by the father, but were only entitled to the said rights on failure of legitimate issue if they presented themselves for legitimation. With regard to succession to the mother, illegitimate children enjoyed the same rights as legitimate children unless their illegitimacy was qualified.

Under the Code do Rohan the condition of illegitimate children improved considerably: they were entitled to maintenance in all cases, even if their illegitimacy was qualified, against both the father and the mother, independently of the existence or otherwise of legitimate issue; those children which were legitimated had, besides, greater rights.

The French Civil Code, as originally promulgated, did not provide for the succession of natural children; this gap was at first remedied by doctrine and jurisprudence and eventually by a law dated 25th March, 1896, which added a sub-section to Section 913 and a new Section -- Section 915,

Our law saves a portion of the parents' property in favour of illegitimate children who have boon legitimated by a decree of the Court or acknowledged by the parents or by the Court; such portion may be claimed from the father as well as from the mother provided it results, in terms of law, that they are children of both parents. The said right is competent also, "jure rappresentationis", to the descendants of such children, provided such descendants are legitimate or have been legitimated by a subsequent marriage whenever the immediate child from whom they descend is dead, unworthy to receive or has been disinherited. The existence of legitimate issue does, not affect the said right "per se", but only its amount.

If the testator leaves children or descendants, as stated in Section 668, the portion of the illegitimate children is a third part of the legitim to which they would have been entitled if they had been legitimate children: in default of any such children or descendants, the portion of the illegitimate children is one half of the said legitim.

In this way the interests of the illegitimate children and of the legitimate family are reconciled, since the portion due to the illegitimate children is nececarily inferior to that due to the legitimate issue. Legitimate issue, by Section 668, includes children or descendants, legitimate or legitimated by a subsequent marriage, adoptive children and their descendants.

The rule just stated in respect of the portion due to illegitimate children applies only to those children who have been "acknowledged in the Act of Birth, or in any other public deed whether before or after their birth, or legitimated by a decree of the competent Court" (Section 677). As to children whose filiation has been declared by a judgement of the competent Court, a distinction is necessary: with regard to the estate of the mother, the abovementioned rule applies; with regard, however, to the estate of the father, the portion saved to the said children is regulated and may be paid in the same manner, but it can never exceed such amount as, regard being had to the condition of the mother, may be necessary for the maintenance of each of such children during his or her lifetime (Section 679 (1)).

In order to determine the amount of the "legitima portio" due to an illegitimate child, it is necessary to establish, first of all, the legitim to which he would have been entitled if he had been legitimate. Consequently:-

(a) Regard must be had to the number of all the children, including the illegitimate ones. Thus, if the "decujus" leaves four legitimate children and an illegitimate child, the legitim will be one half and not a third part of the estate; and if one of the legitimate children has been disinherited he will, this notwithstanding, be counted with the others according to the rules governing the computation of the legitim. Similarly, the legitim due is one half of the estate if the "decujus" leaves two legitimate children and three illegitimate ones, even though one of the illegitimate children is incapable of receiving.

(b) When the legitim is established, the "legitima portio" is calculated by dividing the legitim by the number of all the children, and the quotient resulting therefrom will represent the portion of the estate which the illegitimate child would have received if he had been legitimate. Therefore, in the first example given above, the said portion would be a fifth part of one half of the estate, or one-tenth; and, as an illegitimate child in concourse with legitimate children is only entitled to a third part of the said portion, the "legitima portio" due to him would he a thirtieth part of the estate.

The portion due to a legitimate or illegitimate child who is disabled, or disinherited, or has renounced his share, devolves on his children by right of representation_, where applicable, or increases the portion due to the others. So that supposing, in the same example given above, one of the legitimate children has renounced his legitim, the legitim on which the portion due to the illegitimate child is to be calculated remains one half of the estate; but the said legitim will be divided between the four remaining children and the "legitima portio" due to the illegitimate child would be a third of one-fourth of half the estate, vis. a twentyfourth part of the estate.

The "legitima portio", like the legitim of which it is a fraction, is a "pars bonorum". This notwithstanding, and notwithstanding that it is not a mere debt, the heirs are given the following faculties in making payment:-

(i) They may, in all cases, pay the share saved by law to the illegitimate children either in cash or in movable or immovable property of the estate, on a valuation.

(ii) With regard to the estate of the father, the portions saved to the illegitimate children whose filiation has been declared by a judgement may be paid in kind or in cash or in the form of a maintenance allowance. If the heirs elect to pay a maintenance allowance, they may pay such allowance either directly in cash, monthly in advance, or by granting the usufruct of one or more immovables. But once the amount of the allowance has been fixed, it shall not be subject to any alteration, notwithstanding any change of circumstances, since it is a right of succession and not an allowance due "officio judicis" (Section 679).

The right competent to illegitimate children ceases:-

1. by any of the causes of disability;
2. by disherison; and
3. by the payment of the share due to them either by donation or by testamentary bequests.

The portion due to the spouse and to illegitimate children does not diminish the legitim due to legitimate

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descendants or ascendants, but is a charge on the disposable portion of the estate.

These are the rights saved by law to the family of the deceased. Former laws saved similar rights to the collaterals of the deceased; thus, under Roman Law, a portion of the inheritance was due to the brothers and sisters "germani et consanguinei" if the testator preferred to them a "persona turpis", provided he had no descendants or ascendants. Similar was the right to the third part of the estate saved, under our customary and municipal laws, in favour of indigent persons related to the deceased, on failure of descendants and ascendants. This right was but an extension of the right granted by Roman Law to the brothers and sisters of the deceased, but it was sufficient if the testator had left his estate to a person extraneous to the family and it was not necessary that such person should have been a "persona turpis".

Action for the Abatement of Testamentary Dispositions exceeding the Disposable portion.

Testamentary dispositions, as well as donations, exceeding the disposable portion are subject to abatement and are limited to that portion. The action for abatement is the means whereby the family's rights are protected.

Under the pre-Justinian Law, four different actions had been gradually introduced:-

(a) The "querela nullitatis", attributed to the "heredes sui" passed over by the "paterfamilias", but not formally disinherited, after the introduction of the "successio necessaria formalis".

(b) The "bonorum possessio contra tabulas", attributed to emancipated children who, because they were emancipated, were not "heredes sui"; such children, however, could not be preferred but only formally disinherited.

(c) The "querela inofficiosi testamenti", whereby the "heredes sui" annulled the will and opened the way to intestate succession in their favour. This action was introduced in consequence of the recognition by the "centumvires" of the family's right to a portion of the deceased's estate. The plaintiff, by this action, impeached the will as well as any donation made by the testator on the ground that they exceeded the disposable portion, and the effect of the "querela" was the nullity of the will on the ground of the testator's unsoundness of mind.

(d) The "actio expletoria", granted to the person to whom the legitim was due, where the testator had bequeathed to him only a portion of the share duo to him by way of la gitila.

Justinian, in Novel 115, substituted these actions by the "querela nullitatis ex novo jure" and the "actio expletoria". The former was competent where the person entitled to the legitim, although the legitim or even a larger portion may have been bequeathed to him, was not instituted heir. Such person could impeach the "institutio heredis" and demand the opening of the succession under intestacy in his favour. All other dispositions, however, hold good -- such as legacies or entails -- and this was exactly the difference between the pre-Justinian "querela" and the "querela ex novo jure". The "actio explatoria" was competent where the testator failed to leave the legitim to the persons to whom it was due, either wholly or in part, independently of whether such persons were instituted heirs or not.

Under the present system the persons to whom the legitim is due are entitled to the action for claiming the legitim or any other portion of hereditary property given by law, and to a subsidiary action, vis. the action for the abatement of testamentary dispositions and donations excluding the disposable portion. The latter action is dealt with under "Successions" and under "Donations". Section 111 of Sub-title II of Title III deals with the rules applicable to testamentary dispositions and to donations; Sub-title VI of Title XIV deals with the reduction of donations.

The action for abatement or reduction is competent to those persons whose right to the legitim or "legitima portio" has been set aside by testamentary dispositions or donations exceeding the disposable portion and its effect is the abatment of the said dispositions or donations and their limitation to that portion. Such dispositions or donations are declared null as a result of this action, but only in so far as they exceed the disposable portion, and this is why it is said that such dispositions or donations are abated or reduced rather than annulled. It is immaterial if one or more of the said dispositions or donations is annulled in its entirety, because vis-a-vis this action all the dispositions and donations are taken into account, and therefore,

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the total annulment of one or some of them is always an abatement or a reduction thereof.

Consequently the nullity of testamentary dispositions or of donations exceeding the disposable portion does not take place "ipso jure"; the declaration of nullity must be demanded by means of an action, and if no such demand is made within the prescribed time, such dispositions or donations will become unimpeachable. Moreover, as the action for abatement refers to a succession, it can only be exercised after the opening of the succession, even though it might aim at the reduction of a donation. For similar reasons, it cannot be renounced before that moment, or form the subject-matter of an agreement.

The persons to whom this action is competent are those in whose favour the law saves a portion of the deceased's estate and who have not received the portion due to them, wholly or in part. It is equally competent to any of the said persons who has been unlawfully disinherited.

In any of these cases the remedy is always the action for abatement, and it cannot be demanded that the whole will or the "institutio heredis" be declared null. An only exception refers to the pretcrition of children or descendants who, at the time of the making of the will, were not yet born or of whose existence the testator was at that time unaware. Under these circumstances the entire will is revoked "ipso jure", unless the testator has made provision for the contingency of the existence or subsequent birth of children or descendants.

The action for abatement is divisible and may, therefore, be exercised by each of the persons entitled to it for his or her share.

As the said action is not a personal one, it may be exercised by the heirs, or even legatees or assignees of hereditary rights of the persons to whom this action is competent. It is equally competent, indirectly or by virtue of the "actio surrogatoria", to the creditors of the said person. Naturally, however, such persons will have to impute any property received by the person under whom they claim which he would have had to impute if the action had been exercised by him.

On the other hand, "donees, legatees or creditors of the deceased cannot demand the reduction of donations

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or benefit by it" (Section 1913). As to the creditors, the reason for this provision is that, if they became creditors after the donation was made, the property disposed of would not form part of their guarantee, and if they were already creditors at the time when the donation was made, they should have to bear the consequences of their inaction since they would have trusted the testator and failed to secure their rights. Under the circumstances, the said creditors would only be entitled to claim payment in preference to the legatees, and to the "actio Pauliana", where competent. As to the legatees and donees of the testator, it cannot be conceived how they could demand the reduction of donations made, in favour of other persons, by the person under whom they claim.

The action for abatement may be exercised against any person who may have benefitted by the dispositions or donations made in excess of the disposable portion -- such as heirs, donees or legatees.

Now, supposing the property received by any of such persons has been alienated, may the person to whom this action is competent direct his demand against the alienees and recover from them the value of the property which he could have recovered from the alienor ?

This query is solved by Section 1918, which, though contained under the title of Donations, is perfectly applicable to testamentary dispositions. It is there provided that: "the action for reduction or for recovery may be brought by the person to whom it is competent, against third parties in possession of the immovable property forming part of the donations and alienated by the donees, in the same manner and in the same order as If against the donees themselves, but not until the plaintiff has first discussed the donees". As to movable property, however, the action may only be directed against the heir, donee or legatee, and if the property has been alienated the plaintiff may only recover its value from the said persons: no real right attributes the "droit de suite" in respect of movable property.

Conditions.

This action postulates the making of testamentary dispositions or of donations exceeding the disposable portion. This fact can only be established after a preliminary enquiry is made having for its object the liquidation of the deceased's estate, since the "legitima portio" is a portion of the said estate; the estate is then divided into two portions, the disposable and the undisposable portion, and eventually the plaintiff's legitim is established. The plaintiff will then have to impute what he may have received from the deceased, either by donation or by will, to his legitim in order to determine whether this has or has not already been paid. This is the purpose of this preliminary enquiry which consists in:-

1. The re-instatement of the deceased's estate;
2. The imputation of any property received from the testator either by will or by donation.

1. The re-instatement of the deceased's estate is made up of the following operations:-

(a) The formation in one-bulk of all the property of the testator;

(b) The liquidation and deduction of the debts due by the estate;

(c) The fictitious addition of any property which has been disposed of by donation;

(d) The valuation of the said property.

(a) <u>The formation in one bulk of all the property of the testator.</u>

The assets of the inheritance include the entire property of the testator, movable or immovable, corporeal or incorporeal, whether left under a will or under intestacy, as well as all the debts particularly those due by the heirs and the persons entitled to a "legitima portio". The debts due to the estate by the heirs are included notwithstanding the merger resulting from the acceptance of the inheritance, since merger does not extinguish a debt, though it makes its payment impossible. The said assets, however, do not include that property which has ceased to form part of the testator's estate, such as the right of usufruct or the right to a life annuity and other strictly personal rights, which are extinguished by the death of the holder. Similarly, entailed property is excluded. Equally excluded are bad debts and other worthless property, saving the necessary reservations for the possible payment of a bad debt, and the case of a bad debt due by one of the heirs, in which case the debt becomes incapable of payment to the extent of his share of the inheritance. As to the rights held by the deceased under a suspensive or resolutive condition, these may he included or omitted on a security being given by either of the parties, according to the rule contained in Lex 45, paras, 1 and 73, Dig. "Ad Legem Falcidiam" (Lex 35, p. 2).

(b) The liquidation and deduction of the debts due by the estate.

The said debts diminish the estate as well as the "legitima portio" which is computed on the estate, and must, therefore, be deducted. The same rule existed under Roman Law since the person to whom a "legitima portio" was due had to be instituted heir and was, therefore, liable for the debts due by the estate as such. All the debts are deducted, even those which have not fallen due, since the time granted for the payment of a debt suspends its payment but not its existence. The person of the creditor is immaterial and consequently the debts due to the heirs are to be deducted as well: it has, in fact, already been said that the effect of the merger is not the extinction of the debt but the impossibility of its payment. Funeral expenses are debts, and therefore subject to deduction, in so far as they are necessary expenses. The sums of money left by the deceased for the repose of his soul are generally regarded as debts of the inheritance in view of the fact that, within reasonable limits, such sums are necessary expenses; it is, however, held by some jurists that where such dispositions exceed a reasonable amount, regard being had to the financial and social position of the deceased, they should be reduced to the amount which should reasonably be disposed of for this purpose, and that the excess should be treated like any other liberality and, consequently, liable to abatement.

The debts due by the estate are deducted after the formation in one bulk of all the property of the testator and prior to the fictitious addition thereto of the property disposed of by way of donation, in such a way that the deduction be effected from the assets only of the inheritance and not from the larger amount of property made up of the said assets and the property, disposed of by way of donation. Consequently, if the assets of the inheritance are inferior to the liabilities, the difference is not charged on the property disposed of by donation, since the addition of the said property is meant to benefit only the persons to whom a "legitima portio" is due, and not the creditors of the deceased.

(c) The fictitious addition of the property which has been disposed of by way of donation.

Such addition is necessary because the portion of the deceased's property saved by law in favour of certain

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persons cannot be diminished by any disposition under a gratuitous title. The "legitima portio" is computed on the whole estate of the deceased, viz. on the property which would have existed at the time of his death had he made no donations.

The said addition is a fictitious one, a mere calculation which, however, may eventually necessitate an actual addition for the purposes of abatement, if it results from such calculations that the donations made by the deceased exceed the disposable portion.

Subject to addition is any property given on donation to any person whatsoever, including those to whom a "legitima portio" is due as well as the plaintiff in the action for abatement, even if the testator has exempted any of the said persons from imputing the property received on donation to their legitim.

Equally immaterial is the cause of the donation; consequently, to the deceased's estate are added not only those donations made purely "animo donandi" but also those made in remuneration for services, or out of gratitude, or in consideration of merits of the donee as well as onerous donations, saving the deduction of the value of the services or of the burdens, as the case may be. Similarly, donations made in contemplation of marriage are no exception, nor are donations made for providing any descendant with a sacred patrimony, or for procuring for him on ecclesiastical benefice, or for settling him up in any employment or business or for paying his debts (Section 963). Donations made for procuring maintenance are also included, unless they were made in execution of a legal obligation.

The manner in which the donation is made is also immaterial: a disguised donation is subject to addition as much as a genuine donation, and an indirect donation as much as a direct one. The same applies to the gratuitous payment or remission of a debt.

Any donation is so subject even if made prior to the birth or conception of the person entitled to a "legitima portio", or prior to his legitimation, acknowledgement or judicial declaration, or even prior to the deceased's, marriage.

On the other hand, "the expenses of maintenance, education and instruction of the children and other descendants, the ordinary expenses on the occasion of weddings, and customary presents -- which may be regarded

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as necessary expenses -- are exempted (Section 965). The same applies to alms, no matter how generous, according to the prevailing view.

And what about property forming the subject of a donation, which has perished? French jurists, in the absence of an express provision, hold that if such property has perished owing to the fault of the donee, it should be included in the bulk of the property, but not otherwise, since it would have perished even if it had not been given on donation. And Section 686 of our Civil Code provides that "where a thing forming the subject of a donation has perished, without the fault of the donee, before the death of the donor, it shall not, for the purposes of the last preceding Section, be included in the bulk of the property". As to a life insurance made out in favour of a third person, Art. 453 of the Italian Commercial Code and Art. 68 of the French law of 1930 provide that the insured sum belongs to the beneficiary "jure proprio", and, consequently, the subject of the donation are the premiums paid by the party insured. In the silence of the law, the same rule seems to apply under our law.

(d) The valuation of the said property.

No difficulty is encountered in respect of the valuation of hereditary property: it is evident that regard is to be had to the value of such property at the time of the opening of the succession. As to property forming the subject of a donation, it is necessary to establish whether regard is to be had to the time of the donation or to that of the opening of the succession: the property may have in the meantime increased or diminished in value, either through improvements or deteriorations or through fluctuations of the market. Now as the purpose of the inclusion of the said property in the re-instatement of the estate as if no donation has ever been made, it should be reckoned at its value at the time of the opening of the succession.

The Code Napoleon provided that regard was to be had to the value of the property at the time of the donation in respect of the condition of the thing and to the time of the opening of the succession in respect of the market value of the thing. The same rule applied to movables and immovables indistinctly (Art. 922). The Codice Albertino (Art. 731) distinguished between movables and immovables: movables were to be reckoned at their value at the time of the donation; immovables were to be reckoned at their value at the time of the

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donation in respect of improvements or deteriorations and at their value at the time of the opening of the succession in respect of the fluctuations of the market This distinction has been adopted by the Italian Code (Art. 822) and by our law, which provides in Section 685 that "any property which has been disposed of by way of donation shall be then fictitiously added, movable property being reckoned at its value at the time of the donation, and immovable property according to its condition at the time of the donation and its value at the time of the death of the donor".

The fact that no distinction is made in respect of movable property is justified by the consideration that the deceased would have had to pay the value of the thing at the time of the donation to acquire it: the estate is, therefore, to be regarded as having been reduced by that amount.

As to immovables, the first part of the rule, which derives from the Codice Albertino, and, indirectly, from the Code Napoleon, has been severely criticized. It is an absolute rule and makes no distinction between a change in the condition of the thing which is due to an act of the donee and other changes, which distinction is of paramount importance when the purpose of the addition of the said property is taken into consideration. Jurists, therefore, agree that such property is to be reckoned according to its condition at the time of the donation whore the change is due to improvements carried out, or deteriorations caused by the donee. Where, however, the change is accidental, such change would have taken place even if no donation had been made and regard should, therefore, be had to the condition of the property at the time of the donor's death. It is further held that the rule of the law in the latter case should not be interpreted strictly. Thus, e.g. if a plot of land has become a building site owing to the opening of a new street, or has for similar reasons, increased in value, it should be reckoned at its value at the time of the opening of the succession.

The second part of the rule is correct, since that would have been the value of the property if it had never left the donor's estate.

When all this is dene, the extent of the deceased's estate is known and the legitim may be computed.

2. The Imputation of Property received from the Testator.

The relative rules are contained in the following three sections:-

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(a) Section 979, inappropriately placed under the sub-title on collation, which runs as follows: "(1) Notwithstanding the previsions of Sections 964 and 971, where the donee or legatee entitled to legitim or other portion of property sues for the abatement of any disposition made in favour of a donee, a co-heir or a legatee, even if a stranger, on the ground that such disposition exceeds the disposable portion, he shall impute to his legitim or portion any donation or legacy made to him, unless he shall have been expressly exempted therefrom. (2) Any such exemption shall not operate to the prejudice of a prior donee. (3) Any other thing which, according to the rules laid down in the foregoing Sections, is not subject to collation, shall likewise be exempted from being brought into account".

(b) Section 657 (4), where it is provided that "the person to whom the legitim is due shall impute to it all such things as he may have received from the testator and as are subject to collation under any of the provisions of Sections 954 to 979".

(c) Section 680: "The illegitimate child shall impute to his share, besides the property bequeathed to him by will also the property which may have been given to him by his parent during the latter's lifetime, and which is subject to collation".

The purpose of imputation is to ascertain whether the legitim or other portion has or has not been already paid. And subject thereto is, in general, all that which the deceased may have given to the person entitled to the legitim or other portion of property under a gratuitous title, even though not expressly made in payment thereof. All other dispositions under a gratuitous title are imputable to the disposable portion -- such as donations made to strangers, or donations made to a person entitled to legitim or other portion of property out of the disposable portion. This happens where the donor expressly exempts the donee from bringing into account the property received. An express exemption is necessary because it is natural to presume that the donor, who is a debtor for the legitim or other portion of property, has made the donation in discharge of the said debt.

In order to see whether a person is or is not entitled to a portion of property, and, consequently, whether the said presumption is applicable to him, regard is to be had to the time of the opening of the

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succession. Whether such person appears to "be or not to be so entitled at the time of the donation is immaterial: the presumption is to the effect that if, and only if, the donee is a person entitled to legitim or other portion of property at the time of the donor's death, the property so received by him is to be imputed to his right; otherwise it is regarded as having been given out of the disposable portion.

Dispositions under a gratuitous title which are not exempted from imputation.

Such dispositions are imputable to the non-disposable portion. The person to whom the legitim or the "legitima portio" is due is bound to make such imputation, and the heirs, legatees or donees sued for abatement may demand that such imputation be made prior to the abatement of the dispositions made in their favour.

Imputation is different from collation, which is due only by a descendant who is a co-heir in favour of the other descendants who are co-heirs (Section 954); imputation is due by any person -- descendants, ascendants, husband or wife and illegitimate children -- in whose favour the law saves a portion of the deceased's estate. It is for this reason that Section 979 starts with the words "Notwithstanding the provisions of Sections 964 and 971...": this means that imputation is due by the person in whose favour a portion of property is saved by law, even if not a descendant or an heir, notwithstanding that collation is due only by a descendant who is an heir and in favour only of another descendant who is himself an heir. Collation, in fact, aims at ensuring equality between the heirs who are descendants of the deceased; the purpose of imputation is to ascertain whether the legitim or "legitima portio" has or has not been satisfied.

Imputation operates in favour of any person benefitted out of the disposable portion -- heirs, legatees, or donees; collation operates in favour only of the descendants of the deceased who are his heirs.

Subject to imputation are dispositions under a gratuitous title, whether "inter vivos" or "causa mortis"; testamentary dispositions, on the other hand, are not subject to collation.

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Dispositions exceeding the disposable portion will evidently be rejected. If, on the other hand, the disposable portion is found to have been exceeded, the dispositions made in excess thereof will have to be abated.

Subject to abatement are all dispositions made under a gratuitous title which are imputable to the disposable portion, provided they exceed the said portion. Those dispositions which are imputable to the portion saved by the law are regarded as partial payments thereof and are not, therefore, subject to abatement.

All such dispositions under a gratuitous title, Whether "inter vivos" or "causa mortis", by universal or particular title, are subject to abatement. Liable to contribution are, therefore, the heirs, donees and legatees who have been benefitted out of the disposable portion, unless the deceased has expressly imposed such an obligation on the heirs. Equally subject to abatement are the dispositions made in favour of the persons to whom the legitim or other portion is due, including the plaintiff in an action for abatement, provided always the said dispositions have been made out of the disposable portion. A clause exempting the heir, donee or legatee from imputation discharges any of the said persons from the obligation of imputing to the portion saved in his favour by the law what he may have received from the deceased, but it does not exempt the disposition made in his favour from abatement. Any declaration made to the contrary by the deceased cannot have any effect, since the subjection to abatement of testamentary dispositions and of donations is the sanction to the restriction of the deceased's power of disposal by will or by donation, and may not, therefore, be set aside. The deceased may only determine in which order the dispositions made by him are to be abated.

The dispositions are abated in chronological order, starting from the last one, and as many of them are abated as is required to make up the legitim or other portion saved by law. In fact, the earlier dispositions are made out of the disposable portion and only those made after the said portion is entirely disposed of that violate the rights saved by law in favour of certain members of the deceased's family, and that should, therefore, be reduced.

Testamentary dispositions are always the last dispositions of the deceased, even though the will wherein they are contained bears a prior date to that of the

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donations, on the ground that a will only takes effect on the death of the deceased whilst a donation has an immediate effect. This order cannot be inverted by the testator, since a donation is an irrevocable contract.

There is no priority of time as between testamentary dispositions even if contained in two or more wills of a different date, since they all take effect on the death of the deceased. Consequently, all the testamentary liberalities are subject to abatement together. The testator may, however, establish the order in which such liberalities are to be abated because, by so doing, he does not deprive any of the heirs or legatees of a vested right: he is at liberty to make or not to make a disposition in favour of the said persons and may, therefore, order that one or some of them should boar the onus of reduction, whenever necessary, before the others.

As to donations, the order is established by their respective dates: a donation takes effect as soon as it is concluded and it transfers the property in the thing given at that very moment from the donor to the donee who acquires over the said thing an irrevocable right. If the total or partial reduction of the last donation is sufficient to make up or supplement the legitim or other portion, no further reductions are made; otherwise as many reductions are effected as are necessary for that purpose.

Abatement of testamentary dispositions.

The abatement of these dispositions is total or partial according as to whether they have been made wholly or in part out of the non-disposable portion. The prevision of Section 687 foresees the first case: "where the value of the donations exceeds, or is equal to, the disposable portion, all testamentary dispositions shall be ineffectual". An example will illustrate the rule: supposing the property left by will is worth £1,000 or £500 and the value of the donations is £2,000 or £2,500, the estate, when re-instated, would amount in both cases to £3,000, the legitim due to an only child would be £1,000, and the disposable portion £2,000. In the first case the deceased would have exhausted the disposable portion by means of donations and could not, therefore, make any testamentary dispositions; in the second case the donations would not only be equal to but would exceed the disposable portion. The provision of Section 687 would, therefore, be applicable to both cases, and all testamentary liberalities would be ineffectual.

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Section 688 provides for the second case: "where the testamentary dispositions exceed either the disposable portion or the residue thereof after deducting the value of the donations, they shall abate proportionately without any distinction between heirs and legatees". Supposing the property left by will amounts to £3,000 or £2,500, and that no donations were made in the first case and the value of the donations in the second case as £500, the estate, when re-instated, would amount to £3,000 in both cases, the legitim due to an only child would be £1,000 and the disposable portion £2,000. In the first case the testamentary dispositions would exceed the disposable portion, and in the second case the testamentary dispositions would have been made, as to £1,500 out of the disposable portion, and, as to £1,000, out of the non-disposable portion. In both cases the said dispositions would not be reduced in their entirety, but only by the amount taken from the disposable portion, vis. £1,000.

Testamentary liberalities, whenever necessary, are abated proportionately. It is in fact presumed that the intention of the testator is that his will be carried into effect, in so far as this is possible, and that there be no other differences between the heirs and legatees than those established by him: this can only be effected by abating the testamentary liberalities proportionately. But as this rule is merely an interpretation of the probable intention of the deceased, it cannot stand where the testator has expressly declared his intention to be that a disposition shall have effect in preference to the others (Section 689). The testator is free to dispose or not to dispose in favour of a given person; "a fortiori", therefore, he may bequeath property and subject it to abatement before his other bequests. The effects of a similar declaration is that "such preference shall take place, and any such disposition shall not abate except in so far as the value of the property included in the other disposition shall not be sufficient to make up the sha.ro reserved by law" (Section 689).

Reduction of Donations. If the property included in the testamentary dispositions is not sufficient to make up the share reserved by law, the donations will have to be reduced. As already said, the first to be reduced is the last donation. Donations are subject to reduction whenever they have been made out of the non-disposable portion.

Effects of abatement against third parties in possession. The same retrogressive order is observed in respect of those persons to whom the heirs, or the

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legatees, or the donees may have alienated property received by them gratuitously from the deceased, whenever the action for abatement may be directed against the said alienees: in other words, the plaintiff must sue in the first place those persons claiming under the heirs or legatees, and then, provided this be necessary, the persons claiming under the donees, according to the date of the donation. The same rule applies to successive alienations made by one of the heirs or donees: the action for abatement must be directed against the last alienee and only where necessary against the previous ones, since the previous alienees would have been entitled to the benefit of discussion if the heir or donee had not made the subsequent alienations.

Effects of the action for abatement.

A. Effects as between the plaintiff and the heirs, legatees, donees or persons claiming through them. As a first effect of this action the defendant is bound to restore to the plaintiff what he may have received in excess of the disposable portion. Abatement is effected in kind, since the portion saved by law is due in kind. Where, however, the excess cannot be separated conveniently and without injury, the defendant may pay in cash the amount due by him to the plaintiff (Section 690). If the heir, legatee or donee has alienated the property subject to abatement, he is bound to restore its value, saving the plaintiff's right to sue the third party in possession in respect of immovable property and the latter's entitlement to the benefit of discussion. As to the fruits, Section 1916 provides that "the donee shall restore the fruits of such part of the donation as exceeds the disposable portion, from the day of the opening of the succession of the donor, if the action for reduction has been brought within the year; otherwise, from the day of the demand".

B. Effects as between the plaintiff and the third party who may have acquired some right over the property subject to abatement. The rule "soluto jure dantis solvitur et jus accipientis" applies. "The immovable property", Section 1917 provides, "which is to be returned in consequence of the reduction shall be free from any debt or hypothec with which it may have been charged by the donee".

Extinguishment of this action. The action for abatement cannot be exercised:

(a) if the person in whose favour a portion of the deceased's property is saved by law cannot, through

disability, disherison, renunciation or any other cause, demand the said portion.

(b) if the said person has waived his right to the action for abatement; such right cannot be waived during the lifetime of the deceased (Section 1912).

(c) if the said person is the heir of the deceased, in which case he may only demand the reduction of the dispositions made to his co-heirs, unless he has accepted the inheritance with the benefit of inventory. A pure and simple acceptance of the inheritance debars the heir from claiming the abatement of the deceased's dispositions, because as such he is bound to respect whatever his author may have done; but as all the heirs are in the same, position, the law allows this action to be brought by one of them against the others.

(d) if the time required for prescription has elapsed. As to testamentary dispositions the time required is ten (10) years, which is the normal time within which the action for claiming an inheritance or the legitim must be brought. The said term is extended to one year after the attainment of majority or the cessation of interdiction in favour of the minors and persons interdicted. As to donations, the time required is five years from the opening of the succession and it runs equally against minors and persons interdicted. The same rules apply where the action is brought against third parties in possession.

(e) if the deceased has availed himself of the so-called "cautela del Socius o del Gualdense", according to Section 658. It has already been stated that where the subject of a testamentary disposition is a right of usufruct or a life annuity the value of which surpasses the disposable portion, the persons entitled to the legitim or other portion will only have the option either to abide by the testamentary disposition or to take the share due to them by way of legitim free from every charge, on abandoning in favour of the disponees of the usufruct or life annuity the full ownership of the disposable portion.

Contents of Wills.

As already seen, a will is that instrument whereby a person disposes, for a time when lie shall have ceased to live, of the whole or of a part of his property, and that it may contain dispositions by universal as well as by singular title. Moreover, by Section 626 (2), a will

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may also contain dispositions by singular title without any disposition by universal title; and in this way our law has abandoned the rule of Roman Law "heredis institutio est caput totius testamenti". A disposition is by universal or by singular title according to its subject-matter, and the wording used by the testator is immaterial: if the whole of the property or a portion thereof is disposed of, the disposition is by universal title; otherwise it is by singular title.

Conditions common to all testamentary dispositions.

These conditions refer to the persons and the things forming the subject of a disposition.

(a) The persons forming the subject of a disposition.

The person forming the subject of a disposition must be certain and designated by the testator in the will. This is necessary in order that it may be certain in whose favour the disposition has been made, as well as because testamentary dispositions are inspired to affection and the personal considerations.

Consequently, "any testamentary disposition in favour of a person so uncertain that he cannot be identified even upon the happening of a contingency referred to in the will is void (Section 724)". The best designation of a person is his name, but other designations, such as "my brothers" or "my sisters", are equally valid. A disposition is valid if, although the person in whose favour it has been made is uncertain but may be identified through the happening of a contingency referred to in the will, such as a legacy made in favour of "the student who shall obtain the highest number of marks". Under Roman Law a similar disposition was null on the ground that the legatee was uncertain in the mind of the testator, who therefore, could not have felt any affection for him. It is however, now realized that the testator may be moved by other motives besides affection. For this reason a similar disposition is valid, but it is necessary that the contingency upon the happening of which the person becomes identifiable, be referred to in the will. The following provisions are applications of this rule:

(i) "A testamentary disposition made in favour of the nearest relation of a person shall, in default of any other designation be deemed to have been made in favour of the persons in whom the intestate succession of the said person would legally vest (Section 726)". Naturally,

any qualifications to the said designation will have to be complied with, ns, for example, in the case of a legacy made in favour of the "nearest relation in the paternal line".

(ii) "A disposition made in general terms in favour of the poor, shall be deemed to be made in favour of the poor of the island in which the testator resided at the time of his death (Section 727), unless restricted, e.g. to the poor of his parish".

(iii) "Any disposition made in general terms in favour of the soul of the testator or of any other person shall, if the pious use has not been specified, have no effect". Such dispositions are allowed for religious reasons.

The person forming the subject of a disposition must be designated by the testator, since a testamentary disposition is the expression of his will. Consequently, "any testamentary disposition made in favour of an uncertain person to be designated by the heir or by a third party is void" (Section 725 (i); vide Digest "De heredis institutione"). This rule is absolute in respect of institution of heir, but has two exceptions in respect of legacies. These are:

(i) "It shall be lawful to make a testamentary disposition by singular title in favour of a person to be selected by the heir or by a third party among several persons specified by the testator, or belonging to families, or bodies corporate, specified by him" (Section 725 (2)). The rule of the Digest ("De legatis et fideicoimmissio") was "Si Titio aut Scipio, uti heredis vellet, legatura relictum est heres alteri dando ab utroque liboratus". A choice so restricted is valid because the person selected will always be one specified by the testator.

(ii) "It shall likewise be lawful to make a disposition by singular title in favour of a body corporate to be selected by the heir or by a third party, among several bodies corporate specified by the testator" (Section 725 (3)).

Pollacco justly criticizes the restriction of these exceptions to legacies: there is no reason why they should not be extended to dispositions by universal title.

The person forming the subject of a disposition must be designated in the will, since whatever is bequeathed "causa mortis" must be contained in a will and

the designation of the person in whose favour the disposition is made is undoubtedly an essential part thereof.

Sections 729 and 730 contain applications of this Rule:-

Section 729 (i). "No evidence is admissible which is intended to show that the institution or legacy made in favour of any person or body corporate, or for any use specified in the will, is merely fictitious, and that such institution or legacy is in reality made in favour of a person or body corporate, or for a use, not disclosed in the will, notwithstanding any expression contained in the will calculated to constitute an indication or a presumption of any such intention.

(ii) The provisions of this Section shall not apply in any case in which the institution or legacy is impeached on the ground that such institution or legacy was made through intermediaries in favour of persons under a disability.

Section 730. "Any testamentary disposition whereby even a sum of money or any other determinate thing is bequeathed to a person designated in the will for the purpose of making such use thereof as the testator shall have declared to have confined to such person shall be null even though such person shall offer to prove that such disposition is in favour of persons capable of receiving property by will, or for lawful purposes".

Section 729 is founded on the principle that extrinsic evidence is not admissible to disprove the contents of a will, and it is meant to prevent lawsuits on trust. Trust is that testamentary disposition whereby the heir or the legatee mentioned in the will is entrusted by the testator to pass over the inheritance on the legacy to another person, not mentioned in the will, or to make use thereof as the testator may have confidentially communicated to him. The disposition is known as trust, because the testator trusts the honesty of the apparent heir or legatee, who is known as the trustee.

Trusts were introduced by custom in the Middle Ages and were admitted by the Courts under conditions. A trust may be proper or improper: a proper trust is that disposition wherein it is expressly stated that the apparent heir or legatee is a trustee; it is improper where the trustee is designated as heir or legatee but it results indirectly from the will itself that he is a trustee, as e.g. "I institute A as my heir, who knows my intentions".

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Similar dispositions may be used for two purposes: to evade the law on the capacity of disposing and of receiving by will, and to enable the testator to pay any conscience debt or to carry out his intentions without revealing them. Scandalous proceedings often arose out of these dispositions, and the legislator was compelled to declare their inefficacy. Section 729 is a reproduction of Article 809 of the Codice Albertino, and has a corresponding article (829) in the Italian Civil Code.

The law does not expressly declare the inefficacy of a trust, but the inadmissibility of evidence which is intended to prove it is tantamount thereto, since without such evidence it cannot be enforced. Its enforcement cannot be demanded either by the beneficiary against the trustee or by the lawful heirs in order to open the way to intestate succession. The disposition will, therefor, stand in favour of the trustee, since it cannot be shown that he is a trustee and may not, therefore, be deprived of the thing bequeathed to him.

The same rule applies to a disposition made for a use specified in the will: no action can be brought to show that such use is merely fictitious and that the disposition was in reality made for a use not disclosed in the will.

As already stated, under our law the said disposition is valid in favour of a trustee. Under the French Civil Code the Courts have held the disposition is null on the ground that it cannot stand either in favour of the trustee, since the testator never meant to bequeath the property to him, or in favour of the beneficiary, since he is not mentioned in the will. Our legislator, following the Codice Albertino, has neither entirely allowed not entirely suppressed trusts. His aim, rather than the suppression of trust, was the prevention of lawsuits thereon. A disposition containing a trust is legally valid, and though the trustee may not be compelled to carry it into execution, he is free to do so. It would seem, therefore, that the law wanted to put the trustee in a position to carry out the trust, thus giving effect to the testator's secret intentions, and to prevent at the same time lawsuits intended to disclose the real intentions of the testator.

It is debated whether the said rule applies also to a spontaneous confession by the trustee himself. Sane commentators of the Italian Civil Code, including Pacifici Mazzoni and particularly Gianturco, who bases his opinion on the preparatory work to the Codice Albertino and on the nature of confession, held that the trust may be enforced by the beneficiary in his favour. The prevalent opinion, however, in that the carrying out of a trust is a transfer of property made "nullo jure cogente", and is, therefore, a donation: consequently, it is only valid if all the external and internal requisites of a donation concur.

The following are exceptions to the rule contained in Section 729 (i):-

(a) Where the testator has mentioned in the will the charge as well as the person in whose favour it has been imposed. Such a disposition is not a trust but consists of a burden imposed on the heir or legatee in favour of a person disclosed in the will itself.

(b) Where the institution or legacy is impeached on the ground that it was made through intermediaries in favour of persons under a disability (Section 729 (2)). Evidence may be brought to show that the person mentioned in the will is an intermediary and that the disposition was made in favour of a disabled person not disclosed in the will. If the person in whose favour the disposition was in reality made is under a total disability, the disposition will be totally null and void; if, on the other hand, the disability is only partial, the disposition will be partly valid, and such portion of it as is valid will benefit the disabled portion where the person mentioned in the will is proved to be an intermediary, but will benefit the intermediary where the said person is deemed to be an intermediary under Section 650, but is not proved to be such.

In the case provided for by Section 730 the disposition is null and may not benefit either the trustee or the beneficiary. In his notes on Ordinance VII of 1668 Sir Adrian Dingli states that the provisions of this section were taken from the works of Zaccarie, Toullier and Troplong who uphold the nullity of such testamentary dispositions on the strength of French Jurisprudence.

The uncertainty or non-disclosure of the heir or legatee must be kept distinct from an erroneous or ambiguous designation thereof. Section 731 (i), in fact, provides that "if the person of the heir or of the legatee is erroneously designated, the testamentary disposition shall have effect if the identity of the person whom the testator intended to designate is otherwise certain".

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The things forming the subject of a disposition,

Since the thing forming the subject of a disposition is an essential element thereof it must be certain and designated by the testator in the will.

This rule applies in particular to legacies, but is equally applicable to dispositions by universal title: where a portion of the inheritance is bequeathed such portion must be certain and designated in the will by the testator.

The thing forming the object of a disposition by singular title may be designated:

(i) by reference to its species or genus; where the thing belongs to a "genus fungibile", i.e. a quantity, the legacy is known as legacy of quantity, and the thing will be determined or chosen either by the person on whom the legacy has been imposed or by the legatee or by a third party, as the testator may have directed;

(ii) individually, and the legacy is then known as "Legaturn corporis" -- or legacy of a determinate thing;

(iii) alternatively, in which case the thing will be determined or chosen by a third party from the things designated by the testator;

(iv) by reference to the place whereon the thing is to be taken as e.g. "the money in the safe".

As to the legacy of quantity, the quantity must be specified in the will since it is an essential element of the disposition which must be made in the prescribed form. Consequently, a testamentary disposition is null if the thing forming its subject or the quantity, where the legacy is one of quantity, is not designated in the will, or if the testator has given to the heir or to a third party absolute discretion in fixing the quantity of the legacy. Such absolute discretion may however be given where the legacy has been made by the testator by way of remuneration for services rendered to him during his last illness (Section 732), in view of the fact that a similar legacy is rather the payment of an obligation than a liberality. In exercising his discretion the heir or the third party will take into consideration the importance of the services rendered.

In the following cases the thing forming the subject of a disposition is not indeterminate:-

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(1) If the testator has instituted several persons as heirs or legatees, in equal parts or without designating the share of each of them, in which latter case the shares are presumed to be equal;

(ii) If the thing is determinate, but has been erreneously indicated or described, provided it is otherwise certain what thing the testator wished to dispose of.

If the testator has instituted several persons as his heirs or has bequeathed the same thing to a number of legatees, and has designated the share of each of them, but in so doing has not disposed of the whole thing, that part of the inheritance which has been omitted will devolve on the lawful heirs, and that part of the legacy which has not been disposed of will remain in favour of the person on whom the legacy has been disposed. It may here be recalled that under Roman Law the portion of the inheritance not disposed of by the testator increased the shares of the other heirs, in view of the rule "nemo pro parte testatus pro parte intestatus decedere potest",

Legacies.

The conditions proper to a legacy refer to:

(1) the person on whom it is imposed; and

(2) the thing forming its subject.

(1) With reference to dispositions by singular title, besides the testator and the legatee, the concurrence of a third person is necessary, viz. the person on whom the legacy is imposed, who will have to pay the legacy out of the property acquired by him by succession and who, thereby, sustains a reduction of such property to the extent necessary for the payment of the legacy.

As a rule, legacies are imposed on the heir, but may also be imposed on other legatee, as, e.g. a legacy of maintenance imposed on the legatee of a tenement. It may, therefore, be said that legacies may be imposed on any person benefitted by the deceased, either by testate or by intestate succession, since the deceased may also impose legacies on his lawful heirs; and the fact that the person burdened therewith dies or renounces the inheritance or legacy left to him in no way affects the legacy, since his successors will succeed to his obligations as well as to his rights.

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It follows that a legacy cannot stand unless there he a person who is bound thereto. Thus a legacy made in favour of a sole heir cannot produce any effect; and the same may he said of a legacy made in favour of all the heirs, unless it be made in proportions different from those in which they have been instituted heirs, since one or some of the heirs may he charged with a legacy in favour of the others.

A bequest by singular title may be either a simple legacy or a pre-legacy. A pre-legacy is that which is imposed on the inheritance and on all the co-heirs, including the legatee. It is known as a pro-legacy because the thing or the money bequeathed is delivered or paid to the legatee before the division of the inheritance; it is a simple legacy when, although made in favour of one only of the heirs, it is imposed on one or some of them only.

Is the person responsible for the delivery of the legacy hound only "intra" or even "ultra vires hereditatis"? If the person on whom the legacy has been imposed is an heir who has accepted the inheritance without the benefit of inventory, he is hound therefor even "ultra vires hereditatis":if the said person is a legatee, he is not bound beyond the value of what has been bequeathed to him -- "nemo oneratus nisi honoratus".

Where no one of several heirs has been particularly charged by the testator with the payment of, the legacy, all the heirs will be liable for the payment thereof, each in proportion to his share in the succession. In other words, their obligation is not joint and several (Section 771 (1)). However, subsection (2) of the same Section adds that "they shall also be liable for the whole to the extent of the value of any immovable property of the estate which they hold". In other words, the heir who holds immovable property of the estate is liable beyond his share in the legacy to the extent of the value in the said property, and may be sued therefor by the legatee, saving his right of redress against the other heirs.

Under Roman Law, as well as under the Code Napoleon (Section 1017), the "Codice delle Due Sicilie" (Section 971) and the Codice Albertino (Section 860), the legatee enjoyed a hypothec over the immovables of the deceased's estate; the legatee, under our law, has only a personal action against the heirs for their respective shares, saving his right to claim payment of the whole legacy from those holding immovables of the estate, to the extent of the value of the said immovable.

The rule that the heirs are liable for the payment of the legacy in proportion to their share in the succession is founded on the presumed intention of the testator, who, therefore, may restrict the charge to one or some of them or impose it on all but in different proportions from those established in respect of the succession. This, however, must result clearly, since it constitutes a derogation from the principle that the charge is to be borne proportionately; and, in particular, it is not sufficient that the subject of a legacy be a thing belonging to one of the co-heirs. In fact Section 772 (2) provides that "where the subject of a legacy is a thing belonging to one of the co-heirs, the other co-heirs shall, unless a contrary intention of the testator is shown, compensate such co-heir for its value, either in cash or in hereditary property, each in proportion to his share in the inheritance".

(2) Any thing may be the subject of a legacy, whether movable or immovable, corporeal or incorporeal, present or future, and even services. As usual, however, the subject must be "in commercio", possible, lawful, and, as a rule, it must belong to the testator, since a person can only dispose of what is his. Strictly speaking, therefore, the legacy of a thing belonging to others or of a thing belonging to the legatee should be without effect. This is, in fact, the rule under the Code Napoleon. Under Roman Law, on the contrary, such legacies could, under given conditions, produce certain effects, and most modern Codes have adopted this rule.

Legacy of a "res aliena".

It appears that such a legacy was valid, in all cases, under early Roman Law, until the juriconsult Neratius Presius denied validity where the testator was unaware that the things belonged to others. In fact men, as a rule, dispose of their own things, and it is reasonable to presume that a testator would not bequeath a thing if he knows that it belongs to others; but if, notwithstanding such knowledge, he bequeaths a thing which he knows not to be his, there can be no doubt as to his intention. Saving the aforesaid condition the rule arose "rem alienam legari posse" (para. iv. Inst. De Legatis). Among the Codes that have accepted this rule, our Civil Code (Section 733) and the Italian Civil Code (Section 837) may be included. But while Roman Law admitted all means of evidence tending to prove the knowledge of the testator, modern Codes require an express declaration in the will itself. Moreover, under Roman Law, the heir was bound to acquire the thing and to

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deliver it to the legatee, and only if this was impossible could he pay the value thereof to the legatee; under our law, the heir may always elect either to acquire the thing or to pay the fair value thereof.

Where the thing forming the subject of a legacy belonged to the person charged therewith, the legacy was valid in all cases, under Roman Law, since it was argued that the testator could have equally bequeathed the thing had he been aware that it was not his property in view of the other property bequeathed to the person so charged; and the same rule exists under Italian Law. Section 734 of our Code, on the contrary, provides that "the provisions of the last preceding Section shall also apply, if the thing forming the subject of the legacy belongs to the heirs; or to the legatee required under the will to give it to a third party".

Where a part of the thing bequeathed, or a right over such thing belongs to the testator, the legacy of such thing will be valid only to the extent of such part or right unless it is stated in the will that the testator knew that the thing did not wholly belong to him. In other words, save as to the part or right belonging to the testator, the rule contained in Section 733 applies.

The conditions required for the validity of a legacy of a "res aliena" are dispensed with in the fbllowing two cases:

(i) Where the thing although belonging to others at the time of the will, is the property of the testator at the time of his death (Section 733 (2)). It is then that the legacy takes effect and the property is transmitted to the legatee; moreover, it is reasonable to presume that the testator acquired the thing in the interval in order that the legacy may be valid;

(ii) Where the thing forming the subject of a legacy is an indeterminate movable thing included in a genus or species, even though no thing pertaining to such genus or species existed in the estate of the testator at the time of the will or is found to exist at the time of the death of the testator (Section 736). This exception applies only to movables, since immovables cannot be included in a genus or species -- only movables may be classified under things similar to one another and approximately of equal value. The legacy of a genus, therefore, can only have effect in respect of immovables where there are in the estate such immovable, in which case the testator may know approximately the entity of the legacy (Fr, 77, "De Legatis").

The legacy of a thing included in a genus is deemed to be a legacy of a determinate thing where the testator has referred to the thing as existing in his estate, and will, therefore, have no effect if the thing is not found to exist in the estate at the time of the testator's death (Section 737 (1)). And where the subject of a legacy is a thing or a quantity to be taken from a specified place, such legacy will only have effect if such thing is found therein; and, if only a part thereof is found, it will only have effect to the extent of such part (Section 738), unless the place was mentioned "demonstrationis causa", i.e. in order to describe the thing more accurately.

Legacy of a Thing Belonging to the Legatee.

Here a distinction is necessary: where the thing was already the property of the legatee at the time of the will, the legacy is null (Section 739 (1) and para. III, Inst. "De Legatis"). "Quia quod proprium est ipsius amplius eius fieri non potest". This initial nullity cannot be healed by the alienation of the thing before the testator's death, because the ground for the nullity of the legacy is the absence of the testator's intention of benefitting the legatee, on which the alienation of the thing by the legatee can have no effect. If, on the other hand, the thing was acquired by the legatee after the will, Roman Law attributed to the legatee the right to the price paid or the consideration given for the thing, but denied validity to the legacy where the thing was acquired under a gratuitous title in view of the impossibility of two lucrative causes in respect of the same thing and in favour of the same person. The same rule was adopted by the Codice Albertino (Section 819) and is still in force under the Italian Civil Code (Section 843).

Under our law, by Section 739 (2) and (3), "if the legatee shall have acquired the thing forming the subject of the legacy at any time after the will, either from the testator himself under an onerous title, or from any other person under any title whatsoever, he shall, in the event of the existence of the circumstances referred to in Section 733 (i.e. the thing must have been the property of the testator, or it is at least necessary that the testator was aware and expressly declared that it was not his property), be entitled to claim the value

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of such thing notwithstanding the provisions of Section 780. Where the legatee shall have acquired the thing from the testator under a gratuitous title, the legacy shall be considered to be adeemed". The same rule is contained in the Codice Parmese (Section 689) and in the Codice Ticinese (Section 879).

Furthermore, whilst Roman and Italian Law give to the legatee the right to recover the price or other consideration, our law entitles him to the value of the thing. This difference is due to the fact that as, under our law, the legacy is valid if the thing is acquired gratuitously from a third party, reference can only be made to the value of the thing, since there is no consideration in a gratuitous contract.

<u>Effects of Testamentary Dispositions by Singular Title</u>.

The effects of testamentary dispositions by universal title will be examined under the "Devolution of Inheritance", which is the main effect of both testate and intestate succession.

The effects of a legacy consist in the rights and in the obligations of the legatee:

1. <u>Rights</u>. These are:-

(i) The right to the legacy, i.e. to the delivery or payment thereof. This is a personal right available against the person required under the will to deliver the legacy;

(ii) The rights, whether of ownership, usufruct, possession or other real right, acquired by virtue of the legacy over the subject thereof;

(iii) The actions at law whereby the said rights are guaranteed and may be enforced;

(iv) Certain ancillary rights which are meant to secure the said rights, such as the benefit of separation of estates.

It has already been said that, in respect of inheritance, a distinction must be made between the devolution and the acceptance thereof, and that it is only by virtue of its acceptance that an inheritance is acquired. Legacies, on the contrary, are acquired by operation of law, without the necessity of the legatee's

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intervention, as soon as the succession is opened.This was the rule under late Roman Law, and it has been preserved through the ages up to the present day. At one time Roman jurists discussed the necessity or otherwise of the legatee's acceptance: Norva and Proculus held that it was necessary, whilst Sabinus and Cassius held that it was not. At the time of Gaius, the opinion of Proculus was more generally accepted and was confirmed by a law of Antonius Pius; but the Sabinian theory was accepted in the law of the Pandects (Vide Fr. 77, para. 3, D. "De Legatis", L.31; Fr. 16, para. 1, "Qui testa-Mentum facere passut"; and Fr. 24, "De Obligationibus Et Actionibus"). In all these texts which followed the opinion of Papinus, Marcellus and Pomponius, it is stated that a "furiosus" acquired the legacy notwitstanding that he was incapable of accepting. Modern Codes do not require the legatee's acceptance, and have Thus accepted the theory that legacies are required by operation of law, even without the knowledge of the legatee, though not against his will since he is free to renounce them.

Legacies are a succession by singular title and are, therefore, acquired only if the legatee survives the testator. But if this condition happens, the legacy is acquired and transmitted by the legatee to his heirs, even though he is unaware of its existence or of the death of the testator. It is so transmitted because the legatee, on the death of the testator, acquires not only the right to the delivery of the- legacy, but also any real right over the subject thereof that may have been bequeathed to him by the testator.

Such right is transmitted to the legatee directly from the testator as soon as the latter's succession is opened: "legatum ita dominium rei legatarii facit ut hereditas res singulas quod eo pertinet, ut si ea res relicta sit recta via dominium quod hereditatis ad legatarium transeat numquam factum heredis" (Papinus, Lex. 80, D. "De Legatis", L. 30). Provided the thing bequeathed is determinate, it is acquired by the legatee immediately and directly from the testator. If, on the other hand, it is indeterminate, it cannot be acquired before it is determined; and, if the thing was not the property of the testator, it is only acquired when the heir, if he so chooses, acquires it from the owner and transfers it to the legatee. The same may be said of a legacy of a thing belonging to the person charged with its delivery: the testator can only impose on such person the obligation of delivering it to the legatee, but may not cause the passage of the ownership over a thing which is not his property.

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The legatee may exercise his rights as soon as he acquires the legacy, unless the legacy is "ex die", in which case though the legacy is acquired upon the opening of the succession of the deceased, the said rights may not he exercised before the time expires.

The rule that legacies are acquired upon the death of the testator by operation of law, and the relative, rights may be exercised immediately has two exceptions:-

(a) Section 764, following Roman Law, provides that "it shall not be lawful for the legatee to claim the fruits of, or interest on the legacy, except from the day on which he shall have, even by a judicial letter, called upon the heir to deliver or pay the legacy, or from the day on which the delivery or payment shall have been promised to him". However, "the interest on, or the fruits of the thing bequeathed shall, even in the absence of a judicial intimation, accrue in favour of the legatee immediately upon the death of the testator, where the testator shall have expressly so directed, or where the subject of the legacy is a tenement, or a capital sum, or any other thing producing fruits" (Section 765) ; and "where the subject of a legacy is a life annuity or a pension, such annuity or pension shall commence to run from the day of the death of the testator" (Section 766), since such a legacy is deemed to consist of as many legacies as the number of annual payments made in execution thereof, and every legacy is acquired immediately upon the testator's death.

(b) Following the principles established by the Roman jurists (Fr. 2, D. "Quod Legatorum"), our law provides that "the legatee must demand of the heir possession of the thing bequeathed" (Section 763), even though such thing is determinate and found to exist in the estate, at the time of the death of the testator. Possession vests by law in the heirs (Section 878), and it is for this reason that the legatee must demand it of the heirs. The transfer of possession is effected by means of delivery of the thing. The rule contained in the abovementioned Sections is meant to enable the heirs to make sure of the title of the legatee before effecting the delivery of the legacy and to prevent controversies on the right to the possession of the things bequeathed. If, therefore, the legatee takes, or tries to take possession of the thing bequeathed to him without having demanded it from the heir, he commits an act in contravention of the heir's rights, and the heir may exercise against him any of the actions competent to a legitimate possessor (Section 878). It is even held

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that the said rule applies notwithstanding any authority the testator may have granted to the legatee to take possession of the thing bequeathed, because possession of the hereditary property vests in the heirs by law and may not be denied by the testator to the person whom he has instituted his heir.

The said rule applies to any legatee including the legatee of the right of usufruct over the entire estate, who is often, though inappropriately, described as the usufructuary heir.

As no special form is prescribed by law, possession may be demanded even verbally.

(i) The right to the Legacy is that personal right which entitles the legatee to demand the delivery of the legacy from the person charged therewith. Delivery includes any act which may be necessary for the carrying out of the legacy, e.g. the determination of the thing bequeathed, where this is included in a genus or a species. The thing forming the subject of the legacy, Section 768 (1) provides, "shall be presumed to have been bequeathed and shall be delivered with its necessary accessories and in the condition in which it shall be on the death of the testator". However, subsection (2) of the same Section adds that "the contrary shall be presumed with regard to embellishments or to new constructions made in the tenement bequeathed, or to a tenement of which the testator shall have enlarged the boundary, including therein new acquisitions". With regard to a tenement, it is presumed that the testator has bequeathed the tenement in the condition in which it was at the time of the will, and that is, therefore, the condition in which the legatee may demand that the tenement be delivered to him. As to now acquisitions, the rule is correct; but it appears to be more reasonable to presume, in respect of embellishments, new constructions and enlargement of boundaries which do not includo new acquisitions, that the testator intended to bequeath to the legatee the tenement as improved or enlarged. Sir Adrian Dingli has quoted in his notes the provisions of the foreign codes which refer to the caso, and these provisions support the view that embellishments, new constructions and enlargement of boundaries should not be included: in fact, they exclude from the legacy only new acquisitions. As already stated, however, the thing bequeathed must be delivered with all its accessories, since the legatee should be entitled to the same enjoyment of the thing as the testator had.

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The expenses necessary for the delivery or payment of the legacy is charged to the estate, because otherwise- the legacy would be reduced by such expense, provided this does not prejudice the rights of the persons in whose favour the law reserves a portion of the hereditary property (Section 770). It is evident that once a bequest cannot be made in provisions of the said rights, the expenses for its delivery or payment may not be charged to the estate where this would prejudice the said rights. In such a case the expense would be charged to the successors to the disposable portion.

(ii) <u>The real rights over the thing bequeathed</u>.

The general rules apply: thus, if the usufruct of a thing or of the entire estate is bequeathed, the legatee is entitled to all the rights and is bound by all the obligations of a usufructuary.

(iii) <u>The actions at law whereby the said rights may be enforced.</u>

These are:-

(a) A personal action against the debtor of the legacy. This was the "action testamento", which is described by our law as the action for claiming a legacy. This action, like the corresponding action for claiming An inheritance, is barred by prescription after ten years from the day of the opening of the succession. With regard to minors and persons interdicted, the time is extended to one year after the attainment of majority or the revocation of the decree of interdiction. If the legacy is left "sub conditione" or "ex die", prescription is suspended until the happening of the contangency or the expiration of the time, in accordance with the general rules.

(b) The real actions competent against any person in possession of the thing bequeathed, which are also governed by the general principles.

(iv) <u>Ancillary Rights</u>

These are:-

(a) The benefit of the separation of estates.

(b) The right of the legatee, whenever the legacy is "ex die" or "sub conditione" , of demanding a security for the performance of the legacy by the debtor thereof upon the happening of the contingency or the expiration of the time.

2. Obligations of the Legate.

Strictly speaking, the legatee should have no obligations since he does not succeed to the inheritance of the deceased. Consequently, the only obligations to which he may be subject are those which may have been imposed upon him by the testator, whether expressly or implicitly. The testator may have expressly imposed a burden or a charge on the legatee, and such burden or charge must, evidently, be carried out. Moreover, the law, under given conditions, presumes that a burden created by the testator is inherent to the thing bequeathed and it subjects the legatee to its performance. Section 769 (1) in fact provides that "where before a will is made or subsequently, a right of usufruct, an annuity or other perpetual or temporary burden, shall have been imposed upon the thing bequeathed, the legatee shall receive the thing as so encumbered". If the said rights or burdens existed already at the time of the will, it is presumed that the testator meant to bequeath the thing as encumbered; if created subsequently, a partial revocation of the legacy is presumed. The contrary, however, is presumed, saving an express declaration by the testator, if the burden encumbers the entire property of the inheritance.

Section 769 (2) adds that "where the thing bequeathed is charged with à hypothec in respect of any other debts, the person who is to pay the legacy shall, unless the testator has otherwise directed, be bound to disencumber it". This subsection derives from Constitution III of Severus and Antoninus (C. "De Legatis"), and it applies independently of whether the thing bequeathed was so charged before or subsequently to the will. Moreover, if the legatee pays the debt in order to disencumber the tenement, he is entitled to reimbursement from the debtor of the legacy and is subrogated to the rights of the creditor in respect of the debt paid by him.

<u>Conditional Dispositions</u>.

A testamentary disposition is conditional when it is made to depend upon, an uncertain future event, either by suspending it until the event happens (suspensive condition), or by dissolving it if the event happens or does not happen (resolutive condition). A condition is either suspensive or resolutive, potestative, or casual, or mixed, negative or positive.

<u>Requisites for validity</u> In order to be valid a condition must be possible, lawful and intelligible. A

condition is impossible when it is physically and objectively such, and, therefore, a subjectively impossible condition is valid, such as a condition of taking a university degree imposed on a mentally defective person. If the condition is impossible because of circumstances of time or of place, such as the condition "if you reach America in one second", it was regarded as "non scripta" by the Romans, and this view was also upheld by Toullier and Troplong. More reasonable appears to be the suggestion of Pacifici Mazzoni that only the accidental circumstances of time or of place which render the condition impossible should be regarded as "non scripta", whilst its principal contents should stand.

A condition is unlawful if it is contrary to morality, or to public policy, or is prohibited by law. Unlawful conditions may be classified as follows

1. Conditions contrary to individual liberty, i.e. contrary to freedom of status, religious freedom, freedom of domicile and freedom of marriage.

2. Conditions contrary to the laws on family relations;

3. Conditions contrary to certain laws governing the exercise of property rights, such as a condition restraining the heir from exorcising the benefit of inventory (Section 750).

Section 752 foresees a special kind of unlawful condition and provides that "any testamentary disposition, whether by universal or singular title, made by the testator on condition that he shall in return benefit by the will of the heir or legatee, is null". The reason being that testamentary dispositions cannot serve as means of beliefitting by the will of others.

The most frequent unlawful condition is that in restraint of marriage. It is a traditional rule (Pr. 22, D. "De conditionibus et demonstrationibus") confirmed by Section 749 of our Civil Cede that "a condition prohibiting a first or subsequent marriage shall be considered as if it had not been attached". The right to marry may not be restrained; marriage is the origin of the family and of society, and it is that state in which a man and a woman may live together honestly. Whether it refers to a first or to a subsequent marriage, to the person benefitted or to another, to a physically or morally fit or unfit person, is immaterial, provided its object is to restrain marriage. The nullity of the condition is absolute in so far as it prohibits marriage, but it may be valid if it simply restricts a person's freedom to marry.

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Within reasonable limits marriage may be the subject of a condition, provided the person concerned is not deprived of his freedom; and the lawfulness or otherwise of the condition depends on the particular circumstanced of the case.

Some of the more controversial cases may here be examined. One such case is a bequest left to a person on condition that he shall not marry any of the persons mentioned in the will -- "si Titio non nupserit, vel ita si neque Titio nequo Scipio neque Oaio nupserit" (Fr. 63, D. ibid.). A similar condition is valid -- "magis placait quaelibet eorum si nupserit ainmissuram legatam", in view of the fact that the freedom of the person benefitted is merely restricted. Equally valid is the condition that the heir or legatee shall marry a specified person; it is in fact presumed that the testator had in mind the welfare of both persons whom he imposed the condition. In general it may be said that the condition that the heir or legatee shall marry has constantly been held to be valid.

The law itself makes two exceptions to the rule that "a condition prohibiting marriage shall be considered as if it had not been attached" in Section 749 (2) and (3). Section 749 (2) runs as follows: "Nevertheless, where a legacy consisting in a right of usufruct, use or habitation, or in a pension or other periodical payment, is contingent on the legatee remaining, and limited to the period during which he or she remains a bachelor or a spinster, or a widower or a widow, the legatee shall be entitled to enjoy the legacy only as long as he or she shall remain a bachelor or a spinster, or a widower or a widow". This exception enables the testator to provide for the subsistence of a person during celibacy or widowhood. The condition, however, cannot be attached to all testamentary dispositions, but only to those whereby the maintenance of the legatee is provided for. As soon as the legatee marries or remarries the the legacy is forfeited, but only for the future and the fruits or payments received prior to the marriage are not reimbursable. Such a disposition, therefore, rather than conditional is a limited one.

Section 709 (3) provides that "a condition in restraint of marriage, attached to a testamentary disposition by one of the spouses in favour of the other, shall be valid". The validity of this condition was first recognized by Justinian in Novels 22 and 43 was accepted by Canon Law and handed down to us by intermediate Jurisprudence. Widowhood, it is said, is an honourable state, and it is only natural for one of the spouses to wish that the other should not marry after his or her death; there are the reasons given in justification of the exception. It has however been criticized as a selfish act on the part of the spouses, which may be prejudicial to the morals of the surviving spouse. This criticism does not hold good where the condition is imposed in the interest of the children and limited to the time of their minority, as in such circumstances "magis cura liberum quam videritus invigeritur"(L. 62, Par, II, D. "De conditioaibus et demonstrationibus"). This condition may be attached to any testamentary disposition, even to an institution of heir.

It has already been said in the study of Homan Law that Justinian, confirming the opinion of Sabinus, laid down that "impossibilis condicio in institutionibus et legatis pro non scripta habetur" (Para. x, Just. "De Heredum Institutione"), and that "condiciones contra leges scriptae vel contra bonas mores pro non scriptis habentur'" (I x, D. "De Condicionibus"). In contracts, on the contrary, the rule was, and still is, that an unlawful or an impossible condition "vitiatur et vitiat". In Roman Law this difference was justified by the fact that it was important that a person should not die intestate. As this reason no longer exists, our law rightly applies to the testamentary dispositions the same rule which governs conditions in the matter of contracts -- "where the condition is impossible, or contrary to laws or morals, it shall vitiate the disposition to which it is attached" (Section 748 (1)). A special application of this rule is contained in Section 752: "Any testamentary disposition, whether by universal or singular title, made by the testator on condition "that he shall in return benefit by the will of the heir or legatee, is null". The following two cases are, however, exceptions thereto:

(a) A condition restraining a first or a subsequent marriage is considered as if it had not been attached (Section 749 (1));

(b) A condition restraining the heir from availing himself of the benefit of inventory is likewise considered as if it had not been attached (Section 750).

As to unintelligible conditions, Section 748 (2) provides that "where the condition is unintelligible it shall be considered as if it had not been attached".

As to the happening of contingencies, the following rules are observed:-

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(i) The contingency must actually happen, and the condition is deemed to have not been fulfilled if it does not happen, even if this be due to a fortuitous accident or to an act of the testator himself. Consequently, if e.g. a legacy is left on condition that the legatee pay a debt of the testator, and that debt is paid by the testator himself during his lifetime, the legatee will not be entitled to the bequest. However, in order to favour the efficacy of testamentary dispositions and to give effect to the presumed intention of the testator, two exceptions are made to this rifle:

(a) Section 1103 (1) which may, by analogy, he extended to testamentary dispositions, and which provides that "the condition shall he deemed to be fulfilled if the debtor who is hound under such condition is the person who has impeded the fulfilment thereof".

(b) Where the condition can only he fulfilled with the concurrence of a third party who refuses to intervene. It is presumed that all the testator required was that the person benefitted should be ready to fulfil the condition. Thus Africanus says that a legacy left under the condition "si Teclam uxorem duxerit, mulicre nolente nuberc, cum ipse paratura esse, legatura oi deheatur" (L* 31, D. ibid.).

(ii) "In condicionibus primum voluntas defuncti obtinet, eamque regit condicioneri" (L. 19, D. ibid.). It is by following this principle that one is to decide whether the condition is to be fulfilled by the person benefitted personally or may be fulfilled by others for him; or whether in case of several contingencies, one only or all of them are to happen; or whether the condition is to be fulfilled after the death of the testator or may be fulfilled even during his lifetime. As to the last-mentioned question, it is useful to recall the opinion of paulus confirmed by Lex 11, D, where the distinction, is made between promiscuous and non-promiscuous conditions: a promiscuous condition is that which is potestatative for the person benefitted and capable of repeated fulfillment, e.g. "si duem doderis Ttio, vol si Capitolium ascendris"; a non-promiscuous condition is either a casual condition e.g. "si navem ex Asia venerit", or a potestative condition which can only be fulfilled once e.g. "si filius meus nupserit" , or a mixed condition must be fullifed after the death of the testator, even though the act may have been repeatedly performed during his lifetime, since it cannot be said that the testator's intentions have been carried out unless these are known--

"otiam debet scire hanc condicionem insertam, nam si facto fecerit non videtur olitemperasse voluntate". A non-promiscuous condition, on the contrary may, as a rule, be fulfilled either before or after the testator's death.

As to when a condition is deemed to have or to hove not been fulfilled, the same rules governing conditional obligations apply and reference do made thereto. A negative suspensive condition, however, needs special attention. If the said condition is potestative for the person benefitted, it can only be said to have been fulfilled when such person dies, since only death can ensure that the condition will not be infringed. Strictly speaking, therefore, the disposition to which it is attached could only take effect on the death of the person benefitted, who could derive no advantage therefrom. To obviate this inconvenience the jurisconsult Quintus Mitius Seevola devised the security -- which bears his name, "cautio Mitiana" -- whereby the person benefitted may avail himself of the disposition made in his favour immediately. Section 755 provides that "If the testator has left the inheritance and legacy subject to the obligation that the heir or legatee shall forbear from doing or from giving a specified thing, the heir or legatee shall be bound to give sufficient security, for the fulfilment of such obligation, by means of sureties or by means of a hypothecation or pledge in favour of the person in whom, in case of non-fulfilment, the inheritance or legacy would vest".

Effects.

1. Effects of a suspensive condition. " Pendente conditione" the disposition is suspended: the legacy or the inheritance is net acquired and may not, therefore, be transmitted to the heirs if the conditional heir or legatee dies before the condition is fulfilled, it will be remembered that in respect of conditional obligations the rule is that the rights acquired conditionally under a contract are transmitted to the heirs before the happening of the contingency in view of the principle that the parties stipulate not only for themselves but also for the persons claiming under them. Testamentary dispositions, on the contrary, are made for personal considerations, and a right acquired conditionally under a will may not be transmitted before the condition is fulfilled. Section 753, in fact, provides that "any testamentary disposition made subject to a condition depending upon an uncertain event, and being such that in the intention of the testator the validity thereof is dependent upon the happening or non-happening of such event,

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shall he ineffectual if the person in whose favour it is made dies before the fulfilment of the condition"; and Section 758 (2), referring to the right of the legatee to receive the thing bequeathed, provides that "where the legacy is made conditionally, such right shall not vest in the legatee before the fulfillment of the contion". This rule presupposes that the disposition is made subject to a suspensive condition, as results clearly from Section 753; it is not, therefore, applicable where the condition, in the intention of the testator, is merely meant to suspend the execution of the testamentary disposition (Section 754). Such was the case solved by Papinianus in Fr. 26, D. "Quando dies legatorum vel fidei commissorium cedat" (L. 36, Tit, II). The testator had made a bequest of a sum of money to one of his pupils to be received by him on attaining 25 years of age; in the meantime the money had to be invested and the fruits thereof to be received by the child. The pupil died before he reached the age of 25 years, and the question arose whether the legacy was transmissible to his heirs or became ineffectual through the non-fulfilment of the condition. The solution given by Papinianus was "transmissarum ad heredem pueri fidei commissum"; in other words, the event contemplated by the testator was merely, meant to suspend the execution of the disposition -- "certam aetatem sorti solvendo prestitutam videri, non pueri fidiecommisso relicto condicionem incertam". This was substantiated by the fact that the fruits were to be received by the legatee. In re "Borg utrinque" (15th April, 1883) the same rule was adopted by the Civil Court, First Hall.

As to the protection of the interests of the person in whose favour the disposition is conditionally made, on the one hand, and of the person in whom ine property would vest in case of non-fulfilinoni of the condition, on the other, a distinction has to be made between an inheritance and a legacy. Section 757 provides that "if the heir has been instituted subject to a condition... there shall be appointed an administrator of the inheritance until such condition is fulfilled or it is certain that it cannot be fulfilled. An administrator shall also bo appointed..... in the case in which the instituted heir is the immediate issue, as yet unconceived, of a person living at the time of the death of the testator as provided in Section 637. Such administrator shall have the same powers and duties of the curator of a vacant inheritance, subject to any other direction, according to circumstances, the Court shall deem fit to give".

Where a legacy is bequeathed conditionally, the person charged with the payment of the legacy may be compelled to furnish security in favour of the legatee (Section 756); and if the heir or legatee fails to give such security, an administrator will he appointed to look after the interests of the person in whose favour it had been bequeathed as well as of the person on whom it has been-charged (Section 757 (2)).

These rules do not apply where the conditional heir or legatee is entitled to the "cautio Mitiana", as aforesaid, under Section 755.

"Eveniente conditione", the inheritance devolves on the heir and the legacy is acquired by the legatee with effect retrospective to the date of the opening of the succession. The heir or legatee will, therefore, be entitled to the fruits or interests as from that date.

If the condition is not fulfilled, the disposition is deemed to have never been made.

2. Effects of a Resolutive Condition. "Pendente conditione", the inheritance or legacy is acquired subject to dissolution. If the condition is fulfilled, the right of the heir or of the legatee is dissolved, and the heir or legatee will be bound to restore the property received as well as the fruits thereof, since the fulfilment of a resolutive condition has a retrospective effect. If the condition is not fulfilled, the institution or legacy will take a definite effect.

Limited Dispositions,

"Dies" is the day on which a limited disposition is to take effect ("dies a quo" or suspensive time) or on which its effects are to cease ("dies ad quem" or extinctive time). The extinctive time is proper to successive or continuous liberalities. Time may also be either certain or uncertain: it is certain when it is established by fixing a certain specified day or by reference to an event which will certainly happen on a known and certain day, e.g. the 26th birthday; it is uncertain when it is established by reference to an event which will certainly happen, but on an uncertain day.

Time does not suspend the disposition but only delays the execution thereof. If it is extinctive, its function is to extinguish the disposition on the appointed day.

Where a suspensive time is uncertain, it may disguise a condition in the following two cases:-

(a) Where it is certain that the event will talee place but it is uncertain whether it will happen before or after the death of the legatee: "heres meus eum ipso morietur centum Titlo dabo". In this example, though it is certain that m, heir will die, it is uncertain whether Titius will survive him,

(b) Where it is uncertain whether the event will happen, as in the case of a legacy left to a person to be received by him on attaining a certain age or on his marriage: it may be doubtful whether the disposition is limited or conditional.

The difficulty, in either case, is solved by interpreting the intention of the testator, according to circumstances.

Time may only be annexed to dispositions by singular title. The ground for this rule, in Roman Law, was that the quality of heir did not admit of "continuitatis solutio". Under the laws in force the reason for this rule is tradition, confirmed by Section 751 of our Civil Code, where it is provided that "if in any testamentary disposition by universal title the testator shall fix a day on or from which the institution of the heir shall commence or cease, such limitation shall be considered as if it had not been attached".

Doubts, however, arise in view of Section *754*, which runs as follows: "A condition which, in the intention of the testator, is merely meant to suspend the execution of the testamentary disposition shall not operate so as to bar the heir or legatee from acquiring, even before the fulfillment of the condition, a vested right transmissible to the heirs of such heir or legatee". The solution to the difficulty is this: Section 754 refers to a limitation which merely delays the exercise of some particular right of the heir, such as the management of the hereditary property, without affecting his other rights as heir; Section 751 refers to a limitation which suspends the exercise of all the heir's rights.

Effects. A suspensive time delays the execution of the disposition, but it does not operate so as to bar the legatee from acquiring the legacy. By Section 756, where a legacy is bequeathed so as not to be exigible before a certain time, the person charged with the payment of the legacy may be compelled to give sufficient security in favor of the legatee, and, should he fail to give the security required, an administrator will be appointed until the expiration of the time (Section 757 (2)). Upon the expiration of the time fixed the legatee may demand the delivery of the legacy and exercise all other rights competent to him.

An extinctive time allows the enjoyment of the legacy until its expiration, when all the rights of the legatee are extinguished "ex tunc".

"Modus".

"Modus" is an obligation imposed on the heir or legatee as a charge on the property bequeathed to him, or a charge imposed on the lawful heir who has not been deprived of the inheritance due to him by operation of law, such as the obligation of paying yearly a specified sum to a specified person or institution (in which case the "modus" would constitute a legacy in favor of such person or institution), or the obligation of assuming the testator's surname.

"Modus" is different from a suspensive condition in the following respects: a suspensive condition suspends the acquisition of the inheritance or of the legacy, but it may not be enforced; "modus", on the contrary, has no suspensive effect, but it is enforceable. If the heir or legatee fails to perform the obligation imposed upon him, such failure does not of itself operate the forfeiture of the bequest, unless such forfeiture has been expressly inflicted by the testator.

A "modus" which is impossible or unlawful is null, but such nullity does not affect the validity of the disposition to which it is attached, since the non-fulfilment of the "modus" does not operate so as to bar the heir or legatee from acquiring the inheritance or the legacy.

Penalty Clause,

A penalty clause is a disposition attached and accessory to a "modus" which is made to ensure the performance of the "modus": as it is accessory thereto, it is null if the "modus" is null.

Of Particular Legacies.

1. Legacy of an indeterminate Kind.

As already stated, the subject of such a legacy has to be determined before it can be delivered to the legatee.
The right of selection belongs to the heir, unless the testator has otherwise directed (Section 759) > or to the person charged with the legacy, the reason being that the

heir or the person so charged is the debtor of the legacy, and it will be remembered that in obligations whereof the subject-matter is an indeterminate thing, included in a genus or a species, the right of selection belongs, as a rule, to the debtor. In such case, if the heir or the person charged with the delivery of the legacy dies, the right of selection will pass to his heirs, together with the debt which forms part of the estate; the same rule applies to the case where the right of selection has been attributed by the testator to the legatee (Section 762 (1)). Whore, however, the right of selection has been left to a third party who refuses or is, in consequence of death or other impediment, unable to make the selection, such selection will be made by the Court. The death of the third party, therefore, does not operate the transmission of the said right to his heirs, in view of the principle that mandate is a power conferred personally on the mandatory and is extinguished by his death. The law does not provide for the case in which either the debtor of the legacy or the legatee entitled to the right of selection, is unable to make the selection for any reason other than death; it is agreed, however, that the selection will, under such circumstances, be made by the Court and not by the representative of the person to whom such right belongs. As to the case of a refusal to exercise the said right, some commentators hold that the selection should be made by the Court; it may, however, be objected that, in the matter of obligations. Section 1125 provides that "where the party entitled to the option fails to exercise such option...... the right of option shall vest in the other party", and that the said rule ought to be extended to testamentary dispositions.

As to the rules governing the manner in which the selection is to be made, Section 762 (3) provides that "even where in the estate of the testator there shall be only one of the things included in the genus or species, the heir or legatee having the right of selection shall not, in the absence of an express disposition to the contrary, be entitled to select other than the thing existing in the estate".

If the right of selection belongs to the heir, he must select the thing "cum arbitrio boni viri" or, in other words, "ho cannot be compelled to deliver a thing of the best quality, but cannot offer a thing of the worst quality" (Section 759 (1)). The rule is founded on the presumed intention of the testator, since when an indeterminate thing included in a genus or species is disposed of, one has in mind a thing of an average' quality; and it is applicable to all cases in which a selection is necessary, whether such selection is restricted to things existing in the estate or not.

The same rule applies where the right of selection is left to a third party: it is, in fact, reasonable to suppose that the testator left the selection to a third party precisely in order to ensure impartiality. Consequently, the same rule ought to apply where the selection is to be made by the Court.

Where, however, the right of selection is left to the legatee, he may select the best of the things of the given genus or species existing in the inheritance; but if there be none, he cannot select one of the best quality (Section 760).

The selection determines the subject of the legacy, and by effect thereof the legacy becomes of a determinate thing: as soon as such determination takes place, the ownership passes to the legatee, and the thing is at his risk and peril.

The selection, once made, is irrevocable (Section 762 (2)), provided it has been validly made and it is not impeached with success. If the selection is impeached and declared to be null, a new selection will have to be made. A selection is invalid if, for instance, supposing the right of selection belongs to the legatee, the heir fails to produce all the things existing in the estate and included in the given genus or species.

2. Alternative Legacies

An alternative legacy is -one whereby two or more things are bequeathed alternatively: all the said things form the subject of the legacy, but the delivery of one of them discharges the heir, or the person charged with the legacy, from his obligation*

Here again a selection is necessary as in the case of a legacy of an indeterminate thing included in a genus or species, with the only difference that in alternative legacies the selection is limited to the things bequeathed alternatively. The right of option is presumed to have been left to the debtor of the legacy, but it may be left, by the testator, to the legatee or to a third party.

Any of the things included in the legacy may be selected: if the right of selection belongs to the debtor of the legacy he may select even the worst thing, and if it belongs to the legatee he may select even the best thing; all such things in fact are equally the subject of the legacy, and whichever of them is selected it is necessarily one which the testator meant to bequeath to the legatee.,

3. "Legatum nominis" or legacy of a debt due to the testator. Where the subject of the legacy is a sum owing to the testator»..., the legacy shall only have effect with regard to such portion of the debt as shall still be owing at the time of the death of the testator..." If, therefore, the debt is found to have been paid, the legacy will be ineffectual. Such a legacy, in fact, is one of a determinate thing and is, therefore, ineffectual if the thing is not found to exist in the estate at the time of the testator's death.

The effect of this legacy is that of transmitting the debt to the legatee, together with all the actions necessary for its enforcement, as well as its accessories including the interest which falls due after the death of the testator. The interest which may have already fallen due before the opening of the succession is deemed to be a debt "per se" and is not, therefore, included in the legacy unless the testator has otherwise directed. It need hardly be said that the debtor of the legacy does not warrant the existence of the debt and, much less, the solvency of the debtor: such warranties are due only where the debt is assigned for a consideration.

4. "Legatum Liberationis". It consists in discharging the debtor from a debt due to the testator. Where the legacy consists in discharging the debtor iron all the debts due by him to the testator, such legacy will be deemed to includo only such debts as were due to the testator at the time of the will, and not such other debts as may have been subsequently contracted (Section 743). As the testator could not have foreseen the entity of such other debts, it is presumed that he meant to discharge the debtor only from those debts which were due at the time of the will. The provision of Section 740 is applicable to this legacy; in other words, the "legacy shall only have effect with regard to such portion as shall still be owing at the time of the death of the testator"; consequently, the legatee may not claim what he may have paid from the heir.

5. "Legaturn Debiti". It consists in a legacy made in favor of the creditor of a debt due to him by the testator, or of a legacy of a thing or a sum of money declared

by the testator to be due by him to the legatee* -It has been traditionally held that such a legacy is valid even if no debt is duo by the testator to the legatee. The mention of the debt is deemed to be a false demonstration or the expression of a false consideration. The former does not affect the validity of a legacy, and a disposition can only be voided by a false consideration, even though expressed, if it is shown that the testator would not have made it if he had been aware of the truth. For this reason Pacifici Mazzoni holds that if the testator believed himself to be a debtor and would not have made the legacy had he been aware of the truth, the disposition will be avoided on the strength of Section 722 (1).

The non-existence of the debtor, however, provided it is known to the testator, has an important effect: it has already been said that where a debt is bequeathed it is necessary that such debt should exist at the time of the testator's death, and this rule applies to a "legatum debitis" where the debt exists; where, however, the declaration of the existence of a debt is false, it is obvious that the said condition cannot be required.

It might appear that where the debt is true, the legacy is useless; on closer consideration, however, it will be found that such a legacy is advantageous to the legatee who acquires an "actio hereditaria" in addition to the personal action arising out of the debt, which former action is prescribed by the lapse of ten years, reckoned from the date of the opening of the succession. Moreover, the legacy removes any condition or limitation to which the debt may have been subjected, as well as any doubt in respect of the validity of the debt.

The provision of Section 742, which follows Roman Law, may here be mentioned. It is there stated that "where the testator, without mentioning the debt duo to him, makes a legacy in favor of his creditor, such legacy shall not be deemed to have been made in satisfaction of the debt due to the legatee". Under our law, however, this rule has two exceptions:-

(a) Any disposition made in favor of any person entitled to legitim or other portion of property, without an exemption from imputation, is deemed to have been made in satisfaction of the said rights;

(b) In the absence of a declaration to the contrary, any property which the testator bequeaths to his wife is in all cases deemed to have been bequeathed on account of her dowry and dower (Section 676 – vide also para. 55, Ch. I, B. IV of the Code de Rohan).

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6. Legacy of Maintenance. "A legacy of maintenance shall - include food, clothing, habitation and other necessaries during the life of the legatee; and it may also, according to circumstances, include the education of the legatee according to his condition" (Section 744 and D. B. 34, Tit. I).

7. Legacy of immovable. As a rule the thing bequeathed must be delivered in the- condition in which it is on the day of the death of the testator. To this rule there is an exception in respect of embellishments or of new constructions made in the tenement bequeathed or of a tenement of which the testator has enlarged the boundary, including therein new acquisitions (Section 768 (2)),

8. Legacy of Periodical Performances. (V. Dig. b. 33, Tit, "De annuis legatis"). Such a legacy consists in the payment of a sum of money or the delivery of a specified thing at regular intervals, such as every year, or every month, or every day. It consists in as many legacies as there arc performances: "si in singulos annos aliqui legaturn sit, Sabinus, cuius sententia vera est, ait, plura legate esse sit, id primi anni purum, sequent iura condicionale". In other words, the legacy in respect of the first performance is not subject to any condition excepting that common to all bequests, viz, the survival of the legatee; the legacies in respect of subsequent performances are conditional, that is, they are subject to the condition that the legatee be still alive at the time when they fall due„ The testator, in fact, intends to benefit the legatee for each successive period, and, therefore, if when a new period starts the legatee is dead, the disposition will cease to have effect owing to the absence of the person in whose favor it was meant to have effect. Where, on the contrary, the legacy is one, payable by installments "ex die", such limitaticu will not operate so as to bar the legatee from acquiring the entire legacy the very moment the succession is opened, but will only suspend its execution: consequently if the legatee dies after the testator but before all the installments fall due, such installments as may not yet have fallen due will be payable to his heirs.

The survival of the legatee at the commencement of the period is sufficient to entitle him to the entire legacy for that period, just as where the legacy is one, the fact that the legatee is alive at the time of the testator's death entitles him to the entire legacy (Section 767 (1)).

In respect of a life annuity constituted by means of a contract, it has been seen that it is necessary to

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distinguish between an annuity payable in advance and one payable in arrears: the entire annuity for a given period is acquired if it is payable in advance oven though the creditor may have been alive at the commencement only of that period; if, on the contrary, it is payable in arrears only a proportional part thereof will be due to him, under similar circumstances.

The legacy cannot be claimed until after the expiration of the period (Section 767 (2)); if, however, the legacy is by way of maintenance, it can be claimed at the commencement of the period (Section 767 (3)).

As to the duration of the legacy, Roman Law distinguished according as to whether the legatee was a physical or moral person: in favor of a physical person it lasted for his lifetime, in favor of a moral person it was deemed to be perpetual (vide Frs. 5 and 8, D. ed. Loc.) Pacifici Mazzoni confirms this distinction and holds that a life annuity left to a moral person should be perpetual since it is of its nature indefinite, unless the testator has fixed a time. It *ceases* to be due of course, if the moral person ceases to exist.

OF SUBSTITUTION AND ENTAILS

Substitution is one of the remedies against the inefficacy of testamentary dispositions through the death of the person in whose favor they have been made before the opening of the succession. It consists in the substitution of another person for the heir-institute or for the legatee, in the event of such heir or legatee not being able or willing to accept the inheritance or the legacy. In this way the testator ensures that his property will be enjoyed by a person he intends to benefit.

Kinds of Substitution

Under Roman Law and under Common Law. two main forms of substitution were recognized: (1) Direct Substitution, which was that ordered directly and imperatively - "Primus heres esto; si primus heres non erit, secundus heres esto - and in which the heir-substitute was the direct heir of the deceased; and (2) Indirect Substitution, which was that ordered indirectly - "primus heres esto; eundem vero rogo eiusdem fide committo quid hereditatem secundo restituat" and in which the heir-substitute received the inheritance indirectly through the heir-institute.

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Indirect Substitution was the source of "fideicommissa" or entails, which were clearly expressed in the formulary disposition: "Primus heres osto, eiusdem fidai committo ut hereditatem Secundum restituat".

Direct substitution could be "vulgaris voi communis" or "Pupillaris" or "quasi-pupillaris". Entails have been abolished by the laws in force; but the three kinds of direct substitution have been maintained.

1."Substitutio vulgaris".

It consists in the substitution of another person for the heir-institute or for the legatee, in the event of such heir or legatee not being able or willing to accept the inheritance or legacy (Section 788). The cause of the inability is immaterial: substitution takes place in all cases whether the inability to accept be due death or incapacity of the heir-substitute or of the legatee, or to the happening of a resolutive condition, or to the non-fulfillment of a suspensive condition; unwillingness means the renunciation of the inheritance or of the legacy.

Where in the substitution clause only one of the two contingencies is stated, that is, either that the institute should be unable, or that he should be unwilling to receive the inheritance or legacy, the other contingency shall, unless the disponer shall have stated the contrary, be deemed to be included (Section 791). The same rule existed under Roman Law.

The words used by the testator as well -as the manner of substitution are immaterial: the testator may:-

(a) "plures in unius locum substituere (primus heres esto, si primus heres non erit,Secundus et Tertius heredes sunto)";

(b) "vel unum in plurium locum";

(c) "vel singuli singulis";

(d) "vel in vi com ipse qui heredes instituti sunt possunt suhstitui in vicem" (this reciprocal substitution is known as "breviloqua").

Whether a subsequent substitution is made subordinate to the institution or to the one immediately preceding it, the result will always be the same. If, e.g. A institutes B as his heir, and substitutes C for B, and D for C, D will be regarded as B's substitute, since it is certain that A wants D to receive the inheritance on failure of B and C, in whatever order they may fail to be his heirs. This is the meaning of the rule "Substitutus sabstituto substitutus etiam, instituto intelligitur".

The substitute succeeds to the inheritance or the legacy directly: ho takes the place of the institute as if he had been the institute "ah initio"; the institute is not an intermediary through whom the substitute succeeds. This is a characteristic feature of "substituto vulgaris" which distinguishes it from the "pupillaris et quasi" and from entail.

The substitute succeeds to the share assigned to him by the testator. If the testator has not determined such share, a distinction becomes necessary:-

(a) if there is one substitute for one institute, the substitute receives the entire inheritance or legacy;

(b) If there are several substitutes for one institute, the inheritance or legacy is divided equally between them;

(c) If there is one substitute for several institutes, the substitute receives the inheritance or legacy of those institutes who fail;

(d) In the case of "substitutio brevilequa", the shares established for the institution apply to the substitution.

The substitute is bound to perform all such obligations as may have been imposed on the party for whom has been substituted? Since it is reasonable to presume that the testator did not intend to prefer the substitutio the institute? However as this rule is founded on the probable intention of the testator? It applies only if it does not appear that the testator wished to impose such obligations solely on the party called in the first place (Section 792 (I)) "nevertheless, subsection 2 of the same Section adds? "such obligations (the corresponding word of the Italian text is "condizioni") as particularly affect the person of the heir or legatee shall not in the absence of an express declaration to the contrary be deemed to be operative in regard to the substitution"

Substitution becomes ineffectual if the institute accepts the inheritance or the legacy? or if the substitute dies before the opening of the succession or "pendent condici one" , Where substitution fails, an inheritance will devolve "ab intestato", and a legacy will remain in favor of the person who may have been charged therewith, saving always the effects of the right of accretion.

1. Substituto Pupillaris.

It consists in the substitution of another person for the heir institute or for the legatee in the event of such heir or legatee dying without issue before attaining the age of eighteen years (Section 789 (1)). The essential difference between "substitutio vulgaris" and "substitutlo pupillaris" is that the "vulgaris" presupposes that the institute has not accepted the inheritance or legacy, whilst the "pupillaris" presupposes that the institute has become an heir or has acquired the legacy but-has died before attaining the age in which he could make a will. The "substitutio vulgaris" is, therefore, an indirect substitution, since the substitute succeeds to the testator indirectly, that is, through the institute.

"Substitutio pupillaris" was introduced by custom into Roman Law in order to enable the "paterfamilias" to make a will for his children, whenever these died before attaining the age in which they could make a will for themselves* Its purpose under the laws in force is to enable certain relations to appoint their own successors to property bequeathed by them to a minor who dies before attaining majority. Under Roman Law; the testator first made his will and then made that of the child; under cur law the testator makes only his will, but he institutes two degrees.

"Substitutio Pupillaris" has been abolished in Italy on the ground that it savors of entail; our law leas preserved it in view of the fact that it encourages the testator to bequeath a large share of his property to the minoro

Requisites

(a) It is necessary that the institute die before attaining the age of eighteen years, and without legitimate issue. Otherwise the testator would be enabled to exclude the children of the institute,

(b) Under Roman Law it could only be ordered by the ''paterfamilias" ; under our law; it may be ordered by the father, the mother, the other ascendants, the uncle or aunt and the brother or sister. The right is not restricted to the father since it does not consist in making the child's will and, therefore, paternal authority is not required.

(c) Under Roman Law; the "paterfamilias" could dispose not only of the property bequeathed by him but also of the property of the minor "ex alia causa". Under our law substitution can only refer to property in which the minor may have been instituted heir or appointed legatee (Section 789 (1)) Nay, subsection 3 of Section 789 provides that "any substitution referred to in this Section if made by the father the mother or other ascendant by whom the legitim is due to the heir institute or legatee may only include such portion of the property as the minor on attaining majority could dispose of".

The question whether a "substituto vulgaris" includes also the "pupillaris" and vice-versa was decided affirmatively by the Emperors Marius et Verus in their Constitution reported in the Digest Fr. 4 "De vulgaret pupillari substitutione". Consequently, an express-"substitutio vulgaris" includes tacitly the "substitutio pupillaris" and vice—versa. This rule is founded on the probable intention of the testator of ensuring in all cases a testamentary successor

3. "Substitutio cuasi-pupillaris"

This form of substitution was introduced by Const. IX, C. "De vulgaris et aliis substitionibus". and it consisted in the substitution of another person for an imbecile or an insane person in the event of such person dying in a state of imbecility or insanity, and without issue. It resembles the "substitutio pupillaris" In so far as the inheritance or legacy is acquired by the substitute indirectly through the institute who "mente captus decesserit".

Notwithstanding its abolition in Italian Law this form of substitution is recognized by our laws and may be ordered by the same persons who may order a "substitutio pupillaris".

The "substitutio quasi-pupillaris" may only produce its effects if the imbecile or insane person dies in a state of imbecility or insanity and without issue legitimate or legitimated by a subsequent marriage and may only affect property as the person ordering it may have devised to the imbecile or insane person.

Entails.

Originated by the Roman Jurists, entails were introduced under Intermediary Law and family entails bequeathed to the family of the institute became a wide-spread institute. The economic system prevalent at the time, vis. the preservation of property, encouraged the entailing of property: at that time wealth mainly consisted of landed property, which could easily be left in the family, and the chief industry was agriculture which did not require the free circulation of property.

Entails were originally created in favor of all the members of the family and the property passed from one generation to another in nearly the same way as if it passed by succession. Eventually "fidei commissa individua" appeared, and these were transmissable to one person only in very much the same manner as under the feudal system "more Francorum"o Primogenitures were usually attached to a feud or a title of nobility in order to increase the prestige and power of the family by accumulating the entire property of the family in the hands of the first-born.

When the economic system change the trade and manufacture, which require an unhampered circulation of property, became the chief industries, a movement was started aiming at the abolition of entails. The movement reached us in 1784 at the time when the Code de Rohan was being drafted. In the matter of entails this code followed the law of 1747 of the Gran Ducato di Toscana which had reproduced, to a large extent, the law of 1598 of the Stati del Piemonte which in its turn had been modeled on the Ordinance of Orleans 1560 and on that of Moulin of 1566.

The Gode de Rohan restricted the creation of entails whether "individual" or "individuals", on immovables and fixed annuities (i.e. annuities which may not be redeemed, such as the investments in the Massa Frumen- taria), and abolished them in respect of movables andredeemable capitals, such as the Censi Bollali. Under the provisions of this Code entails could only be created for four generations, excluding the institute, but the last holder of the entail could extend its life for another four generations. These provisions had no retrospective effect, and the same may be said of Ordinance XV of 1864, which abolished testamentary entails completely Ordinance II of 1865 extended the abolition to conventional entails. The provisions of those Ordinances arc now contained in Sections 794, 795 and 1872.

Formerly, entails could only be revoked by the legislative authority; this power is now exercised by the Courts; and greater facilities are given by the laws in force for the said revocation. By Ordinance VI of 1896, the limitation of entailed property was recognized.

Entail, under our law, is that disposition whereby the heir or legatee is required to preserve and return the inheritance or legacy to a third person. Four conditions are necessary:~

(a) Two or more dispositions relating to the same property on a title of ownership

(b) Each of the said dispositions must have its effects;

(c) The succession to the property by one holder to another determined by the death of the previous holder;

(d) The obligation of preserving the property.

"Substitution residuo"

Under Justinian's Novel 108, this kind of substitution implied the obligation on the part of the institute of returning to a third person a fourth part of the property received. So that, in respect of the said portion, a disposition containing this substitution is an entail, and is, therefore, incompatible with the provisions of Section 794 and Section 795. According to these provisions, a provision implying an entail is considered as if it had not been written, so that a bequest of the "residuum" does not deprive the heir or legatee of the right of alienating or disposing freely of the entire property received by him. However, supposing such heir or legatee does not dispose of the entire property, may the substitute in the "residuum" claim the portion that has been bequeathed to him to the exclusion of the legal heirs of the institute? French and Italian Jurisprudence have constantly held that the substitute may claim the "residuum" under the circumstances, on the ground that as the institute's right of disposal is in no way restrained, there is no entail: a similar disposition is considered as a conditional legacy in favor of the substitute in respect of the "residuum", the condition being "se quod succedorit", Pacifici Mazzoni and others, however, oppose this view.
Under French Law both the substitution and the institution are null; under Italian Law as well as under the Codice Albertino only the substitution is null. The latter system has been adopted under our law in Sections 794, 895 and 872; and it is more logical since it is only the substitution that is economically wrong. This system is also in conformity with the probable intention of the testator that at least one of his dispositions should stand.

Implying an entail, and consequently prohibited, is a provision restraining the heir or legatee from alienating or from disposing by will (Section 795 (1))

Section 773 provides that "it shall be lawful for the testator, in bequeathing a pension or a usufruct, to declare such pension or usufruct as not liable to attachment under a garnishee order, and even inalienable, wholly or in part. Any such declaration, if made in general terms, shall be operative even where the garnishee order is applied for, or the alienation is sought
to be made or is demanded in respect of debts incurred by the legatee after he has commenced to enjoy the legacy. The ground for these provisions is that such usufruct or pension is meant to provide the legatee with means of subsistence.

Although a successive usufruct or annuity is not an entail, as the disposition is not made on a title of ownership, still a substitution in respect of usufruct or an annuity savors of entail where it is created for such a number of generations as to absorb the property.

It is for this reason that Section 798 provides that:
"Any perpetual or limited burden by reason of which the whole usufruct of the inheritance or of the legacy, or of a portion of such usufruct, or any other annuity, is to be given to two or more persons successively, shall be considered as if it had not been written. Nevertheless, it is not forbidden to impose the payment of an
annuity, whether in perpetuity or for a limited time, for the purpose of creating a sacred patrimony, or of being employed for the relief of the poor, or in reward for virtue or merit, or for any other purpose of public utility, even though the disposition be in favor of persons belonging to a certain class or to certain families"

It will be noted that -the only substitution is null. It may hero be recalled that by Section 388 (3) ''where the usufruct is granted to several persons to be employed by them successively it shall be operative only in favor of those persons who are alive at the time when the usufruct devolves upon the first usufructuary".

Of the Right of Accretion

The right of accretion is another remedy against the inefficacy of testamentary dispositions. It is described by Section 774 as follows: "Where two or more persons have been instituted heirs or named as legatees conjointly, and any one of such persons predeceases the testator, or is incapable of receiving, or refuses the inheritance or legacy, or has no right thereto owing to the non-fulfillment of the condition under which he was so instituted or named, the share of such person, with the obligations and burdens attaching to it, shall accrue to that of the other co-heirs or co-legatees". The purpose
of this right is, therefore, to prevent the said share

from devolving on the lawful heirs, in respect of an inheritance, or from benefitting the debtor of the legacy, in respect of a legacy.

Under Roman Law this right was a "necessitas juris" in respect of an inheritance, in view of the maxim "nemo pro parte testatus pro parte intestatus decedere potest"; in respect of legacies, this right was founded on the probable intention of the testator argued from the fact that he had named several persons as legatees conjointly. Under our law the right of accretion is, in both cases, founded on the probable intention of the testator®

The following are the conditions under which this right is competent to a co-heir or a co-legatee 'by operation of law:-

(a) The refusal or inability of one of the heirs or of the legatees to accept the inheritance or the legacy.

(b) The share of such heir or legatee must have been vacant since the devolution of succession; if such share has been acquired by the heir or legatee, it is transmitted to his heirs and may not form the subject of the
right of accretion

(c) The said share must not have devolved upon other persons, either expressly or tacitly substituted for the heir or legatee. In fact an express manifestation of the testator's intention prevails over that presumed by law. A tacit substitution takes effect in preference to the right of accretion, since the sight presumption is stronger. It may here be added that, in respect of a renunciation, this must not have been successfully impeached by the creditors by means of the "actio Pauliana"
since the share of a renouncer whose renunciation has been successfully impeached by the creditors cannot be said to be vacant.

(d) The heirs must have been instituted and the legatee is named conjointly. Differently from Roman Law, a joint institution or nomination is always necessary, irrespectively of whether the right of accretion refers to an inheritance or a legatee.

By Section 775 (1) "an institution or a legacy is doomed to Be made conjointly if it depends upon one and the same disposition, and the testator shall not have specified the share of each co-heir or co-legatee in the inheritance or in the thing bequeathed" However, "the shares are deemed to have Been specified only if the testator has expressly fixed the share of cash. The words "in equal part" or "in equal portions" alone shall not operate so as to bar the right of accretion" (Section 775 (2)).

By Section 776 "a legacy is likewise deemed to Be made conjointly if a thing which cannot Be divided without injury has Been Bequeathed By one and the same will to two or more persons, even separately".

"Where the said conditions concur the right of accreation takes place "ipso juris", without the necessity of any act on the part of the co-heir or co-legatee and even notwithstanding his opposition® Section 777 provides, in fact, that: "where the right of accretion takes place it shall not Be lawful for the co-heir or co-legatee
to refuse the accrued share, unless he shall renounce his own original share, "on the ground that an inheritance or a legacy must Be accepted in the manner in which the testator has directed." Consequently, if the inheritance or legacy have already been accepted, the accrued share may not be renounced.

The effect of the right of accretion, in the words of Section 774, is that "the share of such person (vis. the vacant share), with all the obligations and burdens attaching to it, shall accrue to that of the other co-heirs or co-legatees". However, those obligations, and burdens as particularly affect the person of the heir or legatee whose share has become vacant will not be deemed to be operative in regard to the other co-heirs or co-legatees e
Where the right of accretion does not take place, the Burdens and obligations attaching to thè vacant share which devolves either on the lawful heirs-or on the debtor of the legacy, as the case' may Be, will Be operative in respect of such lawful heirs or in respect of the
person charged with the legacy. Succession "ab intestate",
in-fact, depends indirectly upon the will of the testator who has constituted his. Heirs or has named his legatees in such a manner as to exclude the-right of accretion; now it is evident that if the testator has imposed

obligations or Burdens on his testamentary' heir he must also
have intended such obligations or Burdens to be operative in respect of his lawful heirs. For similar reasons, the same rule applies, in respect of legacies, as against the debtor of the legacy (Section 778).

Rules particular to a joint usufruct:-

(a) Where a right of usufruct is bequeathed to two or more persons conjointly, the right of accretion takes place even after the acceptance of the legacy* This is no derogation to the rule above enunciated in view of the fact that a usufruct ''quotidie constituitur et legatur", and is not, therefore, acquired at once in its entirety*

(b) Where the usufruct is not bequeathed conjointly the vacant portion will merge in the ownership (Section 779 (1) and (2)).

All other conditions are required in order that the right of accretion may take place in respect of the legacy of a usufruct, and, in particular, the conditions established in Sections 775 and 776 as to a joint nomination*

Of the Revocation and Lapse of Testamentary Dispositions

Some of the causes which operate the inefficacy of testamentary dispositions, such as the disability of the testator or of the person benefitted, the non-compliance with the formalities prescribed by law, the inexistence of the thing bequeathed in the estate of the testator where the subject of the legacy is a determinate' thing, and so on, have already been dealt with*

Two other special causes of inefficacy will now be examined, namely

1. Causes which bring about the revocation or the lapse of testamentary dispositions in *view* of a presumed change in the intention of the testator owing to the occurrence of certain events. The testamentary dispositions, under the circumstances, are presumed to have been revoked by the testator, notwithstanding that he may have kept silence, and they are revoked or lapsed by operation of the law itself. It is, however, usual to include also those causes of revocation or of lapse which are established by law independently of any presumed alteration of the testator's intention, such as the incapacity of the person benefitted under a will.

2. An express revocation of the *will* by the testator by means of a new will or another public deed

1. Lapse of testamentary dispositions»

There are causes which operate the lapse of all kinds of testamentary dispositions, and others which are proper to legacies. The following fall under the first category

(a) The predecease of the heir or of the legatee. It has already been said that testamentary dispositions are founded on the testator's affection towards the per-son benefitted, which does not necessarily extend to the heirs of the latter. The lapse of the disposition, on this ground, may he remedied in any of the following three ways:

(ii By means of an express substitution,

(ii) By means of the right of accretion;

(iii) By means of a tacit substitution, It corresponds to the right of representation in intestate succession whereby the descendants of the heir or legatee succeed to the inheritance or the legacy in lieu of their parent. By Section 782 (2) "the descendants of the heir or legatee shall succeed in his place to the inheritance or legacy whenever, in case of intestacy, they would have benefitted by the rule of representation". The benefit of tacit substitution is an innovation brought about by the Codes in force, and is founded on the probable intention of the testator, who is presumed to have meant to benefit the descendants of his own children, or brothers or sisters (and these are the cases in which the said rule applies) in the event of the latter dying before him.

Tacit substitution, in respect of the descendants of the testator's children, takes place even in favor of the descendants of an illegitimate child; so that the child must be legitimate, or legitimated "per subsequens matrimonium" or by decree of Court, or adoptive, or acknowledged, or declared by a judgment. In respect of collaterals, on the contrary, tacit substitution takes place only in favor of the descendants of a brother or sister who is legitimate or legitimated by a subsequent marriage, in view of the fact that legitimation by decree of Court, acknowledgement or declaration by a judgment do not give rise to any relationship bet- when the child and the parent's relations* For the same reason, the descendants must be legitimate or legitimated "per subsequens matrimonium".

Section 782 (2) adds that tacit substitution takes place "unless the testator has otherwise directed, or unless the subject of the legacy is a right of usufruct, use or habitation, or any other right which is of its own nature, personal.

(b) A renunciation made by the heir or legatee. Section 905 provides that "no person may take as the representative of an heir who has renounced". The same rule is applicable to testate succession, so that no person may be tacitly substituted to an heir or legatee who has renounced denunciation destroys the right to the inheritance or legacy

even in respect of the descendants of the heir or legatee.
(c) The incapacity to receive of the heir or legatee.
If the heir or legatee was incapable at the time of the will, the disposition would be null "ab initio"; It is only where the heir or legatee subsequently becomes incapable that the testamentary disposition lapses.

(c) The birth of children **to the testator** who had no children or descendants **at** the time of" the will, or the discovery, after **the will of the existence** of children, of whose existence the testator had been unaware « By the Constitution "Si unguam" (C. "De revocandis donationbus") a donation made by a "patronus", who had no children at the time of the donation, to his "liberine", was revoked if a child was subsequently born to the donor.

Under Common Law the rule was extended to all donations made by, and in favor of, any person* its extension to testamentary dispositions was first made by some of the ex-Italian Codes, Under our law, in respect of donations, the resolutive condition must be expressed? in respect of testamentary dispositions, Section 74k provides that "any testamentary disposition, whether by universal or singular title, made by a person who, at the date of the making of the will, had no children or other descendants (under Roman Law the birth of an "horesauus" was sufficient, even if the testator had children at the time of the will), or who was, not aware that he had any children or other descendants, shall "pro jure" be revoked, if there is found to exist or there is born after the will any legitimate child or descendant of the testator, even though posthumous, or a child or a descendant legitimated by a subsequent marriage or adoptive. The same rule shall apply, even though the child or descendant of the testator shall have already been conceived at the timo of the making of the will, or, in the case of a legitimated child, even though such child shall have already been acknowledged before the will and only afterwards legitimated" *

The disposition lapses even if the child is horn after the death of the testator; and the same rule applied to the discovery of the existence of children – in other words it is immaterial whether the discovery is made during the lifetime of the testator or after his death, provided the testator was not aware of their existence at the time of the will. The disposition equally lapses if the testator, although he had become aware of the existence of children after the date of the making of the will, failed to revoke the will. Under these circumstances, in fact, the dispositions are revoked ipso jure, without the necessity of the testator's or of the child's intervention. However, the revocation of the will, on any of these grounds, shall not take place if the testator shall have made provision for the contingency of the existence or subsequent birth of children or descendants, or if the children or descendants found to exist or subsequently born shall predecease the testator"(Section 785).

Where at the time of the making of the will, the testator has one or more children or descendants, legitimate or legitimated by a subsequent marriage, or adoptive, and thereafter other children or descendants are born, each of the latter will be entitled to a share of the estate equal to that which, upon the proportional abatement of all the shares left to the former caused by the inclusion of the latter, is found to be due to the child or' descendant least favored in the will (Section 786). Thus, if the testator had two children, A and B, and instituted them his heirs as to two-'thirds and one-third of his estate respectively, and a child 0 was subsequently born share would be equal to B's share, upon a proportional abatement, viz. one fourth, and A's share would be one-half. This rule, which is derived from the Progetto Cassini, is founded on the probable intention of the testator. The law does not mention the case of the discovery, after the making of the will, of the existence of other children; by analogy, however, the same rule ought to apply. Under Italian Law a child born after the will, in case the testator had other children or descendants at the time of the will, is only entitled to the legitim.

The inexistence of children at the time of the will may be easily proved; as to the testator's knowledge, Section 787 (2) provides that ''until the contrary is proved the testator shall be deemed to have been unaware of the existence of such children or descendants. Moreover, the contrary can be more easily proved. The presumption, however, is ''Juris tantum", The preterition of children or descendants of whose existence the testator was aware does not operate so as to void the disposition, saving the right of children or descendants so passed over to the legitim to which they may be entitled under, the Civil Code (Section 782 (1)).

Causes proper to legacies

(a) The voluntary alienation of the thing bequeathed, which is inconsistent with the testator's intention of preserving the legacy. Any alienation of the thing bequeathed whether in whole or in part, made by the testator even though made by way of sale with the reservation of the power of redemption, or by way of exchange, operates as a revocation of the legacy in regard to the subject of alienation, notwithstanding that such alienation be void, or simulated, or that the thing itself come again to belong to the testator (Section 780 (1)).
In any of these cases, in fact, the "voluntas adinuendi" is presumed. In respect of an exchange the thing acquired does not take the place of the thing bequeathed. On the other hand, an alienation in the proper sense of the word is necessary, and, therefore, the legacy will not lapse if the testator has merely imposed an easement, or a usufruct, or another burden; although the thing bequeathed, of course, is acquired as subject to such burdens. Finally, the alienation must be a voluntary one, since the "voluntas adinuendi" cannot be argued from a forced alienation. If, therefore, the testator has been deprived of the subject of the legacy either by his creditors or by the State, the legacy will stand if the thing comes again to belong to the testator; the disposition will, however, lapse if the thing is not re-acquired by the testator, in view of the fact that the thing would not be found to exist in his estate at the time of his death.

The legacy must be one of a determinate thing, and the alienation must have beén made to a third person. If the alienation has been made in favor of the legatee himself, a distinction is necessary; where the alienation has been made under an onerous title the legatee will be entitled to its value, whilst a gratuitous alienation is considered as having been made in payment of the legacy.

(b) The conversion of the thing bequeathed into another in such manner that it loses its previous form and designation (Section 780 (2). Such a conversion implies the "voluntas adinuendi"

(c) If the thing bequeathed perishes entirely during the lifetime of the testator (Section 781 (1)). The legacy, under the circumstances, would have no subject.
It is immaterial whether the thing has perished accidentally or through some act of the testator or of a third person. The legatee may not claim the value of the thing, nor sue the person responsible for damages; where the thing has perished, the legacy lapses and - cannot subsist even in respect of what remains of the thing bequeathed. The same rule applies if the thing has perished after the death of the testator without the agency or fault of the heir, even though such heir may have been put in default for delay in the delivery thereof, provided the thing would have equally perished in the possession of the legatee (Section 781). The relationships existing between the heir and the legatee, in fact, are those which intervene between debtor and creditor, and the relative rules apply.

Where several things have been alternatively bequeathed, the legacy will subsist, even though there remains one only of such things. The legacy will, however, lapse in respect of the things that have perished, and only that thing which remains may be claimed and offered,(Section 781 (3)). As to the legacy of a thing included in a genus, the rule is "genus et quantitas nunquam pereunt", unless the legacy has been limited to the things found to exist in the testator's estate, in which case the legacy would be one of a determinate thing.

2. The revocation of the will by the testator.

The revocation is valid provided

(a) The testator is capable of making a will; and

(b) The revocation is not affected by mistake, fraud or duress.

The revocation of a will implies the making of a new one, and the capacity to make a will is, therefore, required.. A will may hot, therefore, be revoked by a person interdicted, not even during respite. However, a person interdicted for prodigality may revoke a will made prior to his interdiction, in order to die intesa-tate, and no authority is necessary.

As to the external requisites of a revocation, a distinction is necessary between an express and a tacit revocation. An express revocation may be made either by means of another will or by means of a material deed.
This option is given by law for the testator's convenience:

in fact, whilst a will may not be made by means of an agent, representation is allowed in regard to Notarial deeds.

The will or other "Material deed whereby a previous will is revoked must be valid; and, in particular, "a will which is void cannot have the effect of a Notarial act so as to revoke a previous will" (Section 822).

Any testamentary disposition which has been revoked can only revive by a fresh will (Section 823). It is commonly held that although the withdrawal of the revocation or the revocation of the will whereby a previous will had been revoked is not sufficient to revive a testamentary disposition which has been revoked. It is not necessary that the testator should repeat the dispositions which he wants to revive; it is sufficient if he declares his intention that such dispositions should again take effect.

Tacit revocation takes place where the new will is made which is contrary to, or inconsistent with, the previous one (Section 824 Doctrine distinguishes between:-

(a) Material inconsistency – where it is physically impossible to carry both wills into execution; and

(b) Intentional inconsistency – where both wills could physically take effect, but it results from the will itself that the testator meant to revoke the previous will and give effect only to the new one.

It is important to remember that "where a subsequent will has not. Expressly revoked a previous will or previous' wills." It shall annul such only of the dispositions contained in the previous will or wills as shall be shown to be contrary to, ór inconsistent with, the new dispositions "(Section 824).

As to secret and privileged wills, these may also be revoked by the withdrawal of the will itself, either from the Notary or the Registry of the Court, or the person who may have received it. Provided the testator is capable of revoking a will, he may at any time withdraw it either personally or by means of a representative.

The nullity of a will renders the revocation of a previous will, whether tacit or express, therein contained void as well. However, the revocation made by a subsequent will is fully operative and even if such subsequent will lapses by reason of the predecease or disability of the heir-institute or legatee, or of the renunciation of the inheritance or legacy. The lapse of the will on these grounds, in fact cannot imply the intention of revoking the will.

OF INTESTATE SUCCESSIONS.

Where there is no valid will, or where the testator has not disposed of the whole of his estate, or where the heirs-institute are unwilling or unable to accept the inheritance, or where the right of accretion among the co-heirs does not arise, intestate succession takes place, wholly or in part, by the operation of law (Section 826), which, in disposing of the estate of the deceased takes into consideration the probable intention of the deceased, as argued from man's natural affections Such affections, however, must be reconciled 'with social requirements, and it is for this reason that legitimate children or descendants are preferred to the illegitimate ones, even though the parent's affection may be the same for all of his or her children.

Intestate succession is granted in favor of the descendants, or ascendants, the collateral relatives, the illegitimate children, the illegitimate parents' and the spouse of the deceased, and the Crown, in the order and according to the rules laid down in Sub-Title II of Title III of the Civil Code.

Intestate succession is subdivided into regular and irregular succession. The regular successors are the legitimate descendants, ascendants and collateral relatives; the others are the irregular successors. The regular successors are the true and proper heirs, to whom all the attributes competent to an heir are granted and, in particular, the possession de jure of hereditary property. The irregular successors, on the contrary, must, in competition with regular successors, demand the possession of hereditary property from the regular successors, and, on failure thereof, from the Court. Another difference is that the regular successors are called to the inheritance in order of preference in such a manner that the descendants exclude the ascendants and the collateral relatives; the irregular successors, on the contrary, succeed together with the successors.

In regulating succession among relations, the law takes into consideration the proximity of the relationship (Section 828) which is established by the number of generations (Section 829). Relationship is four orders: (1) that of descendants; (2) that of ascendants; (2) that of brothers and sisters and their descendants; and *(4)* that of other collateral relatives* The descendants exclude the other relations, but the ascendants and brothers and sisters are called to the succession together; so that it may be said that there are three orders whereof the first excludes the other two, and the second excludes the third* This is known as "successio ordinum"» There is then what is known as "successio gradum[1]', established by the proximity of the degree of relationship, whereby in each of the abovementioned orders the nearest relative, saving the rule of representation, excludes the remoter ones.

These are the only circumstances which the law takes into consideration in regulating intestate succession, as is expressly provided in Section **82.** In regulating succession among relations, the law takes into consideration the proximity of the relationship, and does not consider either the prerogative of the line or the origin of the property, except in the cases and in the manner expressly provided for by the law. It neither considers the prerogative of age or of sex or of the priority of marriage. There is only one exception and it refers to the origin of the property: it consists in the legal reversion of property made over the donation by an ascendant, whereby such property reverts to the donor in the event of the descendant dying intestate and without issue.

The proximity of relationship is established by the number of generations: each generation forms a degree, and a series of degrees forms a line (Section 829). The series of degrees between persons descending the one from the other is called the direct line; the series of degrees between persons descending not the one from the other, but from a common ancestor, is called the collateral line (Section 830).

The direct line may be descending or ascending: the descending direct line connects the ancestor with those v/ho descend from him; the ascending direct line connects a person with those from whom he descends (Section **831).**

In the direct line, as many degrees are counted as there are generations, not including the common ancestor

(Section 832). In the collateral line, the degrees are counted "by the generations, commencing from one of the relations up to, and exclusive of, the common ancestor, and then from the latter down to the other relation.

The capacity to succeed

The same rules which regulate the capacity to succeed under a will are applicable to intestate succession.

Absolutely incapable, therefore, are those who have not yet been conceived, those who are not born viable and the members of monastic orders or of religious corporations of regulars Of the causes of relative incapacity, however, only unworthiness is applicable, and Section 835 provides that "persons who are unworthy of receiving under a will, for the cause stated in this Code, are also unworthy of succeeding "ab intestato". The provision contained in Section 833, namely, that "persons who by fraud or violence shall have prevented the deceased from making a will, shall also be as unworthy incapable of succeeding "ab intestato", corresponds to the cause of unworthiness established in respect of testate succession by Section 642(d), whereby a person is considered as unworthy where he has "prevented the testator from making a new will".

Of Representation

A person may succeed either in his own right or by the rule of representation.

A person succeeds in his own right when he stands in the degree which is called directly to the succession. Thus, in the direct line, the,, children are the heirs of their parents "jure proprio", since they stand in the first degree.

Succession takes place "jure rappresentationis" whenever the person who would have succeeded "jure proprio" is dead, or incapable of succeeding or, by reason of a long period of absence, is presumed to have died# Representation operates so as to put the descendants of such person in the place, degree, and rights of the latter. It is known as representation because the descendants represent that ascendant who it had not been for one of the reasons abovementioned, would have succeeded "jure proprio". The representative is the descendant who is put in the place, degree and rights of the person who would have succeeded in his own right; the latter is known as the person represented.

Representation, therefore, is a "fictio juris", and it is based on the probable intention of the deceased just as the entire system of intestate succession is. It is, in fact, reasonable to presume that the deceased's affection for his children, or for his brother or sister extends to the latter's children and descendants, and it is only in the descending direct line and in favor of the children and descendants of a brother or a sister, that the right of representation is granted.

The origin of this institute is to be found in Novel 118, wherein representation in the descending direct line took place "in infinitum", and in the collateral line was limited to the immediate children of a brother or a sister of the deceased. This limitation was severely criticized; and in some European countries, Prance in particular, representation v/as admitted "in infinitum" even in favor of the collateral relatives. The various statutes which had introduced the said extension where confirmed by the Code Napoleon, and were followed by the laws of most of the Italian States. Saving slight differences, the system of the code Napoleon was also followed by our legislator.

Representation, as already said, takes place v/here the person who would have succeeded in his own right is (1) dead, or (2) incapable of succeeding, or (3) by reason of a long period of absence, is presumed to have died. As to absentees, Section 81+4 provides that "Representation cannot take place in regard to persons who are alive, but only in regard to persons who,,.,.,.,,,, by reason of a long period of absence, are, in virtue of a judgment of the competent Court, presumed to have died". The reason for this provision is that Ordinance IV of 1861 and Ordinance VII of 1868 were promulgated before the institute of absentees was reformed in 1873 by Ordinance I of that year, and the law, as it stood before 1873 required a judgment of the competent Court for the declaration of the presumption of death of an absentee.

Accepting a traditional rule, our law documents not allow the representation of a person who has renounced the inheritance; once the right of accepting or of refusing an inheritance has been exercised by means of a renunciation thereof, the right to succession is irretrievably lost. This traditional rule has been criticized as being against the probable intention of the deceased, as well as against equity, upon which the institute of representation is founded.

Representation is admitted in favor of:

1. the legitimate descendants of a legitimate child of the deceased;

2. the legitimate descendants of an illegitimate child of the deceased;

3. the legitimate descendants of a legitimate brother or sister.

Representation is not allowed in favor of ascendants: in other words, a remoter, ascendant cannot by the rule of representation succeed instead of a near ascend-imi. In the ascending line the rule "proprior excludit remotiorem" is strictly adhered to; the reason being that, as the inheritance is necessarily destined to re-descend from the ascendants to their descendants, it would be illogical if the rule of representation were extended in favor of ascendants. Nor is representation allowed in favor of the other collateral relatives whose family ties with the deceased are very much weaker.

Where representation takes place a group of persons representing one individual is known as "stock" ("stirpis").

As already said, under Novel 118, representation in the collateral line was limited to the immediate children of a brother or a sister; under our law representation takes place "in infinitum" whether in the descending direct line or in the collateral line (Sections 840 and 842 (1)),

However, whilst in the descending direct line representation takes place in all cases, whether the children of the deceased take with the descendant of the pre-deceased child or whether, all the children of the deceased having predeceased him, the descendants stand amongst themselves in equal or unequal degrees; in the collateral line although representation is allowed in favor of children and descendants of brothers or sisters of the deceased, whether such children or descendants take with their uncles or aunts, or whether all the brothers and sisters of the deceased having predeceased him, the succession devolves to their descendants in unequal degrees, if the children or descendants of brothers or sisters stand in equal degree, they will all take "per capita" without representation.

In other words, in the direct line the descendants take by right of representation even if they stand in equal degrees, and, consequently, irrespectively of the number of children comprised in each stock. In this way each stock receives an equal share of the Inheritance, and the "partee viriles" of the descendants comprised In the more numerous stock is smaller than that of the descendants in the other stocks. The ground for this rule, upon which the institute of representation itself is founded, is that otherwise the more numerous stock would benefit, from the death or, what is worse, from the unworthiness of the person represented by them, in the direct line, therefore, representation takes place in all cases.

In the collateral line representation takes place where the descendants of a brother or a sister take with their uncles or aunts, or where the succession devolves to the said descendants in unequal degrees; but it does not take place where, all the brothers and sisters of the deceased having predeceased him or being incapable of succeeding, the succession devolves to their descendants in equal degrees: in this case they will all take "per capita". In this respect our law has departed from the French and Italian Codes. Novel 118 contemplated only the case of descendants taking with their uncles or aunts. As to the case of descendants standing in equal degrees, Azone and his school taught that they should succeed "jure proprio" and, therefore, "per capita", whilst Accursius and his school held that representation should take place even in this case. Azone's opinion seems to have been more commonly accepted as it was founded on the silence of Novel 118, which was regarded as having left in force the Edict "unde Cognati" relating to the succession of "cognati", v/ho took "per capita"; and it was confirmed by the "dicta di Spiram" of 1589, during the reign of Charles V. The same rule was followed under Sicilian customary law, which is one of the sources of our law, and was confirmed in 1666 by a Pragmatic of the Duke of Sermoneta, and again in 1819.by the Codice delle Due Sicilie (Art. 662, which corresponds to Section 840-02 (2) of our Civil Code).

Where, all the brothers or sisters of the deceased having predeceased him or being incapable of succeeding, the succession devolves to their descendants in unequal degrees, representation, as already said, takes place, but it does so only in so far as it is necessary to put the "remotiores" in equal degree with the "propriorea", who succeed in their own right, and, therefore, "per capita". In other words, although representation takes place, its effects are modified by the rule that "if the children or descendants of brothers or sisters stand in equal degree, they shall take "per capita", without representation" (Vide judgment given by the Civil Court, 13th October, 1869, in re Zammit vs. Vassallo, confirmed on appeal December 14th, 1870 – Vol V, p. 445)

It follows that, in the collateral line, representation is determined by the necessity of putting all the descendants in one and the same degree, whenever they stand in unequal degrees, and is not founded on equity or on the probable intention of the deceased: in fact, these would imply that accidents of death, incapacity or absence of the person called to the succession "jure proprio" should neither avail nor prejudice his descendants.

As to the number of degrees that may be represented, the rule is that a descendant may represent not only one but even a whole series of degrees. One degree is said to be represented where a descendant ascends to the degree of his parent. Several degrees are represented where a descendant has to ascend a number of degrees, in the same line, in order to reach the degree of the person called to the succession "jure proprio". As many degrees as are required may be represented – there are no limits. However, a descendant, in ascending from one degree to another, must not come across a degree which may not be represented, such as, for example, the degree of an ascendant who has renounced the inheritance: "rappresentatio non datur omisso medio".

Effects of representation.

Representation operates so as to put the representative in the place, degree, and rights of the person represented (Section 839). The representative, therefore, is put in the juridical position in which the person represented would have been had he been alive or capable of succeeding. However, the representative in the direct heir of the deceased: the person represented, in fact, cannot succeed to the inheritance as he is dead, or incapable, or presumed to be dead, and the representative cannot, therefore, succeed through him. Consequently, the representative must be capable of succeeding to the deceased, but his relationship with the person whom he represents is immaterial. Similarly, "it shall be lawful to represent the person whose inheritance has been renounced" (Section 814-5), since the inheritance received under the rule of representation is not that of the person represented but that, of the deceased.

The partition of the inheritance.

The partition between persons who succeed "jure proprio" is made "per capita". In all cases in which representation is allowed, the partition is made "per stirpes". A group of representatives of the same person forms a stock, and each stock receives an equal share of the inheritance. When in one and the same stock there are several branches, the sub-partition is made "per stirpes" in each branch; and the partition among the members of the same branch is made "per capita". Where there are successors "jure proprio" together with successors "jure rappresentationis", the partition is made "per capita" as to the former, and "per stirpes" as to the latter.

Of Regular Successions.

1• Of Succession by Legitimate Descendants,

The legitimate children and descendants of the deceased succeed to their parents or other descendants to the exclusion of all other iugular Successors, because a person's estate is meant to serve for the support of his family and it must, therefore, be passed down from one generation to the next one. And whenever a person's estate passes to his ascendants or to the collateral relatives, this takes place "turbatis unbalatitatis ordinis" either because the deceased has died without issue or because his children or descendants have predeceased him.

Following Justinian's Novel 118, our law calls, in the first place, to the succession of a person, the legitimate children of such person; and, according to Section 847, "the expression 'legitimate children' shall mean and include legitimate children, children legitimated by subsequent marriage, as well as the children of a marriage discovered to be null by reason of an impediment which, at the time of the procreation of such children, was Unknown to either of the parents", viz. putative children. Section 848 adds that "adoptive children and their descendants succeed to the adopter even if there are legitimate children born or legitimated after the adoption, and their descendants"

Called in the second place are the legitimate descendants of legitimate and adoptive children; but the adoptive children of legitimate or adoptive children are excluded. The immediate children succeed "jure proprio"; the descendants succeed "jure rappresentationis".

By Section 8U6 (1) children or their descendants succeed to their father or mother or other ascendants without distinction of sex, and whether they are the issue of the same marriage or of different marriages.

2. of Succession by legitimate ascendants, and brothers and sisters of the deceased.

The regular successors are called to the succession *where* the deceased has left neither children more other descendants. Legitimate ascendants are the legitimate father or mother or other ascendants, as well as those who may have legitimated their children by a subsequent marriage; hut the expression does not include the adopter. Legitimate brothers and sisters include those v/ho may have been legitimated "per subsequens matrimonium", whether of the half or full blood, and their descendants.
Under Novel 118 brothers and sisters of the full blood and their descendants excluded those of the half blood; and under Italian and French Law they are given a greater portion of the inheritance.

As to the manner in which they succeed, a distinction is necessary:-
(1) Where the deceased has left ascendants only (i.e. has left neither children or otherdascondante, nor brothers or sisters, or descendants from them), the rule is "proprio excludit remotiorem", and, therefore, the succession devolves upon the father and mother of the deceased in equal portions, or upon the parent who may have survived him (Section 8149). Where the deceased has left no parents but only ascendants in the paternal and the maternal lines, standing in an equal degree, the inheritance devolves, as to one moiety, upon the ascendant or ascendants of the one line and, as to the other moiety, upon the ascendant or ascendants of the other line. Where such ascendants stand in a different degree, the inheritance devolves upon the nearest ascendant, without any distinction of line (Section 850 (1) and (2)),

(2) If the deceased has left neither issue, nor ascendants, his brothers and sisters whether of the half or full blood, and the descendants of his predeceased brothers or sisters, of the half or full blood, will be entitled to the succession. Whether such brothers or sisters and their descendants take "jure proprio" or "jure rappresentationis", and consequently "per capita" or "per stirpes" has already been seen under "Representation".

(3) where ascendants compete with brothers or sisters, or their descendants, another distinction is necessary (Section 852)

(a) where the ascendant or ascendants compete with brothers or sisters they all succeed "per capita" and ..

equal portions, without any division between tho lines of ascendants;

(b) Where the ascendant or ascendants compete with, the descendants of brothers and sisters, the ascendants succeed "per capita", and the descendants of brothers and sisters succeed "jure rappresentationis" or "per stirpes", whether they are in equal or different degrees;

(c) Where the ascendant or ascendants compete with brothers and sisters as well as with descendants of a predeceased brother or sister, the ascendants and the brothers or sisters succeed "per capita", and the descendants "per stirpes".

Where the ascendants compete with brothers and sisters, or their descendants, it may happen that the legitim saved by law in favor of ascendants be not received by them "in toto" Thus, supposing both parents survive the deceased who has five living brothers, the portion duo to the parents would be 2/7 of the estate, whilst the legitim saved in their favor is one-third.
The same law which secures the attainment of the legitim against the dispositions of the testator fails to secure it against its own provisions.' Under Italian Law the legitim is due to the ascendants irrespectively of the number of brothers or sisters.
As will be seen later, the above rules are considerably modified where the deceased leaves illegitimate children. These, in fact, compete with ascendants and exclude the brothers and sisters of the deceased.

Legal Reversion.

Reversion is normally the effect of an agreement attached to a donation. With respect, however, to donations made by ascendants in favor of their descendants, reversion, unless a contrary intention appears, is presumed by law, provided certain conditions concur. The ground for the presumption is the probable intention of the donor that the property given to a descendant, who dies without issue, should return to him rather than pass to strangers.

Reversion takes place provided (Section 851 (1)):-

(a) the donee has died without issue;

(b) the donee has died without having disposed of the property received, under any title, and even by an act "causa mortis";

(c) the property received still exist in kind in the inheritance;

(d) the donor survives the donee, since the right of reversion is why law allowed in favor of the donor himself, and not of his heirs..

If such things have been alienated, the ascendants will he entitled to the price thereof which may still he due; and will, moreover, succeed to any right of action which the deceased could have exercised for the recovery of such things (Section 851 (2)),

By effect of reversion the things given are taken back to the donor, to the exclusion of all others, but not by way of succession: such things return to the donor by effect of a presumed agreement of reversion. It follows that only the donor is entitled to take such things hack; and reversion takes place to the exclusion of all other persons including the other ascendants, even though the donor he not in a degree enabling him to succeed (Section 850 (1)).

However, although reversion is not a form of succession, the donor is hound to contribute to the payment of the debts of the inheritance in proportion to the value of the property which he takes hack, This rule does not apply to a stipulation of reversion; it is proper to legal reversion, and it is founded on equity. The donee, in fact, could have disposed of the said things instead of contracting debts; and it is only fair that the donee should contribute proportionally to the payment of the said debts.

Reversion also takes place as between the adopter and the adoptive child. It will he remembered, however, that, in respect of adoption, reversion is admitted not only where the adoptive child dies without issue, bur. also where, the adoptive child having left children or descendants, such children or descendants predecease the donor; and where the adoptive child dies without issue, reversion benefits also the descendants of the adopter.

3. Of Succession by legitimate collaterals

On failure of descendants, ascendants, brothers or sisters, and descendants of brothers or sisters, the succession devolves upon the uncles and aunts, and then upon the nearest collateral relation, in whatever line such uncles, aunts or collateral relation may be (Section 854.

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Collateral relations succeed "per capita", and representation is not allowed.

Succession between collaterals cannot extend beyond the twelfth degree (Section 83.5); and where the deceased is not survived by any person entitled to succeed him, the inheritance will devolve upon the Crown (Section 870)

Of Irregular Successions.

1. Illegitimate children.

By reason of social exigencies, the illegitimate children of the deceased are postponed to the legitimate family, and their rights are very much restricted whenever they compete with legitimate children.

An illegitimate child has no right to the succession of his parents unless he has been legitimated by a decree of Court or acknowledged in any of the modes referred to in *Section* 667, or his filiations has been declared by a judgment; *of* the competent Court (Section 856). The legitim children of such an illegitimate child, or the *children legitimated by* a subsequent marriage, are *also* entitled to the succession by the rule of representation.

An illegitimate child who has not been legitimated by a decree of Court, or acknowledged as provided in Section 677, will, if there are others, excepting the Crown, called to the successor, be only entitled to the "legitima portio". Their share in the succession, therefore, varies: if they compete with legitimate issue their share would be a third part of what they would have received had they been legitimate; if there is no-legitimate issue their share would be one half of the said portion. Furthermore;- if the deceased is the illegitimate father, the "legitima portio" may not exceed such an amount as, regard being had to the condition of the mother, may be necessary for the maintenance of the illegitimate child. Where there is no other person called to the succession, the child v/ill, in preference to the Crown, 'be entitled to the whole inheritance (Section 857).

The righi of succession of illegitimate children legitimated by a decree of Court, or acknowledged in any of the modes referred to in Section 677 are regulated as follows:

(a) Where the deceased has left legitimate children or descendants, the illegitimate children will only be entitled to the "legitima portio";

(b) Where the deceased has left no such children or descendants, but Is survived by his parents, or one of them, or any other ascendant, or the spouse, the illegitimate children will be entitled to two thirds of the inheritance, and the remainder will devolve upon the parents, or ascendants, or spouse of the deceased:

Provided that where both the spouse and ascendants survive the deceased, the illegitimate children will be entitled to such portion of the inheritance as will remain after deducting therefrom a third part in favor of the ascendants, and a fourth part in favor of the spouse ;

(c) Where the deceased is not survived by any of the said children or descendants, nor by ascendants, nor by the spouse, the illegitimate children will be entitled to the whole of the inheritance (Section 858).

The illegitimate child must Impute to the portion to which he succeeds any property which he may have received from the deceased, and which is, of its nature, subject to collation.

As to the succession to illegitimate children dying without issue. Section 862 and 863 provide as follows

Section 862. "Where the illegitimate child dies without" leaving issue or spouse, the inheritance of such child devolves upon the parent whose child whether by legitimation or acknowledgement or a judgment of the competent court, he is proved to be, or upon both parents, in equal shares, if, in any of the modes aforesaid, he is proved to be the child of both of them".

Section 863. "Where the illegitimate child dies without issue, "but is survived by the spouse, the inheritance shall devolve, a to two-thirds, upon the surviving spouse, and, as to the remaining third, upon the father or mother of such child, or upon both father and mother, in equal shares, as the case may be, according to the provisions of the last preceding section".

2. The Surviving Spouse.

(a) Where the deceased leaves legitimate issue, the spouse is only entitled to the "legitima portio" saved by law and regulated by Sections 669, 671, 672, 674 and 675 (Section 864).

(b) On failure of legitimate issue, and in competition with ascendants or with illegitimate children legitimated by a decree of Court or acknowledged by the deceased, the surviving spouse is entitled to a third part of the inheritance (Section 865 (1)).

(c) Where the deceased loaves ascendants and brothers or sisters, or illegitimate children as in (b) and brothers or sisters, the share due to the surviving spouse is also a third part of the inheritance (Section 865**(2)**.

(d) The share due to the surviving spouse, in competition with ascendants and illegitimate children as in (b), is one-fourth (Section 865 (3))

(e) The share due to the surviving spouse, in competition with collateral relatives within the sixth degree, is two-thirds, after deducting there from such portion as is due to illegitimate children whose filiation has been declared by a judgment (Section 866 (1)).

(f) On failure of relations within the sixth degree, the surviving spouse is entitled to the whole of the inheritance, saving such portion as is due to the illegitimate children as in (e), (Section 866 (2)).

(g) Where the spouse competes with the parent or parents whose child, whether by legitimation or acknowledgement, or a judgment, the deceased is proved to be, the share due to the spouse is two-thirds of the inheritance (Section 863).

Where there are other heirs, the spouse must impute to the portion to which he or she is entitled, any property which he or she may have received from the deceased by any gratuitous title, even by donation in contemplation of marriage, including, if the surviving spouse is the wife, the dower (Section 867).

The rights of succession mentioned in Sections 864 and 865 will not be competent to the surviving spouse if the marriage was contracted before the 11th February, 1870, without a written instrument, and the merger and tripartition of property, referred to in the Code de Rohan (Ch. 1, *B.* Ill), had taken place, in which case the provisions of that code will be observed (Section 668).
The rights of succession mentioned in Sections 86U, 865 and 866 v/ill not be competent to the surviving spouse

If at the time of the death of the deceased party the spouses v/ere separated from heed and hoard by a judgement of the competent Court, and -the surviving spouse had, under Sections 56 to 60, forfeited the rights' therein mentioned (Section 869),

The provisions of Sections *674* and '675, which refer to the forfeiture of certain rights as a consequence of the re-marriage of-the surviving spouse, may here he re-called.

3 The Crown.

Where the deceased is not survived by any of the persons entitled to succeed him under the aforesaid rules, the inheritance devolves upon the Crown (Section 870) by reason of the rule that all vacant property belongs to the Crown.

Provisions Common to Testate and to Intestate Successions.

1. Of the opening of successions.

Upon the opening of the succession the inheritance devolves upon the heirs, A succession opens at the time of death or upon the declaration that the person whose succession is concerned is, by reason of his long absence, to be presumed to have died, or on the taking of vows in a monastic order or in a religious corporation of regulars (Sections 871 and 875).

Absence, in the legal sense of the word, brings about the opening of the succession of the absentee. Section 871, which is a reproduction of Section 533 of Ordinance VII of 1868, requires, for the opening of the succession, a "judgment declaring that the person whose succession is concerned is "by reason of his long absence, to be presumed to be dead". As already said, however, the institute of absentees was reformed in 1873, and under this law the succession of an absentee may be opened by virtue of a decree of the Court of Voluntary Jurisdiction, whereby the presumptive heirs are vested with the provisional or absolute possession of the property, or by virtue of a decree ordering the opening of a secret will or declaring accessible any public will which the absentee may have made (Vide Sections 241-265 of the Civil Code), The succession is regarded as opened as from the day on which news were last had of the absentee, and it is attributed to those persons who would have been his heirs on the said day; saving the alterations that may become necessary in consequence cither of the reappearance of the absentee or the establishment of the time of death of the absentee.

Upon the taking of solemn vows, a person becomes incapable of owning property; consequently, his succession, whether testate or intestate, opens.

Where several persons among whom there are the testator and the heir or legatee, or who are called by law to each other's succession "ab intestato", perish in a common calamity, and there is no proof as to which of such persons died first, the presumption of survivorship will be determined by the circumstances of the case, and, in default, by the consideration of vigour, having regard to age and sex (Section 872). It is only when direct evidence, such as that given by the survivors, is wanting, that regard is that to the circumstances of the case, such as the fact that the part of the building where one of the said persons was at the time, fell before another part of the building where the other of the said persons was. As to the considerations of age and sex, Sections 873 and 874 establish a number of presumptions, which derive from Sections 720 to 722 of the French Civil Code, However, notwithstanding that the presumptions present some degree of probability, survivorship can never be established with certainty. More reasonable, therefore, is the system followed by the Italian Code, whereby the presumption is that persons who perish in a common calamity perish simultaneous in such a manner that none of them succeed to one of the others (Section *124*).

The place of the opening of the succession.

Most Codes provide expressly that the succession of a person opens in the country of his last domicile. Such a provision is not found in our law: where, however, our law deals with certain matters relating to succession, such as the demand for the delivery of possession, or the security to be given by the illegitimate child or the surviving spouse before the declaration of the delivery of possession (Sections 880 and 881), it provides that such demand or declaration must be made to, or by the Court of the Island in which the deceased resided at the time of the opening of his succession. It appears, therefore, that our law has implicitly accepted the prevailing opinion. It has, however, been decided (vide judgment in Voi, XI, p. 313) that the "actio familiae arciscundae" may also be brought in the forum of the domicile of the defendant co-heir. The principle extends to the other acts concerning the succession, such as the declaration that the inheritance has teen accepted (Vide also Vant).

Effects of the devolution of an inheritance.

These are:

1. The right to accept and acquire or to renounce the inheritance.
2. The possession of hereditary property.

1. Under our law, where a person to whom a succession has opened dies 'without having renounced or accepted it, the right to accept such succession shall vest in his heir3 (Section 897); under Roman Law, as a rule, the right to accept the succession was extinguished by the death of the heir. The ground for the rule established in Section 897 is that the acquisition of the inheritance by virtue of the acceptance of the succession docs not amount to the acquisition of a new right, but consists merely in the exercise of a right acquired by effect of the devolution of the succession.

The heirs who have accepted the inheritance of the person to whom a succession had opened and who had died without having renounced or accepted it, may, nevertheless, renounce the said succession. But the renunciation of the inheritance of the said person operates also as a renunciation of the inheritance devolved upon him (Section 898).

2. The possession of the property of the deceased is, "by operation of law, i.e.- "by effect of devolution and without the necessity of any act on the part of the heir, or of his acceptance, and even without his knowledge, transferred, by way of continuation, to the heir, whether testamentary or an heir-at-law (Section 876) : "Mortus facit vivum possessorcm". The right to the possession of hereditary property "belongs to the heir in all cases, and not even the testator may deprive the heir thereof, since social good order requires that there ho no controversies as to the possession of the said property between the persons interested.

Where there are several heirs, the possession of the property of the deceased vests in all of them; and where the deceased disposes of a portion only of the inheritance, and the remaining portion devolves upon the heirs-at-law, possession vests, by operation of law, in the testamentary heir and in the heir-at-law, in proportion to their respective shares (Section 877).

All the "actiones possessoriae" are competent to the heir as the possessor of hereditary property. Therefore, where any person claiming rights over the property of the inheritance has taken possession thereof, the heirs in whom possession vests by law will be deemed to have been dispossessed "de facto", and may exercise all the actions competent to a legitimate possessor (Section 878).

The above rules do not apply to irregular successors: if they compete with other heirs, the law requires that they should demand possession of such heirs; if they are the only persons called to succession, the demand for the delivery of possession must be made to the Court, since there always remains a doubt as to whether there are other successors.

Sections 879 and 880, in fact, provide: "The illegitimate child or the spouse, entitled by lav/ to a portion of the property of the deceased, must demand delivery of possession of such portion from the person on whom the remainder of the estate devolves, by testate or intestate succession. Where, on failure of other persons, the succession goes to the illegitimate child and the spouse of the deceased, the former must demand possession from the latter".

"Where the illegitimate child or the spouse or the Crown succeeds to the whole inheritance "ab intestato", the demand for the delivery of possession of the inheritance must be made to the Court of the Island in which the deceased resided at the time of his death, or took religious vows. Such delivery of possession shall be deemed to have been made by the declaration of the Court that the succession has opened to the illegitimate child, the spouse or the Crown, and no further acts shall be necessary"

The proceedings are known as of ventilation, and they are meant to make public the demand made by the irregular successor for the opening of the succession in his favor. These proceedings are governed by the special rules established in the Code of Organization and Civil Procedure.

Furthermore, "The Court — Section 881 provides — shall not declare the succession to have opened in favor of the illegitimate child or the surviving spouse before such child or spouse, and a sufficient surety, shall have jointly and severally entered into a recognizance, secured by a general hypothecation of their property, * to restore the inheritance to the heirs of the deceased entitled thereto, and before such recognizance of the child or spouse, and of the surety, shall have been registered in the Public Registry. The Court may, according to circumstances, fix the amount of the recognizance of the surety, or the amount for which the property is to be hypothecated". It may also, according to circumstances, allow a special, instead of a general, hypothec: or, where the party demanding delivery of possession has sufficient immovable property to secure the restoration of the inheritance, dispense altogether with the production of the surety (Section 882). The surety may be dispensed with in all cases where the value of the estate does not exceed £50, and the child or the spouse declares on oath that he or she was unable to find a surety (Section 883).

After the lapse of three years from the opening of the succession, the effects of the hypothecary registration and the obligation of the surety may be declared to have ceased by a decree.(known as "decreto purif1catorio") of the court aforesaid on a demand of the child, or the spouse, or of the surety, after that all the formalities prescribed in Section 88U have been gone through. The child or the spouse, however, will always remain bound personally to restore the inheritance to the heirs of the deceased entitled thereto.

Another case where the delivery of possession must be demanded from the Court is where the inheritance concerned is that of an absentee. It is the Court that vests the presumptive heirs with the provisional or absolute possession of the said property.

2. Of the Acceptance and Renunciation of an Inheritance.

A* Of the acceptance of an inheritance.

The acceptance of an inheritance, or "aditio hereditatis", is that act whereby the person to whom a succession has opened acquires the inheritance.

An inheritance may be accepted either by the person upon whom it has devolved, or, in case he has died without having renounced or accepted it, by the heirs of such person.

Each of several persons called to a succession is at liberty to renounce or accept his share thereof. The shares of those who have renounced devolve on the persons substituted therefore or on the co-heirs by effect of the right of accretion, or on the heirs-at-law. The same rule applies to the heirs of a person who has died without having renounced or accepted an inheritance that had devolved upon him (Section 897), i.e. the shares of those who have renounced will accrue to those who have accepted.

Capacity. The capacity required is that of binding oneself, since the heir succeeds to all the rights and all the obligations of the deceased. Consequently, a married woman cannot accept an inheritance without the consent of her husband; although, if the husband is absent, or a minor, or interdicted, or without just cause refuses his consent, the necessary authority may be given by the Court (Section 888), Similarly, where an inheritance devolves upon a person subject to tutorship or curatorship, or upon an unemancipated minor, it may not be accepted by the said person or minor, but It may be accepted on their behalf by the tutor, curator or father. The tutor, curator, or the father, however, cannot accept such inheritance except under benefit of inventory (Section 889).

As a rule, a person may accept an inheritance which has devolved upon him at any timo, unless such right is barred by prescription. The acceptance of an inheritance is barred by the lapse of thirty years, where the inheritance is vacant; where the inheritance is possessed by others, the right to accept it is barred by the lapse of ten years (Sections 885 and 900).

As the lapse of the said time may prejudice other persons having an interest in the inheritance, such as an heir-substitute, the law provides that ''The Court shall, on the demand of any person interested, fix the time of one month, which may o'- good grounds be extended to another month, within which the heir whether testamentary or at-law shall be bound to declare whether he accepts or renounces the inheritance; and, in default of such declarations within the said time, original or extended, the inheritance shall be deemed to have been renounced (Section 909). This provision, however, documents not derogate from those regulating the acceptance of an inheritance under benefit of inventory".

During the continuance of the time allowed for deliberating, the person entitled to succeed is not bound to assume the status of heir; but he will be considered as curator "de jure" of the inheritance, and,

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as such, may "be sued as representing the inheritance to answer claims brought against it (Section 927 (1) and (2)).

Kinds of acceptance. An inheritance may he accepted unconditionally, or under benefit of inventory (Section 887)
An unconditional acceptance operates a merger between the deceased's estate and that of the heir in such a way that the heir becomes liable for the liabilities of the inheritance with all his property, even "ultra vires hereditatis",

An acceptance under benefit of inventory prevents the said merger; consequently, the heir will only be responsible for the liabilities of the inheritance to the extent of the assets thereof.

Any person called to a succession may avail himself of the benefit of inventory, notwithstanding any prohibition of the testator (Section 918); and whore several persons arc called, any one of them may, independently of the others, avail himself thereof, in which case it will be personal to him (Section 921).

As already seen, the tutor, or the curator, or the father of a minor upon whom an inheritance has devolved, cannot accept such inheritance except under benefit of inventory (Section 889).

An unconditional acceptance may be either express or implied.

It is express if the status of heir is assumed either in a public deed or in a private writing, and it is known as "aditio hereditatis" in the strict sense of the expression.

It is implied if the heir performs any act which necessarily implies his intention to accept the inheritance and which he would not be entitled to perform except in his capacity as heir (Section 891), The said acts are known as "acts of heir", and the person who performs them is said to "pro herede gerere": it is for this reason that an implied acceptance was called "pro herede gestio" by the Romans,
Where the act is such that it may be performed by any person, its performance may not imply an implied acceptance of the intieri tanca, even though no declaration may have been made as to the capacity in which it

was done, and even though it result from circumstances that the person called to the succession intended to perform it in his capacity as heir. It is required that the act could not he done except in the capacity of heir. The expression "entitled to perform", moreover, refers to the Relationship existing between the deceased and the heir, and it is immaterial whether the heir could, apart from such relationship, perform the act validly.

In the following cases acceptance is not implied:

1, Where the heir, being at the same time the testamentary executor, performs acts necessary for the carrying out of the testator's will, since a person may renounce the inheritance or accept the executorships,

2, Where the heir is a co-owner with the "decujus" of the thing, and continues to possess the said thing or obtains its possession after the devolution of the inheritance, since he may do so as a co-owner,

3. If, after the devolution of the succession, the heir holds property of the deceased on lease, or antichrisis, or pledge, or deposit, which he had already received from the deceased by any of the said titles,

4. If the heir pays, with money or other effects belonging to him, the debts of the inheritance or the legacies, since any person may pay a debt of another.

Furthermore, arrangements made for the funeral even if payment is made by the heir out of his own money, acts of mere preservation, such as the interruption of prescription, the renewal of registrations and so on, and acts of provisional administration, such as the exaction of a credit, do not, unless the status of heir has also been assumed, imply acceptance of the inheritance (Section 893).

The following acts, on the other hand, imply acceptance of the inheritance (Section 892)

1. Any donation, sale or assignment of his rights of succession by one of the co-heirs, whether in favor of a stranger or of all or any of his co-heirs. An absolute or abdicatory renunciation, however, does not imply acceptance: it is, in fact, the denial of an acceptance; the same applies to a renunciation made gratuitously by one of the co-heirs in favor of all those co-heirs, whether testamentary or heirs at law, upon whom, on failure of the party renouncing, his portion

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of the inheritance would have devolved (Section 895).

2. A renunciation made, even if gratuitously, by one of the co-heirs in favor of one or more of his co-heirs; but not if it is made in favor of all, unless this is made in proportions different from those in which the portion of the party renouncing would have devolved upon his co-heirs,

3. A renunciation made, oven in favor of all the co-heirs indiscriminately, under an onerous title.

In the last two cases an acceptance is implied from a renunciation because the effect of such renunciations is that of altering the express or implied intention of the testator, which may not be done unless the inheritance is accepted.

The law has mentioned the aforesaid acts only demonstratively; and there are several other acts, such as the alienation of hereditary property or a compromise on claims over the inheritance wherefrom an acceptance of the inheritance is implied. The law has mentioned only those cases which were discussed and variously solved in the past.

In respect of the said acts, "protestatio contra actum non valet"; the act is such that it could only be performed by an heir and acceptance is necessarily implied.

Finally, the acceptance of an inheritance is declared by law, in the following cases:-

1. Where the person entitled to succeed, having the actual possession of the property of the inheritance and being of age, fails to comply with the provisions relating to the benefit of inventory, within three months of the opening of the succession or of the day on which he had knowledge of the devolution thereof.

If the said person wishes to avail himself of the benefit of inventory, he must do so within the said time: if, therefore, he allows his estate to become one with that of the deceased for a time longer than that prescribed by law, he will forfeit the right to renounce the inheritance, and will be deemed to be a pure and unconditional heir, even though he claim to be seized of such property under a different title (Section 910).

2. If the heir misappropriates or conceals any property belonging to the inheritance (Section 911).

3. If the heir is guilty of having fraudulently omitted to include in the inventory property belonging to the inheritance (Section 930).

4. If the heir fails to comply with the provisions relating to the inventory with the fraudulent intention of prejudicing the rights of owners (Code of Organization and Civil Procedure, Section 560),

In the last three cases the declaration of acceptance, purely and unconditionally, is inflicted by law by way of penalty. Doctrine, however, exempts from the operation of these provisions these persons in whoso protection it is required that any inheritance devolving upon them must be accepted under benefit of inventory.

Another case where a pure and unconditional acceptance is declared by law is that provided for in Section 892, which runs as follows: "A person who, by a judgment of the competent Court, has been declared to be the heir, or has been condemned expressly in such capa cits'-, shall be deemed to be the heir with regard to all the legatees and creditors of the inheritance", even if not parties to the proceedings. This rule, which is contrary to the principle of the relativity of the "res judicata", is established by law in view of the confusion which would result were the said person deemed to be the heir with regard only to one or more of the said legatees or creditors.

Of the benefit of inventory.

The benefit of inventory is a right granted by lav/ to the heir whereby the property of the heir is prevented from being intermixed with the property of the inheritance in order that the heir be not liable for the debts of the inheritance beyond the value of the property to which he succeeds (Section 931). It is a faculty: consequently, it may produce no effect unless it is exercised, and it avails only those heirs who exercise it.

Its purpose is twofold: on the one hand it limits the liability of the heir to the value of the property to which he succeeds: and, on the other, it establishes the extents of the assets of the inheritance and guarantees payment there from to the creditors of the inheritance and to the legatees.

Except in those cases where it is declared by law, acceptance under benefit of inventory must be express

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and formal. This is required by the interest of tho creditors of the inheritance and of the legatees; it is imperative that the extent of the inheritance be established as formally as possible, and that the inventory be correct and precise. Moreover, where the heir is in possession of the property of the inheritance the benefit may only be availed of within a very short time from the day of the opening of the succession, as otherwise the intermixture of the properties would prejudice the interest of third persons.

The benefit is exercised by means of:-

(a) A declaration made by the heir that he accepts the inheritance under the benefit of inventory; or that he does not intend to assume the status of heir except under the benefit of inventory, or before an inventory of the Inheritance is made. The said declaration is made by means of a note filed in the Registry of the Court of Voluntary Jurisdiction of the Island in which the succession opens (Section 915).

(b) An inventory, which may be made either prior or subsequently to the said declaration. The declaration is ineffectual unless it is preceded or followed by the inventory (Section 920).

The inventory is a formal description of the property of the inheritance, which is published by a Notary, like all other public deeds. The person making the inventory, however, must, prior to its publication, declare on oath that he will describe the said property faithfully. The Court's intervention is, besides, required in as much as the persons interested must be summoned to be present for the publication of the inventory those who are known are invited to attend by means of a summons issued under the authority of the competent Court, and those who are not known are invited to attend by means of public notices posted in the usual places.

The inventory must consist in a detailed description of all the property of the inheritance, movable and immovable, corporeal and incorporeal, and of all the claims existing against the inheritance. The description of movable property must also contain the value of each item as declared by a referee; as to immovable property, it is usual to state the rent at which the property is let or the income accruing therefrom.

As to the time within which the inventory must bo made, a distinction is necessary:-

1. *Where* the heir is of age and not under disability, and has the actual possession of the property of the inheritance, he is bound to make up the inventory within three months from the day of the opening of the succession, or from the day on which he knew that the inheritance devolved upon him (Section 922). And if, within the said time he fails to commence the inventory, or to complete it within the said time or within such further time as may have been allowed to him, he will be deemed to have accepted the inheritance without the benefit of inventory (Section 923).

Where the inventory is completed, the heir who has not yet made the declaration of accepting the inheritance, will be allowed the time of forty days, to be reckoned from the day of the completion of the inventory, to deliberate whether he would accept or renounce the inheritance; and if, within the said time, the heir has not made in the Registry of the said Court a declaration renouncing the inheritance, or accepting the inheritance under the benefit of inventory, he will be deemed to have accepted it under the benefit of inventory (Section 921) . This is the case where such acceptance is declared by law.

2. Where the heir, though not under disability, has not the actual possession of the property of the inheritance, and has not intermeddled with it, the times fixed for making up the inventory and for deliberating will only commence to run from a day to be fixed by the Court, where any claim is brought against the said heir.

Where no claims are brought, the inventory may be made up at any time, provided the right of acceptance of the inheritance is not barred by prescription [Section 925 (1) and (2)).

3. Minors and persons interdicted will not be deemed to have forfeited the benefit of inventory except on the expiration of one year from the day on which they will have attained majority, or the interdiction will have ceased, as the case may be, unless within such time they will have complied with the provisions relating to the declaration and the inventory (Section 926).

During the continuance of the time allowed for making up the inventory and for deliberating, the person entitled to succeed is not bound to assumed the status of heir (Section 927). Nevertheless, such person will be considered as curator "do jure" of the inheritance, and, as such, he may be sued as representing the inheritance to answer claims brought against it. He may however refuse the said curatorship, and his failure to appear in Court is sufficient to imply a refusal; the Court, under the circumstances, will appoint a curator to represent the inheritance in the proceedings (Section 927

During the continuance of the said time the person entitled to succeed may perform all preservative acts; and where in the estate there are things which cannot be preserved, or the preservation of which entails a considerable: expense, the heir may obtain from the Court of Voluntary Jurisdiction, or, in case of opposition, from the competent Court, leave for such things to be sold in such a manner as the Court will deem expedient. The heir, however, will not by reason of such procedure be deemed to have accepted the inheritance (Section 928),

Where the heir renounces the inheritance before the expiration of the times, original or extended, referred to above, any lawful expenses incurred by him up to the time of renunciation will be at the charge of the inheritance. Such expenses, moreover, will be privileged, as they will have been incurred for the common benefit (Section 929)

The benefit of inventory is forfeited, as already said, if the heir misappropriates or conceals any property belonging to the inheritance or fraudulently omits to include in the inventory property belonging to the inheritance, or fails to comply with the provisions relating to the inventory with the fraudulent intention of prejudicing the rights of other persons.

Of the effects of acceptance.

The acceptance of an inheritance operates the acquisition thereof, and it is the exercise of a potential right acquired by effect of devolution.

The effects of acceptance are retrospective as from the date of the opening of the succession; and, once made, the acceptance may not be withdrawn, since such a withdrawal might prejudice third persons who may have entered into legal relations with the inheritance, it may however be impeached on the ground that it was the result of violence or of fraud practiced upon the heir (Section 899), but on no other ground, particularly lesion. Nevertheless, if a will is discovered which, at the time of the acceptance, was unknown to the person accepting, such person will not be bound to discharge the legacies bequeathed in such will beyond the value of the inheritance, saving"' the legitim or other portion to which such person may be entitled (Section 899 (2)).

An acceptance may also be null on other grounds such as, for example, if the inheritance has not yet devolved, or if a mistake "in corpore hereditatis" is made.

B. Of the Renunciation of an Inheritance,

Renunciation is that act whereby a person entitled to succeed declares that he does not want to assume the status of heir.

The person renouncing must be capable of alienating: a renunciation is, in fact, an alienation of the rights of succession.

Renunciation of an inheritance cannot be presumed. It may only be made by a declaration filed in the Registry of the Court of the Island where the succession is opened (Section 901). In one case, however, renunciation is declared by law. It has already been seen that whore a demand is made by any person interested, the Court will fix the time of one month, which may, on good grounds, be extended to another month, within which the heir will be bound to declare whether he accepts or renounces the inheritance; and that, in default of such declaration within the said time, original or extended, the inheritance will be deemed to have been renounced (Section 909).

Effects of renunciation.

These are:-

1. The extinction, in respect of the person renouncing, of all his rights oil succession, retrospectively as from the day of the opening of the succession. Consequently, the succession is deemed to have opened as from the said day, to the person called to the succession on his failure,

2 (a) In the case of testate succession, the share of the person renouncing devolves on the substitute,- if any, or accrues to the share of the other co-heirs; in default of substitution or of accretion, the said share devolves "ab intestato" upon the heirs-at-laws.

(b) In the case of an intestate succession, the said share accrues to that of the other co-heirs-at-law. The right of accretion takes place in favor of all the co-heirs of the party renouncing who stand in an equal degree, even if such degree is occupied "jure rappresentati onis", whilst the co-heirs occupying a different degree are excluded. Thus, if, for example, the deceased leaves two children and three grand-children whose father is dead, and one of the grand-children renounces his share, such share will accrue to that of his or her brothers or sisters only. If, on the contrary, one of the children renounces his share, such share will accrue to the other co-heirs, including the children of the predeceased brother, i.e. the grand-children, under the rule of representation.

Where the person renouncing is the sole heir, or, where there are several heirs and all of them have renounced the inheritance, the inheritance will devolve on the next degree in the same order of succession. If, therefore, the deceased leaves an only child, who renounces the inheritance, the inheritance will devolve upon the grand-children "jure proprio" and not "jure rappresentationis", since representation, as already soon, documents not take place in the case of renunciation. If then, there are no persons entitled to succeed in the same order of succession, the inheritance will devolve upon the next order.

3. A person who renounces his rights under a testate succession may not succeed "ab intestato", since a son may only succeed to the inheritance of another in the manner prescribed by the latter. The only exception refers to the legitim or other "legitima portio" which may be claimed notwithstanding that the inheritance has been renounced; the reason being that the legitim is a "pars bonorum" and not a portion of the inheritance. Similarly, a person may renounce the inheritance and retain the legacies which may have been bequeathed to him.

As a rule, the renunciation of an inheritance is irrevocable in view of the fact that it operates as if the person renouncing had not been called to succeed. However, apart from the grounds on which a renunciation may be impeached, such as the disability of the person renouncing, there are two exceptions to the principle of the irrevocability of the renunciation

(a) A renunciation may be revoked by means of a subsequent acceptance provided that:

(i) the inheritance has not been accepted by others; and (li) the right to accept the inheritance is not barred, by prescription.

Under these circumstances, as no vested right acquired by others is thereby affected, the person renouncing may, notwithstanding the renunciation, accept and acquire the inheritance. No special form is prescribed by law: in fact, a mere acceptance implies the revocation of the renunciation. The succession, even in this case, is acquired retrospectively as from the date of the opening of the succession; but the acceptance may not operate so as to prejudice the rights acquired by third persons either by virtue of transactions performed with the curator of the vacant inheritance, or by virtue of prescription.

(b) The creditors of a person who renounces an inheritance to the prejudice of their rights may apply to the Court for authorization to accept such inheritance in the place of their debtor (Section 907 (1)).

This rule is an application of the "actio Pauliana", which takes the form of a demand made by the creditors to be authorized to accept the inheritance in the place of their debtor. The said demand must be made in contestation with the debtor and those persons upon whom, in consequence of a renunciation, the inheritance would have devolved.

The extension of the "actio Pauliana" was introduced under the Common Law, in view of the principle that the debtor may not renounce means which would enable him to meet his obligations. Under Roman Law, on the contrary, no such right was recognized to the creditors, since an inheritance came to form part of the estate of the person entitled to succeed by virtue of the "aditio" rather than of the "devolutio hereditatis".

The same right is competent, where the marriage has been contracted under the system known as the "Società[1] Coniugale", to the spouse, since a renunciation made by the other spouse would deprive him or her of a third part of the inheritance renounced.

In those cases the renunciation is annulled not in favor of the renouncing heir, but in favor of the creditors or the spouse, and only to the extent of their rights (Section 907 (3)).

It is lawful, however, for any of' the co-heirs of the person renouncing to oppose the action of the creditors by paying the sums due to them, and the co-heir effecting payment will, "ipso jure", tie subrogated to the rights of the creditors whose claims he has satisfied (Section 907 (h)). This right is granted in order that the co-heirs may prevent interference with the inheritance by strangers.

Rules common to Acceptance and Renunciation,

1. Their effects ore retrospective to the date of the opening of the succession.

2. They may not be made "sub conditiene", or "ex die" or "in diem". Under Roman Law this rule v/as applicable to all the so-called legal acts.

3. They may not be made in respect of a part of the Inheritance, since, as already said, a person may only assume the status of heir in the manner prescribed by the deceased.

4. They may not be made before the succession opens, in view of the danger of the "votimi captandae mortis". Hence the rule "viventis nulla hereditas", which, however, has two exceptions:

(a) In contemplation of marriage, any of the following stipulations may be made: the stipulations "de ae-quandis liberis" and the renunciation of the future succession of a parent or other ascendant in consideration of the dowry or other donation settled or made by the latter to the party renouncing.

(b) A renunciation of a future succession may also be made on the taking of vows in a monastic order or a religious corporation of regulars. This exception was introduced in the Middle Ages with the purpose of enabling the preservation of property in the family and of preventing the monastic-order or religious corporation from succeeding to the said property. Section 913 which deals with this special kind of renunciation, reproduces para. 40, ch. 5, B. III of the Code de Rohan.

As under the laws in force a person becomes incapable of acquiring property on taking religious vows, the purpose of the exception is merely that of favoring the religious profession by enabling a person taking the vows to renounce the inheritance of a living person in favor of those most dear to him.

The requisites are those common to all acts; the age required, however, is that fixed by Canon Law for the taking of the vows (Section 913).

As such a renunciation operates the transfer of property, it might appear that the consent of the alienees is necessary. But the law expressly provides that such renunciation "shall be operative in regard to the persons in whose favor it has been made, even though such persons shall not have been present, and shall not, up to the time of the opening of the succession to the property renounced, have accepted such renunciation (Section 916).

The said renunciation must be made in a manner that the person renouncing and the order *is* corporation may in no case succeed to the property so renounced (Section 913). The person renouncing may, however, reserve a life annuity — known as "livello" — on the property so renounced, unless the Rules of the Order or corporation prohibit such a reservation (Section 91U)•

Apart from the general causes of inefficacy of Juridical acts in general, the said renunciation is annulled if the religious vows are declared to be null (Section 917 (1)). Nevertheless, any alienation of the property renounced which may have been made before the annulment of the vows will remain effectual, saving the right of the person renouncing to claim an indemnity from such other persons as may be liable, according to law — such as the alienor of the said property v/ho may have benefitted from the alienation.

The renunciation remains effectual notwithstanding the suppression of the order or corporation, or the grant of an adult whereby the monk is released from his vows. However, the person renouncing would be entitled to maintenance as a donor, apart from any ties of consanguinity or affinity.

Effects of the Acquisition of an Inheritance.

A. Rights competent to the heir.

(1) The heir acquires the v/hole of the property of the deceased, and assumes all his obligations: in other words, the estate of the deceased becomes the estate of the heir; and, therefore, the rights of the deceased as well as his debts become the rights and the debts of the heir.

(2) A merger takes place between the estate of the deceased and that of the heir by virtue of which the debts existing between the heir and the deceased are extinguished.

(3) Lastly, the heir acquires the right to claim the inheritance, which is known as the "petitio hereditatis". There are very few provisions in our Code, as well as in other Codes, dealing with this action. In fact, the only Section which deals there with specifically is Section 885, where the time required for the prescription of this action is established; a reference to this action is also made by Section 589 under the title on Possession. Resort must, therefore, be made to Roman Law; on thematter.

The "petitio hereditatis" is that action whereby the heir demands, in contestation with the possessor of the inheritance, or of hereditary property, the recognition of his right to the inheritance and the restoration thereof or of hereditary property. "Res hereditaria" are those things which belonged to the deceased; "res hereditatis" are those things of which the deceased had possession but not ownership. The "petitio hereditatis" may be exercised in respect of either of them.

The purpose of this action is mainly the recovery of the right to the inheritance, of which the "vindicatio rerum" or the recovery of hereditary property is but a consequence. In fact, once the plaintiff's right to the inheritance is recognized, the defendant will be bound to restore any "res hereditaria vel hereditatis" which may be in his possession.

Under Roman Law the "petitio hereditatis" could be brought against any person having the possession of hereditary things, whether he possessed them "pro herede" or "pro possessore", i.e. without title.

1. Effects as between the Plaintiff and the Defendant

These effects refer to:-

(a) The restoration of the "res hereditaria et hereditatis" by the defendant who is declared to have no title thereto. The' restoration includes any sum of money or other thing received by the defendant in payment of debts duo to the inheritance.

(b) Compensation for any alienations made by the defendant. The "Senatus-consultum Justinianum" distinguished between a possessor in good faith and a possessor in bad faith: the former was only liable to the extent of the benefit derived from the alienation, if any; the latter v/as bound to restore the value of the property alienated in all cases as if such property had been still in his possession, The distinction is accepted by our law in Section 589 which is expressly made applicable to the "petitio hereditatis". A possessor in good faith is bound to restore the value of the thing alienated, tut only to the extent of the benefit which he has derived (Section 589); a possessor in bad faith is bound to restore to the plaintiff any profit which ho may have derived therefrom, or, at the option of the plaintiff, to j)ay him the value of the thing at the same time of the cesser of possession or the value thereof at the time of the demand, whichever is the greater, notwithstanding that in such case he has not derived any profit there from (Section 593).

(c) Damage caused to hereditary property. The some distinction made by the "Senatus-consultum Justinianum" applies, A possessor in good faith is bound to make good such damage as, by his own act or otherwise, may have been caused to the thing, but only to the extent of the benefit which he has derived from such damage (Section 588). A possessor in bad faith is liable for all damage which may have been occasioned by his own act as well as for that occasioned by a fortuitous event, unless he shows that the thing would have equally perished if it had been in the possession of the owner (Section 594)

(d) Restoration of the fruits. Under Roman Law, in view of the principle "fructus augent hereditatem", the plaintiff was in all cases entitled to claim sdd: the fruits of the thing collected or which could have been collected by the possessor. Our law applies to the fruits the general rules governing possession. A possessor in good faith acquires the fruits of the thing possessed, even though such thing be an inheritance, as long as he remains in good faith; consequently, he is bound to restore the fruits collected or which could have been collected, after a judicial demand. A possessor in bad faith is bound to restore all the said fruits (Sections 577 and 570).

(c) Expenses, The rules governing possession apply. A distinction must, therefore, be made between good and bad faith, and between "expensae neccssariae", "utiles" and "voluptuariae".

2. Effects as between the Plaintiff and Third Persons.

Third persons are those who may have acquired property of the inheritance or rights over the said property fróm the possessor thereof and the debtors of the inheritance who may have paid their debts to the said possessor.

The question is: may the heir impeach such alienations, or compel the debtors to pay again ? Thi3 question remained unanswered satisfactorily until the appearance of the Code Napoleon. Section 890 of our Code provides that the rights which may have been acquired by third parties in virtue of agreements made in good faith with the apparent heir must be respected by the true heir. So much is required by the principle of the stability of contracts; provided, however, the third party was at the time of the agreement in good faith, and had, therefore, no reason to doubt that the alienor was the true heir. This is the only condition prescribed by law, and the good or bad faith of the apparent heir is immaterial; equally of no account are the nature of the thing alienated and the title upon which they may have been alienated. Under Italian Law, on the contrary, the rule is limited to onerous alienations.

This system seems preferable: on alienee under a gratuitous title is not prejudiced if evicted by the true heir, and, moreover, a possessor in good faith is not responsible for alienations under a gratuitous title towards the true heir.

Extinguishment of this action.

Besides the causes of extinguishment common to all actions, the "petitio hereditatis" is barred by a special acquisitive prescription. The person entitled to succeed forfeits the right to claim the inheritance in so far as another person has acquired the inheritance in virtue of possession therefore for the prescribed time. Moreover, the right of accepting an inheritance and the "petitio hereditatis" are barred by the ordinary prescription of thirty years where the inheritance has not been in the possession of other persons.

The requisites for the special prescription aro:

(1) The possession of the inheritance by other persons;

(2) The lapse of the time prescribed. Under the law of the Decemvires, the time required was one year: after the "Senatus-Consultum Juventianum" it was hold that the action had become exempt from prescription on the ground that it had become a personal action which was not subject to prescription, Theodosius II subjected

it to the ordinary proscription of thirty years, which applied to all actions, whether real or personal (const. Ill, C. "De Prescrip.";.

Such was also the law in Malta until the time was reduced to ten years, reckoned from the day of the opening of the succession, by a Bando and a Prammatica dated 1st March, 1737; and the time prescribed by Section 865 (1) of the Civil Code is also ten years.

These are the only conditions required by law. The possessor may even be in bad faith, and he does not require a lawful title. It has, in fact, constantly been held that this is a prescription "sui generis", deriving from the Bando and Prammatica mentioned above, neither of which require any of the said requisites, and that it is not an application of the ordinary prescription of ton years which requires good faith and a lawful title.

The same proscription bars the action for claiming a legacy, or the legitim, or the portion of property granted to illegitimate children or to the spouse.

However, with regard to minors, or persons interdicted, the said action documents not lapse except on the expiration of one year from the day on which they attain majority, or the interdiction ceases, as the case may be (Section 885 (2)).

B. The Obligations of the Heir.

(1) The heir is liable for all the debts and burdens of the inheritance. The debts of the inheritance arc those which were due bj[1], the deceased; the burdens of the inheritance are those imposed by the deceased on the heir in favor of the legatee. The heir is liable for the debts in so far as he succeeds to the whole of the estate of the deceased; ho is liable for the burdens because by virtue of his acceptance of the inheritance he contracts the obligation of performing whatever the testator may have imposed upon him. No "constitution debiti" is required, since the heir is so bound "ope juris"; under Roman Law the obligation of the heir was quasi-contractual, in view of the quasi-contractual nature of the "aditio hereditatis".

The obligation of the heir is personal and it extends to the whole amount of the said debts or burdens even "ultra vires hereditatis", unless the acceptance is made under the benefit of inventory. Consequently, the creditore of the inheritance and the legatees will he entitled to compete with the special creditors of the heir over his property.

The assignment of the inheritance does not exempt the heir from the said liability, since no person may discharge himself from his debts by means of an assignment.

2. The heir is bound to respect any act which the deceased may have done, and may not impeach it except under the circumstances which would have entitled the deceased to do so.

3. The heir may not bring any claim or action against the inheritance, in view of the merger between his property and that of the deceased.

These normal effects of the acquisition of an inheritance are considerably altered where the inheritance is accepted under the benefit of inventory, in respect of both the relations as between the heir and the creditors of the inheritance or the legatees, and the relations as between the heir and the inheritance.

In respect of the relations as between the heir and the creditors of the inheritance or the legatees, the advantages accruing to the heir from the exercise of the benefit are:-

(1) The restriction of his liability for the debts and burdens of the inheritance to the extent of the value of the property to which he succeeds (Section 931)» The said creditors and legatees are not prejudiced thereby, since the property which originally constituted their warranty is entirely secured in their favor. The heir, notwithstanding the benefit, becomes their debtor, not personally, but as the owner of the property of the deceased and to the extent of the value of the said property.

(2) He may be released from the debts and burdens of the inheritance and from the management of the inheritance by assigning the property of the inheritance to the creditors and legatees and to the co-heir who does not similarly elect to give up the property (Section 931 (b)). By effect of this assignment he remains liable only by the predecessor of the inheritance. The said assignment may be made by any of several heirs, in his own interest. The assignment, which is regulated by the Laws of Procedure, is made by means of

of proceedings by way of libel in contéstation with the creditors, the legatees, and the co-licirs. A similar assignment may also be made by an heir who has accepted the inheritance purely and unconditionally, but the assignment would have to include the whole of the property of the heir, and would have to be made in favor of all the creditors including his own.

In respect of the relations as between the heir and the inheritance, the benefit of inventory prevents the merger between the estate of the deceased and that of the heir and the extinguishment of the reciprocal rights and debts. Consequently, the property of the heir is not intermixed with the property of the inheritance, and the heir will retain his right to enforce the payment of his own claims against the inheritance (Section 931 (c)). He will also retain the right to claim the legitim or other portion saved by law in his favor and to demand the abatement of in officious liberalities. Where, on the contrary, the heir neglects to make up the inventory, he will forfeit the right to cause the donations and legacies made in favor of any person other than a co-heir to be reduced (Section 935).

On the other hand, the inheritance retains its rights and actions against the heir, which rights and actions are extinguished by a pure and unconditional acceptance.

It is useful to mention here a rule proper to prescription: prescription is suspended as between the heir and the inheritance where this is accepted under benefit of inventory. As the inheritance is represented by the heir, and the heir has his own interests to look after, he cannot be expected to perform those acts which would interrupt the running of proscription, which is, therefore, suspended by operation of law.

The obligations of the heir who accepts the inheritance under the benefit of inventory are:

1. To administer the property of the inheritance, and

2. To satisfy, out of such property, the debts and burdens of the inheritance.

The heir who enters upon inventory is bound to administer the property of the inheritance, and has all the powers and duties of an ordinary administrator, sinew he is bound to administer the said property not only in his own interest but also in the interest of other persons.

As, however, he is at the same time an owner, he has wider powers and a mere restricted liability. Consequently

(a) Ho may sell property of the inheritance without the authority of the Court. Such sale is, in fact, required for the payment of the debts,

(b) He is not going to give security, since he administers property, which is his, although he is bound towards the creditors and the legatees "do bene administrando". Such creditors and legatees may, in fact, compel him to furnish security for the value of the movable property included in the inventory, for the fruits of the immovable property, and for any balance of the proceeds of the sale of the immovable property which may remain after satisfying the creditors of the inheritance.

(c) Where the heir fails to give such security the Court will give such directions as it may deem proper in order to safeguard the rights of the interested parties (Section 936), such as by appointing another administrator,

(d) The heir is bound to render an account of the administration to the creditors and the legatees (Section 932 (1)). The expenses of the inventory and of the account, however, are at the charge of the inheritance (Section *943)*. The account must be rendered within the time fixed by the Court, on a demand made by any interested party. If he fails to do so, he will be liable for the debts of the inheritance with his own property. It is, however, necessary that he has been put in default to produce his account, and has not yet fulfilled this obligation. In other words, it is not sufficient that he has failed to produce his account within the time assigned, but it is necessary that he should have not fulfilled his obligation at the time in which the creditors or the legatees claim payment against him personally (Section 932 (2). After the liquidation of the account he cannot be compelled to pay out of his own property except to the extent of the balance which results to be due by him (Section 932 (3)).

(e) The heir who enters upon inventory is not, in his administration, answerable except for gross negligence (Section 933),

In the second place, the heir who enters upon inventory is bound to satisfy, out of the property of the inheritance, the claims of the creditors of the inheritance and of the legatees according to the following rules:-

(a) He must first pay those creditors enjoying a privilege or a hypothec, duly preserved, according to their order of preference. The same rule applies if the heir is himself one of the said creditors,

(h) He must then satisfy those creditors who, prior to the publication of the inventory may have "by a judicial letter or other act given him due notice of their claims,

(c) He will then satisfy the other creditors and the legatees in the order of their application for payment. This rule is against the principle that creditors compete together and enjoy equal rights, unless there exist between them a lawful cause of preference. Here the rule "prior in tempore potior in jure" is applied. However

(i) the heir cannot pay a legacy if, before effecting payment thereof, notice of a debt due by the estate is given to him (Section 932 (2)); and

(ii) any creditor appearing after the whole of the estate has been paid out in discharge of other debts, or of legacies, may only exercise his remedy against the legatees. Such action is prescribed by the lapse of three years, to be reckoned from the date of the last payment (Section 941)

The creditors are preferred to the legatees because the rights are acquired under an onerous title, and "nemo liberatis nisi liberatus". Anything given gratuitously, in fact, would be given out of the property of the creditors. It is for this reason that any creditor to whose prejudice the heir may have paid other creditors or legatees can exercise his remedy both against the heir as well as against the creditors or legatees who have been paid (Section 9U0), saving any other right such as the "actio hypo the caria".

Where there are several heirs the effects of the acquisition of an inheritance apply to each one of them in respect of his share. There are, however* other special effects. These refer to:-

1. Collation;
2. Partition; and
3. The payment of debts.

I. Of Collation.

Children and descendants only, on succeeding to the inheritance of an ascendant, whether under a will or "ali Intestalo", must bring into the mass, in the interest only of the other children and descendants, being their co-heirs, everything they may have received from the deceased by donation, directly or indirectly, unless the donor shall have other vase directed.

Only donations made by an ascendant in favor of the descendants who are his heirs are subject to collation; whilst testamentary dispositions are excluded, notwithstanding that the law; talks of the collation of a legacy. In fact, collation is inconceivable in respect of a legacy, the subject-matter of which is a part of a mass. The law mentions also the collation of debts: here again the word is improperly used and it denotes merely the manner in which a debt due by an heir to his ascendant is paid. The mass referred to above is the estate of an ascendant who may have made the donation; and collation, as will be seen hereafter, may be made either in kind or by imputation.

Collation is founded on the presumed intention of the deceased. It is, in other words, presumed from the fact that the deceased has instituted his descendants his heirs that he meant to treat them all equally, and that any donation he may have made in favor of one or more of the said descendants was made in advance of the inheritance, consequently, the donee is bound to bring into the mass what he may have received, either in kind or by imputing it to Ms share.

Collation takes place only as between the co-heirs who are the descendants of the deceased: the presumption above-mentioned, in fact, does not apply where the heir is not a descendant of the deceased. It, therefore, avails only the said persons, and it only operates against them. It is, however, immaterial whether the descendant has accepted the inheritance unconditionally or under the benefit of inventory; or whether, at the time of the donation, the descendant was or was not a presumption heir; equally immaterial is whether the descendants have been instituted heirs in equal or in unequal shares, since it is held that any unequal treatment made in the will ought not to extend beyond the will itself.

Subject to donation is the donee only. This principle is applied by Sections, 959 to 961.

Section 959 "Any donations made to the descendant of a person entitled to succeed at the time of the opening of the succession shall in all cases be deemed to be made without the obligation of collation. The ascendant, on succeeding to the doner, shall not be bound to collate such donations", unless the testator has otherwise directed.

Section 960 "The descendant succeeding in. his own right to the donor, shall not be bound to collate the things given to his ascendant, even though he may have accepted the inheritance of such ascendant. where, however, the descendant succeeds by right of representation, he shall be bound to collate the things given by his ascendant, even though he may have renounced the inheritance of such ascendant".

Section 961. "Any donation made to the spouse of a person "entitled to succeed shall be deemed to be made with exemption from collation, where the donation is made conjointly to both spouses, and only one of them is entitled to succeed, the latter shall collate his portion of the donation".

Where there are heirs who are also descendants of the deceased and heirs who are not descendants, collation takes place only between the descendants. No other person is subject or entitled to collation, and, in particular, it dòes not avail the creditors of the inheritance.

What is subject to collation? Collation is due for any tiling received from the deceased by donation, directly or indirectly, for what has been disbursed by the deceased for providing a dowry to any of his female descendants, or for making any donation on the occasion of marriage, or for providing any descendant with a sacred patrimony, or for procuring for him an ecclesiastical benefice, or for setting him up in any employment or business, or for paying his debts (Sections 954 and 963).

Indirect donations arc those made in the name of intermediaries or disguised as onerous acts. Sections 966 and 967 refer to advantages derived indirectly from agreements entered into with the deceased, and they provide that "any profits which may have been derived from agreements entered into with the deceased shall likewise not be subject to collation, provided such agreements did not at the time they were entered into confer any indirect advantage"; "Nor shall any collation be duo in respect of any special partnership entered into without any fraud between the deceased and one of his heirs". In other words, if the agreement is such that a person would normally enter into with a stranger, no collation is duo. Consequently, the expression "without fraud" used in Section 967 must not he taken in its literal manning; it has the same meaning conveyed hy the expression contained in Section 966 "provided such agreements did not, at the time they were entered into, confer any indirect advantage".

The following are not subject to collation

(1) All that which is left by will, including legacies or pre-legacies, saving an express disposition to the contrary;

(2) The expenses of maintenance, education and instruction;

(3) The ordinary expenses on the occasion of weddings;
(4) Customary presents;

(5) The fruits of, and the interest on things subject to collation, except as from the day of the opening of the succession. Such things are, in fact, deemed to have been given in advance in order to provide for the subsistence of the donee and of his family.

Collation is due as from the day of the queuing of the succession: it is a right and an obligation accessory to the succession and preparatory to the partition of the mass into which the property subject to collation is brought.

Collation is made either by returning the thing in kind, or by imputing to the share the value of the thing. The former is known as collation in the strict sense of the word, the latter as collation by imputation.

Whenever collation is made by imputation, each of the other co-partitioners will be entitled to withdraw beforehand from the mass of the inheritance one or more immovables, equal in quality and quantity, at least approximately, to the thing the value whereof has been imputed (Section 972)

The form of collation depends on the nature of the property to be collated, A distinction must, therefore, be made between immovable and movable property, and money.

(1) Collation of immovable property.

With regard to immovables, collation is made, at the option of the donee either by returning the thing in kind, disencumbered from any burden or hypothec with which the donee may have charged it, or by imputing to the share the value of the thing at the time of the collation (Section 972 (1)).

Where collation is made in kind, the difficulty arises as to whether the immovable is to be returned in the state in which it was at the time of the donation or in that in which it is at the time of the collation.

The purpose of collation is that of reinstating the estate of the deceased as if no donation had ever been made; it is, therefore, necessary to distinguish between changes in the condition of the thing due to an act of the donee and changes duo to accidental circumstances. Consequently

(a) The improvements as well as the deteriorations for which the donee is not responsible and which may have happened accidentally are not taken into account; so that where the thing has been so improved or deteriorated, it is returned in the state in which it may be at the time of the opening of the succession.

(b) The improvements effected by the donee, on the contrary, should not benefit his co-partitioners, since the principle of equality upon which collation is founded binds the donee to return what he may have received from his ascendant but not to enrich his co-heirs by the fruits of his industry or capital. "In all cases,- Section 973 (1) provides, - the donee shall be allowed the expenses with which he has improved the immovable, to the extent of the increase in value produced thereby, regard being had to the time of collation". If, therefore, the expenses are higher than the increase in value, the donee will only be entitled to the lesser sum. This is, in fact, the advantage which accrues to the inheritance, and the extent of the actual loss sustained by the donee and of which, therefore, he is entitled to reimbursement. The donee, however, may not claim more than the amount of the expenses incurred since he cannot derive such an advantage from collation; besides, he may always elect to impute the value of the immovable to his share.

In order to establish whether the immovable has increased in value, regard is had to the time of the opening of the succession, as it is then that the property is brought into the mass. However, the donee will also be allowed the necessary expenses incurred by him for the preservation of the immovable, even though such immovable may not have been improved thereby (Section 973 (2)).

Such expenses are made for the common benefit, and would have had to be incurred by the donor if the donation had not been made. Necessary expenses do not include the ordinary expenses for maintenance, which must be charged to the fruits of the thing. As to embellishments, it is commonly held that the donee should be at least entitled to the rights allowed to a usufructuary and to a possessor in bad faith.

A co-heir who collates a thing in kind may retain possession thereof until the reimbursement of the sums due to him for the expenses and improvements (Section 976).

(c) On the other hand, the donee is bound to account for any deterioration caused through his fault, which may have diminished the value of the property, provided such deteriorations would not have equally taken place if the thing had remained in the estate of the deceased. It is true that the donee was, at the time, the owner of the immovable, but his title was subject to dissolution, and it is he who dissolves the donation by collating it in kind.

As already been, where collation is made in kind the donee will be bound to return the thing disencumbered from any burden or hypothec with which he may have charged it.

Where collation is made by imputation, in so far as the value depends on the market, regard is had to the time of the collation, as if collation were being made in kind. As to improvements, the same rules and distinctions established in respect of collation in kind apply, even if the immovable had been alienated by the donee (Section *97h*).

(2) Collation of movable property.

''Collation of movables is only made by imputing tho value thereof. Such value shall be regulated on the valuation contained in the deed of donation or, in default of such valuation, on a valuation to be made by experts, regard being had to the time of the donation" (Section 977). The reason usually given in justification of this provision is that the amount by which the donor diminished his estate, by acquiring the thing and giving it in donation, or by giving it on donation instead of selling it, is the value of the thing at the time of the donation. Apart from all this, the rule established by Section 977 avoids several difficulties

which would arise were movables to be collated in kind or regard had to their value at the time of collation.
It is a fact that movables change frequently both as to their condition and as to their value. The rule that where collation is made by imputation the other co-partitioners are entitled, to withdraw beforehand from the inheritance one or more things, equal in quantity and quality – at least approximately – to the thing to value whereof has been imputed, applies.

(3) Collation of money.

Collation of money is made by imputation, i.e. by taking loss out of the funds of the inheritance. If such funds are insufficient, the donee can free himself from collating other money by abandoning movable property, or, in default,, immovable property of the inheritance, in proportion to the amount due (Section 978).

A descendant may be exempted by the donor from the obligation of collation, since it is concerned with mere private interest and may, therefore, be derogated from.
An exemption from collation may be contained in the donation itself, or in another public deed, or in a will.
It may, however, have no other effect but that of exempting the donee from the obligation, and, in particular, it may not operate so as to bar any person entitled to legitim or other portion saved by law from demanding the abatement of the donation.
In respect of immovable property, the obligation of collation ceases where the immovable perishes by a fortuitous event and without any fault of the donee (Section 968), whether it perishes before or after the opening of the succession. Such immovable will not be subject to .collations: even though it may have perished subsequently to an alienation made by the donee to a third person. In the event of an alienation, however, the price or other consideration is, according to sano jurists, subject to collation; others hold that the obligation of collation ceases oven in respect of the consideration.

Finally, the obligation of collation is extinguished by the extinguishment, through prescription, of the "actio familino erciscundae", to which collation is accessory.

Collation of debts.

Section 951 under paragraph 111 of Partition, provides as follows: "Each of the co-heirs shall, according to by a descend,.nò to an ascendant whenever the former is instituted heir by the latter. Strictly speaking, the debtor should pay any such svi to the co-heirs, according

the provisions of Sections 954 to 979, collate or bring into the mass any donation which may have been made to him, and any sum which may be due by him". What is termed collation is in reality a manner of payment of sums duo

to their share of the inheritance, saving the share due to him as one of the heirs. However, as between co-heirs who are descendants, any debt due by one of them to the ascendant is paid by way of collation by imputation.
Here again the ground for this manner of payment i3 the presumed intention of the deceased; in fact, the collation of debts ensures the payment of the whole debt, since the creditors of the co-heir who is a debtor towards the inheritance will be precluded from competing over his share of the inheritance. Were it not for Section 951, the inheritance would be divided among the co-heirs, without taking into account the debts due to the inheritance. Any such co-heir would, of course, remain a debtor towards the other co-heirs, but his creditors would be entitled to compete over the property assigned to the said co-heir in virtue of the partition, together with the other co-heirs. The collation of debts excludes the creditors of the said co-heir from competing, and thus ensures full payment to the co-heirs.

However, this is a manner of payment, and not a real collation; if, therefore, the co-heir who is a debtor renounces the inheritance, he will not be released from the debt, notwithstanding that the obligation of collation is extinguished by a renunciation of the inherit on c-o, Moreover, any debt due by a co-heir to the inheritance extinguished by prescription like any other debt; whilst the obligation of collation may not be prescribed during the lifetime of the donee.

II. Of Partition.

The community of an inheritance does not differ from the community of property, except that it has for its subject-matter a "universum jus" instead of one or more particular things.

The special rules which govern it refer to:-

1. A special right of pre-emption; and
2. Partition.

1. Pre-emotion. Where any of the co-heirs has, under an onerous title, assigned his rights over the inheritance

to any person,, not being a co-heir, the other co-heirs or any of them even if the assignee is a relation of the deceased» exclude him from the partition by reimbursing to him the price of the assignment, the expenses incurred on ohe occasion of such assignment, and the interest on the price as from the day on which such price may have been paid to the assignor (Section 953 (l)). The purpose of ^his right is to reduce the number is to reduce the number of co-owners, to facilitate the partition of the inheritance, and to exclude strangers from the Inheritance.

The said right may be exercised separately by any of the co-heirs; where, however, any of the co-heirs has exercised such right, the other co-heirs may avail themselves thereof, provided they declare by means of a judicial act, their Intention to do so within fifteen days from the-, notine given to them (Section 953 (3)).

The right is attributed as against any assignee under an onerous title, even though the assigned be a realtion of the deceased, but not if the assignee is a Co-heir. Its effect is the acquisition by the co-heir or co-heirs, who may have availed themselves thereof, of the share assigned.

It is exercised by means of a declaration, contained in a judicial act (section 953 (U))* of the intention to exercise such right (section 953 (3)); which declaration must be made within one month from the day on which notice of the assignment may have been given (Section 953 *(k)*).

2. Partition. The partition of on inheritance apart from a few rules proper to it is regulated in the same manner as the partition of a common property. Therefore, the intervention of all the co-heirs is required; otherwise it is null, and any of the co-heirs including the co-partitioners, will be entitled to demand a new partition.

Procedure.

The following acts are necessary

(a) The liquidation of the inheritance. The inheritance includes, in the first piace,' the property left by
the deceased. In the relations as between the co-heirs who are descendants of the deceased there may he room for collation of property given by the deceased on donation to one or more of them, or the value of such property, or of debts duo by any of such co-heirs to the inheritance. And, as already seen, whole collation is

made by Imputation, the other co-heirs aro entitled to withdraw beforehand from the mass property, equal in quantity and value, to that the value whereof has boon imputed. Such property is separated from the rest, and the latter is divided between the co-heirs.

(b) The valuation of the property.

(c) The division of the estate into as many shares, equal or unequal as the case may be, as there are co-partitioners.

(d) The assignment of the said shares to the co-partitioners. The shares may be drawn by lot or assigned, or partly assigned and partly drawn by lot.

(e) The liquidation of the debts due by or to any of the co-partitioners to or' "by the inheritance, and which may refer to the fruits of the property of the deceased collected by any one of them, the reimbursement of expenses for improvements carried out in the said property, or of necessary expenses, the accounting for any deteriorations caused to such property, the collation of property given or received on donation, the collation of debts, and so on and so forth.

Section 950 contains a special rule. In proceedings for liquidation, evidence that a thing forms part of the community must be brought by the party alleging it. However, Section 950 provides that "any property which, at the timo of the opening of the succession of a person leaving children or other descendants from two or more marriages, is found in the estate of such person, shall be presumed, in the interest of the children or descendants of the previous marriage, to have existed therein before the celebration of the subsequent marriage, Timeless the contrary is made to appear either by means of an inventory made prior to such subsequent marriage in the manner laid down by the Code of Organization and Civil Procedure (chapter 15), or by other means". This is a traditional presumption and is meant to protect the interests of the children of a previous marriage as against the new family (Vide Code de Rohan 3 and 7, 25), The presumption is "juris tantum", and in respect of immovable property evidence to the contrary is not difficult, as the date of the acquisition thereof results from the deed of acquisition itself,. The best evidence is an inventory made as stated above; and this is the reason why the law; imposes the making of an inventory on a person who is about to re-marry.

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As to all other matters, and, in particular, the declarative effect of partition, the warranty of peaceful possession due by each of the co-partitioners to the others, the warranty of the solvency of the debtors in respect of the assignment of debts, and the dissolution of the partition on the ground of lesion, the partition of an inheritance is regulated by the provisions governing the partition of common property.

Of Partitions made by an Ascendant.

Strictly speaking, the partition of an inheritance may only be made by the co-heirs: partition presupposes ownership, and, on the death of the deceased, his heirs become the owners of his property. The deceased may not, therefore, as a general rule, divide his property among his heirs, since he will have ceased to be the owner of such property at the time when the comunity of property created by him will have started to operate. The deceased may, of course, distribute his property by means of legacies, but such a distribution would not entitle the legatees to such effects of partition as the warranty of peaceful possession or the right to demand its dissolution on the ground of lesion.

This notwithstanding, "it shall be lawful — Section 99U provides —for the father, the mother, or any other ascendant to divide and distribute his or her property among his or her children or descendants, including in such partition even the non-disposable portion". There are traces of a similar right in the Digest ("De actione familiae erciscundae); and this right was recognized by Justinian in Novel3 18 and 107,

The law grants the said right in order to forestall quarrels and lawsuits between the children and descendants, to reduce the expenses, and to ensure a fair and equitable partition.

Our law recognizes also a partition made by an instrument "inter vivos" (Section 995 (1)) which institute derives from the "demission des liens" of early French law, whereby the ascendant donated all his property to his children and descendants during his lifetime.

Naturally, there are differences between a partition made by an instrument "inter vivos" and one made by a will: the former requires the acceptance of the donees; the latter is perfected without the intervention of the descendants. Secondly, a donation takes effect immediately, whilst a will takes effect only on the death of the

testator. Thirdly, a donation is irrevocable, whilst a will may always be revoked. Lastly, a partition made by a will may include also future property: a partition made by an instrument "inter vivos" may only include present property.

As to the nature and effects of a partition made by an ascendant, whether by an instrument "inter vivos" or by a will, there can be no doubt that the effect of the partition is not merely declarative: it operates the transfer of property. Such transfer of property takes place even if the deceased divides his property among his descendants as his heirs-at-law, because succession is testate whenever it is transmitted by means of a will, notwithstanding that such will simply makes reference to intestate succession.

Any partition which is not made among all the children existing at the time of the opening of the succession and the descendants of predeceased children entitled to succeed is null "in toto". In any such case, both the children and descendants who were not comprised in the partition, as well as those among when such partition was made, may demand a fresh partition. A partition, therefore, which is made among the children and descendants existing at the time of the partition is null if other children or descendants are born, provided they survive the testator. Equally null is a partition made among the children and descendants existing at the time of the partition in case any of such children or descendants predeceases the ascendant and leaves no issue.

The ascendant may include in the partition even the non-disposable portion. However, a partition made by a will may also include future property, provided such portion is found to exist in the estate at the time of the opening of the succession. On the contrary, a partition made by an instrument "inter vivos" may only include present property: and if, therefore, other property is subsequently acquired by the ascendant, a supplementary partition will be necessary. Such partition will be made according to law (Section 996).

A partition made by an ascendant may be impeached:-

1. if it is not made among all the children and descendants entitled to succeed existing at the time of the opening of the succession; and it may be impeached even by those among whom the partition may have been made.

2. if any of the children or descendants receives less than is entitled to by law by way of legitim.

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Section 998 (1) provides: "a partition made by an ascendant may be impeached if it rust is made to appear from such partition or from any other dispositions made by the ascendant, that the legitim of any of the persons among whom the partition of 'the property was made has been prejudiced". However, provided the legitim is not prejudiced, the ascendant may divide his property among his children and descendants unequally.

3« where the partition is made by an instrument "inter vivos" it may also be Impeached on the ground of lesion "ultra quartam", as provided in Section 551 {Section 998 (2)), A partition made by a will may not, however, be impeached on this ground. This difference, which is also found in Italian Law, is justified by the fact that only donations are subject to collation. Donations made in favor of descendants are deemed to be payments in advance of the inheritance, and the donor does not thereby show any intention of preferring any of his descendants to the others; testamentary dispositions, on the contrary, if the property is thereby distributed unequally, can have no other meaning but that the testator did not want to establish equality among his descendants. Consequently, in respect of a partition made by an instrument "inter vivos", any inequality between the descendants is deemed 'to be contrary to the intention of the donor, and if it is "ultra quartam", it constitutes a lawful ground for the impeachment of the partition.

The nullity of the partition does not operate so as to invalidate the dispositions in execution of which the partition has been made, even though a stranger may have been benefitted by the act of partition (Section 999)• A fresh partition, made according to law, will, of course, have to be made.

III Of the Payment of Debts.

Liable for the debts of the inheritance are the heirs; and although a legatee may be charged expressly by the testator with the payment of a debt of the inheritance this would not release the heirs vis-a-vis the creditor. The heir may compel the legatee to make payment, and would be entitled the reimbursement if he paid the debt, but the creditor may always, if ho so chooses, demand payment of the heir.

The rule that the legatee is not liable for the debts of the inheritance is modified as follows in the following cases

1. If the legatee, to v/hom an immovable charged with a hypothec has been bequeathed, fails to demand the disencumberment thereof, he v/ill be liable to be sued for payment "propter rem quern possidet", by means of the "actio hypothecaria". If evicted, however, he will be entitled to redress against the heir and will be subrogated to the rights of the creditor whom he will have satisfied,

2. Where a creditor of the inheritance has exercised the benefit of separation of estates, he v/ill be entitled to be paid in preference to a legatee; and although the exercise of the said benefit does not render the legatee liable for the debt, it may have for its consequence the loss of the legacy.

3. If the heir has accepted the inheritance under the benefit of inventory, he will be bound to pay the creditors of the inheritance before he pays or delivers the legacies; and, as already seen, any creditor appearing after the whole of the estate has been paid out in the discharge of other debts, or of legacies, may exercise his remedy against the legatees.

Where there are several heirs a distinction is necessary. In respect of the relations as between the co-heirs, Section 980 provides: "The co-heirs shall contribute among themselves to the payment of the debts of the inheritance in such proportion and manner as shall have been established by the testator. Where the deceased has noi; made a v/ill or has not given any directions as to the apportionment of the debts, the co-heirs shall contribute to the payment of such debts in proportion to their respective share in the inheritance".

In respect of the relations as between the co-heirs and the creditors, the rule is that "in all cases, with respect to the creditors each of the heirs shall be personally liable for the debts of the inheritance in proportion to his share (Section 981 (1)), notwithstanding that the testator may have given other directions as to the apportionment of the debts, or that the co-heirs may have agreed otherwise." This rule is established in the interest of the creditors who, if bound to abide by the directions of the testator, would run the risk if finding that the heir whom the testator may have charged with the payment of the debts has not received a share in the inheritance sufficient to meet the liabilities thereof.
The debt, therefore, is divided among the co-heirs in proportion to their respective share in the inheritance;

but if any of the heir is insolvent, the loss will be born by the creditor, unless the debt is either absolutely or relatively indivisible.

If the debt is secured by a hypothec, each of the heirs having in his possession property charged therewith will be liable, limitedly to such property, for the whole debt. But if by reason of the hypothec he pays the whole debt, he will be entitled to be reimbursed by the other co-heirs, unless the payment of the entire debt had been imposed upon him by the testator, or unless he had agreed to pay the entire debt. He may not, however, seek relief against the other co-heirs beyond the share due personally by each of them, even though such other co-heirs have property subject to the hypothec, and even though in paying the debt he caused himself to be subrogated to the rights of the creditor. But if, in seeking relief, he finds one of the co-heirs to be insolvent, such Insolvency will be borne by all the co-heirs in proportion to the share due by each of them, in view of the fact that the debt is secured by a hypothec. Consequently, if any of the co-heirs pays the entire debt on his own initiative he will not be entitled to seek relief in respect of the share due by an insolvent co-heir.

Where a co-heir, being a creditor, accepts the inheritance unconditionally, the debt due to him, to the extent of the share due by him as heir, is extinguished through merger. As to the remaining portion of the debt, he remains a creditor. A co-heir who, being a creditor, enters upon inventory, retains the right of demanding the payment of the debt, and may, like any other creditor, demand the payment of the debt, deducting therefrom the share payable by him as co-heir (Section 982 (2)). If, therefore, one of the other co-heirs possesses property subject to a hypothec securing the .debt he may demand from him the payment of the entire debt, saving the share payable by the creditor as co-heir. On the contrary, a pure and unconditional heir may only demand the payment of the share in the debt due personally by each of the other co-heirs, even if his debt is secured by a hypothec.

A co-heir entering upon inventory, who is in possession of' property charged with a hypothec as security for a debt to a third party by the inheritance, may seek relief against the other co-heirs if he pays the whole debt, and in so doing he acts like any other creditor,

OF VACANT INHERITANCE.

"An inheritance, until it is accepted, shall be deemed to be vacant (Section 9Wj-)". "Jacens hereditas di cultur quae heredem nullum habet sed sperat habere", and it is distinguished from "hereditas vacans, quao nec habet nec habere sperat heredem".

Until it is accepted, an inheritance ("hereditas jacens") "substinet personam defuncti"; and, on the demand of any person interested, the Court will, saving the provisions of Section 927, appoint a curator. Section 927 provides that the heir is considered a curator "de jure" of the inheritance during the continuance of the timo allowed for making up the inventory or for deliberating. On the expiration of the said time, the heir will have either accepted the inheritance or renounced it: in the latter case a curator will be appointed by the Court, as stated above.

The curator represents and administers the inheritance. The Court's authority is, however, required for acts exceeding an ordinary administration.

His obligations are: to make up an inventory of the property of the inheritance, to deposit any money found in the estate of the deceased as well as any proceeds of a sale of hereditary property, and to give account of his administration.

OF ABSENTEES.

An absentee is a person who has ceased to appear in these islands and has not been heard of (Section 229). Under given conditions, the succession of an absentee opens be means of a declaration of the Court of Voluntary Jurisdiction.

The former laws contained only a few disconnected rules on the matter, and the Institute of absentees may be said to have been organized by Ordinance I of 1873 (now incorporated in the Civil Code), which reproduced most of the rules established by the Code Napoleon.

Strictly speaking, the property of an absentee does not pass to the heirs by way of succession. The testamentary heirs or the heirs-at-law of the absentee are vested with the possession of the said property and the legatees or other persons having rights depending upon the death of the absentee are allowed to exercise such rights.

The said property vests in the heirs provisionally, at first, and then absolutely. Provisional possession is granted where the absentee has not been heard of for a relatively short time and the person concerned is not advanced in years; under these circumstances it is quite possible that he be still alive, and, therefore, the possession of his property is only granted provisionally and on condition that security be given. Where, however, the presumption of death is stronger, the heirs are placed in the absolute possession of the property.

Whether the grant of the possession of the property or the exercise of eventual rights be provisional or absolute, it may only be made by the Court since it must be judicially ascertained whether the conditions prescribed by law concur or not. Moreover, the interest of the absentee, if he is still alive, and those of his heirs, whenever the exact date of his death is established, must be protected.

The succession of an absentee is deemed to be open as from the day on which he was last heard of. Consequently, the testamentary heirs must be alive on that day; otherwise the dispositions made in their favor will lapse. In intestate succession regard is that to the said day in order to establish who are the heirs-at-law of the absentee. If, however, the time of the death of the absentee is established, his succession will become open in favor of such persons as at that time were his testamentary heirs or heirs-at-law, or of their successors; and the persons who have had the enjoyment of the property will be bound to restore it, together with the fruits (Section 258).

As to the place, the succession is deemed to have become open in the island where the absentee last resided (Section 241).

The persons entitled to demand the possession of the property are those in whose favor the succession of the absentee would have become open by reason of death. Consequently, the Court will have to ascertain, before granting such possession, whether the absentee has made any will, and, if he had, to examine its contents. The Court may order the opening of any secret will, or declare accessible any public will, upon the application of any person interested made after the lapse of three continuous years from the day the absentee was last heard of, or of six years, if the absentee has left an attorney to manage his property (Section 241). Where, however, a curator has been appointed the said application may not, even though the said times may have lapsed, be made before the expiration of one year from the appointment of the curator

(Section 241), The demand is made to the Court of Voluntary Jurisdiction of the island where the absentee last resided. Upon such application the Court will direct that the edict he published and posted as provided in Section 242, calling upon any person having information respecting the absentee to communicate such information to the Court, through the Registrar (Section 242).

After the lapse of six months from the publication of the edict the Court, in default of any information respecting the absentee, will, by a decree, order opening of any secret will, or, as the case may be, declare accessible any public will which the absentee ; may have made (Section 213).

1. Of Provisional Possession.

Where the will does not contain any institution of heir, such persons as would have been the heirs-at-law of the absentee, if he had died on the day he was last heard of, or their heirs, may make a demand to the Court that they be vested with the provisional possession of the property (Section 245). Where there is no secret or public will, such demand may be made immediately upon the expiration of the times respectively established in Section 241 (Section 246).

The testamentary heirs of the absentee, or their heirs, may, by a writ of summons against the attorney or curator of an absentee, if any, and against such persons as would have been the heirs-at-law of the absentee if he had died on the day on which he was last heard of, or their heirs, demand before the competent Court to be vested with the provisional possession of the property.

As to heirs at law, therefore, whether they are heirs-at-law because there is no will or because the will does not contain an institution of heir, may make the demand by way of application to the Court of Voluntary Jurisdiction, The testamentary heirs must make the demand in contestation with the persons mentioned, above, and before the competent Court.

The Court of Voluntary Jurisdiction, however, before giving the decree, will order the publication of another edict, similar to that which is published prior to the opening of a secret will or to the declaration that a public will is accessible, which edict must be published and posted up twice, with an interval of at least one month, unless a curator has already been appointed. After the lapse of six months the Court will give the requisite decree. The said time, in case a curator has not been appointed, will run from the second publication of the edict.

When the demand by the heirs to be vested with the provisional possession of the property has become competent, even though no such demand may have been made by them, the legatees, donees, and all other persons having rights on the property of the absentee depending on his death, may, by writ of summons against the testamentary heirs or heirs-at-law, as the case may be, and the attorney or curator, if any, demand to be allowed to exercise such rights provisionally (Section 248).

The spouse of the absentee, in addition to what is due to him or her in virtue of the marriage contract, or by succession or by any other title according to law, may, in case of need, demand an allowance for maintenance, to be fixed according to the condition of the family and the amount of the estate of the absentee (Section 251). The absentee may, in fact, be still alive, and, if so, he or she would be bound to provide maintenance to his or her spouse.

The effects of the grant of provisional possession or of the exercise of eventual rights, refer to the administration of the property, the enjoyment of the fruits, and the representation of the absentee.

The persons vested with the provisional possession of the property of the absentee do not become the owners thereof, and may not, therefore, without the authority of the Court, alienate or hypothecate the immovable property, or perform any act other than of ordinary administration (Section *254)*. Moreover, they may not appear in Court in their own name, but as representatives of the absentee.

As to the fruits, where the person vested with provisional possession or allowed to exercise his eventual rights is an ascendant or descendant or the spouse of the absentee, he will retain all the fruits for his own benefit. Where the said person is a relation of the absentee within the sixth degree, he will be bound to reserve, during the first ten years, a fifth part of the fruits, and subsequently, up to thirty years, a tenth part thereof, where the said person is a relation in a more remote degree, or a stranger, he will be bound to reserve, during the first ten years, a third part of the fruits, and subsequently, up to thirty years, a sixth thereof. Such reservations are made in favor of the absentee, in the event of his return, or in favor of his heirs, in case the day of his death is established.

The obligations of the said person are:- To give security "de bene utendo et fruendo"; to make up an inventory; and to reserve a part of the fruits as aforesaid, The legatees, donees and other persons having rights depending upon the death of the absentee are not bound to draw up an inventory, since they are vested with the possession of specified property or allowed to exercise particular rights.

Provisional possession ceased in the following cases:-

1. If the absentee returns or it is proved that he is alive. The person having property belonging to the absentee in his possession will be bound to restore it or its value in case of movables which he may have alienated. The same applies to the fruits collected after the return of the absentee, as well as to the fruits which the possessor may have been bound to reserve. The Court will give the necessary directions, in respect of the administration of the said property, until this is provided for by the absentee himself (Section 257).

1. if the time of the death of the absentee is established; in which case his succession will become open in favor of such persons as at that time v/ere his testamentary heirs or heirs-at-law, or of their successors; and the persons who may have had the enjoyment of the property will be bound to restore it, together with the fruits, as provided in sub-sections (2) and (3) of Section 235 (Section 258).

2. If any person proves that, at the time of the grant of provisional possession, he had a prior or equal right to that of the possessor. In this case it will be lawful for such person to exclude the possessor from such possession, or to cause himself to be associated therein. The said person, however, will only be entitled to such fruits as will accrue from the day of the judicial demand (Section 256).

2. Of Absolute Possession.

If the absentee has continued for thirty years since provisional possession has been granted, the Court of Voluntary Jurisdiction will, upon the demand of the parties interested, make an order granting absolute possession of the property and the absolute exercise of eventual rights, discharging the securities, and directing any other caution which may have been imposed to cease (Section 260)•

The same order, or, as the case may be, the declaration of the opening of the succession, may also be made, even though no curator may have been appointed nor provisional possession granted, in each of the following cases:-

(a) if one hundred years since the birth of the absentee, and at least three years since the last news of him, will have elapsed;

(b) if eighty years since the birth of the absence and at least ten years since the last news of him, will have elapsed.

The effects of absolute possession are:-

1. The persons vested therewith or allowed the absolute exercise of eventual rights, become the owners of the property and may dispose freely thereof,

2. The said persons may proceed to final partitions of the property,

3. They will retain all the fruits, and will not be bound to reserve any part thereof,

4. Where absolute possession is preceded by the grant of provisional possession all securities are discharged.

Absolute possession ceases in the following cases

1. If the absentee returns, or it is proved that he is still alive. The absentee will recover his property in the state in which it may be, and will be entitled to the priceof such property as has been disposed of, if such price is still due, or to the property in which such price may have been invested (Section 265).

2. if the time of the death of the absentee is established, Such persons as, at that time, were his heirs or legatees, or were vested with any right in consequence of the death, or their successors, may bring

the actions competent to them, saving the rights which the possessors may have acquired by prescription, and the effects of good faith in regard to the fruits collected (Section 265).

Section 264 provides as follows: The legitimate or illegitimate children or descendants of the absentee may, likewise, within the time prescribed in Section 885 to be reckoned from the grant of absolute possession or from the day on which the declaration of the opening of the succession may have been obtained, enforce their rights on the property of the absentee according to the rules laid down in the last preceding Section, without binding bound to prove his death".

The said rights refer to the legitim or other portion saved by law: and Section 885 refers to the limitation of the action for demanding an inheritance, or a legacy, or the legitim, or other "portio legitima".

Transitory Law

It is commonly held that in order to establish the effects of the acquisition of an inheritance, and whether an inheritance has or ha$ not been acquired, regard is to be had to the law in force at the time in which the succession is opened. In fact, regard cannot be had to the law in force at the time the will was made, in respect of testate succession, since a will is a unilateral and revocable act which produces no effect except as from the day on which the succession opens. Nor should regard be had to the law force at the time of the acceptance of the inheritance, because, although an inheritance is not acquired unless it is accepted, the right to acquire an inheritance arises as soon as the inheritance devolves and in virtue of such devolution, and the acceptance of the inheritance is merely the exercise of such right.

However, Section 624 provides that "The provisions of this Code shall not supersede any other law previously in force with regard to any testamentary instrument made before the 11th of February, 1870, even though on such date the disponer may bave been still alive; if any such instrument is not valid according to such other law it may, unless it is revoked by the disponer, be maintained under the provisions of this Code, provided it satisfies the requirements thereof.

The principle thus established is that the law to be observed is that in forwe at the timo the will was made, in the first part of Section 624 the law derogated from the principle commonly upheld "by jurists in order to maintain the validity of wills creating entails or containing other dispositions intended to ensure the preservation of the property in the family, in conformity with the ideas current at the time the law was promulgated.

In the second part of the same Section the law maintains the validity of wills which, though not valid under the law previously in force, satisfy the requirements of the law in force at present.

The law, therefore, which governs succession is that in force at the time when the succession is opened, saving, under our law, the provisions of Section 621+.
As to the application of the said principle, Jurists - distinguish between testate, intestate and conventional succession.

1. Testate Sucession.

As to the capacity of making a will, it is evident that a person making a will under the new law must be capable under the provisions of the said law, since, until it is made, the right to make a will is merely potential. The difficulty arises where the law changes after the will is made but before the succession opens.

The prevailing opinion is that suggested by Gabba, according to whom the testator must have been capable at the time of the will and must be capable under the new law as well. If, he says, the testator was incapable under the law in force when the will was made, the will was null, and may not be made valid by the new law under which the testator is capable of making a will. Conversely, if he was then capable but becomes incapable under the new law, the will is equally null, since the only vested right to which the testator may claim refers to the form of the will. Under our present law, however, the provisions of Section 624 apply.

As to the capacity of receiving by will, regard must be had to the law in force at the time of the devolution, since it is b3r effect of devolution that the right to succeed arises.

As to the forms of wills, regard must be had to the law in force at the time when the will was made. Herd again Section 624 is applicable.

As to the right of disposing by will or by donation, regard must be had to the law in force at the time of the opening of the succession. Before the succession opens, in fact, the persons entitled to the legitim or other portion saved *by* law have *a* mere eventual right. It is, therefore, this law which establishes the persons entitled to the said rights, the conditions of dispersion, and the consequences of an Infringement of the said rights. Section 632 (2) however, provides that the provisions of this Section shall not supersede the provisions contained in Sections 12 and 13. Ch.1, Bk.3 of the Municipal Code of Malta, with regard to children born from marriages contracted before the 11th February, 1870, according to the custom referred to in that Code, in which case the provisions of such Code shall apply". The reason being that the rights, in this case, arise out of a contract and not out of a will.

As to the contents of the will, the law which should apply is that in force at the time of the devolution, because it is then that the will takes effect. Consequently, if a particular disposition is valid under the said law, it will stand notwithstanding any subsequent change in the law this rule? however, documents not apply to dispositions which are to last either in perpetuity or for a considerable time* Aguessan, referring to the abolition of entails, said: ''Man has no right to bind posterity forever if he attempts to do so, he exceeds his rights and claims equality with the legislator"* Nay, not even the legislative power, as Gabba rightly points out, may so bind posterity. The same rule applies to contracts creating similar rights. In fact, entails have been abolished, even with retrospective effect, by several modern Codes.

As to the effects of testamentary dispositions, regard must be had to the law in forco at the time of the devolution, since the right to succeed, and the rights consequent thereon;- arise by effect of devolution. What if, in the case of a conditional disposition, the law changes after the devolution but before the condition is fulfilled. It is generally held that any change in the law; made "pendente conditi one" does not operate retrospectively, because, although "pendente conditiene" the person benefitted conditionally does not acquire a vested right, he is however entitled to claim that "eveniente conditione", the disposition should produce its effects; and he acquires such right by effect of the devolution.

2. Intestate Succession.

The law in force at the time of the devolution of the succession determines who are the heirs-at-law, whether they succeed in their own right or by right of representation, as well as the share in the inheritance to which they are .entitled. There is only one exception and it is established by Section 868, which runs as follows: "The rights of succession mentioned in Sections 861 and 865 (which refer to the rights competent to the surviving spouse) shall not be competent to the surviving spouse, if the marriage was contracted before the 11th February, 1870, without a written instrument, and the merger and tripartition of property referred to in the Code de Rohan, had taken place, in which case the provisions of that Code shall be observed".

3. Conventional Succession,

Where any change in the law takes place after the contract is made and before the succession opens, regard is had to the law in force at the time of the contract, on the ground that rights arising out of a contract become vested as soon as the contract is perfected.

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