Instituto de Cooperação Jurídica da Faculdade
de Direito da Universidade de Lisboa

O Direito da Família e das Sucessões no Código Civil Português de 1867: Uma Perspectiva do Século XXI

Family and Succession Law in the Portuguese Civil Code of 1867: A 21st Century Approach

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APRESENTAÇÃO

Entre os países e territórios em que presentemente se desenvolvem as actividades de cooperação promovidas pela Faculdade de Direito da Universidade de Lisboa através do seu Instituto de Cooperação Jurídica inclui-se Goa.

Aí se encontram ainda em vigor, por determinação legal emanada em 1962 do Parlamento da Índia, as disposições do Direito da Família e das Sucessões constantes do Código Civil português de 1867, bem como de diversa legislação complementar deste.

Esta circunstância, aliada ao interesse pelo Direito português manifestado por muitos juristas locais e à escassez de literatura sobre aquele Código disponível em língua inglesa, justificava a publicação de uma obra que contivesse não apenas os mencionados textos legais, em português e inglês, mas que incluísse também uma introdução e comentários às respectivas disposições, reflectindo uma perspectiva actual acerca das mesmas.

É essa obra, preparada pelo Prof. Doutor Jorge Duarte Pinheiro e pelos Mestres António Sol, Miriam Brigas, Paula Barbosa e Daniel Morais, Assistentes da Faculdade de Direito da Universidade de Lisboa, que agora se apresenta ao público, em edição da Associação Académica da Faculdade tornada possível graças ao patrocínio do Instituto Português de Apoio ao Desenvolvimento e do Montepio Geral.

Possa esta iniciativa corresponder ao aludido interesse e assim contribuir para a preservação dos laços culturais centenários que – também no plano jurídico – unem Portugal e Goa: tal o voto que aqui se deixa consignado.

Lisboa, Dezembro de 2008.

Dário Moura Vicente
Professor da Faculdade de Direito da Universidade de Lisboa
Presidente do Instituto de Cooperação Jurídica

PRESENTATION

Among the countries and territories in which the cooperation activities promoted by the Law School of the University of Lisbon through its Institute for Juridical Cooperation are presently being carried out is Goa.

The Family and Succession Law provisions contained in the Portuguese Civil Code of 1867, as well as in several complementary legal texts, are still in force there, by virtue of an Act emanating from the Indian Parliament in 1962.

This fact, as well as the interest in Portuguese law expressed by many local jurists and the scarcity of literature on that Code available in English, justified the publication of a work that would not only contain the said legal texts in Portuguese and English, but that would also include an introduction and a commentary to the respective provisions, reflecting a modern approach to the latter.

Such a work, prepared by Prof. Dr. Jorge Duarte Pinheiro and by Drs. António Sol, Miriam Brigas, Paula Barbosa and Daniel Morais, Assistant Lecturers of the Law School of the University of Lisbon, is now published by the Associação Académica da Faculdade, thanks to the support of Instituto Português de Apoio ao Desenvolvimento and of Montepio Geral.

It is our wish that this initiative will correspond to the interest mentioned above and thus contribute to the preservation of the cultural links that – also in the legal field – have for centuries united Portugal and Goa.

Lisbon, December 2008.

Dário Moura Vicente
Professor of the Law School of the University of Lisbon
President, Institute for Legal Cooperation

ABREVIATURAS/ABBREVIATIONS

AAVV – autores vários/various authors
al. – alínea/paragraph
als. – alíneas/paragraphs
art. – artigo/article
arts. – artigos/articles
cfr. – confira/see
cit. – citado(a)/quoted
DL – Decreto-Lei/Decree-Law
ed. – edição/edition
e.g. – "exempli gratia"= por exemplo/for instance
et seq. – et sequent/and following/e seguinte(s)
i.e. – "id est"= isto é/that is
n/d – no date/sem data
nº – número/number
nºs – números/numbers
ob. – obra/work
p. – página/page
pp. – páginas/pages
p.e. – por exemplo/for instance
reimpr. – reimpressão/reprint
s. – seguinte/following
ss. – seguintes/following
s/d – sem data/no date
vd. – vide/see
vol. – volume

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INTRODUCTION

1. Most of Portuguese Family and Succession Law is currently found in the Civil Code of 1966, adopted by Decree-Law no. 47.344, of November 25th, 1966, and substantially revised by Decree-Law no. 496/77, of November 25th. However there were many more changes to the Code after 1977: in the fifteen years that followed, and regarding Family Law alone, there were 18 revisions of the Civil Code, some of which were quite significant[1]. In certain areas, such as adoption, not a single article of the original 1966 version survived. Additionally, between 1999 and 2006, legislation was adopted on the protection of endangered children and youth, cohabitation without marriage, sharing of the same household and assisted reproduction. This legislation was not included in the Code of 1966.

In 2003, the Portuguese government expressed an interest in initiating an overall reform of Civil Law, based on two reasons: the "discomfort created by the successive laws that hollowed out the Civil Code", and the "awareness of the fact that, although certainly a masterpiece of civil law science, the Civil Code has aged somewhat"[2]. In one of the studies drawn up for this purpose, it is stated that Family Law "is in total disarray"[3]. Despite the reforms that have taken place in Succession Law, it was also noted that there has been a "strange

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[1] See, e.g., HEINRICH EWALD HÖRSTER, "Evoluções legislativas no Direito da Família depois da Reforma de 1977", in AAVV, *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, vol. I, *Direito da Família e das Sucessões*, Coimbra, Coimbra Editora, 2004, pp. 63 et seq.

[2] See MINISTÉRIO DA JUSTIÇA, *Reforma do Direito Civil: Relatórios Preliminares*, Coimbra, Almedina, 2005, p. 5.

[3] See CARLOS PAMPLONA CORTE-REAL, "Anexo ao Relatório Preliminar da Faculdade de Direito da Universidade de Lisboa", in Ministério da Justiça, *Reforma do Direito Civil: Relatórios Preliminares* (quoted *supra* in footnote 2), p. 50.

quietness regarding the evolution of the actual *types of wealth*" in this field, which is therefore in urgent need of renewal[4].

However, the natural dissatisfaction of men, lawyers and common citizens has led to changes which, paradoxically, do not improve their opinion of reality and of the respective legal framework once implemented. The law keeps being revised, but the dissatisfaction remains or increases.

The societies of the American and European continents, including the Portuguese society, have a *phobia against falling behind*. This leads them to react today to their perception of the likely tomorrow. My study of academic works in the field of Family Law has led me to conclude that doctrine reveals a certain prejudice, a certain arrogance regarding the past. One often finds references to the present time as one of authenticity and freedom, as opposed to other times, not so remote, that are thought to have been *immersed in a sea of hypocrisy and repression*. Many of these texts suggest that we are headed for a *paradise of human relations*, although, at the same time, this is denied by contemporary feelings and statistical data.

It is believed that the existing Family and Succession Law is no longer suitable and that it must be profoundly modified. However it might be worthwhile to pause and think so as to avoid rushing into possibly ineffective changes.

In the 21st century, the Solomonic saying that "there is nothing new under the sun"[5] still holds true. At the end of the 20th century, a Swiss professor brilliantly demonstrated that the alleged current values of Matrimonial Law (individualism, freedom, equality and

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[4] See CARLOS PAMPLONA CORTE-REAL, *Direito da Família e das Sucessões: Relatório apresentado no concurso para professor associado*, supplement to Revista da Faculdade de Direito da Universidade de Lisboa, Lisboa, Lex, 1996, pp. 121-122, 128-129.

[5] "Nil novi sub sole", words of Solomon in *Ecclesiastes* I, 10.

eudaimonism) in fact have very old roots, going back, at least, to the 17th century[6].

With so much discussion of reform, evolution and transformations, it is not deemed wise to ignore the past and its lessons. Hence our proposal to *rediscover the Family Law and Succession Law of the Portuguese Civil Code of 1867*.

2. With the entry into force of the Civil Code of 1966, on 1 June of 1967, all previous civil legislation was revoked[7]. Thus, with occasional exceptions (namely due to the rules on succession of laws), young and middle-aged Portuguese jurists never worked with the Civil Code of 1867 or with the remaining civil legislation applied until the 1st of June of 1967.

However, the previous civil legislation deserves to be known. The Code of 1867 represented the first Portuguese codification of Civil Law; it took the Portuguese Civil Law existing at that time and adapted it to the technical-legal and ideological changes of the 19th century; it was applied in Portugal and in the territories under Portuguese administration for almost a century; it shaped the doctrine and jurisprudence during its time; naturally, it influenced the drafting of the following Code of 1966, and the remaining legal framework developed around it; its provisions of Family and Succession Law are still applied in Goa, a State of the Republic of India.

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[6] ALFRED DUFOUR, *Mariage et société moderne (Les ideologies du droit matrimonial moderne)*, Éditions Universitaires Fribourg Suisse, 1997, particularly p. 7: it is believed that the "distinctive features of the contemporary evolution of the legal regime of modern marriage is the exclusive result of the intellectual evolution of the 20th century; however, "libertarian individualism, equality and eudaimonism have been developed since the end of the 17th century, taking on a systematic doctrinal form in 18th century legal rationalism (*Vernunftrecht*), and entering the legal framework for the first time with the French Revolution"; and the intellectual basis of these values are more complex and partially older, associated with scholastic thinking, legal-naturalist thesis and canonical doctrine.

[7] See articles 2(1) and 3 of Decree-Law no. 47.344, of 25 November , 1966.

In Portugal, the relevance of the Civil Code of 1867 is indisputable. However, its influence is not limited to the territory currently consisting of the western part of the Iberian Peninsula and the archipelagos of the Azores and Madeira. The Code was applied in the so-called overseas provinces, i.e. the territories of Cape Verde, São Tomé and Príncipe, Guinea-Bissau, Angola, Mozambique, Goa, Daman, Diu, Macau and East Timor.

Furthermore, one should not forget that the Code's influence extended beyond the territory under Portuguese administration. The Civil Code of 1867 has a much wider significance which has not been acknowledged, partly due to the language barrier issue. Of course, some extremely enthusiastic opinions were expressed, such as that of the illustrious Portuguese jurist Dias Ferreira[8], but these are not necessarily objective.

Other opinions, however, are more relevant. One such opinion was that of Teixeira de Freitas, a major figure of Brazilian civil law science, who, despite having profoundly criticised the draft Code, admitted that it was a great work, the result of the efforts of a man (António Luís de Seabra, later known as the Viscount of Seabra) of "powerful intelligence" and "extensive knowledge"[9]. Another such opinion was expressed by Cunha Gonçalves, of Goa, "doubtlessly, one of Portugal's most remarkable lawyers from the first half of the [20th] century"[10]; while being clear about his profound admiration

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[8] See DIAS FERREIRA, *Elogio histórico do Visconde de Seabra*, Lisboa, Imprensa Nacional, 1895, p. 27: "Our civil code rivals the best codes of Europe and America, both old and modern. Neither the French nor the Italian civil code are superior to it, nor is the Spanish one, even though it is twenty years younger. The code is destined to govern the Portuguese nationality for centuries".

[9] See TEIXEIRA DE FREITAS, *Nova apostila à censura do senhor Alberto de Morais Carvalho sôbre o Projecto do Código Civil português*, Rio de Janeiro, Tipografia Universal de Laemmert, 1859, particularly pp. 6, 12, 34, 76 and 129.

[10] In the words of another great Portuguese legal specialist, Antunes Varela, in the foreword to PIRES DE LIMA/JOÃO DE MATOS ANTUNES VARELA, *Fundamental Concepts of Civil Law/Noções fundamentais de Direito Civil, Lectures to The 1st Year Course of 1944-*

for the German Civil Code, this author regarded the Portuguese Civil Code as "one of the best in the civilized world"[11].

Outside of the Portuguese speaking world, we may mention the opinions of two famous German comparatists, Zweigert and Kötz, who highlighted the originality of the Portuguese Code of 1867 in relation to the French Civil Code[12]. This same feature is underlined by the prestigious Spanish jurist Castan Tobeñas, who quotes his fellow countryman, Moneva, in describing the Portuguese Code as being the "most rationally drafted of all existing Codes"[13].

Therefore, several reasons justify a republication and reappraisal of the Portuguese Civil Code of 1867, not only in the Portuguese language, but also in English, today's main international language.

Since it would be impossible to make a detailed analysis of the entire Code at once, it was decided to begin with the rules relating to family and succession, considering the reasons described above, in the first paragraph of this introduction. There is one further reason for this choice: the most debated aspect of the draft Code was an issue of Family Law: *the issue of civil marriage*[14]. A *pluralistic* solution was finally arrived at, in a manner similar to the great reforms of

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45 (*Family Law and Succession*) / *Lições ao Curso do 1º ano jurídico de 1944-45* (*Família e Sucessões*), bilingual edition of 1997, sponsored by the Fundação Oriente and the Ordem dos Advogados, p. 17.

[11] CUNHA GONÇALVES, *Tratado de Direito Civil em comentário ao Código Civil Português*, vol. I, Coimbra Editora, Coimbra, 1929, pp. 121 and 5 , respectively. On the cosmopolitan nature of this author, see F. E. NORONHA, "Cunha Gonçalves", *Revista da Ordem dos Advogados* 1998, pp. 14-15.

[12] See KONRAD ZWEIGERT / HEIN KÖTZ, *Introduction to Comparative Law*, reprint of the 2nd edition (1987) translated from German (*Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 2nd ed., 1984) by Tony Weir, Oxford, Clarendon Press, 1993, p. 111.

[13] See CASTAN TOBEÑAS, *La ordenación sistemática del Derecho Civil*, Madrid, Instituto Editorial Réus, 1954, pp. 47 and 48

[14] See PIRES DE LIMA / ANTUNES VARELA, *Noções fundamentais de Direito Civil*, vol. I, 4th ed., Coimbra, Coimbra Editora, 1957, p. 120, footnote; ALMEIDA COSTA, *História do Direito Português*, reprint of the 3rd ed. of 1996, Coimbra, Almedina, pp. 435-436.

Family Law that would be introduced a century later in Western Europe and in the United States of America, with the aim of rendering Family Law more flexible. The Portuguese Civil Code of 1867 did not follow the French Civil Code, which only grants civil effects to non-religious marriage, nor did it retain the previous solution of only recognising marriages carried out according to the rules of Canon Law. Instead, it adopted a dualist marital system, allowing both Catholic and civil marriages.

3. Since one of the objectives is to divulge the Code beyond the Portuguese speaking community, through the use of English, it is convenient to make a brief comparative presentation. Indeed, Portuguese is the official language of States with legal orders belonging to the continental or Roman-German legal system, while English is the official language of many States whose legal orders belong instead to the Anglo-American or common law system.

Both systems originate from Europe, their specificities deriving from a different historical evolution which we shall not discuss here[15]. What should be highlighted is that they are distinguished more by technical than ideological issues[16].

In essence, the Roman-German system (which includes French, German and Portuguese law) and the Anglo-American system (which includes English and American law) differ with regard to the perspective on sources of law, the method of resolving legal issues and the approach to specific legal issues.

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[15] On the genesis of the Roman-German and Anglo-American systems, see KONRAD ZWEIGERT/HEIN KÖTZ, *Introduction to Comparative Law* cit., pp. 76 et seq., 138 et seq., 187 et seq.; CASTRO MENDES, *Direito Comparado*, Lisbon, AAFDL, 1982-83, pp. 162 et seq., 245 et seq.

[16] On the distinction between the Roman-German and Anglo-American systems, see KONRAD ZWEIGERT/HEIN KÖTZ, *Introduction to Comparative Law* cit., pp. 63 et seq.; OLIVEIRA ASCENSÃO, *O Direito. Introdução e Teoria Geral*, 13th ed., Coimbra, Almedina, 2005, pp. 152 et seq.

The perspective on sources of law is the most important of these three distinguishing elements.

In the Roman-German system, the sources of law are: statute, custom, case-law and doctrine. However, these sources do not all carry the same weight. Statutes and custom are considered direct or immediate sources of law, i.e. ways of creating or forming legal rules. Custom, however, is granted a very limited role, with legal rules being created almost exclusively through statute. Doctrine and case-law are merely indirect sources of law, i.e. ways of revealing existing legal rules. In short, statutes hold the leading position and the courts' decisions are bound by them, as a result of which such decisions are not usually granted a generally binding effect. The judge must obey the law and is only bound by a decision of a superior court within the framework of an appeal.

The Anglo-American system differs significantly. Case-law is an immediate source of law, and it is indeed the main one, lying at the very basis of the structure of the Anglo-American system. Even though they are also an immediate source of law, statutes play a merely auxiliary or complementary role. The system is characterised by the so-called rule of precedent: a court's decision is binding on inferior courts, which are obliged to decide future cases according to the same *ratio decidendi*.

Naturally, these different views on the sources of law have an impact upon the method of resolving legal issues. In the Roman--German system, a deductive method is used. The interpreter starts from an ensemble of abstract, general rules, and applies these rules to specific cases. In the Anglo-American system, a case-by-case method is used. A decision is reached in a specific case by taking into account a decision issued in another case. This method is predominantly empirical, based on case-by-case developments.

Finally, the difference between the two systems is felt in terms of the approach to specific legal issues. The Anglo-American *trust*, for example, does not exist in the Roman-German system; and the dichotomy between Public and Private Law, a central distinction of

the branches of law in the Roman-German system, is unparalleled in the Anglo-American system.

Despite these differences, there is no fixed technical separation between the two legal systems. On the one hand, there are certain hybrid legal orders, which bring together aspects from both systems, such as those of Scotland (United Kingdom), Louisiana (United States of America), Quebec (Canada), South Africa and Goa (India)[17]. On the other hand, the classical legal orders of both systems have demonstrated a tendency to spontaneously become more similar to each other, with regard to their perspectives on the sources of law. In English and American law, we have witnessed a proliferation of statutes. In French, German and Portuguese Law, constant or uniform case-law tends to be followed by the courts, even though it is not technically binding. In these same legal orders, the law occasionally uses vague expressions (general clauses and undetermined concepts), thereby granting the judge considerable room for manoeuvre in finding the solution for a specific case. In German and Portuguese Law, the courts may refuse to apply laws which they deem incompatible with the Constitution. In Portugal, the Supreme Court was for some time granted the authority to impose legal interpretations, through so-called "*assentos*" (case-law creating judgments). In 1995, this authority was revoked[18], but there remains one type of judgment

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[17] The examples of Louisiana and Quebec are especially quoted (see, for all, KONRAD ZWEIGERT/HEIN KÖTZ, *Introduction to Comparative Law* cit., pp. 119-122). Regarding the hybrid nature of Scottish and South African law, see FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado*, 2nd ed., Coimbra, Almedina, 1998, p. 34. On the hybrid nature of the legal order of Goa, see CARMO D'SOUZA, "Family Laws of Goa - Proposals for Reform in View of Global Age" (last consulted on 21/11/2007 at "Biblioteca Digital *Ius Commune*", http://www.fd.ul.pt/ICJ/Iuscommune.asp): this designation refers to the situation of Family Law in Goa, as a branch of law composed of rules created within the Portuguese legal order, of the continental system, but applied in a part of the territory of the Republic of India, a federal State belonging to the Anglo-American system.

[18] By article 4(2) of Decree-Law 329-A/95, of December 12.

that constitutes an immediate source of law: judgments of the Portuguese Constitutional Court declaring the unconstitutionality of legal rules are fully binding.

4. The idea of a code is typical of the Roman-German system[19]. A code is a law and, as such, is included in this system's main source of law. However, Roman-German legal orders regard codes as being more than mere laws. A code regulates an entire branch of the law (or at least its main features) in a unitary and systematic manner.

A code is not a compilation or collection of laws. As was stated in the 19th century, it must follow the three Ss rule: it must be succinct, scientific and systematic. The code presupposes a division of issues guided by scientific criteria, so that the ensemble forms a coherent whole.

In this sense, codification "*was the formula found to ensure the concentration and dissemination of the law and the preferred instrument for making it the predominant source of law*"[20].

The success of codification in the Roman-German legal orders is explained essentially by three reasons[21]: a code's global, clear and organised formulation makes it easier to know the existing legal rules, thereby making the Law more certain and precise; a code's rational and logical structure prevents contradictions, helps to identify legal rules relevant for the solution of specific cases and stimulates scientific thought; in countries with multiple legal orders, a code allows for legal unification, thereby strengthening political unity.

5. In the Roman-German system, the most famous codes are the French Civil Code of 1804 ("*Code Civil des Français*"), or the Napoleonic

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[19] See CASTRO MENDES, *Direito Comparado* cit., p. 261.

[20] FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado* cit., p. 41.

[21] See PIRES DE LIMA/ANTUNES VARELA, *Noções fundamentais de Direito Civil*, vol. I, 4th ed., Coimbra, Coimbra Editora, 1957, pp. 115-116.

Code, and the German Civil Code of 1896 ("*Bürgerliches Gesetzbuch*", known as BGB), which are still in force, although they have undergone numerous revisions. Both codes had a profound influence on the Law of other States throughout the world. Nonetheless, their style and structure is significantly different. The importance of these two statutes and their differences led to a subdivision within the Roman-German system[22]: there is a French branch, grouping the French legal order and other legal orders whose Civil Law resembles the "*Code Civil*"; and there is a German branch, grouping the German legal order and other legal orders whose legislation is more similar to the BGB.

The "*Code Civil*" combines liberal individualism (which had triumphed after the recent French Revolution), the legal tradition of the north of France (characterised by Franco-German customary law) and the legal tradition of the south of the country (connected to a written law, descending from Roman law).

The first six articles of the French Civil Code make up a preliminary section, relating to the publication, the effects and the enforcement of laws in general. The remaining articles are divided into three books: Book I, on persons; Book II, on property and the different modifications of property; Book III, on the different modes of acquiring property. This division in three parts follows the ancient structure of Gaio's *Institutas*.

The Code is drafted in simple and elegant language, avoiding redirection and the use of overly technical terms. It is said[23] that this drafting style is largely due to Napoleon Bonaparte, who insisted on creating a law capable of being easily understood by non-jurists such as himself.

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[22] KONRAD ZWEIGERT and HEIN KÖTZ go even further, distinguishing two autonomous systems: the Roman and the German ones (see *Introduction to Comparative Law* cit., namely, p. 75).

[23] See KONRAD ZWEIGERT/HEIN KÖTZ, *Introduction to Comparative Law* cit., p. 85.

The Napoleonic Code inspired almost all the Civil Codes created in the 19th century, as well as those adopted by North African countries in the 20th century. In other former French colonies in Africa, the "*Code Civil*" remained essentially in force after these countries became independent[24].

The German Civil Code was drafted in a period that was calmer in social terms, after the reunification of Germany under Bismarck. Ideologically, this code parallels the French Civil Code in adopting liberal individualism, as can be seen from the importance given to contractual freedom and to property rights. However, the structure of the BGB does not follow the scheme of the *Institutas*, but rather that of eighteenth century German Pandectism (the school of thought to which Windscheid belonged, and who participated in the initial drafting of the BGB). The German Civil Code is structured as follows: Book I, General Part; Book II, Law of Obligations; Book III, Property Law; Book IV, Family Law; Book V, Succession Law.

The BGB is also different from the Napoleonic Code with regard to the drafting style. The German Civil Code often resorts to undetermined concepts and general clauses, it uses predominantly technical language, which is occasionally very abstract, and it uses many redirections. In other words, it is a text intended to be understood by jurists alone.

The BGB influenced the Swiss Civil Code of 1907, the Brazilian Civil Code of 1916, the Greek Civil Code of 1940 and the Italian Civil Code of 1942. The Russian Civil Code of 1964 also drew strongly from the German Code, even if purely in technical matters. Additionally, the *travaux préparatoires* of the BGB (which began in 1874) greatly influenced the Japanese Civil Code of 1898[25].

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[24] See FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado* cit., p. 51.

[25] See FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado* cit., p. 51.

6. The first Portuguese Civil Code[26], of 1867, belongs to the French branch of Roman-German codification, which was indeed the only one in existence at the time. Unlike the French and German Civil Codes, which were drafted by a committee, the Portuguese Civil Code of 1867 is the work of just one man – António Luís de Seabra, later the Viscount of Seabra. As a result, this code is known as the Code of Seabra.

The French Civil Code's influence on the creation of the Code of Seabra is visible in its ideological matrix, in its level of language and in many of its options. The Portuguese Code welcomed the ideas of liberal individualism and was written in a clear and graceful manner[27]. Its substance is similar to that of the French Code with regard to the age of majority, the fate to be given to the property of dissolved associations, the patrimonial effects of marriage, filiation, possession and obligations[28].

That being said, the influence of the French Civil Code on the Code of Seabra should not be exaggerated. It was simply the foreign Civil Code which most inspired the Portuguese Code of 1867[29]. Yet this code was not merely influenced by foreign Civil Codes. It also drew from the earlier Portuguese laws (such as the "*Ordenações Filipinas*", of 1603, and the legislation which followed and completed it – the so-

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[26] It should be noted, however, that the Civil Code is not the first Portuguese code, since it was preceded by the Commercial Code of 1833, drafted by Ferreira Borges.

[27] See "Discurso do Doutor Manuel A. Domingues de Andrade, Professor da Faculdade de Direito de Coimbra", delivered on the occasion of a homage to the late Visconde de Seabra, the text of which was published in the *Boletim da Faculdade de Direito* da Universidade de Coimbra, vol. XXVIII (1952), pp. 277 et seq. (p. 282 is particularly relevant in this context).

[28] See M. BARBOSA DE MAGALHÃES, "Le Code civil français et son influence en Europe – Portugal", in *Travaux de la semaine internationale de Droit (Paris, 1950). L'influence du Code civil dans le Monde*, Paris, Éditions A. Pedone, 1954, pp. 647 et seq.

[29] See M. BARBOSA DE MAGALHÃES, "Le Code civil français et son influence en Europe – Portugal" cit., p. 636.

-called "extravagant laws"), as well as from the works of Portuguese academics from the first half of the 19th century (such as Coelho da Rocha's "*Instituições de Direito Civil Português*", of 1844; and Correia Teles' "*Digesto Português*", published in 1835)[30].

In truth, the Code of Seabra was more strongly influenced by national factors (deriving from tradition or from local manifestations of legal-rationalism) than by the "*Code Civil*". It adopted different solutions from the French ones, *inter alia* regarding the beginning and extinction of legal personality, marriage contracts (except for their patrimonial effects), succession issues and property rights[31]. Other differences can be seen in the inclusion of several institutes absent from the Napoleonic Code (e.g., collective personality – i.e. for legal persons – and ownership of literary, artistic and scientific creations)[32].

However, the most famous unique feature of the Portuguese Civil Code of 1867 is its structure, which is neither that of the *Institutas* nor that of Pandectism. The code is divided into four parts: Part I, on civil capacity; Part II, on acquiring rights; Part III, on property rights; and part IV, on damage to rights and their repair.

As was stated by an illustrious academic[33], the titles of these parts "reflect an approach in which the French code's relationship between Man and the world (static and existential), is replaced by a dynamic and technical approach to the rights of Man ("capacity", "acquiring rights", "damage to rights")".

As the author himself explained[34], the individual is the point of departure for this scheme. Indeed, the structure of the Code of

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[30] See LUÍS CABRAL DE MONCADA, *Lições de Direito Civil. Parte geral*, reprint of the 4th ed., Coimbra, Livraria Almedina, 1995, pp. 119-120.

[31] See M. BARBOSA DE MAGALHÃES, "Le Code civil français et son influence en Europe – Portugal" cit., pp. 647 et seq.

[32] See FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado* cit., p. 49.

[33] FERREIRA DE ALMEIDA, *Introdução ao Direito Comparado* cit., p. 49.

[34] See SEABRA, *Novíssima apostila em resposta à diatribe do Sr. Augusto Teixeira de Freitas contra o Projecto de Código Civil Português*, Coimbra, Imprensa da Universidade, 1859.

Seabra outlines the life of an individual under the law[35], first looking at the individual himself (Part I), then at his acquisition of rights (Part II), at his enjoyment of those rights (Part III), and finally at his defence of those rights (Part IV).

7. The Portuguese Civil Code of 1867 was in force in Portuguese territory (on the European continent and adjacent islands) between 22 March 1868 and 31 May 1967[36]. Starting from 1 July 1870, it was also in force in the so-called overseas provinces (territories of Cape Verde, São Tomé and Príncipe, Guinea-Bissau, Angola, Mozambique, Goa, Daman, Diu, Macau and East Timor), except with regard to the following practices and customs[37]: "a) In India, the practices and customs of the New Conquests and those of Daman and Diu, collected in the respective codes, and insofar as they do not run counter to public order and morality; b) In Macau, the practices and customs of the *Chins* in the disputes under the authority of the prosecutor for Chinese affairs; c) In Timor, the practices and customs of the indigenous population in disputes between them; d) In Guinea, the uses and customs of the gentiles called *Grumetes* in disputes between them; e) In Mozambique, the practices and customs of the *Baneanes*, *Batiás*, *Parses*, Moors, gentiles and indigenous population in disputes between them". Nonetheless, the Code would be fully applied if the parties benefiting from the exception chose to apply it[38]. At the same time, it was prescribed that "marriages carried out according to the religious rites of non-Catholic parties produced all the civil effects recognised by the Code for Catholic and civil marriages"[39].

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[35] See LUÍS CABRAL DE MONCADA, *Lições de Direito Civil. Parte geral* cit., p. 121.

[36] See article 1 of the Legal Charter of 1 July 1867 (and the clarification by PIRES DE LIMA/ANTUNES VARELA, *Noções fundamentais de Direito Civil* cit., p. 119) and articles 2 and 3 of Decree-Law 47.344, of 25 November 1966.

[37] See articles 1, 2 and 8 of the Decree of 8 November 1869.

[38] See article 8, §2, of the same Decree of 8 November 1869.

[39] Article 4 of the above mentioned Decree of 8 November 1869.

However, the original text of the Code of 1867 did not survive unchanged for the almost 100 years during which it was in force. Parts of it were revised several times, as well as completed and revoked, explicitly or tacitly. The main subsequent Civil laws were the following[40]: the Decree of 3 November 1910 (Divorce Act), relating to marriage, which introduced the possibility of divorce; Decree no. 1 of 25 December 1910 (Act on Marriage as a Civil Contract), through which civil marriage became the only legally recognised form of marriage; Decree no. 2 of 25 December 1910 (Protection of Children Act), which revised the Civil Code with regard to filiation, allowing the acknowledgment of adulterous children and extending the possibility of investigating illegitimate paternity; the Decree of 16 December 1930 (Reform of the Civil Code), which revised some 200 articles of the Code of 1867; the Code of Civil Procedure of 1939 (adopted by Decree no. 29.637, of 28 May 1939), particularly its rules relating to inventory proceedings; and the Concordat with the Holy See, of 25 July 1940 (articles XXII to XXV), which gave civil effects to Catholic marriages carried out before or after the Concordat (this would later be confirmed by Decree no. 30.615, of 25 July 1940), excluded the possibility of dissolution of such marriages by divorce, when carried out after the Concordat, and granted the ecclesiastic courts and authorities jurisdiction to assess the validity of Catholic marriages and for the dispensation of non-consummated marriages.

The above mentioned laws were also in force in non-European territories under Portuguese administration. Decree no. 19.943, of 25 June 1931, explicitly foresaw the applicability to the colonies of the revisions of the Civil Code adopted by the Decree of 16 December 1930 (Reform of the Civil Code); this enforcement did not preclude "practices and customs preserved by law or special acts, except when the parties choose to apply the Code" (articles 1

[40] See LUÍS CABRAL DE MONCADA, *Lições de Direito Civil. Parte geral* cit., pp. 129-132.

and 2 of Decree no. 19.943). In accordance with Order no. 9.677, of 30 October 1940, the Code of Civil Procedure of 1939 was applicable in all colonies starting from 1 January 1941, with some adaptations required by local specificities. Decree no. 35.461, of 22 January 1946, regulated the application in the colonies of article XXII of the Concordat of 1940, which granted civil effects to Catholic marriages.

Aside from all these statutes, the contribution made to civil law by case-law creating judgments should not be forgotten. While the Portuguese Civil Code of 1867 was in force, these special Supreme Court judgments, settling conflicts in the jurisprudence, were an immediate source of law, according to article 66 of Decree no. 12.352, of 22 September 1926, and articles 763 et seq. of the Code of Civil Procedure of 1939[41].

8. On 1 June 1967, the Civil Code of 1867 and associated legislation was replaced by the current Civil Code, adopted by Decree-Law no. 47.344, of 25 November 1966[42]. However, to this day, Portuguese Family and Succession Law under the previous Civil Code remains in force in the State of Goa (the territories of Goa, Daman and Diu were integrated into the Republic of India, on 19 December 1961).

With the Civil Code of 1966, there was a fundamental change from the perspective of Comparative Law: the Portuguese legal

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[41] See ALBERTO DOS REIS, *Código de Processo Civil*, vol. VI, articles 721 to 800, reprint, Coimbra, Coimbra Editora, 1985, pp. 237-238, which explains the system of case-law creating judgments thus: "In the case of conflicting case-law, as a result of the Supreme Court having adopted opposite solutions for the same legal issue, the defeated party in the judgment not yet in a condition of *res judicata* has the right to appeal, based on the differing judgments. This appeal shall be judged by the plenary court; and the case-law established by such judgment shall henceforth be binding on the lower courts and on the Supreme Court itself, unless it is modified by another judgment also issued by the plenary court".

[42] See the first three articles of the Decree-Law in question.

system moved from the French branch to the German branch of the Roman-German system[43].

The structure and style of the Civil Code of 1966 are similar to those of the BGB. On the one hand, the Portuguese code accepts the Pandectistic structure, adopting the following scheme: Book I, General Part; Book II, Law of Obligations; Book III, Property Law; Book IV, Family Law; and Book V, Succession Law. On the other hand, this code is strongly conceptual and analytical, occasionally very abstract and uses redirections and undetermined concepts. Therefore, it is not easily understood by persons without a legal education.

Many of the solutions adopted in the first two books of the Portuguese Civil Code of 1966 (General Part and Law of Obligations) were clearly drawn from the BGB. However, the BGB's influence does not extend to the remaining books of the Portuguese code. With regard to rights *in rem*, Family Law and Succession Law, the original version of the Code of 1966 generally continued the tradition of the Code of 1867. There was one difference, however, regarding marriage property regimes: the Code of 1966 replaced the regime of general communion of property (called "marriage according to the custom of the kingdom" in the Code of 1867) with that of the communion of acquired property as the default option.

After the Revolution of April 25, 1974, the Civil Code of 1966 was modified more than 30 times[44]. In the fields of Family Law and Succession Law, the main revisions were those of 1975 and 1977.

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[43] See the unequivocal position of ANTÓNIO MENEZES CORDEIRO, *Da modernização do Direito Civil*, I, *Aspectos gerais*, Coimbra, Almedina, 2004, pp. 51-53.

KONRAD ZWEIGERT and HEIN KÖTZ hesitate in including Portuguese Private Law within the French variant ("romanistic family") or within the German variant ("germanic family")– in *Introduction to Comparative Law* cit., pp. 111-112.

[44] See HEINRICH EWALD HÖRSTER, "Evoluções legislativas no Direito da Família depois da Reforma de 1977" cit., p. 63, which lists 29 changes in the period between 1978 and 2001 alone.

On 15 February 1975, an Additional Protocol to the Concordat between the Holy See and the Portuguese Republic of 7 May 1940 was signed. Article I of this Additional Protocol released Portugal from its commitment to refuse the possibility of divorce in Catholic marriages carried out after 1 August 1940. The Civil Code was revised by Decree-Law no. 261/75, of 27 May, in accordance with the said Protocol, with divorce being allowed for all those who married through the Catholic Church. Decree-Law no. 496/77, of 25 November, which adopted the Reform of the Civil Code, introduced significant changes: the age of majority was decreased from 21 to 18 years; the principle of equality between spouses was introduced, with several consequences – the dotal regime was abolished, and the family would henceforth be headed jointly by the husband and the wife, who were acknowledged to be in equal standing (e.g., in exercising a trade, in carrying out household chores and in managing the couple's property) –; the distinction between legitimate and illegitimate children was eliminated, implying, namely, the equal treatment of all children, regardless of whether they were born within or outside of wedlock, as their father's mandatory heirs; and the spouse's rights of succession were substantially strengthened, placing him or her at least at the same level as the deceased's children, both in intestate and in mandatory succession.

9. 140 years have elapsed since the approval of the Civil Code of 1867, 41 years since the approval of the Civil Code of 1966 and 30 years since its 1977 revision. We are now sufficiently distanced to make a non-emotional assessment of the Family Law and Succession Law that is no longer in force in Portugal.

The objective of this work is to carry out this assessment, albeit briefly. The following structure shall be used: an introduction (which is about to be concluded), a body of articles, and a short commentary.

The body of articles encompasses the articles of the original version of the Portuguese Civil Code of 1867, relating to Family Law and Succession Law, but also the legislation and case-law creating judgments (at the same hierarchical level as the legislation) which complemented or revised, expressly or tacitly, the articles of the original version of the Civil Code of 1867, up to the entry into force of the Portuguese Civil Code of 1966. Given the fact that this legislation is still in force in the State of Goa, we have also taken into account rules adopted specifically for this territory, before its integration into the Republic of India, which was recognised by the Portuguese State many years ago.

Generally, we have tried not to organise the different laws according to chronological criteria[45]. We considered it important for the reader to get a clear, more immediate perspective of both the original version of the Civil Code of 1867 and of the rules of Family Law and Succession Law in force immediately before the entry into force of the Portuguese Civil Code of 1966. Thus, we have divided the rules by subject. The articles relating to a specific subject include the provisions of the original version of the Code of 1867, as well as the case-law creating judgments and the part of the subsequent legislation relevant for the subject in question. For example, regarding the issue of "legal incapacity as a result of being a minor and how to overcome it", articles 97 to 313 of the original version of the Civil Code are reproduced; some of these articles are followed by the case-law creating judgments which referred to them; and the Protection of Children Act (Decree no. 2, of 25 December 1910) is reproduced before articles 185 et seq. of the Code, relating to guardianship of legitimate and legitimated children.

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[45] Presenting, for example, all the articles of the Civil Code and only after, separately, all the articles of the Decree of 3 November 1910 (Divorce Act), followed by the complete Decree no. 1 of 25 December 1910 (Act on Marriage as a Civil Contract), and so on.

The body of articles (including the original and subsequent ones) is structured as follows:

a) **Filiation;**
b) **Marriage;**
c) **Donations;**
d) **Succession;**
e) **Gentile Hindu usages and customs of Goa.**

The Code of gentile Hindu usages and customs of Goa (of 16 December 1880) is presented in full, considering that the Portuguese Family Law and Succession Law applied in that territory at the time of its integration into the Republic of India has been kept in force until now, through India's sovereign decision. However, as it is an autonomous law, this Code shall not be commented upon. Whenever deemed necessary, its articles shall be taken into account in the comments under the other chapters, within the respective issue[46].

We have included in the sections relating to marriage and succession the relevant articles of the Code of Civil Procedure of 1939, i.e. articles 1472 to 1476 (relating to divorce and separation by mutual consent) and articles 1369 to 1477 (relating to inventory proceedings). Since these articles include substantial rules of Family Law and Succession Law, we considered it would not be appropriate to fail to present them for merely formal reasons (i.e. the fact that they were included in a procedural code).

The regulation of donations is generally included in the Law of Obligations. However, the articles of the Portuguese Civil Code of 1867 formally relating to donations (articles 1452 to 1505, in Chapter V – "Donations" –, in Part II, Book II, Title II) contain a proportionately high number of provisions directly relevant to succession (articles 1457 and 1492 to 1505), which needed to be placed within the respective framework in order to be understood.

[46] For example, articles 2 to 8 of the Code of Practices and Customs are taken into account in the commentary to the provisions relating to marriage.

A brief commentary is also presented. It should be noted that this is a commentary, not an annotation. The aim is not to explain each of the articles. Rather, we wish to divulge, in general terms, the Family Law and Succession Law in force between 1867 and 1967, and discuss how it was different from current Portuguese legislation. This objective naturally influenced our methodology. First, a set of articles constituting a formal unit is presented, after which these articles are commented upon. On the one hand, these comments are aimed at helping legal practitioners who were not trained in the framework of the Civil Code of 1867 and of its complementary legislation to understand the logic of the Family Law and Succession Law contained therein. For this purpose, we occasionally resort to the words of renowned legal experts such as Cunha Gonçalves, Pires de Lima and Antunes Varela. On the other hand, the comments highlight what else has changed since 1967 in Portuguese Law.

Something has changed in Portugal and in the rest of the world. But was it really what we suppose it was?

What is the meaning of the legislation which was in force in Portugal for almost a century and which is still in force in Goa?

We hope the following pages prove to be both a useful contribution for those looking for answers and a minimally successful way of contributing to awareness and information on the Code of Seabra.

Direito da Família e das Sucessões que vigorou em Portugal (e Goa) entre 1867 e 1967

Family and Succession law in force in Portugal (and Goa) between 1867 and 1967

1. Filiação

Filiation

1.1. Código Civil de 1867: Artigos 97º-313º

Civil Code of 1867: Articles 97-313

Código Civil de 1867

TÍTULO IX
DA INCAPACIDADE POR MENORIDADE E DO SEU SUPRIMENTO

CAPÍTULO I
DISPOSIÇÕES GERAIS

Artigo 97º

São menores as pessoas de um e de outro sexo, enquanto não perfizerem vinte e um anos de idade.

Artigo 98º

Os menores são incapazes de exercer direitos civis, e os seus actos e contratos não podem constituí-los em obrigação jurídica, salvo nos casos expressamente exceptuados na lei.

Artigo 99º

Os contratos celebrados ilegitimamente pelos menores não podem todavia ser impugnados pelos outros estipulantes, com o fundamento da incapacidade do menor.

Artigo 100º

A incapacidade dos menores é suprida pelo poder paternal e, na falta deste, pela tutela.

Civil Code of 1867

TITLE IX
LEGAL INCAPACITY AS A RESULT OF BEING A MINOR AND HOW TO OVERCOME IT

CHAPTER I
GENERAL PROVISIONS

Article 97

Minors are persons of either gender, while they have not reached the age of twenty one.

Article 98

Minors are legally incapable of exercising civil rights, and their actions and contracts cannot impose legal obligations upon them, except when otherwise explicitly foreseen by law.

Article 99

Contracts executed unlawfully by minors may not, however, be challenged by the other parties on the grounds of the minor's legal incapacity.

Article 100

The legal incapacity of minors is overcome by parental authority and, in its absence, by guardianship.

COMMENTARY TO ARTICLES 97 TO 100

In accordance with articles 97 and 311, twenty one is the age of majority for both men and women. Up to that moment, as foreseen in article 98, minors are generally legally incapable of exercising, but not of holding, rights, since, as a rule, they may have rights and obligations, even if they cannot exercise them by themselves, an intervention being required from the parents or, in their absence, from the guardian, either of whom shall act as legal representatives. Thus, parental authority, firstly, and guardianship, subsidiarily, are ways of overcoming the general incapacity to exercise civil rights that results from being a minor, in accordance with article 100.

As indicated in article 98, minors' general incapacity to exercise civil rights is subject to the exceptions foreseen in the law. For example, as a result of article 1536, no.s 2 and 3, the minor is capable regarding the contracting of loans, if he/she freely administers assets covering the value of such loans, such as those mentioned in article 147, no.s 1 and 2, or if those loans were contracted for his/her own maintenance while the legal representatives were absent.

There are, however, actions which minors cannot carry out at all, neither by themselves nor through legal representatives, constituting an actual incapacity to hold the respective rights and obligations. The right to be married, for example, is not within the minors' legal sphere before a certain age, the so-called nubile age.

However, the nubile age is different from the age of majority. According to article 4, no. 3, of Decree no. 1, of 25 December 1910, which adopted the Act on Marriage as a Civil Contract, the nubile age was 18 or 16 years, depending on whether the individual was male or female. However Decree-Law no. 30.615, of 25 July 1940, following the Concordat between the Holy See and the Portuguese State, of 1940, reduced that age, respectively, to 16 and 14 years.

At the same time, article 3 of the Act on Marriage in the Portuguese Colonies, adopted by Decree no. 35.461, of 22 January 1946, set the nubile age at 16 years for men and 14 years for women.

However, minors who have reached the nubile age shall not be married without the consent of their parents or of those representing them, or without such consent being overcome by a court of law, otherwise the marriage may be annulled, in accordance with articles 5 and 13 of Decree no. 1, of 25 December 1910 (see also articles 5 and 24 of Decree no. 30.615, of 25 July 1940, and article 3 of the aforesaid Act on Marriage in the Portuguese Colonies).

As per the provisions of the second part of article 311, the main consequence of reaching majority is the termination of the general incapacity to exercise civil rights, since an adult may freely govern his person and assets.

Equally, even before reaching the age of majority, the same result is attained with emancipation, regulated in article 304 *et seq.* (see, especially, article 305). On this issue, see below the final part of the comments to Chapter III of Title IX.

According to article 304, emancipation may derive from marriage, as long as the spouses were of nubile age and the marriage was authorised by their parents or by their legal representatives (see article 306 and single §), or from the father's permission, the mother's permission in the absence of the father, or the permission of the family council in the absence of both parents, as long as the minor agreed to the emancipation and is already at least 18 years old, regardless of gender (see article 307).

Aside from the above mentioned cases of emancipation, we should still take into account that children of divorced parents become emancipated at the age of 18, according to article 60 of the Decree of 3 November 1910, which adopted the Divorce Act, the same applying to children of annulled marriages, in light of article 32 of Decree no. 1, of 25 December 1910.

Similarly, non-acknowledgeable children of parents who die in insolvency and exposed or abandoned children become emancipated

at the age of 18, as foreseen in article 291, which is also applicable to incestuous children of parents who die in insolvency in light of article 283.

Exceptionally, the law allows for the emancipation of exposed or abandoned children at 15 years of age, in accordance with article 289.

In comparison with current Portuguese law on minors, two main differences should be highlighted.

Firstly, the age of majority is now set at 18 years, regardless of gender, by articles 122 and 130 of the Civil Code of 1966. It should also be mentioned that this change was introduced by the Reform of the Civil Code, carried out by Decree-Law no. 496/77, of 25 November, whose preamble notes that: "*This option is based on the recognition that young people today are subject to a faster process of intellectual and cultural development. They have demanded – and in some sectors already obtained – an autonomy which should be accompanied by the underlying responsibility*".

Secondly, regarding emancipation, the change of the age of majority has led to the elimination of both voluntary emancipation (foreseen in article 304, no. 2) and legal emancipation of children of marriages dissolved by divorce or annulled (articles 60 of the Divorce Act and 32 of the Act on Marriage as a Civil Contract), as well as of non-acknowledgeable children of parents who die in insolvency and of exposed and abandoned children (referred to in articles 283 and 291). Marriage thus became the only way one could become emancipated, according to article 132. In this respect, it should be noted that, in current Portuguese law, the nubile age is set at 16 years, regardless of gender, in accordance with article 1601, clause (a), of the Civil Code of 1966.

Código Civil de 1867

CAPÍTULO II[47]
DO PODER PATERNAL

SECÇÃO I
DOS FILHOS LEGÍTIMOS

Artigo 101º

São havidos por legítimos os filhos nascidos de matrimónio legitimamente contraído, passado cento e oitenta dias depois da celebração dele, ou dentro dos trezentos dias subsequentes à sua dissolução ou à separação dos cônjuges, judicialmente decretada por sentença com trânsito em julgado, salvo o disposto no parágrafo seguinte.

§ único) Decretado o divórcio ou a separação de pessoas e bens pelos fundamentos de abandono completo do lar conjugal, de ausência sem notícias ou de separação de facto livremente consentida, pelo tempo respectivamente fixado na lei, o prazo da segunda parte deste artigo contar-se-á da data, reconhecida na sentença, em que cessou a coabitação; e, no caso de depósito judicial da mulher, desde a data deste depósito.

(O Artigo 101º foi objecto do Assento do Supremo Tribunal de Justiça, de 02-12-1939, publicado no *Diário do Governo*, I Série, de 09-12-1939, que determinou o seguinte: "*Para o efeito da acção de investigação de maternidade*

Civil Code of 1867

CHAPTER II
PARENTAL AUTHORITY

SECTION I
LEGITIMATE CHILDREN

Article 101

Children born of a lawfully contracted marriage, one hundred and eighty days having passed since its solemnisation, or at the latest three hundred days after its dissolution or the separation of the spouses, decreed by a court in a judgment in a condition of 'res judicata', shall be deemed legitimate, except in the cases foreseen in the following paragraph.

Single §) When the divorce or separation of persons and property has been decreed on the grounds of complete abandonment of the marital home, of absence without news or of willingly consented de facto separation, for the time respectively set out in the law, the deadline foreseen in the second part of this article shall be counted from the date, recognised in the judgment, in which the cohabitation has ceased; and, in the case of the wife's judicial custody, starting from the date of that custody.

(Concerning Article 101, see the case-law creating Judgment of the Supreme Court of 02/12/1939, published in the *Official Gazette*, Series I, of 09/12/1939, which stated: "For the purposes of a legal action to investigate illegitimate maternity,

[47] Os artigos 101º a 136º foram expressamente revogados pelo Artigo 59º do Decreto n.º 2 de 25 de Dezembro de 1910, que aprovou a chamada "Lei da Protecção dos Filhos". / Articles 101 to 136 were explicitly revoked by Article 59 of Decree no. 2 of 25 December 1910, which approved the so-called "Protection of Children Act".

ilegítima é havido por ilegítimo o filho nascido mais de trezentos dias após a data do depósito judicial da mãe, pois que o § único do Artigo 101º do Código Civil, aditado pelo Decreto nº 19.126, é de natureza interpretativa.")

Artigo 102º

A legitimidade do filho, nascido dentro dos cento e oitenta dias seguintes à celebração do matrimónio, não pode contudo ser impugnada:

1º) Se o marido antes de casar teve conhecimento da gravidez da mulher;

2º) Se, estando presente, consentiu que no assento de nascimento fosse declarado por seu filho, ou se, por qualquer outro modo, reconheceu que era seu o filho assim nascido.

Artigo 103º

A presunção da legitimidade dos filhos nascidos durante o matrimónio, passados cento e oitenta dias depois da sua celebração, ou dentro dos trezentos dias subsequentes à sua dissolução, ou à separação dos cônjuges, só pode ser ilidida, provando-se ter-se achado o marido fisicamente impossibilitado de coabitar com a mulher nos primeiros cento e vinte e um dias, ou mais, dos trezentos que houverem precedido o nascimento do filho.

Artigo 104º

A presunção de que o filho, nascido fora dos trezentos dias subsequentes à separação dos cônjuges, não pertence ao marido separado, pode ser ilidida provando-se que o dito filho efectivamente pertence ao marido.

§ único) Esta prova pode fazer-se pelos modos estabelecidos no artigo 119º, nºs 1º e 2º e §§ 1º e 2º.

Artigo 105º

A impotência do marido, anterior ao matrimónio, não pode ser alegada para impugnar a legitimidade do filho; mas pode sê-lo a posterior, contanto que a alegação não tome por fundamento a velhice.

the child born later than three hundred days after the date of the mother's judicial custody shall be deemed illegitimate, since the single § of Article 101 of the Civil Code, added by Decree no. 19.126 is interpretative in nature.")

Article 102

The legitimacy of the child born at the latest one hundred and eighty days following the marriage, cannot however be challenged:

1) If the husband was aware of the wife's pregnancy before marrying;

2) If, while he was present, he consented that the child be declared his own in the birth registry, or if, through any other way, he acknowledged the child as his own at birth.

Article 103

The presumption of legitimacy of the children born during marriage, one hundred and eighty days having passed since its solemnisation, or at the latest three hundred days following its dissolution or the separation of the spouses, may only be set aside by proving that the husband was physically incapable of cohabiting with the wife in the first one hundred and twenty one days, or more, out of the three hundred days preceding the birth of the child.

Article 104

The presumption that the child born after three hundred days have passed since the separation of the spouses does not belong to the separated husband may be set aside by proving that the said child indeed belongs to the husband.

Single §) This may be demonstrated in the ways foreseen in Article 119, numbers 1 and 2 and §§ 1 and 2.

Article 105

The husband's impotence, preceding the marriage, may not be alleged to challenge the legitimacy of the child; but the subsequent impotency may be invoked, as long as it is not invoked on the grounds of old age.

Artigo 106º

Só podem impugnar a legitimidade dos filhos o pai ou os seus herdeiros, nos termos dos artigos seguintes.

Artigo 107º

O pai só pode impugnar a legitimidade dos filhos, nos casos em que a lei o permite, propondo a acção em juízo, se estiver no lugar do nascimento, dentro de sessenta dias, contados desde esse facto, e, não o estando, dentro de cento e vinte dias, contados desde o dia da sua volta.

§ único) Se o nascimento do filho lhe tiver sido ocultado, poderá propor acção dentro de cento e vinte dias, contados desde aquele em que tiver conhecimento da fraude.

Artigo 108º

Os herdeiros do marido só podem impugnar a legitimidade dos filhos nascidos na constância do matrimónio:

1º) Se o dito marido, achando-se presente, deu começo à acção competente e dela não desistiu;

2º) Se faleceu antes que decorressem os prazos marcados para a proposição da acção;

3º) Se o filho nasceu depois da morte do marido.

Artigo 109º

A acção dos herdeiros prescreve, decorridos sessenta dias, contados desde aquele em que o filho tenha entrado na posse dos bens do presumido pai, ou desde o dia em que os herdeiros forem perturbados na posse da herança pelo dito filho.

Artigo 110º

Só é tido por filho, para os efeitos legais, aquele de quem se prove que nasceu com vida e com figura humana.

Artigo 111º

O direito dos filhos legítimos a vindicar o estado que lhes pertence é imprescritível.

Article 106

Only the father or his heirs may challenge the legitimacy of the children, in accordance with the following articles.

Article 107

The father may only challenge the legitimacy of the children, in the cases allowed by law, by instituting legal proceedings, if he is at the place of birth, at the latest sixty days after that fact, and, if he is not at the place of birth, at the latest one hundred and twenty days after the day of his return.

Single §) If the birth of the child was hidden from him, he may bring suit at the latest one hundred and twenty days after the day he became aware of the fraud.

Article 108

The husband's heirs may only challenge the legitimacy of children born in the constancy of marriage:

1) If the said husband, being present, started the respective legal action and did not discontinue it;

2) If he passed away before the deadlines for the initiation of the legal action had elapsed;

3) If the child was born after the death of the husband.

Article 109

The legal action of the heirs is time-barred after sixty days have elapsed since the child has come into possession of the property of the presumed father, or since the day the heirs' possession of the inheritance was disturbed by the said child.

Article 110

For all legal purposes, only he/she who is proven to be born alive and with human shape will be deemed a child.

Article 111

The right of legitimate children to vindicate the status owed to them is not subject to a limitation period.

Artigo 112º

Os herdeiros dos filhos podem prosseguir nas acções de vindicação de estado pendentes; mas só podem intentá-las de novo, sendo o filho falecido, ou tendo caído em demência, antes de decorridos quatro anos depois da sua emancipação ou maioridade e havendo falecido nesse estado.

§ único) Esta acção prescreve no espaço de quatro anos, contados desde o falecimento do filho.

Artigo 113º

Em todos os casos em que a presunção de legitimidade do filho for impugnada em juízo, sendo ele menor, ser-lhe-á dado tutor, que será escolhido de entre os parentes da mãe, se os tiver; e esta será sempre ouvida em juízo.

§ único) A nomeação do tutor será feita em conselho de família, e este composto com parentes da mãe, ou com pessoas da sua amizade, na falta daqueles.

SECÇÃO II
DA PROVA DA FILIAÇÃO LEGÍTIMA

Artigo 114º

A filiação legítima prova-se pelos registos de nascimento, na sua falta por qualquer documento autêntico e, na falta deste, pela posse de estado, provada por escrito ou por testemunhas.

Artigo 115º

A posse de estado, neste caso, consiste no facto de alguém haver sido reputado e tratado por filho, tanto pelos pais, como pelas famílias destes e pelo público.

Artigo 116º

Na falta de registo de nascimento, documento autêntico e posse de estado, a filiação legítima pode provar-se por qualquer meio, havendo começo de

Article 112

The children's heirs may continue pending legal actions to vindicate status; but they may only initiate them, if the child is deceased, or has become of unsound mind, before four years have elapsed since his/her emancipation or age of majority and if the child died in that condition.

Single §) This legal action is time-barred after four years have elapsed since the death of the child.

Article 113

In all cases wherein the presumption of legitimacy of the child is challenged in court, if he/she is a minor, he/she will be assigned a guardian, who will be chosen from among the mother's relatives, if there are any; and the mother shall always be heard in court.

Single §) The appointment of the guardian shall be carried out by the family council, this being made out of relatives of the mother, or with friends of the mother in the absence of relatives.

SECTION II
PROOF OF LEGITIMATE FILIATION

Article 114

Legitimate filiation is proven through the birth record, in its absence by any authentic document and, in the absence of the latter, by the possession of status, proven in writing or by witnesses.

Article 115

The possession of status, in this case, consists of someone having been reputed and treated as a child, both by the parents and by their relatives and the public.

Article 116

In the absence of a birth record, of an authentic document and of possession of status, legitimate filiation may be proven by any means, there being

prova por escrito, proveniente de ambos os pais, conjunta ou separadamente.

Artigo 117º

Ninguém pode vindicar estado contrário ao que resulta dos registos de nascimento, achando-se estes confirmados com a posse do dito estado; bem como ninguém pode impugnar esse mesmo estado.

Artigo 118º

Pode opor-se à vindicação de estado qualquer espécie de prova escrita ou testemunhal.

SECÇÃO III
DOS FILHOS LEGITIMADOS

Artigo 119º

O matrimónio legitima os filhos nascidos antes dele das pessoas que o contraem:

1º) Se os ditos filhos são reconhecidos pelos pais e mães no assento do casamento, ou o foram no do nascimento dos mesmos filhos, ou em testamento ou escritura pública, quer anteriores, quer posteriores ao matrimónio;

2º) Se os filhos provarem a sua filiação por meio de acção e sentença judicial.

§ 1º) O reconhecimento, de que trata o nº 1º, pode ser impugnado por todos aqueles que nisso tiverem interesse.

§ 2º) Às acções, de que trata o nº 2, são aplicáveis as disposições dos artigos 130º e 133º.

§ 3º) Os efeitos da legitimação principiam, em todo o caso, desde a data do matrimónio.

Artigo 120º

A legitimação aproveita tanto aos filhos, como aos seus descendentes, se os ditos filhos já não existirem.

Artigo 121º

Os legitimados por subsequente matrimónio são em tudo equiparados aos filhos legítimos.

a beginning of evidence in writing, originating from both parents, jointly or separately.

Article 117

No one may vindicate a different status from that which is recorded in the birth records, when these are confirmed by the possession of the said status; also, no one may challenge that same status.

Article 118

Any type of written or testimonial evidence may be given to oppose the vindication of status.

SECTION III
LEGITIMATED CHILDREN

Article 119

Marriage legitimates the spouses' children born before the said marriage:

1) If the said children are acknowledged by the fathers and mothers in the marriage registry, or were so at the time of their birth, or in a will or in a deed, either preceding or following the marriage;

2) If the children prove their filiation by means of a legal action and court judgment;

§1) The acknowledgment, referred to in number 1, may be challenged by all those with an interest in doing so.

§2) The provisions of articles 130 and 133 are applicable to the legal actions mentioned in number 2.

§3) The effects of legitimation begin, in any case, at the date of the marriage.

Article 120

Legitimation benefits the children as well as their descendants, if the said children are no longer living.

Article 121

Those legitimated by a subsequent marriage are considered fully equal to legitimate children.

SECÇÃO IV
DOS FILHOS PERFILHADOS

Artigo 122º

Podem ser perfilhados todos os filhos ilegítimos, excepto:

1º) Os filhos adulterinos;

2º) Os filhos incestuosos.

§ 1º) Filhos adulterinos são os havidos por qualquer pessoa, casada ao tempo da concepção, de outra que não seja o seu consorte.

§ 2º) Entendem-se por incestuosos para o efeito sobredito:

1º) Os filhos de parentes por consaguinidade ou afinidade em qualquer grau da linha recta;

2º) Os filhos de parentes por consaguinidade até o segundo grau inclusive da linha transversal.

Artigo 123º

A perfilhação pode ser feita por ambos os pais de comum acordo, ou por qualquer deles separadamente, contanto que seja no registo do nascimento ou em escritura, testamento ou auto público.

Artigo 124º

Quando o pai ou a mãe fizerem o reconhecimento separadamente, não poderão revelar no documento da perfilhação o nome da pessoa de que houverem o filho reconhecido, nem indicar circunstâncias por onde essa pessoa venha a conhecer-se.

Artigo 125º

Basta, para que esta perfilhação seja feita por um dos pais separadamente, que o perfilhante fosse hábil para contrair matrimónio nos primeiros cento e vinte dias dos trezentos que precederam o nascimento do filho.

Artigo 126º

O filho maior não pode ser perfilhado sem consentimento seu.

SECTION IV
ACKNOWLEDGED CHILDREN

Article 122

All illegitimate children may be acknowledged, except for:

1) Adulterous children;

2) Incestuous children.

§1) Adulterous children are those resulting from the union of a person, married at the time of conception, with another person other than his/her spouse;

§2) The following shall be considered incestuous children, for the above mentioned purposes:

1) The children of relatives by blood or marriage in any degree of lineal descent;

2) The children of blood relatives up to the second degree including within the collateral line.

Article 123

Voluntary acknowledgment may be carried out by both parents of common accord, or by either of them separately, so long as it is done in the birth record or in a deed, a will or a document executed under seal.

Article 124

When the father or the mother carry out the acknowledgment separately, they may not reveal in the acknowledgment document the name of the person with whom they had the acknowledged child, nor may they indicate circumstances through which that person might be identified.

Article 125

For the voluntary acknowledgment to be done by one of the parents separately, it is enough for the person voluntarily acknowledging parenthood to have been capable of marrying in the first one hundred and twenty days out of three hundred days that preceded the birth of the child.

Article 126

The child who has reached the age of majority cannot be acknowledged without his/her consent.

Artigo 127º

Se o perfilhado for menor, poderá impugnar a perfilhação, dentro de quatro anos imediatos à sua emancipação ou maioridade.

Artigo 128º

Tanto o reconhecimento do pai ou da mãe, como a impugnação do filho podem ser contestados por todos aqueles que nisso tiverem interesse.

Artigo 129º

Os perfilhados espontaneamente, ou por sentença, adquirem os direitos:

1º) De usar dos apelidos de seus pais;

2º) De serem alimentados por eles;

3º) De sucederem a seus ascendentes, ou haverem parte na herança, conforme o que vai disposto nos artigos 1989º a 1992º.

SECÇÃO V
DA INVESTIGAÇÃO DA PATERNIDADE ILEGÍTIMA

Artigo 130º

É proibida a acção de investigação de paternidade ilegítima, excepto nos casos seguintes:

1º) Existindo escrito do pai, em que expressamente declare a sua paternidade;

2º) Achando-se o filho em posse de estado, nos termos do artigo 115º;

3º) No caso de estupro violento ou de rapto, coincidindo a época do nascimento, nos termos indicados no artigo 101º, com a época do facto criminoso.

Artigo 131º

A acção de investigação de maternidade é permitida, mas o filho deve provar, por qualquer dos meios ordinários, que é o próprio que se diz nascido da pretensa mãe.

Article 127

If the acknowledged child is a minor, he/she may challenge the voluntary acknowledgment, at the latest four years immediately after his/her emancipation or coming of age.

Article 128

Both the voluntary acknowledgment by the father or the mother, and the challenging by the child may be disputed by all those with an interest in doing so.

Article 129

Those who have been voluntarily acknowledged or acknowledged by a court judgment acquire the rights:

1) To use the surnames of their parents;

2) To be paid maintenance by them;

3) To succeed to their ascendants, or to receive a part of the inheritance, in accordance with articles 1989 to 1992.

SECTION V
INVESTIGATING ILLEGITIMATE PATERNITY

Article 130

The legal action to investigate illegitimate paternity is forbidden, except in the following cases:

1) If there is a written document from the father, in which he explicitly affirms his paternity;

2) If the child is in possession of status, in accordance with article 115;

3) In the case of rape or kidnapping, if the time of birth coincided, as indicated in article 101, with the time of the criminal act.

Article 131

The legal action to investigate maternity is allowed, but the child must prove, by any normal means, that the presumed mother indeed gave birth to him/her.

Artigo 132º

A acção de investigação de paternidade ou de maternidade não é, porém, admitida em juízo nos casos em que a perfilhação é defesa.

Artigo 133º

As acções de investigação de paternidade ou de maternidade só podem ser intentadas em vida dos pretensos pais, salvas as seguintes excepções:

1º) Se os pais faleceram durante a menoridade dos filhos, porque, nesse caso, têm estes o direito de intentar a acção, ainda depois da morte dos pais, contanto que o façam antes que expirem os primeiros quatro anos da sua emancipação ou maioridade;

2º) Se o filho obtiver, de novo, documento escrito e assinado pelos pais, em que estes revelem a sua paternidade, porque, neste caso, pode propor acção a todo o tempo em que haja alcançado o sobredito documento, isto sem prejuízo das regras gerais acerca da prescrição dos bens.

SECÇÃO *VI*
DOS FILHOS ESPÚRIOS

Artigo 134º

Dizem-se filhos espúrios os que não podem ser perfilhados.

Artigo 135º

Os filhos espúrios só têm o direito de exigir de seus pais os alimentos necessários; em tudo o mais são havidos por inteiramente estranhos aos pais e à família destes.

Artigo 136º

O filho espúrio só poderá demandar seus pais, para o efeito sobredito, se o facto da paternidade ou da maternidade se achar provado em processo cível ou criminal, controvertido entre seus pais ou outras partes; ou, no caso do nº 3 do artigo 130º, se o facto tiver sido judicialmente provado.

Article 132

The legal action to investigate paternity or maternity is not, however, allowed in court in cases where the acknowledgment is forbidden.

Article 133

The legal actions to investigate paternity or maternity may only be initiated while the presumed parents are alive, except for the following cases:

1) If the parents die while the children are minors, since, in this case, these have the right to initiate the legal action even after the parents' death, as long as they do so before the end of the first four years following their emancipation or age of majority;

2) If the child obtains, again, a written document signed by the parents, in which these reveal their paternity, since, in this case, he/she may initiate the legal action at any time when he/she had obtained the above mentioned document, not precluding the general rules concerning the limitation period for property.

SECTION *VI*
SPURIOUS CHILDREN

Article 134

Children who may not be acknowledged are called spurious.

Article 135

Spurious children have the sole right to demand from their parents the payment of the necessary maintenance; in all else they are considered complete strangers to the parents and their families.

Article 136

The spurious child may only make the above mentioned demand from his/her parents in court if paternity or maternity has been proven in a civil or criminal trial, following a controvert procedure involving his/her parents or other parties; or, in the case of the third number of article 130, if the fact has been proven in court.

1.2. Lei da Protecção dos Filhos (Decreto n.º 2, de 25 de Dezembro de 1910), reproduzida entre o art. 136º e o art. 137º do Código Civil de 1867

Protection of Children Act (Decree no. 2, of 25 December 1910), presented between Article 136 and Article 137 of the Civil Code of 1867

Lei da Protecção dos Filhos (Decreto n.º 2, de 25 de Dezembro de 1910)

CAPÍTULO I
DOS FILHOS LEGÍTIMOS

Artigo 1º

São havidos por legítimos os filhos nascidos de matrimónio legitimamente contraído, passados cento e oitenta dias depois da celebração dele ou dentro dos trezentos dias subsequentes à sua dissolução ou à separação dos cônjuges, judicialmente decretada.

Artigo 2º

O matrimónio legitima sempre os filhos nascidos antes dele das pessoas que o contraem, qualquer que fosse a situação destas no momento da concepção ou do nascimento dos filhos.

Artigo 3º

A legitimação pode fazer-se por dois meios:

1º) Sendo os filhos reconhecidos pelos pais e mães no assento do casamento ou no do nascimento dos mesmos filhos, ou em testamento ou escritura pública, quer anteriores, quer posteriores ao matrimónio;

2º) Provando os filhos a sua filiação por meio de acção e sentença judicial.

§ 1º) O reconhecimento de que trata o nº 1 pode ser impugnado por todos aqueles que nisso tiverem interesse.

§ 2º) Às acções de que trata o nº 2 são aplicáveis as disposições dos artigos 34º e 37º.

Protection of Children Act (Decree no. 2, of 25 December 1910)

CHAPTER I
LEGITIMATE CHILDREN

Article 1

Children born of a lawfully contracted marriage, one hundred and eighty days having passed since its solemnization, or at the latest three hundred days after its dissolution or the separation of the spouses, decreed by a court of law, shall be deemed legitimate.

Article 2

Marriage always legitimates the spouses' children born before the said marriage, regardless of the spouses' situation at the moment of conception or of the birth of the children.

Article 3

Children may be legitimated in two ways:

1) If the children are acknowledged by the fathers and mothers in the marriage registry, or in the respective birth registry, or in a will or a deed, either preceding or following the marriage;

2) If the children prove their filiation by means of a legal action and court judgment.

§ 1) The voluntary acknowledgment referred to in number 1 may be challenged by all those with an interest in doing so.

§ 2) The provisions of articles 34 and 37 are applicable to the legal actions mentioned in number 2.

§ 3º) Os efeitos da legitimação principiam, em todo o caso, desde a data do matrimónio.

Artigo 4º

A legitimação aproveita tanto aos filhos como aos seus descendentes, se os ditos filhos já não existirem.

Artigo 5º

Os legitimados por subsequente matrimónio são, para todos os efeitos, considerados como filhos legítimos, e como tais se denominam.

Artigo 6º

A legitimidade do filho nascido dentro dos cento e oitenta dias seguintes à celebração do matrimónio não pode ser impugnada:

1º) Se o marido antes de casar teve conhecimento da gravidez da mulher;

2º) Se, estando pessoalmente presente, consentiu que no assento de nascimento fosse declarado por seu filho, ou se, por qualquer outro modo, reconheceu que era seu o filho assim nascido.

Artigo 7º

A presunção da legitimidade dos filhos nascidos durante o matrimónio, passados cento e oitenta dias depois da sua celebração ou dentro dos trezentos dias subsequentes à sua dissolução ou à separação dos cônjuges, só pode ser ilidida se não se verificar a hipótese do nº 2 do artigo antecedente e além disso se provar ter-se achado o marido fisicamente impossibilitado de coabitar com a mulher nos primeiros cento e vinte e um dias, ou mais, dos trezentos que houverem precedido o nascimento do filho.

§ 3) The effects of legitimation begin, in all cases, at the date of the marriage.

Article 4

Legitimation benefits the children as well as their descendents, if the said children are no longer living.

Article 5

Those legitimated by a subsequent marriage are, for all purposes, considered as legitimate children, and shall be so named.

Article 6

The legitimacy of the child born at the latest one hundred and eighty days following the marriage may not be challenged:

1) If the husband was aware of the wife's pregnancy before marrying;

2) If, while he was present, he consented that the child be declared his own in the birth registry, or if, through any other way, he acknowledged the child as his own at birth.

Article 7

The presumption of legitimacy of children born during a marriage, one hundred and eighty days having passed since it was solemnised, or at the latest three hundred days following its dissolution or the separation of the spouses, may only be rebutted if the situation described in the second number of the previous article does not occur and, cumulatively, if it is proven that the husband was physically unable of cohabiting with the wife in the first one hundred and twenty one days, or more, out of the three hundred days preceding the birth of the child.

Artigo 8º

A presunção de que o filho, nascido fora dos trezentos dias subsequentes à separação dos cônjuges ou ao divórcio definitivo ou provisório, não pertence ao marido separado ou divorciado, pode ser ilidida provando-se que o dito filho, efectivamente, pertence ao marido.

§ único) A esta prova é aplicável o disposto no artigo 3º, nºs 1º e 2º, e §§ 1º e 2º.

Artigo 9º

A impotência do marido, quer anterior, quer posterior ao matrimónio, pode ser alegada para impugnar a legitimidade do filho, contanto que a alegação não tome por fundamento a velhice.

Artigo 10º

O pai só pode impugnar a legitimidade dos filhos nos casos em que a lei o permite, propondo a acção em juízo dentro de cento e vinte dias, contados desde que tiver conhecimento do facto do nascimento.

Artigo 11º

Os herdeiros do marido só podem impugnar a legitimidade dos filhos nascidos na constância do matrimónio:

1º) Se o dito marido, achando-se presente, deu começo à acção competente, e dela não desistiu;

2º) Se faleceu antes que decorresse o prazo marcado para a proposição da acção;

3º) Se o filho nasceu depois da morte do marido.

(Sobre a legitimidade activa do filho para impugnar a sua paternidade legítima, vd. o Assento do Supremo Tribunal de Justiça, de 22-07-1938, publicado no

Article 8

The presumption that the child born after the three hundred days following the separation of the spouses or the final or provisional divorce does not belong to the separated or divorced husband may be rebutted by proving that the said child is indeed of the husband.

Single §) The provisions of Article 3, numbers 1 and 2 and §§ 1 and 2 are applicable to the aforementioned proof.

Article 9

The husband's impotence, either preceding or following the marriage, may be alleged to challenge the legitimacy of the child, as long as it is not invoked on the grounds of old age.

Article 10

The father may only challenge the legitimacy of children in the cases where the law so allows, by instituting legal proceedings at the latest one hundred and twenty days after becoming aware of the birth.

Article 11

The husband's heirs may only challenge the legitimacy of children born in the constancy of marriage:

1) If the said husband, being present, started the respective legal action and did not discontinue it;

2) If he passed away before the deadlines for the initiation of the legal action had elapsed;

3) If the child was born after the death of the husband.

(Concerning the active legitimacy of the child to challenge his/her legitimate paternity, see the case-law creating

Diário do Governo, I Série, de 04-08-1938, que estabeleceu: "*O filho havido por legítimo pode propor acção para impugnar a sua legitimidade, visto estar revogado o Artigo 106º do Código Civil.*")

Artigo 12º

A acção dos herdeiros só pode ser proposta dentro de sessenta dias, contados desde aquele em que o filho tenha entrado na posse dos bens do presumido pai, ou desde o dia em que os herdeiros forem perturbados na posse da herança pelo dito filho.

Artigo 13º

Só é tido por filho, para os efeitos legais, aquele de quem se prove que nasceu com vida e com figura humana.

Artigo 14º

O direito dos filhos legítimos a vindicar o estado que lhes pertence é imprescritível, sem prejuízo, porém, das regras gerais acerca da prescrição dos bens.

§ único) No caso de menoridade ou interdição dos filhos, poderão propor as acções de vindicação de estado os seus representantes legais.

Artigo 15º

Os herdeiros dos filhos podem prosseguir nas acções de vindicação de estado pendentes; mas só podem intentá-las de novo tendo o filho falecido ou tendo caído em demência antes de decorridos quatro anos depois da sua emancipação ou maioridade, e havendo falecido neste estado, sem que a acção tivesse sido proposta pelo tutor.

§ único) Esta acção prescreve no espaço de quatro anos, contados desde o falecimento do filho.

Judgment of the Supreme Court of 22/07/1938, published in the *Official Gazette*, Series I, of 04/08/1938, which stated: "*The child deemed legitimate may initiate a legal action to challenge his/her legitimacy, since article 106 of the Civil Code has been revoked.*")

Article 12

The heirs' legal action must be initiated at the latest sixty days after the child has come into possession of the property of the presumed father, or since the day the heirs' possession of the inheritance was disturbed by the said child.

Article 13

For all legal purposes, only he/she who is proven to be born alive and with human shape will be deemed a child.

Article 14

The right of legitimate children to vindicate the status owed to them is not subject to a limitation period, not precluding the general rules concerning the limitation period for property.

Single §) Where the children are minors or have been deprived of civil rights, the actions for vindication of status may be initiated by their legal representatives.

Article 15

The children's heirs may continue pending legal action to vindicate status; but they may only initiate them if the child has passed away or has become of unsound mind before four years have elapsed since his/her emancipation or age of majority and, having died in that condition, if the action was not initiated by the guardian.

Artigo 16º

Em todos os casos em que a presunção de legitimidade do filho for impugnada em juízo, sendo ele menor, ser-lhe-á dado tutor nomeado pelo juiz, o qual será escolhido de entre os parentes da mãe, se os tiver; e esta será sempre ouvida em juízo.

CAPÍTULO II
DA PROVA DA FILIAÇÃO LEGÍTIMA

Artigo 17º

A filiação legítima prova-se pelos registos de nascimento, na sua falta por qualquer documento autêntico, e, na falta deste, pela posse de estado, provada por escrito ou por testemunhas.

Artigo 18º

A posse de estado consiste no facto de alguém haver sido reputado e tratado como filho pelos pais e de haver sido reputado como filho destes também pelo público.

Artigo 19º

Na falta de registo de nascimento, documento autêntico e posse de estado, a filiação legítima pode provar-se por quaisquer meios administrativos em juízo, desde que determinem no espírito do julgador a convicção dessa filiação.

Artigo 20º

Salvo o disposto no artigo 14º, ninguém pode vindicar estado contrário ao que resulta dos registos de nascimento, achando-se estes confirmados com a posse do dito estado.

Single §) This legal action is barred by limitation after four years have elapsed since the death of the child.

Article 16

In all cases wherein the presumption of legitimacy of the child is challenged in court, if he/she is a minor, he/she will be assigned a guardian appointed by the judge, who will be chosen from among the mother's relatives, if there are any; and the mother shall always be heard in court.

CHAPTER II
PROOF OF LEGITIMATE FILIATION

Article 17

Legitimate filiation is proven through the birth record, in its absence by any authentic document and, in the absence of the latter, by the possession of status, proven in writing or by witnesses.

Article 18

The possession of status, in this case, consists of someone having been reputed and treated as their own child by the parents and having been reputed as the parents' child also by the public.

Article 19

In the absence of a birth record, of an authentic document and of possession of status, legitimate filiation may be proven by any means before a court of law, as long as the court is persuaded of the existence of such filiation.

Article 20

With the exception of what is foreseen in article 14, no one may

Artigo 21º

Pode opor-se à vindicação de estado qualquer espécie de prova escrita ou testemunhal.

CAPÍTULO III
DOS FILHOS PERFILHADOS

Artigo 22º

Podem ser perfilhados todos os filhos ilegítimos, excepto os incestuosos.

§ único) Entendem-se por incestuosos para este efeito:

1º) Os filhos de parentes por consanguinidade ou afinidade em qualquer grau da linha recta, ainda que o casamento causa da afinidade tenha sido dissolvido;

2º) Os filhos de parentes por consanguinidade no segundo grau da linha transversal.

Artigo 23º

A perfilhação poderá ser feita por ambos os pais, de comum acordo, ou por qualquer deles separadamente no registo do nascimento e no próprio acto deste registo ou posteriormente, por averbamento ao mesmo registo.

§ 1º) Se um ou ambos os pais forem inábeis, por virtude de casamento ainda não dissolvido, para contrair matrimónio nos primeiros cento e vinte dias dos trezentos que precederam o nascimento do filho, a perfilhação só poderá ser feita por averbamento, embora no mesmo acto do registo, e em separado para cada pai que for inábil, considerando-se secreta essa perfilhação, para todos os efeitos, enquanto a inabilidade durar.

§ 2º) Pelos mesmos inábeis poderá também ser feita a perfilhação em

vindicate a different status from that which is recorded in the birth records, when these are confirmed by the possession of the said status.

Article 21

The vindication of status may be opposed by producing any type of written or testimonial evidence.

CHAPTER III
ACKNOWLEDGED CHILDREN

Article 22

All illegitimate children may be acknowledged, except for incestuous children.

Single §) The following shall be considered incestuous children, for the above mentioned purposes:

1) The children of relatives by blood or marriage in any degree of lineal descent, even if the marriage which caused the affinity has been dissolved;

2) The children of blood relatives at the second degree of the collateral line.

Article 23

Acknowledgment may be carried out by both parents, of common accord, or by either of them separately, in the birth record and in the very act of drawing up this record, or at a later stage, through an addendum to the said record.

§ 1) If either or both parents are incapable, due to a marriage that has not yet been dissolved, of marrying within the first one hundred and twenty days out of the three hundred days which preceded the birth of the child, the acknowledgment may only be done by addendum, even though in the same act of registration, and it shall be done separately for each incapable parent, such

testamento cerrado, aprovado antes ou depois do nascimento do filho, e nessa parte irrevogável.

§ 3º) É expressamente proibida a perfilhação de pessoa que figure como filho legítimo de outrem no respectivo registo de nascimento, enquanto a declaração desse estado não for cancelada por força de sentença judicial transitada em julgado.

Artigo 24º

Se nenhum dos pais for inábil nos termos do artigo 23º, § 1º, ambos poderão também perfilhar o filho de comum acordo, por escritura ou auto público anterior ou posterior ao nascimento do mesmo filho, ou separadamente por escritura, auto público, ou testamento anterior ou posterior ao nascimento do mesmo filho e nessa parte irrevogável.

Artigo 25º

Se só um dos pais estiver nas condições do artigo antecedente, só esse poderá usar das faculdades aí concedidas, sem prejuízo, quanto ao outro, do disposto no artigo 23º, §§ 1º e 2º.

Artigo 26º

Quando a perfilhação for feita em escritura, auto público, ou testamento, anteriormente ao nascimento do filho, não valerá, nem sequer como princípio de prova, se a data da escritura ou auto público, ou da aprovação do testamento, não estiver compreendida nos cento e oitenta dias que precederam o nascimento do filho.

an acknowledgment being considered secret, for all purposes, for as long as the incapacity lasts.

§ 2) The same incapable parents may also carry out the acknowledgment in a closed will, approved before or after the birth of the child, and irrevocable with regard to the acknowledgment.

§ 3) The acknowledgment of a person indicated in the birth record as the legitimate child of someone else is explicitly prohibited, for as long as the indication of that status has not been cancelled by a court judgment in a condition of *res judicata*.

Article 24

If neither parent is incapable, as defined in article 23, § 1, both may also acknowledge the child of common accord, through a deed or document executed under seal preceding or following the birth of the said child, or separately through a deed, document executed under seal or will preceding or following the birth of the said child and irrevocable with regard to the acknowledgment.

Article 25

If only one of the parents meets the conditions of the preceding article, only that parent may use the possibility foreseen therein, not precluding, with regard to the other parent, what is foreseen in article 23, §§ 1 and 2.

Article 26

When the acknowledgment is carried out through a deed, a document executed under seal or a will, preceding the birth of the child, it shall have no legal effects, not even as *prima facie* evidence, if the execution of the deed

Artigo 27º

Em qualquer caso, quando o pai ou a mãe fizerem o reconhecimento separadamente, não poderão revelar perante o oficial do registo civil ou no documento público da perfilhação o nome da pessoa de quem houveram o filho perfilhado ou de qualquer dos pais dela, mas poderão indicar todas as demais circunstâncias tendentes a identificá-lo.

Artigo 28º

O filho maior não pode ser perfilhado sem consentimento seu.

Artigo 29º

Se o perfilhado for menor, poderá impugnar a perfilhação dentro dos quatro anos imediatos à sua emancipação ou maioridade.

Artigo 30º

Tanto o reconhecimento do pai ou da mãe como a impugnação do filho poderão ser contestados por todos aqueles que nisso tiverem interesse.

Artigo 31º

O perfilhado espontaneamente ou por sentença, por pessoa ou pessoas que não sejam inábeis, por virtude de casamento ainda não dissolvido, para contrair matrimónio nos primeiros cento e vinte dias dos trezentos que precederem o nascimento do filho, adquire os direitos:

1º) De usar dos apelidos do pai ou mãe perfilhante;

2º) De ser por ele ou eles alimentado;

3º) De lhe ou lhes suceder; ou de suceder aos avós, ou haver parte nas respectivas heranças, conforme o disposto nos artigos 1990º a 1992º do

or of the said document or the approval of the will was not done within one hundred and eighty days preceding the birth of the child.

Article 27

In any case, when the father or the mother carry out the acknowledgment separately, they may not disclose before the officer of the civil registry or in the public act of acknowledgment the name of the person with whom they had the acknowledged child, or of either of that person's parents, but they may indicate all other circumstances useful to identifying him/her.

Article 28

The child who has reached the age of majority may not be acknowledged without his/her consent.

Article 29

If the acknowledged child is a minor, he/she may challenge the acknowledgment, at the latest four years immediately after he/she becomes emancipated or reaches the age of majority.

Article 30

Both the voluntary acknowledgment by the father or the mother and the challenging by the child may be disputed by all those with an interest in doing so.

Article 31

Those who have been voluntarily acknowledged, or acknowledged by a court judgment, by a person or persons who were not incapable, due to a marriage that had not yet been dissolved, of marrying within the first one hundred and twenty days out of the three hundred

Código Civil e Decreto com força de lei de 31 de Outubro de 1910.

Artigo 32º

O perfilhado por pessoa ou pessoas inábeis nos termos do artigo 23º, § 1º, só por morte do inábil ou inábeis, ou dissolvendo-se o casamento causa da inabilidade, poderá exercer, em relação a cada pai inábil, e separadamente, os direitos consignados no artigo anterior.

Artigo 33º

Ainda durante a inabilidade de um ou ambos os pais, o filho poderá demandá-lo ou demandá-los para o exclusivo efeito de ser alimentado por ele ou por eles, se o facto da paternidade ou da maternidade se achar provado em processo cível ou criminal, controvertido entre seus pais ou outras pessoas, ou, em qualquer dos casos dos nºs 3º e 4º do artigo 34º, se o facto tiver sido judicialmente provado.

days that preceded the child's birth, acquire the following rights:

1) To use the surnames of the acknowledging father or mother;

2) To be paid maintenance by him/her or by them;

3) To succeed him/her or them, or to succeed their grandparents, or to receive a part of the respective inheritances, in accordance with articles 1990 to 1992 of the Civil Code and with the Decree of 31 October 1910.

Article 32

The child acknowledged by a person or persons who were incapable as described in article 23, § 1, may only exercise, in relation to each incapable parent, and separately, the rights granted by the previous article if the incapable person or persons die, or if the marriage which caused the incapacity is dissolved.

Article 33

Even during the incapacity of one or both of the parents, the child may initiate legal proceedings against him/her or them, with the sole purpose of being paid maintenance, if the fact of paternity or maternity has been proven in a civil or criminal trial, following a controvert procedure involving the parents or other parties, or, in any of the cases of numbers 3 and 4 of article 34, if the fact has been proven in court.

CAPÍTULO IV
DA INVESTIGAÇÃO DA PATERNIDADE OU MATERNIDADE ILEGÍTIMA

Artigo 34º

É permitida a acção de investigação de paternidade ilegítima nos casos seguintes:

1º) Existindo escrito do pai, em que expressamente declare a sua paternidade;

2º) Achando-se o filho em posse de estado nos termos do artigo 18º;

3º) No caso de estupro violento ou de rapto, coincidindo a época do nascimento, nos termos indicados no artigo 1º, com a época do facto criminoso;

4º) No caso de sedução praticada com abuso de autoridade ou de confiança, ou com promessa de casamento, coincidindo a época do nascimento, nos termos indicados no artigo 1º, com a época da sedução;

5º) No caso de a mãe e o pretenso pai terem notoriamente convivido como marido e mulher no período legal da concepção.

Artigo 35º

A acção de investigação de maternidade é sempre permitida.

(Sobre o artigo 35º, vd. o Assento do Supremo Tribunal de Justiça, de 19-07-1955, publicado no *Diário do Governo*, I Série, de 02-08-1955, que estabeleceu: "*Continuam em vigor o Artigo 9º e seu § único do Decreto de 16 de Dezembro de 1880, sem prejuízo do disposto no Artigo 8º, § 2º do Decreto de 18 de Novembro de 1869 e no Artigo 2º do Decreto nº 19.943, de 25 de Junho de 1931.*")

CHAPTER IV
INVESTIGATING ILLEGITIMATE PATERNITY OR MATERNITY

Article 34

The legal action to investigate illegitimate paternity is allowed in the following cases:

1) If there is a written document from the father, in which he explicitly affirms the said paternity;

2) If the child is in possession of status, in accordance with article 18;

3) In the case of rape or kidnapping, if the time of birth coincided, as indicated in article 1, with the timing of the criminal act.

4) In the case of seduction carried out with abuse of authority or trust, or with a promise of marriage, when the time of birth, as indicated in article 1, coincided with the time of the carrying out of the seduction;

5) When the mother and the presumed father were known to have lived together as husband and wife at the legal time of conception.

Article 35

The legal action to investigate maternity is always allowed.

(Concerning article 35, see the case-law creating Judgment of the Supreme Court of 19/07/1955, published in the *Official Gazette*, Series I, of 02/08/1955, which stated: "*Article 9, and its single §, of the Decree of 16 December 1880 shall remain in force, not precluding article 8, § 2, of the Decree of 18 November 1869 and article 2 of Decree no. 19.943, of 25 June 1931.*")

Artigo 36º

A acção de investigação de paternidade ou maternidade só não é admitida em juízo nos casos em que a perfilhação é defesa, ou enquanto não pode produzir efeitos por virtude da inabilidade do pretenso pai ou mãe, tal como é definida no artigo 23º, § 1º.

§ único) Neste último caso a acção pode propor-se logo que se verifique qualquer das circunstâncias previstas no artigo 32º.

Artigo 37º

A acção de investigação de paternidade ou maternidade só pode ser intentada em vida do pretenso pai ou mãe, ou dentro do ano posterior à sua morte, salvas as seguintes excepções:

1º) Se os pais falecerem durante a menoridade ou demência dos filhos, porque, neste caso, têm estes o direito de intentar a acção, contanto que o façam antes que expirem os primeiros quatro anos da sua emancipação ou maioridade ou do restabelecimento da sua razão;

2º) Se o filho obtiver, depois do prazo de um ano indicado neste artigo, um documento escrito e assinado pelos pais, em que estes revelem a sua paternidade; porque, neste caso, pode propor acção a todo o tempo em que haja alcançado o sobredito documento, se realmente provar que o obteve dentro dos seis meses que precederam a proposição da demanda; isto sem prejuízo das regras gerais acerca da prescrição dos bens.

Artigo 38º

A acção de investigação de paternidade ilegítima pode também ser proposta, ainda antes do nascimento do

Article 36

The legal action to investigate paternity or maternity shall only not be allowed in court in cases where the acknowledgment is forbidden, or while it may not produce effects due to the incapacity of the presumed father or mother, as defined in article 23, § 1.

Single §) In the latter case, the legal action may be initiated as soon as any of the circumstances foreseen in article 32 occur.

Article 37

The legal action to investigate paternity or maternity may only be initiated while the presumed father or mother is living, or within the year following his/her death, with the following exceptions:

1) If the parents had died while the children were still minors or were of unsound mind, since, in this case, the children may initiate the legal action, as long as they do so before the end of the first four years after becoming emancipated, reaching the age of majority or becoming sane;

2) If the child obtains, after the one year deadline indicated in this article, a written document signed by the parents, in which these reveal their filiation; in this case, the child may initiate the legal action at any time the said document is obtained, as long as it is proven that it was obtained at the latest six months before the initiation of the proceedings; but general rules concerning the limitation period of property are applicable.

Article 38

The legal action to investigate illegitimate paternity may also be initiated,

filho, pela mãe grávida, em nome dele, contanto que faça verificar previamente a gravidez nos termos e pelo processo do artigo 650º do Código de Processo Civil; mas a acção ficará nula se o filho não nascer com vida e figura humana, ou se a respectiva certidão não for junta aos autos dentro do prazo de trinta dias a contar do nascimento.

Artigo 39º

Se ambos os pais eram inábeis para contrair matrimónio nos primeiros cento e vinte dias dos trezentos que precederam o nascimento do filho, a acção de investigação pode ser intentada contra ambos conjuntamente.

Artigo 40º

Quando a mãe era inábil, pelo facto de estar casada com outrem nos primeiros cento e vinte dias dos trezentos que precederam o nascimento do filho ilegítimo, a acção de investigação de paternidade só poderá ser recebida em juízo quando uma sentença passada em julgada tiver declarado, nos termos dos artigos 10º a 12º, que o filho não é de matrimónio.

Artigo 41º

Nas acções de investigação, quando o interesse do filho menor puder colidir com o da mãe, ou pai, ou tutor, sob cujo poder se encontra, será o menor representado por um tutor especial, nomeado pelo juiz, a requerimento de qualquer parente do menor, ou do Ministério Público.

even before the child is born, by the pregnant mother, in the child's name, as long as the pregnancy is previously confirmed in accordance with the procedure described in article 650 of the Code of Civil Procedure; but the legal action shall be null and void if the child is still born or born without human shape, or if the respective birth record is not annexed to the case file at the latest thirty days after the birth.

Article 39

If both parents were incapable of marrying in the first one hundred and twenty days of the three hundred days preceding the birth of the child, the legal action to investigate paternity and maternity may be initiated against both parents jointly.

Article 40

When the mother was incapable, due to being married to another person in the first one hundred and twenty days of the three hundred days preceding the birth of the illegitimate child, the legal action to investigate paternity may only be accepted by the court when a judgment in the condition of *res judicata* has been declared, in accordance with articles 10 to 12, stating that the child is not of the marriage.

Article 41

In the legal actions to investigate paternity or maternity, when the interest of the minor child may clash with that of the mother, or father, or guardian, under whose power he/she is placed, the minor shall be represented by a special guardian, appointed by the judge, at the

Artigo 42º

Os herdeiros dos filhos podem prosseguir nas acções de investigação pendentes, mas só podem intentá-las de novo tendo o filho falecido, ou tendo caído em demência, na ocasião em que ainda lhe era lícito propor a acção nos termos do artigo 37º e no nº 1, e havendo falecido nesse estado sem que a acção tivesse sido proposta pelo tutor.

§ único) Esta acção prescreve pelo lapso de um ano, contado desde o falecimento do filho.

(Sobre o artigo 42º, vd. o Assento do Supremo Tribunal de Justiça, de 22-06-1954, publicado no *Diário do Governo*, I Série, de 06-07-1954, que estabeleceu: "*O § único do Artigo 42º do Decreto nº 2, de 25 de Dezembro de 1910, tanto se aplica ao caso de o filho falecer depois do pretenso pai como antes, desde que à data do falecimento do filho este tivesse o direito de propor a acção.*")

Artigo 43º

A acção de investigação deve ser proposta perante o tribunal em cuja jurisdição se afirma ter ocorrido o nascimento do filho ilegítimo, ou, no caso de acção anterior ao nascimento, no juízo do lugar da coabitação ou da concepção.

request of any of the minor's relatives or of the Public Prosecutor.

Article 42

The children's heirs may continue pending legal actions to investigate paternity or maternity; but they may only initiate them if the child is deceased, or has become of unsound mind, at a time when it was still lawful for the children to initiate the legal proceedings in accordance with article 37 and its first number, and if the children died in that condition and the guardian did not initiate the legal action in question.

Single §) This legal action is barred by limitation after one year has elapsed since the death of the child.

(Concerning article 42, see the case-law creating Judgment of the Supreme Court of 22/06/1954, published in the *Official Gazette*, Series I, of 06/07/1954, which stated: "*The single § of article 42 of Decree no. 2, of 25 December 1910, is applicable if the child dies before or after the presumed father, as long as the child was entitled to initiate the legal action at the time of his/her death.*")

Article 43

The legal action to investigate paternity or maternity must be initiated before the court in whose jurisdiction the illegitimate child is said to have been born, or, in the case of the initiation of the action prior to the birth, before the court of the place of cohabitation or conception.

Artigo 44º

O filho ilegítimo, autor numa acção de investigação de paternidade ilegítima, presume-se pobre, salvo prova em contrário, para o efeito de lhe ser concedida a assistência judiciária.

§ único) Além disso, terá direito a pedir alimentos provisórios, que, todavia, o juiz só concederá se, pelo meio do artigo 391º do Código de Processo Civil, se convencer de que o autor poderá ter razão, não influindo, porém, esta sentença no resultado final da acção de investigação.

Artigo 45º

O Ministério Público intervirá sempre nestas acções e prestará assistência aos menores e à mãe ilegítima, independentemente da representação que os assistidos tenham em juízo.

Artigo 46º

Pelo facto do vencimento na acção de perfilhação fica o filho com os direitos consignados no artigo 31º, a partir da instauração do pleito.

CAPÍTULO V
DOS ALIMENTOS E SOCORROS ÀS MÃES DOS FILHOS ILEGÍTIMOS

Artigo 47º

O pai tem obrigação de prestar alimentos à mulher pobre de quem houve um filho ilegítimo, e para este efeito pode ser por ela demandado a partir do momento em que lhe é lícito propor a acção referida no artigo 38º, seguindo-se os termos gerais do processo sobre

Article 44

The illegitimate child who has initiated a legal action to investigate illegitimate paternity is presumed to be poor, until otherwise proven, for the purposes of benefiting from legal aid.

Single §) In addition, he/she shall be entitled to request the provisional payment of maintenance which, however, the judge shall only grant if, in accordance with article 391 of the Code of Civil Procedure, the judge is convinced that the author may be right; such a decision shall, however, have no influence on the final outcome of the investigation proceedings.

Article 45

The Public Prosecutor shall always intervene in these legal actions and assist the minors and the illegitimate mother, regardless of whether these are represented in court.

Article 46

Upon succeeding in acknowledgment proceedings, the child acquires the rights enumerated in article 31, starting from the date of the initiation of the proceedings.

CHAPTER V
MAINTENANCE AND AID TO THE MOTHERS OF ILLEGITIMATE CHILDREN

Article 47

The father is obliged to pay maintenance to the woman who is poor with whom he had an illegitimate child, and he may be sued for that purpose by her from the moment she is permitted to initiate the legal action mentioned in article 38; the

alimentos provisórios e definitivos, e aplicando-se aos provisórios o disposto no § único do artigo 44º.

§ único) Esta obrigação não existe ou cessa se a mulher tiver, notoriamente, má conduta, ou se, durante o período legal da gravidez, tiver notoriamente relações sexuais com outro homem.

Artigo 48º

A mulher pobre, com direito a alimentos, nos termos do artigo antecedente, pode cumular com estes o pedido de indemnização pelo pai ilegítimo de todas as despesas com a gravidez e com o parto, e de todos os prejuízos que necessariamente lhe resultarem desses factos.

Artigo 49º

As acções referidas nos dois artigos anteriores serão apensadas a qualquer das acções de investigação de paternidade de que trata o capítulo anterior, e não prejudicam o direito que tem a mulher virgem, estuprada ou violada, de ser dotada pelo criminoso, nos termos dos artigos 2391º do Código Civil e 400º do Código Penal.

CAPÍTULO VI
DOS DIREITOS DOS FILHOS NÃO PERFILHÁVEIS

Artigo 50º

Denominam-se não perfilháveis os filhos incestuosos.

general rules of the proceedings concerning the payment of provisional and definitive maintenance shall be applicable, and the single § of article 44 shall be applied regarding the payment of provisional maintenance.

Single §) This obligation does not exist or ceases if the woman clearly carries on bad conduct, or if, during the legal period of the pregnancy, she clearly has sexual relations with another man.

Article 48

A woman who is poor, entitled to maintenance in accordance with the preceding article, may simultaneously request that the illegitimate father be ordered to pay compensation for all the expenses related to the pregnancy and birth, as well as all damage necessarily arising from these facts.

Article 49

The legal actions mentioned in the two preceding articles shall be annexed to any of the actions for investigation of paternity addressed in the previous chapter, and they shall not affect the right of the virgin woman, who was forced or raped, to be granted a dowry to be paid by the perpetrator of the crime, in accordance with articles 2391 of the Civil Code and 400 of the Criminal Code.

CHAPTER VI
RIGHTS OF CHILDREN WHO MAY NOT BE ACKNOWLEDGED

Article 50

Incestuous children are deemed non-acknowledgeable.

Artigo 51º

Os filhos não perfilháveis só têm direito de exigir dos seus pais os alimentos necessários; em tudo o mais são havidos por inteiramente estranhos aos pais e à família destes.

Artigo 52º

O filho não perfilhável só poderá demandar seus pais, para o efeito sobredito, se o facto da paternidade ou da maternidade se achar provado, em processo cível ou criminal, controvertido entre seus pais ou outras partes; ou, em qualquer dos casos dos nºs 3º e 4º do artigo 34º, se o facto tiver sido judicialmente provado.

CAPÍTULO VII
DISPOSIÇÕES GERAIS E TRANSITÓRIAS

Artigo 53º

Este Decreto com força de lei entrará em vigor juntamente com o Decreto nº 1, relativo ao casamento civil, desta data.

Artigo 54º

O presente decreto aproveita a todos os filhos nascidos ou concebidos antes da sua entrada em vigor, mas não terá efeito em relação aos bens das sucessões já abertas, salvos os direitos adquiridos perante a legislação actualmente vigente, que serão respeitados.

Artigo 55º

Aquele que, em nome próprio, ou na qualidade de representante do pretenso filho, tenha proposto qualquer das acções de que trata este decreto, não só sem

Article 51

Non-acknowledgeable children have the sole right to demand from their parents the payment of the necessary maintenance; in all else they are considered complete strangers to the parents and to the families of the latter.

Article 52

The non-acknowledgeable child may only make the above mentioned demand from his/her parents in court if paternity or maternity has been proven in a civil or criminal trial, following a controvert procedure involving his/her parents or other parties; or, in the case of numbers 3 and 4 of article 34, if the fact has been proven in a court of law.

CHAPTER VII
GENERAL AND TRANSITORY PROVISIONS

Article 53

This decree shall enter into force together with Decree no. 1, relating to civil marriage, of the same date as the present decree.

Article 54

This decree shall be applicable to all children born or conceived before its entry into force, but it shall not be applicable to the property included in successions already opened, except for rights acquired under the legislation in force, which shall be abided by.

Article 55

A person who, in his/her own name or as a representative of the presumed

fundamento bastante, mas com intenção caluniosa, será condenado nas penas do artigo 245º do Código Penal.

Artigo 56º

A publicação por qualquer meio das peças do processo de investigação de paternidade ou maternidade ilegítima, com excepção da respectiva sentença, é proibida e sujeita os infractores às penas dos artigos 407º e 410º do Código Penal e do Decreto de 28 de Outubro de 1910, conforme no caso couber.

Artigo 57º

Todas as dúvidas que se suscitarem na interpretação e execução deste decreto com força de lei serão resolvidas por circulares do Poder Executivo, sobre consulta do Supremo Tribunal de Justiça.

Artigo 58º

O presente decreto será sujeito à apreciação da próxima Assembleia Nacional Constituinte e incorporado na reforma do Código Civil.

Artigo 59º

Ficam substituídos e revogados os artigos 101º a 136º do Código Civil, 665º e § 3º do Código de Processo Civil e a demais legislação em contrário.

child, initiates any of the legal actions foreseen in this decree, not only without sufficient basis, but also with a slanderous intent, shall be sentenced in accordance with article 245 of the Criminal Code.

Article 56

The publication, by any means, of the documents constituting the illegitimate paternity or maternity investigation proceedings, with the exception of the respective judgment, is forbidden and those disrespecting this rule shall be sentenced in accordance with articles 407 and 410 of the Criminal Code or with the Decree of 28 October 1910, depending on the specific case.

Article 57

Any questions which may arise concerning the interpretation and implementation of this decree shall be settled by means of circulars issued by the Executive, upon the advice of the Supreme Court.

Article 58

This decree shall be presented for approval at the next National Constituent Assembly and incorporated in the reform of the Civil Code.

Article 59

Articles 101 to 136 of the Civil Code, article 665 and § 3 of the Code of Civil Procedure and all contrary legislation are hereby replaced and revoked.

COMMENTARY TO ARTICLES 101 TO 136 AND TO THE PROTECTION OF CHILDREN ACT

In accordance with the provisions of the Protection of Children Act, adopted by Decree no. 2, of 25 December 1910, there are two main categories of children: legitimate children and illegitimate children, the first being divided into legitimate children *stricto sensu* and legitimated children.

Legitimate children are, according to article 101 of the Civil Code, as revised by Decree no. 19.126, of 16 December 1930, which replaced article 1 of Decree no. 2, of 25 December 1910, "*children born of a lawfully contracted marriage, one hundred and eighty days having passed since its solemnisation, or at the latest three hundred days after its dissolution or the separation of the spouses, decreed by a court of law*", these deadlines having been chosen as corresponding to the minimum and maximum periods of gestation.

However, article 101's definition of legitimate children is incomplete, and it has to be complemented with other legal rules.

On the one hand, legitimate children are not only those born from legitimately contracted marriages, but also those born from null or voidable marriages, as a result of article 31 of Decree no. 1, of 25 December 1910, which adopted the Law of Marriage as a Civil Contract, published in Official Gazette no. 70, of 27 December 1910.

On the other hand, the aforesaid article 101 seems to imply, *a contrario sensu*, that children born after the marriage, but before one hundred and eighty days have passed since its solemnisation, would be illegitimate.

The same seems to be suggested by article 165 of the Code of Civil Registry of the State of India, which foresees that "*If the child is born before the dissolution of the marriage, no mention contrary to the child's legitimacy will be included in the birth registration act, even if the mother says that the child is not her husband's, or if the latter states that the child is not his, except in one of the*

following cases: 1) If the child was born before one hundred and eighty days have passed since the solemnisation of the marriage; (...)" (this interpretation is followed by the judgment of the Supreme Court of 6/6/1933, in *Revista de Legislação e de Jurisprudência*, year 66, no. 2492, pages 158-160, according to which, except for the cases foreseen in article 6 of the Protection of Children Act, a child born before one hundred and eighty days have passed since the marriage would be illegitimate).

However, this interpretation does not appear to be valid, as it would render unnecessary all the provisions of Decree no. 2 which relate to the challenging of the legitimate paternity of such children. And even if that interpretation was restricted to situations where there had been a declaration of non-paternity by the mother or her husband, it would still hardly be compatible with the provisions of the Protection of Children Act. In fact, article 165 of the Code of Civil Registry of the State of India does not establish the illegitimacy of children born before one hundred and eighty days have passed since the marriage, and the declaration of non-paternity mentioned therein may later be used as means of proof in a suit to challenge legitimacy (in this sense, see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil. Lições ao Curso do 1º Ano Jurídico de 1944-45 (Família e Sucessões)*, Centro de Estudos Norte-Americanos, Lda., Mirandela, n/d, page 277, no. 1, in relation to article 261 of the Portuguese Code of Civil Registry of 1932, which contained a provision similar to that of the aforementioned article 165).

Therefore, it should be concluded that children born before one hundred and eighty days have passed since the solemnisation of the marriage are legitimate, as can be clearly read in article 6 of the Protection of Children Act; these children are, however, in a different situation from that of children born after that period has elapsed, with regard to the admissibility of challenge of the paternity. Thus, while the paternity of the first type of children may, as a rule, be challenged, except in the two cases indicated in no.s 1 and 2 of article 6 of the said Act, the paternity of the latter shall not be challenged, unless the parent was not personally present at the time the birth was

registered, nor did he consent for the child to be called his in the birth record, nor did he in any other way recognise the child as his own, and it is proven that the father was physically incapable of cohabiting with the mother in the first one hundred and twenty one days, or more, of the three hundred days preceding the birth, in accordance with article 7 of the Protection of Children Act.

Articles 10 and 11 of the Protection of Children Act, relating to the legitimacy and the deadlines for the suit to challenge paternity, seem to suggest that only the parents or their heirs may challenge the paternity of children. However, on 22/7/1938, the Supreme Court issued a case-law creating judgment in which it was settled that "*A child deemed legitimate may initiate a suit to challenge his/her legitimacy, since article 106 of the Civil Code is revoked*" (published in the Official Gazette, Series I, of 4/8/1938).

As mentioned above, aside from legitimate children *stricto sensu*, there are also legitimated children, i.e., children born before his/her parents' marriage, regardless of the parents' situation at the child's time of conception or birth, in accordance with article 2 of the Protection of Children Act.

According to the provisions of article 5 of this Act, legitimated children are considered, for all purposes, legitimate children, and should so be called. Although the subsequent marriage of the parents is a *sine qua non* condition for this legitimation, it does not suffice, it being further required that the paternity and maternity be recognised, in accordance with article 3 of the Protection of Children Act.

Depending on how the acknowledgment is carried out, the legitimation is either voluntary or judicial. In voluntary legitimation, foreseen in no. 1 of article 3 of the Protection of Children Act, the acknowledgment is initiated by the parents themselves, while in judicial legitimation, referred to in no. 2 of the same provision, it is the children who ask the court to clarify their filiation.

It should be stressed that, according to § 3 of article 3 of the Protection of Children Act, the effects of the legitimation begin at the date of the legitimating marriage, having no retroactive effects to the

time of birth, which may have important consequences, especially with regard to succession (see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil*, cit., page 285, no. 2).

Aside from legitimate filiation, the law foresees, in articles 22 *et seq.* of the Protection of Children Act, illegitimate filiation, i.e., that of children born outside of wedlock, divided into those who are acknowledgeable and those who are not. Thus, article 22 of this Act states that only incestuous children shall not be acknowledged, defined by the single § of that provision as "*the children of relatives by blood or marriage in any degree of lineal descent, even if the marriage which caused the affinity has been dissolved*", as well as "*the children of blood relatives at the second degree of the collateral line*".

The acknowledgment may be voluntary, when the parents spontaneously acknowledge the paternity or maternity, or judicial, when it is decreed by a court of law in a paternity or maternity investigation suit initiated by the child specifically for that purpose.

The acknowledgment of illegitimate adulterous children, i.e., children of a father and/or mother who, due to a marriage that has not yet been dissolved, are incapable of being married in the first one hundred and twenty days of the three hundred preceding the birth of the child, in other words, during the legal period of conception, obeys specific rules set out in §§ 1 and 2 of article 23 of the Protection of Children Act, and it is considered secret for as long as the incapacity lasts.

The value of an acknowledgment of illegitimate adulterous children made in a public will is arguable, considering that § 2 of article 23 mentions only the closed will, given the secret nature of the acknowledgment in question.

Thus, some argue that such an acknowledgment is valid, since the conditions foreseen in §§ 1 and 2 of article 23 are aimed at protecting the interests of the acknowledging parent, implying that this parent may lawfully renounce the benefit of such protection (this opinion was expressed, e.g., in Cunha Gonçalves, *Tratado de Direito Civil em*

Comentário ao Código Civil Português, vol. II, Coimbra Editora, Coimbra, 1930, pages 282 and 283).

Conversely, it may be argued that the law pursues an aim of public policy, specifically family stability, which is endangered by the publicising of one of the spouse's adultery and of the existence of an adulterous child, and for this reason the acknowledger shall not be free to set aside what the law established for reasons other than simply his own benefit (see legal opinion in *Revista de Legislação e de Jurisprudência*, year 65, no. 2457, from 14/5/1932, pages 14-16, in which it was concluded that, although the acknowledgment of an illegitimate adulterous child in a public will is null and void, it could nonetheless serve as the basis for a suit to investigate illegitimate paternity, in accordance with article 34, no. 1, of the Protection of Children Act).

Regarding legal proceedings to investigate illegitimate paternity or maternity, regulated in article 34 *et seq.* of the Protection of Children Act, it should first be noted that while the suit to investigate illegitimate maternity is, in principle, always allowed (the only exception being the case of incestuous or adulterous children, as foreseen in articles 35 and 36 of the mentioned Act), the suit to investigate illegitimate paternity is only allowed in the cases foreseen in article 34, while it is also forbidden in the case of incestuous or adulterous children.

In reference to article 35, one should take into account the case-law creating judgment of the Supreme Court of 19/7/1955, published in the Official Gazette, Series I, of 2/8/1955, which determined that article 9 (including its single §) of the Code of Gentile Hindu Usages and Customs of Goa, adopted by the Decree of 16 December 1880, was still in force; under this article illegitimate children shall not be acknowledged, except in the case of illegitimate children of dancers and of other unmarried women.

Returning to the suit to investigate illegitimate paternity, for it to be successful, it is not enough to obtain evidence of the facts foreseen

in article 34 of the Protection of Children Act, since those circumstances are only *prima facie* evidence of the fact of paternity, which must be proved.

Once illegitimate children have been acknowledged, be it voluntarily or by a court of law (see article 46 of the Protection of Children Act), they hold the rights foreseen in article 129 of the Civil Code, as revised by Decree no. 19.126, of 16 December 1930, which replaced article 31 of the Protection of Children Act, i.e., the right to use the parents' last names, the right to receive maintenance from the parents, and the right to succeed to their ascendants or to receive a part of the inheritance, in accordance with articles 1989 to 1992.

The expression "*starting from the date of the initiation of the proceedings*", used in article 46 of the Protection of Children Act, should not be interpreted as meaning that the child acknowledged by a court of law acquires his/her respective rights starting from the initiation of the investigation suit; rather, it means that only after this moment can such rights become effective; this is because the investigation suit does not create a status, it merely declares its existence, and for this reason the judgment has retroactive effects starting from the time of birth (see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil*, cit., pages 299 and 301).

In accordance with article 32 of the Protection of Children Act, adulterous children may only exercise the above mentioned rights upon the death of the incapable person(s), or upon the dissolution of the marriage which caused the incapacity; these rights must be exercised separately and in relation to each incapable parent; under certain circumstances, however, it is possible to bring a suit for maintenance against the incapable father and/or mother, even during the incapacity, as foreseen in article 33 of that Act.

Non-acknowledgeable illegitimate children, previously called spurious children in articles 134 to 136 of the Civil Code (which were revoked by article 59 of the Protection of Children Act), may only request maintenance from the parents, in certain cases, and they

are considered, for all other purposes, complete strangers to the parents and to their respective family, in accordance with articles 51 and 52 of the Protection of Children Act.

The Protection of Children Act restricted the situations of non--acknowledgeable illegitimate children to the cases of incestuous children, since article 122, no. 1, of the Civil Code (revoked by article 59 of that Act) also considered adulterous children as non-acknowledgeable. However, as mentioned above, adulterous children, in the framework of the rules introduced by Decree no. 2, may be acknowledged, as long as this acknowledgment remains secret for as long as the father's and/or mother's incapacity lasts.

The Filiation Law currently in force in Portugal is very different from that found in the Code of Seabra and in the Protection of Children Act.

These issues are regulated in Title III of Book IV of the Portuguese Civil Code of 1966, and they underwent profound modifications with the Reform of the Civil Code, introduced by Decree-Law no. 496/77, of 25 November, which sought to adapt the Code's legal options to the constitutional provisions included in the Portuguese Constitution of 1976.

The main innovative principle of the 1976 Constitution, regarding filiation, was the prohibition of discrimination against children born outside of wedlock, foreseen in article 36, no. 4, of the Portuguese Constitution as follows: *"Children born outside of wedlock shall not, for this reason, be subject to any type of discrimination and the law or public services shall not use discriminatory designations relating to filiation"*.

Thus, with the 1977 reform of the Civil Code of 1966, there ceased to exist any difference between legitimate and illegitimate children in Portugal, which required profound changes to the rules on establishing filiation, now included in Chapter I of Title III of Book IV of the Civil Code of 1966, in articles 1796 to 1873.

As for means for establishing maternity, the more recent Portuguese law has foreseen two: the declaration of maternity

before the civil registry, which is the common means for children born both within and outside of wedlock (see articles 1803 *et seq.*), and the recognition by a court of law (see articles 1814 *et seq.*).

As for paternity, it can be established either on the basis of a presumption of paternity (articles 1826 to 1846), regarding children born or conceived in the constancy of the matrimony and whose father is presumed to be the mother's husband; or, in case of children conceived outside of wedlock, on the basis of recognition, which may be voluntary (on the father's own initiative), in which case it is called acknowledgment (regulated in articles 1849 to 1863), or ordered by a court of law, following a suit to investigate paternity (foreseen in articles 1869 to 1873).

Therefore, there is still a distinction with regard to the means of establishing paternity between children born or conceived within or outside of wedlock, which could raise doubts as to the compatibility of such a solution with the interdiction of the discrimination against children born out of wedlock, foreseen in the above mentioned article 36, no. 4, of the Constitution.

However, it has been held that it is not unconstitutional to distinguish the means of establishing paternity, insofar as, given its very high likelihood, the presumption of paternity in relation to children born or conceived in the constancy of matrimony is still fully justified (see Jorge Miranda and Rui Medeiros, *Constituição Portuguesa anotada*, book I, *Introdução Geral. Preâmbulo. Artigos 1º a 79º*, Coimbra Editora, Coimbra, 2005, pages 419 and 420, and Jorge Duarte Pinheiro, *Direito da Família e das Sucessões*, vol. II, *Introdução geral ao Direito da Família e das Sucessões. Introdução ao Direito da Família. Direito da Filiação e Direito Tutelar*, 3rd edition, AAFDL, Lisbon, 2007, pages 129-130).

The presumption of paternity corresponds to the previous presumption of legitimacy (see, *inter alia*, article 7 of the Protection of Children Act), based on the principle that the woman abides by her duty of fidelity to the husband.

As for acknowledgment, while in the Protection of Children Act it is a means of establishing both the maternity and the paternity, in

relation to illegitimate children (see articles 22 *et seq*. of this Act), in current Portuguese law it is only a means to establish the paternity of children born or conceived outside of wedlock, which are no longer considered illegitimate.

Furthermore, unlike the Protection of Children Act, article 34 of which foresees the cases in which the suit to investigate paternity is possible, current Portuguese law allows for the suit to investigate paternity in all cases, as long as the maternity has been established or the recognition of both is requested simultaneously, and as long as there is no differing paternity on record, since otherwise it is first necessary to rectify, declare the nullity or cancel that record (see articles 1848, no. 1, and 1869 of the Civil Code of 1966). Therefore, the situations foreseen in the different no.s of article 34 of the Protection of Children Act are no longer conditions for accepting the investigation suit, and are now foreseen in article 1871 of the Civil Code of 1966, with some differences, as grounds for legal presumptions of paternity, which may however be set aside by raising in the judge's mind doubts about their likelihood (see no. 2 of article 1871).

Finally, it should still be noted that, in current Portuguese law, there are no longer non-acknowledgeable illegitimate children, previously referred to in articles 22 and single § and 50 of the Protection of Children Act. There is, however, a specificity regarding the children of relatives by blood or affinity in lineal descent, as well as the children of siblings, or in other words, concerning incestuous children, as defined in article 22, single §, of the Protection of Children Act.

Indeed, articles 1809, clause a), and 1866, clause a), of the Civil Code of 1966, do not allow for an officious investigation of the maternity and paternity of such children, which is not to say that it is forbidden to establish their biological filiation, since this is allowed under the general terms. In fact, an officious investigation is not, in itself, a means of establishing maternity and paternity, but merely an activity required by law, with the aim of leading to that

establishment through the above indicated means: declaration of maternity or recognition by a court of law, for maternity, and acknowledgment or recognition by a court of law, for paternity. An officious investigation takes place in relation to maternity whenever the maternity is not mentioned in the birth record, and in relation to paternity whenever the minor's record of birth only indicates maternity, in accordance with articles 1808, no. 1, and 1864, of the Civil Code of 1966, respectively.

Código Civil de 1867

SECÇÃO VII
DO PODER PATERNAL NA CONSTÂNCIA DO MATRIMÓNIO

Artigo 137º

Aos pais compete reger as pessoas dos filhos menores, protegê-los e administrar os bens deles; o complexo destes direitos constitui o poder paternal.

Artigo 138º

As mães participam do poder paternal e devem ser ouvidas em tudo que diz respeito aos interesses dos filhos, mas é ao pai que especialmente compete durante o matrimónio, como chefe da família, dirigir, representar e defender seus filhos menores, tanto em juízo, como fora dele.

Artigo 139º

No caso de ausência ou de outro impedimento do pai, fará a mãe as suas vezes.

Artigo 140º

Os pais devem dar a seus filhos os necessários alimentos e ocupação conveniente, conforme as suas posses e estado.

Artigo 141º

O poder dos pais, quanto às pessoas dos filhos menores, não é sujeito a cautela alguma preventiva; mas, no caso de abuso, os pais poderão ser punidos, na

Civil Code of 1867

SECTION VII
PARENTAL AUTHORITY IN THE CONSTANCY OF MARRIAGE

Article 137

It is for the parents to govern the persons of their minor children, to protect them and to manage their property; the ensemble of these rights constitutes what is called parental authority.

Article 138

Mothers take part in parental authority and must be heard in all that concerns the interests of the children, but it is especially up to the father, during marriage, as head of the family, to represent and defend his minor children, both in and out of court.

Article 139

In case of absence or of another impediment of the father, the mother replaces him.

Article 140

Parents must provide their children with the necessary maintenance and suitable occupation, in accordance with their means and status.

Article 141

The authority of the parents, regarding the persons of their minor children, is not subject to any provisional measure; but, in case of abuse, the parents may be

conformidade da lei geral, e inibidos de reger as pessoas e bens de seus filhos, a requerimento dos parentes ou do ministério público.

§ único) Sendo o pai inibido de reger a pessoa e os bens do menor, será dado tutor ou administrador a este, por nomeação do conselho de família.

Artigo 142º

Os filhos devem, em todo o tempo, honrar e respeitar seus pais, e cumprir, durante a menoridade, os seus preceitos em tudo o que não seja ilícito.

Artigo 143º

Se o filho for desobediente e incorrigível, poderão seus pais recorrer à autoridade judicial, que o fará recolher à casa de correcção para isso destinada, pelo tempo que lhe parecer justo, o qual aliás não excederá o prazo de trinta dias.

§ único) O pai tem, todavia, a faculdade de fazer cessar a prisão ordenada.

Artigo 144º

Pertence aos pais a propriedade e usufruto dos bens que os filhos adquirem enquanto estão em sua companhia, com o emprego de meios ou capitais pertencentes aos mesmos pais, salvo o direito de os remunerar, dando-lhes alguma parte dos ditos bens.

Artigo 145º

Pertence aos pais só o usufruto dos bens que os filhos que estão em sua companhia adquirem por seu trabalho, indústria e recursos próprios, ou por qualquer título gratuito.

punished, in accordance with the general law, and prohibited from governing the persons and property of their children, at the request of relatives or of the Public Prosecutor.

Single §) If the father has been prohibited from governing the minor's person and property, a guardian or administrator shall be attributed to the minor, to be appointed by the family council.

Article 142

Children must, at all times, honour and respect their parents, and, while they are minors, abide by all their commands in so far as they are not illicit.

Article 143

If the child is disobedient and incorrigible, his/her parents may resort to judicial authority, which will have him/her kept in the correctional home so destined, for the period it deems just, which shall not exceed thirty days.

Single §) The father has, however, the power to have the ordered incarceration ceased.

Article 144

The parents shall have the rights of property and usufruct over the assets acquired by the children while the latter are in the company of the parents, if they were acquired using means or capital belonging to the said parents, notwithstanding the right to remunerate the children, by giving them a part of the said assets.

Article 145

The parents shall only have a right of usufruct over the assets acquired by the

Artigo 146º

Pertence aos pais só a administração:

1º) Dos bens doados ou deixados aos filhos com exclusão do usufruto dos pais;

2º) Dos bens provenientes de sucessão, de que os pais forem excluídos por causa de indignidade. Mas esta disposição não abrange o cônjuge não declarado indigno.

Artigo 147º

Não pertence aos pais, nem o usufruto, nem a administração:

1º) Dos bens que os filhos adquirem por seu trabalho e indústria, vivendo sobre si com permissão dos pais;

2º) Dos bens que os filhos adquirem pelas armas, letras ou artes liberais, vivam, ou não, em companhia dos pais;

3º) Dos bens que forem doados ou deixados aos filhos, com exclusão da administração dos pais.

Artigo 148º

Os encargos do usufruto pertencente aos pais são:

1º) Todos aqueles a que, em geral, estão sujeitos os usufrutuários, excepto a caução;

2º) A decente sustentação e educação dos filhos, conforme a sua condição e os seus haveres;

3º) O pagamento de quaisquer prestações ou interesses atrasados a que os bens usufruídos estejam obrigados.

§ único) A excepção feita ao nº 1, relativamente à caução, cessará, se os pais passarem a segundas núpcias.

children while they are in their company through their own work, industry and resources, or through any gratuitous way.

Article 146

Parents' rights are limited to administration regarding:

1) property donated or left to the children while excluding the parents' usufruct;

2) property deriving from a succession, in relation to which the parents are excluded on the grounds of indignity. However this provision shall not include the spouse who was not debarred from succeeding.

Article 147

The parents shall have neither the right of usufruct nor the right to administer:

1) the property acquired by the children through their own work and industry, living on their own with the permission of the parents;

2) the property acquired by the children through military services, arts or liberal professions, whether or not they live in the company of their parents;

3) the property donated or left to the children, excluding the administration by the parents.

Article 148

The burdens inherent in the parents' rights of usufruct are the following:

1) All those which usually go with the right of usufruct, with the exception of the security;

2) The decent support and education of the children, in accordance with their condition and possessions;

Artigo 149º

O direito de usufruto concedido aos pais extingue-se:

1º) Pela maioridade ou emancipação dos filhos;

2º) Quando, pela morte de qualquer dos cônjuges, não for promovido inventário dentro do prazo estabelecido na lei;

3º) Pela renúncia.

§ único) A renúncia, feita em favor do filho, será tida em conta de doação.

Artigo 150º

Os pais não podem alienar, hipotecar, ou por qualquer outro modo obrigar os bens dos filhos, sendo meros usufrutuários ou administradores dos ditos bens, excepto no caso de urgente necessidade, ou de proveito evidente para o menor, precedendo autorização judicial, com audiência do ministério público.

Artigo 151º

Se, durante o exercício do poder paternal, alguns bens recaírem nos filhos, os pais, consistindo a herança em valores mobiliários de considerável importância, serão obrigados a prestar caução, sendo julgada necessária.

§ único) Se os pais não puderem prestar a sobredita caução, serão depositados os valores, ou, se os pais o requererem, convertidos em outros valores ou colocados produtivamente, com a possível segurança, e receberão os mesmos pais o rendimento deles.

3) The payment of any due installments or interests imposed upon the property subject to usufruct.

Single §) The exception made to number 1, concerning the security, shall cease if the parents enter a second marriage.

Article 149

The right of usufruct granted to the parents ceases:

1) As an effect of the age of majority or emancipation of the children;

2) When, due to the death of either spouse, no inventory is carried out within the deadline defined in the law;

3) Through renunciation.

Single §) A renunciation carried out in favour of the child shall be considered a donation.

Article 150

Parents may not dispose of, mortgage or in any other way create obligations upon the property of the children if they are mere holders of the right of usufruct or mere administrators of the said property, except in case of urgent necessity, or of evident benefit to the minor, following judicial permission after consulting the Public Prosecutor.

Article 151

If, during the exercise of parental authority, certain property befalls to the children, the parents, when the inheritance consists of securities of considerable worth, shall be obliged to offer a security (deposit), if this is deemed necessary.

Single §) If the parents cannot present the said security (deposit), the securities shall be deposited, or, at the request of the parents, shall be converted into other

Artigo 152º

Os pais não são obrigados a dar contas da sua gerência, salvo pelo que toca aos bens de que forem meros administradores.

§ único) Estas contas serão tomadas pelo juiz respectivo, de quatro em quatro anos, e observar-se-á, a respeito do produto líquido ou do alcance, o disposto nos artigos 253º, 254º e 255º.

Artigo 153º

Se entre os pais e seus filhos menores se levantarem conflitos de interesses, cuja resolução dependa da autoridade pública, será dado aos filhos, por nomeação do juiz competente, tutor especial que os defenda.

Artigo 154º

Os pais devem entregar a seus filhos, logo que se emancipem ou cheguem à maioridade, não sendo por outra causa incapazes, todos os bens e rendimentos que lhes pertencem, na forma declarada nos artigos antecedentes.

§ único) Os móveis, de que o pai tiver o usufruto, serão restituídos no estado em que se acharem; não existindo, pagará aquele o valor deles, excepto se se tiverem consumido em uso que fosse comum aos ditos filhos, ou tendo perecido por caso fortuito.

securities or placed productively, with the possible security (deposit), and the parents shall receive the income they generate.

Article 152

Parents are not obliged to account for their management, except regarding the property of which they are merely administrators.

Single §) This accounting shall be received by the respective judge, every four years, and the provisions of articles 253, 254 and 255 shall be applied regarding their net result or debt.

Article 153

If conflicts of interest arise between the parents and the minor children, the solution of which is dependent on a public authority, the children shall be awarded a special guardian to defend them, appointed by the competent judge.

Article 154

Parents must surrender to their children, once these have become emancipated or have reached the age of majority, if they are not legally incapable due to other reasons, all the property and income that belong to them, in the form set out in the preceding articles.

Single §) The movable property over which the parent holds the right of usufruct shall be returned in the condition in which it is found; if it no longer exists, the father will pay its value, except if it was consumed in a use that was common to the said children, or if it perished by chance.

SECÇÃO VIII
DO PODER PATERNAL, DISSOLVIDO O MATRIMÓNIO

Artigo 155º

Dissolvido o matrimónio por morte de um dos cônjuges, o que sobrevive continua a exercer o poder paternal, devendo conformar-se com as seguintes disposições.

Artigo 156º

O cônjuge sobrevivo é obrigado a requerer, dentro de sessenta dias, contados desde o falecimento do outro cônjuge, que se proceda a inventário dos bens que pertencem ao menor, ou que devam ser repartidos com ele.

§ único) O cônjuge que assim o não cumprir perderá o usufruto dos bens do filho.

Artigo 157º

Se, ao tempo da morte do marido, a mulher ficar grávida, fará constar dentro de vinte dias, ou logo que conheça a gravidez, o seu estado ao juiz dos órfãos competente, para que este nomeie curador ao ventre, que tome provisoriamente conta dos bens que houverem de pertencer ao nascituro.

§ único) Esta curatela dura só enquanto durar a gestação.

Artigo 158º

O curador dos órfãos promoverá o andamento e conclusão do inventário e requererá o que for de direito a favor dos menores, sob pena de perdas e danos.

SECTION VIII
PARENTAL AUTHORITY AFTER THE DISSOLUTION OF MARRIAGE

Article 155

When the marriage has been dissolved by the death of one of the spouses, the surviving spouse continues to exercise parental authority and must comply with the following provisions.

Article 156

The surviving spouse is obliged to request, at the latest sixty days after the death of the other spouse, inventory proceedings for the property that belongs to the minor or that must be shared with him/her.

Single §) The spouse who fails to do so shall lose the right of usufruct over the child's property.

Article 157

If, at the time of the husband's death, the wife is left pregnant, she will let her condition be known to the competent judge of orphans at the latest twenty days after the said death, or as soon as she becomes aware of it, so that the judge may appoint a womb curator, who will temporarily be responsible for the property that will belong to the unborn child.

Single §) This curatorship shall last only until the end of the gestation.

Article 158

The curator of orphans shall procure the progress and conclusion of the inventory and shall request what is lawfully to be requested in favour of the minors, failing which he will pay losses and damage.

Artigo 159º

O pai pode nomear em seu testamento um ou mais conselheiros, que dirijam e aconselhem a mãe viúva em certos casos, ou em todos aqueles em que o bem dos filhos o exigir.

§ único) Não gozará desta faculdade o pai que, ao tempo do seu falecimento, estiver interdito do poder paternal.

Artigo 160º

Só podem ser nomeados conselheiros os indivíduos que podem ser tutores.

Artigo 161º

A mãe que, em prejuízo de seus filhos, deixar de seguir o parecer do conselheiro nomeado pelo pai, ou, por qualquer modo, abusar da sua autoridade materna, poderá ser inibida, por deliberação do conselho de família, a requerimento do dito conselheiro, do curador, ou de qualquer parente dos filhos, de reger as pessoas e bens destes.

§ único) Neste caso nomeará o conselho de família pessoa que sirva de tutor aos filhos menores, nos termos dos artigos 185º e seguintes.

Artigo 162º

A mãe, que passar a segundas núpcias, perderá a administração dos bens dos filhos menores a que se refere o artigo 146º, se nela não for mantida por deliberação do conselho de família, mas conservará o seu poder materno no que disser respeito às pessoas de seus filhos.

§ único) A mãe bínuba que, por deliberação do conselho de família, for mantida na administração destes bens é obrigada a prestar a caução que ao mesmo

Article 159

The father may appoint in his will one or more advisors, to direct and counsel the widowed mother in certain cases, or in all cases wherein the well being of the children so requires.

Single §) The father who, at the time of his death, was interdicted from exercising his parental authority shall not have this option.

Article 160

Only individuals who may be guardians can be appointed advisors.

Article 161

The mother who, to the detriment of her children, does not follow the opinion of the advisor appointed by the father, or who, in any other way, abuses her maternal authority, may be prohibited from governing the child's person and property through a decision of the family council, at the request of the said advisor, of the curator, or of any relative of the children.

Single §) In this case, the family council shall appoint a person to act as guardian to the children who are still minors, in accordance with articles 185 et seq.

Article 162

The mother who enters a second marriage shall lose the right to administer the property of the children who are still minors, referred to in article 146, unless the family council otherwise decides, but she will keep her maternal authority regarding the persons of the children.

Single §) The twice-wed mother who, by decision of the family council,

conselho parecer necessária, se ele não julgar conveniente dispensá-la.

Artigo 163º

Se a mãe bínuba for mantida na administração dos bens dos filhos, nos termos do artigo anterior, será o marido solidariamente responsável com ela pelos prejuízos que resultarem da sua gerência, ainda que judicialmente separado ou divorciado, respeitando os prejuízos a tempo anterior à separação ou ao divórcio.

§ único) Se a mãe for privada da administração dos bens dos filhos, nomeará o conselho de família pessoa que se encarregue dessa administração, com os mesmos deveres e direitos que têm os tutores relativamente aos bens dos menores.

Artigo 164º

Se a mãe tornar a enviuvar, recobrará a administração dos bens dos filhos, se desta se encontrasse privada.

Artigo 165º

Em caso de anulação de matrimónio, ou de separação judicial, observar-se-á a respeito dos filhos o disposto nos títulos respectivos.

keeps the right to administer this property is obliged to give the security deemed necessary by that council, if it does not consider it convenient to dispense her from that obligation.

Article 163

If the twice-wed mother keeps the right to administer the property of the children, in accordance with the preceding article, her husband will be jointly and severally liable with her for the damage arising from her management, even if he is judicially separated or divorced, as long as the damage in question relates to a time preceding the separation or divorce.

Single §) If the mother is deprived of the administration of the children's property, the family council shall appoint a person responsible for that administration, with the same duties and rights awarded to guardians in relation to the property of minors.

Article 164

If the mother is widowed once again, she will recover the right to administer the children's property, if she had lost this right.

Article 165

In the case of annulment of the marriage, or of legal separation, the provisions of the respective sections shall be applied regarding the children.

SECÇÃO IX
DO PODER PATERNAL EM RELAÇÃO AOS FILHOS ILEGÍTIMOS

Artigo 166º

Os filhos menores perfilhados estão sujeitos ao poder paternal, da mesma forma que os filhos legítimos, excepto se os pais houverem contestado a sua paternidade e forem convencidos judicialmente. Os pais não gozam, todavia, do usufruto dos bens dos filhos perfilhados.

§ único) No caso excepcional indicado neste artigo, o menor será tutelado, segundo o disposto nos artigos 279º, 280º e 281º, se o outro progenitor não puder exercer o poder paternal.

Artigo 167º

Os filhos menores não perfilhados não estão sujeitos ao poder paternal, e serão tutelados, como se dirá nos artigos 279º e seguintes.

SECÇÃO X
DA SUSPENSÃO E DO TERMO DO PODER PATERNAL

Artigo 168º

O poder paternal suspende-se:

1º) Pela incapacidade dos pais, judicialmente reconhecida;

2º) Pela ausência dos pais, nos termos do artigo 82º;

3º) Por condenação dos pais, que envolva interdição temporária daquele poder.

SECTION IX
PARENTAL AUTHORITY OVER ILLEGITIMATE CHILDREN

Article 166

Children who are still minors and have been acknowledged are subject to parental authority, in the same way as legitimate children, except if the parents have contested their paternity and lost in court. The parents do not enjoy, however, the right of usufruct over the property of the acknowledged children.

Single §) In the exceptional case indicated in this article, the minor shall be subject to guardianship, in accordance with articles 279, 280 and 281, if the other parent cannot exercise parental authority.

Article 167

Children who are still minors and have not been acknowledged are not subject to parental authority, and they will be subject to guardianship, as described in articles 279 et seq.

SECTION X
SUSPENSION AND TERMINATION OF PARENTAL AUTHORITY

Article 168

Parental authority is suspended:

1) Due to the incapacity of the parents, decreed by a court of law;

2) Due to the absence of the parents, in accordance with article 82;

3) Due to a conviction of the parents implying a temporary interdiction in relation to that power.

Artigo 169º

Os pais conservam, porém, o seu direito ao usufruto dos bens do filho menor, no caso de suspensão do poder paternal por efeito de demência.

Artigo 170º

O poder paternal termina:

1º) Por morte dos pais ou dos filhos;

2º) Pela emancipação ou maioridade dos filhos.

SECÇÃO XI
DOS ALIMENTOS

Artigo 171º

Por alimentos entende-se tudo o que é indispensável ao sustento, habitação e vestuário.

§ único) Os alimentos compreendem, também, a educação e instrução do alimentado, sendo este menor.

Artigo 172º

A obrigação de alimentos é recíproca entre descendentes e ascendentes e entre irmãos, nos termos seguintes.

Artigo 173º

Na falta dos pais, ou se estes não tiverem meios para prestar os devidos alimentos, ou se esses meios não forem suficientes, podem os filhos legítimos ou legitimados pedi-los aos ascendentes mais próximos de qualquer das linhas, segundo o seu direito sucessório.

Article 169

Parents shall continue to have, however, the right of usufruct over the property of their child who is still a minor, in the case of a suspension of parental authority due to being of unsound mind.

Article 170

Parental authority is terminated:

1) Upon the death of the parents or of the children;

2) Upon the emancipation or age of majority of the children.

SECTION XI
MAINTENANCE

Article 171

Maintenance is defined as all that is indispensable for subsistence, lodging and clothing.

Single §) Maintenance also includes the education and instruction of the receiver of maintenance, if he/she is a minor.

Article 172

The obligation to pay maintenance is reciprocal between descendants and ascendants and between siblings, in accordance with the following provisions.

Article 173

In the absence of parents, or if these do not have the means to provide the due maintenance, or if those means are insufficient, legitimate or legitimated children may request maintenance from their closest ascendants of any line of descent, in accordance with their rights of succession.

Artigo 174º

Na falta dos pais e de outros ascendentes, podem os filhos legítimos ou legitimados pedir alimentos a seus irmãos legítimos, germanos, uterinos ou consanguíneos, mas subsidiariamente e na ordem em que vão nomeados.

Artigo 175º

Os filhos perfilhados só podem pedir alimentos a seus pais ou mães e a seus irmãos, segundo a regra estabelecida no artigo precedente.

Artigo 176º

A obrigação de prestar alimentos transmite-se com a herança, se tiverem sido judicialmente pedidos ou voluntariamente prestados mediante documento autêntico ou autenticado.

Artigo 177º

Os filhos legítimos, que se acharem sem pai, mãe, avós ou irmãos, que possam prestar-lhes alimentos, serão alimentados até à idade de dez anos por quaisquer outros parentes até o sexto grau, preferindo os mais próximos.

Artigo 178º

Os alimentos serão proporcionados aos meios daquele que houver de prestá-los e à necessidade daquele que houver de recebê-los.

Article 174

In the absence of parents and of other ascendants, legitimate or legitimated children may request maintenance from their legitimate, full blood, uterine or consanguine siblings, but only subsidiarily and in the order herein indicated.

Article 175

Acknowledged children may only request maintenance from their fathers or mothers and from their siblings, in accordance with the rule established in the preceding article.

Article 176

The obligation to pay maintenance is passed on together with an inheritance, if maintenance has been requested in a court of law or has been voluntarily given through an authentic or authenticated document.

Article 177

Legitimate children without a father, mother, grandparents or siblings who may provide them with maintenance, will receive maintenance until the age of ten from any other relatives up to the sixth degree, with preference given to the closest relatives.

Article 178

Maintenance shall be proportional to the means of the person obliged to provide it and to the necessity of the person entitled to receive it.

Artigo 179º

A obrigação de alimentos cessa:

1º) Quando aquele que os presta não pode continuar a prestá-los, ou aquele que os recebe deixa de precisar deles;

2º) Nos casos em que é admitida a deserdação.

Artigo 180º

Cessa igualmente a obrigação de alimentos, quando a necessidade destes resulta de procedimento repreensível do alimentado, e este emendando-se os pode tornar desnecessários. Mas se a emenda do alimentado já não pode fazer com que ele deixe de carecer dos alimentos, o acto repreensível dele será tido em consideração só para o efeito de se lhe arbitrarem menores, ou de se lhe reduzirem os já arbitrados.

Artigo 181º

Os alimentos taxados podem ser reduzidos, se a possibilidade de prestá-los ou a necessidade de recebê-los se acharem minoradas.

Artigo 182º

O direito aos alimentos não pode ser renunciado, bem que estes possam deixar de ser pedidos, e que possam renunciar-se os alimentos vencidos.

Artigo 183º

Se aquele que for obrigado aos alimentos justificar que os não pode prestar como pensão, mas tão-somente em sua casa e companhia, assim poderão ser decretados. O mesmo se observará, se o alimentado, sem justa causa, saiu de

Article 179

The obligation to pay maintenance ceases:

1) When the person who provides it is no longer capable of doing so, or when the person receiving it no longer needs it;

2) In the cases in which disinheritance is permitted.

Article 180

The obligation to pay maintenance also ceases when its necessity is a result of a reprehensible course of action of the person receiving it, and when the alteration of this course of action may render it unnecessary. However, if this alteration can no longer prevent him/her from needing maintenance, the reprehensible action shall only be taken into account for the purpose of deciding to reduce the entitlement to maintenance, or of reducing maintenance already awarded.

Article 181

The awarded amount of maintenance may be reduced in case of a decrease in the possibility to provide it or of the need to receive it.

Article 182

The right to maintenance cannot be renounced, even if one may stop asking for maintenance to be paid and may renounce maintenance already owed.

Article 183

If the person obliged to pay maintenance justifies that he/she cannot provide it as a pension, but only in his/her house and company, it may be so ordered. The same will be done if the

casa e companhia daquele que tem de prestar-lhos.

Artigo 184º

Os alimentos taxados, ou consistentes em prestações periódicas serão pagos no princípio de cada período em que se vencerem.

person receiving maintenance, without just cause, left the house and company of the person obliged to pay that maintenance.

Article 184

The maintenance awarded, or consisting of periodical installments, shall be paid at the beginning of each period in which it is due.

COMMENTARY TO ARTICLES 137 TO 184

I. Parental authority, regulated by articles 137 *et seq.* of the Civil Code of 1867, may be defined as the ensemble of rights and duties assigned by law to the parents in order for them to direct the persons and property of their minor children.

Parental authority includes: the right to custody, which encompasses the right to company and vigilance (see article 137); the right to maintenance or keep, encompassing nourishment or food, dress and housing, which should be commensurate to the parents' possessions and social status (see articles 140, 148, no. 2, and 171); the right to education, instruction, occupation or settlement (see articles 140, 148, no. 2, and 171, single §); the right to correct (see article 143); the right to represent (see articles 138 and 139); and patrimonial rights relating to certain of the children's assets (see article 144 *et seq.*), which will be further explained below.

As for the parents' patrimonial rights over the children's assets, the law gives them the ownership and usufruct (article 144), or just the usufruct (article 145), or just the administration (article 146), or neither the usufruct nor the administration (article 147) of certain assets.

On the differences between ordinary usufruct and the parents' legal usufruct of certain of the children's assets, see Cunha Gonçalves, *Tratado*, vol. II, cit., pages 392 *et seq.*

The law further distinguishes between acts of mere administration (i.e., those aimed at the preservation of or production of fruits from the children's assets, which parents may carry out without any court order even if their rights over the children's assets are limited to usufruct or administration), and acts of disposition (such as the sale or mortgaging of property, which may only be carried out in case of urgent need or of obvious benefit to the minor, upon obtaining a court order, in accordance with article 150).

Aside from the rights and obligations of the parents in relation to the children, the law also foresees rights and obligations of the latter in relation to the parents. Thus, in accordance with article 142, minor children must respect and obey their parents.

With regard to the exercise of parental authority, in accordance with article 138, this falls, in the constancy of matrimony, to the mother and father, but the latter takes on a predominant role over that of the mother, given his status of "*head of the family*".

In the case of separation *a mensa et thoro*, article 1212 determines that "*When the children remain in the care and custody of one of the spouses, the other spouse shall continue to have parental obligations and rights, in whatever is not opposed to any burden specifically assigned to the other spouse*". However, as was duly noted by Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 305, no. 2, and Cunha Gonçalves, *Tratado*, vol. II, cit., page 352, the mere surrendering of the minor to one of the parents already implies limitations to the exercise of the other's parental authority.

In accordance with article 155, in the case of dissolution of the marriage, due to the death of one of the spouses, parental authority falls entirely upon the surviving spouse. However, this principle is somewhat restricted when the wife is the surviving spouse. On the one hand, a widow who is pregnant at the time the husband dies does not have, according to article 157, the power to administer the assets of the unborn child; a curator must be appointed by a court of law for this purpose, even if the curatorship is limited chronologically to the gestation period. The above mentioned legal provision aims at preventing a possible conflict of interests between the widow and the unborn child or the husband's other heirs. Cunha Gonçalves, in *Tratado*, vol. II, cit., pages 418 and 419, strongly criticises this legal option and classifies the womb curator as a purely historical figure. On the other hand, the widow may be subject to the advisors appointed in the husband's will, in accordance with article 159. If the widow remarries, she loses the administration of certain assets of her minor children, unless the family council decides otherwise, in

which case it may impose upon her the obligation to provide a security, as foreseen in article 162 and single §.

In the case of divorce, articles 21 to 25 of the Decree of 3 November 1910, which adopted the Divorce Act, are applicable. Articles 21 and 22 of this Act determine that, once the marriage has been dissolved through divorce, the children shall preferably be surrendered and entrusted to the spouse in favour of whom the divorce was decreed, even though both parents shall keep parental authority, unless this is interdicted. However, despite the apparent meaning of article 22, the parental authority of the spouse to whom the child is not entrusted is diminished in content, since, obviously, this spouse no longer has the custody of the minor.

These options are equally applicable to putative children, i.e., children of marriages that were declared null and void or were annulled, *ex vi* article 32 of Decree no. 1, of 25 December 1910, which adopted the Act on Marriage as a Civil Contract, with the specificities foreseen in articles 34 to 37 of that same Act.

Therefore, regarding custody of minor children of null or annulled marriages, the law varies depending on whether either of the spouses was found guilty in the declaration of nullity or in the annulment of the marriage. Thus, if neither spouse is guilty, article 34 determines that the daughters, while they are minors, and the sons, up to the age of six, shall be entrusted to the mothers. If one of the spouses was found guilty, custody shall belong to the other spouse, except if the guilty spouse was the mother, in which case she will be entitled to keep the sons or daughters up to the age of three, as foreseen in article 35.

These provisions are subsidiarily applicable to the children of divorced parents, except if the circumstances of the specific case make a different solution advisable (in this sense, see Cunha Gonçalves, *Tratado*, vol. II, cit., page 361).

Article 36 of the Act on Marriage as a Civil Contract foresees the possibility of the children being surrendered to a third party, in cases

where it is manifestly inconvenient for them to stay with either parent; in such a situation, the closest relatives in the paternal or maternal lineage are preferred.

Finally, article 37 of the same Act foresees the possibility of the parents agreeing on the custody of minor children, for their benefit.

With regard to parental authority over acknowledged illegitimate children, article 166 of the Civil Code of 1867 determines the principle of equality between those and legitimate children, relating to their subjection to that authority, unless the mother or father have challenged the acknowledgment proceedings, and lost in court, in which case they shall not hold parental authority, as foreseen in the second part of the aforesaid article.

However, illegitimate parents do not exercise parental authority in the same way as legitimate parents. For starters, since there is no family for the illegitimate father to be the head of, there is no reason for him to have a predominant position in relation to the illegitimate mother (in relation to this and other differences between the parental authority of legitimate and illegitimate parents, see Cunha Gonçalves, *Tratado*, vol. II, cit., pages 355 *et seq*.).

As for non-acknowledged illegitimate children, article 167 determines that they are not subject to parental authority, but instead to guardianship, in accordance with articles 279 *et seq*.

In cases of abuse, parents may be deprived by a court of law of the exercise of parental authority, as foreseen in article 141. However, this provision cannot be interpreted to mean that this interdiction of parental authority presupposes criminal behaviour on the part of the parents towards the children. Indeed, the abuse that justifies the interdiction of parental authority does not need to be a crime (see Cunha Gonçalves, *Tratado*, vol. II, cit., page 372).

Parental authority may be suspended in the cases foreseen in article 168, and this suspension may be decreed incidentally or as a provisional measure within the suit to interdict parental authority, as determined in article 968 of the Code of Civil Procedure of 1939.

On the proceedings for interdiction of parental authority, see articles 962 to 969 of the Code of Civil Procedure of 1939.

Finally, article 170 determines when parental authority ceases: upon the death of the parents or children, or when the children become emancipated or reach the age of majority. The interdiction of parental authority should be added to these two situations.

Current Portuguese law relating to parental authority includes several different choices from those of the Civil Code of 1867.

With regard to the content of parental authority, we would highlight article 1878, no. 2, of the Civil Code of 1966, which, after determining that children must obey their parents, adds that: "*parents must, however, according to the children's maturity, take into account their opinion in important family matters and recognise their autonomy in organising their own life*"; this renders the subordination of minor children to their parents more flexible, and since this subordination is aimed at protecting the children, it cannot be used as grounds for any sort of parental authoritarianism.

On the other hand, article 1880 of the current Portuguese Civil Code obliges parents to pay for the professional training expenses of the adult or emancipated child, within reason; this is already outside of parental authority, since this only refers to non-emancipated minor children, but it is a manifestation of the duty of assistance between parents and children.

Regarding the parents' rights over the children's assets, the legal usufruct mentioned in articles 145, 148 and 149 of the Civil Code of 1867 no longer exists.

As for the exercise of parental authority, the differences between current Portuguese rules and those included in the Code of 1867 derive, essentially, from the constitutional principle of equality between the spouses, namely concerning rights and duties towards the children. Indeed, the Portuguese Constitution of 1976 determined, in article 36, no. 3, that "*spouses have the same rights and duties concerning civil and political capacity and the keeping and raising of their children*".

Therefore, article 1901 of the Civil Code of 1966 foresees that, in the constancy of matrimony, both spouses hold parental authority, which should be exercised by common accord; the husband is no longer deemed predominant over the wife, having lost his role as *"head of the family"*. In the absence of common accord, a court may decide issues of significant importance.

In the case of divorce, separation *a mensa et thoro*, declaration of nullity or annulment of the marriage, *de facto* separation and termination of the civil union as intended by one of the partners, the fate of non-emancipated minor children, as well as the maintenance owed and the manner in which it shall be provided, shall be decided by common accord between the spouses or partners in the civil union, subject, however, to the court's ratification or the Public Prosecutor's approval; these should refuse to ratify or approve such an agreement if it goes against the minors' interests (see articles 1905, 1909 and 1912 of the Civil Code of 1966).

In the break-up situations mentioned above, parents may agree on the joint exercise of parental authority or on having certain issues decided by common accord (see article 1906, no.s 2 and 3). In the absence of common accord, the court shall decide in accordance with the minor's interests, parental authority belonging to the parent to whom the child is entrusted (see articles 1905, no. 2, and 1906, no. 1). However, the other parent shall have the right/duty to visit, the obligation to provide maintenance and the power to monitor the child's education and living conditions, and he/she may also continue administering certain of the child's assets, if this is agreed with the other parent (see articles 1905 and 1906, no.s 3 and 4).

As for parental authority over children born outside of wedlock, current Portuguese law makes a distinction depending on whether filiation is determined for both parents or for just one of them. In the latter case, in accordance with article 1910 of the Civil Code of 1966, parental authority belongs to the person who has been determined to be the minor's parent. If both parents have been determined, in accordance with article 1911, parental authority is

exercised by the parent who has the custody of the child. The law presumes that the mother has the custody of the child, and this presumption may only be set aside in a court of law; this option has been criticised for its dubious constitutionality, especially regarding the principle of equality, foreseen in article 13 of the Portuguese Constitution of 1976. In the case of civil union, both parents shall exercise parental authority, if they declare before the civil registry clerk that they so wish.

Finally, aside from inhibition of parental authority, the Civil Code of 1966 foresaw limitations to its exercise, if the minor's safety, health, moral upbringing and education are endangered and if inhibition of the exercise of parental authority is not justified (see article 1918).

II. With regard to the issues surrounding maintenance, regulated in article 171 *et seq.* of the Civil Code of 1867, we would begin by criticising the inclusion of these rules in Chapter II of Title IX of the Single Book of Part I of the said Code, relating to parental authority, since it is not only parents who are obliged to provide maintenance, nor is it only minor children who are entitled to receive it. On the other hand, specifically regarding parental authority, since the duty to provide maintenance is included in the duty to maintain or keep, mentioned in articles 129, no. 2, 135, 140 and 148, no. 2, there is no need to treat this issue in a separate section (in this sense, see Cunha Gonçalves, *Tratado*, vol. II, cit., page 429).

The persons obliged to provide maintenance and the persons entitled to request it are listed in article 172, i.e., descendants, ascendants and siblings, with reciprocity, and with the exception of relatives by affinity. This listing must, however, be completed with the provisions of article 177, which oblige any relatives up to the sixth degree to provide maintenance to legitimate children, up to the age of 10, without a father, mother, grandparents and siblings who can provide them with maintenance.

One determines who is obliged to provide maintenance by applying the rule of hierarchy of degree of relation, according to which the closest relatives are preferred over the more remote ones, in accordance with articles 173 and 174. However, respecting the degree of proximity presupposes that all relatives potentially obliged to provide maintenance are equally capable of doing so, since, otherwise, the person entitled to receive maintenance may request it directly from more remote relatives, skipping the closer ones, as foreseen in article 173; although this article only mentions the parents, it should be applied, by analogy, to other relatives in the same circumstances.

Further regarding the order of preference of persons obliged to provide maintenance, there is no reason why uterine siblings should be preferred over consanguine siblings when, in the scope of legal guardianship, precisely the opposite is true (see article 200, no. 4), with paternal relatives being generally preferred over maternal ones, as can be inferred from no.s 1 to 3 of that same article (in this sense, see Cunha Gonçalves, *Tratado*, vol. II, cit., page 432).

The expression "*in the absence of parents and of other ascendants*", included in article 174, encompasses not only the cases of death, absence or insolvency of the persons mentioned therein, but also the situations where disinheritance is allowed (see article 1876, no.s 1 and 2), since, according to article 179, no. 2, the obligation to provide maintenance ceases in the situations where disinheritance is allowed.

Article 177, despite explicitly referring to legitimate children, is also applicable to legitimated children, as can be deduced from article 5 of the Protection of Children Act, as well as from article 173; it does not apply, however, to acknowledged children, not only because article 177 does not mention them, but also because the obligation to provide maintenance follows, in a way, the rules on succession (see articles 173 and 174), and article 2005 does not grant acknowledged children the right to succeed to transversal or collateral relatives (see Cunha Gonçalves, *Tratado*, vol. II, cit., page 433).

In accordance with article 175, "*Acknowledged children may only request maintenance from their fathers or mothers and from their siblings*". However, this provision must be read together with article 129, which, by giving acknowledged children the right to succeed to other ascendants besides the parents, tacitly grants them the right to request maintenance from them (see Cunha Gonçalves, *Tratado*, vol. II, cit., page 434).

As for non-acknowledgeable children, i.e. incestuous children, they have the same rights to maintenance, even if subject to certain procedures for proving the filiation, as foreseen in articles 51 and 52 of the Protection of Children Act. In the opinion of Cunha Gonçalves (*Tratado*, vol. II, cit., pages 434-435), incestuous children may request maintenance not only from the parents, but also, in their absence, from equally incestuous siblings, since the aforesaid article 51 merely determines that non-acknowledgeable children are strangers to their parents and their families, but they are not strangers among themselves, and therefore article 175 must be applicable to them, by analogy. Furthermore, since the obligation to provide maintenance is reciprocal (see article 172), the parents may also request maintenance from their incestuous children, if needed, as long as the paternity or maternity have been proven in accordance with article 52 of the Protection of Children Act.

According to articles 178 to 180, the beneficiary of the right to maintenance may request it only if he/she needs it, if the person obliged to provide it is economically capable of doing so, and if nothing legally prevents that beneficiary from exercising the right in question.

Need is a relative concept, depending on factors such as age, health, family expenses and the beneficiary's socio-economic standing. However, how he/she arrived at such a situation is irrelevant, since, even if the first part of article 180 excludes the right to maintenance "*when the need for it is a result of a reprehensible course of action of the person receiving it*", this exclusion only occurs if the beneficiary could render the provision of maintenance unnecessary by correcting his/her behaviour.

It should further be noted that, in accordance with the second part of article 180, the maintenance may be reduced if the beneficiary needs it due to his/her reprehensible course of action and is no longer able to rehabilitate him/herself, even by changing his/her behaviour. Conversely, if the beneficiary is to blame for needing the maintenance but can, by him/herself, recover from this situation, he/she will not be entitled to maintenance, and should obtain it by his/her own effort.

As an example of a fact that legally prevents the beneficiary from exercising the right to maintenance, we can mention a situation of reasons for disinheritance (see article 1876, no.s 1 and 2), since, in such a case, the obligation to provide maintenance is terminated, in accordance with article 179, no. 2. This legal provision is not limited to persons who may disinherit: the mere fact justifying the disinheritance is sufficient for it to be applicable; therefore, in such situations, relatives such as siblings who cannot disinherit (because the beneficiary of maintenance is not his/her mandatory heir) are no longer obliged to provide maintenance (see Cunha Gonçalves, *Tratado*, vol. II, cit., page 442).

Finally, maintenance and the manner in which it is to be provided may be decided by agreement between the parties or by a court of law; in either case, it must be proportional to the means of the person providing it and to the need of the person receiving it, in accordance with article 178.

As for the procedural rules applicable to this issue, see particularly articles 393 to 399, relating to the preventive procedure for provisional maintenance, articles 1119 to 1121, on special execution for maintenance, as well as articles 1462 to 1466, on the petition for maintenance for minors, all from the Code of Civil Procedure of 1939.

Comparing the rules on maintenance included in articles 2003 to 2020 of the Civil Code of 1966, currently in force in Portugal, we would highlight their different location in the Code, in relation to their location in the Code of Seabra; they are not included in the part relating to parental authority, regulated in Section II of Chapter II of

Title III of Book IV, but instead in an autonomous title – Title V of the same Book.

On the other hand, the range of persons obliged to provide maintenance, as determined in article 2009 of the Civil Code of 1966, is wider, encompassing also uncles and aunts, for as long as the beneficiary is a minor, and the stepfather and stepmother in the case of minor stepchildren who are under their care, or who were so at the time of the spouse's death.

Código Civil de 1867

CAPÍTULO III
DA TUTELA DOS FILHOS LEGÍTIMOS E ILEGÍTIMOS

SECÇÃO I
DISPOSIÇÕES GERAIS

Artigo 185º

Na falta ou impedimento dos pais, é o poder paternal suprido pela tutela.

Artigo 186º

A tutela é um encargo de que ninguém pode ser escuso, senão nos casos expressos na lei.

Artigo 187º

A tutela é exercida por um tutor, um protutor, um curador e um conselho de família.

Artigo 188º

O juiz do domicílio do menor é o competente para prover acerca da sua pessoa e bens.

§ 1º) Não obsta a doutrina deste artigo às providências conservatórias, que possam tornar-se necessárias acerca dos bens que o menor tenha em outros julgados.

§ 2º) Neste caso, serão as providências que se tomarem comunicadas oficialmente ao juiz e ao curador do menor.

Civil Code of 1867

CHAPTER III
GUARDIANSHIP OF LEGITIMATE AND ILLEGITIMATE CHILDREN

SECTION I
GENERAL PROVISIONS

Article 185

In the absence or impediment of the parents, parental authority is replaced by guardianship.

Article 186

Guardianship is a burden of which no one may be excused, except in the cases foreseen in the law.

Article 187

Guardianship is carried out by a guardian, a pro-guardian, a curator and a family council.

Article 188

The court of the minor's area of residence is competent to decide on his/her person and property.

§ 1) The provision of this article does not preclude provisional measures, that may be necessary, relating to the property held by the minor in areas ascribed to other courts.

§ 2) In this case, the competent court and the minor's curator shall be officially informed of any provisional measures imposed on the said property.

Artigo 189º

Falecendo alguma pessoa cujos herdeiros sejam menores, ausentes ou incapazes de administrar seus bens, será obrigado o que ficar cabeça-de-casal, e, na sua falta, qualquer pessoa que morasse com o falecido, a dar parte do falecimento ao curador dos órfãos no prazo de dez dias, sob pena de cinco mil réis a cem mil réis de multa.

Artigo 190º

O curador dos órfãos requererá ao respectivo juiz que proveja provisoriamente no que for de urgência quanto às pessoas e bens dos menores, se não for possível convocar prontamente, para esse fim, o conselho de família, e, bem assim, solicitará que se comece o inventário dentro de um mês, o mais tardar, contado desde a participação mencionada no artigo antecedente, que irá sempre junta ao seu requerimento.

Artigo 191º

Se o juiz não for requerido e tiver notícia de que se dá o caso de proceder judicialmente, assim o mandará desde logo, com citação do curador dos órfãos, que requererá o que for de justiça contra quem não tiver feito as devidas participações.

§ único) Se o juiz achar que a negligência proveio do curador dos órfãos, assim o participará ao respectivo procurador régio.

Artigo 192º

O curador dos órfãos que não promover o inventário e o juiz que,

Article 189

Should a person whose heirs are minors, absentees or legally incapable regarding the administration of their patrimony, die, the head of the family and, in his/her absence, any person who resided with the deceased, will be obliged to inform the curator of orphans of this death at the latest ten days after the fact, and failing to do so will be sentenced to pay a fine between five thousand and one hundred thousand "reis".

Article 190

The curator of orphans shall request the competent court to order provisional measures on urgent issues relating to the persons and property of the minors, if it is not possible to swiftly assemble, for that purpose, the family council, and he will also request the beginning of inventory proceedings at the latest one month after the date of the information mentioned in the preceding article, that should be annexed to the request.

Article 191

If the court does not receive a request and becomes aware of the need to intervene, it will do so at once, notifying the curator of orphans, who will request what is deemed appropriate in relation to those who did not provide the due information.

Single §) If the court finds that the negligence is due to the curator of orphans, it will report this fact to the Public Prosecutor.

Article 192

The curator of orphans who does not procure the inventory and the judge

sendo requerido, não proceder nos termos referidos, serão responsáveis por todos os prejuízos que, por sua culpa ou negligência, os menores venham a padecer.

who, having been requested to do so, does not act in accordance with the preceding provisions, shall be liable for all the damage to the property of the minors which they caused, with fault or negligence.

SECÇÃO II
DA TUTELA TESTAMENTÁRIA

Artigo 193º

O pai pode nomear em testamento, ou por acto autêntico entre vivos, tutor ao filho menor ou interdito, se a mãe é falecida, ou se acha inibida de exercer o poder paternal.

§ único) Na falta, ou no impedimento do pai, tem a mãe a mesma faculdade; mas, se nomear seu segundo marido, ficará a nomeação dependente da aprovação do conselho de família.

Artigo 194º

Tanto o pai, como a mãe, na falta ou no impedimento dele, podem nomear um só tutor para todos os filhos, ou um tutor diferente para cada um deles.

Artigo 195º

Quando a mãe nomear tutor a seus filhos, por impedimento do pai, e este impedimento vier a cessar, ficará a dita nomeação sem efeito.

SECTION II
TESTAMENTARY GUARDIANSHIP

Article 193

The father may appoint in his will, or by an authentic act *inter vivos*, a guardian for a child who is a minor or has been interdicted, if the mother is deceased or if she has been prohibited from exercising parental authority.

Single §) In the absence or impediment of the father, the mother has the same power; however, if she appoints her second husband, the appointment will depend upon the approval of the family council.

Article 194

The father, and the mother in his absence or impediment, may appoint a sole guardian for all the children, or a different guardian for each of the children.

Article 195

When the mother appoints a guardian for her children, due to an impediment of the father, and the said impediment ceases, the appointment in question will become void.

Artigo 196º

Se o pai ou a mãe nomearem mais de um tutor para se substituírem uns a outros, recairá a tutela em cada um dos nomeados pela ordem da nomeação, se a precedência entre eles não for de outro modo especificada.

Artigo 197º

As pessoas que deixarem ao menor qualquer herança ou legado poderão nomear-lhe tutor, se o pai ou a mãe o não tiverem nomeado, e se o dito legado ou herança forem de maior valor que o património do menor. Esta nomeação porém dependerá da confirmação do conselho de família.

§ único) Mas bem poderá aquele que, por seu testamento, deixar alguns bens ao menor nomear, em todo o caso, administrador especial para os ditos bens, enquanto durar a menoridade.

Artigo 198º

Os tutores testamentários servirão enquanto durar a menoridade ou a interdição.

SECÇÃO III
DA TUTELA LEGÍTIMA

Artigo 199º

Haverá tutela legítima:

1º) Nos casos de impedimento, suspensão, ou perda do poder paternal;

2º) Na falta de tutor testamentário.

Article 196

If the father or the mother appoints more than one guardian, so that they may replace each other, the guardianship will befall on each of the guardians in the order in which they were appointed, if no other order of precedence is set out.

Article 197

Persons who have left to the minor any inheritance or legacy may appoint a guardian for him/her, if the father or the mother has not done so, and if the said inheritance or legacy is of greater value than his/her current property. Such an appointment will however depend upon the approval of the family council.

Single §) However, the person who, by a will, has left some assets to the minor may appoint, in any case, a special administrator for the said assets, until he/she reaches the age of majority.

Article 198

Testamentary guardians shall carry out their functions until the child reaches the age of majority or the interdiction ceases.

SECTION II
LEGAL GUARDIANSHIP

Article 199

There is legal guardianship:

1) In the cases of the prevention of the exercise, the suspension or the loss of parental authority;

2) In the absence of a testamentary guardian.

Artigo 200º

A tutela legítima pertence aos parentes do menor na ordem seguinte:

1º) Ao avô ou avó paternos;

2º) Ao avô ou avó maternos;

3º) Aos mais ascendentes em linha recta, preferindo sempre o paterno em igualdade de grau;

4º) Aos irmãos ou irmãs, sendo preferidos os germanos aos consanguíneos e estes aos uterinos e em cada uma destas classes os de maior idade;

5º) Aos irmãos ou irmãs do pai ou da mãe, preferindo sempre os da linha paterna, excepto sendo menos idóneos; em igualdade de circunstâncias preferirá o mais velho.

§ único) Concorrendo varões e mulheres no mesmo grau preferirão aqueles a estas, excepto sendo notoriamente menos idóneos.

Article 200

Legal guardianship shall be entrusted to the relatives of the minor, in the following order:

1) To the paternal grandfather or grandmother;

2) To the maternal grandfather or grandmother;

3) To the remaining lineal ascendants, with preference to the paternal relative at the same degree of ascendancy;

4) To the siblings, with preference to full blood siblings over consanguine siblings, and to these over uterine siblings, and within each of these classes with preference to the eldest;

5) To the siblings of the father or mother, with preference to the paternal relatives, except if they are less capable; circumstances being equal, the eldest shall take preference.

Single §) Where male and female relatives compete at the same degree of relation, the former will take precedence over the latter, except if they are clearly less capable.

Artigo 201º

Os tutores legítimos servirão, enquanto durar a menoridade.

§ 1º) Se houver diversos parentes, no mesmo grau e igualmente idóneos, servirá cada um deles por espaço de três anos.

§ 2º) A tutela legítima depende da confirmação do conselho de família.

Article 201

Legal guardians shall carry out their functions until the child reaches the age of majority.

§ 1) If there are several relatives, at the same degree of relation and equally capable, each will serve as a guardian for a period of three years.

§ 2) Legal guardianship depends upon confirmation by the family council.

SECÇÃO IV
DA TUTELA DATIVA

Artigo 202º

A falta dos tutores testamentários e legítimos supre-se com a tutela dativa.

Artigo 203º

Os tutores dativos são nomeados pelo conselho de família.

Artigo 204º

Os tutores dativos não são obrigados a servir por mais de três anos.

SECÇÃO V
DOS PROTUTORES

Artigo 205º

Em todos os casos de tutela haverá um protutor, nomeado pelo conselho de família na mesma sessão em que nomear ou confirmar o tutor.

Artigo 206º

Se o tutor for parente do menor, o protutor não poderá ser nomeado na mesma linha, salvo sendo irmão germano.

§ único) Se não houver parentes senão em uma das linhas, e o tutor for nomeado nela, o protutor será nomeado de entre os estranhos.

SECTION IV
DATIVE GUARDIANSHIP

Article 202

The absence of testamentary guardians and of legal guardians is overcome with dative guardianship.

Article 203

Dative guardians are appointed by the family council.

Article 204

Dative guardians are not obliged to serve as guardians for more than three years.

SECTION V
PROGUARDIANS

Article 205

In all cases of guardianship, there shall be a proguardian, appointed by the family council in the same session in which the guardian is appointed or confirmed.

Article 206

If the guardian is a relative of the minor, the proguardian may not be appointed from within the same line of relation, except if he/she is a full blood sibling.

Single §) If there are relatives in only one of the lines of relation, and the guardian is appointed from within it, a stranger must be appointed as proguardian.

SECÇÃO VI
DA FORMAÇÃO DO CONSELHO DE FAMÍLIA

Artigo 207º

O conselho de família compõe-se de cinco parentes mais próximos do menor, residentes dentro dos limites da jurisdição do juiz do inventário, três da linha paterna e dois da materna, preferindo os mais velhos em igualdade de grau.

§ 1º) Se não houver parentes senão de uma das linhas, os outros vogais serão nomeados de entre os amigos dos pais do menor, com a diferença de que, neste caso, ainda que essa linha seja materna, subministrará três vogais.

§ 2º) Os irmãos germanos de ambos os sexos, ou os maridos das irmãs germanas, como representantes destas, podem ser todos conjuntamente membros do conselho de família, ainda que sejam mais de cinco; mas, se formarem número par, será chamado mais um parente.

§ 3º) A constituição do conselho de família poderá ser reformada a todo o tempo em que algum parente, com melhor direito, reclame a sua admissão em substituição de um vogal já nomeado, mas sem prejuízo das deliberações do conselho anteriormente tomadas, salvo tendo havido prejuízo dos menores.

(Sobre o Artigo 207º, vd. o Assento do Supremo Tribunal de Justiça, de 22-01-1929, publicado no *Diário do Governo*, II Série, de 05-02-1929, que estabeleceu: "*Pode a todo o tempo corrigir-se a defeituosa organização do conselho de família, sendo sempre facultado aos tribunais sanar a nulidade resultante da inobservância*

SECTION VI
THE COMPOSITION OF THE FAMILY COUNCIL

Article 207

The family council is made up of the five closest relatives to the minor residing within the jurisdiction of the court competent to carry out the inventory, three from the paternal line and two from the maternal line, with preference to the elder relatives at the same degree of relation.

§ 1) If there are relatives only within one line of relation, the other members of the council will be appointed from the friends of the minor's parents, with the difference that, in this case, even if the line in question is the maternal one, three members of the family council will be chosen from it.

§ 2) Full blood siblings of either gender, or the husbands of full blood sisters, as their representatives, may all be members of the family council, even if they exceed the number of five; but if they total an even number, a further relative shall be called upon.

§ 3) The composition of the family council may be changed whenever a relative requests to be admitted in place of an already appointed member, if he is more entitled to be on the family council than the member in question, not precluding the decisions already taken by the family council, except if these were to the detriment of the minors.

(Concerning Article 207, see the case-law creating Judgment of the Supreme Court of 22/01/1929, published in the *Official Gazette*, Series II, of 05/02/

dos arts. 207º e 209º do Código Civil, que na ordem de precedência ali estabelecida manda preferir aos mais velhos de entre os parentes em igualdade de grau, e, consequentemente, os mais próximos aos mais remotos, quando em grau desigual.")

1929, which stated: "*The wrongful composition of the family council may be corrected at any time, the courts always having the possibility to correct the nullity resulting from a violation of articles 207 or 209 of the Civil Code which, in the order of precedence set therein, indicate that the elder of the relatives should be preferred, if they are at the same degree of relation, and, therefore, that the closer relatives should be preferred to the ones that are less close, if they are at different degrees of relation*")

Artigo 208º

Se os parentes que residirem no julgado do inventário não forem em número suficiente para a formação do conselho de família, serão chamadas pessoas que tenham tido relações de amizade com os pais do menor e, na falta delas, quaisquer outras pessoas de probidade.

Article 208

If there are not enough relatives residing in the jurisdiction of the court competent for the inventory to make up the family council, friends of the minor's parents shall be called upon and, in their absence, any other sound persons.

Artigo 209º

Os parentes que residirem em diversa jurisdição podem, querendo, fazer parte do conselho de família.

Article 209

Relatives who reside in a different jurisdiction may, if they so wish, be a part of the family council.

Artigo 210º

O conselho de família será convocado de ofício dentro de oito dias, contados desde a notícia do facto da orfandade, ou da vacância da tutela, e em todos os outros casos, no prazo que parecer necessário.

Article 210

The family council shall be summoned on the court's own initiative at the latest eight days after the news that the minor became an orphan or that the guardianship is vacant and, in all other cases, within the timeframe deemed necessary.

Artigo 211º

O juiz fará sempre declarar no mandado convocatório o objecto principal, que deve ser submetido à deliberação do conselho.

Article 211

The judge shall include in the summons the main purpose, which should be put to the decision of the council.

Artigo 212º

O tutelado maior de catorze anos tem o direito de assistir às deliberações do conselho de família, e de ser nelas ouvido, quando se tratarem negócios de maior importância, e, não estando ausente, será convocado pela forma determinada nos artigos precedentes, para que possa, querendo, usar daquele direito.

Artigo 213º

Os vogais do conselho são obrigados a comparecer pessoalmente.

Artigo 214º

O que não comparecer no dia e hora designados, não alegando em tempo legítima causa de escusa ou de impedimento, será condenado pelo juiz na multa de quinhentos réis até cinco mil réis, para os estabelecimentos de beneficência pupilar.

Artigo 215º

Os curadores dos órfãos e os tutores devem sempre assistir aos conselhos de família, mas terão tão-somente voto consultivo.

Artigo 216º

O juiz preside, sem voto, ao conselho de família.

Artigo 217º

O conselho de família não pode deliberar com menos de três membros.

Article 212

The child older than fourteen years who is awarded a guardian has the right to sit in and to be heard in the deliberations of the family council, when affairs of the utmost importance are at stake, and, if he/she is not an absentee, he/she shall be summoned in the same way foreseen in the preceding articles, so that he/she may use this right if he/she so wishes.

Article 213

The members of the council are obliged to be personally present at the meetings.

Article 214

The member of the council who is not present at the designated day and hour, without invoking in due time a reason to be excused or an impediment, will be sentenced by the judge to pay a fine between five hundred and five thousand "reis", to go to child care establishments.

Article 215

The curator of orphans and the guardians must always be present at family council meetings, with a merely advisory position.

Article 216

The judge presides over the family council, without the right to vote.

Article 217

The family council shall not decide with less than three members.

Artigo 218º

Nenhum vogal do conselho de família tem voto, nem pode assistir à deliberação sobre negócio em que ele, ou os seus ascendentes, descendentes ou consorte tenham interesse próprio e oposto ao interesse dos menores; mas pode ser ouvido, se o conselho o julgar conveniente.

Artigo 219º

As decisões do conselho de família são tomadas por maioria absoluta de votos dos vogais presentes.

SECÇÃO VII
DOS CURADORES DOS ÓRFÃOS

Artigo 220º

Os curadores gerais dos órfãos e os magistrados do ministério público que fazem as vezes deles têm a seu cargo velar pelos interesses e direitos dos menores.

Artigo 221º

Os curadores devem ser ouvidos em tudo o que diga respeito aos direitos e interesses dos menores, e podem exigir dos tutores e dos protutores todos os esclarecimentos de que careçam a bem daqueles.

Artigo 222º

O curador é responsável, solidariamente com o juiz, pelas perdas e danos que resultarem ao menor de providências ilegalmente requeridas por ele e ordenadas pelo juiz, ou ordenadas pelo juiz com a aprovação e aquiescência do curador.

Article 218

No member of the family council has a right to vote, nor may he be present for a deliberation concerning an affair in which he, or his ascendants, descendants or consort have a personal interest opposed to that of the minors; but this member may be heard, if the council deems it convenient.

Article 219

The decisions of the family council are taken by absolute majority of the votes of the members who are present.

SECTION VII
CURATORS OF ORPHANS

Article 220

The general curators of orphans and the magistrates of the Public Prosecutor's Office that carry out their functions are entrusted with watching out for the interests and rights of minors.

Article 221

The curators of orphans must be heard in all that concerns the rights and interests of minors, and may demand that the guardians and proguardians provide all clarifications deemed necessary for the benefit of the minors.

Article 222

The curator of orphans is jointly and severally liable, together with the judge, for the minor's losses and damage resulting from actions illegally requested by him/her and ordered by the judge, or ordered by the judge with approval and acquiescence of the curator of orphans.

Artigo 223º

O juiz que não ouvir o curador, nos termos do artigo 221º, é responsável por erro de ofício, ainda que desse despacho não resulte prejuízos aos menores.

SECÇÃO VIII
DAS ATRIBUIÇÕES DO CONSELHO DE FAMÍLIA

Artigo 224º

Pertence ao conselho de família:

1º) Confirmar a mãe bínuba na administração dos bens do filho menor e interdito;

2º) Confirmar os tutores legítimos;

3º) Nomear os tutores dativos;

4º) Nomear protutor, nos casos em que deve haver esta nomeação;

5º) Confirmar a tutela confiada pela mãe em testamento ao segundo marido;

6º) Remover o tutor nos casos mencionados nos artigos 236º e seguintes;

7º) Determinar a profissão, o ofício, ou o serviço, a que o menor há-de dedicar-se, e resolver, quando o pai ou a mãe do menor exercessem alguma indústria ou comércio, se esta indústria ou comércio devem continuar a ser exercidos por ele, não tendo os pais disposto a tal respeito, ou se ocorrerem graves inconvenientes no cumprimento da sua vontade;

8º) Taxar no começo da tutela as quantias que o tutor poderá despender com o menor e com a administração dos bens, sem prejuízo do aumento ou da diminuição que as circunstâncias exigirem;

9º) Especificar o valor da hipoteca que há-de ficar onerando os bens do

Article 223

The judge who fails to consult the curator, in accordance with article 221, is responsible for a judicial error, even if the decision in question does not lead to damage for the minors.

SECTION VIII
THE POWERS OF THE FAMILY COUNCIL

Article 224

The family council has the following powers:

1) To confirm the twice-wed mother as the administrator of the property of the child who has not reached the age of majority or has been interdicted;

2) To confirm the legal guardians;

3) To appoint the dative guardians;

4) To appoint a proguardian, whenever required;

5) To confirm the guardianship set out in the mother's will in favour of her second husband;

6) To remove the guardian in the cases mentioned in articles 236 et seq;

7) To determine the profession, craft or the service that the minor will undertake and decide, when the father or mother of the minor had some form of business or commerce, whether such business or commerce should continue to be carried out by the minor, in the absence of instructions from the parents in that respect, or if there is grave inconvenience in the fulfillment of their wishes;

8) To establish at the beginning of the guardianship the amounts the guardian may spend with the minor and with the administration of the property, not precluding increases or decreases required by circumstances;

tutor, com atenção à importância dos móveis, e rendimentos que ele houver de receber e puder acumular até o fim da tutela; designar os bens em relação aos quais deve ser registada, e assinar um prazo razoável, dentro do qual seja feito o registo e, bem assim, quando o julgar conveniente, escusar o tutor da hipoteca, ou só do registo prévio dela, e das mais formalidades, para que possa entrar logo no exercício da tutela;

10º) Verificar a legalidade das dívidas passivas do menor e autorizar e regular o seu pagamento, não havendo oposição dos interessados;

11º) Designar a aplicação que devem ter o dinheiro, as jóias, ou quaisquer outros objectos preciosos do menor;

12º) Autorizar o tutor para fazer prender o menor, nos termos do artigo 143º e seu parágrafo;

13º) Autorizar o tutor para proceder à venda dos móveis, cuja conservação não for conveniente, e deliberar sobre a aplicação que lhes deve dar, não havendo comprador;

14º) Autorizar o tutor para quaisquer benfeitorias extraordinárias, e para dar os imóveis de arrendamento por mais de três anos, contanto que o prazo não exceda a época da maioridade;

15º) Autorizar o tutor para levantar os capitais do menor dados a juros;

16º) Autorizar o tutor para contrair empréstimos, emprestar dinheiro do menor, hipotecar ou alienar bens imóveis, em caso de urgente necessidade ou de utilidade reconhecida;

17º) Autorizar o tutor para aceitar doações feitas ao menor, propor acções persecutórias, fazer composições

9) To specify the value of the mortgage to be imposed on the property of the guardian, paying attention to the importance of the movable property, and the earnings to be paid to him/her and that he/her may accumulate up to the end of the guardianship; decide on the property in relation to which a mortgage should be registered and impose a reasonable deadline for this to be done, as well as, when it so deems convenient, to excuse the guardian from the mortgage or merely from its previous registry and other formalities, so that he/she may begin to exercise the guardianship at once;

10) To verify the lawfulness of the passive debts of the minor and authorise and regularise their payment, as long as interested parties do not oppose this;

11) To decide on what to do with the money, jewels or any other valuable objects belonging to the minor;

12) To authorise the guardian to have the minor arrested, in accordance with article 143 and its §;

13) To authorise the guardian to sell the movable property that it is not appropriate to keep, and decide on what to do with it when no buyer is found;

14) To authorise the guardian to carry out any exceptional improvements, and to lease immovable property for more than three years, as long as the final term does not exceed the time of the age of majority;

15) To authorise the guardian to withdraw the capital of the minor earning interest;

16) To authorise the guardian to contract loans, to loan money belonging to the minor, to mortgage or dispose of immovable property, in case of urgent necessity or recognised usefulness;

amigáveis, transacções ou compromissos, em termos determinados;

18º) Autorizar o casamento e as convenções antenupciais do menor, não sendo tutor deste o avô;

19º) Arbitrar, quando não haja oposição, as mesadas ou os alimentos que deverem ser pagos por conta do menor a seus irmãos ou ascendentes;

20º) Examinar e aprovar as contas da tutela nos prazos que ele próprio designar, os quais não poderão exceder quatro anos;

21º) Autorizar a substituição ou redução da hipoteca a que os bens do tutor estejam sujeitos;

22º) Emancipar o menor na falta do pai e da mãe.

17) To authorise the guardian to accept donations made to the minor, initiate legal actions, arrive at settlements or carry out transactions or accept commitments, under certain terms;

18) To authorise the marriage and the prenuptial agreements of the minor, when the guardian is not the grandparent;

19) To decide, in the absence of opposition, on the allowance or maintenance to be paid on behalf of the minor to his siblings or ascendants;

20) To examine and approve the accounts of the guardianship in the deadlines set by it, which may not exceed four years;

21) To authorise the replacement or reduction of the mortgage to which the property of the guardian is subject;

22) To emancipate the minor in the absence of the father and the mother.

Artigo 225º

O conselho de família não pode nomear ao menor mais de um tutor simultaneamente. Se o menor tiver bens a grande distância, poderá ser encarregada a sua administração a um administrador, que será nomeado pelo juiz dos órfãos da localidade, precedendo requisição do juiz do inventário.

Article 225

The family council shall not appoint more than one guardian for the minor simultaneously. If the minor owns property at a distant place, its administration may be entrusted to an administrator, who will be appointed by the judge of orphans of that jurisdiction, upon request of the judge competent for the inventory.

Artigo 226º

Das decisões do conselho de família podem recorrer para o conselho de tutela o tutor, o protutor, o curador dos órfãos, e qualquer parente do menor, ou outro interessado na decisão, salvo o caso especificado no artigo 1062º.

§ 1º) O conselho de tutela é composto do juiz de direito da comarca, dos seus dois substitutos imediatos, e do curador

Article 226

The guardian, the proguardian, the curator of orphans, any relative of the minor or any other interested party in a decision of the family council may appeal the said decision to the guardianship council, except in the case foreseen in article 1062.

§ 1) The guardianship council is composed of the division judge, his/

dos órfãos, que terá voto meramente consultivo.

§ 2º) Da decisão do conselho de tutela que confirmar a do conselho de família não haverá recurso.

§ 3º) Se a decisão do conselho de família não for confirmada, poder-se-á recorrer para a relação do distrito, que resolverá definitivamente.

§ 4º) Estes recursos têm efeito suspensivo, salvo nos casos em que a lei expressamente ordenar o contrário.

SECÇÃO IX
DAS PESSOAS QUE PODEM ESCUSAR-SE DE SEREM TUTORES, PROTUTORES OU VOGAIS DO CONSELHO DE FAMÍLIA

Artigo 227º

Podem escusar-se da tutela e da protutela:

1º) Os ministros de estado efectivos;

2º) Os empregados de nomeação do governo;

3º) Os militares, ainda que não sejam de patente; os reformados não poderão todavia escusar-se, se não se acharem empregados em serviço activo;

4º) Os eclesiásticos que tiverem cura de almas;

5º) Os que já tiverem a seu cargo alguma tutela;

6º) Os que tiverem cinco filhos legítimos vivos;

7º) Os que tiverem setenta anos de idade;

8º) Os que padecerem moléstia crónica, que os impossibilite de saírem

her two immediate substitutes and the curator of orphans, who will have a merely advisory role.

§ 2) A decision of the guardianship council confirming a decision of the family council cannot be appealed.

§ 3) If the decision of the family council is not confirmed, there is a possibility of appeal to the district appeal court, which shall decide definitively.

§ 4) These appeals suspend the effects of the appealed decisions, except in the cases where the law explicitly foresees the opposite.

SECTION IX
PERSONS WHO MAY EXCUSE THEMSELVES FROM BEING GUARDIANS, PROGUARDIANS OR MEMBERS OF THE FAMILY COUNCIL

Article 227

The following persons may excuse themselves from guardianship and proguardianship:

1) Active members of Government;

2) Civil servants appointed by the Government;

3) Members of the military, even without rank; those who are retired may, however, only excuse themselves if they are employed in active service;

4) Members of the church responsible for souls;

5) Those already entrusted with a guardianship;

6) Those with five living legitimate children;

7) Those who are at least seventy years old;

de casa e de tratarem pessoalmente dos seus próprios negócios;

9º) Os que forem tão pobres que não possam ocupar-se da tutela ou da protutela, sem grave prejuízo seu.

Artigo 228º

Os que não forem parentes do menor não podem ser constrangidos a aceitar tutela, havendo no julgado parentes que a possam exercer.

Artigo 229º

A escusa não será atendida, se o tutor ou o protutor não a requererem na sessão em que forem nomeados, estando presentes a ela, e, não o estando, dentro de seis dias, contados desde aquele em que a nomeação lhes for intimada.

§ único) Se as causas da escusa forem supervenientes, deverá esta ser requerida dentro de trinta dias, contados desde aquele em que essas causas chegarem ao conhecimento do requerente: fora desse tempo não serão atendidas.

Artigo 230º

Os que forem escusos da tutela ou da protutela podem ser compelidos a aceitá-la, cessando o motivo da escusa.

Artigo 231º

Se o conselho de família desatender a escusa do tutor ou do protutor em exercício, e estes recorrerem da decisão, serão obrigados a continuar a exercer os seus cargos, enquanto o recurso não for resolvido. Se assim o não fizerem, o conselho de família nomeará quem os substitua, ficando o revel responsável

8) Those with a chronic ailment, that prevents them from leaving the house and personally attending to their own business;

9) Those who are so poor that they cannot take charge of the guardianship or proguardianship, without great detriment to themselves.

Article 228

Persons who are not related to the minor shall not be forced to accept guardianship, as long as there are relatives in the jurisdiction who can be entrusted with it.

Article 229

The excuse shall not be accepted if the guardian or the proguardian do not present it at the session in which they are appointed, if they were present, and, if they were not present, at the latest six days after they were informed of the appointment.

Single §) If the causes of the excuse arise after the appointment, the excuse must be requested at the latest thirty days after the person requesting it became aware of the said causes: after this deadline they shall be irrelevant.

Article 230

Those excused from the guardianship or proguardianship may be compelled to accept it, if the reason for the excuse has ceased.

Article 231

If the family council decides not to excuse the guardian or proguardian already exercising their functions, and these appeal the decision, they shall be

pela gerência do substituto, se não obtiver provimento.

obliged to continue to exercise their functions until the appeal is decided. If they fail to continue to exercise their functions, the family council shall appoint a substitute, the party at fault being liable for the substitute's management, unless the appeal is successful.

Artigo 232º

O tutor testamentário, que se escusa da tutela, ou é removido por sua má gerência, perde o direito ao que lhe foi deixado no testamento, se outra coisa não for determinada pelo testador.

Article 232

A testamentary guardian who excuses himself, or is removed due to bad management, loses the right to what has been left to him/her in the will, unless the testator stipulates otherwise.

Artigo 233º

Às escusas dos vogais do conselho de família são aplicáveis as disposições dos nºs 7º e 8º do artigo 227º, e as dos artigos 228º, 229º e seu parágrafo.

Article 233

The provisions of numbers 7 and 8 of article 227 and of articles 228 and 229 and its paragraph shall be applied to the excusing of members of the family council.

SECÇÃO X
DAS PESSOAS QUE NÃO PODEM SER TUTORES, PROTUTORES, NEM VOGAIS DO CONSELHO DE FAMÍLIA

SECTION X
PERSONS WHO SHALL NOT BE GUARDIANS, PROGUARDIANS OR MEMBERS OF THE FAMILY COUNCIL

Artigo 234º

Não podem ser tutores, nem protutores, nem vogais do conselho de família:

1º) Os interditos;

2º) Os menores não emancipados;

3º) Os devedores de soma considerável ao menor;

4º) Os que tiverem demanda com o menor, ou se a tiverem seus pais, filhos ou mulheres, por objecto importante, e os que forem conhecidos como inimigos do menor ou dos pais dele;

Article 234

The following persons shall not be guardians, proguardians or members of the family council:

1) Interdicted persons;

2) Non-emancipated minors;

3) Those owing the minor a considerable sum;

4) Those with a legal action against the minor, or whose parents, children or wives have such action, relating to something of importance, and those known as enemies of the minor or his parents;

5º) As pessoas de mau procedimento e que não tiverem modo de vida conhecido;

6º) Os que tiverem sido removidos de outra tutela por falta de cumprimento das suas obrigações;

7º) Os juízes singulares e o curador dos órfãos nos julgados do domicílio do menor ou em que seus bens estiverem.

5) Those of ill behaviour and whose way of life is not known;

6) Those who have been removed from another guardianship due to the non-fulfilment of their obligations;

7) Judges in jurisdictions with only one judge and the curator of orphans in the jurisdiction of the minor's residence or in the one where his property is located.

SECÇÃO XI
DOS QUE PODEM SER REMOVIDOS DA TUTELA

Artigo 235º

Podem ser removidos da tutela:

1º) O tutor testamentário ou legítimo que começar a exercer o seu cargo antes da convocação do conselho de família e da nomeação do protutor;

2º) Os que não requererem nem promoverem o inventário nos termos da lei;

3º) Os que procederem mal na sua gerência, tanto em relação às pessoas, como em relação aos bens dos tutelados;

4º) Aqueles a quem sobrevier algum dos motivos de exclusão indicados na secção precedente.

SECTION XI
PERSONS WHO MAY BE REMOVED FROM THE GUARDIANSHIP

Article 235

The following persons may be removed from the guardianship:

1) The testamentary guardian or the legal guardian who begins exercising his/her functions before the summoning of the family council and the appointment of the proguardian;

2) Those who fail to request or procure the inventory in accordance with the law;

3) Those who carry on wrongly in their management, regarding both the persons and the property of those subject to guardianship;

4) Those who, after their appointment, fall within one of the reasons for exclusion mentioned in the preceding section.

SECÇÃO XII
DA EXCLUSÃO OU REMOÇÃO DOS TUTORES E DOS PROTUTORES

Artigo 236º

Ao conselho de família pertence resolver a exclusão ou a remoção do tutor

SECTION XII
EXCLUSION OR REMOVAL OF GUARDIANS AND PROGUARDIANS

Article 236

It is for the family council to decide the exclusion or removal of the guardian

e do protutor, verificando as causas ou os impedimentos legais com audiência do interessado, sempre que esta se possa dar sem grave inconveniente.

Artigo 237º

A resolução do conselho de família será sempre fundamentada.

Artigo 238º

Se o interessado aquiescer à resolução do conselho de família, proceder-se-á imediatamente à sua substituição.

Artigo 239º

Se o interessado recorrer da resolução do conselho, será esta sustentada à custa do menor. O conselho só poderá ser condenado nas custas no caso de calúnia manifesta.

Artigo 240º

No caso de exclusão, proverá o conselho provisoriamente, como convier, acerca da pessoa e dos bens do menor, enquanto se não resolver definitivamente o recurso.

Artigo 241º

No caso de remoção, se o removido estiver no exercício de suas funções, e houver grave inconveniente em que continue na gerência, enquanto se não resolver o recurso, poderá o curador requerer ao juiz a providência provisória que parecer indispensável.

Artigo 242º

O tutor ou o protutor removido ficará ao mesmo tempo inibido de ser vogal do conselho de família.

and proguardian, verifying the legal causes or impediments, with a hearing of the interested party, whenever it can be held without grave inconvenience.

Article 237

The decision of the family council will always be reasoned.

Article 238

If the interested party accepts the decision of the family council, he/she will be immediately replaced.

Article 239

If the interested party appeals the decision of the council, the appeal will be paid for by the minor. The council may only be ordered to pay the costs in the case of manifest slander/libel.

Article 240

In the case of exclusion, the council shall temporarily decide, as it sees fit, regarding the person and property of the minor, while the appeal is not definitively decided.

Article 241

In the case of removal, if the removed person was exercising his/her functions, and if there is grave inconvenience in the continuance of this management, while the appeal is not decided, the curator may request the judge to decree the provisional measures deemed indispensable.

Article 242

The removed guardian or proguardian will simultaneously be prohibited from being a member of the family council.

SECÇÃO XIII
DOS DIREITOS E OBRIGAÇÕES DO TUTOR

Artigo 243º

Pertence ao tutor:

1º) Reger e defender a pessoa do menor, e administrar seus bens, como bom pai de família, e representá-lo em todos os actos civis, excepto no casamento e na disposição de última vontade;

2º) Educar, ou fazer educar, alimentar e tratar o menor, conforme a sua condição, da maneira ordenada pelo conselho de família;

3º) Repreender e corrigir moderadamente o menor nas suas faltas, recorrendo, se ele não se emendar, ao conselho de família, que procederá nos termos do artigo 143º;

4º) Requerer inventário do património do menor dentro de oito dias, desde aquele em que lhe for deferido o juramento, e promover solicitamente o seu andamento;

5º) Requerer a convocação e autorização do conselho de família, em todos os casos em que esta autorização é necessária;

6º) Arrendar os imóveis do menor por tempo que não exceda três anos;

7º) Prover às reparações e despesas ordinárias dos imóveis, e fazer cultivar os prédios rústicos que não forem arrendados;

8º) Receber as rendas, foros, censos, quinhões e juros do menor, e promover e receber o pagamento de quaisquer dívidas, salvo o que fica disposto no artigo 224º, nº 15;

SECTION XIII
RIGHTS AND OBLIGATIONS OF THE GUARDIAN

Article 243

It is up to the guardian to:

1) Govern and protect the person of the minor, administer his/her property, as a *bonus pater familias*, and represent him/her in all civil acts, except in marriage and in the expression of the last will and testament;

2) Educate, or make arrangements for the education, feed and take care of the minor, in accordance with his/her condition, in the manner ordered by the family council;

3) Rebuke and moderately correct the minor with regard to his flaws, resorting, if the minor does not correct these flaws, to the family council who shall act in accordance with article 143;

4) Request an inventory of the property of the minor at the latest eight days after he/she takes the oath, and diligently promote its pursuit;

5) Request the summoning and the authorisation of the family council, in all cases in which such authorisation is required;

6) Lease the immovable property of the minor for a period not exceeding three years;

7) Provide for the repair and normal expenses of the immovable property, and to have the rural real estate cultivated, if it has not been leased;

8) Collect the rents, pensions, shares and interest belonging to the minor, and procure and receive the payment of any debts, except for what is foreseen in number 15 of article 224;

9º) Propor acções conservatórias, e as persecutórias, que forem autorizadas pelo conselho de família, e defender o menor em todas as acções intentadas contra ele;

10º) Pagar as dívidas do menor, se para isso estiver autorizado;

11º) Aceitar, a benefício de inventário, as heranças que sobrevierem ao menor;

12º) Promover a venda dos bens mobiliários do menor, nos casos em que não possam conservar-se, e a venda dos bens imobiliários, nos casos em que esta pode admitir-se.

9) Institute legal proceedings to preserve rights, and those to obtain something in the possession of another person, if they are authorised by the family council, and to defend the minor in all legal proceedings instituted against him/her;

10) Pay the minor's debts, if he/she is authorised to do so;

11) Accept inheritances accruing to the minor, subject to the inventory proceedings;

12) Procure the sale of the minor's movable property, in the cases in which these cannot be kept, and the sale of immovable property, in the cases in which this is allowed.

Artigo 244º

É absolutamente defeso ao tutor:

1º) Dispor, por título gratuito, dos bens do menor;

2º) Arrendar, comprar e arrematar os bens do menor;

3º) Tornar-se cessionário de direitos, ou de crédito contra o seu pupilo, excepto nos casos de sub-rogação legal;

4º) Receber doações do menor, entre vivos ou por testamento, ou do ex-pupilo emancipado ou maior, salvo depois de ter dado contas de sua administração, e de ter obtido quitação geral;

5º) Fazer contratos em nome do pupilo, que obriguem este pessoalmente a praticar certos actos, excepto no caso em que essa obrigação for necessária para se lhe dar educação, estabelecimento ou ocupação.

Article 244

The guardian is absolutely prohibited from:

1) Gratuitously disposing of the minor's property;

2) Renting, acquiring and auctioning the minor's property;

3) Becoming the transferee of rights or of credit against his/her ward, except in the cases of legal subrogation;

4) Receiving donations from the minor, *inter vivos* or through a will, or from a former ward who has become emancipated or has reached the age of majority, unless it occurs after he/she has accounted for his/her administration and obtained full acquittance;

5) Enter into contracts in the name of the ward, that personally oblige the latter to carry out certain acts, except when such an obligation is necessary to provide for the ward's education, establishment or occupation.

Artigo 245º

A disposição do nº 4 do artigo antecedente não é aplicável aos tutores que forem ascendentes ou irmãos do menor.

Artigo 246º

O tutor é obrigado a declarar no inventário o que o menor lhe deve; se o não fizer, não poderá exigir o pagamento, durante a tutela; e, se o exigir depois, deverá provar que antes disso não tivera conhecimento da dívida.

Artigo 247º

O tutor tem direito a ser gratificado, e esta gratificação, se não tiver sido designada pelos pais do menor em seu testamento, será arbitrada pelo conselho de família, contanto que não exceda a vintena dos rendimentos líquidos dos bens do menor.

Artigo 248º

O tutor é responsável pelos prejuízos que, por dolo, culpa ou negligência, causou ao seu pupilo.

SECÇÃO XIV
DAS CONTAS DA TUTELA

Artigo 249º

O tutor é obrigado a dar contas da sua gerência, ou seja ao conselho de família, ou seja ao ex-pupilo emancipado ou maior.

Article 245

Number 4 of the previous article is not applicable to guardians who are ascendants or siblings of the minor.

Article 246

The guardian is obliged to declare in the inventory whatever the minor owes him/her; failing to do so, he/she shall not request the payment of the debt, during the guardianship; and, if the guardian later requests the said payment, he/she must prove that he/she was unaware of the debt before that moment.

Article 247

The guardian has the right to be remunerated, and this remuneration, if it has not been established by the parents of the minor in their will, shall be decided by the family council, as long as it does not exceed one twentieth of the net income of the minor's property.

Article 248

The guardian is liable for the damage that he/she has caused the ward, with deceit, fault or negligence.

SECTION XIV
ACCOUNTING FOR THE GUARDIANSHIP

Article 249

The guardian is obliged to account for his/her management, either to the family council or to the former ward, if he has become emancipated or has reached the age of majority.

Artigo 250º

As contas apresentadas ao conselho de família serão examinadas por uma ou duas pessoas inteligentes, designadas pelo mesmo conselho dentre os seus membros, sendo possível, e serão aprovadas ou reprovadas, em todo ou em parte, como parecer direitamente.

Article 250

The accounts presented to the family council shall be examined by one or two intelligent persons, appointed by the same council from among its members, if possible, and shall be approved or rejected, in whole or in part, as the council deems accurate.

Artigo 251º

As contas devem ser acompanhadas dos documentos justificativos, excepto pelo que toca a despesas de que não é costume exigir recibo.

Article 251

The accounts must be accompanied by all confirming documents, except regarding expenses for which it is not usual to request a receipt.

Artigo 252º

Serão abonadas ao tutor todas as despesas legalmente feitas, ainda que delas não tenha resultado proveito ao menor, se isso não acontecer por culpa do mesmo tutor.

Article 252

All expenses lawfully carried out by the guardian shall be approved, even if they did not benefit the minor, as long as the guardian is not to blame for this fact.

Artigo 253º

Se à vista das contas, o tutor ficar alcançado, a importância do alcance vencerá o juro da lei, desde a aprovação das mesmas contas.

Article 253

If, upon the review of the accounts, the guardian is indebted, the amount of the debt shall be due and subject to legal interest from the time of the approval of the said accounts.

Artigo 254º

O saldo a favor do tutor será satisfeito pelos primeiros rendimentos do menor que o tutor receber; mas, se ocorrerem despesas urgentes, de forma que o tutor se não possa inteirar, vencerá juros o saldo, quando se lhe dever, se o conselho de família não prover de outro modo ao pronto pagamento da dívida.

Article 254

The balance in favour of the guardian shall be settled with the first income of the minor received by the guardian; however, if there are urgent expenses, so that the guardian cannot be paid, the balance shall be subject to legal interest, upon the moment it is owed, unless the family council otherwise provides for the timely payment of the debt.

Artigo 255º

O tutor alcançado, não tendo bens por onde indemnize o menor, fica sujeito ao castigo que a lei penal lhe imponha, sem que por isso deixe, quando a indemnização venha a ser possível, de estar obrigado a ela.

Artigo 256º

Nos casos de morte, ausência ou interdição do tutor, as contas serão dadas pelos seus herdeiros ou representantes.

Artigo 257º

No caso de emancipação ou maioridade, as contas serão dadas ao emancipado ou maior, com assistência do curador e do protutor.

§ único) O saldo que resultar destas contas vencerá juros legais a favor do tutor ou contra ele; no primeiro caso, desde que ao ex-pupilo for requerido o pagamento, com prévia entrega de seus bens, e no segundo, desde a aprovação das contas.

SECÇÃO XV
DOS DIREITOS E OBRIGAÇÕES DO PROTUTOR

Artigo 258º

Incumbe ao protutor, além de outras atribuições expressas neste código:

1º) Sustentar e defender os direitos do menor em juízo, ou fora dele, todas as vezes que se acharem em oposição com os interesses do tutor;

2º) Vigiar a administração do tutor e levar ao conhecimento do curador e do

Article 255

The indebted guardian, not having property with which to compensate the minor, is subject to the punishment foreseen in criminal law, notwithstanding the obligation to pay the said compensation if such payment becomes possible.

Article 256

In the cases of the guardian's death, absence or interdiction, the accounts shall be presented by his/her heirs or representatives.

Article 257

Where the minor becomes emancipated or reaches the age of majority, the accounts shall be presented to him/her, with the assistance of the curator and of the proguardian.

Single §) The balance resulting from these accounts shall be subject to legal interest in favour or against the guardian; in the first case, starting the moment the payment is requested from the former ward, preceded by the surrendering of his property, and in the second case, starting the moment of the approval of the accounts.

SECTION XV
RIGHTS AND OBLIGATIONS OF THE PROGUARDIAN

Article 258

It is for the proguardian, aside from other competencies explicitly set out in this code, to:

1) Support and defend the rights of the minor in or outside of court, whenever these are opposed to the interests of the guardian;

conselho de família tudo quanto lhe parecer prejudicial à pessoa ou aos interesses do menor;

3º) Assistir ao inventário e à venda dos bens do menor;

4º) Promover a convocação do conselho de família, nos casos de abandono ou vacância da tutela, e em todos aqueles em que deva verificar-se a exclusão ou a remoção do tutor.

Artigo 259º

O protutor pode assistir às deliberações do conselho de família, e tomar parte nelas, mas não pode votar.

Artigo 260º

O protutor pode exigir do tutor, no mês de Janeiro de cada ano, uma nota do estado da administração dos bens do menor, e, a todo o tempo, que o tutor lhe deixe ver o seu livro ou caderno de gerência, e que lhe preste os esclarecimentos de que a este respeito precisar.

Artigo 261º

O protutor não pode aceitar procuração do tutor em objecto da gerência deste.

Artigo 262º

São aplicáveis ao protutor as disposições do artigo 244º, nºs 2º, 3º e 4º, e do artigo 248º.

2) Supervise the guardian's administration and inform the curator and the family council of anything he/she deems detrimental to the person or interests of the minor;

3) Assist in the pursuit of the inventory and the sale of the minor's property;

4) Procure the summoning of the family council, in case of abandonment or vacancy of the guardianship, and in all cases where the guardian should be excluded or removed.

Article 259

The proguardian may observe the deliberations of the family council, as well as take part in them, although without the right to vote.

Article 260

The proguardian may require the guardian, in January of each year, to provide a description of the condition of the administration of the minor's property, and he/she may at all times require the guardian to show him/her the management record and to provide the clarifications that he/she may need in this respect.

Article 261

The proguardian shall not accept a power of attorney from the guardian regarding the guardian's management.

Article 262

The provisions of numbers 2, 3 and 4 of article 244 and those of article 248 are applicable to the proguardian.

SECÇÃO XVI
DO ARRENDAMENTO E DA VENDA DOS BENS DOS MENORES

Artigo 263º

Os bens imóveis dos menores serão dados de arrendamento, se o conselho de família não resolver, por achar nisso maior conveniência, que sejam administrados pelo tutor.

Artigo 264º

Os arrendamentos, até três anos, serão feitos pelo tutor, do modo que parecer mais conveniente aos interesses dos menores.

Artigo 265º

Os arrendamentos, por mais de três anos, serão sempre feitos em hasta pública, com assistência do protutor e do curador.

Artigo 266º

O disposto nos três artigos antecedentes não é aplicável aos arrendamentos dos bens dos menores que se acharem debaixo do poder paternal, os quais serão feitos ao prudente arbítrio do pai, salvo no que diz respeito ao prazo estabelecido no artigo 224º, nº 14º.

Artigo 267º

A venda dos bens mobiliários, nos casos em que deva fazer-se, será feita em hasta pública, com assistência do protutor e do curador, excepto se, por seu diminuto valor, o conselho de família encarregar o tutor de realizar a venda particularmente.

SECTION XVI
LEASE AND SALE OF THE MINOR'S PROPERTY

Article 263

The immovable property of the minor will be leased if the family council decides that it should not be administered by the guardian, finding this more convenient.

Article 264

The leases, of up to three years, shall be executed by the guardian, in the way deemed most convenient to the interests of the minors.

Article 265

Leases exceeding three years shall always be made at auction, with the assistance of the proguardian and of the curator.

Article 266

The provisions of the three preceding articles are not applicable to leases of minors' property subject to parental authority, which should be carried out in accordance with the father's prudent decision, except with regard to the deadline foreseen in number 14 of article 224.

Article 267

The sale of movable property, when it must be carried out, shall be at auction, with the assistance of the proguardian and of the curator, except if, due to its small value, the family council instructs the guardian to privately make its sale.

Artigo 268º

A venda dos bens imobiliários dos menores será sempre feita em hasta pública, na forma sobredita.

Artigo 269º

Se os bens mobiliários ou imobiliários estiverem em julgado diferente daquele onde correr o inventário, será a venda deles efectuada em hasta pública no julgado onde estiverem, por deprecada do juiz da tutela, com assistência do respectivo curador, e da pessoa que o conselho de família autorizar, se tiver por conveniente fazê-lo, para requerer no acto tudo quanto for a bem dos menores.

§ único) A disposição deste artigo não derroga a excepção do artigo 267º.

Artigo 270º

Sempre que se houver de proceder a venda de bens de menores, em hasta pública, será o valor de tais bens previamente verificado, e o conselho de família estabelecerá o mínimo preço venal, que não poderá ser inferior ao sobredito valor.

Artigo 271º

Sendo postos os bens em praça com preço superior ao da avaliação, se não houver arrematação, far-se-á segunda praça com o preço da avaliação.

Artigo 272º

Se os bens forem desde logo postos em praça com o preço da avaliação, e não houver arrematante, não se fará segunda praça com o mesmo preço, e o conselho de família resolverá se há-de sobrestar na

Article 268

The sale of the minors' immovable property shall always be at auction, in the above described manner.

Article 269

If the movable or immovable property is to be found in a different jurisdiction from that where the inventory is taking place, its sale will be at auction in the said jurisdiction, by commission of the judge of guardianship, with the assistance of the respective curator, and of the person authorised by the family council, if it so deems fit, to request in this act anything that is to the benefit of the minors.

Single §) This article does not derogate from the exception foreseen in article 267.

Article 270

Whenever minors' property is to be sold at auction, the value of the said property shall be previously evaluated, and the family council shall determine the minimum selling price, which shall not be inferior to the above mentioned value.

Article 271

If the property is taken to auction at a price higher than that of the valuation, and there is no bidder, a second auction shall be held with the price corresponding to the valuation.

Article 272

If the property is at once put on auction with the price corresponding to the valuation, and there is no bidder, there will not be a second auction with

alienação, ou se deverão os bens voltar à praça com preço inferior, que neste caso poderá ser determinado pelo mesmo conselho.

Artigo 273º

Observar-se-ão em tudo o mais as formalidades ordinárias das arrematações.

Artigo 274º

O que fica disposto nos artigos precedentes é aplicável à venda dos bens dos menores que se acharem debaixo do pátrio poder, sendo, porém, neste caso, as atribuições do conselho de família exercidas pelo juiz, com assistência do curador dos órfãos.

SECÇÃO XVII
DA TUTELA DOS FILHOS PERFILHADOS

Artigo 275º

A tutela dos filhos perfilhados rege-se pelas mesmas regras da tutela dos filhos legítimos, com as seguintes modificações.

Artigo 276º

O conselho de família será substituído por um conselho especial, composto de cinco vizinhos, que o juiz dos órfãos nomeará, dentre os amigos ou parentes do pai ou da mãe que houver reconhecido o filho menor.

Artigo 277º

Se o pai ou a mãe que houver perfilhado o filho ilegítimo lhe nomear tutor, esta nomeação terá efeito, ainda

the same price, and the family council shall decide whether it will not proceed with the sale or whether it will return the property to auction at a lower price, which in this case may be determined by the said council.

Article 273

All other matters shall be governed by the usual auction procedures.

Article 274

The provisions of the preceding articles are applicable to the sale of the minors' property subject to parental authority, except that, in this case, the powers of the family council are exercised by the judge, with the assistance of the curator of orphans.

SECTION XVII
GUARDIANSHIP OF ACKNOWLEDGED CHILDREN

Article 275

The guardianship of acknowledged children is governed by the same rules as the guardianship of legitimate children, with the following differences.

Article 276

The family council shall be replaced by a special council, made up of five neighbours, appointed by the judge of orphans from among the friends or relatives of the father or mother who has acknowledged the minor child.

Article 277

If the father or the mother who has acknowledged the illegitimate child appoints a guardian for him/her, this

que o filho venha posteriormente a ser reconhecido pelo outro progenitor.

Artigo 278º

Não haverá tutela legítima pelo que respeita aos filhos perfilhados.

SECÇÃO XVIII
DA TUTELA DOS FILHOS ESPÚRIOS

Artigo 279º

O pai ou a mãe do filho espúrio menor pode nomear-lhe tutor por acto entre vivos, ou em seu testamento, nos casos em que é obrigado a dar-lhe alimentos.

Artigo 280º

Na falta de pai e de mãe, nomeará o respectivo juiz dos órfãos pessoa idónea que se encarregue do menor e proveja à sua educação e rumo futuro, com os meios que para esse fim os pais houverem aplicado.

Artigo 281º

Se os pais nenhuns meios houverem aplicado para os alimentos do filho, o tutor, que neste caso será nomeado pelo juiz, promoverá, com assistência do curador dos órfãos, as acções que devam propor-se contra os pais ou seus herdeiros.

Artigo 282º

Nesta espécie de tutela exercerá o juiz todas as atribuições do conselho de família, e o curador dos órfãos as que competem ao protutor. Das decisões do

appointment shall come into force, even if the child is later on acknowledged by the other parent.

Article 278

There shall be no legal guardianship regarding acknowledged children.

SECTION XVIII
GUARDIANSHIP OF SPURIOUS CHILDREN

Article 279

The father or the mother of the spurious child may appoint a guardian for him/her in act *inter vivos*, or in his/her will, in the cases where he/she is obliged to pay maintenance.

Article 280

In the absence of both father and mother, the respective judge of orphans shall appoint a capable person to be responsible for the minor and provide for his/her education and future, with the means that the parents have ascribed to that purpose.

Article 281

If the parents have not provided any means for the maintenance of the child, the guardian, who in this case shall be appointed by the judge, shall, with the assistance of the curator of orphans, initiate the necessary legal proceedings against the parents or their heirs.

Article 282

In this kind of guardianship, the judge takes on all the powers of the family council, and the curator of orphans takes

juiz recorrer-se-á, quando cumprir, para a relação do distrito.

Artigo 283º

Se o pai ou a mãe do menor falecerem insolventes, o menor será tido por abandonado, e observar-se-á acerca dele o mesmo que na secção seguinte se determina acerca dos expostos.

SECÇÃO XIX
DA TUTELA DOS MENORES ABANDONADOS

Artigo 284º

Os expostos e os menores abandonados, cujos pais não forem conhecidos, enquanto não chegarem à idade de sete anos, estarão debaixo da tutela e administração das respectivas câmaras municipais, ou das pessoas que se houverem encarregado voluntária ou gratuitamente da sua criação.

§ único) O disposto neste artigo não obsta à execução dos regulamentos especiais de qualquer estabelecimento público de beneficência pupilar, autorizado por lei.

Artigo 285º

Logo que os expostos ou abandonados perfaçam sete anos de idade, serão postos à disposição do conselho de beneficência pupilar, ou de qualquer outra magistratura a quem a lei administrativa incumbir desse mister.

Artigo 286º

O conselho de beneficência pupilar, ou a magistratura que o substituir, dará

on the powers of the proguardian. The decisions of the judge may be appealed, when so deemed fit, to the district appeal court.

Article 283

If the father or the mother of the minor pass away in a state of insolvency, the minor shall be considered abandoned, and the provisions of the next section, concerning exposed children, shall be applied to the said minor.

SECTION XIX
GUARDIANSHIP OF ABANDONED MINORS

Article 284

Exposed and abandoned minors, whose parents are not known, until they reach the age of seven, shall be placed under the guardianship and administration of the respective municipalities, or of the persons who have voluntary and gratuitously taken charge of their upbringing.

Single §) The provisions of this article do not prevent the application of special regulations of any legally authorised public establishment for child care.

Article 285

As soon as the exposed or abandoned minors reach the age of seven, they shall be placed at the disposition of the council for the welfare of children, or of any other body of magistrates charged with this task by law.

Article 286

The council for the welfare of children, or the body of magistrates

aos expostos ou abandonados o rumo de vida que lhes for mais vantajoso, fazendo-os entrar em algum estabelecimento, ou entregando-os por contrato a pessoas que queiram encarregar-se da sua educação e ensino.

Artigo 287º

As pessoas que tomarem a seu cargo expostos ou abandonados ficam sendo seus tutores, salva a superintendência do conselho, ou da magistratura que o substituir, que pode fazer rescindir o contrato e dar novo rumo ao menor, em caso de abuso ou de falta de cumprimento das obrigações estipuladas.

Artigo 288º

O conselho de beneficência pupilar, ou a magistratura que o substituir, não pode impor ao exposto ou abandonado, nem estipular em nome dele, obrigações que vão além dos quinze anos de sua idade.

Artigo 289º

Chegando o exposto ou abandonado a esta idade, poderá ser emancipado pelo sobredito conselho, ou pela magistratura que o substituir, se mostrar que tem a capacidade necessária para reger-se.

Artigo 290º

O exposto ou abandonado terá a propriedade e o usufruto de tudo o que adquirir por qualquer título, durante a sua menoridade.

replacing it, shall determine for the life of the exposed or abandoned minors the course which it deems most advantageous, having them join any establishment, or surrendering them by contract to persons willing to take charge of their education and training.

Article 287

Persons who take charge of exposed or abandoned minors become their guardians, notwithstanding the supervision of the council, or of the body of magistrates replacing it, which can rescind the contract and determine a new destination for the minor, in case of abuse or violation of stipulated obligations.

Article 288

The council for the welfare of children, or the body of magistrates replacing it, shall not impose on the exposed or abandoned minor, nor shall it stipulate in the name of the said minor, obligations lasting beyond the minor's age of fifteen.

Article 289

When the exposed or abandoned minor has reached the age of fifteen, he/she may be emancipated by the aforementioned council, or by the body of magistrates replacing it, if he/she demonstrates he/she has the necessary ability to govern him/herself.

Article 290

The exposed or abandoned minor shall have the ownership and usufruct of all that he/she had acquired on any ground whatsoever, before reaching the age of majority.

Artigo 291º

Logo que o exposto ou abandonado chegue aos dezoito anos de idade, ficará de direito emancipado, e se lhe dará baixa no livro competente.

Artigo 292º

Se o exposto ou abandonado falecer intestado e sem descendentes, herdará seus bens o estabelecimento de beneficência pupilar.

Artigo 293º

Em tudo o mais que disser respeito aos direitos do exposto ou abandonado, observar-se-á, no que for aplicável, o disposto relativamente aos outros menores.

SECÇÃO XX
DA TUTELA DOS FILHOS DE PESSOAS MISERÁVEIS

Artigo 294º

Os filhos menores de pessoas miseráveis, que por morte, avançada idade, ou moléstia de seus pais, ou por qualquer outro motivo justificado, não puderem ser alimentados e socorridos por eles, ou por seus parentes, serão entregues ao cuidado e protecção da respectiva municipalidade, que os fará criar, alimentar e educar à custa das rendas do concelho, até à idade em que possam ganhar sua vida.

Artigo 295º

Se os pais melhorarem de condição, e adquirirem meios suficientes, pagarão as despesas feitas pelo município e, se pedirem seus filhos, ser-lhes-ão entregues.

Article 291

As soon as the exposed or abandoned child reaches the age of eighteen, he/she will be emancipated *ipso jure*, and his/her name will be removed from the respective book.

Article 292

If the exposed or abandoned minor dies intestate and without descendants, the child care establishment shall inherit his/her property.

Article 293

In all else concerning the rights of exposed or abandoned minors, the provisions relating to other minors shall be applied, to the extent that they may be so.

SECTION XX
GUARDIANSHIP OF THE CHILDREN OF INDIGENTS

Article 294

Minor children of indigent persons who, due to the death, old age or illness of their parents, or for any other justified reason, may not be fed and assisted by them or by their relatives, shall be handed over to the care and protection of the respective municipalities, which will raise, feed and educate them at the municipality's expense, up to the age when they are able to make a living for themselves.

Article 295

If the parents' condition improves, and they acquire sufficient means, they shall pay the expenses incurred by the municipality and, if they request their children, these shall be returned to them.

Artigo 296º

A municipalidade é considerada como legítima tutora dos mencionados menores, enquanto estiverem a seu cargo, em tudo o que disser respeito à sua criação e educação, sem quebra dos direitos paternos, que em tudo o mais subsistem na forma da lei geral.

Article 296

The municipalities are considered as the legal guardian of the aforementioned minors, for as long as they are under their charge, for anything relating to their upbringing and education, notwithstanding parental rights which shall persist in accordance with general law.

SECÇÃO XXI
DA RESCISÃO DOS ACTOS PRATICADOS PELOS MENORES

SECTION XXI
RESCINDING ACTS CARRIED OUT BY MINORS

Artigo 297º

Os menores não gozam do privilégio de restituição por inteiro.

Article 297

Minors do not enjoy the benefit of full restitution.

Artigo 298º

Os actos e contratos que o menor pode legalmente praticar, e bem assim os que forem praticados com a devida autorização, tanto pelo menor, como pelo tutor, não podem ser rescindidos pelos menores, senão nos casos em que a lei geralmente, ou alguma disposição especial dela, o permite.

Article 298

The acts and contracts which the minor may lawfully execute, as well as those executed with due permission, either by the minor or by the guardian, shall not be revoked by the minors, except in the cases in which general or special law so allows.

Artigo 299º

Os actos praticados pelo menor sem a devida autorização são nulos, salvo o disposto nos artigos 1058º e 1059º, mas não poderá o dito menor valer-se desta nulidade nos casos seguintes:

1º) Nas obrigações que tiver contraído sobre coisas de arte ou profissão em que seja perito;

2º) Se tiver usado de dolo para se fazer passar por maior.

§ único) A simples declaração, ou inculca de maioridade, ou de emancipação, não é suficiente para, neste caso, caracterizar o dolo.

Article 299

The acts carried out by the minor without due permission are null and void, with the exception of what is foreseen in articles 1058 and 1059, but the minor shall not invoke this fact in the following cases:

1) In the obligations contracted in relation to matters of art or in a profession of which he/she is an expert;

2) If he/she deceitfully presented him/herself as having reached the age of majority.

Single §) A simple statement or suggestion of majority or emancipation is not sufficient, in this case, to constitute deceit.

SECÇÃO XXII
DO REGISTO DE TUTELAS

Artigo 300º

Em cada juízo orfanológico haverá um livro numerado, rubricado e encerrado pelo respectivo juiz, para serem registadas as tutelas dos menores e interditos.

§ único) O escrivão que servir o ofício nº 1 será encarregado deste livro, no qual lançará não só as tutelas do seu cartório, mas também as dos outros, para o que deverão os respectivos escrivães transmitir-lhes as necessárias notas.

Artigo 301º

As páginas deste livro serão divididas em colunas, ou casas, em que se declare:

1º) A filiação, a idade e o domicílio do menor, ou do interdito;

2º) A importância do seu património em bens mobiliários e imobiliários;

3º) As datas em que teve princípio e fim o inventário;

4º) O nome, profissão, idade, estado e domicílio do tutor, e se é testamentário, legítimo ou dativo;

5º) Se o tutor tem hipoteca, ou prestou outra caução;

6º) As datas em que começou e findou a gerência do tutor;

7º) A data das contas que este prestar, se houve alcance e qual;

8º) As observações que ocorrerem.

SECTION XXII
REGISTRY OF GUARDIANSHIPS

Article 300

At every court of orphans there shall be a numbered book, signed and kept by the respective judge, to record the guardianships of minors and of interdicted persons.

Single §) The clerk who records the first entry shall be responsible for this book, in which he/she will record not only the guardianships of his office, but also those of the others, and for this purpose the respective clerks must send the aforementioned clerk the necessary information.

Article 301

The pages of this book shall be divided in columns, or sections, in which the following will be recorded:

1) The filiation, age and residence of the minor, or of the interdicted person;

2) The amount of the minor's patrimony in movable and immovable property;

3) The dates at which the inventory began and was concluded;

4) The name, profession, age, status and residence of the guardian, and whether he is a testamentary guardian, a legal guardian or a dative guardian;

5) Whether the guardian has a mortgage or provided some other security;

6) The dates at which the guardian's management began and ended;

7) The date at which the guardian presents the accounts, if there was a debt and, in this case, how much;

8) Any observations deemed fit.

Artigo 302º

O livro mencionado nos artigos precedentes será acompanhado de um índice alfabético dos nomes dos tutores e dos tutelados.

Artigo 303º

O escrivão ou juiz, que pela sua parte deixar de cumprir o que fica disposto nesta secção, incorre em responsabilidade por erro de ofício e pelas perdas e danos a que der causa.

SECÇÃO XXIII
DA EMANCIPAÇÃO

Artigo 304º

O menor pode emancipar-se:

1º) Pelo casamento;

2º) Por concessão do pai, da mãe na falta deste, ou do conselho de família, na falta de ambos.

Artigo 305º

A emancipação habilita o menor para reger sua pessoa e bens, como se fosse maior.

Artigo 306º

A emancipação por casamento, porém, só produzirá os seus efeitos legais, tendo o varão dezoito anos completos, e a mulher dezasseis, e tendo sido o casamento competentemente autorizado.

§ único) Casando-se o menor, sem a necessária autorização, continuará a ser considerado como menor quanto à administração de seus bens, até à maioridade; mas ser-lhe-ão arbitrados dos rendimentos dos ditos bens os alimentos necessários ao seu estado.

Article 302

The aforementioned book shall be accompanied by an alphabetical index of the names of the guardians and of the wards.

Article 303

The clerk or judge who, regarding his/her functions, does not comply with the provisions of this section shall be held responsible for failure of duty and for any losses or damage caused.

SECTION XXII
EMANCIPATION

Article 304

A minor may be emancipated:

1) Through marriage;

2) By grant of the father, of the mother in the absence of a father, or of the family council in the absence of both.

Article 305

Emancipation entitles the minor to govern his own person and property, as if he had reached the age of majority.

Article 306

However, emancipation through marriage shall only produce its effects under the law if the male spouse is at least eighteen years old and the female spouse is at least sixteen years old, and if the marriage was duly authorised.

Single §) If the minor marries without the required authorisation, he will continue to be considered a minor with regard to the administration of his/her property, up until the age of majority; but he/she shall be paid maintenance in

Artigo 307º

A emancipação mencionada no artigo 304º, nº 2º, só pode verificar-se com aprazimento do menor, e depois que este haja completado dezoito anos.

Artigo 308º

A emancipação outorgada pelo pai ou pela mãe consistirá num simples auto ou termo, assinado perante o juiz do domicílio do emancipante; e a outorgada pelo conselho de família consistirá no auto de deliberação tomada na forma ordinária.

§ único) O juiz mandará passar em seguida o respectivo alvará, que só produzirá o seu efeito, em relação a terceiros, desde que for registado no livro das tutelas.

Artigo 309º

No caso do nº 1º do artigo 304º, o menor emancipado requererá ao juiz competente, juntando os documentos comprovativos do seu casamento, idade e respectiva licença, que o faça entrar na administração dos seus bens; e o juiz deferirá, como for justo, sem audiência prévia de alguém.

§ único) O despacho que mandar entregar a administração só produzirá o seu efeito, em relação a terceiros, desde que for registado no livro das tutelas.

accordance with his/her status, to be taken from the income of the said property.

Article 307

The type of emancipation mentioned in the second number of article 304 may only take place with the agreement of the minor, and after he/she has reached the age of eighteen.

Article 308

The emancipation granted by the father or mother shall consist of a mere record or document, signed before the judge of the residence of the person granting the emancipation; the emancipation granted by the family council shall consist of a record of the deliberation taken in the usual manner.

Single §) The judge shall subsequently order the respective title to be drawn up, which will only be binding *erga omnes* after it has been registered in the book of guardianships.

Article 309

In the case of the first number of article 304, the emancipated minor may request the competent judge, gathering all the documents attesting to his/her marriage, age and respective license, to allow him/her to administer his/her own property; and the judge shall decide, in equity, without previously hearing any parties.

Single §) The order which directs the handing over of the administration shall only come into effect, *erga omnes*, after it has been registered in the book of guardianships.

Artigo 310º

Concedida a emancipação, não pode ser revogada.

SECÇÃO XXIV
DA MAIORIDADE

Artigo 311º

A época da maioridade é assinada, sem distinção de sexo, aos vinte e um anos completos. O maior fica habilitado para dispor livremente da sua pessoa e bens.

Artigo 312º

O maior deve requerer, com a certidão de idade, que lhe sejam entregues os bens que tiverem estado em administração, e se lhe dê baixa no registo de tutelas.

Artigo 313º

O juiz, porém, sobrestará sempre na entrega dos bens, havendo sentença de interdição, proferida contra o requerente, ou processo, só que seja, pendente para esse fim.

Article 310

An emancipation that has been granted cannot be revoked.

SECTION XXIV
AGE OF MAJORITY

Article 311

A person reaches the age of majority, regardless of gender, having completed twenty one full years. The person who has reached the age of majority is empowered to freely govern his person and property.

Article 312

With a certificate of age, the person who has reached the age of majority shall request that his/her assets until then subject to administration be delivered to him/her, and that he/she be removed from the guardianship registry.

Article 313

However, the judge will always withhold the delivering of the assets, if there is a judgment interdicting the person in question, or a pending case before a court aimed at doing so.

COMMENTARY TO ARTICLES 185 TO 313

In accordance with article 185, if parental authority cannot be exercised, due to the parents' absence or impediment (e.g., the inhibition of parental authority), the minor's incapacity is overcome through guardianship.

Guardianship is not exercised by one entity alone, but by an ensemble of entities mentioned in article 187: a guardian, a proguardian, a curator and a family council. However, this ensemble must be completed in accordance with article 226, which foresees another guardianship body, the guardianship council, which functions as an appellate body for the decisions of the family council.

With regard to the guardian, the law distinguishes 3 types of guardianship – testamentary, legal or dative – depending on its source and the manner in which the guardian is appointed. Thus, with testamentary guardianship (articles 193-198), the guardian is appointed in a will; with legal guardianship (article 199-201), the appointment derives from the law itself; and with dative guardianship (articles 202-204), the appointment is made by the family council.

As mentioned above, testamentary guardianship is instituted by a will, and it may be so instituted by the minor's parents. Under the law, this option may only be exercised by the one parent still holding parental authority in the absence or impediment of the other parent (see article 193 and single §).

Although, as a rule, only the last parent to exercise parental authority may institute a testamentary guardianship, article 197 allows, as an exception, for it to be instituted by persons who leave the minor an inheritance or legacy, if the father or mother did not appoint a guardian, and if the said inheritance or legacy is worth more than the minor's patrimony; such an appointment, however, shall be subject to confirmation by the family council. In any case, even if the parents appointed a guardian, whoever legates certain

assets to the minor may equally appoint a special administrator for those assets, for as long as the legatee is a minor.

On the other hand, despite the designation of this type of guardianship, it may be instituted not only in a will but also in an authentic act *inter vivos*, in accordance with article 193.

Article 194, interpreted *a contrario sensu*, prohibits the appointment of several tutors for the same child, the same applying to dative guardianship, where the family council shall not appoint more than one guardian for the minor, as foreseen in article 225. Moreover, article 187 itself refers to the guardian in the singular, meaning that one minor shall not have several guardians simultaneously.

This interdiction aims at protecting the minor's interests, insofar as it tries to prevent the occurrence of conflicts in the guardian's decision-making with regard to the minor's person and property.

However, article 196 allows the appointment of successive guardians, in order to replace one another, guardianship being awarded to each of them in the order in which they were appointed, unless the author of the appointment stipulated otherwise.

Concerning legal guardianship (i.e. when the guardian is appointed by law), aside from the requisite common to all forms of guardianship – the parents' absence or impediment –, article 199, no. 2, further requires the absence of a testamentary guardian. Thus, legal guardianship is subsidiary in relation to testamentary guardianship.

Only the minor's relatives indicated in article 200 may be legal guardians, and in the order established therein; their appointment must be confirmed by the family council, which can exclude the relatives who are not deemed capable of carrying out these functions (see articles 201, § 2, and 224, no. 2).

Lastly, in accordance with article 202, there may be dative guardianship, if no testamentary guardian was appointed and if the minor has none of the relatives mentioned in article 200, or if the relatives that do fall in this category are unable to exercise the legal guardianship. In other words, dative guardianship is subsidiary in relation to testamentary guardianship and to legal guardianship.

Dative guardianship has, aside from the general limit of the age of majority, a further temporal limit: 3 years, as foreseen in article 204; this is justified by the fact that the dative guardians will not be relatives or, at least, will not be close relatives to the minor (see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil. Lições ao Curso do 1º Ano Jurídico de 1944-45 (Família e Sucessões)*, Centro de Estudos Norte-Americanos, Lda., Mirandela, n/d, page 325).

As for the guardian's functions, they are listed in article 243, the main one being to "*govern and protect the person of the minor, administer his/her property, as a* bonus pater familias, *and represent him/her in all civil acts, except in marriage and in the expression of the last will and testament*" (see no. 1 of the aforesaid article).

The guardian is entitled to be remunerated (article 247), he/she is liable for the damage he/she causes to the minor, with deceit or mere fault (article 248), and is obliged to account for his/her management to the family council and to the former ward who has become emancipated or has reached the age of majority (article 249).

The proguardian is the second guardianship entity, appointed by the family council, in accordance with articles 205 and 224, no. 4.

Since article 205 mentions that the proguardian is appointed by the family council in the same session in which the guardian is appointed or confirmed, and since a testamentary guardian is appointed by the parents, with no need of confirmation by the family council, it is unclear whether a proguardian should be appointed in the case of testamentary guardianship.

Cunha Gonçalves (*Tratado de Direito Civil em Comentário ao Código Civil Português*, vol. II, Coimbra Editora, Coimbra, 1930, page 490) answers this question affirmatively, referring to no. 1 of article 235, which lists as persons who may be removed from guardianship "*the testamentary guardian or the legal guardian who begins exercising his/her functions before the summoning of the family council and the appointment of the proguardian*" (our underlining).

However, Pires de Lima and Antunes Varela have the opposite opinion (*Noções Fundamentais de Direito Civil*, cit., page 327, no. 1),

arguing that, on the one hand, the aforesaid article 235, no. 1, *in fine*, may refer only to the legal guardian (not to the testamentary one), and that article 224, no. 4, *a contrario sensu*, implies that there are situations in which no proguardian is appointed.

The proguardian's functions are determined in article 258. According to this article, the proguardian is essentially the guardian's supervisor, and is equally responsible for damage he/she causes to the minor, deceitfully or negligently (see article 248, *ex vi* article 262).

The third guardianship entity mentioned in article 187 is the general orphan curator, regulated in articles 220 and 221, in charge of defending minors' interests and rights.

As for the family council, its composition follows the provisions of article 207. See, in this regard, the case-law creating judgment of the Supreme Court of 22/1/1929, published in the Official Gazette, Series II, of 5/2/1929, which determined the following: "*The wrongful composition of the family council may be corrected at any time, the courts always having the possibility to correct the nullity resulting from a violation of articles 207 or 209 of the Civil Code which, in the order of precedence set therein, determine that the elder of the relatives should be preferred, if they are at the same degree of relation, and, therefore, that the closer relatives should be preferred to the ones that are less close, if they are at different degrees of relation*".

On the composition and functioning of the family council, see articles 1490 *et seq*. of the Code of Civil Procedure of 1939. The third part of article 1490 of this law confirmed the aforesaid judgment, determining that: "*Even after the council has been established, any relative who should be preferred may request his admittance in place of an already appointed member, and this replacement may be requested by whoever has an interest in the rightful constitution of the council*".

Although, as a rule, the family council is made up of the minor's relatives, as determined in article 207, there may not be enough relatives residing within the jurisdiction of the court carrying out the orphan inventory to constitute the family council, and the relatives residing in another court's jurisdiction may not want to be part of

this entity (see article 209). In this case, the friends of the minor's parents shall be called upon and, in their absence, any other sound persons, in accordance with article 208.

In the absence of relatives, and if sound persons are called upon before calling upon friends of the minor's parents, there is an irregularity. In this situation, the friends of the minor's parents who were not called upon may request that the family council be changed, applying analogically the provisions of article 207, § 3 (in this sense, see the legal opinion in *Revista de Legislação e de Jurisprudência*, year 70, no. 2592, pages 85 *et seq.*). In such situations, the composition of the family council should be changed, although this modification shall only be effective for the future and the previous decisions shall be preserved, except if they caused damage to the minor.

Article 224 determines the family council's functions. The law determines that the council must intervene in the personal and patrimonial acts which are the most relevant for the minor's life.

This collective body's quorum is of at least 3 members, and decisions are adopted, as a rule, by the absolute majority of votes of the attending members, in accordance with articles 217 and 219, respectively.

Unlike parental authority, which the parents may not renounce, in certain cases it is possible to be excused from being a guardian, a proguardian or a member of the family council, in accordance with articles 227 *et seq*. The law also determines, in article 234, that certain persons may not be guardians, proguardians or members of the family council. Furthermore, article 235 foresees the cases in which guardians may be removed from their functions.

In accordance with articles 236 *et seq.*, it is up to the family council to decide on the exclusion or removal of guardians and proguardians.

As mentioned above, aside from the entities explicitly mentioned in article 187, there is another entity relevant to guardianship – the guardianship council, foreseen in article 226, which decides on appeals from the decisions of the family council. Its interventions must be provoked (it cannot act on own initiative) by the guardian,

the proguardian, the curator of orphans, any of the minor's relatives or by any other party with an interest in the decision, in accordance with the aforesaid article 226.

Article 226, § 1, was revoked by article 1426 of the Code of Civil Procedure of 1939, the guardianship council being instituted by the respective jurisdiction's childhood guardianship court.

In accordance with article 226, § 2, there is no further appeal if the guardianship council confirms a decision of the family council. On the other hand, if the guardianship council does not confirm the decision of the family council, there may be a further appeal to the District Court of Appeal, which shall decide definitively, in accordance with § 3 of that article. In this respect, see also article 1499 of the Code of Civil Procedure of 1939.

The guardianship of acknowledged children is regulated in articles 275 *et seq*. The fundamental rule in this domain is that the guardianship of legitimated children is equalled to the guardianship of legitimate children, as determined in article 275, with only some differences regarding legal guardianship and the family council.

Thus, according to the provisions of article 276, the family council is replaced by a special council, composed of five neighbours, appointed by the court, from among the friends or relatives of the acknowledging father or mother. In this regard, some argue that this article is only applicable when the illegitimate child was acknowledged by only one of the parents, and that the constitution of the family council, for the guardianship of illegitimate children acknowledged by the father and by the mother, follows the general rule of article 207 (see, e.g., Cunha Gonçalves, *Tratado*, vol. II, cit., page 502). Pires de Lima and Antunes Varela (*Noções Fundamentais de Direito Civil*, cit., page 333) have the opposite opinion, basing it on the risk of the illegitimate children being frowned upon by the parents' families, regardless of whether they were acknowledged by only one or by both parents.

The same risk justifies the absence of legal guardianship in the case of acknowledged children, as foreseen in article 278 (see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil*, cit., page 335).

Regarding testamentary guardianship, it should further be noted that, according to article 277, the acknowledging parent's appointment of a guardian comes into effect even if the child is, later on, acknowledged by the other parent. However, after the child has been acknowledged by both parents, the general rules on testamentary guardianship of legitimate children become fully applicable, the first acknowledging parent having no preference over the last one (see Pires de Lima and Antunes Varela, *Noções Fundamentais de Direito Civil*, cit., page 335, no. 1, and Cunha Gonçalves, *Tratado*, vol. II, cit., page 473).

The guardianship of spurious or non-acknowledgeable children, i.e. incestuous children, in accordance with article 22 and single § and with article 50 of the Protection of Children Act (adopted by Decree no. 2, of 25 December 1910), is regulated in article 279 *et seq*.

As determined in article 279, although parents cannot acknowledge their spurious child and, therefore, are deprived of the exercise of parental authority, they may, however, appoint a guardian for them in an act *inter vivos* or in a will, whenever the fact of the paternity or maternity has been proved in a court of law, in accordance with article 52 of the above mentioned Protection of Children Act.

Non-acknowledgeable children may, equally, be under dative guardianship, with the specificities foreseen in articles 280 to 282.

Articles 284 *et seq*. and articles 294 *et seq*., respectively, relate to guardianship of exposed and abandoned minors, as well as of the children of indigent persons.

Article 126 of the Code of Civil Registry of 1958, adopted by Decree-Law no. 41.967, of 22 November 1958, defines the concept of abandoned thus: "*For the purposes of registering a birth, abandoned children are newborn babies from unknown parents who are found abandoned at any location, as well as minors apparently under the age of 14 or insane, if their parents' whereabouts are not known, regardless of whether the parents themselves are known or unknown, and if they left them unprovided for*".

In addition, article 150 of the Code of Civil Registry of the State of India, of 1912, defines an exposed minor as "*a child born from unknown parents, who is found abandoned at any location*".

As a general rule, exposed and abandoned minors are placed under the guardianship of their respective municipalities, until they reach the age of seven; from that moment on, they are placed at the disposition of the council for the welfare of children or of any other body of magistrates charged with this task by law, in accordance with articles 284 and 285.

As for the guardianship of the children of indigent persons (i.e., persons lacking the means to educate and raise their children), article 294 determines that these "*shall be handed over to the care and protection of the respective municipalities, which will raise, feed and educate them at the municipalities' expense, up to the age when they are able to make a living for themselves*".

In comparison with current Portuguese law, we would firstly note that, unlike article 185 of the Code of Seabra, in which guardianship is the only means to overcome parental authority, the Civil Code of 1966 determines, aside from guardianship, another means of overcoming that power – the administration of property, in accordance with articles 1922 and 1967 *et seq*. Thus, in accordance with the provisions of article 1922, there is administration of property when the parents lose their parental authority in relation to the minor's property, but not in relation to his/her person, or when the entity competent to appoint the guardian entrusts to a third party, in full or in part, the administration of the minor's property.

In light of the above, administration of property always coexists with either parental authority or guardianship; this is logical, since its content is limited to the patrimonial side of the minor's life, it still being necessary to provide for his/her person.

It should be noted that, although the Civil Code of 1867 presents guardianship as the sole means of overcoming parental authority (in accordance with article 185), it also determines, in article 197, single §, that the author of a testamentary legacy in favour of the minor may

appoint a special administrator for the assets in question, until the minor reaches the age of majority; this possibility is also foreseen in the current Portuguese Civil Code (article 1968).

With regard to the rules on guardianship itself, the differences derive primarily from the constitutional principle on the prohibition of discrimination between children born within and out of wedlock (article 36, no. 4, of the Constitution of the Portuguese Republic of 1976), which required the elimination of legal guardianship.

The other forms of guardianship – testamentary and dative – have been kept in the current Portuguese law, although they are no longer named as such and their respective rules are substantially different in certain aspects.

Thus, article 1928, no.s 1 and 3, of the Civil Code of 1966, determines that the guardian may be appointed by the minor's parents, in a will or in an authentic or authenticated document, should they die or become incapacitated, which corresponds to the testamentary guardianship under the Civil Code of 1867, regulated in articles 193 *et seq.*; the fundamental difference between the two is that the father is no longer preferred over the mother with regard to the appointment of the guardian, given the principle of equality between the spouses, included in the Portuguese Constitution of 1976 (article 36, no. 2) and which led to the 1977 revision of the original version of the Civil Code of 1966.

In fact, article 193 and its single § foresaw that the mother would only be allowed to appoint a guardian for the minor or interdicted child, through a will or an authentic act *inter vivos*, in the father's absence or impediment. However, the aforesaid article 1928, no. 1, of the Civil Code of 1966, determines that either of the parents exercising parental authority may appoint a guardian, the father no longer being given preference over the mother.

Article 1928, no. 2, of the Civil Code of 1966 introduced the rule according to which, once the parent who appointed a guardian for the minor child has deceased, while the other parent is still living,

that appointment does not expire; however, in such a situation the other parent may revoke that appointment.

Thus, that appointment shall come into effect if the living parent dies without revoking it.

On the other hand, the elimination of the expression "testamentary guardianship" is due to the fact that the guardian may be appointed not only through a will, but also through an authentic or authenticated document, in accordance with the aforesaid article 1928, no. 3.

Dative guardianship, foreseen in articles 202 *et seq.* of the Civil Code of 1867, corresponds to the guardianship in which the guardian is appointed by the family court, after consulting the family council; the family council has thus lost the power to appoint a guardian for the minor (article 1931 of the Civil Code of 1966 and article 82, no. 1, clause a), of Law no. 3/99, of 13 January, which adopted the Law on the Structuring and Functioning of Civil Courts.

With regard to the guardianship bodies, article 1924, no. 1, of the Civil Code of 1966 mentions only the guardian and the family council. It should be added that, according to article 1962, no. 2, there is no family council nor, therefore, a proguardian, in the case of minors entrusted to educational or welfare establishments.

The composition of the family council has been simplified, in comparison to what was foreseen in article 207 of the Civil Code of 1867. Thus, in accordance with articles 1951 and 1952 of the Civil Code of 1966, the family council has only 3 members: two regular members, one from the paternal lineage and another from the maternal lineage, whenever possible, and a presiding representative of the Public Prosecutor's Office. Once again, in light of the constitutional principle of equality between the spouses (foreseen in article 36, no. 2, of the Constitution of 1976, and in article 1671 of the Civil Code of 1966, as revised in 1977), the predominance of paternal lineage over maternal lineage has been eliminated.

Indeed, article 207 determined that, as a rule, the family council would be made up of the minor's five closest relatives residing within the jurisdiction of the court carrying out the orphan inventory,

three coming from the paternal lineage and two from the maternal lineage. Conversely, both lineages are equally represented under current Portuguese law, through their respective member of the family council.

Although the aforesaid article 1924, no. 1, does not mention it, there is still a proguardian (previously regulated in articles 205 and 206 of the Civil Code of 1867, and currently regulated in articles 1955 and 1956 of the Civil Code of 1966), who is one of the regular members of the family council, responsible for the permanent supervision of the guardian's actions. Thus, the family council no longer chooses the proguardian, who should be, whenever possible, from the opposite lineage to that of the guardian (see article 1955, no. 2). It should further be noted that it is up to the court to choose the proguardian, in accordance with article 1955, no. 3, if the guardian is the minor's full blood sibling or the latter's spouse, or if both of the family council's regular members are from the same lineage or are from neither of them.

In accordance with articles 305 and 311 of the Civil Code of 1867, the general incapacity to exercise rights as a result of being a minor is terminated with emancipation or with the age of majority, the emancipated person or adult becoming entitled to govern his person and property (on this issue, see above the commentary to Chapter I of Title IX – articles 97-100).

Regarding emancipation, article 304 determines that it may occur through marriage, as long as the minor is of nubile age and the marriage was duly authorised by his/her parents or his/her legal representatives (see article 306); it may also be granted by the father, or by the mother in his absence, or by the family council in the absence of both parents, as long as the minor has consented thereto and has reached the age of 18, regardless of gender (see article 307).

The nubile age is different from the age of majority. According to article 4, no. 3, of Decree no. 1, of 25 December 1910, which adopted the Act on Marriage as a Civil Contract, the nubile age was set at 18 or 16 years, depending on whether the individual was male

or female. However, Decree-law no. 30.615, of 25 July 1940, following the Concordat between the Holy See and the Portuguese State, of 1940, reduced that age to 16 and 14, respectively.

Article 3 of the Act on Marriage in the Portuguese Colonies, adopted by Decree no. 35.461, of 22 January 1946, set the nubile age at 16 years for men and 14 years for women.

In light of the above mentioned nubile age, questions were raised concerning the interpretation of article 306 and its single §. Some of the doctrine argued that, if the minor had reached the nubile age but not the age mentioned in article 306 (18 or 16 years, depending on whether the individual was male or female, respectively), he/she would, for all purposes, still be considered a minor until he/she reached that age, regardless of whether the marriage was authorised or not, and would therefore remain subject to parental authority or guardianship in relation to his/her person and property. When the minor reached the age of 18 or 16, depending on his/her gender, he/she would become emancipated; however, if the marriage was not authorised, he/she would only administer his/her property after reaching the age of majority (see Guilherme Moreira, Bruschy, Alexandre de Seabra and Dias Ferreira, *apud* Pires de Lima, "Emancipação pelo Casamento. Notas aos Artigos 306º do Código Civil e 51º do Decreto nº 1, de 25 de Dezembro de 1910", in *Revista de Legislação e de Jurisprudência*, no. 2766, of 18/3/1944, pages 371 and 372).

A different opinion was expressed by Pires de Lima (*op. cit.*, pages 372 *et seq.*), for whom minors under the age indicated in article 306, but already of nubile age, would become emancipated through marriage. If, however, the marriage was not authorised, they would not administer their property, and the emancipation would come into effect only with regard to the governing of their persons. Thus, the single § of article 306 would be used to interpret the "*legal effects*" of emancipation, referred to in the mentioned article, restricting them to the administration of property. In truth, the preservation of parental authority regarding the persons of minor children under the age of 18 or 16, depending on gender, but already of nubile age,

who had in the meantime married, would not be compatible with the rights and obligations deriving from their status (see Pires de Lima, *op. cit.*, page 374).

Thus, according to the doctrine presented in the preceding paragraph, if the minor of nubile age, regardless of whether he/she has reached the age of 18 or 16, depending on whether the individual is male or female, is married without the required authorisation, he/she will remain legally incapable of exercising rights with regard to the administration of his/her property, until he/she reaches the age of majority, but will be capable of governing his/her person (since the opposite solution would not be compatible with his/her marital status).

It should be added that, even if the emancipated minor does not administer his/her property, before reaching the age of majority, due to the marriage not having been authorised, he/she will be entitled to receive from the income of that property the maintenance required by his/her status, as determined in article 306, single §.

Aside from the above mentioned cases of emancipation, which may be called voluntary emancipation, we should still take into account the legal emancipation, i.e., the emancipation by act of law of the children of divorced parents, at the age of 18, according to article 60 of the Decree of 3 November 1910, which adopted the Divorce Act, the same applying to the children of annulled marriages, in light of article 32 of the Act on Marriage as a Civil Contract.

It was disputed whether the emancipation at the age of 18 of the children of divorced parents was mandatory or optional, in light of the provisions of article 392 of the Code of Civil Registry of 1932, according to which only the child could request for the emancipation to be added to his/her birth record. For the opinion that the mentioned emancipation would be optional, see the legal opinion in *Revista de Legislação e de Jurisprudência*, year 75, no. 2718, pages 20 *et seq.*, according to which article 60 of the Divorce Act aimed at granting the children of divorced parents a benefit, and for this reason it could not be interpreted as imposing the emancipation upon them. Therefore,

as long as the child of divorced parents under the age of 21, but over the age of 18, did not request the adding of the emancipation to the birth record, he/she would be considered a minor for all legal purposes, article 392 not allowing the officious registration of the emancipation or upon request from any other interested party.

Article 84, no. 1, of the Code of Civil Registry of 1958, which revoked the previous Code of 1932, explicitly determined that the registration of the emancipation of the children of divorced parents could be carried out officiously. Thus, the doctrine according to which this emancipation would be optional ceased to be valid.

In fact, this emancipation derives automatically from the law, not only in the sense that it does not have to be granted by the parents or by the minor's legal representative, but also in the sense that it is mandatory, including for the minor him/herself.

However, so as to come into effect, this emancipation must be added to the minor's birth record, in accordance with the aforesaid article 84 of the Code of Civil Registry of 1958. However, once it has been added thereto, the minor must be considered emancipated, starting from the date of the parents' divorce, not precluding the rights of third parties acquired before the registration of the emancipation, in accordance with the provisions of article 217 of the above mentioned law (see Pereira Coelho, *Apontamentos de Direito da Família*, Secção de Textos – Associação Académica, Coimbra, 1959-60, page 837).

Non-acknowledgeable children of parents who die in insolvency and exposed and abandoned children are also legally emancipated at the age of 18, under the provisions of article 291, applicable to the incestuous children of parents who die in insolvency *ex vi* article 283.

Exceptionally, the law allows for the emancipation of exposed or abandoned children at 15 years of age, in accordance with article 289.

Finally, under article 310, emancipation may not be revoked.

The other means of terminating the general incapacity to exercise rights that comes with being a minor is, naturally, reaching the age

of majority. This is reached, regardless of gender, at the age of 21, in accordance with articles 97 and 311.

As was explained before, in the commentary to Chapter I of Title IX (articles 97-100), current Portuguese law has two main differences in relation to the Civil Code of 1867 in this respect.

Firstly, the age of majority is now set at 18 years, regardless of gender, by articles 122 and 130 of the Civil Code of 1966. It should also be mentioned that this change was introduced by the Reform of the Civil Code, carried out by Decree-Law no. 496/77, of 25 November, whose preamble notes that: "*This option is based on the recognition that young people today are subject to a faster process of intellectual and cultural development. They have demanded – and in some sectors already obtained – an autonomy which should be accompanied by the underlying responsibility*".

Secondly, regarding emancipation, the change of the age of majority has led to the elimination of both voluntary emancipation (foreseen in article 304, no. 2) and the legal emancipation of children of marriages dissolved by divorce or annulled (articles 60 of the Divorce Act and 32 of the Act on Marriage as a Civil Contract), as well as of non-acknowledgeable children of parents who die in insolvency and of exposed and abandoned children (referred to in articles 283 and 291). Marriage thus became the only way one could become emancipated, according to article 132 (of the Civil Code of 1966).

It should also be mentioned that, in current Portuguese law, the nubile age is set at 16 years of age, regardless of gender, in accordance with article 1601, clause (a). For a minor of nubile age to get married, it is still necessary for that marriage to be authorised by his/her parents or by the guardian, or for the lack of authorisation to be duly overcome. The violation of this legal requirement is an *impediens impedimentum* to the marriage, that is to say, it does not affect the validity of the act, but leads to the application of patrimonial penalties (see articles 1604, clause (a), and 1612).

Therefore, in accordance with article 1649 of the Civil Code of 1966, if the marriage of a minor of nubile age was not authorised,

and if this authorisation was not overcome by the civil registry's officer, the minor may not administer the property he/she brings to the couple or gratuitously acquires subsequently, before reaching the age of majority; however, he/she is entitled to receive from the income of that property the maintenance required by his status, which reflects the same option as that taken in article 306, single §, of the Civil Code of 1867.

2. Casamento

Marriage

2.1. Código Civil de 1867: Artigos 1056º - 1239º

Civil Code of 1867: Articles 1056-1239

CAPÍTULO I
CASAMENTO

SECÇÃO I
REGRAS GERAIS

Artigo 1056º

O casamento é um contrato perpétuo feito entre duas pessoas de sexo diferente, com o fim de constituírem legitimamente a família.

(Substituído e revogado pelos artigos 1º e 2º do Decreto nº 1, de 25 de Dezembro de 1910, diploma que , no artigo 72.º, procedeu à revogação expressa dos artigos 1056.º a 1074.º, 1083.º a 1095.º, 1184.º a 1188.º e 1192.º do Código Civil de 1867)

Artigo 1º do Decreto n.º 1, de 25/12/1910

O casamento é um contrato celebrado entre duas pessoas de sexo diferente, com o fim de constituírem legitimamente a família.

Artigo 2º do Decreto n.º 1, de 25/12/1910

Este contrato é puramente civil e presume-se perpétuo, sem prejuízo da sua dissolução por divórcio, nos termos do Decreto com força de lei de 3 de Novembro de 1910.

Artigo 1057º

Os católicos celebrarão os casamentos pela forma estabelecida na igreja católica. Os que não professarem a religião católica celebrarão o casamento perante o oficial do registo civil, com as condições, e pela forma estabelecida na lei civil.

CHAPTER I
MARRIAGE

SECTION I
GENERAL PROVISIONS

Article 1056

A marriage is a perpetual contract made between two persons of different sex, with the aim of legitimately constituting a family.

(Replaced and revoked by articles 1 and 2 of Decree no. 1 of 25 December 1910, which explicitly revoked, in article 72, articles 1056 to 1074, 1083 to 1095, 1184 to 1188 and 1192 of the Civil Code of 1867)

Article 1 of Decree no. 1, of 25/12/1910

A marriage is a contract solemnised between two persons of different sex, with the aim of legitimately constituting a family.

Article 2 of Decree no. 1, of 25/12/1910

This is a purely civil contract and it is presumed to be perpetual, not precluding its dissolution by divorce, in accordance with the Decree of 3 November 1910.

Article 1057

Catholics shall be married in the form determined by the Catholic Church. Those who are not of the Catholic religion shall be married before the official of the civil registry, with the conditions and in the form foreseen in the civil legislation.

Artigo 1057º

O casamento será celebrado perante o oficial do registo civil, com as condições e pela forma estabelecida na lei civil.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16 de Dezembro de 1930; o Decreto n.º 19943, de 25 de Junho de 1931, que tornou extensivo às colónias o Decreto n.º 19126, dispôs no seu artigo 5.º que o presente artigo se aplica às colónias onde existir a obrigatoriedade do registo civil*)

Article 1057

A marriage shall be carried out before the official of the civil registry, with the conditions and in the form foreseen in the civil legislation.

(*New drafting in accordance with Decree no. 19.126, of 16 December 1930; Decree no. 19.943, of 25 June 1931, which extended the scope of Decree no. 19.126 to the colonies, indicated in article 5 that the present article is applicable to the colonies wherein civil registry is mandatory*)

COMMENTARY TO ARTICLES 1056 TO 1057

Marriage is regulated in Chapter I of Title II, included under "*Specific rules on contracts*", which leads us to conclude that marriage is just one more specific type of contract, in parallel with others, such as the memorandum of company association (article 1240), the domestic services contract (article 1370) or the loan contract (article 1506).

Article 1056 defines the concept of marriage, envisaged as "*the most serious of the institutions of private law of all peoples*", according to Cunha Gonçalves (see his manual, *Direitos da família e direitos das sucessões*, Ática, 1955, page 18). Initially, marriage was conceived of with three conditions: a) that this contract is perpetual in nature (it should be noted that doctrine does not fully agree on the contractual nature of marriage – for more on this issue, see Antunes Varela and Pires de Lima, *Noções Fundamentais de Direito Civil, lições ao 1.º ano jurídico de 1944--45*, page 33 *et seq.*); b) that it is solemnised between two persons of different sex; and c) that its objective is to constitute a family. With the Act on Marriage as a Civil Contract, the element of perpetuity tends to be excluded, since the Decree of 3 November 1910 allowed the dissolution of civil marriages through divorce. However, the presumption of perpetuity continued to exist in principle, since divorce was recognised as an exception and took into account circumstances following the solemnisation of the marriage. The Divorce Act and its respective commentary, contained in this book, may be consulted for further developments.

With the publication of the Code of 1867, two types of marriage were allowed: civil marriage for non-Catholics and Catholic marriage for the members of this religion. The Concordat signed between the Holy See and the Portuguese Government on 7 May 1940, adopted by Law no. 1984, of 30 May, ratified by the Confirmation Letter of 10 July 1940 and regulated by Decree no. 30.615, of 25 July 1940, introduced optional civil marriage for Catholics. In other words,

Catholic fiancés could opt between the civil form and the religious form of marriage, but in either case it was still mandatory for the civil registry clerk to intervene with regard to impediments and publicising of the registry. The legislator thus attempted to avoid the possible inconveniences of a dualist system, by keeping a single legal regime for impediments: the one laid down in civil law.

Article XXII of the 1940 Concordat between the Holy See and the Portuguese Government therefore states: "*The Portuguese State grants civil effects to marriages carried out in accordance with Canon Law, as long as the marriage act is transcribed in the competent civil registry*". This was confirmed by article 2 of Decree no. 30.615, of 25 July 1940: "A marriage carried out in accordance with Canon Law shall have all the civil effects if the respective act is transcribed in the civil registry. § 1) Its effects start from the date of the solemnisation of the marriage, if it is transcribed in the following seven days. If it is not, its effects start from the date of the transcription. § 2) The marriage may still be transcribed even after the death of one or of both spouses" (our underlining).

The provisions of the Decree of 16 December 1880 are particularly relevant for the understanding of the legal rules in force in Goa, more specifically regarding marriage. Article 1 of this Decree preserves "*the gentile Hindu special and private usages and customs of Goa, as revised and codified in the following provisions, with no distinction between Old and New Conquests*". And, according to article 2 of the same Decree, "*a marriage contracted between gentile Hindus in accordance with their religious rite produces all the civil effects which the laws of the kingdom ascribe to a Catholic or civil marriage*". Article 30 of this Decree further allows for the regime set out in the Civil Code to be opted for.

Código Civil de 1867

SECÇÃO II
DISPOSIÇÕES COMUNS A AMBAS AS ESPÉCIES DE CASAMENTO

Artigo 1058º

É proibido o casamento:

1º) *Aos menores de vinte e um anos, e aos maiores inibidos de reger suas pessoas e bens, enquanto não obtiverem o consentimento de seus pais ou daqueles que os representam, nos termos do artigo 1061º;*

2º) *Ao tutor, e aos seus descendentes, com a pessoa tutelada, enquanto não finda a tutela, e as contas desta não estão aprovadas, excepto se o pai ou a mãe falecidos o tiverem permitido em seu testamento, ou em outro escrito autêntico;*

3º) *Ao cônjuge adúltero com o seu cúmplice condenado como tal;*

4º) *Ao cônjuge condenado como autor, ou como cúmplice do crime de homicídio, ou de tentativa de homicídio contra o seu consorte, com a pessoa que, como autor ou como cúmplice, haja perpetrado aquele crime, ou concorrido com ele;*

5º) *Aos que tiverem o impedimento da ordem, ou se acharem ligados por voto solene reconhecido pela lei.*

(Substituído e revogado pelo artigo 4º do Decreto nº 1, de 25 de Dezembro de 1910, a seguir reproduzido)

Artigo 4º do Decreto n.º 1, de 25/12/1910

Não podem contrair casamento:

1º) Os parentes por consanguinidade ou afinidade na linha recta, ainda que o casamento causa da afinidade tenha sido dissolvido;

2º) Os irmãos germanos, consanguíneos e uterinos, legítimos ou ilegítimos;

Civil Code of 1867

SECTION II
PROVISIONS COMMON TO BOTH TYPES OF MARRIAGE

Article 1058

The following shall not be married:

1) Minors under the age of twenty one, and majors inhibited from governing their person and property, while they do not obtain the consent of their parents or their representatives, in accordance with article 1061;

2) The guardian, and his descendants, with the ward, before the end of the guardianship and the approval of the respective accounts, except if the deceased father or mother have allowed it in their will or in any other authentic document;

3) The adulterous spouse with his/her accomplice, convicted as such;

4) The spouse convicted as author or accomplice of the crime of murder or attempted murder against his/her consort, with the person who, as an author or accomplice, committed or contributed to that crime;

5) Those with the impediment of a religious order, or bound by a legally recognised solemn vow.

(Replaced and revoked by article 4 of Decree no.1 of 25 December 1910)

Article 4 of Decree no. 1, of 25/12/1910

The following shall not be married:

1) Relatives by blood or marriage in lineal descent, even if the marriage which caused the affinity has been dissolved;

2) Full blood siblings, consanguine and uterine siblings, be they legitimate or illegitimate;

3º) Os menores de dezoito anos, sendo do sexo masculino, e de dezasseis, sendo do feminino;

4º) Os interditos por demência, verificada por sentença passada em julgado, ou notória, e bem assim os divorciados por motivo de doença contagiosa reconhecida como incurável, ou de doença incurável, que importe aberração sexual;

5º) O cônjuge condenado como autor ou como cúmplice do crime de homicídio, ou de tentativa de homicídio contra o seu consorte, com qualquer dos condenados como autores ou cúmplices do mesmo crime;

6º) Os ligados por outro casamento ainda não dissolvido.

Artigo 5º do Decreto n.º 1, de 25/12/1910

Ao maior de dezoito anos, sendo do sexo masculino, e de dezasseis, sendo do feminino, mas menor de vinte e um, não emancipado, é igualmente proibido o casamento, enquanto não obtiver o consentimento de seus pais ou daqueles que o representam, ou o suprimento desse consentimento em forma legal.

Artigo 5.º do Decreto n.º 1, de 25/12/1910

Têm capacidade para contrair casamento os indivíduos de mais de dezasseis anos, sendo do sexo masculino, e de catorze, sendo do sexo feminino, mas os menores de vinte e um anos não emancipados só poderão contrair casamento depois de obterem o consentimento dos seus pais ou daqueles que os representam, ou o suprimento desse consentimento, nos termos do artigo 293.º do Código do Registo Civil.

(*Nova redacção conferida pelo Decreto n.º 30.165, de 25 de Julho de 1940*).

3) Those under the age of eighteen, being male, and under the age of sixteen, being female;

4) Those interdicted due to insanity, if it has been confirmed by a judgment in a condition of *res judicata* or is clear, as well as those divorced due to a contagious disease known to be incurable, or due to an incurable disease implying a sexual aberration.

5) The spouse convicted as the author or accomplice of the crime of murder or attempted murder against his/her consort, with any of the persons convicted as authors or accomplices in the same crime;

6) Those bound by another marriage that has not yet been dissolved.

Article 5 of Decree no. 1, of 25/12/1910

Non-emancipated persons over the age of eighteen, being male, and over the age of sixteen, being female, but under the age of twenty one, are also forbidden from marrying, as long as the consent of their parents or of their representatives is not obtained, or as long as this consent is not overcome in accordance with the law.

Article 5 of Decree no. 1, of 25/12/1910

Male individuals over the age of sixteen and female individuals over the age of fourteen are legally capable of marrying, but non-emancipated individuals under the age of twenty one may only be married after obtaining the consent of the parents or of those representing them, or after this consent has been overcome, in accordance with article 293 of the Code of Civil Registry.

(*As revised by Decree no. 30.165, of 25 July 1940*)

Artigo 7º do Decreto n.º 1, de 25/12/1910

Aos maiores sob tutela, não compreendidos no nº 4 do artigo 4º, bem como aos maiores sob curadoria, é proibido o casamento enquanto não obtiverem o consentimento daqueles que os representam ou o suprimento desse consentimento em forma legal.

Artigo 8º do Decreto n.º 1, de 25/12/1910

Também é proibido contrair casamento aos parentes em terceiro grau na linha colateral, salvo se obtiverem dispensa, que só poderá ser concedida pelo Governo ocorrendo motivos ponderosos;

Artigo 9º do Decreto n.º 1, de 25/12/1910

O tutor ou o curador e seus descendentes, ascendentes, irmãos, cunhados ou sobrinhos, não poderão casar com a pessoa tutelada ou curatelada, enquanto não tiver passado um ano completo sobre a cessação da tutela ou curadoria, e não estiverem aprovadas as respectivas contas.

Artigo 10º do Decreto n.º 1, de 25/12/1910

Qualquer dos ex-cônjuges não poderá contrair novo casamento enquanto não decorrerem sobre a dissolução do seu casamento anterior por divórcio, ou por morte, os prazos marcados no artigo 55º do Decreto com força de lei de 3 de Novembro de 1910.

Article 7 of Decree no. 1, of 25/12/1910

Majors subject to guardianship, not included in no. 4 of article 4, as well as majors subject to curatorship, are forbidden from marrying as long as the consent of their representatives is not obtained, or as long as this consent is not overcome in accordance with the law.

Article 8 of Decree no. 1, of 25/12/1910

Marriage is also forbidden for relatives in the third degree of collateral descent, unless they are permitted to do so, such permission only being given by the Government in light of serious reasons.

Article 9 of Decree no. 1, of 25/12/1910

The guardian or curator and his/her descendants, ascendants, siblings, brothers/sisters-in-law or nephews/nieces may not marry the person under guardianship or curatorship before one full year has elapsed since the end of the guardianship or curatorship and before the respective accounts have been approved.

Article 10 of Decree no. 1, of 25/12/1910

Neither of the former spouses may contract a new marriage before the deadlines foreseen in article 55 of the Decree of 3 November 1910 have elapsed since the dissolution, by divorce or by death, of their previous marriage.

Artigo 1059º

A infracção das disposições contidas no artigo precedente, nenhum outro efeito produz senão sujeitar os infractores às penas abaixo declaradas.

Artigo 1060º

O menor não emancipado, ou o maior debaixo de tutela, casando sem licença de seus pais, ou daqueles que os representam, incorre nas penas seguintes:

1º) O menor não emancipado não pode pedir a entrega da administração dos seus bens, sem que chegue à maioridade, ficando-lhe só o direito de pedir os alimentos necessários, até onde chegarem os rendimentos desses bens.

2º) Os maiores debaixo de tutela só podem haver a administração dos seus bens, cessando a causa da interdição, observando-se, quanto ao mais, o que fica disposto em relação aos menores.

3º) Os casamentos contraídos por menores não emancipados, ou por maiores sob tutela, sem o necessário consentimento, consideram-se sempre como contratados com separação de bens.

(Substituído e revogado pelos Artigos 5º, 7º, 13º, 14º, 15º e 51º a 53º do Decreto nº 1, de 25 de Dezembro de 1910)

Artigo 13º do Decreto n.º 1, de 25/12/1910

O casamento celebrado contra o disposto nos Artigoºs 5º a 7º é anulável.

Artigo 14º do Decreto n.º 1, de 25/12/1910

A anulação do casamento, nos termos dos Artigos 5º e 13º, só poderá ser pedida pelo próprio cônjuge menor até seis meses depois de atingir a maioridade legal, ou por aqueles cujo consentimento é necessário à celebração do acto, e a ele não assistiram, até seis meses depois dessa celebração.

Article 1059

The infringement of the provisions of the previous article produces no effect other than subjecting its offenders to the penalties indicated below.

Article 1060

A non-emancipated minor, or a major subject to guardianship, who marries without the permission of his/her parents or of their representatives, is subject to the following penalties:

1) The non-emancipated minor may not request the surrendering of the administration of his/her property, before reaching the age of majority, having only the right to request the necessary maintenance, limited by the income of that property.

2) Majors subject to guardianship may only take up the administration of their property if the cause of the interdiction ceases, with the provisions relating to minors applying regarding the rest.

3) Marriages of non-emancipated minors or of majors subject to guardianship, without the due consent, are always considered as having been contracted under the regime of separate property.

(Replaced and revoked by articles 5, 7, 13, 14, 15 and 51 to 53 of Decree no. 1, of 25/12/1910)

Article 13 of Decree no. 1, of 25/12/1910

A marriage solemnised against the provisions of articles 5 to 7 is voidable.

Article 14 of Decree no. 1, of 25/12/1910

The annulment of the marriage, in accordance with articles 5 and 13, may only be requested by the minor spouse him/herself, up to six months after having reached the age of majority, or by those whose consent of the marriage is required and who did not attend it, up to six months after the marriage.

§ 1º) Se o facto do casamento tiver sido ocultado, este prazo contar-se-á desde o dia em que dele souberem as pessoas cujo consentimento é necessário;

§ 2º) Se porém, o menor atingir a maioridade legal antes da anulação do casamento por sentença passada em julgado, e ratificar este, a sua ratificação retrotrairá os seus efeitos à data do mesmo casamento.

§ 1) If the marriage was kept a secret, this deadline shall start from the day the persons whose consent is required become aware of the marriage;

§ 2) If, however, the minor reaches the age of majority before the marriage is annulled by a judgment in a condition of *res judicata*, and he/she ratifies the marriage, this ratification shall produce its effects retroactively to the date of the marriage.

Artigo 15º do Decreto n.º 1, de 25/12/1910

A anulação do casamento, nos termos do artigo 7º e 13º só pode ser promovida pelo próprio incapaz quando se tornar capaz, ou pelos seus representantes legais, nos seis meses seguintes ao casamento.

§ único) Se porém, o incapaz se tornar capaz na constância do matrimónio, e o ratificar antes do mesmo ter sido anulado, a sua ratificação retrotrairá os seus efeitos à data do mesmo matrimónio.

Article 15 of Decree no. 1, of 25/12/1910

The annulment of the marriage, in accordance with articles 7 and 13 may only be requested by the incapable person, the incapacity having ceased, or by his/her legal representatives, within the six months following the marriage.

Single §) If, however, the incapable person ceases to be so in the constancy of the marriage and ratifies it before it has been annulled, this ratification shall produce its effects retroactively to the date of the marriage.

Artigo 51º do Decreto n.º 1, de 25/12/1910

O maior de dezoito anos, sendo do sexo masculino, e de dezasseis sendo do feminino, mas menor de vinte e um, não emancipado, que casar com infracção do disposto nos Artigos 5º e 6º do presente decreto com força de lei, não poderá pedir a entrega da administração dos seus bens sem que chegue à maioridade, ficando-lhe só o direito de pedir os alimentos necessários, até onde chegarem os rendimentos desses.

Article 51 of Decree no. 1, of 25/12/1910

A person over the age of eighteen, being male, and over the age of sixteen, being female, but under the age of twenty one, non-emancipated, who is married in infringement of the provisions of articles 5 and 6 of this decree may not request the surrendering of the administration of his/her property before reaching the age of majority, having only the right to request the necessary maintenance, limited by the income of that property.

Artigo 52º do Decreto n.º 1, de 25/12/1910

Os maiores sob tutela ou curadoria, que casarem com infracção do disposto no Artigo 7º, só poderão haver a administração dos seus bens cessando a causa da interdição, observando-se, quanto ao mais, o que no artigo antecedente fica disposto em relação aos menores.

Article 52 of Decree no. 1, of 25/12/1910

Majors subject to guardianship who are married in infringement of the provisions of article 7 may only take up the administration of their property if the cause of the incapacity ceases, with the provisions of the previous article relating to minors being applicable regarding the rest.

Artigo 53º do Decreto n.º 1, de 25/12/1910

Os casamentos celebrados com infracção do disposto nos Artigos 5º e 7º do presente decreto com força de lei consideram-se sempre como contraídos com separação de bens.

Article 53 of Decree no. 1, of 25/12/1910

Marriages in infringement of the provisions of articles 5 and 7 of the present decree are always considered as having been contracted under the regime of separate property.

Artigo 1061º

Havendo dissentimento entre os pais sobre a concessão da licença para o casamento, prevalecerá a opinião do pai. Se existir só um deles, ou se o outro se achar legalmente impedido, bastará o consentimento do que sobreviver, ou não estiver impedido, excepto se, sobrevivendo a mãe, esta passar a segundas núpcias, e não for confirmada na administração dos bens do filho; porque em tal caso esta faculdade pertencerá ao conselho de família.

§ 1º) Se, na falta ou impedimento dos pais, o avô exercer a tutela, a este pertencerá a concessão ou a denegação da licença.

§ 2º) Na falta ou impedimento dos pais e dos avós, pertencerá esta faculdade ao conselho de família.

(Substituído e revogado pelo Artigo 6º do Decreto nº 1, de 25 de Dezembro de 1910)

Article 1061

In case of dissent between the parents on whether to permit the marriage, the opinion of the father shall prevail. If there is only one parent, or if the other one is under legal impediment, the consent of the surviving or of the one who is not under impediment shall suffice, except if the mother, being the surviving parent, remarries and is not confirmed in the administration of the child's property; because in this case this power shall belong to the family council.

§ 1) If, in the absence or impediment of the parents, the grandfather exercises the guardianship, he will be entitled to grant or refuse the permission.

§ 2) In the absence or impediment of the parents and grandparents, this power shall belong to the family council.

(Replaced and revoked by article 6 of Decree no. 1, of 25/12/1910)

Artigo 6º do Decreto n.º 1, de 25/12/1910

Havendo dissentimento entre os pais sobre a concessão da licença para o

Article 6 of Decree no. 1, of 25/12/1910

In case of dissent between the parents on whether to permit the marriage, the

casamento, resolverá o juiz, depois de ouvir os dois cônjuges, na presença de dois homens bons, analogamente ao disposto nos Artigos 37° e 38° do decreto de 3 de Novembro de 1910.

§ 1°) Se existir um só dos pais, ou se o outro se achar legalmente impedido, bastará o consentimento do que sobreviver ou não estiver impedido.

§ 2°) No caso de ausência prolongada de um dos cônjuges, poderá o juiz, a requerimento do outro e exercendo o seu prudente arbítrio, suprir o consentimento do ausente.

§ 3°) Se, na falta ou impedimento dos pais, o avô exercer a tutela, a este pertencerá a concessão ou a denegação da licença.

§ 4°) Na falta ou impedimento dos pais e dos avós, pertencerá esta faculdade ao conselho de família.

§ 5°) Da concessão ou denegação de licença em nenhum caso há recurso.

judge shall decide, after listening to both spouses, in the presence of two good men, in analogy with the provisions of articles 37 and 38 of the Decree of 3rd November 1910.

§ 1) If there is only one parent, or if the other is under legal impediment, the consent of the surviving or of the one who is not under impediment shall suffice.

§ 2) In case of prolonged absence of one of the spouses, the judge may, at the request of the other spouse, and in accordance with his prudent discretion, overcome the consent of the absentee spouse.

§ 3) If, in the absence or impediment of the parents, the grandfather exercises the guardianship, he will be entitled to grant or to refuse the permission.

§ 4) In the absence or impediment of the parents and grandparents, this power shall belong to the family council.

§ 5) The granting or refusal of the permission is never subject to appeal.

Artigo 1062°

Da concessão ou denegação de licença, em nenhum caso há recurso.

(Substituído e revogado pelo § 5° do Artigo 6° do Decreto n° 1, de 25 de Dezembro de 1910)

Article 1062

The granting or refusal of the permission is never subject to appeal.

(Replaced and revoked by § 5 of Article 6 of Decree no. 1, of 25/12/1910)

Artigo 1063°

O tutor, ou o seu descendente, que casar com a pessoa tutelada contra o disposto no artigo 1058° n° 2, ficará inibido de receber dela coisa alguma por doação ou por testamento, e o casamento será considerado como contraído com separação de bens.

§ único) O tutor será, alem disso, privado da administração dos bens, durante a menoridade da pessoa tutelada.

Article 1063

The guardian, or his descendant, who marries the ward in infringement of article 1058, no. 2, shall be prohibited from receiving anything from such person by donation or by will, and the marriage shall be considered as contracted under the regime of separate property.

Single §) The guardian shall, aside from this, be deprived of the administration of the property, while the ward is still a minor.

(Substituído e revogado pelos Artigos 17º e 55º do Decreto nº 1, de 25 de Dezembro de 1910)

Artigo 17º do Decreto n.º 1, de 25/12/1910

O casamento celebrado contra o disposto nos Artigos 7º a 10º não é anulável, mas sujeita os infractores às sanções especiais prescritas no capítulo VII do presente decreto com força de lei e às que lhe couberem pela legislação penal em vigor.

Artigo 55º do Decreto n.º 1, de 25/12/1910

O tutor ou o curador e seu descendente, ascendente, irmão, cunhado ou sobrinho, que casar com a pessoa tutelada ou curatelada, contra o disposto no Artigo 9º do presente decreto com força de lei, ficará inibido de receber do seu cônjuge coisa alguma por doação ou por testamento, e o casamento será considerado como contraído com separação de bens.

§ único) O tutor ou curador será, além disso, privado da administração dos bens durante a menoridade da pessoa tutelada ou curatelada e o infractor marido incorrerá na multa a que se refere o Artigo 54º e seu § único.

(Replaced and revoked by articles 17 and 55 of Decree no. 1, of 25/12/1910)

Article 17 of Decree no. 1, of 25/12/1910

A marriage solemnised in infringement of articles 7 to 10 is not voidable, but it subjects the offenders to the special sanctions foreseen in chapter VII of the present decree and to those resulting from the criminal legislation in force.

Article 55 of Decree no. 1, of 25/12/1910

The guardian or curator, his/her descendant, ascendant, sibling, brother/sister-in-law or nephew/niece, who marries the person subject to guardianship or curatorship, in infringement of article 9 of the present decree, shall be prohibited from receiving anything from his/her spouse by donation or by will, and the marriage shall be considered as having been contracted under the regime of separate property.

Single §) The guardian or curator shall, aside from this, be deprived of the administration of the property, while the person subject to guardianship or curatorship is still a minor and the offending husband shall pay the fine foreseen in article 54 and its single §.

Artigo 1064º

O que fica disposto no artigo precedente é aplicável a todas as pessoas mencionadas no artigo 1058º nºs 3º e 4º, que contraírem casamento contra o que determina o mesmo artigo.

(Substituído e revogado pelo artigo 11º do Decreto nº 1, de 25 de Dezembro de 1910)

Article 1064

The provisions of the preceding article are applicable to all the persons mentioned in article 1058, no.s 3 and 4, who contract marriage in infringement of that article.

(Replaced and revoked by article 11 of Decree no. 1, of 25/12/1910)

Artigo 11º do Decreto n.º 1, de 25/12/1910

O casamento celebrado contra o disposto em qualquer dos números do Artigo 4º é, em relação aos contraentes, nulo de pleno direito e como se nunca tivesse existido.

Article 11 of Decree no. 1, of 25/12/1910

A marriage solemnised in infringement of any of the numbers of article 4 is, in relation to the contracting parties, null and void, as though it never existed.

Artigo 1065º

O casamento contraído em pais estrangeiro, entre portugueses, não produz efeitos civis neste reino, não sendo contraído em conformidade da lei portuguesa; salvo o que se acha estabelecido na segunda parte do artigo 24º quanto à forma externa do contrato.

(Substituído e revogado pelos artigos 58º a 61º do Decreto nº 1, de 25/12/1910)

Article 1065

A marriage in a foreign country, between Portuguese persons, does not produce civil effects in this kingdom, not being contracted in accordance with the Portuguese law; except for what is foreseen in the second part of article 24 regarding the external formalities of the contract.

(Replaced and revoked by articles 58 to 61 of Decree no. 1, of 25/12/1910)

Artigo 58º do Decreto n.º 1, de 25/12/1910

O casamento dos portugueses no estrangeiro será regulado pelas disposições seguintes:

§ 1º) Se só um dos contraentes for português, o casamento poderá ser feito pela forma usada no país onde for celebrado.

§ 2º) Se ambos os contraentes forem portugueses, poderão casar, pela forma da lei nacional, perante o agente diplomático ou consular de Portugal, ou pela forma que legalmente for exigida no país onde for celebrado, se não contrariar os princípios do direito público português.

Article 58 of Decree no. 1, of 25/12/1910

A marriage of Portuguese persons abroad shall be governed by the following provisions:

§ 1) If only one of the contracting parties is Portuguese, the marriage may be carried out with the usual formalities of the country where it takes place;

§ 2) If both contracting parties are Portuguese, they may marry, with the formalities of the national legislation, before the Portuguese diplomatic or consular agent, or with the formalities legally required in the country where the marriage takes place, if they do not infringe the principles of Portuguese public law.

Artigo 59º do Decreto n.º 1, de 25/12/1910

Os casamentos celebrados no estrangeiro perante autoridades portuguesas estão sujeitos às formalidades e impedi-

Article 59 of Decree no. 1, of 25/12/1910

Marriages solemnised abroad before Portuguese authorities are subject to the formalities and impediments foreseen

mentos previstos neste decreto com força de lei e no do registo civil, e para isso, o agente diplomático ou consular devolverá o conhecimento dos impedimentos, que porventura surjam perante ele, ao oficial do registo civil da naturalidade do nubente, não podendo efectuar-se o casamento enquanto estes impedimentos não estiverem solvidos.

in this decree and in that of the civil registry, and, for that purpose, the diplomatic or consular agent shall inform the official of the civil registry of the fiancé's place of birth of any impediments brought to his/her attention, the marriage not being carried out before these impediments are removed.

Artigo 60º do Decreto n.º 1, de 25/12/1910

Os casamentos referidos no artigo anterior devem ser registados em Portugal, à vista dos documentos exigidos por este decreto com força de lei e pelo do registo civil, dentro de três meses depois de celebrados ou dentro de trinta dias contados do regresso de ambos ou, pelo menos, de um dos cônjuges ao país.

Article 60 of Decree no. 1, of 25/12/1910

The marriages referred to in the preceding article must be registered in Portugal, in light of the documents required by this decree and by that of the civil registry, up to three months after they were solemnised, or up to thirty days after the return to the country of both or of at least one of the spouses.

Artigo 61º do Decreto n.º 1, de 25/12/1910

Os casamentos contraídos em país estrangeiro poderão provar-se por qualquer dos meios legais admitidos no mesmo país, salvo o caso do § 2º do Artigo 58º, no qual a prova deverá ser feita nos termos dos Artigos 59º e 60º.

Article 61 of Decree no. 1, of 25/12/1910

Marriages contracted in a foreign country may be proven through any of the means legally admissible in that country, except for the case of § 2 of article 58, in which the proof must comply with the provisions of articles 59 and 60.

Artigo 1066º

O casamento contraído em país estrangeiro, entre português e estrangeira, ou entre estrangeiro e portuguesa, produz efeitos civis neste reino, verificando-se, relativamente ao cônjuge português, as condições requeridas pela lei portuguesa.

Article 1066

A marriage contracted in a foreign country between a Portuguese man and foreign woman, or between a foreign man and a Portuguese woman, produces civil effects in this kingdom, the conditions required by Portuguese law being met regarding the Portuguese spouse.

Artigo 1067º

O consentimento dos contraentes, para o casamento, só pode prestar-se irrevogavelmente no próprio acto de celebração dele. São, portanto, nulos os contratos, em que as partes se obrigam para o futuro, debaixo do título de esponsais, desposórios ou qualquer outro, a contrair casamento quer haja, quer não, estipulação de cláusulas penais.

§ único) A disposição deste artigo não obsta, contudo, a que a pessoa que, sob promessa de casamento, recebeu nesse intuito quaisquer donativos ou autorizou alguma despesa, seja obrigada à restituição daqueles, ou à indemnização desta, se lhe for exigida.

(Substituído e revogado pelo Artigo 24º do Decreto nº 1, de 25/12/1910, que reproduz o presente Artigo 1067º e o seu § único)

Artigo 1068º

O consentimento para o casamento pode ser dado por procurador, contando que a procuração seja especial, e contenha expressa designação da pessoa, com quem o casamento há de ser contraído.

(Substituído e revogado pelo Artigo 25º do Decreto nº 1, de 25/12/1910)

Artigo 25º do Decreto n.º 1, de 25/12/1910

O consentimento para o casamento pode ser prestado por intermédio de procurador, contanto que a procuração seja especial e contenha expressa designação da pessoa com quem o casamento há-de ser contraído.

Article 1067

The consent to the marriage of the contracting parties may only be given irrevocably in the act in which it is solemnised. Contracts through which the parties take on a future obligation to be married, under the title of betrothal, affiance or any other, regardless of the foreseeing of penal clauses, are therefore null and void.

Single §) However, the provisions of this article do not preclude a person who, under the promise of marriage, received for that purpose any gift or authorised any expense, from being obliged to return such gifts or to pay compensation for such expense, if this is requested.

(Replaced and revoked by Article 24 of Decree no. 1, of 25/12/1910, which reproduces the present Article 1067 and its single §)

Article 1068

The consent to the marriage may be given through a proxy, as long as the power of attorney is given specially for this purpose and explicitly indicates the person with whom the marriage shall be contracted.

(Replaced and revoked by Article 25 of Decree no. 1, of 25/12/1910)

Article 25 of Decree no. 1 of 25/12/1910

The consent to be married may be given through a proxy, as long as the power of attorney is given specially for this purpose and explicitly indicates the person with whom the marriage shall be contracted.

COMMENTARY TO ARTICLES 1058 TO 1068

The legislator contemplated in articles 1058 to 1064 of the Civil Code the impediments to contracting a marriage. It should be recalled that these impediments are applicable both to civil and to Catholic marriages.

There are different categories for the several types of marital impediment. If absolute impediments, also called extinctive impediments, are infringed, the marriage is null and void. Relative impediments are divided into impeditive and provisional. A marriage carried out in infringement of an impeditive impediment is null and void, but this may be validated. As for provisional impediments, they do not render the marriage null and void.

On page 24 of his manual (*Direitos da família e direitos das sucessões*), Cunha Gonçalves analyses the controversy surrounding these categories, noting that "*according to some authors, extinctive impediments are divided into absolute and relative, the first being those that absolutely prevent or may prevent the marriage, the infringement of which renders them definitively null and void; the latter are those which may prevent the marriage, but the infringement of which implies merely a nullity which may be validated; and impeditive would be those which are impediments to the marriage, but do render it null and void if they are infringed*".

If the marriage is absolutely null and void, any interested person may, at any time, apply for the judicial declaration of the nullity, in accordance with article 11 of the Act on Marriage as a Civil Contract. In the case of relative nullity, the annulment proceedings may be instituted by certain persons indicated in article 13 *et seq*. of the same Act.

The impediments deemed to be extinctive are the following: close relation, infringement of the nubile age, insanity and certain diseases, spousal homicide and an earlier marriage. The impeditive impediments foreseen in Civil Law are: interdiction based on deaf-muteness or prodigality, and Canon Law added other impediments

such as difference of faith, belonging to sacred orders or being a member of the cloth, kidnapping and adultery, public honesty, spiritual relation, adoption, simple vow of chastity and apostasy. As an example of a provisional impediment, we would mention the exercise of guardianship and the intermarital period.

Let us look at the main features of the most important types of impediments mentioned above.

Regarding blood relatives, article 4 of the Act on Marriage as a Civil Contract states that lineal relatives and full blood, consanguine and uterine siblings, be they legitimate or illegitimate, may not be married. For civil marriage, affinity is merely an extinctive impediment for lineal descent. The impediment remains even after the dissolution of the marriage. For Catholic marriage, affinity in collateral descent constitutes an excusable impediment up to the second degree. Pires de Lima and Antunes Varela, in their above quoted lessons (page 71), justify this impediment stating that "*science currently considers it proven that marriages between such close relatives either generates actual atrophy and illness in resulting offspring, or at the very least develops already existing ones. Additionally, the admissibility of such marriages would offend our moral sensitivity, in the framework of our conceptions and customs*".

Concerning nubile age, in accordance with article 5 of Decree no. 30.615, being under the age of 16 in the case of men, and 14 in the case of women, constitutes an extinctive impediment. This means that minors between the ages of 16 and 21, if they are male, or between 14 and 21, if they are female, may only contract marriages if authorised to do so by their respective parents. Article 1061 and article 6 of the Act on Marriage as a Civil Contract impose the hierarchy of principles to be observed regarding the power to authorise the marriage. The provisions of article 293 of the Code of Civil Registry of 1932 are also relevant. Subsequently, articles 165 to 169 of the Code of Civil Registry of 1958 regulated this issue.

The lack of consent of the parents, guardian or judge is an impeditive impediment in terms of the Civil Law. In this regard, the Code of Canon Law of 1917 does not consider being a minor to be

an impediment. However, considering the provisions of article 174 of the Code of Civil Registry of 1958, which requires the presentation of the certificate issued by the civil registrar of the fiancés domicile confirming the admissibility of the civil marriage, it is clear that the marriage may not be solemnised without the due consent required in Civil Law.

The legislator also considered insanity to be an extinctive impediment, "*be it declared by a judgment interdicting the person in question, be it clear and existent at the time or date set for the marriage*". Insanity is considered "*an abnormal state of the mental capacities, rendering the fiancé incapable of governing his/her person and property*", as noted by Cunha Gonçalves on page 29 of his manual. This means that an insanity which has not been declared by a judgment interdicting the person in question must be a public fact or be known by the persons dealing directly with the fiancé. It should be noted that, under Canon Law, insanity is not considered a marital impediment. However, since it is mandatory to produce the certificate issued by the civil registrar, if this certificate is not correctly issued, insanity also becomes relevant for Catholic marriage.

The legislator also mentions, as being prevented from marrying, persons who were "*divorced due to a contagious disease known to be incurable, or due to an incurable disease implying a sexual aberration*". The reference to sexual aberration aims at encompassing, not a disease, but a congenital defect such hermaphroditism, incompatible with the aim of marriage regarding reproduction. It should be highlighted that the legislator only extends this interdiction to those who have been divorced, and not to those who are single or widowed. Pires de Lima and Antunes Varela, on page 23 of their manual (*Noções Fundamentais*), argue that this different treatment according to civil status derives from the need to carry out a pre-marital bodily exam, which would run counter to principles in force. In the case of a divorcé, the allegation of the above mentioned situation would already be included in the respective divorce suit.

Article 4, no. 5, of the Act on Marriage as a Civil Contract, further prohibits the marriage of the "*spouse convicted as author or accomplice of the crime of murder or attempted murder against his/her consort*". A conviction is, therefore, indispensable, and neither manslaughter nor murder in self defence is an extinctive impediment.

Following the principle of monogamy, under the Civil Code of 1867 the existence of a prior non-dissolved marriage is an extinctive impediment. The Criminal Code of 1852 itself lays down in article 337 that "*any man or woman who contracts a second or subsequent marriage, when the previous one was not lawfully dissolved, shall be sentenced to the largest temporary imprisonment and to the maximum fine*". It should be noted that the interdiction of bigamy was not fully applied to the overseas territories, their usages and customs being preserved. In article 5 of the above mentioned Decree of 16 December 1880, it is stated that "*a marriage between gentile Hindus may be dissolved only due to the wife's adultery, with the following formalities…*"; article 8 mentions that "*marriages in simultaneous polygamy carried out until the date of the present decree, without the conditions foreseen in article 3, shall be held valid for all civil and legal purposes*".

With regard to impeditive impediments, these are listed in articles 5 to 7 of the Act on Marriage as a Civil Contract: a) absence of authorisation for the minors to marry: articles 5 and 6; and b) absence of authorisation for interdicted persons in accordance with article 7, specifically the interdiction based on deaf-muteness and adults subject to curatorship due to prodigality.

One should also take into account what is laid down concerning provisional impediments which lead to situations that do not result in the marriage being null and void.

The exercise of guardianship prevents the marriage of the guardian or curator, or of one of his descendants, ascendants, siblings, brothers/sisters-in-law and nephews/nieces with the person under guardianship "*before one full year has elapsed since the end of the guardianship or curatorship and before the respective accounts have been approved*". As mentioned by Pires de Lima and Antunes Varela on page 91 of their manual, this rule aims at avoiding "*tutors and curators from using the position of strength*

which they usually hold over those under guardianship so as to impose a certain marriage and avoid accounting for their administration".

A marriage carried out in violation of the inter-marital period, in accordance with article 10 of the Act on Marriage as a Civil Contract and article 55 of the Decree of 3 November 1910, also constitutes an impeditive impediment. This is justified by moral reasons, opposed to the widow(er) or divorcé being swiftly remarried, and by the attempt to avoid the solemnisation of a new marriage during the condition of pregnancy. Probable doubts as to the unborn child's paternity are thus avoided, in accordance with article 6 of Decree no. 2 of 25/12/1910. The legislator has, however, allowed for the possibility of this rule not being respected, as foreseen in the single § of article 291 of the Code of Civil Registry of 1932 which states that *"a widowed or divorced woman may, however, be married after six months have elapsed since the dissolution of the marriage, as long as she previously confirms whether she is pregnant, in accordance with article 650 of the Code of Civil Procedure"* (see article 173 of the Code of Civil Registry of 1958). The same exception is observed when the divorce was granted *"for any of the grounds mentioned in no.s 5, 6 and 8 of article 4, or in accordance with article 40 or article 47".*

It should further be considered that there are other impediments not included in the Civil Code, such as the exercise of the military profession, diplomatic and consular functions, the functions of overseas administrators, primary teachers and imprisonment. In these situations, the solemnisation of the marriage requires the respective authorisation of the competent superior authorities, meaning that the fiancés may not be married autonomously.

Canon Law has imposed additional impeditive impediments, already mentioned above, such as difference of faith, except in the case of exemption by the Pope, belonging to sacred orders or being a member of the cloth, even though clergyman from lower orders may be exempted by the Pope. Canon Law also includes kidnapping, while the kidnapped woman is still under the control of the kidnapper, this impediment being terminated when the woman is

made free again. It also constitutes an impediment for a man to marry the mother, daughter or sister of his mistress, even though it is possible to obtain an exemption. A godfather may also not marry his goddaughter, nor can a godmother marry her godson, even though it is possible to obtain an exemption. The simple vow of chastity also leads to an impediment, unless exempted upon request. Canon Law further condemns as an impediment marriage between a Catholic and an atheist or an enemy of the Church, except in the case of exemption by the Pope.

Article 1067 mentions the importance of consent as an essential condition for the solemnisation of the marriage. The consent must be current and explicit. The legislator set aside the possibility of tacit consent, considering the solemn nature of this contract. An exception to this principle is the solemnisation of the marriage through a proxy, meeting the following conditions: a special power of attorney must be issued, explicitly indicating the person with whom the marriage is to be contracted.

The legislator was also concerned with the existence of betrothal agreements, already mentioned in the tradition of Roman Law, also called marriage promissory agreements. If such agreements are reached, they are null and void under the law, since the consent expressed therein is not current, as required. As for the origin of these agreements, Cunha Gonçalves states on page 38 of his manual that *"betrothal is, therefore, a contract which, throughout the centuries, replaced the purchase of the bride, called the 'puella empta' or the bride donation contract"*.

Curiously, however, in the single § of article 1067, the legislator allows for betrothal agreements, this being a situation in which there may be an obligation to repair damage caused. This is a case of inadequate legislative technique and drafting. The right to compensation can only derive from the existence of a contract that results, not in nullity, but in a right deriving from a promise. As stated by Cunha Gonçalves, on page 39 of his manual, *"it would suffice to reflect and note that the promise of marriage has merely the value of any other promise: it is a fact, legally unenforceable, the failure to follow through on it leading*

merely to compensation for losses and damage". According to the legislator, the failure to follow through on a marriage promise results in two obligations: to return prenuptial gifts and donations (including both gifts from the other spouse and from relatives and friends), and to compensate for any damage and losses.

Código Civil de 1867

SUBSECÇÃO I
DISPOSIÇÕES ESPECIAIS RELATIVAS AO CASAMENTO CATÓLICO

Artigo 1069º

O casamento católico só produz efeitos civis, sendo celebrado em conformidade com as leis canónicas recebidas neste reino, ou por elas reconhecido, salvas as seguintes disposições.

Artigo 1070º

A lei canónica define e regula as condições, e os efeitos espirituais do casamento; a lei civil define e regula as condições, e os efeitos temporais dele.

Artigo 1071º

O ministro da igreja, que celebrar algum casamento contra o que dispõe o artigo 1058º, incorre nas penas cominadas na lei penal.

SUBSECCÇÃO II
DISPOSIÇÕES ESPECIAIS RELATIVAS AO CASAMENTO FEITO PELA FORMA INSTITUÍDA NA LEI CIVIL

Artigo 1072º

O casamento entre súbditos portugueses, não católicos, produz também todos os efeitos civis, se tiverem sido observados os requisitos essenciais

Civil Code of 1867

SUBSECTION I
SPECIAL PROVISIONS RELATING TO CATHOLIC MARRIAGES

Article 1069

A Catholic marriage only produces civil effects if it is solemnised in accordance with the canon laws followed in this kingdom, or if it is recognised by them, with the following exceptions.

Article 1070

Canon law defines and governs the spiritual conditions and effects of the marriage; civil law defines and governs its temporal conditions and effects.

Article 1071

A minister of the Church who solemnises a marriage in infringement of the provisions of article 1058 is subject to the penalties foreseen in criminal law.

SUBSECTION II
SPECIAL PROVISIONS RELATING TO MARRIAGE CARRIED OUT IN ACCORDANCE WITH THE FORMALITIES OF CIVIL LAW

Article 1072

A marriage between non-Catholic Portuguese subjects also produces full civil effects, if the essential conditions of the contracts are complied with, as

dos contratos, as disposições do artigo 1058º e as seguintes.

Artigo 1073º

Não podem contrair casamento:

1º) Os parentes por consanguinidade ou afinidade na linha recta;

2º) Os parentes em segundo grau na linha colateral;

3º) Os parentes em terceiro grau na linha colateral, salvo se obtiverem dispensa;

4º) Os menores de catorze anos, sendo do sexo masculino, e de doze, sendo do feminino;

5º) Os ligados por casamento não dissolvido.

§ único) A dispensa, a que se refere o nº 3, será concedida pelo governo, ocorrendo motivos ponderosos.

(Substituído e revogado pelos Artigos 4º, 5º, 7º, 8º, 9º e 10º do Decreto nº 1, de 25/12/1910)

Artigo 1074º

A infracção do que fica disposto no artigo precedente produz a nulidade do casamento.

(Substituído e revogado pelos artigos 11º, 13º, 17º e 51º a 54º do Decreto nº 1, de 25/12/1910)

Artigo 54º do Decreto n.º 1, de 25/12/1910

O casamento dos parentes em terceiro grau, na linha colateral, sem obtenção da dispensa exigida pelo artigo 8º, será considerado como contraído com separação de bens, e sujeita o infractor marido ao pagamento de uma multa correspondente à sua renda, e não superior a 1.000$00 réis.

(Este limite foi elevado ao décuplo pelo artigo 3º da Lei nº 1552 de 1 de Março de 1924)

§ único) Esta multa será imposta em processo criminal, se não for paga voluntariamente ao oficial do registo civil, perante quem foi celebrado.

well as the provisions of article 1058 and the following provisions.

Article 1073

The following may not be married:

1) Relatives by blood or marriage in lineal descent;

2) Relatives in the second degree of collateral descent;

3) Relatives in the third degree of collateral descent, except if they obtained an exemption;

4) Those under the age of fourteen, being male, and under the age of twelve, being female;

5) Those bound by a marriage that has not yet been dissolved.

Single §) The exemption mentioned in no. 3 shall be granted by the Government, in light of serious reasons.

(Replaced and revoked by articles 4, 5, 7, 8, 9 and 10 of Decree no. 1, of 25/12/1910)

Article 1074

The infringement of that which is foreseen in the preceding article results in the nullity of the marriage.

(Replaced and revoked by articles 11, 13, 17 and 51 to 54 of Decree no. 1, of 25/12/1910)

Article 54 of Decree no. 1, of 25/12/1910

The marriage of relatives in the third degree of collateral descent, without obtaining the exemption required by article 8, shall be considered as contracted under the regime of separate property, and obliges the offending husband to pay a fine corresponding to his income, and not exceeding 1.000 "reis".

(This limit was increased by ten times by article 3 of Law no. 1552 of 1 March 1924)

Single §) This fine shall be imposed in a criminal trial, if it is not paid voluntarily to the official of the civil registry before whom the marriage was solemnised.

Artigo 1075º

Quem pretender contrair casamento, pela forma instituída na lei civil, apresentará ao oficial do registo civil do seu domicílio, ou da sua residência, uma declaração assinada por ambos os contraentes, a qual deve especificar:

1º) Os nomes e apelidos, a idade, a profissão, o domicílio ou a residência dos contraentes;

2º) Os nomes e apelidos, a profissão e o domicilio ou a residência de seus pais.

1º) Se o oficial do registo civil, escolhido para a celebração do contrato, não for o do domicilio de ambos os contraentes, a declaração supra mencionada será apresentada ao oficial do registo civil do domicilio de cada um, com a designação daquele que elegeram para a celebração do contrato.

2º) A declaração deve também ser acompanhada das certidões de idade dos contraentes, e de documentos que provem o consentimento dos seus superiores legítimos, se deles carecerem, bem como da dispensa, a que se referem o nº 3 e o § único do artigo 1073º, quando seja necessária.

(Substituído pelos Artigos 149º, 150º, 151º, 152º, 153º e 154º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzidos adiante, a seguir ao artigo 1085º do Código Civil)

Article 1075

Persons intending to contract marriage with the formalities foreseen in civil law shall present to the official of the civil registry of their domicile or residence a declaration signed by both contracting parties, which must specify:

1) The names and surnames, age, profession, domicile or residence of the future spouses;

2) The names and surnames, profession and domicile or residence of their parents.

1) If the official of the civil registry, chosen to solemnise the marriage, is not the one of the domicile of both contracting parties, the above mentioned declaration shall be presented to the official of the civil registry of the domicile of each of them, with the indication of the official chosen for the solemnisation of the contract.

2) The declaration must also be accompanied by the age certificates of the contracting parties, and by documents proving the consent of their legal superiors, when required, as well as of the exemption referred to in no. 3, and in the single § of article 1073, when required.

(Replaced by articles 149, 150, 151, 152, 153 and 154 of the Code of Civil Registry, approved by Decree-Law 41.967, of 22/11/1958, copied infra after article 1085 of the Civil Code)

Artigo 1076º

Os oficiais do registo civil, a quem for apresentada a declaração especificada no artigo antecedente, farão afixar em lugar publico, à entrada das suas repartições, um edital, em que se anuncie a pretensão dos contraentes, com todas as indicações mencionadas no mesmo artigo, convidando as pessoas que souberem de algum dos impedimentos legais mencionados nos artigos 1058º e 1073º, a virem declará-los no prazo de quinze dias.

§ único) Os impedimentos legais, mencionados no artigo 1058º, nº 1 só podem ser opostos por

Article 1076

The officials of the civil registry to whom the declaration foreseen in the preceding article is presented shall have put up in a public place, at the entrance to their offices, an edict announcing the intention of the contracting parties, with all the indications mentioned in the same article, inviting those who are aware of any of the legal impediments mentioned in articles 1058 and 1073 to declare them within fifteen days.

Single §) The legal impediments mentioned in article 1058, no. 1, may only be put forward by

aqueles, cujo consentimento é necessário para a celebração do contrato.

(Substituído pelos artigos 155º, 156º, 157º e 158º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzidos adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1077º

Decorridos os quinze dias, não havendo declaração de impedimento legal, e não tendo o oficial do registo civil conhecimento de algum, procederá o mesmo oficial, à celebração do casamento, nos termos declarados no artigo 1081º.

§ 1º) Quando tenha havido publicações em mais de uma repartição de registo civil, exigirá o oficial, que tiver sido escolhido para a celebração do contracto, certidão que mostre, que perante o outro ou outros oficiais não houve oposição ao casamento, nem ele ou eles sabem de impedimento legal, que obste ao dito casamento.

§ 2º) Em todo o caso, passado um ano desde a publicação sem que o casamento se tenha efectuado, não poderá este celebrar-se sem nova publicação.

(Substituído pelos Artigos 159º, 160º, 161º e 162º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzidos adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1078º

Se, durante o prazo de publicação, ou antes da celebração do casamento, aparecer declaração de algum impedimento legal, ou este for conhecido do oficial do registo civil, que nesse caso o declarará por escrito, não poderá fazer-se a celebração do casamento, sem que o dito impedimento seja julgado improcedente, nos prazos e pelo modo estabelecido no código de processo.

(Substituído pelo Artigo 163º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzido

those whose consent is required for the solemnisation of the contract.

(Replaced by articles 155, 156, 157 and 158 of the Civil Registry Code, approved by Decree-Law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1077

Fifteen days having elapsed without a declaration of a legal impediment, and without the official of the civil registry being aware of any such impediment, the said official shall solemnise the marriage, in accordance with article 1081.

§ 1) When there have been publications of edicts in more than one office of the civil registry, the official chosen to solemnise the marriage shall request a certificate demonstrating that there was no opposition to the marriage before the other officer(s) and that this/these officer(s) are not aware of any legal impediments to prevent the said marriage.

§ 2) In any case, if one year has elapsed since the publication of the edict and the marriage has not been carried out, it cannot be solemnised without the publication of a new edict.

(Replaced by articles 159, 160, 161 and 162 of the Civil Registry Code, approved by Decree-Law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1078

If, during the time of publication of the edict, or before the solemnisation of the marriage, a declaration of a legal impediment is made, or the official of the civil registry becomes aware of such an impediment (in which case he will declare it in writing), the marriage may not be solemnised, unless the said impediment is ruled to be non-existing, within the deadline and in the manner foreseen in the Code of Civil Procedure.

(Replaced by article 163 of the Civil Registry Code, approved by Decree-Law no. 41-967,

adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1079º

A declaração de que tratam os artigos antecedentes deve especificar o impedimento, indicar o domicilio ou a residência da pessoa que a faz, e ser datada e assinada.

§ único) A assinatura será reconhecida por tabelião.

(Substituído pelo Artigo 164º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzido adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1080º

As declarações de impedimento, julgadas falsas, obrigam o declarante a perdas e danos, além das penas em que incorrer, se tiver procedido dolosamente.

(Substituído pelo Artigo 180º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzido adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1081º

Para a celebração do casamento devem os contraentes, ou seus procuradores, comparecer na repartição de registo civil, cujo oficial haja de exarar o assento do contrato, salvo se, por motivo de doença, algum dos contraentes não comparecer pessoalmente e não se fizer representar por procurador, porque em tal caso irá o oficial do registo civil ao lugar onde este contraente estiver. Na presença dos contraentes, ou de seus representantes, e das testemunhas, o oficial lerá os artigos 1056º e 1057º do código, e perguntará em seguida a cada um dos contraentes, se permanece na resolução de celebrar o casamento por aquela forma e, com resposta afirmativa de ambos, lavrará o assento de casamento com as formalidades prescritas

of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1079

The declaration referred to in the preceding articles must specify the impediment, indicate the domicile or residence of the person making it, and must be dated and signed.

Single §) The signature must be authenticated by a public notary.

(Replaced by article 164 of the Civil registry Code, approved by Decree-Law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1080

Declarations of impediment deemed to be false oblige the person making the declaration to pay for losses and damage, aside from other resulting penalties, if he/she acted deceitfully.

(Replaced by article 180 of the Civil Registry Code, approved by Decree-Law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1081

To solemnise the marriage, the contracting parties or their proxies must appear before the office of the civil registry, the respective official drafting the record of the contract, except if, due to illness, one of the contracting parties does not appear personally and is not represented by a proxy, in which case the official of the civil registry shall go to the place where the said contracting party is to be found. In the presence of the contracting parties, or of their proxies, and of the witnesses, the official shall read articles 1056 and 1057 of the code, and shall subsequently ask each of the contracting parties if they still intend to be married in this manner and, both answering affirmatively, shall draft the record of the marriage with the formalities foreseen in this

neste código, sem que possa haver inquérito prévio acerca da religião dos contraentes.

§ único) Na repartição do registo civil será o casamento celebrado perante duas testemunhas, e fora dela perante seis.

(Substituído pelos Artigos 177º, 178º e 179º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzidos adiante, a seguir ao artigo 1085º do Código Civil)

Artigo 1082º

Os oficiais do registo civil, que procederem à celebração de contratos de casamento contra o disposto nesta secção, na parte que lhes diz respeito, incorrerão nas penas cominadas aos ministros da igreja no artigo 1071º.

(Substituído pelo Artigo 180º do Código do Registo Civil, aprovado pelo Decreto-Lei nº 41.967, de 22/11/1958, reproduzido adiante, a seguir ao artigo 1085º do Código Civil)

SECÇÃO III
DA PROVA DO CASAMENTO

Artigo 1083º

A celebração do casamento contraído no reino só pode provar-se por certidão, extraída do registo competente, excepto provando-se a perda deste, porque em tal caso é admissível qualquer outra espécie de prova.

(Substituído e revogado pelos Artigos 45º e 46º do Decreto nº 1, de 25/12/1910)

Artigo 45º do Decreto n.º 1, de 25/12/1910

A celebração do casamento contraído na República, depois de decretada a obrigatoriedade do registo civil, deve ser provada por certidão extraída do mesmo registo, excepto demonstrando-

code, without the possibility of previously inquiring about the religion of the contracting parties.

Single §) The marriage shall be solemnised in the presence of two witnesses, if at the office of the civil registry, and with six witnesses if outside of the said office.

(Replaced by articles 177, 178 and 179 of the Civil Registry Code, approved by Decree-law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

Article 1082

The officials of the civil registry who solemnise marriages against the provisions of this section, in the part concerning them, shall be subject to the penalties foreseen for ministers of the Church in article 1071.

(Replaced by article 180 of the Civil Registry Code, approved by Decree-law no. 41.967, of 22/11/1958, copied infra, after article 1085 of the Civil Code)

SECTION III
PROOF OF MARRIAGE

Article 1083

A marriage contracted within the kingdom may only be proven with a certificate, extracted from the respective record, except if it is proven that this record was lost, since in this case any other type of evidence is admissible.

(Replaced and revoked by articles 45 and 46 of Decree no. 1, of 25/12/1910)

Article 45 of Decree no. 1, of 25/12/1910

A marriage solemnised within the Republic, after the civil registry was decreed mandatory, must be proven with a certificate extracted from that registry, except if it is shown that this

-se a perda deste, porque em tal caso é admissível qualquer outra espécie de prova.

Artigo 46º do Decreto n.º 1, de 25/12/1910

Os casamentos anteriormente contraídos podem ser provados por certidão extraída dos livros do registo civil ou paroquial de onde constarem ou, na falta destes, por qualquer outra espécie de prova.

Artigo 1084º

Ninguém pode, porém, contestar o casamento de pessoas falecidas na posse desse estado em prejuízo dos filhos de tais pessoas, fundando-se em falta de certidão do casamento, se os falecidos não declararam o lugar onde o celebraram, salvo se se provar, por outra certidão, que algum dos cônjuges era a esse tempo casado com outrem.

(Substituído e revogado pelos Artigos 47º e 48º do Decreto nº 1, de 25/12/1910)

Artigo 47º do Decreto n.º 1, de 25/12/1910

Ninguém pode, porém, contestar o casamento de pessoas falecidas na posse desse estado, em prejuízo dos filhos das mesmas pessoas, salvo provando por certidão extraída do registo civil, ou dos livros paroquiais, que alguma delas era casada com outra pessoa.

Artigo 48º do Decreto n.º 1, de 25/12/1910

Quando for contestada a existência do casamento e forem contraditórias e equivalentes as provas exibidas de parte a parte, a dúvida será resolvida em favor

was lost, since in this case any other type of evidence is admissible.

Article 46 of Decree no. 1, of 25/12/1910

Marriages contracted before that time may be proven with a certificate extracted from the civil registry or parochial books in which the record is to be found or, in the absence of these, through any other means of evidence.

Article 1084

No one may, however, challenge the marriage of persons deceased in that status to the detriment of those persons' children, with the grounds of the absence of a marriage certificate, if the deceased persons did not declare the place where they were married, except if it is proven, through another certificate, that one of the spouses was at the time married to someone else.

(Replaced and revoked by articles 47 and 48 of Decree no. 1, of 25/12/1910)

Article 47 of Decree no. 1, of 25/12/1910

No one may, however, challenge the marriage of persons deceased in that status, to the detriment of those persons' children, except if it is proven through a certificate extracted from the civil registry, or from the parochial books, that one of them was married to someone else.

Article 48 of Decree no. 1, of 25/12/1910

When the existence of the marriage is challenged and the evidence for both sides is contradictory and equivalent, the doubt shall be settled in favour of the

do mesmo casamento se os cônjuges contestados tiverem vivido ou viverem na posse desse estado.

same marriage if the challenged spouses have lived or live in that status.

Artigo 1085º

O casamento contraído em pais estrangeiro poderá provar-se por qualquer meio de prova, se nesse país tais actos não estiverem sujeitos a registo regular e autêntico.

(*Substituído e revogado pelo Artigo 61º do Decreto nº 1, de 25/12/1910, acima reproduzido, imediatamente antes do artigo 1066º do Código Civil*)

Article 1085

A marriage contracted in a foreign country may be proven by any means of proof, if in that country such acts are not subject to a regular and authentic registry.

(*Replaced and revoked by article 61 of Decree no. 1, of 25/12/1910, copied supra, immediately before article 1066 of the Civil Code*)

ARTIGOS DO CÓDIGO DO REGISTO CIVIL, APROVADO PELO DECRETO-LEI N.º 41.967, DE 22/11/1958

(Aplicável no território europeu de Portugal, citados nas disposições normativas atrás referidas)

ARTICLES OF THE CODE OF CIVIL REGISTRY, APPROVED BY DECREE-LAW NO. 41.967, OF 22/11/1958

(Applicable to the European Portuguese territory, quoted in the above mentioned legal provisions)

Artigo 149º

1. Aqueles que pretenderem contrair casamento devem declará-lo, pessoalmente ou por intermédio de procurador bastante, perante o funcionário do registo civil e requerer a instauração do processo preliminar.

2. A declaração para a instauração do processo preliminar para casamento católico poderá ainda ser prestada pelo pároco competente para a organização do respectivo processo canónico.

Article 149

1. Those who intend to be married must declare it, personally or through a proxy, before the civil registry clerk and request the initiation of the preliminary proceedings.

2. The declaration with a view to initiating the preliminary proceedings for a Catholic marriage may also be made by the priest competent to organise the respective canon proceedings.

Artigo 150º

1. A declaração para casamento deve constar de documento escrito por um dos nubentes e assinado por ambos, com dispensa de reconhecimento das assina-

Article 150

1. The marriage declaration must be made in a document written by one of the fiancés and signed by both, with no need for the signatures to be recognised,

turas, ou do auto lavrado em impresso de modelo anexo a este diploma, e assinado pelo funcionário do registo civil e pelos declarantes, se souberem e puderem fazê-lo.

2. No caso previsto no n.º 2 do artigo anterior a declaração poderá ser prestada sob a forma do requerimento escrito e assinado pelo pároco, igualmente com dispensa de reconhecimento da assinatura.

3. A declaração deve conter:

a) Os nomes completos, idade, estado, profissão, naturalidade e residência dos nubentes;

b) Os nomes completos, estado, naturalidade e residência dos pais e, no caso de algum ser falecido, a menção desta circunstância;

c) O nome completo, estado, naturalidade e residência do tutor, se algum dos nubentes for menor e tiver tutela instituída;

d) No caso de segundas núpcias de qualquer dos nubentes, o nome completo do cônjuge anterior, com a indicação da data e lugar do óbito ou das datas da sentença do divórcio, de anulação ou declaração de nulidade do anterior casamento e do seu trânsito em julgado, bem como do tribunal que a proferiu;

e) As residências dos nubentes nos últimos doze meses, se tiverem sido diversas das que tenham no momento da declaração;

f) A modalidade de casamento que os nubentes pretendem contrair e a conservatória ou paróquia em que deverá ser celebrado;

g) A indicação de o casamento ser celebrado com ou sem escritura antenupcial;

or in the act drawn up in accordance with the model annexed to this law, and signed by the civil registry clerk and by the authors of the declaration, if they know and can do so.

2. In the case foreseen in no. 2 of the previous article, the declaration may be made in the form of a request written and signed by the priest, also with no need for the signature to be recognised.

3. The declaration must contain:

a) The fiancés' full names, age, status, profession and place of birth and residence;

b) The parents' full names, status, place of birth and residence and, if one of them is deceased, the mention of that fact;

c) The guardian's full name, status and place of birth and residence, if any of the fiancés is a minor subject to guardianship;

d) In the case of remarriage of either of the fiancés, the full name of the previous spouse, together with his/her time and place of death or the date of the judgment that decreed the divorce or that annulled or declared the nullity of the previous marriage, and when it became *res judicata*, as well as the court that issued it;

e) The place of residence of the fiancés in the previous twelve months, if it is different from their residence at the time of the declaration;

f) The type of marriage the fiancés wish to enter into and the civil registry office or parish where it is to be carried out;

g) The indication of whether there is a prenuptial agreement;

h) A indicação da situação militar do nubente, quando em idade militar;

i) O número, data e repartição expedidora dos bilhetes de identidade dos nubentes, quando exigíveis, ou o protesto pela sua apresentação posterior.

(*Ter em conta o disposto no artigo 191.º do Código do Registo Civil do Estado da Índia, aprovado por Decreto de 9 de Novembro de 1912, o qual estabelece a forma da declaração dos nubentes com vista à celebração do casamento. Saliente-se nomeadamente o § único do artigo citado, no qual se refere que "nas classes em que por lei é permitida a poligamia, declarar-se-há também o nome da anterior mulher, mencionando-se os documentos que, em virtude da respectiva legislação, tiverem autorizado esse acto". O artigo 192.º enuncia ainda a tramitação que deverá ser observada nesta matéria.*)

h) The indication of the male fiancé's military situation, when he is of military age;

i) The number of the fiancés' identity cards, as well as when and where they were issued, when their production is required, or the indication that they will be produced at a later date.

(*Consider the provisions of article 191 of the Code of Civil Registry of the State of India, approved by Decree of 9 November 1912, which foresees the manner of the fiancés' declaration for the purposes of being married. One should namely consider the single § of the above mentioned article, which foresees that "in relation to the classes for which the law allows polygamy, one should also declare the name of the previous wife, mentioning the documents which, in light of the respective legislation, have authorised that act". Article 192 also indicates the procedures to be followed in this respect.*)

Artigo 151º

1. A declaração inicial deve ser instruída com os seguintes documentos:

a) Atestados comprovativos da residência actual dos nubentes;

b) Certidões do registo de nascimento dos nubentes;

c) Certidão do registo de óbito do pai ou da mãe de nubentes menores não emancipados, quando algum deles seja falecido, ou do registo de tutela instituída, no caso de falecimento de ambos;

d) Certidões ou atestados comprovativos da situação económica dos nubentes, quando pretendam beneficiar da isenção ou redução emolumentar previstas neste código;

e) Certidão da escritura antenupcial, quando a houver;

Article 151

1. The initial declaration must be accompanied by the following documents:

a) Certificates demonstrating the fiancés' current place of residence;

b) The fiancés' birth certificates;

c) Death certificate of the father or mother of non-emancipated minor fiancés, when he/she is deceased, or the record of the guardianship in place, if both are deceased;

d) Certificates or documents demonstrating the fiancés' economic situation, when they intend to benefit from the exemption or reduction of the emoluments foreseen in this code;

e) Certificate of the prenuptial agreement, when one has been carried out;

f) Documento comprovativo das licenças necessárias ou de quaisquer outras circunstâncias especiais, cuja prova seja exigida para a celebração do casamento;

g) Os bilhetes de identidade dos nubentes e a caderneta militar do nubente varão ou documento equivalente, quando exigíveis.

2. Os documentos a que se referem as alíneas a), b), c) e d) devem ser apresentados no acto da declaração; os restantes poderão ser apresentados posteriormente, mas antes da celebração do casamento civil ou da passagem do certificado necessário para a realização do casamento canónico, sem prejuízo do disposto nos nºs 2 do artigo 164.º e 4 do artigo 194.º.

3. As certidões de nascimento dos nubentes, bem como as certidões de óbito necessárias à instrução do processo, podem ser substituídas por certificados de notoriedade, passados nos termos previstos neste código.

4. Os bilhetes de identidade, a caderneta militar e o documento previsto na alínea g) serão restituídos aos apresentantes, depois de anotada a sua apresentação no verso do auto ou documento inicial.

5. Os nubentes a quem seja concedido o benefício de redução emolumentar referida na alínea d) do n.º 1 são dispensados da apresentação do bilhete de identidade se residirem a mais de 10 km da sede do concelho e o casamento se realizar em freguesia rural.

f) Document demonstrating the necessary authorisations or any other special circumstances which must be demonstrated in order to solemnise the marriage;

g) The identity cards of the fiancés and the military card of the male fiancé, or equivalent document, when requirable.

2. The documents mentioned in clauses a), b), c) and d) must be produced in the act of the declaration; the remaining ones may be produced subsequently, but before the civil marriage is solemnised or before the certificate required for the canon marriage is issued, not precluding the provisions of no. 2 of article 164 and no. 4 of article 194.

3. The fiancés' birth certificates, as well as the death certificates required for the marriage proceedings, may be replaced by certificates of public knowledge, issued in accordance with this code.

4. The identity cards, the military card and the document foreseen in clause g) shall be returned to those who produced them after their production has been noted in the back of the initial act or document.

5. The fiancés who are granted the benefit of reduction of emoluments mentioned in clause d) of no. 1 are not required to produce their identity card if they reside more than 10 km away from the seat of the borough and if the marriage is carried out in a rural location.

Artigo 152º

1. No caso de segundas núpcias de qualquer dos nubentes, a prova da dissolução, anulação ou declaração de

Article 152

1. Where either fiancé is remarrying, the dissolution, annulment or declaration of nullity of the previous

nulidade do casamento anterior faz-se pelos correspondentes averbamentos mencionados nas certidões de nascimento ou, quando estas tenham sido substituídas por certificados de notoriedade, pelas respectivas certidões de óbito ou da sentença.

2. Se das certidões de nascimento não constarem os averbamentos devidos, o funcionário do registo civil sustará o andamento do processo e observará o disposto no artigo 88.º.

3. Efectuados os averbamentos em falta, as conservatórias detentoras dos assentos de nascimento dos nubentes enviarão, imediatamente, à conservatória do processo de casamento, a fim de serem juntos a este, os boletins comprovativos.

4. Preferindo não aguardar o resultado das diligências previstas no número anterior, poderão os interessados provar a dissolução, anulação ou declaração de nulidade do casamento, mediante a apresentação das respectivas certidões de óbito ou de sentença, conforme os casos.

marriage must be demonstrated by the respective notes added to the birth certificates or, when these have been replaced by certificates of public knowledge, by the respective death certificates or judgment.

2. If the birth certificates do not contain the notes in question, the civil registry clerk shall suspend the proceedings and observe the provisions of article 88.

3. Once the missing notes have been added, the civil registry office holding the fiancés' birth certificates shall immediately send the respective proof to the civil registry office organising the marriage file, so that it may be included in the latter.

4. If the interested parties prefer not to wait for the result of the proceedings foreseen in the previous number, they may prove the dissolution, annulment or declaration of the nullity of the marriage by producing the respective certificates of death or of the judgment, depending on the case.

Artigo 153º

1. A apresentação de certidões de actos cujos assentos originais constem dos livros da conservatória organizadora do processo será dispensada e substituída por notas lançadas e assinadas pelo conservador no verso do auto ou documento inicial.

2. Nas notas mencionar-se-ão a data do facto registado e os números dos livros e folhas onde o respectivo registo se encontra lavrado.

Article 153

1. The production of certificates of acts whose originals are included in the books of the civil registry office organising the file shall be dispensed and replaced by notes added and signed by the civil registry clerk in the back of the initial act or document.

2. The above mentioned notes shall mention the date of the recorded fact and the numbers of the books and sheets where the respective record is to be found.

Artigo 154º

1. As certidões de registo de nascimento dos nubentes deverão ser de narrativa completa e passada há menos de três ou seis meses, consoante provirem, respectivamente, do continente e das ilhas adjacentes ou das províncias ultramarinas e do estrangeiro.

2. As certidões de registo de nascimento passadas por autoridades estrangeiras terão apenas de satisfazer à forma adoptada para o mesmo fim pela lei do país de origem.

Article 154

1. The birth certificates of the fiancés must include a complete narrative and be issued less than three or six months before, depending on whether they come, respectively, from the continent and adjacent islands or from the overseas provinces and abroad.

2. The birth certificates issued by foreign authorities need only comply with the formalities used for the same purpose by the law of the country of origin.

Artigo 155º

1. Autuada a declaração com os documentos apresentados, dará o conservador publicidade à pretensão dos nubentes por meio de edital, no qual incluirá os elementos referidos nas alíneas a) a g) do n.º 3 do artigo 150.º e convidará as pessoas que conheçam algum impedimento ao casamento a virem declará-lo com a maior brevidade possível.

2. O edital, escrito em impresso do modelo anexo a este diploma, estará afixado à porta da repartição, por forma bem visível, durante oito dias consecutivos.

3. Se algum dos nubentes residir ou tiver residido, nos últimos doze meses, fora da área da repartição organizadora do processo, o conservador remeterá uma cópia do edital à repartição dessa residência, para aí ser afixada nas condições do número anterior.

4. A cópia do edital, quando tenha de ser afixada no estrangeiro ou nas províncias, será remetida, para esse fim, conforme os casos, ao respectivo agente

Article 155

1. Once the declaration and the produced documents have been recorded, the civil registry clerk shall publicise the intention of the fiancés through an edict, which will include the elements mentioned in clauses a) to g) of no. 3 of article 150, and shall invite the persons who know any impediment to the marriage to declare it as quickly as possible.

2. The edict, in accordance with the model form annexed to this law, shall be put up outside the civil registry office, in a visible manner, for eight consecutive days.

3. If either of the fiancés resides or has resided, in the last twelve months, outside the area of the civil registry office organising the file, the registrar shall send a copy of the edict to the office of the area of that residence, so that it may be put up there in the conditions mentioned in the previous number.

4. The copy of the edict, when it must be publicized abroad or in the provinces, shall be sent, for that purpose, depending

diplomático ou consular português ou ao Ministério do Ultramar, por intermédio da Conservatória dos Registos Centrais.

(*Ter em conta o disposto no artigo 193.º do Código do Registo Civil do Estado da Índia no qual se enuncia a tramitação a observar para a afixação dos editais, salientando-se nomeadamente a remissão para os artigos 4.º a 10.º Decreto n.º 1 de 25 de Dezembro de 1910, relativos aos impedimentos legais para o casamento. Sobre a tramitação seguida, ter em conta artigos 194.º, 195.º e 196.º do citado Código.*)

Artigo 156º

1. Se algum dos nubentes residir, ou houver residido nos últimos doze meses, nas províncias ultramarinas ou no estrangeiro, poderá o conservador, em substituição da afixação do edital no local da residência, ouvir em auto quatro testemunhas idóneas acerca da identidade e capacidade para contrair casamento desse nubente.

2. Se as testemunhas oferecidas não residirem na área da repartição organizadora do processo, poderão ser ouvidas, por meio de ofício precatório, na conservatória da sua residência.

3. Sempre que tenha alguma dúvida sobre a residência dos nubentes no País durante os últimos doze meses, poderá o funcionário do registo civil exigir a prova dessa residência, por meio de atestado passado pelo presidente da junta de freguesia onde os interessados afirmem ter residido durante aquele período.

Artigo 157º

No dia imediato ao termo do prazo dos editais, o funcionário que os tiver

on the case, to the respective Portuguese diplomatic or consular agent or to the Overseas Ministry, through the central civil registry services.

(*Consider the provisions of article 193 of the Code of Civil Registry of the State of India, which foresees the procedure to be followed to publicise the edicts, including reference to articles 4 to 10 of Decree no. 1 of 25 December 1910, relating to the legal impediments for a marriage. On the procedure to be followed, one should take into account articles 194, 195 and 196 of the mentioned Code.*)

Article 156

1. If either of the fiancés resides, or has resided in the previous twelve months, in the overseas provinces or abroad, the registrar may, instead of putting up the edict in the place of residence, question in the act four capable witnesses concerning the fiancé's identity and capacity to be married.

2. If the witnesses put forward do not reside in the area of the civil registry office organising the file, they may be heard, through an official request, at the civil registry office of the area where they reside.

3. Whenever the civil registry clerk has any reason to doubt that the fiancés resided in the country during the previous twelve months, he/she may require the production of evidence to that avail, in the form of a declaration issued by the president of the local authority where the interested parties claim to have resided in that period.

Article 157

On the day immediately following the end of the edict deadline, the civil

afixado lavrará um certificado do qual conste que foram cumpridas as formalidades legais e que foi ou não declarada ou é do seu conhecimento a existência de algum impedimento matrimonial, e, em seguida, juntá-lo-á ao processo, ou remetê-lo-á à repartição competente, com os documentos oferecidos para prova dos impedimentos que eventualmente houverem sido declarados.

registry clerk that has put it up shall draw up a certificate indicating that the legal formalities were complied with and whether any matrimonial impediment was declared or is known to him/her, and, subsequently, shall add that certificate to the file, or shall send it to the competent civil registry office, together with any documents produced to demonstrate the impediments which may have been declared.

Artigo 158º

1. A existência de impedimento pode ser declarada por qualquer pessoa até ao momento da celebração do casamento e deverá sê-lo pelos funcionários do registo civil logo que dele tenham conhecimento.

2. Se durante o prazo dos editais ou até à celebração do casamento for deduzido algum impedimento ou a sua existência chegar, por qualquer forma, ao conhecimento do conservador, deverá este fazê-lo constar do processo de casamento, cujo andamento será suspenso até que o impedimento cesse, seja dispensado ou julgado improcedente por decisão judicial com trânsito em julgado.

3. A existência de casamento anterior, ainda que não inscrito ou transcrito, constitui impedimento à celebração de novo casamento.

(Nesta matéria, interessam igualmente os artigos 197.º a 201.º do Código do Registo Civil do Estado da Índia, que se referem à certificação efectuada pelo conservador acerca da existência de impedimentos. Destaque-se nomeadamente o artigo 200.,º que, em termos diferentes dos que constam do n.º 3 do artigo 158.º do CRCivil português, prevê que "tratando-se de viúvo ou

Article 158

1. The existence of an impediment may be declared by any person until the moment the marriage is solemnised, and must be declared by the civil registry clerks as soon as they become aware of it.

2. If an impediment is raised or the registrar becomes, in any way, aware of an impediment during the edict deadline or until the solemnisation of the marriage, he/she must indicate it in the marriage file, the proceedings of which shall be suspended until the impediment ceases, is dispensed or is deemed false by a court ruling in a condition of *res judicata*.

3. The existence of a prior marriage, even if it has not been registered or transcribed, is an impediment to the solemnisation of a new marriage.

(In this regard, articles 197 to 201 of Code of Civil Registry of the State of India are also relevant, relating to the certification carried out by the civil registrar on the existence of impediments. Article 200 is particularly relevant, since, differently from no. 3 of article 158 of the Portuguese Code of Civil Registry, it foresees that "in the case of a widow(er) or a divorcé, the civil registry clerk must refuse to solemnise the marriage as long as the deadlines of six months for the male spouse and of one year

de divorciado, o funcionário do registo civil deve recusar-se a celebrar casamento enquanto não decorrerem os prazos de seis meses para o varão e de um ano para a mulher, nos termos dos artigos 10.º do decreto n.º 1 de 25 de Dezembro de 1910 e 55.º do decreto de 3 de Novembro do mesmo ano, salvo sempre os casos de divórcio previstos no § 1.º deste último artigo". Saliente-se ainda o disposto nos artigos 186.º, 187.º e 188.º do mesmo Código, no qual é feita referência à dispensa mencionada no artigo 8.º do Decreto n.º 1 de 1910, relativo ao casamento de parentes em terceiro grau da linha colateral.)

Artigo 159º

1. Ao conservador competirá, independentemente do disposto nos artigos anteriores, verificar, em face dos elementos juntos ao processo, a identidade e capacidade matrimonial dos nubentes, podendo, no caso de dúvida, solicitar as informações necessárias junto das autoridades civis ou eclesiásticas competentes, exigir prova complementar por meio de testemunhas e bem assim convocar, quando indispensável, os nubentes ou seus representantes legais, a fim de os ouvir sobre os pontos duvidosos.

2. As testemunhas que vierem a ser oferecidas, bem como os nubentes, seus pais ou tutores, poderão ser ouvidos por ofício precatório, na conservatória da respectiva residência.

Artigo 160º

1. Findo o prazo das publicações e realizadas as diligências previstas nos artigos anteriores, deverá o conservador, dentro de três dias subsequentes à última diligência efectuada, lavrar despacho no qual, depois de mencionar os elementos

for the female spouse have not elapsed, in accordance with article 10 of Decree no. 1 of 25 December 1910 and article 55 of the Decree of 3 November 1910, with the general exception of the situations of divorce foreseen in §1 of the latter article". One should also note the provisions of articles 186, 187 and 188 of the same Code, which refer to the dispensation mentioned in article 8 of Decree no. 1 of 1910, relating to the marriage of relatives in the third degree of the collateral line.)

Article 159

1. Regardless of the provisions of the previous articles, the registrar shall verify, in light of the elements in the file, the identity of the spouses and whether they are capable of being married, and may, if doubts arise, request the necessary information from the appropriate civilian or ecclesiastical authorities, require additional evidence through witnesses and convene, when this is indispensable, the spouses or their legal representatives, in order for them to be heard on the issues in question.

2. The witnesses put forward, as well as the spouses and their parents or guardians may be heard through an official request to the civil registry office of their respective residence.

Article 160

1. Once the deadline for the publications has elapsed and the proceedings foreseen in the previous article have been concluded, in the three days following the last proceeding, the registrar must draft an act in which, after mentioning the elements included in the initial declaration, completed and corrected in accordance with the joined

referidos na declaração inicial, completada e corrigida de harmonia com os documentos juntos e as diligências efectuadas, concluirá pela possibilidade ou impossibilidade legal de os nubentes celebrarem o casamento.

2. A menção prevista no número anterior poderá ser substituída por simples referência aos elementos contidos na respectiva declaração inicial, se dos documentos juntos ou das diligências realizadas não resultar a necessidade de os completar ou corrigir.

3. Se for desfavorável à celebração do casamento, o despacho será notificado aos nubentes, pessoalmente ou por carta registada com aviso de recepção.

4. Não devem constituir embaraço à celebração do casamento as pequenas irregularidades ou deficiências verificadas nos registos, certidões ou certificados apresentados pelos nubentes, nomeadamente os relativos à grafia dos nomes ou à eliminação ou acrescentamento de qualquer apelido, contanto que não envolvam dúvidas fundadas sobre a identidade das pessoas a quem respeitem.

Artigo 161º

Se o despacho do conservador for favorável, deverá o casamento celebrar-se dentro dos noventa dias seguintes, sob pena de ser necessária nova publicação de editais e a junção de novos atestados de residência e das certidões de nascimento que entretanto houverem excedido o prazo de validade.

Artigo 162º

1. Se os nubentes, na declaração inicial ou posteriormente, houverem manifestado a intenção de celebrar casamento

documents and the proceedings carried out, he/she shall conclude as to the legal possibility or impossibility of the persons in question solemnising the marriage.

2. The indication foreseen in the previous number may be replaced by simple reference to the elements contained in the respective initial declaration, if neither of the documents or proceedings implies any completion or correction of them.

3. If it is concluded that the marriage may not be solemnised, the act shall be notified to the persons wishing to be married, in person or by registered mail with proof of delivery.

4. Small irregularities or deficiencies in the records or certificates produced by the persons wishing to be married, including those relating to the spelling of the names or the elimination or adding of a last name, shall not prevent the solemnisation of the marriage, as long as there are no justified doubts as to the identity of the persons in question.

Article 161

If the registrar's order is favourable, the marriage shall be solemnised within the following ninety days, failing which it will be necessary to publish new edicts and to join new certificates of residence and birth if these have in the meantime exceeded their validity.

Article 162

1. If the persons intending to be married, in the initial declaration or at a later date, have expressed their intent to solemnise a Catholic marriage, the registrar shall issue, within three days, a

católico, pelo conservador será passado, dentro do prazo de três dias, um certificado, no qual se declare que os nubentes podem contrair casamento.

2. O prazo para a passagem do certificado contar-se-á da data do despacho final ou daquela em que os nubentes se manifestem, perante o conservador, no sentido previsto no número anterior.

3. Se o certificado respeitar a processo instaurado nos termos do n.º 2 do artigo 149.º, depois de pagos os respectivos emolumentos e selos, será remetido oficiosamente ao competente pároco.

4. No caso de os nubentes pretenderem realizar casamento civil em conservatória diferente daquela onde ocorreu o processo, o conservador observará o disposto nos n.ºs 1 e 2 e, uma vez realizado o pagamento do que for devido, remeterá oficiosamente o certificado a essa repartição.

5. Estando junta ao processo certidão de escritura antenupcial, deverá esta ser remetida, à repartição da celebração do casamento, com o certificado a que se refere o número anterior.

Artigo 163º

Se depois de passado o certificado chegar ao conhecimento do funcionário que o houver emitido a existência de algum impedimento matrimonial, deverá o facto ser imediatamente comunicado.

Artigo 164º

1. O certificado previsto no artigo 162.º deve conter as menções seguintes:

a) Nomes completos, idade, estado, profissão, naturalidade e residência dos nubentes;

certificate declaring that they may be married.

2. The deadline for the issuance of the certificate shall start from the date of the final order or from the date when the persons intending to be married express to the registrar the intention mentioned in the previous article.

3. If the certificate concerns a file initiated in accordance with no. 2 of article 149, after the respective emoluments and taxes have been paid, it shall be officiously sent to the respective priest.

4. If the fiancés intend to carry out a civil marriage in a civil registry office other than the one which organised the file, the registrar shall comply with no.s 1 and 2 and, once whatever is owed has been paid, shall officiously send the certificate to that other office.

5. If a certificate of a prenuptial agreement has been added to the file, this should be sent to the civil registry office that will solemnise the marriage, together with the certificate mentioned in the previous number.

Article 163

If the civil registry clerk who issued the certificate becomes aware at a later date of the existence of an impediment to the marriage, he/she must communicate that fact immediately.

Article 164

1. The certificate foreseen in article 162 must indicate the following:

a) Full names, age, status, profession, place of birth and residence of the fiancés;

b) No caso de segundas núpcias de algum dos nubentes, o nome completo do primeiro cônjuge e a data da dissolução, anulação ou declaração de nulidade do matrimónio anterior;

c) Os nomes completos, estado, naturalidade e residência dos pais dos nubentes, se forem conhecidos;

d) Os nomes completos, estado e residência dos tutores dos nubentes menores sob tutela;

e) A indicação de que o casamento se celebra com ou sem escritura antenupcial, com referência ao documento comprovativo, havendo-o;

f) As indicações referentes à existência de consentimento prévio dos pais ou tutor dos nubentes menores ou a menção do nome das pessoas que o podem prestar no acto da celebração do casamento;

g) Prazo dentro do qual o casamento deve ser celebrado.

2. Se os nubentes houverem declarado haver escritura antenupcial, mas não a apresentarem até à passagem do certificado, será esta circunstância mencionada, com a indicação de que a escritura deverá ser apresentada até ao acto da celebração do casamento.

3. Os certificados destinados à celebração do casamento civil, além das menções previstas no n.º 1, conterão as seguintes:

a) Se foram ou não apresentados os documentos comprovativos das licenças especiais referidas no artigo 170.º, quando necessárias;

b) Os impedimentos dispensados ou julgados improcedentes;

c) O nome completo, estado e residência do procurador de algum dos nubentes, se o houver.

(…)

b) If one of the fiancés is remarrying, the full name of the first spouse and the date of the dissolution, annulment or declaration of nullity of the previous marriage;

c) The full names, status, place or birth and residence of the fiancés' parents, if they are known;

d) The full names, status and place of residence of the guardians of the fiancés who are minors subject to guardianship;

e) The indication of whether the marriage is solemnised with or without a prenuptial agreement, mentioning the relevant document, if it exists;

f) The indications relating to the existence of prior consent by the parents or guardian of fiancés who are still minors or the mention of the name of the persons who may give this consent in the marriage act;

g) Deadline for the solemnisation of the marriage;

2. If the fiancés have declared the existence of a prenuptial agreement, but did not present it before the issuance of the certificate, this circumstance shall be mentioned, indicating that the deed should be presented before the marriage act.

3. Certificates aimed at the solemnisation of civil marriage, aside from the indications foreseen in no. 1, shall indicate the following:

a) Whether the documents demonstrating the special licenses mentioned in article 170 were produced, when required;

b) The impediments which were dispensed or deemed to be false;

c) The full name, status and place of residence of the proxy of one of the fiancés, if one has been appointed.

(…)

Artigo 177º

O dia da celebração do casamento será escolhido pelos nubentes, mas a hora será fixada pelo conservador do registo civil, ouvidos os interessados.

Artigo 178º

1. É indispensável para a celebração do casamento a presença:

a) Dos contraentes ou de um deles e do procurador do outro;

b) Do funcionário do registo civil;

c) De duas testemunhas maiores ou emancipadas, que saibam e possam assinar.

2. Considera-se celebrado na presença do funcionário do registo civil o casamento realizado perante quem, não tendo embora essa qualidade, exercesse publicamente as respectivas funções, salvo se ambos os nubentes conhecerem, no momento da celebração, a falsa qualidade do celebrante ou a sua irregular investidura.

Artigo 179º

1. A celebração do casamento é pública e será feita pela forma seguinte:

a) O funcionário lerá a declaração inicial e o despacho a que se referem os artigos 150.º e 160.º ou o certificado previsto no n.º 4 do artigo 162.º, omitindo a referência aos impedimentos dispensados, quando desprimorosos para os nubentes;

b) Em seguida, tratando-se de casamento de menores não emancipados, para o qual ainda não tenha sido dado o consentimento dos pais ou tutor, nem feita oposição julgada improcedente, perguntará às pessoas que o devam prestar,

Article 177

The day of the marriage shall be chosen by the fiancés, but the hour shall be set by the registrar, after hearing the interested parties.

Article 178

1. The presence of the following persons is indispensable to solemnise the marriage:

a) The contracting parties, or one of them and the other's proxy;

b) The civil registry clerk;

c) Two witnesses of legal age or emancipated, who know how to and can sign.

2. A marriage carried out before someone who, although not being a civil registry clerk, publicly exercised those functions, is deemed to have been solemnised before a civil registry clerk, unless both fiancés were aware, at the time of the marriage, that that person was not a civil registry clerk or was irregularly appointed as such.

Article 179

1. A marriage ceremony is public and shall be carried out in accordance with the following:

a) The clerk shall read the initial declaration and the act mentioned in articles 150 and 160 or the certificate foreseen in no. 4 of article 162, omitting the reference to the impediments that were dispensed, when they are damaging to the fiancés;

b) Subsequently, in the case of the marriage of non-emancipated minors, for which the consent of the parents or guardian has not yet been granted, nor has there been an objection which was

quando presentes, se querem fazer-lhe oposição;

c) No caso de as pessoas referidas na alínea anterior se oporem ao casamento, o funcionário reduzirá a auto a oposição deduzida e sustará a realização do auto, notificando os nubentes do disposto no n.º 2 do artigo 168.º;

d) Na falta de oposição, o funcionário interpelará as pessoas presentes para que declarem se conhecem algum impedimento que obste à realização do casamento;

e) Não sendo declarado qualquer impedimento, perguntará a cada um dos nubentes, primeiro à mulher e depois ao varão, se aceita o outro por consorte;

f) Cada um dos interpelados responderá, sucessiva e claramente: "É de minha livre vontade casar com F..... (indicando o nome completo do outro nubente).

2. Prestado o consentimento dos contraentes, o casamento considerar-se-á celebrado, o que o funcionário proclamará, declarando em voz alta que o F.... e F..... (indicando os nomes completos de marido e mulher) se encontram unidos pelo casamento.

3. Se algum dos nubentes for mudo, surdo-mudo ou não souber falar a língua portuguesa, observar-se-á o disposto nos artigos 102.º e 103.º.

4. Antes de prestado o consentimento, podem os nubentes, bem como os seus representantes legais ou as testemunhas do acto, solicitar a permissão de lerem integralmente para si os documentos juntos ao processo e o despacho final do conservador ou o respectivo certificado.

(O Código do Registo Civil do Estado da Índia estabelece, nos artigos 216.º a 224.º, regime

overruled, he/she shall ask the persons who should grant that consent, if they are present, whether they oppose the marriage;

c) If the persons mentioned in the previous clause oppose the marriage, the clerk shall include in the respective act that opposition and shall interrupt the marriage act, notifying the fiancés of the provisions of no. 2 of article 168;

d) In the absence of opposition, the clerk shall invite the persons present to declare whether they are aware of any impediment to the contracting of the marriage;

e) If no impediment is declared, he/she will ask each of the fiancés, beginning with the woman, if he/she accepts the other as his/her spouse;

f) Both of the persons thus asked shall reply, successively and clearly: "It is my free intention to marry F... (indicating the full name of the other person being married).

2. Once the contracting parties have given their consent, the marriage shall be deemed to have been solemnised, which the clerk shall proclaim, declaring out loud that F... and F... (indicating the full names of the husband and wife) are joined in marriage.

3. If one of the fiancés is deaf, deaf-mute or does not speak the Portuguese language, the provisions of articles 102 and 103 shall be complied with.

4. Before consent is given, the fiancés, as well as their legal representatives or the witnesses to the act, may request permission to read in full the documents joined to the file and the final order of the registrar or the respective certificate.

(The Code of Civil Registry of the State of India foresees, in articles 216 to 224, a specific

específico para a celebração do casamento enquanto acto jurídico. De salientar, nomeadamente, pela diferença do regime constante do CRCivil de 1958, o n.º 4 do artigo 219.º, que exige a presença de quatro testemunhas de maior idade).

regime for the solemnisation of a marriage as a legal act. It should namely be noted, given the difference in relation to the rules of the Code of Civil Registry of 1958, that no. 4 of article 219 requires the presence of four witnesses of legal age.)

Artigo 180º

A prestação do consentimento dos nubentes, bem como a proclamação do funcionário, não podem ser feitas sob qualquer reserva, nem sujeitas a termo ou condição de qualquer espécie, sendo irrelevantes todas as declarações que se fizerem em contravenção do disposto neste artigo, sem prejuízo da responsabilidade em que incorre o funcionário pelo facto de as aceitar.

(*Em matéria de consentimento para a celebração do casamento, o artigo 182.º do Código do Registo Civil do Estado da Índia estabelece que o conservador se recusará a celebrar o casamento das pessoas que não prestarem o seu "consentimento livremente, incluindo as coagidas no acto de celebração, e as que se encontrarem em estado de embriaguez, ou por outro motivo privadas do exercício das faculdades intelectuais". Estabelece ainda o § único do artigo citado que "ficam ressalvados os usos e costumes dos indivíduos não católicos sancionados por lei".*)

Article 180

The consent by the fiancés, as well as the clerk's proclamation, may not be made subject to any reservation, nor conditioned by any kind of term or condition, with any declarations made in infringement of the provisions of this article being irrelevant, not precluding the responsibility of the clerk who accepts such declarations.

(*Concerning consent to the marriage, article 182 of the Code of Civil Registry of the State of India foresees that the registrar shall refuse to solemnise the marriage of persons who do not give their "consent freely, including those who are coerced in the marriage act, and those who are in a state of drunkenness or who, for any other reason, are deprived of the exercise of their intellectual faculties". The single § of the quoted article further indicates that "the usages and customs of non-Catholic individuals accepted by law are excepted"*)

COMMENTARY TO ARTICLES 1069 TO 1085 OF THE CIVIL CODE

The previous articles require that the marriage act be registered in the civil registry, following the principle enshrined in article 45 of the Act on Marriage as a Civil Contract. It is thus enshrined, as a principle which may not be set aside, that marriages carried out on Portuguese territory where civil registry is mandatory must be recorded in the said registry. The only exception allowed to this principle is for situations where the respective record has been lost, "*any other type of evidence*" then being admitted. This expression is understood, in accordance with article 3 of the Code of Civil Registry of 1932, as "*the normal judicial means*", encompassing all types of evidence allowed by law.

If there are doubts as to the existence of the marriage, and if the evidence produced by the interested parties is contradictory, the law also allows that the marriage be deemed to exist, if it is proven that the spouses previously lived together or still do so. Surely, this option was grounded in reasons of a social nature.

If the marriage was contracted abroad, the law grants the possibility of resorting to the means of evidence admitted in the country. On page 60 of his manual (*Direitos da família e direitos das sucessões*), Cunha Gonçalves indicates that spouses are obliged to request that their marriage be transcribed into the civil registry after six months, following the return of either spouse to the country, and after that deadline the marriage may only be transcribed upon payment of a 150 "escudos" fine. What legal interest is being protected here? In accordance with no. 6 of article 4 of the Act on Marriage as a Civil Contract, a non-dissolved previous marriage is an impediment to the solemnisation of a new marriage, and for this reason, if the marriage is not transcribed, there is a situation of legal impediment, preventing the solemnisation of a new marriage. The law thus aims at ensuring

the rights of third parties, preventing that, by not transcribing a marriage, one may invoke single status to escape certain obligations contracted during the marriage.

Aside from the situations described in the above mentioned articles, it is always possible to challenge a marriage registry, in light of the breach of principles of public policy concerning marital impediments.

Código Civil de 1867

SECÇÃO IV
DA ANULAÇÃO DO CASAMENTO E DOS EFEITOS DELA

Artigo 1086º

O casamento católico só pode ser anulado no juízo eclesiástico, e nos casos previstos nas leis da igreja, recebidas neste reino.

(Revogado pelos Artigos 65º e 66º do Decreto nº 1, de 25/12/1910)

Artigo 1087º

A jurisdição do juízo eclesiástico limita-se, todavia, ao conhecimento e julgamento da nulidade; e todas as diligências ou actos de indagação, que devam praticar-se, serão deprecados à competente autoridade judicial civil.

(Revogado pelos Artigos 65º e 66º do Decreto nº 1, de 25/12/1910)

Artigo 1088º

Proferida no juízo eclesiástico, sentença que anule o casamento, será executada pela autoridade civil, a quem será oficialmente comunicada; e à autoridade eclesiástica só competirá transmitir ao pároco, perante quem tiver sido celebrado o casamento, uma certidão da sentença, para ser averbada á margem do respectivo registo.

(Revogado pelos Artigos 65º e 66º do Decreto nº 1, de 25/12/1910)

Artigo 1089º

A anulação do casamento, contraído entre súbditos portugueses, pela forma instituída na lei civil, só pode ser proferida pelos tribunais civis.

Civil Code of 1867

SECTION IV
ANNULMENT OF A MARRIAGE AND ITS EFFECTS

Article 1086

A Catholic marriage may only be annulled in the ecclesiastic court and in the cases foreseen by the laws of the Church followed in this kingdom.

(Revoked by articles 65 and 66 of Decree no. 1, of 25/12/1910)

Article 1087

The jurisdiction of the ecclesiastic court is limited, however, to acknowledging and judging the nullity; and all the proceedings or acts of inquiry which should be carried out shall be requested from the competent civil judicial authority.

(Revoked by articles 65 and 66 of Decree no. 1, of 25/12/1910)

Article 1088

A judgment annulling a marriage adopted by an ecclesiastic court shall be enforced by the civil authority, to whom it shall be officially transmitted; the ecclesiastic authority shall only have the power to transmit to the priest before whom the marriage was solemnised a certificate of the judgment, to be added at the margin of the respective record.

(Revoked by articles 65 and 66 of Decree no. 1, of 25/12/1910)

Article 1089

The annulment of the marriage contracted between Portuguese subjects with the formalities of civil law may be declared only by civil courts.

(*Revogado pelos Artigos 65º e 66º do Decreto nº 1, de 25/12/1910*)

Artigo 65º do Decreto n.º 1, de 25/12/1910

Da mesma data em diante todas as causas de nulidade ou anulação do casamento ficarão competindo exclusivamente ao foro civil. As pendentes, porém, continuarão o seu curso regular no juízo eclesiástico, mas qualquer das partes poderá renová-las no juízo civil, enquanto as decisões do foro eclesiástico não forem executadas, nos termos do artigo 1088º do Código Civil.

Artigo 66º do Decreto n.º 1, de 25/12/1910

As sentenças do juízo eclesiástico, que forem proferidas depois da publicação do presente decreto com força de lei, não serão executadas, nem produzirão efeitos civis, sem que as partes declarem, conjunta ou separadamente, em requerimento assinado e reconhecido por notário, entregue na Direcção dos Negócios Eclesiásticos do Ministério da Justiça, que prescindem do direito de renovar a acção no juízo civil.

Artigo 1090º

Este casamento não pode ser anulado por motivo da religião dos contraentes.

(*Substituído e revogado pelo Artigo 30º do Decreto nº 1, de 25/12/1910*)

Artigo 30º do Decreto n.º 1, de 25/12/1910

Quando o casamento nulo ou anulável tiver sido contraído de boa fé, produzirá os seus efeitos civis em relação aos cônjuges. Se só um dos cônjuges o tiver

(*Revoked by articles 65 and 66 of Decree no. 1, of 25/12/1910*)

Article 65 of Decree no. 1, of 25/12/1910

From the same date onwards, all the legal actions for declaration of nullity or annulment of a marriage shall be the exclusive competence of the civil courts. Pending legal actions, however, shall continue their regular course in the ecclesiastic courts, but either of the parties may renew them in a civil court, as long as the decisions of the ecclesiastic courts are not enforced, in accordance with article 1088 of the Civil Code.

Article 66 of Decree no. 1, of 25/12/1910

The judgments of the ecclesiastic courts delivered after the publication of this decree shall not be enforced, nor will they produce any civil effects, unless the parties declare, jointly or separately, in a request signed and authenticated by a public notary, submitted to the Directorate of Ecclesiastic Affairs of the Ministry of Justice, that they renounce the right to renew the legal action in the civil courts.

Article 1090

Such a marriage may not be annulled on the grounds of the contracting parties' religion.

(*Replaced and revoked by article 30 of Decree no. 1, of 25/12/1910*)

Article 30 of Decree no. 1, of 25/12/1910

When a marriage which is null and void or voidable has been contracted in good faith, it shall produce its civil effects

contraído de boa fé, o casamento só produzirá efeito em favor dele.

Artigo 1091º

Qualquer casamento, ainda que anulado seja, não deixará de produzir efeitos civis, desde o dia da sua celebração, em relação tanto aos cônjuges como a seus filhos, se houver sido contraído em boa fé, por ambos em cônjuges.

(Substituído e revogado pelos Artigos 30º e 31º do Decreto nº 1, de 25/12/1910)

Artigo 31º do Decreto n.º 1 de 25/12/1910

Todavia os filhos de casamento nulo ou anulável são sempre legítimos, posto que havidos antes do mesmo casamento e ainda que este não tenha sido contraído de boa fé por um ou ambos os cônjuges.

§ único) Exceptuam-se somente os filhos das pessoas compreendidas nos nºs 1 e 2 do artigo 4º, aos quais cabem somente os direitos referidos nos artigos 50º a 52º do Decreto nº 2 desta data.

Artigo 1092º

Se um só dos cônjuges tiver estado de boa fé, só a ele e aos filhos aproveitarão os ditos efeitos.

(Substituído e revogado pelos Artigos 31º a 33º do Decreto nº 1, de 25/12/1910)

Artigo 32º do Decreto n.º 1, de 25/12/1910

Aos direitos e obrigações dos pais entre si e a respeito dos filhos, no caso de anulação do casamento, serão aplicáveis as disposições análogas em matéria de divórcio, e especialmente as relativas a

regarding the spouses. If only one of the spouses contracted the marriage in good faith, the marriage may only produce effects in his/her favour.

Article 1091

Any marriage, even if it is annulled, shall continue to produce civil effects, from the day it was solemnised, regarding both the spouses and their children, if it was contracted in good faith, by both spouses.

(Replaced and revoked by articles 30 and 31 of Decree no. 1, of 25/12/1910)

Article 31 of Decree no. 1 of 25/12/1910

However, the children of a marriage which is null and void or voidable are always legitimate, as long as they were born before the marriage and even if this was not contracted in good faith by one or both spouses.

Single §) The only exception is for the children of persons referred to in no.s 1 and 2 of article 4, such children having only the rights mentioned in articles 50 to 52 of Decree no. 2 of this date.

Article 1092

If only one of the spouses had been in good faith, only he/she and his/her children shall benefit from the said effects.

(Replaced and revoked by articles 31 to 33 of Decree no. 1, of 25/12/1910)

Article 32 of Decree no. 1, of 25/12/1910

If a marriage is annulled, the analogous provisions relating to divorce and especially those concerning maintenance, in the part which is not governed by the present decree, shall be applicable to the

alimentos, na parte não regulada pelo presente decreto com força de lei.

Artigo 33º do Decreto n.º 1, de 25/12/1910

Quando o casamento for declarado nulo por culpa de um dos cônjuges, este perderá todas as vantagens havidas do outro, e ficará, não obstante, obrigado a cumprir as promessas que lhe houver feito no respectivo contrato antenupcial.

Artigo 1093º

Se os cônjuges separados não chegarem amigavelmente a um acordo quanto aos filhos, será convocado um conselho de família, organizado nos termos do artigo 1206º. A este conselho competirá prover nos termos do artigo 1207º, nº 3.

(*Revogado pelo Artigo 1º do Decreto nº 20.431, de 24/10/1931*)

Artigo 1094º

Se ambos os cônjuges separados tiverem estado em boa fé, não poderá o pai apartar as filhas da companhia da mãe, contra vontade desta.

Artigo 1095º

A anulação do casamento produz, quanto aos bens dos cônjuges, os mesmos efeitos, que tem a dissolução por morte.

(*Substituído e revogado pelo Artigo 69º do Decreto nº 1, de 25/12/1910*)

Artigo 69º do Decreto n.º 1, de 25/12/1910

A anulação do casamento produz, como o divórcio, entre os próprios cônju-ges, quanto a seus bens e pessoas, na parte não especialmente regulada, os mesmos efeitos que tem a dissolução por morte.

rights and obligations of the parents between themselves and in relation to their children.

Article 33 of Decree no. 1, of 25/12/1910

When a marriage is declared null and void with one of the spouses being to blame, this spouse shall lose all the advantages obtained from the other spouse, and will, nonetheless, be obliged to keep the promises made to the other spouse in the respective prenuptial agreement.

Article 1093

If the separated spouses do not reach an amicable agreement regarding the children, a family council shall be summoned, organised in accordance with article 1206. This council shall decide in accordance with article 1207, no. 3.

(*Revoked by Article 1 of Decree no. 20.431, of 24/10/1931*)

Article 1094

If both the separated spouses were in good faith, the father may not part the daughters from the mother's company, against her wishes.

Article 1095

The annulment of the marriage produces regarding the property of the spouses, the same effects as its dissolution by death.

(*Replaced and revoked by article 69 of Decree no. 1, of 25/12/1910*)

Article 69 of Decree no. 1, of 25/12/1910

The annulment of the marriage produces, as divorce, between the spouses themselves, regarding their property and persons and in whatever is not especially regulated, the same effects as its dissolution by death.

COMMENTARY TO ARTICLES 1086 TO 1095

Articles 65 and 66 of the Act on Marriage as a Civil Contract establish the exclusive competence of civil courts regarding suits to declare the nullity of or to annul a marriage, which is therefore the general rule in this respect. Such suits may only be handled by an ecclesiastic court if they have not yet been concluded therein, interested parties however being given the right to initiate them before a civil court. Consequently, article 66 clarifies that judgments delivered by an ecclesiastic court shall only be executed upon the signed request of both parties, once the remaining legal requirements have been met, and this requirement must include the renunciation of the renewal of the suit in a civil court.

It can thus be seen that the legislator of 1910 presumed that the judgments issued by an ecclesiastic court could not autonomously produce effects, which means they are not immediately executable, since the law required "*a request signed and authenticated by a public notary, submitted to the Directorate of Ecclesiastical Affairs of the Ministry of Justice, that they renounce the right to renew the legal action in the civil courts*". Since the civil court is the prevailing one, it must be explicitly excluded from the case in question, otherwise the judgment will not be effective.

A similar presumption of predominance of the civil court is found in article 1087 of the Civil Code, which specifies the scope of intervention of the civil court and of the ecclesiastic court. The ecclesiastic court may acknowledge and judge nullity. The civil court is responsible for "all the proceedings or act of inquiry which should be carried out". This is a curious division of labour, and it appears difficult to understand. How is it possible to acknowledge and judge a case without directly carrying out the proceedings required for the discovery of the truth? Apparently, after 1910, ecclesiastic intervention was still accepted, but it was gradually made devoid of content.

We should clarify which type of nullity should be judged in the civil court and which type should be so judged in the ecclesiastic court. We may distinguish three types of nullity in civil law, namely: legal inexistence, absolute nullity and relative nullity. We include in the first category marriages solemnised in violation of the conditions for their validity. This is the case of a marriage carried out by a false clerk of the civil registry, lacking therefore the formal requirement which is essential for its validity.

Absolute nullity occurs when the marriage is solemnised in violation of an extinctive impediment, in accordance with article 4 of the Act on Marriage as a Civil Contract.

It should further be clarified that, by its very nature, a nullity deriving from an extinctive impediment may not be validated. Articles 11 and 12 of the Act on Marriage as a Civil Contract presuppose that the impediment is still in place at the time the respective suit is initiated.

Article 18 of the Act on Marriage as a Civil Contract also mentions relative nullities, specifying that a marriage may be annulled if it is proven that consent was given in error or due to coercion.

Regarding nullities of Catholic marriages, Cunha Gonçalves justifies their existence, on page 71 of his manual (*Direitos da família e direitos das sucessões*), due to the fact that "*despite the meticulous care and the strict rules which the Catholic Church uses to organise marriage files, it is not rare for those rules to be broken, either by the carelessness of some priests, or by the ignorance or bad faith of certain fiancés. It is thus necessary to annul some marriages, so that the infringement of religious principle and of the sacrament does not go unpunished*".

The Concordat of 1940 provides in article XXV that ecclesiastic courts are exclusively competent to judge legal actions relating to the nullity of a Catholic marriage or to the dispensation of non-consummated marriages. What are, then, the grounds for the nullity of a Catholic marriage? Obviously, the legislator does not mean the possible violation of rules of Civil Law which must be observed for the validity of Catholic marriages, such as publicity through edicts.

The situation leading to the nullity must necessarily derive from the infringement of Canon Law, such as in the case of some of the impediments mentioned above: (1) a marriage contracted by persons who are not of nubile age (e.g. a marriage where the man is under 16 and the woman is under 14 years of age); (2) Impotence, be it known by the other party or not, be it absolute or relative; (3) consanguine relation, in accordance with canon 1.139 of the Code of Canon Law of 1917, which states that "*the Church never validates* in radice *a marriage solemnised against an impediment laid down in natural or divine law*"; (4) Affinity, just as in Civil Law, with the specificity that Canon Law allows for exemption in the case of lineal affinity, such as that between a father-in-law and a daughter-in-law; (5) Bigamy, which is considered an impediment of divine law, so as to preserve the unity which characterizes marriage; (6) Insanity has already been discussed above, in the comment to article 4, no. 4, of the Act on Marriage as a Civil Contract.

Regarding the procedure for the annulment of Catholic marriages, two procedures should be taken into account: the ordinary procedure and the summary procedure. Ordinary procedure follows the rules included in canons 1960-1989 of the Code of Canon law of 1917 and in the Instructions of the Sacred Congregation for the Sacraments of 15 August 1936. Summary procedure follows the provisions of canons 1990-1993 of the same Code and is used in imperatively determined situations where documental evidence suffices to assess the nullity.

The legislator has also foreseen putative marriages, i.e. marriages which the spouses and third parties claim have been lawfully solemnised. In accordance with article 69 of the Act on Marriage as a Civil Contract, the annulment of a marriage, as in the case of a divorce, leads to the same effects as dissolution due to death, regarding the spouses and their persons and property. It was thus stated that, in the event of a marriage being annulled, the children's situation is safeguarded, since they should not be disadvantaged,

considering that they were born in a situation of legality: during a marriage. Only incestuous children are excluded from this regime. The rules relating to this issue – article 1091 to 1094, as revised – also mention the fact of whether the marriage was contracted in good or bad faith. The aim is to encompass the situation of absence of guilt in the grounds for annulment, recognising that such good faith should be taken into account at the moment the marriage was solemnised, and that it cannot be required subsequently, in accordance with articles 30 and 31 of the Act on Marriage as a Civil Contract.

The mentioned provisions lead us to conclude that the legislator was moving in the direction of making annulment of a marriage equivalent to divorce, with regard to relations between the spouses and with their children. Regarding existing property, the regime is the same as is applicable in case of death. Further, the change introduced in article 1092 is worthy of praise, insofar as it stated that, even if one of the spouses was not in good faith, the marriage still produces its effect in relation to that spouse and to the children. Indeed, the legislator believed that a superior interest needed to be guarded in the name of the protection of the family thus constituted. However, article 33 of the Act on Marriage as a Civil Contract states that, when blame falls upon one of the spouses, he/she shall "*lose all the advantages obtained from the other spouse, and will, nonetheless, be obliged to keep the promises made in the respective prenuptial agreement*". The law thus sanctions the behaviour at the time of the solemnisation of the marriage with the obligation to comply with promises made in the prenuptial agreement. This solution is logical, considering that what is at stake is something preceding the fact which created the nullity.

Código Civil de 1867

SECÇÃO V
DA CONVENÇÃO DOS ESPOSOS RELATIVAMENTE AOS SEUS BENS

SUBSECÇÃO I
DISPOSIÇÕES GERAIS

Artigo 1096º

É lícito aos esposos estipular, antes da celebração do casamento, e dentro dos limites da lei, tudo o que lhes aprouver relativamente a seus bens.

Artigo 1097º

Estas convenções não terão validade, se não forem celebradas em escritura pública.

Artigo 1098º

Na falta de qualquer acordo ou convenção, entende-se, que o casamento é feito segundo o costume do reino, excepto se for contraído com quebra das disposições do artigo 1058º nºs 1 e 2º, porque, nesse caso, entender-se-á que os cônjuges são casados com simples comunhão de adquiridos.

Artigo 1099º

Se os esposos declararem simplesmente em seu contrato que pretendem casar-se segundo o costume do reino, observar-se-ão as disposições dos artigos 1108º a 1124º.

Civil Code of 1867

SECTION V
PRENUPTIAL AGREEMENT

SUBSECTION I
GENERAL PROVISIONS

Article 1096

It is lawful for the engaged persons to stipulate, before being married, and within the legal limits, all they deem fit with regard to their property.

Article 1097

These agreements shall only be valid if they are made in a deed.

Article 1098

In the absence of a prenuptial agreement, the marriage is considered to be entered into according to the custom of the kingdom, except if it is carried out in infringement of the provisions of article 1058, no.s 1 and 2, because, in this case, it shall be considered that the spouses are married in simple communion of acquired property.

Article 1099

If the engaged persons simply declare in their contract that they intend to be married according to the custom of the kingdom, the provisions of articles 1108 to 1124 shall be applied.

Artigo 1100º

Se os esposos declararem simplesmente, que querem casar-se com simples comunhão de adquiridos, observar-se-ão as disposições dos artigos 1130º a 1133º.

Artigo 1101º

Se os esposos declararem simplesmente, que pretendem casar-se com separação de bens, observar-se-ão as disposições dos artigos 1125ºa 1129º.

Artigo 1102º

Se os esposos pretenderem casar-se segundo o regime dotal, observar-se-ão as disposições dos artigos 1134ºa 1165º.

Artigo 1103º

Ter-se-á por não escrita qualquer convenção, que altere a ordem legal da sucessão dos herdeiros legitimários, ou os direitos e obrigações paternais e conjugais, consagrados por lei.

Artigo 1104º

A mulher não pode privar o marido, por convenção antenupcial, da administração dos bens do casal; mas pode reservar para si o direito de receber, a título de alfinetes, uma parte dos rendimentos de seus bens, e dispor dela livremente, contando que não exceda a terça dos ditos rendimentos líquidos.

Artigo 1105º

As convenções antenupciais não podem ser revogadas, nem alteradas por nova convenção, depois da celebração do casamento.

Article 1100

If the engaged persons simply declare that they intend to be married in simple communion of acquired property, the provisions of articles 1130 to 1133 shall be applied.

Article 1101

If the engaged persons simply declare that they intend to be married in separation of property, the provisions of articles 1125 to 1129 shall be applied.

Article 1102

If the engaged persons intend to be married in accordance with the dotal regime, the provisions of articles 1134 to 1165 shall be applied.

Article 1103

A prenuptial agreement that changes the legal order of succession of mandatory heirs, or parental and marital rights and obligations, prescribed by law, shall be considered as not having been written.

Article 1104

The wife may not deprive the husband, by prenuptial agreement, of the administration of the couple's property; but she can reserve for herself the right to receive, for pocket expenses, a part of her property's income, and dispose of it freely, so long as it does not exceed a third of the said net income.

Article 1105

Prenuptial agreements may not be revoked nor altered by a new agreement, after the marriage.

Artigo 1106º

As convenções antenupciais, estipuladas em país estrangeiro, entre súbditos portugueses, regulam-se pelas disposições da presente secção; podendo, todavia, as ditas convenções ser redigidas ou pela forma autêntica, estabelecida nesse pais, ou perante os agentes consulares do governo português que aí existirem.

Article 1106

Prenuptial agreements made in a foreign country, between Portuguese subjects, are governed by the provisions of this section; however, the said agreements may be made either in the authentic form required in that country, or before the local consular agents of the Portuguese government.

Artigo 1107º

Se o casamento for contraído em pais estrangeiro entre português e estrangeira, ou entre estrangeiro e portuguesa, e nada declararem nem estipularem os contraentes relativamente a seus bens, entender-se-á, que casaram conforme o direito comum do pais do cônjuge varão, sem prejuízo do que se acha disposto neste código relativamente a bens imóveis.

Article 1107

If the marriage is contracted in a foreign country between a Portuguese man and a foreign woman, or between a foreign man and a Portuguese woman, and if the contracting parties fail to declare or stipulate anything concerning their property, it shall be considered that they were married in accordance with the common law of the male spouse's country, not precluding what is foreseen in this code concerning immovable property.

COMMENTARY TO ARTICLES 1096 TO 1107

In the mentioned articles, the legislator presents the property regime in force between the spouses as a result of prenuptial agreements. It is thus understood that one of the important changes brought on by marriage is the fact that the property each spouse "brings" to the marriage is subject to a differentiated legal regime. On page 113 of his manual (*Direitos da famímila e direitos das sucessões*), Cunha Gonçalves defines a marital property regime as "*the ensemble of legal or conventional provisions by which the spouses are to be governed in their patrimonial relations, for the rest of their lives, or for as long as the marriage lasts, a regime which is also mandatory for the respective heirs and for third parties, such as the couple's creditors*". The property regime binds not only the respective parties, but also all those who establish legal relations relating to the couple's patrimony. The Civil Code of 1867 enshrined four property regimes: the regime of general communion (article 1099, together with articles 1108 to 1124), the regime of communion of acquired property (article 1100, together with articles 1130 to 1133), the regime of separation of property (article 1101, together with articles 1125 to 1129), and the dotal regime (article 1102, together with articles 1134 to 1165). The specificities of each of these regimes shall be commented upon later, but it should be highlighted that these regimes are not completely different from each other, since they share certain common characteristics.

The legislator thus allowed for two types of situations: a) one where the fiancés stipulate in a prenuptial agreement the property regime which they wish to apply to their marriage, within the limits defined by law (article 1096 and articles 1099 to 1102) and b) in the absence of an explicit or tacit agreement between the parties, the legislator determined the default legal regime to be that of the general communion of property. According to Cunha Gonçalves (page 117 of his manual), it is impossible for fiancés to make no

stipulation at all relating to the property regime, since "*the marriage record must always state which is the property regime chosen by the contracting parties, mentioning the document that proves this choice, if it exists*" (Code of Civil Registry of 1932, article 301, no. 7).

This option was set aside by the Portuguese Civil Code of 1966, article 1717 of which indicates communion of acquired property as the default regime. The signing of a prenuptial agreement must take place before the marriage itself, and be made in deed (article 1097). We would highlight that, if the marriage is then not contracted, the agreement becomes void due to the lack of its object, the initial expectations being frustrated. If the fiancés are legally incapable, an intervention from their parents or from whoever can overcome that incapacity is required, and the law also allows for the legitimation of a previously born child in that act.

The rules on the unalterable nature of these agreements (article 1105) are of particular interest and relevance, due to their consequences. On p. 115 and 116 of his manual, Cunha Gonçalves identifies five consequences to these rules, of which the most important are the following three: a) the interdiction to revoke is only applicable during the marriage, and revocation is admissible through donations between spouses and through a will; b) the choice for a different legal regime in the prenuptial agreement is not considered a change of legal regime, when the first regime to be chosen was dependent on a resolutive condition, since the second applicable regime is agreed before the marriage, not after it; and c) there is also no change of the legal regime stipulated in the prenuptial agreement in the case of a change of this agreement preceding the solemnisation of the marriage. What are the reasons for these rules? Possibly, as mentioned by Pires de Lima and Antunes Varela, on page 143 of their manual (*Noções Fundamentais*), the legislator intended to avoid that the power held by one of the spouses over the other be used to condition the other spouse's behaviour, leading him/her to stipulate a new agreement more economically favourable to the empowered spouse.

We would also highlight the limits established by the legislator with regard to the nullity of prenuptial agreements. Article 1103 states that the prenuptial agreement is null and void if it changes the order of mandatory heirs. This rule should be interpreted together with article 2042, which also excludes the possibility of "*renounc*[ing] *the succession of a living person, or dispos*[ing] *of or impos*[ing] *obligations upon rights that he/she may have over the inheritance*".

Código Civil de 1867

SUBSECÇÃO II
DO CASAMENTO SEGUNDO O COSTUME DO REINO

Artigo 1108º

O casamento, segundo o costume do reino, consiste na comunhão entre os cônjuges, de todos os seus bens presentes e futuros não exceptuados na lei.

Artigo 1109º

São exceptuados da comunhão:

1º) Os prazos de livre nomeação, enquanto não tomarem a natureza de fateusins hereditários, como se dirá no titulo respectivo;

2º) Os bens doados ou legados com a condição de incomunicabilidade, ou os subrogados em lugar deles;

3º) Os bens herdados pelo pai e pela mãe viúvos por morte do filho de outro matrimónio, existindo irmãos germanos do filho falecido;

4º) As duas terças partes dos bens que possuir o cônjuge, que passar a segundas núpcias, ou dos que herdar de seus parentes, tendo, de anterior matrimónio, filhos ou outros descendentes;

5º) Os vestidos e roupas do uso pessoal dos esposos, e as jóias esponsalícias dadas pelo esposo antes do casamento.

§ único) A incomunicabilidade dos bens, mencionados neste artigo, não abrange os frutos e rendimentos dos ditos bens, o valor das benfeitorias, nem o preço de prazo comprado na constância do matrimónio.

Civil Code of 1867

SUBSECTION II
MARRIAGE ACCORDING TO THE CUSTOM OF THE KINGDOM

Article 1108

A marriage according to the custom of the kingdom consists of the communion between the spouses of all their present and future property that is not excluded by law.

Article 1109

The following are excluded from the communion:

1) Freely appointed emphyteusis that are not perpetual, as shall be stated in the respective title;

2) Property donated or legated under the condition of non-communion or that which is subrogated in its place;

3) Property inherited by the widowed father and mother following the death of a child from another marriage, if the deceased child has full blood siblings;

4) Two thirds of the property of a spouse who is remarried, or of that inherited by the spouse from his/her parents if there are children or other descendants from a previous marriage;

5) Clothes and garments of personal use of the spouses, and betrothing jewelry given by the spouse before the marriage.

Single §) The non-communion of the property, mentioned in this article does not encompass the fruits and income of the said property, the value of the improvements, nor the price of the emphyteusis purchased during the marriage.

Artigo 1109º

São exceptuados da comunhão:

1º) Os prazos de livre nomeação, enquanto não tomarem a natureza de fateusins hereditários;

2º) Os bens doados ou deixados com a cláusula de incomunicabilidade, ou os subrogados em lugar deles;

3º) Os bens herdados pelo pai ou mãe bínubos, por morte do filho de outro matrimónio, existindo irmãos germanos do filho falecido, ou filhos de irmãos germanos falecidos, nos termos do artigo 1236º;

4º) A metade dos bens que possuir o cônjuge que passar a segundas núpcias, ou dos que herdar de seus parentes, ou receber por doação, tendo, de anterior matrimónio, filhos ou outros descendentes, nos termos do artigo 1235º;

5º) Os vestidos, roupas e outros objectos de uso pessoal e exclusivo dos esposos, e as jóias esponsalícias dadas pelos esposos antes do casamento.

§ único) A incomunicabilidade dos bens, mencionados neste artigo, não abrange os frutos e rendimentos dos ditos bens, o valor das benfeitorias, nem o preço de prazo comprado na constância do matrimónio.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1110º

São igualmente incomunicáveis as dividas dos esposos, anteriores ao matrimónio, excepto:

1º) Se o outro consorte estiver pessoalmente obrigado, ou quiser obrigar-se ao pagamento delas;

Article 1109

The following are excluded from the communion:

1) Freely appointed emphyteusis that are not perpetual;

2) Property donated or legated under the condition of non-communion or that which is subrogated in its place;

3) Property inherited by the twice--wed father or mother following the death of a child from another marriage, if there are full blood siblings of the deceased child or children of deceased full blood siblings, in accordance with article 1236;

4) Half of the property of a spouse who is remarried, or of that inherited by the spouse from his/her parents or received in donation, if there are children or other descendants from a previous marria-ge, in accordance with article 1235;

5) Clothes, garments and objects of the spouses' personal and exclusive use, and betrothing jewelry given by the spouses before the marriage.

Single §) The non-communion of the property, mentioned in this article does not encompass the fruits and income of the said property, nor the value of the improvements, nor the price of the emphyteusis purchased during the marriage.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1110

The debts of the spouses preceding the marriage are also excluded from the communion, except if:

1) The other consort is personally obliged or wants to oblige him/herself to pay such debts;

2º) Se tiverem sido aplicadas em proveito comum dos cônjuges.

2) If they were used for the common benefit of the spouses.

Artigo 1111º

Compreendem-se entre as dívidas anteriores, as que resultam de qualquer facto anterior dos consortes, ainda que a obrigação de pagar só venha a tornar-se efectiva na constância do matrimónio.

Article 1111

The above mentioned debts include those deriving from any previous fact of the consorts, even if the obligation to pay has only arisen during the marriage.

Artigo 1112º

Os credores pelas dívidas mencionadas nos artigos precedentes podem, todavia, fazer-se pagar, não chegando os bens trazidos para o casal pelo devedor, pela sua metade dos adquiridos, mas só depois de dissolvido o matrimónio, ou havendo separação.

Article 1112

The creditors of the debts mentioned in the preceding articles may, however, have themselves paid from the debtor's half of the acquired property, if the property the debtor brought to the couple is insufficient, but only after the marriage has been dissolved or the spouses are separated.

Artigo 1113º

As dívidas contraídas na constância do matrimónio por acto ou contrato de ambos os cônjuges, ou pelo marido, com outorga da mulher, ou pela mulher, com autorização do marido, ou pela mulher só, nos casos em que é permitido pelo artigo 1116º, são comunicáveis.

1º) Se os bens comuns não forem suficientes para o pagamento das dívidas, de que trata este artigo, ficarão a ele sujeitos os bens próprios de qualquer dos cônjuges.

2º) O cônjuge que for obrigado a pagar pelos seus bens próprios qualquer das referidas dívidas, ou a maior parte delas, terá regresso contra o outro, para ser indemnizado pelo bens próprios deste, se os tiver, do que pagou além da metade que lhe pertencia.

Article 1113

Debts incurred during the marriage by an act or contract of both spouses, or by the husband with the wife's consent, or by the wife with the husband's authorisation, or by the wife alone in the cases in which this is allowed by article 1116, are of joint liability.

1) If the common property is insufficient for the payment of the debts referred to in this article, the exclusive property of any of the spouses shall be liable for the said payment.

2) The spouse who is obliged to pay any of the mentioned debts from his/her exclusive property shall have a right to be compensated by the other spouse from his/her exclusive property, if there is any, for the part which he/she paid beyond the half ascribed to him/her.

Artigo 1114º

Às dívidas contraídas pelo marido na constância do matrimónio, sem outorga da mulher ficam obrigados os bens próprios do marido.

1º) Na falta de bens próprios do marido, as referidas dividas serão pagas pela meação dele nos bens comuns. Neste caso, porém, o dito pagamento só poderá ser exigido depois de dissolvido o matrimónio, ou havendo separação de bens entre os cônjuges.

2º) Mas se as dividas tiverem sido aplicadas em proveito comum dos cônjuges, ou contraídas na ausência ou no impedimento da mulher, não permitindo o fim para que foram contraídas, que se espere pelo seu regresso, ou pela cessação do impedimento, ficam os bens comuns obrigados ao pagamento delas.

Article 1114

The husband's exclusive property is liable for the debts incurred by him during the constancy of the marriage, without the wife's consent.

1) If the husband has no exclusive property, the above mentioned debts shall be paid from his moiety of the common property. In this case, however, the said payment may not be requested before the marriage has been dissolved or there has been a separation of the spouses' property.

2) But if the debts have been used for the common benefit of the spouses, or incurred in the absence or impediment of the wife, the end for which they were incurred not allowing to wait for the wife's return or the cessation of the impediment, the common property shall be liable for their payment.

Artigo 1114º

Pelas dívidas contraídas pelo marido na constância do matrimónio, sem outorga da mulher ficam obrigados os bens próprios do marido.

§ 1º) Na falta de bens próprios do marido, as referidas dividas serão pagas pela meação dele nos bens comuns. Neste caso, porém, o dito pagamento só poderá ser exigido depois de dissolvido o matrimónio, ou havendo separação de bens entre os cônjuges, podendo, contudo, o credor, para sua garantia, seguir com acção e execução até à penhora do direito e acção do marido nos bens do casal comum.

§ 2º) Mas se as dividas tiverem sido aplicadas em proveito comum dos cônjuges, ou contraídas na ausência ou no impedimento da mulher, não permitindo o fim para que foram contraídas, que se espere pelo seu regresso, ou pela cessação do impedimento, ficam os bens comuns obrigados ao pagamento delas.

Article 1114

The husband's exclusive property is liable for the debts incurred by him during the constancy of marriage, without the wife's consent.

§ 1) If the husband has no exclusive property, the above mentioned debts shall be paid from his moiety of the common property. In this case, however, the said payment may not be requested before the marriage has been dissolved or there has been a separation of the spouses' property; notwithstanding, the creditor may, for the sake of his/her guarantee, proceed with the legal action and execution up to the attachment of the right and interest of the husband over the couple's common property.

§ 2) But if the debts have been used for the common benefit of the spouses, or incurred in the absence or impediment of the wife, the end for which they were incurred not allowing to wait for the wife's return or for the cessation of the impediment, the

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1115º

Tanto em relação ao marido como em relação à mulher, o que fica disposto no artigo antecedente é também aplicável:

1º) Às dívidas provenientes de crimes ou de factos ilícitos, praticados por algum dos cônjuges;

2º) Às dívidas que onerarem bens incomunicáveis, não sendo por juros, foros, censos ou quinhões, vencidos depois da aquisição desses bens.

Artigo 1116º

A mulher não pode contrair dividas sem autorização do marido, excepto estando ele ausente ou impedido, e se o fim para que a divida foi contraída, não permite que se espere pelo seu regresso, ou pela cessação do impedimento.

Artigo 1117º

O domínio e posse dos bens comuns está em ambos os cônjuges, enquanto subsiste o matrimónio: a administração, porém, dos bens do casal, sem excepção dos próprios da mulher, pertence ao marido.

§ único) A mulher só pode administrar por consentimento do marido, ou no seu impedimento ou ausência.

Artigo 1118º

O marido só pode dispor livremente dos bens mobiliários do casal; mas se, sem consentimento da mulher, os alhear, common property shall be liable for their payment.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1115

The provisions of the preceding article are also applicable, with regard to both the husband and the wife:

1) To the debts deriving from crimes or unlawful facts, committed by one of the spouses;

2) To the debts encumbering property excluded from the communion, except if relating to interest, canon, annuity or shares accrued after acquiring the said property.

Article 1116

The wife may not incur debts without the husband's authorisation, except in the case of his absence or impediment and if the end for which the debt was incurred did not allow waiting for his return or for the cessation of the impediment.

Article 1117

The ownership and possession of the common property belongs to both spouses, while the marriage lasts; however, it is for the husband to manage the couple's property, including the wife's exclusive property.

Single §) The wife may only manage the property with the consent of the husband, or in the case of his impediment or absence.

Article 1118

The husband may dispose freely of the couple's movable property; but if he

ou obrigar por contratos gratuitos, será a importância dos bens assim alheados, levada em conta na meação dele.

Artigo 1119º

Os bens imobiliários, quer sejam próprios de alguns dos cônjuges, quer sejam comuns, não podem ser alheados, ou obrigados por qualquer forma, sem consentimento e acordo comum.

§ único) Nos casos de divergência, e de oposição mal cabida, pode o consentimento do consorte dissidente ser suprido por decreto judicial.

Artigo 1120º

O marido não pode repudiar herança alguma, sem outorga da mulher; mas a responsabilidade da aceitação pura, sem outorga da mulher, só pesará sobre a meação e bens próprios dele.

Artigo 1121º

A comunhão acaba pela dissolução do matrimónio, ou pela separação, em conformidade da lei.

Artigo 1122º

Falecendo um dos cônjuges, continuará o sobrevivo na posse e administração do casal, enquanto se não ultimarem as partilhas, excepto:

1º) Pelo que tocar aos bens incomunicáveis do falecido; neste caso, porém, se o legítimo sucessor for menor, continuará o pai ou a mãe na administração;

2º) Nos casos em que possa haver direito de retenção, por benfeitorias ou comunicação de preço.

sells or subjects it to any obligation through gratuitous contracts, without the wife's consent, the amount corresponding to such property shall be taken into account in his moiety.

Article 1119

Immovable property, be it exclusive to one of the spouses or common, may not be sold or subject to any obligation without common consent and agreement.

Single §) In case of divergent opinions, and of unfounded opposition, the consent of the dissenting spouse may be overcome by a court order.

Article 1120

The husband may not renounce any inheritance, without the wife's consent; but the liability for the pure acceptance of an inheritance, without the wife's agreement, shall rest only upon his moiety and upon his exclusive property.

Article 1121

The communion ends by the dissolution of the marriage, or by separation, in accordance with the law.

Article 1122

If one of the spouses dies, the surviving one shall continue to have possession and to manage the couple's property, until the partition is concluded, except:

1) Regarding the deceased's property excluded from the communion; in this case, however, if the legitimate successor is a minor, the father or mother shall continue to manage the said property.

2) In cases where there may be a lien, due to improvements or communion regarding the price.

Artigo 1123º

Os bens da comunhão serão repartidos entre os cônjuges ou seus herdeiros, com a devida igualdade, conferindo cada um o que dever á massa comum.

Article 1123

The property of the communion shall be equally split between the spouses or their heirs and each one shall account for his/her liabilities to the common pool.

Artigo 1124º

A mulher será paga, primeiro que o marido, de seus créditos, e se os bens comuns não chegarem para a sua inteira indemnização, responderá o marido pelos seus próprios, salvo se a divida lhe não for imputável. O marido não gozará de igual regresso contra os próprios da mulher.

Article 1124

The wife shall be paid, before the husband, for her credits, and if the common property is insufficient to fully compensate her, the husband shall be liable from his exclusive property, except if he is not responsible for the debt in question. The husband shall not have a similar right against the wife's exclusive property.

COMMENTARY TO ARTICLES 1108 TO 1124

These articles establish the rules for the regime of general communion, or according to the custom of the kingdom, so called because it was the legal regime in force during the Monarchy, more specifically since the "Ordenações Manuelinas", Book IV, Title VI, where it was stated *"that all marriages carried out in our kingdoms and lands are to be considered as having been entered into on the basis of equal shares, except when the parties stipulate otherwise"*. Article 1098 itself indicates that this is the default regime, something which was only set aside by articles 53, 54, 55 and 56 of the Act on Marriage as a Civil Contract, where the regime of separation of property is imposed, considering the special circumstances under which marriages are carried out. In civil marriages *in extremis*, the default regime is that of absolute separation when one of the spouses dies before it is confirmed, in accordance with article 312 of the Code of Civil Registry of 1932. The Code of Civil Registry of 1958 followed a similar solution in articles 181 and 186, read together with article 175.

What are the characteristics of this regime? Article 1108 enshrines the general rule on this issue; according to this article, this regime is characterised by the communion between the spouses of all present and future property, which is not excluded by law. It should be clarified that this communion encompasses not only property, but also debts, and that future property is only that which is acquired by the spouses up to the interruption or dissolution of the marriage. The communion also does not encompass assets excluded by law, or those excluded by the parties' prenuptial agreement.

Article 1109 states which assets are excluded from the marital communion, not including those where a close connection exists, understood here as a family relation. See the case of numbers 2 and 3 of this article, where it is understood that the special family relation

which exists in relation to one of the spouses is not transmissible to the other spouse, so as to respect the wishes of the donor or testator. Therefore, the property in question belongs to only one of them, being excluded from the marital communion. On pages 121 and 122 of his manual (*Direitos da família e direitos das sucessões*), Cunha Gonçalves justifies the exception of the above mentioned number 2 thus: "*... Although the testator may not deprive the heir of his/her legitimate portion, he/she may exclude the heir's spouse from it, since the spouse is not a mandatory heir. All the more so, a donor or testator who is not an ascendant may exclude the spouse from the communion*" (our underlining).

Number 5 of article 1109 further excludes from the marital communion clothes, garments and other objects of the spouses' personal and exclusive use, as well as betrothing jewelry given by the spouses before the marriage. It should be noted that this provision only encompasses clothes meant for personal use, and not those which result from decorations, or are specific of a certain profession, such as the robe of a magistrate, a lawyer or a doctor.

Articles 1110 to 1116 contain the legal regime applicable to debts. The legislator distinguished between debts contracted before and after the marriage. Debts contracted before the marriage are excluded from the communion, only the property of the debtor being liable for their payment, in accordance with article 1112. The reason for is that they precede the solemnisation of the marriage and they are presumed to be for the exclusive benefit of the debtor spouse. Article 1110 allows two exceptions to this exclusion from the communion, based on the other spouse taking on the debt, due to its usefulness for the couple. Once again, the safeguarding of the conjugal society is affirmed as the main principle concerning family legal relations. In the latter case, all common property is liable for the payment of the debt.

Debts contracted after the marriage follow the rule of joint liability of both spouses, being included in the communion (article 1113). The debts mentioned in articles 1114 (contracted by the husband without the wife's consent), 1115 and 1119 (debts contracted by the

wife without a court order replacing the husband's authorisation) are, however, an exception to this rule. On page 123 of his manual, Cunha Gonçalves uses two classifications to describe when these debts are to be included in the communion, considering their object: household expenses and administration expenses, the first including *inter alia* expenses to feed, dress and house the family, as well as to educate the children, and the latter including repair of buildings, taxes, fees and similar expenses.

The couple's common property is liable for the debts included in the communion. If such property is insufficient or inexistent, the exclusive property of either spouse is subject to attachment – article 1113, §§ 1 and 2. The exclusive property of the debtor is liable for debts excluded from the communion; in the absence of such property, these debts are paid by the debtor's moiety of the common property, even though such payment is only effective after the dissolution of the marriage or the separation of the spouses' property.

It should be noted that the legislator considered the wife as having a lesser capacity to contract debts, in accordance with the limitations referred to in article 1185 *et seq*. Accordingly, the general principle is that the wife could only contract debts insofar as she was authorised to do so by the husband. This authorisation could only be excluded in situations where the following conditions were both met: a) the husband's absence or impediment, b) if the aim for which the debt was contracted did not allow to wait for the husband's return or for the termination of the impediment. It is once again a limitation imposed on the wife, considering her lesser capacity to assure the economic management of marital life rationally and diligently.

With regard to competence to administer common property, article 1117 states that it belongs to both spouses, even though it was known that, in practice, this administration was left up to the husband. It should be noted, however, that a married woman administered her exclusive property, in accordance with articles 1104 and 1117.

Concerning the alienation of property, the legislator set up different rules for movable property and for immovable property. Regarding movable property, article 1118 enshrined the rule of unrestricted alienation by the husband, *"but if he sells or subjects it to any obligation through gratuitous contracts, without the wife's consent, the amount corresponding to such property shall be taken into account in his moiety"*. This is understandable, taking into account that the husband's administration of this property must take in account the couple's common good, from an economic perspective, which would not be served by a gratuitous alienation of the property. The legislator therefore imposed upon the husband, as the administrator, a larger responsibility in the management of the couple's movable property. Article 1471 introduces an exception to the above mentioned article, since it allows for donations of movable property or currency made by the husband without the wife's consent not to be deducted from the moiety when they remunerate services provided to the couple, or have a small economic value. A contrary provision is found in article 1480.

With regard to the alienation of immovable property, the legislator imposed a sterner regime, imposing in article 1119 a mandatory consent and common agreement for the alienation. This provision should be read together with article 1191, relating to the husband alienating the said property or moving the court, the consent of the wife being required thereto.

Concerning the dissolution of the marital regime, article 1121 states that this occurs with the dissolution of the marriage, or with separation, in accordance with the law (article 1121). It should also be highlighted, as do Pires de Lima and Antunes Varela on page 165 of their manual (*Noções Fundamentais*), that an annulment or declaration of nullity terminates the communion. This is laid down in article 69 of the Act on Marriage as a Civil Contract. Also, the absence of one of the spouses may determine the termination of the marital regime, in accordance with article 82 of the Civil Code.

Código Civil de 1867

SUBSECÇÃO III
DA SEPARAÇÃO DE BENS OU DA SIMPLES COMUNHÃO DE ADQUIRIDOS

Artigo 1125º

Se os esposos declararem que querem casar-se com separação de bens, não se haverá por excluída a comunhão nos adquiridos, sem expressa declaração.

Artigo 1126º

São aplicáveis a este contrato as subsequentes disposições dos Artigos 1130º, 1131º e 1132º.

Artigo 1127º

Nos casamentos feitos com separação de bens, cada um dos cônjuges conserva o domínio de tudo quanto lhe pertence, podendo dispor dos respectivos bens livremente, salva a restrição imposta no Artigo seguinte.

Artigo 1128º

É aplicável à mulher, quanto aos seus bens mobiliários separados da comunhão, e à terça parte dos seus rendimentos, o que no Artigo 1118º fica disposto, relativamente ao marido, acerca de bens mobiliários comuns.

§ único) Exceptuam-se desta disposição os capitais postos a juros, aos quais, bem como às outras duas terças partes dos rendimentos, e aos bens imobiliários, é aplicável o que fica disposto no Artigo 1119º.

Civil Code of 1867

SUBSECTION III
SEPARATE PROPERTY OR SIMPLE COMMUNION OF ACQUIRED PROPERTY

Article 1125

If the engaged persons declare that they intend to be married in the regime of separate property, the communion of acquired property shall not be considered excluded, unless it is explicitly excluded.

Article 1126

The provisions of articles 1130, 1131 and 1132 are applicable to this contract.

Article 1127

In marriages under the regime of separate property, each spouse retains the ownership of all that belongs to him/her, being entitled to freely dispose of this property, with the exception foreseen in the following article.

Article 1128

The provisions of article 1118 regarding the husband in relation to the movable common property are applicable to the wife, in relation to her movable property that is separate from the communion, and in relation to the third part of her income.

Single §) This provision shall not be applicable to capital earning interest, to which article 1119 shall be applicable; this article shall also be applicable to the remaining two thirds of the income and to immovable property.

Artigo 1129º

Acerca das dívidas dos cônjuges, observar-se-á o seguinte:

1º) As dívidas anteriores ao casamento serão pagas pelos bens do cônjuge devedor;

2º) As dívidas contraídas durante o matrimónio serão pagas por ambos os cônjuges, se conjuntamente a isso se obrigaram;

3º) Se se tiver obrigado só o marido, ou só a mulher com autorização dele, respondem pelas obrigações contraídas todos os bens próprios do cônjuge que se obrigou;

4º) Se a mulher se tiver obrigado sem autorização do marido, só respondem pelas obrigações contraídas todos os bens próprios dela, cuja livre alienação lhe é permitida pelo Artigo 1128º.

Article 1129

The following shall apply to the debts of the spouses:

1) Debts preceding the marriage shall be paid with the property of the debtor spouse;

2) Debts incurred during the marriage shall be paid by both spouses, if they so jointly obliged themselves;

3) If only the husband has incurred the obligation, or only the wife with his permission, all the exclusive property of the obliged spouse shall be liable for the obligations so incurred.

4) If the wife has incurred the obligation without the husband's permission, only her exclusive property which she is allowed to freely dispose of in accordance with article 1128 shall be liable for the obligations so incurred.

Artigo 1130º

Se os esposos declararem, que pretendem casar-se com simples comunhão de adquiridos, os bens, que cada um dos mesmos cônjuges tiver ao tempo do casamento, ou depois houver por sucessão, ou por outro qualquer título gratuito, ou por direito próprio anterior, serão considerados e regidos como o são os bens próprios, quando o casamento é feito segundo o costume do reino.

Article 1130

If the engaged persons declare that they intend to be married in simple communion of acquired property, the property which each spouse has at the time of the marriage, or acquires later through succession or through any other gratuitous manner, or through a preceding exclusive right, shall be considered and governed as exclusive property, when the marriage is made in accordance with the custom of the kingdom.

Artigo 1131º

Os esposos com simples comunhão de adquiridos devem, antes do seu casamento, inventariar, ou no contrato antenupcial, ou em outra escritura ou auto público, os bens que levam para o casal, sob pena de estes serem havidos como adquiridos.

Article 1131

The engaged persons in simple communion of acquired property must, before the marriage, make an inventory, in the prenuptial agreement or in another deed or document executed under seal, of the property which they are bringing into the couple, otherwise such property shall be considered as having been acquired after the marriage.

§ único) A anterior disposição abrangerá os bens supervenientes, mencionados no artigo precedente, se o inventário deles não for feito dentro de seis meses, depois que vieram ao poder do cônjuge a quem pertencem.

Single §) The preceding provision shall encompass property acquired subsequently, mentioned in the previous article, if its inventory is not made before six months have elapsed since the property came into the possession of the spouse to whom it belongs.

Artigo 1131º

Os esposos com simples comunhão de adquiridos devem, antes do casamento, inventariar, ou no contrato antenupcial, ou em outra escritura ou auto público, os bens que levam para o casal, sob pena de estes serem havidos como adquiridos.

§ único) A anterior disposição abrangerá os bens supervenientes, mencionados no artigo precedente, e os bens ilíquidos levados para o casal, se o inventário deles não for feito dentro de seis meses, depois que vieram, especificadamente, ao poder do cônjuge a quem pertencem, podendo esse inventário ser feito por escritura ou auto público, ou pelo balanço da herança apresentado na repartição de finanças.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Article 1131

The engaged persons in simple communion of acquired property must, before the marriage, make an inventory, in the prenuptial agreement or in another deed or document executed under seal, of the property they are bringing into the couple, otherwise such property shall be considered as having been acquired after the marriage.

Single §) The preceding provision shall encompass property acquired subsequently, mentioned in the previous article, and the gross property brought into the couple, if its inventory is not made before six months have elapsed since the property came specifically into the possession of the spouse to whom it belongs; the said inventory may be made through a deed or document executed under seal, or through a list of the inheritance produced before the Revenue Office.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Artigo 1132º

A comunhão dos adquiridos acaba nos mesmos casos, em que termina a comunhão universal.

Article 1132

The communion of the acquired property ends in the same cases as universal communion does.

Artigo 1133º

As dívidas dos cônjuges sócios nos adquiridos, sendo anteriores ao

Article 1133

The debts of spouses sharing acquired property, if they precede the marriage,

casamento, se forem pagas pelos adquiridos, serão levadas em conta na parte respectiva ao cônjuge devedor.

and if they are paid for with acquired property, shall be taken into account in the debtor spouse's respective part.

COMMENTARY TO ARTICLES 1125 TO 1133

The separation regime instituted by the Civil Code of 1867 reflects the time in which it was created, namely the philosophy behind the minds of its drafters. The Portuguese Civil Code reveals the husband's dominant presence in relation to the wife, specifically regarding the scope of rights, under the assumption of male intellectual superiority for the management of the conjugal society.

The Code includes two types of separation. *Stricto sensu* separation, encompassing the simple separation of property, and absolute separation and communion of acquired property (see Cunha Gonçalves, page 134 *et seq.* of *Direitos da família e direitos das sucessões*). In the first case – simple separation of property – the fiancés declare that they intend to be married with separate property. One should keep in mind that this intention does not exclude the communion of acquired property in accordance with article 1125, an explicit declaration to that effect being required. In the case of simple separation, each spouse remains the exclusive owner of the property which he/she already owned when he/she was married, as well as of the property acquired gratuitously during the marriage. With absolute separation, wherein the fiancés explicitly state their intention to set aside the regime of communion of acquired property, the property in question is effectively separated. The exclusive property of the spouses is that which they bring to the marriage, as well as that which they acquire, gratuitously or not, during the marriage. On page 137 of his manual, Cunha Gonçalves notes that the legislator made no provisions in relation to "*the nature of the income of the couple's property, in the regime of absolute separation*". This issue has been widely debated, but, under article 1128, the wife may only dispose of a third of this income without the husband's authorisation, such authorisation being required to dispose of the remaining two thirds, as well as for the alienation of interest earning capital and of immovable property.

It should, however, be highlighted that the author in question eventually solved the issue through analogy. Thus, he resorted to the provisions of articles 1109, 1153, 1162 and 1226 to conclude that the income of both spouses' exclusive property is common.

With regard to the disposition of property, article 1127 refers that each spouse remains in control of the property, and may dispose of it without the other spouse's consent. It should, however, be noted that the rule in question must be interpreted restrictively, insofar as article 1128 limits the husband's power to alienate property. Article 1191 also runs counter to the provisions of article 1127, insofar as it prohibits the husband from selling immovable property without the wife's consent, even when such immovable property is his exclusive property.

As for debts, in the separation regime, the applicable rules are found in article 1129: a) only the debtor spouse is liable for debts preceding the marriage, unless they were contracted for the common benefit of the couple; b) both spouses are liable for debts contracted during the marriage, if they so stipulated.

The separation of property regime terminates upon the dissolution of the conjugal society due to death, divorce, annulment or separation of persons and property, to name only the main causes.

The regime of communion of acquired property, the second type within the separation regime, is a very specific type of regulation. We cannot say that it is truly an autonomous property regime, since it is more of a change to the regime of general communion of property as a result of an agreement between the spouses. A fundamental aspect of this regime is the time when the respective asset was acquired, an essential element to determine its nature: exclusive or common.

Regarding exclusive property, the legislator stated, in article 1130, that this would be the property held by the spouses at the time of the solemnisation of the marriage, be it movable or immovable and regardless of whether it was acquired gratuitously or not. Property acquired after the solemnisation of the marriage, gratuitously

or as a result of a previous right of the spouse, is also exclusive. All other property would be common.

As for debts, as in the regime of the general communion of property, article 1133 distinguishes between debts included in the communion and debts excluded from the communion; in the case of the latter, the exclusive property of the debtor spouse and, in the absence of such property, his/her moiety in the common property is liable for their payment. Only common property may be executed for debts included in the communion and, in their absence, the exclusive property of each of the debtors.

SUBSECÇÃO IV
DO REGIME DOTAL

Artigo 1134º

Se os esposos pretenderem casar-se segundo o regime dotal e assim o declararem em seu contrato, observar-se-ão as seguintes disposições.

Artigo 1135º

A mulher pode dotar-se a si própria com os seus bens, ou ser dotada por seus pais ou por outrem, contando que todos os interessados intervenham, por si ou por seus procuradores, no mesmo contrato.

Artigo 1136º

Podem ser objecto de dote tanto os bens mobiliários, como os imobiliários, e tanto os bens que a mulher já possui, como os que de futuro venha a adquirir por testamento ou *ab-intestato*.

Artigo 1137º

Consistindo o dote em bens presentes líquidos, serão estes especificados no contrato de casamento, ou em qualquer documento ou acto público, anterior ao mesmo contrato; e, sendo ilíquidos, mencionar-se-á no contrato a proveniência do direito a eles, devendo, neste caso, especificar-se quando se liquidarem, sob pena de serem havidos como bens comuns.

§ único) Abrangendo o dote bens futuros, serão estes devidamente especificados dentro de seis meses depois que vierem a poder do dotado; aliás serão também havidos como bens comuns.

SUBSECTION IV
DOTAL REGIME

Article 1134

If the engaged persons intend to be married under the dotal regime and so declare in their contract, the following provisions shall be applied.

Article 1135

The wife may endow herself with her own property, or be endowed by her parents or by others, as long as all the interested parties intervene, personally or through their attorneys, in the same contract.

Article 1136

Both movable and immovable property, as well as property already owned by the wife and property she may subsequently acquire through testamentary or intestate succession, may be the object of a dowry.

Article 1137

If the dowry consists of ascertained property, such property shall be specified in the marriage contract, or in any other document or public act preceding the said contract; and, if it is not ascertained, the contract shall mention the source of the right to such property, as well as specify when it will be ascertained, otherwise it shall be considered common property.

Single §) If the dowry encompasses future property, such property shall be duly specified at the latest six months after it has come into possession of the endowed; otherwise, it shall also be considered common property.

Artigo 1138º

Se o dote consistir em bens móveis, será declarado o valor deles no contrato dotal, sob a mesma cominação expressa no artigo precedente.

Artigo 1139º

Os esposos podem estipular na escritura dotal fiança, ou qualquer outra caução, ou designar os bens em que deve recair a hipoteca.

Artigo 1140º

Se, no dote, quer este seja constituído pela mulher, quer pelo marido, quer por outrem, for incluído dinheiro, será este convertido dentro de três meses, contados desde o casamento, em bens imóveis, inscrições de assentamento, ou acções de companhias, ou dado a juros por escritura publica, com hipoteca. O dote em dinheiro, que não for convertido na forma sobredita, ter-se-á como não existente, e entrará na comunhão.

Artigo 1141º

Durante o matrimónio, não pode constituir-se dote nem aumentar-se o constituído, salvo se for por efeito de acessões naturais.

Artigo 1142º

Se o dote tiver sido constituído pelos pais ou pelos avós da dotada, serão os dotadores responsáveis pela importância dele, no caso de evicção.

Artigo 1143º

Se o dote tiver sido constituído por qualquer outra pessoa, esta só responderá

Article 1138

If the dowry consists of movable property, its value shall be declared in the dotal contract, otherwise the consequence foreseen in the preceding article shall apply.

Article 1139

The engaged persons may stipulate in the dotal deed a security, or any other guarantee, or stipulate the property which may be charged with a mortgage.

Article 1140

If the dowry, be it constituted by the wife, by the husband or by a third party, includes money in cash, this shall be converted, at the latest three months after the marriage, into immovable property, government bonds or company shares, or invested to earn interest through a deed, subject to mortgage. The dowry in cash which is not converted in this manner, shall be considered as non existent, and shall become a part of the communion of property.

Article 1141

During the marriage, one may not constitute a dowry or increase one already constituted, except due to natural accession.

Article 1142

If the dowry has been constituted by the parents or grandparents of the endowed woman, the endowers shall be liable for its value, in case of eviction.

Article 1143

If the dowry has been constituted by any other person, such person shall only

pela evicção, se houver procedido de má fé, ou se a responsabilidade tiver sido estipulada.

Artigo 1144º

O dote estipulado é devido com todos os seus rendimentos desde a celebração do casamento, se outra coisa não tiver sido convencionada.

Artigo 1145º

Se o casamento durar dez anos, contados desde o vencimento dos prazos assinados para o pagamento do dote, a mulher ou os seus herdeiros, poderão exigir do marido a restituição dele, no caso de dissolução do casamento ou de separação de bens, sem que sejam obrigados à prova de que o dote foi efectivamente pago, excepto se o marido provar, que fez inúteis diligências para o receber.

Artigo 1146º

Se o dote for constituído por pai e mãe conjuntamente, sem declaração da parte com que cada um contribui, entender-se-á, que cada um deles se obrigou por metade.

Artigo 1146º

Se o dote for constituído por pai e mãe conjuntamente, em bens comuns, sem declaração da parte com que cada um contribui, entender-se-á, que cada um deles se obrigou por metade.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1147º

Se os pais não declararem, que dotam por suas terças, será o dote levado em conta na legítima da dotada, e só se deduzirá da terça dos pais aquilo, em que o dito dote exceder a legitima.

be liable for the eviction if he/she has acted in bad faith, or if the liability was so stipulated.

Article 1144

The stipulated dowry is owed with all its income since the marriage, in the absence of a differing agreement.

Article 1145

If the marriage lasts 10 years, starting from the end of the deadline for the payment of the dowry, the wife or her heirs may demand its restitution from the husband, in the case of the dissolution of the marriage or of the separation of property, not being obliged to prove that the dowry was indeed paid, except if the husband proves that he made useless attempts to collect it.

Article 1146

If the dowry was constituted jointly by a father and mother, without stating the part in which each of them contributed, it shall be understood that each of them is liable for half.

Article 1146

If the dowry was constituted jointly by a father and mother, with common property, without stating the part which each of them contributed, it shall be understood that each of them is liable for half.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1147

If the parents do not declare that the dowry is to come out of their disposable thirds, the dowry shall be taken into account in the endowed's legitime, and only whatever exceeds it shall be deducted from the parents' disposable thirds.

Artigo 1147º

Se os pais não declararem, que dotam pelas suas cotas disponíveis, será o dote levado em conta na legítima da dotada, e só se deduzirá das cotas disponíveis dos pais aquilo, em que o dito dote exceder a legitima.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1148º

O marido pode dispor livremente dos bens mobiliários dotais, salvo se outra coisa for estipulada; mas responderá pelo seu valor.

Artigo 1149º

Os bens imobiliários são inalienáveis, excepto se for:

1º) Para dotar e estabelecer os filhos comuns, consentindo ambos os cônjuges;

2º) Para alimentos da família, aos quais se não possa prover de outro modo;

3º) Para pagamento de dívidas da mulher, ou de quem a dotou, anteriores ao casamento, se constarem de documento autêntico ou autenticado, e não poderem ser pagas por outros bens;

4º) Para a reparação indispensável de outros bens dotais;

5º) No caso de serem por sua natureza inseparáveis de bens não dotais;

6º) Por troca de outros bens de valor igual ou maior, ficando os ditos bens subrogados em lugar dos alheados;

7º) Nos casos de expropriação por utilidade publica.

§ 1º) O que se dispõe neste artigo nºs 1º, 2º, 3º e 4º é aplicável aos bens imobiliários dotais, ficando, nesses casos, o marido exonerado de toda a

Article 1147

If the parents do not declare that the dowry is to come out of their disposable portions, the dowry shall be taken into account in the endowed's legitime, and only whatever exceeds it shall be deducted from the parents' disposable portions.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1148

The husband may freely dispose of the dotal movable property, unless it is stipulated otherwise; but he shall be liable for its value.

Article 1149

The immovable property may not be alienated, except when it is:

1) To endow and settle common children, with both spouses' consent;

2) For the maintenance of the family when the same cannot be otherwise provided;

3) To pay the wife's debts, or those of the person who endowed her, which precede the marriage, if they are recorded in an authentic or authenticated document and cannot be paid with other property;

4) To carry out the indispensable repair of other dotal property;

5) By its very nature inseparable from non-dotal property;

6) To exchange it for other property of equal or greater value, the said property being subrogated in place of that which was alienated;

7) A case of expropriation due to public utility.

§ 1) What is foreseen in no.s 1 to 4 of this article is applicable to dotal immovable property, the husband

responsabilidade por eles. Igualmente fica isento da responsabilidade, quando o produto de alienação dos bens mobiliários dotais, que pelo artigo antecedente é permitida ao marido, tiver aplicação a algum dos fins especificados nos referidos números.

§ 2º) Nos casos dos nºs 1º, 2º, 3º, 4,º, 5º e 6º, não poderá ter lugar a alienação sem autorização judicial.

§ 3º) A venda dos bens dotais, quando venha a ocorrer, será feita em hasta pública.

§ 4º) *A alienação, de que trata o nº 1, não excederá a legitima do filho, que se quiser dotar ou estabelecer, acrescentando a essa legítima a terça de seus pais, tudo calculado em relação à época, em que a alienação houver de fazer-se pelo modo porque o seria, se, por morte dos pais, nesse tempo se dissolvesse o matrimónio.*

§ 4º) A alienação, de que trata o nº 1, não excederá a legitima do filho, que se quiser dotar ou estabelecer, acrescentando a essa legítima a metade de seus pais, tudo calculado em relação à época, em que a alienação houver de fazer-se pelo modo porque o seria se, por morte dos pais, nesse tempo se dissolvesse o matrimónio.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

§ 5º) Nos casos dos nºs 5º e 7º, o produto dos bens alheados será aplicado à aquisição de outros de igual valor, que lhes ficarão subrogados.

Artigo 1150º

Os bens imobiliários dotais, alheados com quebra do que fica exposto no artigo precedente, podem ser reivin-

being, in such cases, exonerated from any liability in this respect. He shall also not be liable when the product of the alienation of the dotal movable property, allowed by the preceding article, is used for one of the purposes specified in the above mentioned numbers.

§ 2) In the cases of no.s 1 to 6, the property may not be alienated without leave of court.

§ 3) The sale of the dotal property, when it occurs, shall be carried out at public auction.

§ 4) *The alienation referred to in no. 1 shall not exceed the legitimate portion of the child which is going to be endowed or established, adding to the said legitime the available thirds of the parents, all calculated in relation to the time at which the alienation would have to be carried out in the manner it would be so if, due to the death of the parents, the marriage was dissolved at that time.*

§ 4) The alienation referred to in no. 1 shall not exceed the legitimate portion of the child which is going to be endowed or established, adding to the said legitime the available half of the parents, all calculated in relation to the time at which the alienation would have to be carried out in the manner it would be so if, due to the death of the parents, the marriage was dissolved at that time.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

§ 5) In the cases of no.s 5 and 7, the product of the alienated property shall be used to acquire other property of equal value, which shall be subrogated to it.

Article 1150

The dotal immovable property alienated in infringement of the provisions of the preceding article may

dicados pela mulher, tanto na constância do matrimónio, como depois da sua dissolução, ou depois de haver separação, ainda que ela consentisse na alienação.

§ 1º) Se os bens alheados forem mobiliários, a reivindicação de que trata este artigo, só será admitida dadas as seguintes circunstâncias:

1º) De não ter o marido bens, com que responda pelo valor dos bens alheados;

2º) De terem sido, tanto as alienações feitas pelo marido como as subsequentes entre terceiros, por titulo gratuito ou com má fé.

§ 2º) O direito de reivindicação passa aos herdeiros da mulher.

be recovered by the wife, both in the constancy of the marriage and after its dissolution, or following a separation, even if she consented to the alienation.

§ 1) If it was movable property that was alienated, the recovery dealt with in this article shall only be admissible in the following circumstances:

1) If the husband does not have property with which to compensate for the value of the alienated property;

2) When the alienations carried out by the husband and subsequent ones between third parties were made gratuitously or in bad faith.

§ 2) The right to recover the property passes to the wife's heirs.

Artigo 1151º

O marido que alhear, ou obrigar os bens dotais, nos casos em que lhe não é permitido fazê-lo, fica responsável por todas as perdas e danos, tanto para com a mulher, como para com terceiros, a quem não haja declarado a natureza dos bens alheados.

Article 1151

The husband who alienates or imposes obligations upon dotal property, in cases in which he is not allowed to do so, is liable for all the losses and damage, both to the wife and to third parties to whom he did not declare the nature of the alienated property.

Artigo 1152º

Os bens imóveis dotais não podem ser prescritos durante o matrimónio, conforme o que fica disposto no artigo 551º. Os móveis dotais podem ser prescritos, mas responde por eles o marido.

Article 1152

Dotal immovable property may not be acquired by prescription during the marriage, in accordance with article 551. Dotal movable property may be acquired by prescription, but the husband is liable for it.

Artigo 1153º

Os bens que a mulher, casada segundo o regime dotal, possuir ou adquirir depois, e que não forem havidos como dotais, ficarão pertencendo exclusivamente à mulher como próprios, mas os

Article 1153

The property held or acquired subsequently by the wife, married under the dotal regime, and which is not considered dotal property, shall belong exclusively to the wife, but its income

rendimentos deles serão comuns, salvo havendo estipulação em contrário.

shall be common, in the absence of a different stipulation.

Artigo 1154º

A mulher não goza do direito de hipoteca quanto aos bens mencionados no artigo precedente, nem de privilégio, que lhe não possa competir por direito comum.

Article 1154

The wife does not enjoy the right of mortgage over the property mentioned in the preceding article, nor any privilege which cannot be hers under common law.

Artigo 1155º

Os bens do marido, casado segundo o regime dotal são havidos como próprios.

Article 1155

The property of the husband married under the dotal regime shall be considered as exclusive property.

Artigo 1155º

Os bens do marido, casado segundo o regime dotal são havidos por próprios, sendo-lhes aplicável o disposto no artigo 1131º e seu parágrafo.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Article 1155

The property of the husband married under the dotal regime shall be considered as exclusive property, the provisions of article 1131 and its paragraph being applicable to it.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Artigo 1156º

Dissolvido o matrimónio, ou havendo separação, será o dote restituído à mulher, ou a seus herdeiros, com quaisquer outros bens, que directamente lhe pertencerem.

Article 1156

Once the marriage is dissolved, or separation occurs, the endowment shall be returned to the wife, or to her heirs, along with any other property directly belonging to her.

Artigo 1156º

Dissolvido o matrimónio, ou havendo separação, será o dote restituído à mulher, ou a seus herdeiros, com quaisquer outros bens, que directamente lhe pertencerem, livres de quaisquer hipotecas ou ónus reais que neles ou nos seus rendimentos tenham sido impostos durante o matrimónio, ficando os bens livres do respectivo ónus dotal só por falecimento de qualquer dos cônjuges.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Article 1156

Once the marriage is dissolved, or separation occurs, the dowry shall be returned to the wife, or to her heirs, along with any other property directly belonging to her, free from any mortgages or *in rem* burdens imposed upon it or on its income during the marriage, the said property being freed from the respective dotal burden only following the death of one of the spouses.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Artigo 1157º

O marido ou os seus herdeiros, não serão responsáveis pela restituição, mencionada no artigo precedente, se os bens da mulher se perderem por acidente, que lhes não seja imputável.

Artigo 1158º

Se fizerem parte do dote bens imobiliários serão restituídos, logo que sejam pedidos; mas os bens mobiliários que fizerem parte do mesmo dote, só podem ser exigidos passado um ano depois da dissolução do matrimónio, ou depois de legalmente se efectuar a separação.

§ único) Desta moratória ficam exceptuados os bens conservados em poder do marido.

Artigo 1159º

A mulher e seus herdeiros podem, todavia, exigir os juros legais das somas demoradas na forma sobredita.

Artigo 1160º

Se o dote consistir em usufruto, censos, foros ou quinhões, a restituição se fará com a entrega dos respectivos títulos, cessando de fruir ou receber as prestações.

§ único) A esta espécie de bens não é aplicável a moratória concedida na última parte do artigo 1158º.

Artigo 1161º

Se o dote consistir em dívidas activas, responderá o marido pelas quantias recebidas, e pela importância daquelas que se perderem, ou acharem prescritas por sua culpa ou negligência. Quanto às demais, satisfará com restituir os títulos que tiver em seu poder.

Article 1157

The husband or his heirs shall not be liable for the restitution, mentioned in the preceding article, if the wife's property is lost due to an accident for which they are not responsible.

Article 1158

If the dowry includes immovable property, this shall be returned as soon as it is requested; but the movable property included in the dowry may only be demanded after one year has elapsed since the dissolution of the marriage, or after the judicial separation.

Single §) The above period shall not apply to property kept in the husband's custody.

Article 1159

The wife and her heirs may, however, demand the legal interest of the sums retained in the above described manner.

Article 1160

If the dowry consists of the right of usufruct, annuity, canon or shares, the restitution shall be made by surrendering the respective titles, no longer enjoying or receiving the installments.

Single §) The period foreseen in the final part of article 1158 shall not be applied to such property.

Article 1161

If the dowry consists of active debts, the husband shall be liable for the amounts received and for the value of those lost, or time-barred, due to his fault or negligence. Regarding the rest, it shall suffice to return the titles in his possession.

Artigo 1162º

Os frutos pendentes e os rendimentos de quaisquer bens dotais, serão partilhados entre o marido e a mulher ou seus herdeiros, em proporção do tempo que tiver durado o matrimónio no último ano.

Artigo 1163º

O marido, ou seus herdeiros, têm direito de ser pagos pela mulher ou por seus herdeiros das benfeitorias necessárias e úteis, mas só na importância do valor acrescido ao tempo da restituição. As benfeitorias voluptuárias só podem ser levantadas pelo marido ou pelos seus herdeiros, nos termos do artigo 500º.

Artigo 1164º

As despesas, e os encargos ordinários dos bens dotais, reputam-se compensados com o rendimento dos mesmos bens.

Artigo 1165º

As regras, acerca da restituição dos bens dotais, são aplicáveis à restituição dos próprios da mulher.

Article 1162

Pending fruits and income of any dotal property shall be partitioned between the husband and the wife or their heirs, in proportion to the time the marriage lasted in the final year.

Article 1163

The husband, or his heirs, have the right to be paid by the wife or her heirs for necessary and useful improvements, but only for the accrued value at the time of the restitution. Luxurious improvements may only be removed by the husband or his heirs, in accordance with article 500.

Article 1164

The expenses and normal burdens of the dotal property are considered to be compensated by the income of the said property.

Article 1165

The rules relating to the restitution of dotal property are applicable to the restitution of the wife's exclusive property.

COMMENTARY TO ARTICLES 1134 TO 1165

The dotal regime may be defined as the oldest property regime in the evolution of Portuguese law, having been inherited from Roman Law in the Civil Code of 1867.

The law requires an explicit agreement between the fiancés to apply it, and a mere mention of the words "dowry" or "endowed woman" is not sufficient for this purpose. What are the characteristics of the dotal regime thus agreed upon? Article 1135 states that the wife may endow herself with her own property, or be endowed by her parents or by others, the contract only being valid if all these elements intervene in it. Article 1136 indicates the object of a dowry, with the objective of ensuring its permanence during the marriage. We may, therefore, characterise the dowry, with regard to immovable property, through three extremely relevant constitutive elements: it is inalienable – article 1149 –, it is not liable for debts – article 1149, no. 3 –, and it may not be acquired by prescription – article 1152. As for the first of these characteristics, article 1150 indicates the consequences of a violation of article 1149. This article aims at safeguarding the family, when its subsistence is jeopardised, such as in the situations mentioned in numbers 1, 2 and 3 of the mentioned article. However, it should be noted that the wife will not always be able to initiate the suit to demand restitution of immovable dotal property which was alienated, since, because the dowry must be registered, if it was not registered and if the property was transmitted to a third party, this transmission must be effective for all legal purposes.

Furthermore, article 1141 states that the dowry is inalterable, a characteristic which aims at guaranteeing (in the words of Pires de Lima and Antunes Varela, on page 193 of *Noções Fundamentais*) *"the list of property determined in the deed which instituted the dowry"*. Thus, article 1140 lists the principles to be applied in the institution of a dowry which

includes money in cash, considering the ease with which such money may disappear. In this case, its values must be converted, "*at the latest three months after the marriage, into immovable property, government bonds or company shares, or invested to earn interest through a deed, subject to mortgage*". Consequently, the violation of these conditions implies that the dowry is inexistent.

Article 1148 states further that dotal movable property is alienable, unless the parties agree otherwise.

The dotal regime must also take into account paraphernal property, indicated in article 1153, subject to specific rules. This is the non-dotal property acquired by the husband or the wife, gratuitously or not, during the marriage. It is owned by whoever acquires it, not precluding the husband's power of administration. It should be highlighted that the income of both dotal and paraphernal or exclusive property is common, even though the spouses may agree to exclude it from the communion.

The dotal regime is terminated with the dissolution of the marriage or with separation, in which case article 1156 orders that the dowry be returned to the wife or to her heirs, free of burdens imposed upon them or on their income during the marriage, "*being freed from the respective dotal burden only following the death of one of the spouses*". The final part of this rule, introduced by the Reform of 1930, leads us to conclude that divorce does not void the dotal burden, which will only occur upon the death of one of the spouses.

The dotal regime was kept in the original version of the Portuguese Civil Code of 1966, but it was eliminated by article 180 of Decree-Law no. 496/77, of 25 November, which adopted the reform of the law of 1966.

Código Civil de 1867

SUBSECÇÃO V
DAS DOAÇÕES ENTRE ESPOSADOS

Artigo 1166º

É lícito aos esposados estipular no seu contrato antenupcial a favor de um deles, ou de ambos, as doações, ou deixas que bem lhes parecer, salvas as seguintes restrições.

Artigo 1167º

Se o marido ou a mulher tiverem, ao tempo do casamento, ascendentes ou descendentes com direito a legítima, e algum destes for vivo ao tempo da dissolução do matrimónio, não poderá a dita doação ou deixa exceder a importância da terça dos bens, que então possuir.

Artigo 1167º

Se o marido ou mulher tiverem, ao tempo do casamento, ascendentes ou descendentes com direito a legítima e algum destes for vivo ao tempo da dissolução do matrimónio, não poderá a dita doação ou deixa exceder a importância da metade dos bens que então possuir.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1168º

As doações ou deixas, estipuladas no contrato antenupcial, ficarão sem efeito, não se verificando o matrimónio ou sendo anulado, salvo o que fica disposto no Artigo 1091º.

Civil Code of 1867

SUBSECTION V
DONATIONS BETWEEN ENGAGED PERSONS

Article 1166

Engaged persons may stipulate in their prenuptial agreement, in favour of one or both of them, the donations or legacies which they deem fit, except for the following restrictions.

Article 1167

If the husband or the wife had, at the time of the marriage, ascendants or descendants entitled to the legitime, and one of these is living at the time of the dissolution of the marriage, the said donation may not exceed the amount corresponding to a third of the existing property.

Article 1167

If the husband or the wife had, at the time of the marriage, ascendants or descendants entitled to the legitime and one of these is living at the time of the dissolution of the marriage, the said donation or legacy may not exceed the amount corresponding to half of the existing property.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1168

The donations or legacies, stipulated in the prenuptial agreement, shall be without effect if the marriage does not take place or if it is annulled, with the exception of what is foreseen in Article 1091.

Artigo 1169º

As doações antenupciais não podem ser anuladas:

1º Por falta de aceitação expressa;

2.º Por superveniência de filhos;

3º Por causa de ingratidão.

Artigo 1170º

Se a doação for de bens presentes e determinados, será irrevogável, ainda que o donatário venha a falecer primeiro que o doador, se outra coisa não for estipulada.

Artigo 1171º

Se a doação for de parte, ou da totalidade da herança, não poderá o doador revogar ou prejudicar a doação, dispondo por título gratuito dos bens doados.

Artigo 1172º

O direito à doação, mencionada no Artigo antecedente, seja ou não seja recíproca, não é transmissível aos herdeiros do donatário, falecendo este primeiro que o doador.

Artigo 1173º

Os menores podem fazer doações por contrato antenupcial, contanto que intervenha autorização daqueles, a quem, nos termos do Artigo 1061.º e seus parágrafos, compete autorizar o casamento.

Artigo 1174º

São aplicáveis às doações entre esposados as regras gerais estabelecidas no capítulo das doações, em tudo o que não for contrário ao que fica disposto na presente secção.

Article 1169

Prenuptial donations may not be annulled:

1) Due to lack of explicit acceptance;

2) Due to supervenience of children;

3) Due to ingratitude.

Article 1170

If the donation relates to present and determined property, it shall be irrevocable, even if the donee dies before the donor, unless it is otherwise stipulated.

Article 1171

If the donation relates to a part or all of the inheritance, the donor may not revoke or do detriment to the donation by gratuitously disposing of the donated property.

Article 1172

The right to the donation, mentioned in the previous article, be it reciprocal or not, is not transmissible to the heirs of the donee, if the latter dies before the donor.

Article 1173

Minors may make donations in a prenuptial agreement, as long as these are authorised by those who, in accordance with article 1061 and its paragraphs, are competent to authorise the marriage.

Article 1174

The general rules established in the chapter on donations are applicable to donations between engaged persons, insofar as they do not contradict what is foreseen in the present section.

COMMENTARY TO ARTICLES 1166 TO 1174

Donations for a marriage may be made between engaged persons (article 1166 to 1174) or by third parties to engaged persons (articles 1175 to 1177).

Donations for a marriage between engaged persons must be made in a prenuptial agreement, a necessary condition for them to benefit from the respective special regime.

However, what matters is that the engaged persons "*must be named in the contract as fiancés and must declare that the donation is motivated by the envisaged marriage; thus, it shall be considered as having been made in the prenuptial agreement. For the same reason, a donation between engaged persons may be made in a different document than the one stipulating the couple's property regime, as long as it precedes the marriage and is made in light of it, since the two agreements, even though formally separate, shall be the prenuptial agreement*" (Cunha Gonçalves, *Tratado de Direito Civil*, vol. VI, Coimbra, Coimbra Editora, 1932, page 719).

In order for there to be a donation for a marriage, it must be made in light of the future marriage, being intimately tied to it.

Donations for a marriage may encompass present and determined property as well as future property.

As for the donation of future property, article 1171 indicates that the donation may relate to a part or to all of the inheritance, therefore encompassing future property – this is the case of the contractual appointment of an heir. These donations are protected by forbidding the donor from revoking or doing detriment to them by gratuitously disposing of the donated property.

Therefore, donations for a marriage are the only ones which may come into effect *mortis causa* (see articles 1166, 1171 and 1175, as well as the single § of article 1457). Any other donation contract aimed at coming into effect upon the death of the donor shall be considered a testamentary disposition, as a result of article 1457 (i.e., it may be freely revoked).

Cunha Gonçalves gives some examples of donations *mortis causa*/succession agreements which are prohibited, such as "*a prenuptial agreement wherein the spouses renounce their children's potential inheritance*", an early repudiation of the donor's inheritance (see article 2099), and "*a donation made by the parent of an engaged person to the other, relating to a part of the potential inheritance of the same engaged person, included in the prenuptial agreement itself*", even though he believed that in that latter case there was a valid contract, "*in view of article 1775, which allows the donation of future property to engaged persons, not excluding that which may later be acquired by the donor as a result of as yet unopened successions*" (*Tratado de Direito Civil*, vol. X, Coimbra Editora, Coimbra, 1935, page 510).

However, the same author would allow, for example, "*a clause obliging the donee to choose, at the time of the donor's death, between the donation and the succession*", and "*a clause under which the donee promises to share the donated thing with his co-heirs, after the donor's death*" (*Tratado de Direito Civil*, Vol. X, pages 511-512).

Let us now turn to the issue of the revocability of donations for a marriage.

Under the general rules, a donation contract may be revoked. According to article 1482, donations "*may only be revoked, aside from the cases in which any contract may be revoked:*

1) Due to supervenience of legitimate children, if the donor was married at the time of the donation;

2) Due to ingratitude of the donee;

3) Due to inofficiousness.

However, donations for a marriage between engaged persons are preserved in the cases of lack of explicit acceptance, supervenience of children and ingratitude (see articles 1169, 1483, no. 2, and 1489).

Donations are irrevocable if they relate to present and determined property, even if the donee dies before the donor (see article 1170), unless stipulated otherwise. If they relate to future property, the donor may dispose of the property in question, but only if non-gratuitously, since otherwise there would be an actual revocation (see article 1171).

Cunha Gonçalves (*Tratado de Direito Civil*, vol VI, page 733) allows for the inclusion of a clause reserving the donor's right to dispose gratuitously of the donated property – considering it a suspensive condition, the donation being equaled to a will –, as well as for a clause whereby the donor renounces the possibility of alienating the donated property non-gratuitously – since this is a right which its holder may dispose of.

Article 1167 requires two conditions for donations to expire: the existence of ascendants or descendants entitled to the legitime – mandatory heirs – at the time of the marriage; and that one of these is living at the time of the dissolution of the marriage. In such cases, the donation expires in whatever exceeds the half mentioned therein, i.e., it cannot exceed the value of half of the existing property.

As for the relevant date for the calculation of these values, it is that of the donor's death. In this sense, Cunha Gonçalves states "*In principle, the legitime only comes into being after the death of the author of the inheritance; no one may inherit from a living person; and, if the person dies in insolvency, the inheritance shall be worth zero. We should assume that this sentence refers to the moment of the donor's death, since article 1167 mentions donation and legacy, and this may only occur in a donation* mortis causa, *since article 1171 relates to the donation of part or all of the donor's inheritance. It appears that the legislator was only concerned with this possibility when drafting that sentence*" (*Tratado de Direito Civil*, vol. VI cit., page 727).

As for the expression "half" used therein, Cunha Gonçalves criticises the disparity between this drafting and that of article 1787, considering that "*if, in article 1167, the legislator intended to protect the legitime of presumed heirs, he should not have limited the donation to 'half', uniformly, since article 1787 states that, if the testator, at the time of his/her death, only has ascendants other than parents, or one of the latter, their legitime is a third of the inheritance*", and for this reason the limit included in article 1167 should be the same as the mandatory portion applicable to the specific case.

Therefore, this author asks the following question: if "*at the time of the donor's death, there is only one grandparent, may the latter have the donation reduced to half, since article 1787 is only applicable to testamentary dispositions? Some say so, pointing out that article 1167 should be extended to all donations* inter vivos. *However, this opinion must be rejected; this is because article 1167 is a very special provision and not a general rule; also because an inofficious donation may only be reduced in whatever damages the legitime, in accordance with article 1492; therefore, a grandparent may not require that a donation made by his/her grandchild be reduced in more than his/her legitime*" (*Tratado de Direito Civil*, vol. VI, pages 727-728).

While reducing the donation to half, one must take into account not only the property existing in the donor's patrimony at the time of his/her death, but also the donated property which must be collated.

A donation also expires if the donee dies before the donor, in the case of donations *mortis causa*, and only expires, in the case of donations *inter vivos*, if this has been explicitly stipulated (articles 1170 and 1172); if the marriage is not solemnised or is annulled (article 1168); and in the case of divorce or separation caused by the donee (see article 1213 and article 27 of the Decree of 3 November 1910).

As to whether the limits enshrined in articles 1462 to 1464 are applicable to donations for a marriage between engaged persons, Cunha Gonçalves has a clearly opposite opinion, stating that, being a special rule, it is article 1167 that should be applied (the general rules for a donation contract shall only be applied insofar as they do not contradict this special regime – article 1174). See *Tratado de Direito Civil*, vol. VI. pages 724-725.

However, article 1235 is applicable to the case of a widowed or divorced engaged person, with descendants from a previous marriage who are successors, since "*it has the same aim as article 1167: safeguarding the legitime of the donor's presumed heirs; but it has a smaller scope, as can be seen in the following comparison: a) article 1167 limits the donations to half of all the property; whereas article 1235 mentions only the assets preceding the second marriage or those inherited subsequently from ascendants or consanguine relatives*"; *b) article*

1167 applies both to a single donor and to twice-wed donor; whereas article 1235 applies only to the twice-wed donor; c) thus, article 1167 mentions all descendants, legitimate or acknowledged, aside from mentioning the ascendants; article 1235 only mentions the existence of legitimate children or descendants, and does not consider the existence of ascendants as an obstacle to the donation" (Cunha Gonçalves, *Tratado de Direito Civil*, vol. VI, pages 728-729).

Regarding reductions due to inofficiousness, article 1501 excludes donations between engaged persons from the regime of article 1482. However, that provision is only applicable when the engaged persons subsequently had children, or when these were born after the donation, such children being indirectly benefited by the donation made between their parents while they were engaged.

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SECÇÃO VI
DAS DOAÇÕES FEITAS POR TERCEIRO AOS ESPOSADOS

Artigo 1175º

Pode qualquer dispor em favor dos futuros esposos, ou de algum deles, de parte dos seus bens ou de todos, em vida ou por morte, contanto que o faça no próprio contrato antenupcial, ou em escritura pública separada, salvo o que se acha ordenado acerca das doações inoficiosas.

Artigo 1175º

Pode qualquer dispor em favor dos futuros esposos, por meio de doação inter vivos ou mortis causa, da totalidade ou de parte de seus bens presentes ou futuros, contanto que o faça no próprio contrato antenupcial ou por escritura pública separada, salvo o que se acha ordenado a respeito das doações inoficiosas.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1176°

Se as doações, permitidas pelo Artigo antecedente, forem feitas no contrato antenupcial, serão válidas sem dependência da aceitação expressa dos donatários; mas, se forem feitas em actos separados, não terão efeito, enquanto não forem expressamente aceitadas.

Artigo 1177°

Posto que tais doações sejam feitas em favor dos esposos, ou de algum deles, aproveitarão aos filhos que procederem

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SECTION VI
DONATIONS OF A THIRD PARTY TO ENGAGED PERSONS

Article 1175

Any one may dispose, inter vivos or mortis causa, of a part or of all of his/her property in favour of the future spouses, or of any of them, as long as he/she does so in the prenuptial agreement itself, or in a separate deed, except for what is foreseen regarding inofficious donations.

Article 1175

Any one may dispose, through a donation *inter vivos* or *mortis causa*, of all or of a part of his/her existing or future property in favour of the future spouses, as long as he/she does so in the prenuptial agreement itself, or in a separate deed, except for what is foreseen regarding inofficious donations.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1176

If the donations, allowed by the preceding article, were made in the prenuptial agreement, they shall be valid regardless of explicit acceptance by the donees; but, if they are made in separate acts, they shall be without effect as long as they are not explicitly accepted.

Article 1177

When such donations are made in favour of the engaged persons, or of any of them, they shall benefit the children

do mesmo casamento, ainda que o donatário, ou donatários, faleçam primeiro que o doador; e tão-sòmente caducarão, se o doador sobreviver a todos os descendentes dos donatários.

resulting from the marriage in question, even if the donee or donees die(s) before the donor; and they shall only expire if the donor survives all the descendents of the donees.

COMMENTARY TO ARTICLES 1175 TO 1177

In accordance with article 1175, a third party may, *inter vivos* or *mortis causa*, donate to the engaged persons all or a part of his/her present or future property.

This donation must be made in the prenuptial agreement – in which case the donation is valid even without the donee's explicit acceptance, since this acceptance is assumed to be implied in the solemnisation of the prenuptial agreement –, or in a separate deed – as long as the limit of inofficiousness is abided by (see articles 1175 and 1176).

These donations may not be revoked due to the supervenience of children (article 1483, no. 2), nor due to the donee's ingratitude (article 1489).

Articles 1462 to 1464 are applicable to donations *mortis causa*.

They may be subject to reduction due to inofficiousness, something which was clarified in the new drafting of article 1501; this reduction must be made in accordance with article 1492 *et seq*. and with article 2107.

In the case of donations for a marriage from a third person to an engaged person, the donor may not revoke the donation by alienating, gratuitously or not, the donated property; to this extent, article 1171 is not applicable to such donations.

These donations expire if the marriage is impossible or invalid (article 1168, applicable by analogy), if the donee dies before the donor (article 1177), and in the case of separation or divorce caused by the donee (article 1213 and article 27 of the Decree of 3 November 1910).

Article 1177 is also relevant, since it determines that, when the engaged donee dies before the donor, the donation benefits the children resulting from that marriage, an issue which is obviously only relevant for donations *mortis causa*. In light of this option, Cunha

Gonçalves wonders if a donation may be "*made directly in favour of the unborn children of the engaged persons, since the children are, after all, the beneficiaries of the donation to the parents*", taking into account that "*such a donation is not possible* inter vivos (...) *according to article 1479, unborn children may only acquire when they have been conceived at the time of the donation and are born alive. But in a donation* mortis causa (...) *it appears that a donation in favour of unborn children who have not yet been conceived would be valid, as long as the engaged persons that are to be their parents are specified, in accordance with article 1777, especially when the donation is not direct, but is instead made through a reversion clause, in accordance with the second part of article 1473* (...)" (Tratado, vol. VI, pages 738-739).

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SECÇÃO VII
DAS DOAÇÕES ENTRE CASADOS

Artigo 1178°

O marido e a mulher podem fazer entre si doações dos seus bens presentes, assim por acto entre vivos, como por testamento.

Artigo 1179°

As doações em vida serão reguladas, conforme o que é ordenado no capítulo das doações, e as doações por morte, conforme o que se dispõe no título dos testamentos.

Artigo 1180°

Os cônjuges não podem fazer doações um ao outro no mesmo e único acto.

Artigo 1180°

Os cônjuges não podem fazer um ao outro doações no mesmo e único acto, salvas as deixas ou reservas de usufruto para o sobrevivente, feitas no acto da doação de bens seus a terceiros.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1181°

As doações entre cônjuges podem ser revogadas, livremente e a todo o tempo, pelos doadores.

§ 1°) A mulher não precisa para este efeito de ser autorizada pelo marido, ou por decreto judicial.

§ 2°) A revogação deve ser expressa.

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SECTION VII
DONATIONS BETWEEN SPOUSES

Article 1178

A husband and wife may make among themselves donations of their present property, in an act *inter vivos* or in a will.

Article 1179

Donations *inter vivos* shall be governed in accordance with the provisions of the chapter on donations; and donations *mortis causa* shall be governed in accordance with the title on wills.

Article 1180

Spouses may not make donations to each other in the same single act.

Article 1180

Spouses may not make donations to each other in the same single act, except dispositions or reservations of usufruct to the surviving spouse, made in the act of the donation of their property to third parties.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1181

Donations between spouses may be revoked, freely and at all times, by the donors.

1) For this purpose, the wife does not require the husband's authorisation or an order of the court;

2) The revocation must be explicit.

Artigo 1182º

Estas doações não são revogáveis por superveniência de filhos, mas podem ser reduzidas por inoficiosidade.

Artigo 1183º

Os bens doados tomarão a natureza de próprios do donatário, seja qual for o contrato antenupcial.

Article 1182

These donations are not revocable due to the supervenience of children, but they may be reduced due to inofficiousness.

Article 1183

The donated property shall assume the nature of exclusive property of the donee, whatever may be the prenuptial agreement.

COMMENTARY TO ARTICLES 1178 TO 1183

The admissibility of donations between spouses was controversial, since they could jeopardise the principle of the immutability of prenuptial agreements and could derive from a psychological predominance of one spouse over the other. Allowing such donations, however, goes against the principle of immutability, since they imply a transfer of property from the patrimony of one spouse to that of the other. While it is true that the asset in question is not transferred to the communion, since it continues to be exclusive property, its owner is no longer the same.

A husband and wife may dispose of their present property in favour of each other, be it through a donation *inter vivos* or in a will (article 1178).

However, a twice-wed spouse, with children or descendants from the previous marriage, may not donate to his/her spouse more than half of his/her property existing at the time of the solemnisation of the new marriage and of the property he/she acquires subsequently from his/her ascendants or consanguine relatives, for as long as those descendants exist.

In current Portuguese law, donations between spouses are only forbidden in the case of the mandatory regime of separation of property (see article 1762 of the Civil Code of 1966; the mandatory regime of separation of property is applicable to the cases indicated in article 1720, no. 1, of the same Code).

In accordance with article 1180, spouses may not make reciprocal donations in the same act.

Donations may be freely revoked by the donor, at any time (article 1181), even after the death of the donee. According to Cunha Gonçalves, the revocation must be explicit, i.e., the donor must make *"a special deed of revocation, if the donation is* inter vivos, *and a new will or a*

revoking deed, in accordance with article 1755, when the donation is made in a will" (*Tratado*, vol. VI, page 756).

In accordance with article 1183, donated assets are the exclusive property of the donee, regardless of what is stipulated in the prenuptial agreement.

Donations between spouses expire if a reversion clause was stipulated (see articles 1473 to 1475) –, but not if the donor survives the donee, since the property is transferred to the donee's heirs; however, the donor may revoke the donation –, and in the case of divorce or separation caused by the donee (article 1213 of the Civil Code and article 27 of the Decree of 3 November 1910). Conversely, the Portuguese Civil Code of 1966 foresees that donations between spouses expire when the donee dies before the donor, *"except if the latter confirms the donation in the three months following the donee's death"* (article 1766, no. 1, clause a)).

This type of donation is also subject to reduction due to inofficiousness (see article 1182).

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SECÇÃO VIII
DOS DIREITOS E OBRIGAÇÕES GERAIS DOS CÔNJUGES

Artigo 1184º

Os cônjuges têm obrigação:

1º) De guardar mutuamente fidelidade conjugal;

2º) De viver juntos;

3º) De socorrer-se e ajudar-se reciprocamente.

(Substituído e revogado pelo Artigo 38º nº 1 do Decreto nº 1, de 25/12/1910)

Artigo 38º do Decreto n.º 1, de 25/12/1910

Os cônjuges têm obrigação:

1º) De guardar mutuamente fidelidade conjugal;

2º) De viver juntos;

3º) De socorrer-se e ajudar-se reciprocamente.

Artigo 1185º

Ao marido incumbe, especialmente, a obrigação de proteger e defender a pessoa e os bens da mulher; e a esta de prestar obediência ao marido.

(Substituído e revogado pelo Artigo 39º do Decreto nº 1, de 25/12/1910)

Artigo 39º do Decreto n.º 1, de 25/12/1910

A sociedade conjugal baseia-se na liberdade e na igualdade, incumbindo ao marido, especialmente, a obrigação de defender a pessoa e os bens da mulher e dos filhos e à mulher, principalmente, o governo doméstico e uma assistência

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SECTION VIII
GENERAL RIGHTS AND OBLIGATIONS OF THE SPOUSES

Article 1184

Spouses are obliged:

1) To maintain mutual conjugal fidelity;

2) To live together;

3) To reciprocally assist and help each other.

(Replaced and revoked by no. 1 of article 38 of Decree no. 1, of 25/12/1910)

Article 38 of Decree no. 1, of 25/12/1910

Spouses are obliged:

1) To maintain mutual conjugal fidelity;

2) To live together;

3) To reciprocally assist and help each other.

Article 1185

The husband has, in particular, the obligation to protect and defend the wife's person and property; and the wife has the obligation to obey the husband.

(Replaced and revoked by article 39 of Decree no. 1, of 25/12/1910)

Article 39 of Decree no. 1, of 25/12/1910

The conjugal society is based on freedom and equality, the husband having, in particular, the obligation to defend the wife's and children's person and property, and the wife is responsible, mainly, for the management of the house and moral

moral tendente a fortalecer e aperfeiçoar a unidade familiar.

Artigo 1186º

A mulher tem obrigação de acompanhar o seu marido, excepto para pais estrangeiro.

(Substituído e revogado pelo Artigo 40º do Decreto nº 1, de 25/12/1910)

Artigo 40º do Decreto n.º 1, de 25/12/1910

A mulher deve adoptar a residência do marido, excepto se este quiser mudar-se para as colónias ou para o estrangeiro sem acordo dela, pois, nesse caso, decidirá o juiz, nos termos do Artigo 6º.

Artigo 1187º

A mulher autora não pode publicar os seus escritos, sem consentimento do marido; mas pode recorrer a autoridade judicial, em caso de injusta recusa dele.

(Substituído e revogado pelo Artigo 42º, nº 1, do Decreto nº 1, de 25/12/1910)

Artigo 42º do Decreto n.º 1, de 25/12/1910

A mulher autora pode publicar os seus escritos sem o consentimento do seu marido.

Artigo 1188º

A mulher goza das honras do marido, que não sejam meramente inerentes ao cargo que ele exerce ou haja exercido, e conserva-as enquanto não passar a segundas núpcias.

(Substituído e revogado pelo Artigo 43º do Decreto nº 1, de 25/12/1910)

assistance aimed at strengthening and perfecting the family unit.

Article 1186

The wife is obliged to accompany her husband, except to a foreign country.

(Replaced and revoked by article 40 of Decree no. 1, of 25/12/1910)

Article 40 of Decree no. 1, of 25/12/1910

The wife must adopt the husband's residence, except if the latter intends to move to the colonies or abroad without her agreement because, in this case, the judge shall decide in accordance with article 6.

Article 1187

The wife who is an author may not publish her writings without the husband's consent; but she may resort to the courts in the case of his unfounded refusal.

(Replaced and revoked by no. 1 of article 42 of Decree no. 1, of 25/12/1910)

Article 42 of Decree no. 1, of 25/12/1910

The wife who is an author may publish her writings without the husband's consent.

Article 1188

The wife enjoys the husband's honours which are not merely inherent to the office he holds or has held, and keeps them as long as she does not remarry.

(Replaced and revoked by article 43 of Decree no. 1, of 25/12/1910)

Artigo 43º do Decreto n.º 1, de 25/12/1910

A mulher goza das honras do marido que não sejam meramente inerentes ao cargo que ele exerce ou haja exercido, e conserva-as, bem como o direito de usar o seu nome, até ser proferido o divórcio ou, em caso de viuvez, até passar a segundas núpcias.

Article 43 of Decree no. 1, of 25/12/1910

The wife enjoys the husband's honours which are not merely inherent to the office he holds or has held, and keeps them, as well as the right to use his name, until the divorce is granted or, if she was widowed, until she is remarried.

Artigo 1189º

A administração de todos os bens do casal pertence ao marido, e só pertence à mulher na falta ou no impedimento dele.

Article 1189

It is for the husband to manage all the couple's property, the wife only having the right to manage this property in his absence or impediment.

Artigo 1190º

A mulher administradora, na ausência ou no impedimento do marido, não pode alienar bens imobiliários sem autorização do conselho de família, com assistência do Ministério Público; e se o valor dos ditos bens exceder 1.000$00 réis, a alienação só poderá fazer-se pela forma estabelecida nos artigos 268º e seguintes.

(*Limite de 1.000 réis fixado neste Artigo foi elevado ao décuplo pelo § 1 do Artigo 3º da Lei nº 1552, de 1 de Março de 1924*)

§ único) As alienações feitas com quebra do que fica disposto neste artigo serão nulas e os compradores só poderão recuperar o preço da compra pelos bens próprios da mulher vendedora, se ela os tiver, ou pelos do casal, provando-se, que tal preço foi convertido em aumento do mesmo casal, e até o valor deste aumento.

Article 1190

The wife exercising management, in the husband's absence or impediment, may not alienate immovable property without the family council's authorization, assisted by the Public Prosecutor; and if the value of the said property exceeds 1.000$00 "reis", the alienation may only be carried out in the manner foreseen in articles 268 et seq.

(*The limit of 1.000 "reis" foreseen in this article was raised by ten times by § 1 of article 3 of Law no. 1552, of 1 March 1924*)

Single §) The alienations made in infringement of the provisions of this article shall be null and void and the purchasers shall only be compensated for the price of the purchase from the exclusive property of the wife who carried out the sale, or from the property of the couple, if it is proven that this price was converted to the benefit of the couple, and up to the value of this benefit.

Artigo 1191º

Não é lícito ao marido alienar bens imobiliários, nem estar em juízo por causa de questões de propriedade, ou posse de bens imobiliários, sem outorga da mulher.

§ 1º) Esta outorga pode ser suprida judicialmente, se a mulher a recusar sem justo motivo, ou se estiver impossibilitada para a dar.

§ 2º) As alienações porém, dos bens próprios feitas pelo marido, contra a disposição deste artigo, só podem ser anuladas a requerimento da mulher ou de seus herdeiros, achando-se o marido constituído em responsabilidade para com ela, ou para com eles, e não tendo outros bens pelos quais responda.

§ 3º) Se as ditas alienações forem de bens comuns, a mulher, ou os seus herdeiros, ou os herdeiros legitimários do marido, poderão, em qualquer caso, requerer que sejam anuladas.

Article 1191

It is not lawful for the husband to alienate immovable property, nor to move the court for issues relating to property or possession of immovable property, without the wife's consent.

§ 1) This consent may be overcome by the court, if the wife refuses to give it without just cause, or if she is prevented from giving it.

§ 2) However, the alienation of exclusive property by the husband, in infringement of the provisions of this article, may only be annulled at the bequest of the wife or her heirs, the husband being liable in relation to her or them, and not having other property with which to meet this liability.

§ 3) If the said alienations relate to common property, the wife, or her heirs, or the husband's mandatory heirs may, in any case, request that they be annulled.

Artigo 1192º

A mulher casada não pode estar em juízo sem autorização do marido, excepto:

1º) Nas causas crimes em que seja ré;

2º) Em quaisquer pleitos com o marido;

3º) Nos actos que tenham unicamente por objecto a conservação, ou segurança dos seus direitos próprios e exclusivos;

4º) Nos casos em que tenha que exercer, relativamente a seus filhos legítimos, ou aos naturais que tivesse de outrem, os direitos e deveres inerentes ao poder paternal.

(Substituído e revogado pelo Artigo 44º do Decreto nº 1, de 25/12/1910)

Article 1192

A married woman may not move the court without the husband's authorisation, except:

1) In criminal cases in which she is the accused;

2) In any legal actions against the husband;

3) In proceedings aimed only at preserving or guaranteeing the safety of her exclusive rights;

4) In cases in which she must exercise, in relation to her legitimate or illegitimate children, rights and duties inherent to parental authority.

(Replaced and revoked by article 44 of Decree no. 1, of 25/12/1910)

Artigo 44º do Decreto n.º 1, de 25/12/1910

A mulher casada pode estar em juízo sem outorga nem autorização do marido, nos mesmos casos e termos em que este o pode fazer sem outorga nem autorização da mulher.

Artigo 1193º

A mulher não pode, sem autorização do marido adquirir ou alienar bens, nem contrair obrigações, excepto nos casos em que a lei especialmente o permite.

§ único) Se o marido recusar indevidamente a autorização pedida pela mulher, poderá esta requerer suprimento ao juiz de direito respectivo que, ouvido o marido, a concederá ou negará, como parecer de justiça.

Artigo 1194º

A autorização do marido deve ser especial para cada um dos actos, que a mulher pretenda praticar, excepto sendo para comerciar, pois neste caso, pode a mulher praticar, em virtude de autorização geral, todos os actos relativos ao seu comércio, e até hipotecar os seus bens imobiliários, e propor acções, contanto que seja por causa do seu trato.

Artigo 1195º

A autorização marital pode ser dada de palavra, por escrito ou por factos, de que ela necessariamente se deduza.

Artigo 1196º

A autorização porém, para comerciar, para hipotecar ou alienar bens imóveis, ou para propor acções em juízo, só pode

Article 44 of Decree no. 1, of 25/12/1910

A married woman may move the court without the husband's consent or authorisation, in the same cases and terms that the latter can do so without the wife's consent or authorisation.

Article 1193

The wife may not, without the husband's authorisation, acquire or alienate property, nor incur obligations, except in the cases specifically allowed by law.

Single §) If the husband unduly refuses the authorisation requested by the wife, she may request the respective judge to overcome this authorisation; the judge shall, after hearing the husband, grant or deny the authorisation, in equity.

Article 1194

The husband's authorisation must be specific for each act that the wife intends to carry out, except those relating to trade since, in this case, the wife may carry out, due to a general authorisation, all the acts relating to her trade, and even mortgage her immovable property and initiate legal actions, as long as motivated by her trade.

Article 1195

The marital authorisation may be given orally, in writing or by facts from which it is necessarily deduced.

Article 1196

However, the authorisation to trade, to mortgage or to sell immovable property, or to initiate legal actions in

ser outorgada por escrito autêntico, ou autenticado.

court may only be granted in an authentic or authenticated document.

Artigo 1197º

O marido pode revogar a autorização, enquanto o acto para que foi concedida não está começado; mas se este tiver tido começo de execução, só a poderá revogar, reparando qualquer prejuízo de terceiro, que resulte da revogação.

Article 1197

The husband may revoke the authorisation before the act to which it relates has been initiated; but if it has been initiated, he may only revoke it if he repairs any damage to third parties resulting from the revocation.

Artigo 1198º

O marido responde pelas obrigações que a mulher, casada segundo o costume do reino, ou com simples comunhão de adquiridos, contraiu com autorização sua, mas não pelas obrigações que a mulher, casada de outra forma, contraiu sobre bens ou interesses privativamente seus.

Article 1198

The husband is liable for the contractual obligations incurred, with his authorisation, by the wife, married according to the custom of the kingdom or in simple communion of acquired property, but not for obligations incurred by the wife, married under another regime, in relation to her exclusive property or interests.

Artigo 1199º

No caso de suprimento de autorização, o marido só responde pelos actos da mulher, que procederam de obrigações comuns, ou reverteram em benefício comum.

Article 1199

Where the authorisation is overcome by the court, the husband is only liable for the acts of the wife deriving from common obligations or which give rise to common benefit.

Artigo 1200º

A nulidade, precedida da falta de autorização, só pode ser alegada pelo marido, ou por seus herdeiros e representantes.

Article 1200

Nullity, preceded by lack of authorisation, may only be invoked by the husband or by his heirs and representatives.

Artigo 1201º

A nulidade, precedida da falta de autorização pode ser sanada:

1º) Pela confirmação do marido, não se achando proposta em juízo por terceiro, acção nenhuma a este respeito;

Article 1201

Nullity, preceded by lack of authorisation, may be cured:

1) Through the husband's confirmation, when no legal action has been filed by a third party in this concern;

2º) Se não for arguida dentro de um ano, contado desde a dissolução do matrimónio;

3º) Se o acto houver prescrito, conforme as regras gerais.

Artigo 1202º

A acção concedida aos cônjuges, nos casos sobreditos, não é admitida no casamento celebrado em pais estrangeiro e não publicado no reino, em conformidade da lei.

2) If it is not invoked within one year after the dissolution of the marriage;

3) If the act is time-barred, in accordance with general rules.

Article 1202

The rights granted to the spouses in the above mentioned cases do not exist in a marriage solemnised in a foreign country and which was not publicised in the kingdom, in accordance with the law.

COMMENTARY TO ARTICLES 1184 TO 1202

Article 38, no. 1, of the Act on Marriage as a Civil Contract, enshrines the basic principles of the conjugal society, with regard to personal relations between the spouses. It is thus stated that the conjugal society is based on freedom and equality, and the role of each member of the family is defined. It should be noted that the original version of the Civil Code made no mention of equality as a structural principle of legal relations between the spouses, merely defining their obligations. After the revision, it was stated that the husband must defend the wife's and the children's persons and property, and that the wife is responsible for the management of the house and for moral assistance aimed at strengthening and perfecting the family unit.

What is the underlying content of each of these responsibilities? The law obviously distinguishes them according to the gender of the members of the couple. The husband's obligations are directed at the defense of the family's patrimony and dignity, while the wife's are related to the directing of the domestic unit, functioning as its support, and contributing to it, not in the economic sense, but by maintaining the moral structure required for its equilibrium. On page 223 of their manual (*Noções Fundamentais*), Pires de Lima and Antunes Varela indicate that the management of the house includes "*directing household expenses, cooking, clothing, cleaning, washing, water, lighting, heating; and also the hiring and firing of servants, treatment of illness and charity work*".

The underlying relation of rights and obligations in the conjugal society does not allow us to conclude that there is absolute or even relative equality. On page 210 of his manual (*Direitos da família e direitos das sucessões*), Cunha Gonçalves justifies this as follows: "*... it is absolutely incorrect that the conjugal society is based on freedom and equality. No society can have absolute equality and freedom; this is because it is necessary to have a direction, an entity to decide, administer and order, others being responsible for*

executing these commands; and, since any agreement binds, or restricts the will of the parties to it; the concept upon which the legislator based the conjugal society is wrong" (our underlining).

With regard to the spouses' reciprocal duties, article 38 of the Act on Marriage as a Civil Contract imposes the obligation to maintain mutual conjugal fidelity. This duty is based on the acceptance of the principle of monogamy. It should be noted that article 4, no.s 1 and 2, considers the violation of the duty of fidelity – adultery – as grounds for divorce, in accordance with the regime introduced by the Decree of 3 November 1910.

Another reciprocal duty of the spouses is to live together, justified in the dominant doctrine (Cunha Gonçalves, Pires de Lima and Antunes Varela) as necessary for complying with the marital obligation. This is confirmed by article 40 of the Act on Marriage as a Civil Contract, which makes it mandatory for the wife to adopt the husband's residence, with the exceptions foreseen in the final part of that article: a) if the husband intends to move to the colonies; b) if the husband intends to move abroad. In both cases, if the wife does not agree, a decision of the judge is required. Article 41 of the Act on Marriage as a Civil Contract confirms that it is impossible to physically coerce the wife, forcing her to accompany the husband against her will; this provision was then revoked by article 1470 of the Code of Civil Procedure of 1939. We would highlight that the latter article allowed the wife to be surrendered to a court of law in situations where "*the wife abandoned the husband or refuses to accompany him, having such an obligation*", which clearly does not encompass the situation in question.

In the case of a situation where the wife is truly entitled not to live together with the husband, since meeting that obligation would imply some violence at the level of marital cohabitation, the dominant doctrine considers that there is no abandonment of the marital domicile. Indeed, it was the husband himself who caused the act of abandonment. Thus, the wife may request maintenance, and the husband must provide it, if she does not have the means to survive.

On page 221 of his manual, Cunha Gonçalves states that this is a situation where the decision of the judge "*only excludes the spouses' duty to live together, while the respective grounds still exist; but the spouses are still subject to the remaining duties, deriving from the marriage. It is a* modus vivendi, *which is terminated as soon as life in common becomes possible*".

The provisions also impose the duty of mutual help and assistance, which implies the obligation to assist and the obligation to provide maintenance. The violation of the duty to assist may be considered a serious injury and, consequently, grounds for a divorce suit in accordance with the Decree of 3 November 1910. With regard to the provision of maintenance, it should be noted that, if there is a violation of article 40 of the Act on Marriage as a Civil Contract, the wife may not request the respective maintenance, since she disobeyed her duty to live together with the husband. If the *de facto* separation occurs as a result of the husband's actions, then this maintenance may be requested. Article 1231 regulates a specific situation concerning the widowed spouse, who is entitled to maintenance from the property left by the deceased, while he/she requires it, and as long as he/she is not remarried.

It should be highlighted that the rules in question indicate that this is a reciprocal duty. However, it is possible to conclude that, since the wife does not, as a rule, have exclusive property, this duty must be ensured by the respective husband. As noted by Cunha Gonçalves, mutual assistance must therefore be understood as a division of household and family labour, and the fulfillment of the rule in question must be articulated with the provisions of article 39 of the Act on Marriage as a Civil Contract.

An important issue in the rules under analysis is the wife's specific legal regime for legal (in)capacity. It was mentioned above that the wife is essentially responsible for the management of the house, while article 39 of the Act on Marriage as a Civil Contract validates the acts carried out by the wife in that capacity. Some authors highlight that the principle of equality in marital relations derives from these rules. They justify this statement with the existence of mutual rights

and duties, the division of labour between the couple being based on the specific competencies of each spouse.

Article 43 of the Act on Marriage as a Civil Contract further states that the wife *"enjoys the husband's honours which are not merely inherent to the office he holds or has held"*, and this is so until the divorce is granted, or until she is widowed or is remarried.

In this respect, it should be noted that the famous Decree of 1910 excluded a large number of the incapacities mentioned in the Code at the time of its publication, namely regarding the publication of works authored by the wife and her representation in court. With regard to the administration of property, the incapacity remains, since the husband is responsible for it, except in his absence or impediment. Thus, the administration shall not be carried out by the husband in the following cases: a) if certain property was donated or legated to the wife under the condition that she administer it; b) if the husband agrees to the wife's administration of the property; c) if the husband is absent, in accordance with articles 1117, 1189 and 1190; and d) if the husband is subject to an impediment (single § of articles 1117, 1189 and 1190).

Article 1193 introduces the general principle of the married woman's patrimonial legal incapacity, insofar as it prevents the wife from acquiring or selling property without the husband's authorisation. Some authors refer to this article as an incapacity to enter into contracts, justified in the name of the good management of domestic life and the impossibility of giving the same legal value to the will of both spouses. Thus, the wife is only granted the possibility of receiving donations, without requiring the husband's authorisation, since she is considered legally incapable with regard to non-gratuitous acquisitions, exceptions being made only in articles 1104 and 1128. It has also been accepted in doctrine (Pires de Lima and Antunes Varela, *Noções Fundamentais*, pages 137 to 138) that the wife requires the husband's authorisation to exercise a liberal profession, since the exercise of such a profession conditions

the wife's tasks, preventing her from meeting some of the tasks which the Civil Code determines to be her main functions – "management of the house", referred to in article 39 of Decree no. 1.

With regard to overcoming the married woman's legal incapacity, article 1129, no. 4, allows for the alienation of property included in the above mentioned article 1128. This alienation must obey the provisions of article 1194, the wife being entitled to request, with due justification, that the husband's authorisation be overcome. The legislator was careful in defining the conditions to overcome this authorisation, raising a permanent doubt in the interpreter's mind as to the liability of the wife for the practice of these acts. In fact, this authorisation must be specific for each act the wife intends to carry out, with the exception of wives who are traders, since their activity is incompatible with such a solution. In the latter situation, the legislator allowed for a more encompassing statement, since it recognised the possibility of a general authorisation for the wife to carry out "*all the acts relating to her trade, and even mortgage her immovable property and initiate legal actions, as long as motivated by her trade*" (our underlining).

The Portuguese Civil Code of 1966, in its original version, kept separate marital status depending on the spouses' gender. However, article 36, no. 3, of the Portuguese Constitution of 1976 introduced the principle according to which "*spouses have the same rights and duties with regard to civil and political capacity and the keeping and raising of their children*". This constitutional provision voided any previous law which discriminated between the wife and the husband and implied a reform of the Portuguese Civil Code of 1966, carried out by Decree-Law no. 496/77, of 25 November. As a result, under current Portuguese law, the husband and the wife have the same rights and obligations, as well as identical powers to administer and enter into contracts. There are, in fact, two provisions of the Portuguese Civil Code of 1966, as revised in 1977, which illustrate to a sufficient degree the changes that occurred since then: article 1671, no. 2,

according to which "*the family is to be directed by both spouses, who must agree on the direction of their life in common*"; and article 1677-D, which states that "*each spouse may exercise any profession or activity without the other's consent*".

Código Civil de 1867

SECÇÃO IX
DA INTERRUPÇÃO DA SOCIEDADE CONJUGAL

Artigo 1203º

A sociedade conjugal pode ser interrompida, ou pelo que toca às pessoas e bens dos cônjuges, ou só pelo que toca aos bens.

SUBSECÇÃO I
DA SEPARAÇÃO DE PESSOAS E BENS

Artigo 1204º

Podem ser causa legítima de separação de pessoas e bens:

1º) O adultério da mulher;

2º) O adultério do marido com escândalo público, ou completo desamparo da mulher, ou com concubina teúda e manteúda no domicílio conjugal;

3º) A condenação do cônjuge a pena perpétua;

4º) As sevícias e injúrias graves.

(Revogado pelo Artigo 4º do Decreto de 3/11/1910)

Artigo 4º do Decreto de 3/11/1910

São taxativamente causas legítimas do divórcio litigioso:

1º) O adultério da mulher;

2º) O adultério do marido;

3º) A condenação definitiva de um dos cônjuges a qualquer das penas maiores fixas dos artigos 55º e 57º do Código Penal;

4º) As sevícias e injúrias graves;

Civil Code of 1867

SECTION IX
INTERRUPTION OF THE CONJUGAL SOCIETY

Article 1203

The conjugal society may be interrupted, either in relation to the persons and property of the spouses, or only in relation to their property.

SUBSECTION I
SEPARATION OF PERSONS AND PROPERTY

Article 1204

The following are legitimate grounds for a separation of persons and property:

1) The wife's adultery;

2) The husband's adultery with public scandal, or complete abandonment of the wife, or keeping a concubine in the conjugal domicile;

3) The conviction of the spouse to life imprisonment;

4) Ill-treatment and serious injuries.

(Revoked by article 4 of the Decree of 3/11/1910)

Article 4 of the Decree of 3/11/1910

The following are the only legitimate grounds for a contested divorce:

1) The wife's adultery;

2) The husband's adultery;

3) The definitive conviction of one of the spouses to any of the major penalties foreseen in articles 55 and 57 of the Criminal Code;

4) Ill-treatment or serious injuries;

5º) O abandono completo do domicílio conjugal por tempo não inferior a três anos;

6º) A ausência, sem que do ausente haja notícias, por tempo não inferior a quatro anos;

7º) A loucura incurável quando decorridos, pelo menos, três anos sobre a sua verificação por sentença passada em julgado, nos termos dos artigos 419º e seguintes do Código de Processo Civil;

8º) A separação de facto, livremente consentida, por dez anos consecutivos, qualquer que seja o motivo dessa separação;

9º) O vício inveterado do jogo de fortuna ou azar;

10º) A doença contagiosa reconhecida como incurável, ou uma doença incurável que importe aberração sexual.

§ 1º) O divórcio fundado no nº 3 deste artigo só pode ser pedido se o cônjuge que o solicita não houver sido condenado como co-autor ou cúmplice do crime de que resultou a condenação do outro cônjuge;

§ 2º) Se o divórcio for pedido com fundamento nos nºs 3º e 7º deste artigo, o réu será representado na respectiva acção pelo Ministério Público; e também este o representará nos casos dos nºs 5º e 6º, se o réu não comparecer ou não se fizer representar depois da citação que nesses casos deve ser-lhe feita nos termos de direito.

§ 3º) No caso do nº 8, a prova será restrita ao facto da separação, sua continuidade e duração.

§ 4º) No caso do nº 10, a acção não pode propor-se sem que a natureza e os caracteres da doença incurável sejam verificados em exame prévio realizado

5) The complete abandonment of the conjugal domicile for at least three years;

6) The absence, where nothing has been heard of the absentee, for at least four years;

7) The incurable insanity after at least three years have elapsed since it was pronounced by a ruling in a condition of *res judicata*, in accordance with articles 419 et seq. of the Code of Civil Procedure.

8) The *de facto* separation, freely consented, for ten consecutive years, regardless of the reason for that separation;

9) A chronic gambling addiction;

10) A contagious disease known to be incurable, or an incurable disease implying a sexual aberration.

§ 1) A divorce on the grounds of no. 3 of this article may only be requested if the spouse requesting it has not been convicted as a co-author or an accomplice of the crime for which the other spouse was convicted.

§ 2) If the divorce is requested on the grounds of no.s 3 and 7 of this article, the defendant shall be represented in the respective legal action by the Public Prosecutor; the latter shall also represent him/her in the cases of no.s 5 and 6, if the defendant fails to be present or to have him/herself represented after the summons to be carried out in such cases in accordance with the law.

§ 3) In the case of no. 8, the evidence shall be restricted to the fact of the separation, its continuity and duration.

§ 4) In the case of no. 10, the legal action may not be initiated without the verification of the nature and characteristics of the incurable disease,

nos termos dos artigos 247º e 260º do Código de Processo Civil.

in a previous examination carried out in accordance with articles 247 and 260 of the Code of Civil Procedure.

Artigo 1205º

A separação só pode ser requerida pelo cônjuge inocente.

(Revogado pelo Artigo 44º do Decreto de 3/11/1910)

Article 1205

Separation may only be requested by the innocent spouse.

(Revoked by article 44 of the Decree of 3/11/1910)

Artigo 44º do Decreto de 3/11/1910

É ao cônjuge inocente, como autor da acção, que compete a faculdade de optar pelo divórcio ou pela separação de pessoas e bens.

Article 44 of the Decree of 3/11/1910

It is for the innocent spouse, as applicant, to choose between divorce or separation of persons and property.

Artigo 1206º

O cônjuge que pretender a dita separação, recorrerá ao juiz de direito da comarca do seu domicílio, ou residência, para que este faça convocar o conselho de família, que será composto dos seis parentes mais próximos de um e de outro cônjuge, três de cada lado, e do competente magistrado do Ministério Público, que terá voto meramente consultivo.

§ 1º) A falta de parentes será suprida com os amigos da família, e a destes com homens bons da vizinhança.

§ 2º) Em caso de empate, decidirá o juiz.

§ 3º) Nomeado o conselho de família, serão ambas as partes ouvidas sobre a constituição deste, e poderão requerer a substituição dos membros, em que se derem algumas das circunstâncias mencionadas nos nºs 1º, 2º, 3º, 4º, 5º e 6º do artigo 234º. Igual requerimento poderão fazer, oferecendo-se a provar na falta das ditas circunstâncias, alguma das seguintes:

1º) Suborno;

2º) Interesse na separação.

§ 4º) A mulher poderá requerer ao mesmo tempo depósito provisório, quer ela seja a queixosa, quer seja o queixoso o marido.

Article 1206

The spouse seeking the said separation shall apply to the judge of the division of his/her domicile or residence for the judge to call the family council, which shall be made up of the six closest relatives of both spouses, three on each side, and of the competent Public Prosecutor, who shall have a merely advisory vote.

§ 1) The lack of relatives shall be overcome with the friends of the family, and the lack of the latter shall be overcome with good men of the neighbourhood.

§ 2) In the case of a tie, the judge shall decide.

§ 3) Once the family council is appointed, both parties shall be heard on its composition, and may request the replacement of its members, when any of circumstances mentioned in no.s 1 to 6 of article 234 occur. They may request the same, in the absence of the above mentioned circumstances, if they prove any of the following:

1) Bribery;

2) Interest in the separation.

§ 4) The wife may simultaneously apply for provisional custody, whether she or the husband is the applicant.

(Ter em conta o disposto no artigo 49º da Lei do Divórcio, Decreto de 3/11/1910, diploma que é integralmente reproduzido mais adiante)

(Consider the provisions of article 49 of the Divorce Act, Decree of 3/11/1910, copied infra)

Artigo 1207º

O conselho de família, ouvido o Ministério Público, e as partes, e não conseguindo reconciliar estas, examinará quaisquer provas que se deduzirem perante ele acerca da questão, e resolverá:

1º) Se deve, ou não autorizar a separação das pessoas;

2º) Qual deve ser a soma dos alimentos, se alguns dos cônjuges separados carecer deles, e o outro tiver meios de os prestar;

3º) E, finalmente, havendo filhos, sobre o modo de providenciar a respeito deles, se os cônjuges se não acordarem amigavelmente acerca disso.

Article 1207

The family council, after hearing the Public Prosecutor and the parties, and failing to reconcile the latter, shall examine any evidence produced before it relating to the matter and shall decide:

1) If the separation of persons should or not be authorised;

2) What the amount of maintenance should be, if either of the separated spouses needs it and the other has the means to pay it;

3) And, finally, if there are children, on how they should be provided for, if the spouses do not agree amicably on this issue.

Artigo 1208º

As decisões do conselho de família serão homologadas pelo juiz de direito, e delas não haverá recurso, excepto no caso do nº 2 do artigo precedente, quanto à verba dos alimentos.

Article 1208

The decisions of the family council shall be sanctioned by the judge, and they shall not be subject to appeal, except in the case of no. 2 of the preceding article, regarding the amount of maintenance.

Artigo 1209º

No caso dos nºs 1 e 2 do artigo 1204º, é lícito ao cônjuge ofendido recorrer ao conselho de família, ou intentar contra o outro cônjuge a competente acção criminal.

§ 1º) Porém, se o cônjuge ofensor reincidir, poderá o cônjuge ofendido intentar acção criminal, não obstante ter recorrido ao conselho de família;

§ 2º) Sendo a acção intentada contra a mulher e esta absolvida, será de direito havida por separada de pessoas e bens, e poderá requerer, sem necessidade de outro título, senão da sentença de absolvição que

Article 1209

In the case of no.s 1 and 2 of article 1204, it is lawful for the offended spouse to resort to the family council, or to initiate the respective criminal proceedings against the other spouse.

§ 1) However, if the offending spouse repeats the offence, the offended spouse may initiate criminal proceedings, regardless of having resorted to the family council.

§ 2) If the proceedings are instituted against the wife and she is acquitted, she shall be by law considered as separated of persons and property, and

se proceda executoria-mente à separação, e entrega dos bens que lhe pertencerem.

§ 3º) Se o cônjuge recorrer à acção criminal, observar-se-á o que fica disposto no nº 3 do artigo 1207º, convocando-se para isso o conselho de família, nos termos do artigo 1206º.

(Revogado pelo Artigo 61º e § 1º do Decreto de 3/11/1910)

may request, with no additional title other than the acquitting judgment, that the separation and the surrendering of her property be carried out through execution proceedings.

§ 3) If the spouse resorts to the criminal proceedings, the provisions of no. 3 of article 1207 shall apply, the family council being summoned for this purpose, in accordance with article 1206.

(Revoked by article 61 and § 1 of the Decree of 3/11/1910)

Artigo 61º do Decreto de 3/11/1910

O adultério do marido ou da mulher só será considerado criminoso quando ocorrer durante a vida dos cônjuges em comum, e será punido nos termos dos artigos 401º a 404º do Código Penal, com as seguintes modificações.

§ 1º) O adultério do marido será igualado, em carácter e em gravidade ao da mulher, mas a pena nunca poderá exceder para qualquer deles e respectivo co-réu o máximo de prisão correccional, ficando assim alteradas as incriminações e penalidades dos artigos 401º e 404º.

§ 2º) Os § 2º e 4º do artigo 401º são revogados.

§ 3º) O direito de queixa e acusação do cônjuge ofendido prescreve pelo lapso de seis meses.

§ 4º) O cônjuge ofendido tem de optar pela acção criminal de adultério, ou pela civil de divórcio, ou de separação, com base em adultério, não podendo cumulá-las, em caso algum, nem servir-se numa delas de elementos obtidos em diligências, administrativas ou judiciais, preparatórias de outra.

§ 5º Sendo intentada a acção criminal, e terminando pela absolvição do acusado, este, ainda que seja o marido, poderá

Article 61 of the Decree of 3/11/1910

The husband's or the wife's adultery shall only be considered criminal when it occurs during the spouse's life in common, and shall be punished in accordance with articles 401 to 404 of the Criminal Code, with the following modifications:

§ 1) The husband's adultery shall be equal, in character and gravity, to the wife's adultery, but the sanction may never exceed, for either of them and for the respective co-defendant, the maximum of the correctional imprisonment sentence, the crimes and penalties of articles 401 and 404 being thus altered.

§ 2) §§ 2 and 4 of article 401 are hereby revoked.

§ 3) The offended spouse's right of complaint and of pressing charges is time-barred after six months.

§ 4) The offended spouse must choose between criminal proceedings for adultery or civil proceedings for divorce or separation on the basis of adultery, and he/she may in no case pursue both jointly nor use in one of them elements obtained in administrative or judicial acts carried out to prepare the other.

requerer, sem necessidade de outro título senão da sentença de absolvição, que se proceda executoriamente à separação e entrega dos bens que lhe pertencerem.

§ 6º) Neste caso, a sentença absolutória decretará de direito o divórcio, ou a separação de pessoas conforme na contestação o tiver requerido o acusado, entendendo-se que opta pela separação em caso de silêncio e devendo, observar-se o disposto no Artigo 19 e seus parágrafos deste decreto.

§ 7º) Ficam assim substituídas as disposições do artigo 1209º e seus parágrafos do Código Civil.

§ 5) If the criminal proceedings are instituted, and they result in the acquittal of the accused, the latter, even if it is the husband, may request, with no additional title other than the acquitting judgment, that the separation and surrendering of his/her property be carried out through execution proceedings.

§ 6) In this case, the acquitting judgment shall by law decree the divorce, or the separation of persons, depending on what the accused requested in the defense, it being understood that separation was chosen if nothing was said, and article 19 of this decree, along with its paragraphs, shall be applied.

§ 7) The provisions of article 1209 of the Civil Code, along with its paragraphs, are hereby replaced.

Artigo 1210º

Da separação de pessoas deriva necessariamente a separação de bens.

§ único) Exceptua-se o caso de adultério da mulher, no qual, seja qual for o regime em que o matrimónio tivesse sido contraído, a mulher não terá direito a separação de bens, mas só a alimentos, salvo se provar, que ao tempo em que cometeu o adultério, podia requerer a separação contra o marido, por alguma das causas mencionadas no nº 2 do artigo 1204º.

(O § único foi revogado pelo Artigo 50º do Decreto de 3/11/1910)

Article 1210

The separation of persons results necessarily in the separation of property.

Single §) The case of the wife's adultery is excepted; in this case, regardless of the regime in which the marriage was contracted, the wife shall not be entitled to the separation of property, but only to maintenance, except if she proves that, at the time of the said adultery, she could request separation from the husband, for any of the grounds mentioned in no. 2 of article 1204.

(The single § was revoked by Article 50 of the Decree of 3/11/1910)

Artigo 1211º

Em todos os casos em que se dê separação de bens, se procederá a inventário e partilha, como se o casamento estivesse dissolvido.

Article 1211

In all cases where separation of property occurs, an inventory and partition shall be carried out, as if the marriage were dissolved.

Artigo 1212º

Quando os filhos ficarem ao cuidado e guarda de um dos cônjuges, nem por isso se terá por desonerado o outro das obrigações, nem por privado dos direitos paternais, nem aquilo que não se opuser ao desempenho do encargo, especialmente atribuído ao outro cônjuge.

Article 1212

When the children remain in the care and custody of one of the spouses, the other spouse shall continue to have parental obligations and rights, in whatever is not opposed to the role specifically assigned to the other spouse.

Artigo 1213º

O cônjuge que der causa à separação, perderá tudo o que houver recebido do outro cônjuge, ou que outrem, por consideração deste, lhe houver dado ou prometido.

Article 1213

The spouse who causes the separation shall lose all that he/she received from the other spouse or that a third party has given or promised to him/her on account of the other spouse.

Artigo 1214º

A separação de bens em nada prejudica os direitos anteriormente adquiridos pelos credores do casal.

Article 1214

The separation of property shall not affect the previously acquired rights of the couple's creditors.

Artigo 1215º

Os cônjuges podem dispor livremente dos bens mobiliários, que depois da separação pertencerem a cada um deles, salvo o direito dos filhos.

Article 1215

The spouses may dispose freely of the movable property belonging to each of them after the separation, save for the children's rights.

Artigo 1216º

A disposição entre vivos dos bens imobiliários, que ficam pertencendo a cada um dos cônjuges depois da separação, depende do consentimento de ambos, podendo ser judicialmente suprido o daquele, que, sem justo motivo, o recusar.

Article 1216

The *inter vivos* disposition of immoveable property belonging to one of the spouses after the separation shall depend on the consent of both, but the court may overcome the consent of the one who refuses without a just reason.

Artigo 1217º

A separação de bens não autoriza os cônjuges a exercer antecipadamente direitos, dependentes da dissolução do matrimónio.

Article 1217

The separation of property does not authorise the spouses to exercise beforehand rights dependent on the dissolution of the marriage.

Artigo 1218º

Seja qual for o modo, como a separação se faça, será sempre lícito aos cônjuges restabelecer a sociedade conjugal, nos termos em que tinha sido constituída, contando que o façam por acto de conciliação perante o respectivo juiz de paz.

§ único) Esta reconciliação em nada prejudicará quaisquer direitos de terceiro adquiridos durante a separação.

Article 1218

Regardless of the manner in which the separation takes place, the spouses shall always be allowed to reestablish the conjugal society, in the terms in which it was originally constituted, as long as they do so through an act of conciliation before the respective justice of the peace.

Single §) This reconciliation shall not affect the rights of third parties acquired during the separation.

SUBSECÇÃO II
DA SIMPLES SEPARAÇÃO JUDICIAL DOS BENS

Artigo 1219º

A mulher casada, quer sem comunhão de bens, quer com ela, que se achar em perigo manifesto de perder o que for seu, pela má administração do marido, poderá requerer separação de bens nos termos seguintes.

SUBSECTION II
SIMPLE JUDICIAL SEPARATION OF PROPERTY

Article 1219

The married woman, with or without communion of property, who is in manifest danger of losing what is hers, due to the husband's bad administration, may request the separation of property in accordance with the following provisions.

Artigo 1220º

Se a mulher for casada segundo o costume do reino, a separação só poderá recair sobre os bens que tiver trazido para o casal, ou que, depois, lhe houvessem advindo, e na meação dos que tiver adquirido conjuntamente com o marido.

Article 1220

If the wife is married according to the custom of the kingdom, the separation may only affect the property which she has brought to the couple or that became hers subsequently, and the moiety of the property acquired jointly with the husband.

Artigo 1221º

Se a mulher for casada segundo o regime dotal, ou por outra espécie de separação de bens, só se lhe admitirá a separação judicial, sendo os bens dotais, ou separados susceptíveis de deterioração, e não se achando a restituição do

Article 1221

If the wife is married in accordance with the dotal regime, or in another form of separation of property, judicial separation shall only be allowed if the dotal or separated property may deteriorate, and if the restitution of the

dote suficientemente assegurada por algum dos modos estabelecidos no artigo 1139º.

dowry is not sufficiently assured by any of the ways foreseen in article 1139.

Artigo 1222º

Se o casamento tiver sido contraído segundo o costume do reino, entender-se-á que os cônjuges renunciam à comunhão de bens, desde a apresentação em juízo do requerimento para a separação, se esta vier a realizar-se.

Article 1222

If the marriage has been contracted in accordance with the custom of the kingdom, it shall be understood that the spouses renounce the communion of property from the moment the application for separation is submitted to the court, if the separation actually occurs.

Artigo 1223º

Julgada a separação por sentença do respectivo juiz de direito, será entregue à mulher a administração dos seus bens.

Article 1223

When the separation has been decreed by a judgment of the respective civil judge, the wife shall be given the administration of her property.

Artigo 1224º

Depois da separação, se os bens forem dotais, conservarão a mesma natureza. Todos os outros serão considerados como próprios.

Article 1224

After the separation, dotal property shall retain this nature. All other property shall be considered as exclusive.

Artigo 1225º

O requerimento para a separação, e bem assim a sentença que a julgar, serão anunciados no prazo de oito dias em algum dos periódicos que haja na comarca, ou não os havendo, por editais no lugar do domicílio dos cônjuges.

§ 1º) O prazo de oito dias será contado, no primeiro caso, desde o dia da apresentação do requerimento no cartório do respectivo escrivão; e no segundo, desde o dia em que a sentença passar em julgado.

§ 2º) As dívidas que o marido contrair depois do primeiro anúncio, não poderão recair sobre os bens que forem separados por ofício da sentença.

Article 1225

The application for separation, as well as the judgment that decides on it, shall be announced within eight days in one of the division's periodicals or, if there are none, by edicts put up in the spouse's place of domicile.

§ 1) The deadline of eight days shall start, in the first case, on the day the application is submitted in the office of the respective court clerk; and, in the second case, on the day in which the judgment becomes *res judicata*.

§ 2) The property separated as a result of the judgment shall not be liable for debts incurred by the husband after the first announcement.

Artigo 1226º

A separação de bens não exonera a mulher de concorrer, para as despesas do casal, com os rendimentos dos seus bens na proporção dos seus haveres, com relação aos do marido.

Artigo 1227º

Esta separação de bens não pode fazer-se por convenção.

Artigo 1228º

Os credores especiais de qualquer dos cônjuges podem intervir como oponentes na demanda de separação.

Artigo 1229º

Os efeitos da separação podem ser anulados por convenção entre os cônjuges, contanto que seja celebrada por escritura, ou auto público, e anunciada pela mesma forma que fica determinada para o requerimento e sentença de separação.

§ único) Os efeitos desta convenção, pelo que toca a terceiros, só começam a correr desde a data dos referidos anúncios.

Artigo 1230º

Ainda que não haja separação judicial de bens, a mulher terá sempre o direito de embargar de terceiro, sem necessidade de autorização do marido, qualquer execução feita sobre os rendimentos dos seus bens dotais, ou próprios, administrados pelo marido, se por essa execução for privada dos necessários alimentos.

Article 1226

The separation of property does not exonerate the wife from contributing to the couple's expenses, from the income of her property, in the proportion between her and her husband's property.

Article 1227

This separation of property may not be carried out by agreement.

Article 1228

Special creditors of either of the spouses may intervene in the court proceedings so as to oppose the application for separation.

Article 1229

The effects of the separation may be annulled by agreement between the spouses, as long as this agreement is carried out in a deed or document executed under seal and announced in the same manner used for the application and the ruling which decreed the separation.

Single §) The *erga omnes* effects of this agreement shall start only on the day of the mentioned announcements.

Article 1230

Even if there is no judicial separation of property, the wife is always entitled to oppose in court, as a third person, without the need for the husband's authorisation, any execution made on the income of her dotal or exclusive property managed by the husband, if such execution will deprive her of the necessary maintenance.

COMMENTARY TO ARTICLES 1203 TO 1230

The original version of the Civil Code of 1867 foresaw two ways of interrupting the conjugal society: a) simple separation of persons and property and b) simple judicial separation of property. In fact, up to 1910, and under the principle of the perpetuity of marriage, inscribed in the primitive version of article 1056, divorce was not accepted as a way to terminate the conjugal society, with only its interruption being permitted. It should, however, be noted that the terminology used was not particularly exact, since what actually happened under the regime then in force was an exclusion of the application of certain rules to the family society and not, as the expression interruption might lead one to assume, a temporary termination of the marriage itself. Let us look at the features that characterise the above mentioned regimes.

The simple separation of property is regulated in articles 1219 to 1230, and it translates into an option given to the married woman, in the event of certain situations which endanger her patrimony, as a result of the husband's bad administration. In accordance with article 1223, when the separation is decreed, and unlike the general regime in force, the property is administered by the wife. However, it should be noted that the legislator did not take a radical stand in this respect, and instead limited this solution to the strict limits required for the safeguarding of the patrimony, since article 1220, in the context of marriages according to the custom of the kingdom, allowed the husband to keep the administration of property he brought to the marriage and of property he acquired gratuitously.

Thus, the conjugal society is dissolved with regard to the property, but is preserved in relation to the respective spouses. Some authors argue that the legislator considered simple separation of property as a sanction, which could be revoked, since article 1229 allowed for spousal reconciliation.

The regime of separation of persons and property is, in turn, regulated in articles 1204 to 1218. These provisions allow us to conclude that this separation regime is more serious than the other one. Indeed, the separation of persons and property encompasses both the spouses' patrimony and their persons, with the legislator foreseeing two types of separation: a) contested separation of persons and property; b) separation of persons and property by mutual consent, distinguished according to whether it is requested by one of the spouses or by both jointly.

Regarding contested separation of persons and property, one should take note of article 43 of the Decree of 3 November 1910, according to which the grounds for this separation are the same as those for a contested divorce. We may highlight that article 4 of the above mentioned Decree considered the husband's and the wife's adultery as equal grounds for separation, clearly contradicting the provisions of the initial version of the Civil Code, which shows a real change of opinion concerning the violation of marital duties. See, however, below, the commentary to the Divorce Act. Pires de Lima and Antunes Varela, on page 250 *et seq*. of their manual (*Noções Fundamentais*), note that there are grounds for divorce suits that run counter to principles of Family Law. This would be the case of the grounds mentioned in no. 7 of article 4 of the Decree of 3 November 1910, which would run counter to the obligation of mutual help and assistance mentioned in no. 3 of article 38 of the Act on Marriage as a Civil Contract.

Article 44 of the Decree of 3 November states that the proposed suit is defined – as a divorce or a separation suit – by the innocent spouse, which shows that responsibility for the separation directly influences the entire procedure to be followed.

Article 45 of the above mentioned Decree states that, if the plaintiff is unsuccessful in the suit, "*this fact by itself shall be regarded as a presumption of serious injury for the purpose of institution of a suit for divorce or separation of persons and property by the defendant, if he/she so wishes*". This is, therefore,

additional grounds for the initiation of the divorce suit, together with the remaining grounds mentioned in article 4 of the Decree in question.

As for the effects of the separation, article 1211 states that in "*all cases where separation of property occurs, an inventory and partition shall be carried out, as if the marriage were dissolved*"

The separation regime also limits the spouses' patrimonial capacity, since, after the separation, the disposition of immovable property requires the consent of both spouses, in accordance with article 1216, even though this may be overcome by a court of law if there is a refusal without a just reason.

Article 46 of the Decree of 3 November further allows for the separation to be converted into a divorce, a divorce thus granted being considered equal to a contested divorce, under article 47 of the same Decree.

With regard to the separation of persons and property by mutual consent, it should be clarified that the regime in place did not derive from the reforms of 1910, but rather from Decrees dating from 1918 and 1919, specifically: Decree no. 4.343, of 30 April 1918, Decree no. 4.431, of 30 May 1918, and Decree no. 5.644 of 10 May 1919. This issue was then regulated in articles 1472 to 1476 of the Code of Civil Procedure of 1939, as indicated in the text. The procedural legislator imposed a minimum period of five years, starting from the date of the marriage, before one can resort to this possibility, thereby changing the two year period initially foreseen in article 35 of the Decree of 3 November 1910, possibly thinking that such a longer period would dissuade the termination of marital ties. Or, by requiring a longer period of reflection before the termination of the marriage, it could prevent the spouses from rushing into the separation. For further development, see, below, the commentary to the Divorce Act.

Código Civil de 1867

SECÇÃO X
DO APANÁGIO DOS CÔNJUGES VIÚVOS

Artigo 1231º

Fosse qual fosse o contrato do dissolvido casamento, o cônjuge, que por morte do outro, se achar sem meios de subsistência, terá direito a ser alimentado pelos rendimentos dos bens deixados pelo falecido, sejam de que natureza forem.

§ único) Esta disposição não abrange os bens, de que o cônjuge falecido tenha sido mero usufrutuário.

Artigo 1232º

Os alimentos durarão enquanto o alimentado deles precisar, ou não passar a segundas núpcias, e serão taxados pelo prudente arbítrio do julgador, em proporção dos rendimentos dos sobreditos bens, e conforme a necessidade e condição do alimentado, salvo se as partes se acordarem sobre isso amigavelmente.

§ único) A disposição deste artigo verificar-se-á, haja ou não filhos do matrimónio, e ainda quando o cônjuge defunto tenha deixado filhos, havidos de outro matrimónio anterior.

Civil Code of 1867

SECTION X
MAINTENANCE RIGHTS OF WIDOWED SPOUSES

Article 1231

Regardless of the regime of the dissolved marriage, the spouse who, due to the death of the other spouse, is left without means to survive, shall be entitled to maintenance from the income of the property left by the husband, whatever its nature.

Single §) This provision does not encompass property over which the deceased spouse had merely a right of usufruct.

Article 1232

The maintenance shall last for as long as the one entitled to it needs it, or for as long as he/she is not remarried, and shall be determined according to the prudent discretion of the judge, in proportion to the income of the said property and according to the need and condition of the one entitled to it, except if the parties reach an amicable agreement in this respect.

Single §) The provisions of this article shall be applied regardless of whether the marriage resulted in children and of whether the deceased spouse has left children born of a previous marriage.

SECÇÃO XI
DAS SEGUNDAS NÚPCIAS

Artigo 1233º

A viúva que quiser contrair segundas núpcias, antes de terem decorrido trezentos dias depois da morte do marido, será obrigada a fazer verificar se está ou não grávida.

(Substituído e revogado pelo Artigo 10º do Decreto nº 1, de 25/12/1910)

Artigo 10º do Decreto n.º 1, de 25/12/1910

Qualquer dos ex-cônjuges não poderá contrair novo casamento enquanto não decorrerem sobre a dissolução do seu casamento anterior por divórcio, ou por morte, os prazos marcados no artigo 55º do Decreto com força de lei de 3 de Novembro de 1910.

Artigo 56º do Decreto n.º 1, de 25/12/1910

O que fica disposto no artigo antecedente é igualmente aplicável aos que casarem com infracção do disposto no artigo 10º do presente decreto com força de lei, sem prejuízo do disposto no artigo 1234º do Código Civil, se a viúva ou divorciada incorrer também na respectiva sanção.

Artigo 55º do Decreto de 3 de Novembro de 1910

A mulher divorciada não poderá contrair novo casamento sem que haja passado um ano completo sobre a data da dissolução do casamento anterior; e o marido também só o poderá fazer passados seis meses.

§ 1º) Cessa a imposição deste artigo e o novo casamento é imediatamente

SECTION XI
RE-MARRIAGE

Article 1233

The widowed woman who wants to remarry before three hundred days have passed since the husband's death shall be obliged to have verified whether or not she is pregnant.

(Replaced and revoked by article 10 of Decree no. 1, of 25/12/1910)

Article 10 of Decree no. 1, of 25/12/1910

Neither of the former spouses may contract a new marriage before the deadlines foreseen in article 55 of the Decree of 3 November 1910 have elapsed since the dissolution, by divorce or by death, of their previous marriage.

Article 56 of Decree no. 1, of 25/12/1910

The provisions of the preceding article are also applicable to those who are married in infringement of article 10 of this decree, not precluding the provisions of article 1234 of the Civil Code, if the widowed or divorced woman is also subject to the respective sanction.

Article 55 of Decree of 3 November 1910

A divorced woman may not be remarried before one full year has elapsed since the dissolution of the previous marriage; and the husband may also only be remarried after six months.

§ 1) The restriction foreseen in this article ceases and the new marriage is immediately possible when the divorce

possível quando o divórcio for autorizado por qualquer dos fundamentos classificados nos nºs 5º, 6º e 8º do artigo 4º, ou nos termos do artigo 40º, ou do artigo 47º.

§ 2º) Ao cônjuge convencido de estar sofrendo de doença referida nos nºs 7 e 10º do artigo 4º será proibido o novo casamento, mas o consorte poderá realizar novo matrimónio logo que passe o respectivo prazo, marcado neste artigo 55º.

has been granted for any of the grounds mentioned in no.s 5, 6 and 8 of article 4, or in accordance with article 40 or article 47.

§ 2) The spouse who is proved to be suffering from an illness mentioned in no.s 7 and 10 of article 4 shall be forbidden from remarrying, but the consort may be remarried as soon as the respective period elapses, as foreseen in this article.

Artigo 1234º

A viúva que casar, desobedecendo ao artigo precedente, perderá todos os lucros nupciais que por lei ou convenção tenha recebido ou haja de receber por parte do marido anterior, os quais passarão aos legítimos herdeiros dele; e o segundo marido não poderá contestar a sua paternidade relativamente ao filho que nascer, passados cento e oitenta dias depois de seu casamento, salvo contudo, o direito do filho para reclamar, se assim lhe convier, a paternidade do marido anterior, podendo prova-la.

Article 1234

The widowed woman who is married in infringement of the preceding article shall lose all the nuptial benefits which she has received or had to receive from the previous husband, by law or agreement, which shall be transmitted to his lawful heirs; and the second husband shall not be entitled to contest his paternity concerning the child born after one hundred and eighty days have elapsed since his marriage, save for the right of the child to invoke, when convenient, the paternity of the previous husband, if he/she can prove it.

Artigo 1235º

O varão, ou a mulher que contrair segundas núpcias, tendo filhos ou outros descendentes sucessíveis de anterior matrimónio, não poderá comunicar com o outro cônjuge, nem por nenhum título doar-lhe mais do que a terça parte dos bens, que tiver ao tempo do casamento, ou que venha depois a adquirir depois por doação ou herança de seus ascendentes ou de outros parentes.

Article 1235

A man or a woman who remarries and has children or other descendants from a previous marriage who are successors, may not share with nor donate to the other spouse more than a third of the his/her assets at the time of the marriage, or of the assets acquired subsequently by donation or inheritance from his/her ascendants or other relatives.

Artigo 1235º

O varão ou a mulher que contrair segundas núpcias, tendo filhos ou outros descendentes sucessíveis de anterior matrimónio, não poderá comunicar com o outro cônjuge, nem por qualquer título

Article 1235

A man or a woman who remarries and has children or other descendants from a previous marriage who are successors, may not share with nor donate to the other spouse more than half of his/her

doar-lhe mais do que a metade dos bens, que tiver ao tempo do casamento, ou que venha a adquirir por doação ou herança de seus ascendentes ou de outros parentes.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1236º

Se ao dito varão ou mulher ficarem de algum dos filhos de qualquer dos matrimónios bens, que este filho houvesse herdado de seu falecido pai ou mãe, e existirem irmãos germanos daquele filho falecido, a estes pertencerá a propriedade dos mesmos bens, e o pai ou a mãe só terá o usufruto.

Artigo 1236º

Se ao bínubo ficarem de algum dos filhos de qualquer matrimónio bens que este filho houvesse herdado de seu falecido pai ou mãe ou dos ascendentes destes e existirem irmãos germanos do filho falecido ou descendentes de irmãos germanos falecidos, a estes pertencerá a propriedade dos mesmos bens, e o pai ou a mãe só terá o usufruto.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1237º

A mulher que contrair segundas núpcias depois de completar cinquenta anos, não poderá alhear por título algum, desde o dia em que há contraído o segundo matrimónio, a propriedade das duas terças partes dos bens mencionados no artigo 1235º, enquanto tiver filhos e descendentes, que os possam haver.

Artigo 1237º

A mulher que contrair segundas núpcias depois de completar cinquenta

assets at the time of the marriage, or of the assets acquired subsequently by donation or inheritance from his/her ascendants or other relatives.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1236

If the said man or woman inherits property from a child of any of the marriages, the said property having been inherited by that child from his/her deceased father or mother, and if the deceased child has full blood siblings, ownership of the said property shall belong to the latter, and the father or mother shall merely have a right of usufruct over it.

Article 1236

If the remarried spouse inherits property from a child of any of the marriages, the said property having been inherited by that child from his/her deceased father or mother, and if the deceased child has full blood siblings, or there are descendants of deceased full blood siblings, these shall have the ownership of the said property, and the father or mother shall merely have a right of usufruct over it.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1237

The woman who remarries after the age of fifty, starting with the day in which she is remarried, shall not be allowed to alienate, at any title, the property of two thirds of the assets mentioned in article 1235, as long as she has children or descendants who may acquire it.

Article 1237

The wife who is remarried after the age of fifty, starting with the day in

anos, não poderá alhear por título algum, desde o dia em que haja contraído o segundo matrimónio, a propriedade de metade dos bens mencionados no artigo 1235º, enquanto tiver filhos e descendentes, que os possam haver, podendo qualquer interessado requerer inventário desses bens e o registo da respectiva condição resolutiva em relação aos bens.

(*Nova redacção conferida pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1238º

O varão, ou a mulher, com filhos de anterior matrimónio, que casar com pessoa que os não tenha, presumir-se-á casado, não havendo convenção em contrário, segundo o costume do reino, salvo o disposto nesta secção, que será sempre mantido.

Artigo 1239º

É aplicável ao segundo matrimónio tudo o mais que fica disposto relativamente ao primeiro.

which she is remarried, shall not be allowed to *alienate*, at any title, the property of half of the assets mentioned in article 1235, as long as she has children or descendants who may acquire it, any interested party being entitled to request an inventory of the said property and the registration of the respective condition subsequent in respect to the property.

(*New drafting in accordance with Decree no. 19.126, of 16/12/1930*)

Article 1238

A man or a woman, with children from a previous marriage, who marries a person with no children, shall be understood to be married, in the absence of a different agreement, in accordance with the custom of the kingdom, except for what is foreseen in this section, which shall always be complied with.

Article 1239

A re-marriage shall be subject to all the provisions foreseen concerning a first marriage.

COMMENTARY TO ARTICLES 1231 TO 1239

The rules in question show that the legislator evidently singled out the situation of the widowed wife and of the divorced wife, the latter only possible after the Decree of 3 November 1910. Indeed, we should take note that the legal rules in force must be assessed in light of the new drafting introduced by the above mentioned Decree.

Thus, it was imposed that after 1910 the widowed wife and the divorced wife could not be remarried before one year had elapsed, a period which was shortened to six months for men, considering that it was unnecessary to justify a possible state of pregnancy.

The legislator established exceptions to the above in article 4, no.s 5, 6 and 8, in article 40 and in article 47 of the Decree of 1910 in question. A joint interpretation of the provisions shows that the legislator considered that, in those situations, the existence of a period of distance between the spouses justified setting aside the presumption of pregnancy. Therefore, the rule is excluded upon the verification of the circumstances in question.

If a marriage is carried out in violation of these provisions, the legislator of 1910 states that the wife loses all the advantages deriving from the previous marriage, these advantages being passed on to the previous husband's intestate heirs. There is therefore a condemnation by the legislator of the wife's behaviour, possibly due to the possibility that it could result in the transfer of paternity, if she is pregnant. Indeed, the law does not grant the second husband the possibility of challenging the pregnancy, allowing only the respective child to challenge the paternity in question, upon production of evidence. In this respect, see article 101 of the Civil Code, which enshrines the presumption of legitimate paternity of children, after one hundred and eighty days have elapsed since the solemnisation of the second marriage. And, curiously, it points out that this challenge should only be brought when it is convenient for the child.

The legislator was also careful to impose limits on the spouses' exercise of private autonomy, in articles 1235, 1236 and 1237, indicating that, in the case of a second marriage, and if there are children from the previous marriage, the other spouse may not receive more than half of the respective property, thereby preserving the integrity of the family patrimony. A similar limitation is included in article 1237, but applying only to the twice-wed woman with children or descendents, a situation which should be highlighted due to its demonstration of how the spouses are treated differently. A different legal regime will be applied if the second marriage occurs in the absence of children – in this situation, the alienation in question becomes possible.

Article 1238 further states, as the default option, that the property regime according to the custom of the kingdom be applied to second marriages, if either spouse has children of a previous marriage. However, the legislator allowed for the possibility of a prenuptial agreement setting aside the default regime.

2.2. Lei do Divórcio
(Decreto de 3 de Novembro de 1910)

Divorce Act (Decree of 3 November 1910)

LEI DO DIVÓRCIO
(Aprovada por Decreto de 3 de Novembro de 1910)

CAPÍTULO I
DA DISSOLUÇÃO DO CASAMENTO

Artigo 1º

O casamento dissolve-se:
1º) Pela morte de um dos cônjuges;
2º) Pelo divórcio.

Artigo 2º

O divórcio, autorizado por sentença passada em julgado, tem juridicamente os mesmos efeitos da dissolução por morte, quer pelo que respeita às pessoas e aos bens dos cônjuges, quer pelo que respeita à faculdade de contraírem novo e legítimo casamento.

Artigo 3º

O divórcio pode ser pedido só por um dos cônjuges ou por ambos conjuntamente. No primeiro caso diz-se divórcio litigioso; no segundo caso diz-se divórcio por mútuo consentimento.

CAPÍTULO II
DO DIVÓRCIO LITIGIOSO

SECÇÃO I
DAS CAUSAS E PROCESSO DO DIVÓRCIO LITIGIOSO

Artigo 4º

São taxativamente causas legítimas do divórcio litigioso:

DIVORCE ACT
(Approved by the Decree of 3 November 1910)

CHAPTER I
DISSOLUTION OF THE MARRIAGE

Article 1

A marriage is dissolved:
1) By the death of one of the spouses;
2) By divorce.

Article 2

A divorce, granted by a ruling in a condition of *res judicata*, has the same legal effects as the dissolution by death, both regarding the persons and property of the spouses, and regarding the capacity to contract a new and lawful marriage.

Article 3

A divorce may be requested by one of the spouses or by both of them jointly. In the first case, it is called a contested divorce; in the second case it is called a divorce by mutual consent.

CHAPTER II
CONTESTED DIVORCE

SECTION I
GROUNDS AND PROCEDURE OF A CONTESTED DIVORCE

Article 4

The following are the only legitimate grounds for a contested divorce:

1º) O adultério da mulher;

2º) O adultério do marido;

3º) A condenação definitiva de um dos cônjuges a qualquer das penas maiores fixas dos artigos 55º e 57º do Código Penal;

4º) As sevícias e as injúrias graves;

5º) O abandono completo do domicílio conjugal por tempo não inferior a três anos;

6º) A ausência, sem que do ausente haja notícias, por tempo não inferior a quatro anos;

7º) A loucura incurável quando decorridos, pelo menos, três anos sobre a sua verificação por sentença passada em julgado, nos termos dos artigos 419º e seguintes do Código de Processo Civil;

8º) A separação de facto, livremente consentida, por dez anos consecutivos, qualquer que seja o motivo dessa separação;

9º) O vício inveterado do jogo de fortuna ou de azar;

10º) A doença contagiosa reconhecida como incurável, ou uma doença incurável que importe aberração sexual.

§ 1º) O divórcio fundado no nº 3 deste artigo só pode ser pedido se o cônjuge que o solicita não houver sido condenado como co-autor ou cúmplice do crime de que resultou a condenação do outro cônjuge.

§ 2º) Se o divórcio for pedido com fundamento nos nºs 3 e 7 deste artigo, o réu será representado na respectiva acção pelo Ministério Público; e também este o representará nos casos dos nºs 5º e 6º, se o réu não comparecer ou não se fizer representar depois da citação que nesses casos deve ser feita nos termos de direito.

1) The wife's adultery;

2) The husband's adultery;

3) The definitive conviction of one of the spouses to any of the major penalties foreseen in articles 55 and 57 of the Criminal Code;

4) Ill-treatment or serious injuries;

5) The complete abandonment of the conjugal domicile for at least three years;

6) The absence, where nothing has been heard of the absentee, for at least four years;

7) The incurable insanity after at least three years have elapsed since it was pronounced by a ruling in a condition of *res judicata*, in accordance with articles 419 et seq. of the Code of Civil Procedure.

8) The *de facto* separation, freely consented, for ten consecutive years, regardless of the reason for that separation;

9) A chronic gambling addiction;

10) A contagious disease known to be incurable, or an incurable disease implying a sexual aberration.

§ 1) A divorce on the grounds of no. 3 of this article may only be requested if the spouse requesting it has not been convicted as a co-author or an accomplice of the crime for which the other spouse was convicted.

§ 2) If the divorce is requested on the grounds of no.s 3 and 7 of this article, the defendant shall be represented in the respective legal action by the Public Prosecutor; the latter shall also represent him/her in the cases of no.s 5 and 6, if the defendant fails to be present or to have him/herself represented after the summons, to be carried out in such cases in accordance with the law.

§ 3º) No caso do nº 8, a prova será restrita ao facto da separação, sua continuidade e duração.

§ 4º) No caso do n. 10, a acção não pode propor-se sem que a natureza e os caracteres da doença incurável sejam verificados em exame prévio realizado nos termos dos Artigos 247º e 260º do Código de Processo Civil.

§ 3) In the case of no. 8, the evidence shall be restricted to the fact of the separation, its continuity and duration.

§ 4) In the case of no. 10, the legal action may not be initiated without the verification of the nature and characteristics of the incurable disease, in a previous examination carried out in accordance with articles 247 and 260 of the Code of Civil Procedure.

Artigo 5º

A acção de divórcio será proposta, ou no juízo do domicílio ou no da residência do autor; mas se este residir em país estrangeiro, a respectiva acção será proposta na comarca de Lisboa.

Article 5

A legal action for divorce may only be initiated in the court of the domicile or in that of the plaintiff's residence; however, if the latter resides in a foreign country, the action in question shall be initiated in the Lisbon court.

Artigo 6º

No requerimento em que se deduzir a acção o autor alegará precisamente alguns dos factos classificados no Artigo 4º como causa legítima de divórcio, juntando certidão de casamento, e, quando o pedido se fundar em qualquer dos factos constantes dos nºs 3º e 7º do mesmo artigo, certidão da respectiva sentença com trânsito em julgado.

§ único) No mesmo requerimento alegará o autor o que entender de seu direito acerca do destino dos filhos menores havendo-os, dos alimentos destes e de qualquer outro ponto que seja necessário regular a respeito dos filhos comuns.

Article 6

In the application initiating the legal action, the plaintiff shall allege precisely some of the facts listed in Article 4 as legitimate grounds for the divorce, together with a marriage certificate, and, when the request is based on any of the facts mentioned in no.s 3 and 7 of the same article, with a certificate of the respective court judgment in a condition of *res judicata*.

Single §) In the same request, the plaintiff shall allege what he/she deems fit concerning the fate of the minor children, if there are any, of their maintenance and of any other issue the regulation of which might be required regarding the common children.

Artigo 7º

O pedido que não vier fundamentado e documentado nos termos do artigo antecedente, será indeferido, e desse

Article 7

A request which is not duly justified and documented in accordance with the preceding article shall be rejected, and

despacho poderá o requerente interpor recurso de agravo, que subirá nos próprios autos.

Artigo 8º

Deferido o pedido, seguirá a acção, até à sentença final, os termos do processo ordinário, com as seguintes modificações:

1º) Todas as excepções serão deduzidas na contestação, e todas as nulidades, incluindo as insupríveis, salvo a da falta da primeira citação, serão arguidas e julgadas nos prazos e termos do artigo 132º e seguintes do Código de Processo Civil.

2º) Não poderão depor mais de cinco testemunhas a cada facto, e o número total delas, para cada uma das partes não pode exceder a trinta;

3º) São admissíveis depoimentos por carta precatória ou rogatória, que possa cumprir-se dentro do prazo máximo de seis meses, sendo porém a parte que os requerer obrigada a declarar expressamente os factos a que as testemunhas têm de depor;

4º) Os exames directos são permitidos ainda mesmo no caso do nº 10 do artigo 4º, apreciando-se a prova, que deles e dos anteriores resultar, nos termos do artigo 2419º do Código Civil;

5º) Finda a produção das provas, cada uma das partes terá vista do processo por dez dias improrrogáveis, para alegações escritas no cartório;

6º) A sentença não fará relatório nem da questão nem das provas, mas conterá sempre os nomes das partes, a causa do pedido, a disposição de lei aplicável e os fundamentos da decisão, despidos de qualquer comentário;

the plaintiff may appeal the ruling in question, which will be forwarded within the same case file.

Article 8

Once the request is admitted, the legal action shall be conducted, up to the final ruling, in accordance with the ordinary procedure, with the following modifications:

1) All the exceptions shall be raised in the reply, and all the nullities, including those which cannot be cured, except that of the lack of an initial summons, shall be raised and decided in the deadlines and conditions of article 132 et seq. of the Code of Civil Procedure.

2) No more than five witnesses may depose for each fact, and their total number, for each party, may not exceed thirty;

3) Depositions by way of commission or by letter of request are admissible, if they may be carried out at least within six months, the party requesting them being obliged to explicitly declare the facts to which the witnesses' deposition should relate.

4) Direct examinations are allowed even in the case of no. 10 of article 4, the evidence resulting from them and from the previous numbers being examined in accordance with article 2419 of the Civil Code.

5) Once the evidence has been presented, each party shall be entitled to consult the records for ten days, non-extendable, to file written arguments.

6) The judgment shall not report on the issue or the evidence, but will always contain the names of the parties, the cause of action, the applicable legal provision and the grounds of the decision, unaccompanied by commentary;

7º) Se a sentença, que será publicada em audiência, autorizar o divórcio na mesma, designando dia e hora, convocará o juiz os cônjuges a uma conferência, que se realizará dentro do prazo improrrogável de quinze dias, para resolverem acerca do destino dos filhos menores, havendo-os, dos alimentos destes e de qualquer ponto que seja necessário regular a respeito dos filhos comuns.

7) If the judgment, to be announced in open court, grants the divorce, the judge shall decide on a day and time and summon the spouses for a conference, which shall take place within the non-extendable deadline of fifteen days, to decide on the fate of the minor children, if there are any, their maintenance and any other issue the regulation of which might be required regarding the common children.

Artigo 9º

Se os cônjuges, por si ou por seus advogados, acordarem acerca de todos ou alguns dos pontos a que se refere o nº 7 do artigo anterior, será o acordo reduzido a escrito e homologado por sentença, na qual o juiz decidirá os pontos não acordados, se os houver. Se algum dos cônjuges deixar de comparecer, por si ou por seu advogado, ou na falta de acordo, decidirá o juiz. Em qualquer dos casos a respectiva sentença será publicada em audiência.

Article 9

If the spouses, personally or through their counsels, agree on all or some of the points mentioned in no. 7 of the previous article, such agreement shall be put in writing and sanctioned by a judgment, in which the judge shall decide on the points not agreed upon, if there are any. If one of the spouses fails to be present, personally or through his/her counsel, or in the absence of an agreement, the judge shall decide. In any case, the respective judgment shall be announced in open court.

Artigo 10º

Da sentença que autorizar ou negar o divórcio cabe apelação em ambos os efeitos.

Article 10

The judgment granting or denying the divorce is subject to appeal with or without stay.

Artigo 11º

Da sentença que homologar, decidir e homologar, ou puramente decidir, os pontos a que se refere o nº 7 do artigo 8º, nos termos do artigo 9º, cabe apelação só no efeito devolutivo, restrita à matéria não acordada.

Article 11

The judgment sanctioning, deciding and sanctioning, or simply deciding the points mentioned in no. 7 of article 8, in accordance with article 9, may be appealed but without stay and restricted to the issues not agreed upon.

Artigo 12º

O prazo para a interposição da apelação a que se refere o artigo 10º conta-se, no caso de negação do divórcio, da publicação em audiência da sentença respectiva, mencionada no nº 6 do artigo 8º, e no caso de autorização, da audiência em que se publicar a sentença a que se refere o artigo 11º, se houver lugar a ela, compreendendo a apelação, nesta hipótese, uma ou ambas as sentenças, conforme de uma ou ambas se apelar.

Article 12

The deadline for initiating the appeal mentioned in article 10 shall start, where the divorce is denied, from the announcing of the respective judgment in open court, as mentioned in no. 6 of article 8, and in the case of an authorisation, from the announcement of the judgment referred to in article 11, if such an announcement takes place, the appeal including, in this case, one or both judgments, depending on whether one or both are being appealed.

Artigo 13º

Sendo autorizado o divórcio pelo tribunal de 2.ª instância, sobre recurso interposto da sentença que o negou, observar-se-á igualmente o que fica disposto nos artigos antecedentes acerca dos filhos.

§ único) Para este efeito, baixará traslado quando se interpuser recurso de revista, e a nova apelação, havendo-a, só compreenderá a sentença relativa aos filhos.

Article 13

If the divorce is granted by the appeal court on an appeal against a judgment which denied it, what is foreseen in the preceding articles concerning children shall also be complied with.

Single §) For this purpose, a transcript record shall be returned to the lower court in the case of an appeal to the Supreme Court, and a new appeal shall only include the judgment relating to the children.

Artigo 14º

As sentenças e despachos proferidos nas acções de divórcio admitem sempre recurso até ao Supremo Tribunal de Justiça.

Article 14

The judgments and rulings made in divorce actions are always subject to appeal up to the Supreme Court.

Artigo 15º

As acções de divórcio admitem sempre reconvenção, cujos termos serão processados de harmonia com o disposto nos artigos 332º e seguintes do Código de Processo Civil.

§ único) A acção principal e a reconvenção serão julgadas como uma só, e a sentença do juiz, que será lançada

Article 15

Counterclaims are always admissible in divorce actions, which shall be filed in accordance with articles 332 et seq. of the Code of Civil Procedure.

Single §) The main legal action and the counterclaims shall be judged as one, and the judgment, delivered in the file of the main legal action, shall state, when

no processo de acção principal, declarará, quando julgar procedente o divórcio, se autoriza este pelos fundamentos de uma ou de outra acção.

Artigo 16º

O Ministério Público só intervirá nas acções de divórcio quando representar o réu.

Artigo 17º

Com excepção da primeira citação para a causa, todas as outras citações ou intimações serão feitas na pessoa dos advogados ou procuradores das partes, ou do Ministério Público, quando representar o réu.

Artigo 18º

As acções de divórcio não podem ser confessadas pelo réu, mas o autor pode delas desistir até à conclusão para sentença final em 1.ª instância, e os cônjuges podem sempre reconciliar-se enquanto a decisão final não tiver passado em julgado, quaisquer que sejam os termos e o tribunal em que se encontre.

§ único) Para os efeitos da última parte deste artigo se lavrará termo no processo assinado por ambos os cônjuges, ou por seus procuradores com poderes especiais e expressos, o qual será julgado por sentença ou acórdão.

Artigo 19º

Proferida definitivamente sentença autorizando o divórcio, será ela publicada por extracto no Diário do Governo e em dois periódicos, havendo--os da comarca onde a acção tenha

the divorce case is held tenable, if the divorce is granted due to the grounds of the main legal action or on those of the counterclaims.

Article 16

The Public Prosecutor shall only intervene in divorce actions when representing the defendant.

Article 17

With the exception of the first summons, all others notices or intimations shall be made to the counsels or attorneys of the parties, or to the Public Prosecutor when representing the defendant.

Article 18

The defendant may not admit to the grounds of a divorce action, but the plaintiff may withdraw such an action up to the conclusion for final judgment in the trial court, and the spouses may always reconcile as long as the final decision has not become *res judicata*, regardless of the terms and of the court in which the action is to be found.

Single §) For the purposes of the final part of this article, a record shall be drawn up in the file and signed by both spouses, or by their attorneys with special and explicit powers, such record being sanctioned by judgment of the trial court or appeal court.

Article 19

Once the judgment authorising the divorce has been definitely decreed, an extract of it shall be published in the Official Gazette and in two periodicals, if there are any in the division in which

seguido os seus termos, e será averbada de ofício, pelo funcionário competente, à margem do respectivo assento de casamento, remetendo-lhe para esse fim o tribunal respectivo ou apresentando-lhe qualquer interessado a certidão da sentença com trânsito em julgado.

§ 1º) Se o assento de casamento não constar do registo civil, poderá qualquer interessado fazê-lo transcrever à vista de certidão extraída da existente no processo, no registo civil do último domicílio dos cônjuges divorciados, ou de qualquer deles, para aí ser averbada, nos termos deste artigo, a sentença autorizando o divórcio.

§ 2º) A mulher divorciada não poderá usar, sob pena de desobediência, o nome ou nomes que lhe tenham provindo do marido.

the legal action took place, and shall be added officiously by the competent clerk to the margin of the respective marriage registry, the respective court sending him/her or any interested party presenting him/her with a certified copy of the judgment in a condition of *res judicata*.

§ 1) If the marriage registry is not to be found in the civil registry, any interested party may have it transcribed in accordance with a certified copy extracted from the one existing in the case file, in the civil registry of the last domicile of the divorced spouses, or of either one of them, so that the judgment authorising the divorce may then be added to it in accordance with this article.

§ 2) A divorced woman may not use, under penalty of disobedience, the name or names she acquired through her husband.

Artigo 20º

A mulher casada pode requerer o depósito judicial, quer como preparatório, quer como consequência da proposição da acção de divórcio.

§ 1º) Acerca do depósito serão observadas as disposições dos artigos 477º a 481º inclusive do Código de Processo Civil[48].

Article 20

A married woman may request judicial custody, either preparatory or as a consequence of the initiation of the divorce action.

§ 1) Such judicial custody shall be governed by the provisions of articles 477 to 481 of the Code of Civil Procedure.

[48] Ter em conta que o Código de Processo Civil referido no texto é o Código de 1876. Com a entrada em vigor do Código de Processo Civil, aprovado pelo Decreto nº 29.637 de 28 de Maio de 1939 foi revogado o primeiro código citado, passando a matéria em causa a ser tratada nos artigos 1467º a 1471º / One should keep in mind that the Code of Civil Procedure mentioned in this text is the Code of 1876. With the entry into force of the Code of Civil Procedure, adopted by Decree no. 29.637 of 28 May 1939, the previous Code was revoked, these issues being addressed in articles 1467 to 1471.

§ 2º) A mulher que, por haver pedido o depósito judicial, tenha de abandonar o domicílio conjugal, pode requerer ao juiz o arrolamento dos bens mobiliários do casal, observando-se neste caso, na parte aplicável, o disposto nos artigos 675º a 683º do Código de Processo Civil[49].

§ 3º) A mulher que requerer o depósito judicial, quer seja autora, quer seja ré na acção de divórcio, tem direito a pedir alimentos provisórios, os quais serão arbitrados pelo juiz, depois de mandar ouvir ambos os cônjuges.

§ 4º) Ao pagamento e à execução por estes alimentos provisórios são aplicáveis os artigos 960º a 963º do Código de Processo Civil[50].

§ 2) The wife who, due to having requested judicial custody, must leave the conjugal home, can request the judge to carry out an inventory of the couple's movable property, the provisions of articles 675 to 683 of the Code of Civil Procedure being applicable in this case.

§ 3) The wife who requests judicial custody, whether she is the plaintiff or the defendant in the divorce action, is entitled to request provisional maintenance, which shall be decided upon by the judge, after hearing both spouses.

§ 4) The payment and execution proceedings relating to such provisional maintenance are governed by articles 960 to 963 of the Code of Civil Procedure.

SECÇÃO II
DOS FILHOS[51]

Artigo 21º

Os filhos serão de preferência entregues e confiados ao cônjuge a favor de quem tenha sido proferido o divórcio.

§ único) No caso de manifesta inconveniência de serem os filhos entregues e confiados à guarda de qualquer dos cônjuges, serão todos, ou alguns, confiados a terceira pessoa, preferindo-se, para esse fim os mais próximos parentes da linha paterna ou materna.

SECTION II
CHILDREN

Article 21

Children shall be surrendered and entrusted preferably to the spouse in favour of whom the divorce has been decreed.

Single §) In the case of manifest inconvenience in surrendering and entrusting the children to the care of either of the spouses, all or some of them shall be entrusted to a third person, with preference to the closest relatives in the paternal or maternal line.

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[49] Idem.

[50] Idem.

[51] Cfr. nesta matéria o disposto ao nível processual no Código de Processo Civil, aprovado pelo Decreto nº 29.637 de 28 de Maio de 1939 - artigos 1452º a 1466º / See, in this respect, what is foreseen at the procedural level in the Code of Civil Procedure, adopted by Decree no. 29.637 of 28 May 1939 – articles 1452 to 1466.

Artigo 22º

Em todos os casos, porém, o pai e a mãe conservam sobre os filhos o pátrio poder, enquanto dele não forem interditos; e têm o direito de vigiar e superintender na educação de seus filhos.

Artigo 23º

É proibido aos cônjuges divorciados renunciar ao pátrio poder sobre os filhos, ainda que a benefício do outro cônjuge; e bem assim é-lhes proibido estipular qualquer cláusula que iniba um deles de ver, visitar ou receber os seus filhos.

Artigo 24º

Tanto o pai como a mãe são obrigados a concorrer para os alimentos dos filhos em proporção dos seus rendimentos e bens próprios.

§ único) A prestação de alimentos em benefício dos filhos tem hipoteca legal sobre os bens dos cônjuges.

Artigo 25º

A dissolução do casamento pelo divórcio não prejudicará os filhos em quaisquer vantagens que lhes estejam asseguradas pela lei, pelos pais ou por terceira pessoa.

SECÇÃO III
DOS BENS

Artigo 26º

Do divórcio resulta sempre a separação de bens entre os cônjuges, adquirindo cada um deles a propriedade plena e livre

Article 22

In all cases, however, the father and the mother continue to have parental authority over the children, as long as they are not legally prevented from exercising it; and they have the right to watch over and supervise the education of their children.

Article 23

Divorced spouses may not renounce their parental authority over the children, even if to the benefit of the other spouse; it is also forbidden for them to stipulate any clause preventing one of them from seeing, visiting or receiving his/her children.

Article 24

Both the father and the mother are obliged to contribute to the maintenance of the children proportionately to their income and personal property.

Single §) The amount of maintenance due to the children has legal mortgage over the property of the spouses.

Article 25

The dissolution of the marriage by divorce shall not be detrimental to the children regarding any advantages provided to them by law, by their parents or by a third person.

SECTION III
PROPERTY

Article 26

The divorce always results in the separation of the property of the spouses, each acquiring full ownership and free

administração dos que lhe ficarem pertencendo, podendo sobre elas transaccionar livremente e por todas as formas.

§ único) A separação e partilha de bens entre os cônjuges pode ser feita amigavelmente por meio de escritura pública, ou judicialmente por inventário nos termos gerais de direito.

administration of the property ascribed to him/her, being allowed to freely carry out transactions, by any form, with regard to such property.

Single §) The separation and partition of the property between the spouses may be done amicably through a deed, or by the court through an inventory in accordance with the general provisions of the law.

Artigo 27º

O cônjuge que der causa ao divórcio perderá todos os benefícios que haja recebido, ou haja de receber, do outro cônjuge, quer lhe tenham sido estipulados em contrato antenupcial, quer assegurados posteriormente. Pelo contrário, o cônjuge inocente conserva todos os benefícios que lhe tenham sido assegurados pelo cônjuge culpado, ainda que tais benefícios fossem estipulados com a cláusula de reciprocidade.

§ único) É permitido ao cônjuge inocente renunciar ao direito garantido neste artigo; mas havendo filhos, a renúncia só pode fazer-se a favor destes.

Article 27

The spouse responsible for the grounds of the divorce shall lose all benefits that he/she has received, or should still receive, from the other spouse, whether these have been awarded to him/her in a prenuptial agreement or at a later date. Conversely, the innocent spouse shall maintain all benefits awarded to him/her by the guilty spouse, even if such benefits were stipulated with a clause of reciprocity.

Single §) The innocent spouse is allowed to renounce the right granted by this article; but, if there are children, he/she may only renounce in their favour.

Artigo 28º

O divórcio só produz efeitos para com terceiro depois de definitivamente autorizado, e em nada prejudica os direitos adquiridos anteriormente pelos credores do casal.

Article 28

A divorce only produces effects towards third parties once it has been definitively authorised, and it is in no way detrimental to rights previously acquired by the couple's creditors.

SECÇÃO IV
DOS ALIMENTOS DEFINITIVOS

SECTION IV
DEFINITIVE MAINTENANCE

Artigo 29º

Qualquer dos cônjuges tem direito a exigir do outro que lhe preste alimentos, se deles carecer.

Article 29

Either of the spouses is entitled to require that the other pay maintenance

§ único) O quantitativo desses alimentos será fixado em harmonia com a necessidade do cônjuge que os recebe, e com as circunstâncias do que os presta; mas nunca poderá exceder um terço do rendimento líquido do segundo.

Artigo 30º

Os alimentos a que se refere o artigo anterior podem ser pedidos pelos cônjuges cumulativamente com a acção de divórcio, ou podem sê-lo posteriormente à sentença que houver autorizado o divórcio.

§ 1º) No primeiro caso previsto neste artigo, o pedido de alimentos será deduzido por articulado em separado, que o autor apresentará com a petição de divórcio, e o réu com a contestação a ela. Em ambos os casos o pedido pode ser contestado no prazo de três audiências, a contar para o réu da acusação da citação, e para o autor da apresentação do pedido pelo réu, podendo um e outro replicar e treplicar, respectivamente, no prazo de duas audiências.

§ 2º) A acção por alimentos, a que se refere o parágrafo anterior, correrá por apenso à acção de divórcio, e os termos dela, após os articulados, só prosseguirão no caso de vir a ser autorizado o divórcio.

§ 3º) Se os alimentos forem pedidos posteriormente ao divórcio, a acção para eles será do mesmo modo apensada à principal.

§ 4º) Em tudo o mais estas acções de alimentos seguirão os termos estabelecidos no Código de Processo Civil para as acções ordinárias, com restrições idên-

to him/her, if he/she requires such maintenance.

Single §) The amount of such maintenance shall be determined in accordance with the need of the spouse receiving it, and the circumstances of the one paying it; but it may never exceed a third of the net income of the latter.

Article 30

The maintenance referred to in the preceding article may be requested by the spouses together with the divorce action, or may be so requested following the judgment granting the divorce.

§ 1) In the first case foreseen in this article, the request for maintenance shall be made in a separate pleading, presented by the plaintiff along with the divorce petition, or by the defendant along with the reply to the latter. In both cases the request may be challenged within the subsequent three hearings, starting for the defendant from the service of the summons, and for the plaintiff from the submission of the request by the defendant, both being allowed to present a rejoinder and sur-rejoinder, respectively, within the subsequent two hearings.

§ 2) The legal action for maintenance, mentioned in the preceding paragraph, shall be annexed to the divorce action, and it shall only proceed, after the presentation of the pleadings, if the divorce is granted.

§ 3) If the maintenance is requested after the divorce, its file shall equally be annexed to the file of the main legal action.

§ 4) In all other respects, these legal actions for maintenance shall follow the provisions of the Code of Civil Procedure for normal proceedings, with restrictions

ticas às dos nºs 1º, 2º e 3º do artigo 8º deste decreto.

identical to those of no.s 1, 2 and 3 of article 8 of this decree.

Artigo 31º

A prestação de alimentos, que for fixada, poderá de futuro ser reduzida a requerimento do cônjuge que a presta, provando que por suas circunstâncias a não pode continuar a prestar igual, ou que o outro cônjuge, por suas circunstâncias, não carece continuar a recebê-la igual.

§ 1º) Do mesmo modo a prestação primitiva de alimentos pode ser aumentada a requerimento do cônjuge que os recebe, provando que dela carece maior e que o outro cônjuge está, por melhoria de situação, em circunstâncias de a aumentar, contanto que essa melhoria não provenha de novo casamento que haja contraído.

§ 2º) Tanto um como o outro pedido serão deduzidos por meio de petição não articulada na acção de alimentos, podendo impugnar-se por embargos no prazo de dez dias a contar da intimação do pedido, mas só serão admitidos depois de decorrido um ano sobre a anterior fixação de alimentos.

Article 31

The determined payment of maintenance may be subsequently reduced at the request of the spouse paying it, based on evidence that his/her circumstances prevent him/her from continuing to pay it in that amount, or that the other spouse, due to his/her circumstances, no longer needs to receive it in that amount.

§ 1) In the same way, the original payment of maintenance may be increased at the request of the spouse receiving it, based on evidence that he/she needs a larger amount and that the other spouse is, due to an improvement of the situation, in circumstances allowing him/her to increase it, as long as this improvement is not due to a new marriage.

§ 2) Both requests shall be made through a non-articulated petition in the maintenance action, and they may be challenged through objection proceedings at the latest ten days after the service of notice of the request, but they shall only be admitted after one year has elapsed since the previous determination of maintenance.

Artigo 32º

O direito aos alimentos e a obrigação de prestá-los cessam:

1º) Se o cônjuge que os recebe contrair novo casamento;

2º) Se o cônjuge que os recebe se tornar indigno desse benefício por seu comportamento moral;

Article 32

The right to maintenance and the obligation to pay it ceases:

1) If the spouse receiving it is remarried;

2) If the spouse receiving it becomes unworthy of that benefit due to his/her moral behaviour;

3º) Se o cônjuge que os presta não puder continuar a prestá-los, ou se o que os recebe deixar de os precisar.

§ único) À cessação dos alimentos nos casos previstos neste artigo é aplicável à forma de processo prescrita na primeira parte do § 2º do artigo antecedente.

Artigo 33º

O facto de contrair novo casamento o cônjuge que presta os alimentos não o exime da obrigação para com o alimentado, nem pode servir-lhe de fundamento para pedir a redução nos termos do artigo 31º.

SECÇÃO V
DOS EFEITOS DA NÃO AUTORIZAÇÃO DO DIVÓRCIO

ARTIGO 34º

Se o divórcio a final não for autorizado, não poderá o cônjuge que o pediu requerê-lo de novo com idêntico fundamento senão passados dois anos, mas não fica inibido de o solicitar desde logo com fundamento diverso.

§ único) A não autorização do divórcio, que tiver sido requerido com fundamento em qualquer dos nºs 1º a 4º, 9º e 10º do artigo 4º, e bem assim, a não verificação em exame prévio da doença referida neste último número, constitui presunção de injúria grave para o cônjuge vencedor, e fica sendo fundamento bastante para este solicitar, por sua vez, querendo, o divórcio ou a separação de pessoas e bens contra o cônjuge vencido.

3) If the spouse paying it is no longer capable of doing so, or if the one receiving it no longer needs it.

Single §) The procedure established in the first part of § 2 of the preceding article is applicable to the cessation of maintenance in the cases foreseen in this article.

Article 33

Remarrying does not discharge the spouse who is paying maintenance from this obligation towards the other spouse, nor may it be grounds to request a reduction in accordance with article 31.

SECTION V
EFFECTS OF THE NON-GRANTING OF THE DIVORCE

Article 34

If the divorce is ultimately not granted, the spouse who requested it may not request it once again with the same grounds before two years have elapsed, but he/she is not prevented from requesting it again at once based on different grounds.

Single §) The non-granting of the divorce, which has been requested with any of the grounds foreseen in no.s 1 to 4, 9 and 10 of article 4, as well as the non-confirmation in a prior examination of the disease mentioned in the latter no., constitutes a presumption of a serious offence against the victorious spouse, and serves as sufficient grounds for the latter to request, in turn, if he/she so wishes, the divorce or the separation of persons and property against the defeated spouse.

CAPÍTULO III
DO DIVÓRCIO POR MÚTUO CONSENTIMENTO

Artigo 35º

Só podem obter o divórcio por mútuo consentimento os cônjuges casados há mais de dois anos, tendo ambos completado, pelo menos, vinte e cinco anos de idade.

Artigo 36º

Para obterem o divórcio por mútuo consentimento deverão os cônjuges, em petição não articulada, expor ao juiz de direito do seu domicílio o respectivo pedido, instruído com os seguintes documentos:

1º) Certidão de casamento;

2º) Certidões de idade;

3º) Declaração especificada e documentada de todos os seus bens;

4º) Acordo que houverem tomado sobre a posse dos filhos menores, se os tiverem;

5º) Declaração da contribuição com que cada um deles concorrerá para a criação e educação dos filhos menores;

6º) Certidão do contrato antenupcial, bem como o seu registo, se os houver.

Artigo 37º

Autuada a petição e documentos, será logo indeferida a pretensão se não vier instruída nos termos do artigo 36º. Se deferida for, mandará o juiz intimar os cônjuges para comparecerem pessoalmente na sua presença, e, se eles não se conciliarem e persistirem no seu propósito mandará lavrar auto de acordo dos cônjuges para o seu divórcio, na

CHAPTER III
DIVORCE BY MUTUAL CONSENT

Article 35

A divorce by mutual consent may only be obtained by spouses married for more than two years, both having reached, at least, the age of twenty five.

Article 36

In order to obtain a divorce by mutual consent, the spouses must, in a non-articulated petition, present the judge of the court of their domicile with the respective request, together with the following documents:

1) A marriage certificate;

2) Age certificates;

3) A specified list of all their property;

4) Any agreement they may have reached on the custody of the minor children, if there are any;

5) The declaration of the share each shall contribute to the raising and education of the minor children;

6) A certificate of the prenuptial agreement, as well as its registry, if these exist.

Article 37

After the petition and documents have been registered, the request shall be rejected at once if it is not in accordance with the provisions of article 36. If it is admitted, the judge shall order the spouses to appear before him/her in person and, if they do not reconcile and persist in their intention, the judge shall have a record drawn up of the spouses' agreement in the divorce, in the

presença de dois homens bons, por ele designados para assistirem à conferência, e que assinarão como testemunhas.

Artigo 38º

A comparência pessoal dos dois cônjuges é essencial, mas a diligência poderá verificar-se em casa dos interessados, se assim for requerido com fundamento, devidamente comprovado, na impossibilidade absoluta de comparecimento de algum deles no tribunal.

Artigo 39º

O juiz homologará por sentença o acordo dos cônjuges, constante do auto referido no artigo antecedente, autorizando-lhes o divórcio provisoriamente e por espaço de um ano.

§ 1º) Este divórcio provisório não autoriza os cônjuges a exercer direito algum resultante da dissolução do casamento, quer pelo que respeita às pessoas, quer pelo que respeita aos bens, suspendendo-lhes apenas a obrigação de viver em comum.

§ 2º) A administração de todos os bens do casal continua a pertencer ao marido, mas a mulher pode requerer arrolamento dos mobiliários e pedir alimentos provisórios, os quais, na falta de acordo dos cônjuges, serão arbitrados pelo juiz, conforme os §§ 3º e 4º do artigo 20º.

Artigo 40º

Decorrido o ano, os cônjuges deverão, espontaneamente ou a requerimento de um deles, comparecer de novo pessoalmente perante o juiz, a fim de declararem se mantêm a sua resolução,

presence of two good men, appointed by them to watch the conference, and who shall sign as witnesses.

Article 38

The presence in person of the two spouses is essential, but the hearing may be held in the home of the interested parties, if this is required with a justification, duly demonstrated, in the absolute impossibility of one of them appearing in court.

Article 39

The judge shall sanction through a judgment the agreement of the spouses, included in the record mentioned in the preceding article, provisionally authorising their divorce for one year.

§ 1) This provisional divorce does not authorise the spouses to exercise any right resulting from the dissolution of the marriage, regarding both their persons and their property, with only the obligation of living together being suspended.

§ 2) The administration of all the couple's property will continue to be up to the husband, but the wife may request the inventory of the movable property and request provisional maintenance, which, in the absence of an agreement of the spouses, shall be awarded by the judge, in accordance with §§ 3 and 4 of article 20.

Article 40

After one year, the spouses must, spontaneously or at the request of one of them, appear once again in person before the judge so as to declare if their intentions are unaltered, a record of this

lavrando-se auto dessa diligência com as mesmas cautelas do artigo 37º. Se os cônjuges se reconciliarem nesse acto, ou já o estiverem, será por sentença julgado sem efeito o divórcio provisório entre eles; se mantiverem a determinação anterior, será de novo homologado por sentença o seu acordo, pronunciando-se então, o divórcio definitivo.

§ 1º) Para o efeito deste artigo, o escrivão fará, sob sua responsabilidade, o processo concluso ao juiz, completado que seja o ano após a primeira sentença, se dentro dos trinta dias posteriores os cônjuges se não apresentarem nem nenhum deles vier requerer.

§ 2º) A intimação a que se refere este artigo será feita pessoalmente, por deprecada ou editalmente, conforme no caso couber, nos termos gerais de direito. Efectuada a intimação, a falta de comparência de qualquer dos cônjuges será havida como prova de não reconciliação.

§ 3º) Proferida sentença que autorize o divórcio definitivo, observar-se-á o disposto no artigo 19º e seus parágrafos.

§ 4º) São extensivas ao divórcio definitivo por mútuo consentimento as disposições dos artigos 26º a 33º inclusive, na parte aplicável, com a restrição de que os alimentos definitivos só podem ser requeridos posteriormente à sentença que autorize o divórcio definitivo.

hearing being drawn up with the same care as foreseen in article 37. If the spouses reconcile themselves in this hearing, or have already done so, their provisional divorce shall be decreed void; if they retain their prior intentions, their agreement will once again be sanctioned by a judgment, the final divorce then being decreed.

§ 1) For the purposes of this article, the court clerk shall, under his/her own responsibility, present to the judge the concluded file, after one year has elapsed since the first judgment, if the spouses do not appear before the court and neither of them requests this hearing in the subsequent thirty days.

§ 2) The summons this article refers to shall be made in person, by letter or edict, according to each case, under the general terms of the law. Once the summons has been made, the absence of either of the spouses shall be considered as evidence of non-reconciliation.

§ 3) Once the judgment granting the final divorce has been decreed, the provisions of article 19 and its paragraphs shall be observed.

§ 4) The provisions of articles 26 to 33 shall be applied, as possible, to the final divorce by mutual consent, with the restriction that definitive maintenance may only be requested after the judgment granting the final divorce.

Artigo 41º

Os cônjuges que, tendo requerido o divórcio por mútuo consentimento, se reconciliarem antes de ele ser declarado definitivo, não poderão mais obter o divórcio por mútuo consentimento, mas ser-lhes-á permitido propor o divórcio litigioso, nos termos do Capítulo II.

Article 41

Spouses who, having requested the divorce by mutual consent, reconcile themselves before the divorce is decreed as final, may no longer obtain the divorce by mutual consent, but they will be allowed to initiate a contested divorce, in accordance with Chapter II.

Artigo 42º

Do despacho do juiz que, nos termos do artigo 39º, indeferir a pretensão, cabe recurso de agravo, que subirá nos próprios autos.

CAPÍTULO IV
DA SEPARAÇÃO DE PESSOAS E BENS

Artigo 43º

É permitido aos cônjuges a separação de pessoas e bens pelos mesmos fundamentos do divórcio litigioso, mas nos termos e com os efeitos e forma de processo prescritos e determinados no Código Civil e Código de Processo Civil; salvas as modificações constantes dos nºs 1º, 2º e 3º do artigo 8º, e as dos artigos seguintes.

Artigo 44º

É ao cônjuge inocente, como autor da acção, que compete a faculdade de optar pelo divórcio ou pela separação de pessoas e bens.

Artigo 45º

Se ao autor decair na acção de separação de pessoas e bens, intentada com fundamento em qualquer dos nºs 1º a 4º, 9º e 10º do artigo 4º, ou decair no exame prévio a que se refere o § 4º do mesmo artigo, será esse facto por si só considerado como presunção de injúria grave, para o efeito do réu intentar, querendo, a competente acção de separação de pessoas e bens ou de divórcio.

Article 42

The ruling of the judge which, in accordance with article 39, rejects the request, is subject to appeal, forwarded within the same case file.

CHAPTER IV
SEPARATION OF PERSONS AND PROPERTY

Article 43

Spouses may be separated of persons and property with the same grounds as required for a contested divorce, but with the effects and in accordance with the procedure set out in the Civil Code and in the Code of Civil Procedure; with the exception of the modifications foreseen in no.s 1, 2 and 3 of article 8, and of those of the following articles.

Article 44

It is for the innocent spouse, as applicant, to choose between divorce or separation of persons and property.

Article 45

If the plaintiff is unsuccessful in the suit for separation of persons and property, instituted on the basis of any of the grounds mentioned in numbers 1 to 4, 9 and 10 of article 4, or is unsuccessful in the prior examination mentioned in § 4 of that same article, this fact by itself shall be regarded as a presumption of serious injury for the purpose of institution of a suit for divorce or separation of persons and property by the defendant, if he/she so wishes.

Artigo 46º

Proferida sentença que autorize a separação de pessoas e bens se, no prazo de cinco dias a contar do seu trânsito em julgado, os cônjuges se não reconciliarem, poderá qualquer deles obter que a separação seja convertida em divórcio, assim o requerendo nos autos da acção de separação.

§ Único) O juiz, sendo-lhes estes conclusos, mandará citar a parte contrária, para responder no prazo improrrogável de cinco dias, restritivamente sobre a não reconciliação, e, com resposta ou sem ela, converterá dentro de quarenta e oito horas, a separação em divórcio, se não tiver sido proferido documento que por si só invalide a declaração do requerente; e essa decisão, depois de proferida em audiência, será publicada e averbada nos termos do artigo 19º e seus parágrafos.

Article 46

After the judgment is delivered granting the separation of persons and property, when the spouses do not reconcile within five days from the date it becomes *res judicata*, either of them may apply for conversion of the separation into divorce, within the separation case-file.

Single §) Once the file has been placed before him/her, the judge shall order the summons of the opposite party to reply to the matter of non-reconciliation, within a non-extendable five-day period, and with or without a reply the judge shall convert the separation into divorce within 48 hours, if no document is produced which by itself invalidates the applicant's plea; and, after it is pronounced in open court, this decision shall be published and added to the civil registry in accordance with article 19 and its paragraphs.

Artigo 47º

O divórcio proferido nos termos do artigo antecedente será para todos os efeitos legais equiparado ao divórcio litigioso.

§ Único) A respeito dos filhos, da partilha de bens e dos alimentos entre os cônjuges, manter-se-á o que tiver sido determinado para a separação de pessoas.

Article 47

A divorce granted in accordance with the previous article shall be considered a contested divorce for all legal purposes.

Single §) With respect to children, partition of property and maintenance between the spouses, that which has been determined for the separation of persons shall be maintained.

Artigo 48º

A separação de pessoas e bens, enquanto não transformada em divórcio, não impede que qualquer dos cônjuges, se se houverem reconciliado, possa depois requerer o divórcio litigioso, ou que ambos o requeiram por mútuo

Article 48

The separation of persons and property, as long as it is not converted into divorce, does not prevent either of the spouses, if they have reconciled, from applying thereafter for a contested divorce, nor does it prevent both spouses

consentimento, desde que estejam nas condições fixadas no artigo 35º.

Artigo 49º

O Ministério Público só intervirá nas acções de separação de pessoas e bens quando representar o réu nos casos do § 2º do artigo 4º.

CAPÍTULO V
DISPOSIÇÕES GERAIS

Artigo 50º

Fica revogado, para todos os efeitos o § único do artigo 1210º do Código Civil.

Artigo 51º

Fica proibida para o futuro a separação temporária de pessoas, autorizada pelo artigo 469º do Código de Processo Civil.

Artigo 52º

A acção de divórcio só compete aos cônjuges e extingue-se pela morte de qualquer deles.

Artigo 53º

Se o cônjuge a quem competir a acção for incapaz de exercê-la, poderá, em sua vida, ser representado por qualquer dos seus ascendentes, descendentes ou irmãos, e, na falta ou recusa deles, pelos parentes mais próximos, observada a ordem em que são mencionados neste artigo.

from applying for divorce by mutual consent, as long as the requisites set in article 35 are met.

Article 49

The Public Prosecutor shall intervene in suits for separation of persons and property only when he/she must represent the defendant in the cases of § 2 of article 4.

CHAPTER V
GENERAL PROVISIONS

Article 50

The single paragraph of article 1210 of the Civil Code is hereby revoked for all purposes.

Article 51

Hereafter, there shall be no temporary separation of persons, as allowed by article 469 of the Code of Civil Procedure.

Article 52

A suit for divorce can only be instituted by the spouses and shall abate upon the death of either spouse.

Article 53

If the spouse who is entitled to institute a suit is legally incapable of doing so, he/she may be represented during his/her lifetime by any of his/her ascendants, descendants or siblings and, in the case of their absence or refusal, by their closest relatives, in the order in which they are mentioned in this article.

Artigo 54º

É proibido estipular qualquer restrição à faculdade de divórcio, renunciar a ele, ou impor-lhe qualquer penalidade em convenções antenupciais, disposições testamentárias ou doações.

Artigo 55º

A mulher divorciada não poderá contrair novo casamento sem que haja passado um ano completo sobre a data da dissolução do casamento anterior; e o marido também só o poderá fazer passados seis meses.

§ 1º) Cessa a disposição deste artigo e o novo casamento é imediatamente possível quando o divórcio for autorizado por qualquer dos fundamentos classificados nos nºs 5º, 6º e 8º do artigo 4º, ou nos termos do artigo 40º ou do artigo 47º.

§ 2º) Ao cônjuge convencido de estar sofrendo de doença referida nos nºs 7º e 10º do artigo 4º, será proibido o novo casamento, mas o consorte poderá realizar novo matrimónio logo que passe o respectivo prazo, marcado neste artigo 55º.

Artigo 56º

Ao filho nascido de mulher divorciada, dentro de trezentos dias após a dissolução do seu casamento, são aplicáveis as disposições dos artigos 101º e seguintes do Código Civil.

Artigo 57º

O matrimónio legitima sempre todos os filhos nascidos antes dele das pessoas que o contraem.

Article 54

It is forbidden to stipulate any restriction on the right to divorce, to renounce it or to provide any penalty for it in prenuptial agreements, wills or donations.

Article 55

A divorced woman may not be remarried before one full year has elapsed since the dissolution of the previous marriage; and the husband may also only be remarried after six months..

§ 1) The restriction foreseen in this article ceases and the new marriage is immediately possible when the divorce has been granted for any of the grounds mentioned in no.s 5, 6 and 8 of article 4, or in accordance with article 40 or article 47.

§ 2) The spouse who is proved to be suffering from an illness mentioned in no.s 7 and 10 of article 4 shall be forbidden from remarrying, but the consort may be remarried as soon as the respective period elapses, as foreseen in this article.

Article 56

The provisions of article 101 et seq. of the Civil Code are applicable to the child born to a divorced woman before 300 days have elapsed since the dissolution of her marriage.

Article 57

Marriage always legitimates all the children born to the respective spouses before they contracted the marriage.

Artigo 58º

O filho nascido na constância de matrimónio e impugnado pelo marido, nos termos dos artigos 102º e seguintes do Código Civil, poderá também ser legitimado por subsequente matrimónio de seus pais.

Artigo 59º

Os filhos legítimos de cônjuges divorciados, nos quais se compreendem os legitimados por subsequente matrimónio, e os seus descendentes, sucedem aos pais, e demais ascendentes, sem distinção de sexo nem de idade, posto que procedam de casamentos diversos.

Artigo 60º

Se os cônjuges tiverem filhos de mais de dezoito anos e menos de vinte e um, serão eles emancipados de direito pelo divórcio definitivo de seus pais e considerados maiores para os efeitos legais.

Artigo 61º

O adultério do marido ou da mulher só será considerado criminoso quando ocorrer durante a vida dos cônjuges em comum, e será punido nos termos dos artigos 401º a 404º do Código Penal, com as seguintes modificações:

§ 1º) O adultério do marido será igualado, em carácter e gravidade ao da mulher, mas a pena nunca poderá exceder para qualquer deles e respectivo co-réu o máximo da prisão correccional, ficando assim alteradas as incriminações e penalidades dos artigos 401º e 404º.

§ 2º) Os §§ 2º e 4º do artigo 401º são revogados.

Article 58

A child born in the constancy of matrimony and challenged by the husband, in accordance with article 102 et seq. of the Civil Code, may also be legitimated by the subsequent marriage of his/her parents.

Article 59

Legitimate children of divorced spouses, including those who were legitimated by a subsequent marriage, and their descendants, succeed to their parents and other ascendants, regardless of gender and age, even if they result from different marriages.

Article 60

If the spouses have children over the age of eighteen and under twenty one, these shall be deemed *ipso jure* emancipated upon their parents' final divorce and they are considered as majors for all legal purposes.

Article 61

The husband's or the wife's adultery shall only be considered criminal when it occurs during the spouses' life in common, and shall be punished in accordance with articles 401 to 404 of the Criminal Code, with the following modifications:

§ 1) The husband's adultery shall be equal, in character and gravity, to the wife's adultery, but the sanction may never exceed, for either of them and for the respective co-defendant, the maximum of the correctional imprisonment sentence, the crimes and penalties of articles 401 and 404 being thus altered.

§ 3º) O direito de queixa e acusação do cônjuge ofendido prescreve pelo lapso de seis meses.

§ 4º) O cônjuge ofendido tem de optar pela acção criminal de adultério, ou pela civil de divórcio, ou de separação, com base em adultério, não podendo cumulá-las em caso algum, nem servir-se numa delas de elementos obtidos em diligências, administrativas ou judiciais, preparatórias da outra.

§ 5º) Sendo intentada a acção criminal, e terminando pela absolvição do acusado, este, ainda que seja o marido, poderá requerer, sem necessidade de outro título senão da sentença de absolvição, que se proceda executoriamente, à separação e entrega dos bens que lhe pertencerem.

§ 6º) Neste caso a sentença absolutória decretará de direito o divórcio, ou a separação de pessoas, conforme na contestação o tiver requerido o acusado, entendendo-se que opta pela separação em caso de silêncio, e devendo observar-se o disposto no artigo 19ºe seus parágrafos deste decreto.

§ 7º) Ficam assim substituídas as disposições do artigo 1209º e seus parágrafos do Código Civil.

§ 2) §§ 2 and 4 of article 401 are hereby revoked.

§ 3) The offended spouse's right of complaint and of pressing charges is time-barred after six months.

§ 4) The offended spouse must choose between criminal proceedings for adultery or civil proceedings for divorce or separation on the basis of adultery, and he/she may in no case pursue both jointly nor use in one of them elements obtained in administrative or judicial acts carried out to prepare the other.

§ 5) If the criminal proceedings are instituted, and they result in the acquittal of the accused, the latter, even if it is the husband, may request, with no additional title other than the acquitting judgment, that the separation and surrendering of his/her property be carried out through execution proceedings.

§ 6) In this case, the acquitting judgment shall by law decree the divorce, or the separation of persons, depending on what the accused requested in the defense, it being understood that separation was chosen if nothing was said, and article 19 of this decree, along with its paragraphs, shall be applied.

§ 7) The provisions of article 1209 of the Civil Code, along with its paragraphs, are hereby replaced.

Artigo 62º

São nulas de direito todas as convenções que, acerca da partilha de bens como consequência do divórcio ou da separação entre si ou com outrem fizerem os cônjuges fora da respectiva escritura antenupcial ou das estipulações referidas no artigo 27º.

Article 62

All the agreements between the spouses or between them and third parties, aside from the respective prenuptial agreement or stipulations referred to in article 27, regarding the partition of property following a divorce or separation, are null and void.

Artigo 63º

As causas civis de divórcio ou separação não se interromperão por motivo de qualquer incidente de processo, salvo pelo tempo indispensável para que este seja julgado juntamente com a acção principal, ou antes dela, como for mais acomodado à natureza do incidente e melhor parecer ao juiz.

Article 63

Civil suits for divorce or separation shall not be suspended on account of any procedural incident, except for the time strictly required for this incident to be decided on together with the main suit, or before it, depending on what best suits the nature of the incident and is deemed fit by the judge.

CAPÍTULO VI
DISPOSIÇÕES TRANSITÓRIAS

CHAPTER VI
TRANSITORY PROVISIONS

Artigo 64º

Os cônjuges judicialmente separados à data da promulgação deste decreto com força de lei por decisão passada em julgado têm o direito de a transformar em divórcio definitivo, a requerimento de qualquer deles, quer essa separação tenha sido obtida pelos meios estabelecidos no Código de Processo Civil, quer pelo meio especial determinado no artigo 1209º do Código Civil.

§ 1º) São aplicáveis a caso previsto neste artigo as disposições dos artigos 46º e 47º, mas, qualquer que seja o tempo decorrido desde a separação judicial, o prazo de cinco anos só se reputara concluído, depois de decorrer um ano, pelo menos, após a publicação deste decreto.

§ 2º) Todavia, qualquer dos cônjuges a que se refere este artigo poderá requerer desde já o divórcio litigioso, ou, pelo mesmo fundamento da separação, ou por outro dos admitidos no capítulo II, incluindo o do nº 8 do artigo 4º, nos termos do artigo 68º e ambos os cônjuges poderão requerer o divórcio por mútuo

Article 64

Spouses judicially separated at the time of the promulgation of this legal Decree, by a decision in a condition of *res judicata*, are entitled to its conversion into a final divorce, on application from either of them, whether the separation was obtained by the procedure provided in the Code of Civil Procedure or by the special procedure determined in article 1209 of the Civil Code.

§ 1) The case contemplated in this article is governed by the provisions of articles 46 and 47, but, whatever may be the period which has lapsed since the judicial separation, the period of five years shall be regarded as over only after the lapse of at least one year after the publication of this Decree.

§ 2) However, either spouse referred to in this article may forthwith apply for a contested divorce either on the same grounds of separation or any other of those permitted in Chapter II, including that of clause 8 of article 4, in accordance with article 68, and both spouses may apply for divorce by mutual consent, in

consentimento, nos termos do capítulo III, logo que se verifiquem as condições do artigo 35º.

Artigo 65º

Se os cônjuges a que se refere o artigo anterior estiverem, quanto aos bens, no regime especial do artigo 1210º § único, do Código Civil, será lícito à mulher requerer desde já a partilha dos bens, como se aquele § único do artigo 1210 não houvesse existido.

§ único) O direito concedido à mulher neste artigo não depende do uso de qualquer outra faculdade concedida aos cônjuges no artigo anterior.

Artigo 66º

Se, no caso previsto no artigo 469º do Código de Processo Civil, tiver sido apenas autorizada a separação temporária das pessoas, pode, qualquer dos cônjuges, independentemente do prazo fixado, requerer o divórcio litigioso, se para isso tiver fundamento legal, seguindo a acção ou os termos prescritos nos artigos 6º e seguintes do presente decreto com força de lei, ou poderão ambos requerer o divórcio por mútuo consentimento consoante o disposto no § 2º do artigo 64º.

Artigo 67º

As acções de separação de pessoas e bens, pendentes à data de promulgação desta lei, seguirão seus termos como tais; e se a final forem julgadas procedentes, ser-lhes-á aplicável o disposto nos artigos 46º e 47º e seus respectivos parágrafos.

§ 1º) Ao autor, porém, de tais acções é permitido desistir delas, sejam quais

accordance with Chapter III, provided the requisites of article 35 are met.

Article 65

If the spouses referred to in the previous article are, with regard to property, in the special regime of article 1210, single §, of the Civil Code, the wife may apply for the partition of the property forthwith, as if that sole paragraph of article 1210 had never existed.

Single §) The right granted to the wife by this article does not depend on the exercise of any other right granted to the spouses in the previous article.

Article 66

If, in the case provided in article 469 of the Code of Civil Procedure, only temporary separation of persons has been granted, either spouse may, independently of the fixed time-limit, apply for a contested divorce, if there are legal grounds for it, and the suit will follow the procedure determined in article 6 et seq. of the present legal Decree, or both may apply for divorce by mutual consent according to the provision of § 2 of article 64.

Article 67

The suits for separation of persons and properties pending on the date of promulgation of this law shall proceed as such; and if they are ultimately granted, the provisions of articles 46 and 47 and their respective paragraphs shall apply to them.

§ 1) However, the plaintiff in such suits may withdraw the cases, whatever

forem o estado e o tribunal em que se encontrem, para propor de novo a competente acção de divórcio, com o mesmo ou com diverso fundamento, se assim preferir fazê-lo.

§ 2º) Se tais acções de separação de pessoas e bens forem julgadas a final improcedentes, será aplicável o disposto no artigo 45º.

§ 3º) Se o autor desistir da acção de separação de pessoas e bens, ou ela vier a final a ser julgada improcedente, poderão os cônjuges requerer o divórcio por mútuo consentimento, se se encontrarem nas condições fixadas no artigo 35º.

their stage and the court in which they are pending, in order to institute again, if so wished, the proper divorce suit on the same or on different grounds.

§ 2) If these suits for separation of persons and property are ultimately dismissed, the provisions of article 45 shall apply.

§ 3) If the plaintiff withdraws the suit for separation of persons and property, or if it is ultimately dismissed, the spouses may apply for divorce by mutual consent, if the conditions of article 35 are met.

Artigo 68º

O artigo 4º, nº 8 e seu § 3º são imediatamente aplicáveis aos cônjuges, que, à data da publicação deste decreto com força de lei estiverem separados de facto há mais de dez anos consecutivos.

§ único) Os cônjuges que, estando separados há menos tempo, não tornarem a fazer vida em comum até se completar o referido prazo de dez anos, poderão usar do direito consignado no artigo 4º, nº 8, e seu § 3º, logo que se complete esse prazo.

Article 68

Article 4, number 8, and its § 3 are immediately applicable to spouses who, on the date of the publication of this legal Decree, have been *de facto* separated for more than ten consecutive years.

Single §) Spouses who, being separated for less than ten years, do not restart their life in common before the said period of ten years has elapsed, may exercise the right provided in article 4, no. 8, and its § 3, as soon as that period is completed.

Artigo 69º

Este decreto, que entra em vigor nos prazos ordinários, será sujeito à apreciação da próxima Assembleia Nacional Constituinte e incorporado na reforma do Código Civil e do Código de Processo Civil.

Article 69

This Decree shall come into force in the normal time, it shall be subject to the approval of the ensuing National Constituent Assembly and included in the reform of the Civil Code and the Code of Civil Procedure.

Artigo 70º

Fica revogada a legislação em contrário.

Article 70

The law contradicted by the present Decree is hereby repealed.

2.3. Artigos 1472º-1476º do Código de Processo Civil de 1939 (divórcio e separação por mútuo consentimento)

Articles 1472-1476 of the Code of Civil Procedure of 1939 (divorce and separation by mutual consent)

Código de Processo Civil de 1939 (divórcio e separação por mútuo consentimento)

Nesta matéria, o Código de Processo Civil, aprovado pelo Decreto nº 29.637 de 28 de Maio de 1939 veio estabelecer, em sede de Processos de Jurisdição Voluntária, novo regime jurídico para o divórcio por mútuo consentimento, revogando, neste âmbito, o disposto na lei do divórcio de 3/11/1910. Continua a aplicar-se, no entanto, o disposto no artigo 41º da lei do divórcio de 3/11/1910.

No respectivo diploma de aprovação do Código, mais concretamente, artigo 6º, era determinada a extensão de aplicação do código em referência ao "Império Colonial, com as modificações que as circunstâncias especiais das colónias exigirem".

Code of Civil Procedure of 1939 (divorce and separation by mutual consent)

In relation to this subject, the Code of Civil Procedure, approved by Decree no. 29.637 of 28 May 1939, introduced, with regard to voluntary jurisdiction proceedings, a new legal regime for divorce by mutual consent, revoking, within this scope, what is foreseen in the Divorce Act of 3/11/1910. However, the provisions of article 41 of the Divorce Act of 3/11/1910 continued to be in force.

In the diploma which adopted this Code, specifically in its article 6, the geographical scope of the Code was extended to the "Colonial Empire, with the modifications required by the special circumstances of the colonies".

Artigo 1472º

(*Requisitos para o divórcio ou separação por mútuo consentimento*)

O divórcio, ou a separação de pessoas e bens, por mútuo consentimento só pode ser pedido pelos cônjuges casados há mais de cinco anos e que tenham completado, pelo menos, vinte e cinco anos de idade.

Article 1472

(*Conditions for divorce or separation by mutual consent*)

The divorce, or the separation of persons and property, by mutual consent may only be requested by spouses married for more than five years and who have reached, at least, the age of twenty-five.

Artigo 1473º

(*Como deve ser instruído o requerimento*)

O requerimento, assinado por ambos os cônjuges ou pelos seus procuradores, será instruído com os seguintes documentos:

a) Certidão do registo de casamento;

Article 1473

(*Documents that shall accompany the request*)

The request, signed by both spouses or by their attorneys, shall be accompanied by the following documents:

a) A marriage registry certificate;

b) Age certificates;

b) Certidões de idade;

c) Relação especificada de todos os bens;

d) Acordo que houverem celebrado sobre a guarda e destino dos filhos menores, se os houver;

e) Fixação da quota com que cada um deles contribui para a criação e educação dos filhos menores;

f) Certidão de escritura antenupcial, e do seu registo, se os houver.

c) A specified list of all the property;

d) Any agreement they may have reached on the custody and fate of the minor children, if there are any;

e) The determination of the share each shall contribute to the raising and education of the minor children;

f) A certificate of the prenuptial agreement, and its registry, if these exist.

Artigo 1474º

(*Despacho de indeferimento ou de convocação da conferência*)

Se faltar algum dos documentos indicados no artigo anterior ou se, pelo exame deles, se verificar que não pode ser autorizado o divórcio ou a separação, será logo indeferido o requerimento.

No caso contrário, serão convocados para uma conferência os cônjuges e seus pais, bem como os filhos que tiverem mais de dezoito anos.

A comparência pessoal dos cônjuges é essencial.

Article 1474

(*Decision to reject the request or to convene a conference*)

If any of the documents mentioned in the preceding article is lacking or if, in their analysis, it is noted that the divorce or the separation may not be authorised, the request shall be at once be rejected.

Otherwise, the spouses and their parents shall be convened for a conference, as well as their children over the age of eighteen.

The presence of the spouses in person is essential.

Artigo 1475º

(*Conferência. Divórcio provisório ou separação provisória*)

No acto da conferência o juiz exortará os cônjuges a desistir do seu propósito, chamando-lhes sobretudo a atenção para os efeitos nocivos do divórcio ou da separação no que respeita ao futuro dos filhos.

Se os cônjuges mantiverem a sua resolução, lavrar-se-á auto de divórcio ou separação por mútuo consentimento, que será assinado pelas pessoas presentes.

O acordo dos cônjuges será homologado, autorizando-se o divórcio ou a

Article 1475

(*Conference. Provisional divorce or separation*)

During the conference, the judge shall encourage the spouses to give up their intention, drawing their attention particularly to the negative effects of the divorce or separation with regard to the children's future.

If the spouses remain determined, the record of divorce or separation by mutual consent shall be drawn up and signed by those present.

The agreement of the spouses shall be sanctioned, the provisional divorce or separation being granted for the duration

separação provisória por espaço de um ano. Esta autorização suspende a convivência conjugal, habilita a mulher a requerer o arrolamento dos bens mobiliários e alimentos provisórios, e produz imediatamente, em relação aos filhos, os efeitos designados nas alíneas d) e e) do artigo 1473º.

§ único) Os alimentos devem ser logo pedidos no acto da conferência e, ouvidos imediatamente os cônjuges e as pessoas presentes, serão fixados na sentença de homologação.

of one year. Such granting suspends the conjugal cohabitation, entitles the wife to request an inventory of the movable property and provisional maintenance and immediately produces, regarding the children, the effects foreseen in article 1473(d) and (e).

Single §) Maintenance must be immediately requested during the conference and, after hearing the spouses and those present, it shall be determined in the sanctioning ruling.

Artigo 1476º

(*Nova conferência. Divórcio ou separação definitiva*)

Decorrido o ano, se os cônjuges não requererem nova conferência, deve a secretaria, dentro de trinta dias, fazer o processo concluso, com a informação de que está terminado o período de separação ou divórcio provisório.

Serão notificados os cônjuges, os pais e os filhos para comparecerem novamente.

Apresentando-se os cônjuges, o juiz procurará, mais uma vez, reconciliá-los. Se o conseguir ou se os cônjuges já se tiverem reconciliado anteriormente, será declarado sem efeito o divórcio ou a separação provisória; se não for possível reconciliá-los, será decretado o divórcio ou a separação definitiva.

No caso de não comparecerem ambos os cônjuges ou algum deles, ficará também sem efeito o divórcio ou a separação provisória.

A sentença que decretar o divórcio ou a separação definitiva produzirá os mesmos efeitos que se fosse proferida em processo litigioso; esses efeitos

Article 1476

(*New conference. Definitive divorce or separation*)

After one year has elapsed, if the spouses do not request a new conference, the court clerk shall, within thirty days, conclude the proceedings, with the information that the provisional separation or divorce period has ended.

The spouses, the parents and the children shall be notified to appear again before the court.

Once the spouses are present, the judge shall attempt, once again, to reconcile them. If he/she manages to do so, or if the spouses have already previously reconciled, the provisional divorce or separation shall be declared void; if it is not possible to reconcile them, the definitive divorce or separation shall be decreed.

The provisional divorce or separation shall also be void if both or either of the spouses fails to be present.

The ruling that decrees the definitive divorce or separation shall produce the same effects as that of a contested divorce; these effects are produced retroactively,

retrotraem-se, quanto aos bens, à data em que tiver sido autorizado o divórcio ou a separação provisória.

§ único) O cônjuge que estiver ausente do continente ou da ilha em que tiver lugar a conferência regulada neste artigo pode fazer-se representar por procurador com poderes especiais.

with regard to the property, from the date on which the provisional divorce or separation was granted.

Single §) The spouse who is absent from the continent or the island in which the above mentioned conference takes place may have him/herself represented by an attorney with special powers.

COMMENTARY TO THE DIVORCE ACT AND TO ARTICLES 1472 TO 1476 OF THE CODE OF CIVIL PROCEDURE OF 1939

The Act of 3 November 1910 allowed divorce as a means to dissolve a marriage, thereby widening the grounds for the termination of the conjugal society, previously limited to death in the initial version of the Civil Code of 1867. That was still the period when the principle of perpetuity was the basic structure of family legal relations. The law of 1910 did not encompass marriages between Catholics carried out in accordance with the rite of the Roman Church, as foreseen in the Concordat of 7 May 1940 (internal Portuguese law, under the provisions of article 61 of Decree no. 30615, of 25 July 1940). Indeed, under article XXIV of the Concordat between the Holy See and the Portuguese State, of 7 May 1940, "it *is deemed that, by the very fact of the contracting of a canon marriage, the spouses renounce the civil option to request a divorce, which may thus not be applied by civil courts to Catholic marriages*".

Concerning the admission of divorce as a means to dissolve marital life, we would mention the thinking of some authors who dedicated their attention to this issue: D. Alberto Bramão, in *Casamento e divórcio*, 1908; D. Roboredo Sampaio e Mello, in *Família e Divórcio*, 1906; Mascarenhas de Melo, in *Contra o divórcio*, 1908; J. G. Pinto Coelho, in *A defesa da institucionalização da família*, 1935; Alberto Esteves, *A família*, 1932 and Sá Nogueira, *Do divórcio*, 1914, among many others.

D. Roboredo Sampaio e Mello, on pages 290 and 291 of the above quoted work, mentions that divorce is a natural effect of natural and positive law, "*... a logical consequence of the inalienable right to individual freedom, and a moral and social necessity*". Thus, when the spouses' life in common becomes impossible, "*due to one of the many circumstances that render a marital union unbearable, dangerous and immoral, the State, with its*

responsibility to guard and ensure freedom and protect the just interests of individuals and of the collectivity (...), can't but recognise the divorce".

In article 2 of the Act of 1910, the legislator gave the dissolution of the marriage by divorce the same legal effects as dissolution by death, with regard to the spouses' property, persons and capacity to contract a new marriage. Despite this, the first marriage continues to have important effects: a) lineal affinity is preserved as an impediment for a future marriage; b) it leads to a new civil status: divorced; and c) the contracting of a new marriage is subject to the limitations imposed by the Act in question. However, there are substantial differences between the married status and the divorced status, including that, in the case of divorce, children are emancipated at the age of 18, while a widowed spouse keeps parental authority until the child is 21 years old, just to name one of the main differences.

It should, however, be mentioned that although divorce is allowed as a legal mechanism to terminate the conjugal society, the legislator nonetheless retained a negative opinion of it. See, e.g., article 1475 of the Code of Civil Procedure of 1939, where it is stated that the function of the conference judge, so as to come to a provisional divorce decree, is to encourage the spouses to give up their intentions, considering, among other reasons, "*the negative effects of the divorce or separation with regard to the children's future*". We believe the specific reference to children derives from the very concept of marriage, legally thought of as a contract aimed at the legitimate constitution of a family, in accordance with the provisions of article 1056. Therefore, its aim, in essence, was procreation.

In relation to the structuring of the Act, we note that the legislator distinguished two types of divorce: one, called contested divorce, regulated in articles 4 to 34, and another, called divorce by mutual consent, foreseen in articles 35 to 42 of the Act. One may characterise both of these types as a reflection of the ideology underlying their definition.

A contested divorce works as a sort of sanction divorce, applicable to the infringing spouse, and requested only by the non-guilty/

innocent spouse. It requires specific grounds, deriving from a violation of a marital duty, as can be seen in the provisions of articles 4 and 6 of the Act.

We would particularly highlight numbers 1 and 2 of article 4, which consider the husband's and the wife's adultery as legitimate grounds for a contested divorce. It is a noteworthy legislative innovation, considering that the initial version of the Civil Code, in article 1204, numbers 1 and 2, considered the wife's and the husband's adultery as legitimate grounds for the separation of persons and property, but in the case of the husband's adultery it further required that it be "*with public scandal, or complete abandonment of the wife, or keeping a concubine in the conjugal domicile*". In the version introduced by the Act of 1910, adultery becomes equal grounds for contested divorce, these additional requirements being dropped. Similarly, José Montez indicates (in *Do divórcio, estudo sociológico-jurídico*, page 83) that the Divorce Act of 3 November 1910, by making the man's adultery equal to the woman's and thus dignifying her, "*carried out an absolutely just change*".

Further grounds for divorce, in accordance with article 4 of the Act, is the definitive conviction of one of the spouses to any of the major penalties foreseen in articles 55 and 57 of the Criminal Code. We may wonder which penalties the legislator is referring to, since not all imply imprisonment and, therefore, do not prevent the exercise of the respective marital duties. In truth, it would be strange for the legislator to encompass any penalty as sufficient cause for a contested divorce. As mentioned by José Montez, on page 95 of the above mentioned work, "*it does not make sense for the law not to consider grounds for divorce a sentence to a larger undetermined penalty, which may go up to 12 years of exile, and at the same time do so with regard to a penalty which, although determined, the Criminal Code itself requires to be correctional imprisonment*" (our underlining).

Another important question for the analysis of these rules is whether, in the case of a pardon or a reversal of the conviction, the spouse that intends to initiate a contested divorce is preventing from

doing so. The law does not provide a clear answer. However, the occurrence of a pardon for a specific sentence does not seem to us to be enough to prevent the initiation of the suit. Indeed, the fact continues to exist as grounds for a contested divorce, even though the respective penalty will not have to be served. In the case of the reversal of the conviction, the understanding presented by António Montez, on page 98 of his work, makes sense: "(...) In the case, however, of reversal of the conviction resulting in the rehabilitation of the convicted person, one should consider when it occurs in relation to the divorce application. If the rehabilitation precedes the divorce application, since it leads to the reintegration of the convicted person, now deemed innocent as a result of the extraordinary revision of the convicting judgment, into his/her legal status before the conviction, the latter cannot be used as grounds for the divorce, and if as a consequence of it the other spouse was remarried, this marriage is not dissolved. Indeed, such a marriage could only be dissolved through annulment, and the Act on Marriage as a Civil Contract does not mention as grounds for the annulment of the marriage the rehabilitation of the convicted spouse, when the divorce was based on that conviction".

Article 4, no. 4, of the Act states that ill-treatment and serious injuries are also grounds for a contested divorce, something which was already mentioned in article 1204, no. 4, as a legitimate ground for separation of persons and property. It should be taken into account that each of the issues raised may, individually, be considered autonomous grounds for a contested divorce. The rule in question must be read together with article 36, single §, and article 45, indicating two legal presumptions which may be excluded in accordance with article 2158.

Article 4, no.s 5 and 6, refers to two other causes for a contested divorce: "*the complete abandonment of the marital domicile for at least three years*" and "*the absence, where nothing has been heard of the absentee, for at least four years*". The legislator therefore considered compliance with the duty to live together as an indispensable element for the survival of the marital

relationship, as well as the inherent contribution to the charges arising from marital life, which can hardly take place in the above mentioned situations, and for which reason the marriage could be terminated.

Article 4, no. 7, further lists incurable insanity after at least three years have elapsed since it was pronounced by a ruling in a condition of *res judicata*, in accordance with articles 419 *et seq*. of the Code of Civil Procedure of 1876. The Decree of 21 December 1910 clarified the content of this provision, indicating that that period starts from when the incurable insanity occurred, which implies a declaration by experts. In principle, this is before the divorce suit through an interdiction on the grounds of insanity.

Article 4, no. 9, includes a chronic gambling addiction among the grounds for divorce. This is quite peculiar. Unlike the other grounds mentioned in article 4, with a direct connection to marital life and, consequently, capable of constituting a violation of marital duties, in the situation in question it is the effects resulting from the action in question that are condemned by the legislator. We would highlight the squandering of patrimony that may occur as a result of the mentioned addiction. However, this consequence could be avoided by resorting to the suit for interdiction due to prodigality, without it being necessary to include this as grounds for a contested divorce, as the legislator chose to do.

Finally, article 4, no. 10, lists as grounds for a contested divorce "*a contagious disease known to be incurable, or an incurable disease implying a sexual aberration*". What is the meaning of this provision? Once again, the legislator does not specify what was envisaged. We may accept that there were reasons connected to the impossibility of meeting the aims inherent in marriage, namely procreation. In the above mentioned situations, this aim is strongly limited by the fact that one of the spouses is *a priori* prevented from accomplishing the purpose of the marriage. It should be noted that these situations are so impeditive of marital life that, according to no. 4 of article 4 of the Act, the spouse who gives rise to a divorce with these grounds may

only contract a new marriage after complying with all the formalities imposed by law.

Throughout the Act, and regarding the procedure applicable to contested divorces, we find references to the dichotomy innocent spouse/guilty spouse. In many legal provisions relating to the divorce suit, we find reference to the terms applicant and defendant. See, e.g., article 19, § 2, which prohibits the divorced woman from using, *"under penalty of disobedience, the name or names she acquired through her husband"*.

Article 20, §§ 2 and 3, equally states a specific regime applicable when the married wife requests judicial custody, being entitled to request that an inventory of the property be carried out and to request provisional maintenance. It should be noted that this right to maintenance is personal in nature, and may not be transferred to another person.

Article 21 enshrines the general principle concerning children in this respect, indicating that these are to be surrendered, preferably, to the spouse in favour of whom the divorce was decreed, which presupposes that the latter's responsibility is related to the incapacity presumed by law concerning the direction of the children's life. The legislator grants the spouse deemed guilty for the divorce a lesser capacity as a holder of parental authority. And let us not forget, interestingly, that articles 22 and 23 of the Act of 1910 explicitly say that one may not renounce parental authority.

Article 27 of the Act significantly clarifies the effects attached to the condition of innocent spouse and of guilty spouse. The distinction between the two regimes is that the guilty spouse *"shall lose all benefits that he/she has received, or should still receive, from the other spouse, whether these have been awarded to him/her in a prenuptial agreement or at a later date"*, while *"the innocent spouse shall maintain all benefits awarded to him/her by the guilty spouse, even if such benefits were stipulated with a clause of reciprocity"*. Regardless of the grounds for the divorce, the legislator assumes that the fact that someone was deemed responsible for the divorce places that person in a situation of "lesser dignity" with regard to the marriage

contract. The legislator deemed, *inter alia*, that the benefits to be excluded should encompass not only what had been stipulated before the marriage in a prenuptial agreement, but also any benefit awarded subsequently. It is the very essence of the established marital relationship that is called into question, to the point of setting aside the rights/benefits deriving from its solemnisation.

On page 104 of his manual (*Direitos da família e direitos das sucessões*), Cunha Gonçalves notes that the provision in question is only applicable to divorces where guilt can indeed be established, and not in situations of insanity, incurable illness, absence or freely consented separation, where there is no guilt. If both spouses are guilty, one can also not apply the provision in question. The benefits encompassed by this article include essentially the betrothing jewelry and donations made by the spouse that won the suit to the defeated spouse.

We would highlight that, at the level of the effects of a divorce, and not precluding what has been mentioned above, article 26 of this Act indicates that it results in the separation of property between the spouses, "*each acquiring full ownership and free administration of the property ascribed to him/her*". This article must be read together with article 1156 of the Civil Code, as revised by Decree no. 19.126, of 16 December 1930, which states that, if the spouses were married in accordance with the dotal regime, the respective dotal property is not freed from its respective burden by the divorce, only being so by the death of one of the spouses. The objective was to avoid fraud, by simulating a divorce by mutual consent so as to be able to alienate the dotal property, since "*the burden upon this property would become void by the mere fact of the divorce*". Under article 1156, dotal property remains inalienable, even after the divorce.

Another interesting aspect, due its extent, relates to articles 29 and 30 of the Act, according to which the spouses are mutually obliged to provide maintenance, even after the person providing it is remarried. This raises an issue: why should the spouse whose behaviour led to the divorce suit enjoy this benefit? We are clearly thinking of the grounds listed in article 4, no.s 1 to 6, since with

regard to the remaining ones – no.s 7 to 10 –, and in light of the situations described therein, the legislator's intention would be understandable. The essence of the right to maintenance is found in the duties to help and assist which must guide both spouses (article 1184, no. 3). Yet such duties are terminated when the divorce is granted.

A divorce by mutual consent, in turn, is requested by both members of the marital relationship, without the need to invoke specific grounds as justification, unlike in the first type of divorce discussed above. The joint will of the spouses is therefore sufficient. As prior conditions for a divorce by mutual consent, the legislator requires the marriage to have lasted for more than 5 years and the spouses to be at least 25 years old. Thus, it is presumed that the spouses united for more than five years will not rush into their decision, which could occur if this type of divorce were allowed after only two years of marriage, as in the version of article 35 of the Act of 1910. This also potentially avoids resorting to divorce as an immediate mechanism to interrupt the conjugal society. Curiously, the legislator further requires that the spouses be at least twenty-five years old, even though the age of majority is set by article 311 at twenty-one. It is presumably the wisdom of years that legitimises the spouses to dissolve their marital ties.

If there is an agreement as to the custody and fate of the minor children, as well as to the terms of contribution to their education and to the couple's property, the legislator merely sets up the procedure to be followed so as to formalise the respective divorce suit, with no further delays. However, we should mention that, even though divorce is admissible by law, its very drafting leads us to conclude that the legislator's main aim is still to preserve the stability of the marital union. In this respect, article 1475 of the Code of Civil Procedure of 1939 establishes a provisional divorce or separation for a one-year period, after which, if the spouses do not request a new conference, and if a certain number of requisites are met, the final divorce or separation is granted. The granting of the provisional

divorce or separation is always preceded by an attempt to reconcile the spouses.

With regard to divorce by mutual consent, we would highlight certain effects imposed by the sanctioning of the agreement on a provisional divorce, due to their significant impact on the wife's rights. Indeed, we are still within the constancy of the marriage, even though the couple is in a hybrid situation for the period of one year. The legislator mentions that the authorisation for the provisional divorce "*suspends the conjugal cohabitation, entitles the wife to request an inventory of the movable property and provisional maintenance and immediately produces, regarding the children, the effects foreseen in article 1473(d) and (e)*". The first issue is how to determine the meaning of the expression "*conjugal cohabitation*", since the legislator does not explicitly refer to the suspension of marital duties, as it could have done.

Curiously, even though it is not possible to define the legal regime for the termination of the conjugal society, the legislator goes further in the final part of the mentioned article, by allowing for the possibility of defining, at the time of the sanctioning of the provisional separation, the custody and fate of the minor children, as well as the terms in which each spouse is to contribute to them. This condition is also listed in articles 8 and 21 of the Act of 1910 for contested divorces. Namely, in article 20, § 2, of the Act of 1910, the wife who has requested judicial custody is also granted the right to request an inventory of the movable property, as well as to request provisional maintenance. The latter request may be made regardless of whether she is the applicant or the defendant in the divorce suit. The legislator seems to have taken into account that most married women would not usually have their own income, since the administration of the said income belonged to the husband, in accordance with article 1117.

A divorce terminates the marriage, even though some of its consequences are preserved, such as: a) the legitimacy of common children; b) the emancipation of the wife under the age of 21; and c) the existence of a relation of affinity which may not be dissolved.

3. Doações: Artigos 1452º-1505º do Código Civil de 1867

Donations: Articles 1452-1505 of the Civil Code of 1867

Código Civil de 1867

CAPÍTULO V
DAS DOAÇÕES

SECÇÃO I
DAS DOAÇÕES EM GERAL

Artigo 1452º

Doação é um contrato, por que qualquer pessoa transfere a outrem gratuitamente uma parte, ou a totalidade de seus bens presentes.

Artigo 1453º

A doação não pode abranger bens futuros.

§ único) Por bens futuros entendem-se aqueles, que não se acham em poder do doador, ou a que este não tem direito ao tempo da doação.

Artigo 1454º

A doação pode ser pura, condicional, onerosa, ou remuneratória.

§ 1º) Pura é a doação meramente benéfica, e independente de qualquer condição.

§ 2º) Doação condicional é a que depende de certo evento ou circunstância.

§ 3º) Doação onerosa é a que traz consigo certos encargos.

§ 4º) Doação remuneratória é a que é feita em atenção a serviços recebidos pelo doador, que não tenham a natureza de dívida exigível.

Civil Code of 1867

CHAPTER V
DONATIONS

SECTION I
DONATIONS IN GENERAL

Article 1452

A donation is a contract through which one person gratuitously transfers to another a part or all of his/her existing property.

Article 1453

A donation may not encompass future property.

Single §) Future property is defined as property which is not under the control of the donor, or which he/she is not entitled to at the time of the donation.

Article 1454

A donation may be pure, conditional, onerous or remuneratory.

§ 1) A pure donation is one which is strictly beneficial, free of any condition.

§ 2) A conditional donation is one which depends on a certain event or circumstance.

§ 3) An onerous donation is one which carries with it certain burdens.

§ 4) A remuneratory donation is one which is done in light of services received by the donor which do not correspond to a demandable debt.

Artigo 1455º

A doação onerosa só pode ser considerada como doação, na parte em que exceder o valor dos encargos impostos.

Artigo 1456º

As doações que tiverem de produzir os seus efeitos entre vivos, são irrevogáveis desde que forem aceitas, excepto nos casos declarados na lei.

Artigo 1457º

As doações, que tiverem de produzir os seus efeitos por morte do doador, têm a natureza de disposição de última vontade, e ficam sujeitas às regras estabelecidas no título dos testamentos.

§ único) A disposição deste Artigo não abrange as doações para casamento, ainda que hajam de produzir o seu efeito depois da morte do doador.

Artigo 1458º

A doação pode ser feita verbalmente ou por escrito.

§ 1°) A doação verbal só pode ser feita com tradição da coisa doada, sendo esta mobiliária.

§ 2°) A doação de coisas mobiliárias, não sendo acompanhada de tradição, só pode ser feita por escrito.

Artigo 1459º

A doação de bens imobiliários, se o valor deles não exceder a cinquenta mil réis, poderá ser feita por escrito particular com a assinatura do doador, ou de outrem a seu rogo, não sabendo ele escrever, e de mais duas testemunhas, que escrevam o seu nome por inteiro; se exceder aquela quantia, só poderá ser feita por escritura pública.

Article 1455

An onerous donation may only be considered a donation in the part exceeding the value of the burdens imposed on it.

Article 1456

Donations which must produce their effects *inter vivos* are irrevocable as soon as they are accepted, except when otherwise foreseen by law.

Article 1457

Donations which must produce their effects *mortis causa* shall be deemed dispositions of last wishes and are subject to the provisions of the title on wills.

Single §) This article's provision does not encompass donations for a marriage, even if they shall produce their effect after the death of the donor.

Article 1458

A donation may be made orally or in writing.

§ 1) An oral donation may only be made together with the delivery of the donated thing, if it is movable.

§ 2) The donation of movable things, when not accompanied by its delivery, may only be made in writing.

Article 1459

The donation of immovable property, if its value does not exceed fifty thousand "reis", may be made in a private document signed by the donor, or by another at his request, if the donor is illiterate, and by two witnesses, who shall write their full name; if it exceeds that amount, it may only be made in a deed.

§ único) *Estas doações só produzirão efeito em relação a terceiros, desde que forem registadas, como se determina no título respectivo.*

Artigo 1459º

A doação de bens imobiliários, se o valor deles não exceder a 1.000$, poderá ser feita por escrito particular com a assinatura do doador, ou de outrem a seu rogo, não sabendo ele escrever, e de mais duas testemunhas que escrevam o seu nome por inteiro, se exceder aquela quantia, só poderá ser feita por escritura pública.

§ único) Estas doações só produzirão efeito, em relação a terceiros, desde que forem registadas.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Artigo 1460º

É nula a doação, que abrange a totalidade dos bens do doador sem reserva do usufruto, ou que deixa o doador sem meios de subsistência.

Artigo 1461°

Se o doador fizer doação de todos os seus bens móveis e imóveis, entender-se-á, que a doação abrange os direitos e acções.

Artigo 1462º

Se o doador, em contrato de casamento, fizer doação de seus bens por morte, sem fazer reserva alguma, ou reservando alguns bens sem designação deles ou de porção certa, entender-se-á, que reserva a terça dos doados.

Single §) These donations shall only produce effects erga omnes if they are registered in accordance with the provisions of the respective title.

Article 1459

The donation of immovable property, if its value does not exceed one thousand "escudos", may be made in a private document signed by the donor, or by another at his request, if the donor is illiterate, and by two witnesses, who shall write their full name; if it exceeds that amount, it may only be made in a deed.

Single §) These donations shall only produce effects *erga omnes* if they are registered.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Article 1460

A donation encompassing all the property of the donor, without reserving the right of usufruct, or leaving the donor without means of survival, is null and void.

Article 1461

If the donor donates all his/her movable and immovable property, it shall be understood that the donation encompasses rights and actions.

Article 1462

If the donor, in a prenuptial agreement, donates his property *mortis causa*, without making any reservation, or reserving some of the property without describing it or a determined part of it, it shall be understood that he/she meant to reserve a third of the donated property.

Artigo 1463º

Se o doador, em contrato de casamento, dispuser da sua terça legal, entender-se-á que reserva a terça da terça.

Article 1463

If the donor, in a prenuptial agreement, disposes of his/her disposable third, it shall be understood that he/she meant to reserve a third of that disposable third.

Artigo 1463º

Se o doador, em contrato de casamento, dispuser de toda a sua cota disponível, entender-se-á que reserva a terça da sua meação.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Article 1463

If the donor, in a prenuptial agreement, disposes of the entirety of his/her disposable portion, it shall be understood that he/she meant to reserve a third of his/her moiety.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Artigo 1464º

Se o doador se finar sem dispor da reserva legal, pertencerá esta ao donatário.

§ único. Se, porém, a reserva tiver sido feita por estipulação expressa no acto da doação, e o doador se finar sem dispor dela, pertencerá a dita reserva aos seus herdeiros legítimos dentro do quarto grau, e só na falta destes acrescerá ao donatário.

Article 1464

If the donor dies without disposing of the legal reserve, this shall be deemed to belong to the donee.

Single §) If, however, the reserve has been made by an explicit provision in the act of the donation, and the donor dies without disposing with regard to it, the said reserve shall belong to the intestate heirs within the fourth degree, and only when these do not exist will it belong to the donee.

Artigo 1465.°

A doação caduca não sendo aceita em vida do doador, salva a disposição do Artigo 1478°.

Article 1465

The donation expires if it is not accepted while the donor is living, with the exception of that which is foreseen in Article 1478.

Artigo 1466º

Se a doação não for aceita no próprio acto, e a aceitação não for inserida no contexto do documento, do qual consta a doação, será depois averbada nele.

Article 1466

If the donation is not accepted in the act itself, and the acceptance is not made in the context of the document containing the donation, it shall subsequently be added to it.

Artigo 1467º

Sendo a doação feita a várias pessoas conjuntamente, não se dará entre elas o direito de acrescer, salvo se o doador expressamente houver declarado o contrário.

Artigo 1468º

O doador não responderá pela evicção da coisa doada, se a isso se não obrigar expressamente, salvas as disposições dos Artigos 1142º e 1143º.

§ único) O donatário ficará, porém, sub-rogado em todos os direitos que possam competir ao doador, verificando-se a evicção.

Artigo 1469º

Se a doação for feita com encargo de pagamento das dívidas do doador, entender-se-á essa cláusula, não havendo outra declaração, como obrigando ao pagamento das que, ao tempo da doação, existirem com data autêntica ou autenticada.

Artigo 1470º

Na falta de estipulação a respeito das dívidas do doador, observar-se-á o seguinte:

§ 1º) Se a doação for de certos e determinados bens, o donatário não responderá pelas dívidas do doador, excepto no caso de hipoteca ou de fraude, em prejuízo dos credores

§ 2º) Se a doação for da totalidade dos bens, responderá o donatário por todas as dívidas do doador, anteriormente contraídas, salvo havendo declaração em contrário.

Article 1467

If the donation is made jointly to several persons, none of them shall have the right of accretion, except if the donor has explicitly stated otherwise.

Article 1468

The donor shall not be responsible for the eviction of the donated thing, if he/she does not explicitly take on that obligation, with the exception of that which is foreseen in Articles 1142 and 1143.

Single §) The donee shall, however, be subrogated in all the rights of the donor if the eviction does occur.

Article 1469

If the donation is made with the burden of paying the donor's debts, this clause shall be understood, in the absence of a differing statement, to require the payment of existing debts at the time of the donation, with an authentic or authenticated date.

Article 1470

In the absence of a stipulation concerning the donor's debts, the following shall apply:

§ 1) If the donation relates to certain specific property, the donee shall not be responsible for the donor's debts, except in the case of mortgage or fraud, to the detriment of creditors.

§ 2) If the donation relates to the entire property, the donee shall be responsible for all the donor's previous debts, unless otherwise stipulated.

Artigo 1471°

As doações de móveis ou dinheiro, feitas pelo marido, sem consentimento da mulher, serão levadas em conta na meação dele, excepto sendo remuneratórias ou de pouca importância.

Article 1471

Donations of movable property or money, made by the husband without the wife's consent, shall be taken into account in his moiety, except if they are remuneratory or of little importance.

Artigo 1472°

A doação legìtimamente feita, seja de que valia for, produzirá todos os seus efeitos jurídicos, independentemente de insinuação ou de qualquer outra formalidade posterior à mesma doação, salvo o que fica disposto no § único do Artigo 1459°.

Article 1472

A legitimately made donation, of whatever amount, shall produce all its legal effects, regardless of insinuation or of any other subsequent formality, with the exception of that which is foreseen in the single § of Article 1459.

Artigo 1473°

O doador pode estipular a reversão da coisa doada, contanto que seja a seu favor e não de outras pessoas, salvo nos casos em que a substituição testamentária é permitida.

Article 1473

The donor may stipulate the reversion of the donated thing, as long as it is in his favour and not of others, except in the cases where testamentary substitution is allowed.

Artigo 1473°

O doador pode estipular a reversão da coisa doada, tanto a seu favor, como para outras pessoas nos termos dos Artigos 1866.° e seguintes.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Article 1473

The donor may stipulate the reversion of the donated thing, in his favour or in favour of other persons in accordance with Articles 1866 et seq.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Artigo 1474°

A reversão, estipulada pelo doador a favor de terceiro, com quebra da disposição do Artigo antecedente, é nula mas não produz a nulidade da doação.

Article 1474

The reversion, stipulated by the donor in favour of a third party in breach of the provisions of the previous Article, shall be null and void but shall not render the donation null.

Artigo 1475°

Os bens doados, passando, pela cláusula de reversão, para o poder da pessoa ou pessoas a favor de quem tal

Article 1475

The donated property that is transferred, through the reversion clause, to another person or persons in favour of

cláusula foi estipulada, passam livres de quaisquer encargos, que lhes tenham sido impostos no tempo em que estavam em poder do donatário.

whom the clause was stipulated, is transferred free of any burden imposed upon it while it was in the donee's possession.

SECÇÃO II
DAS PESSOAS QUE PODEM FAZER OU RECEBER DOAÇÕES

Artigo 1476º

Podem fazer doações todos os que podem contratar e dispor de seus bens.

Artigo 1477º

Podem aceitar doações todos os que não são especialmente inibidos disso por disposição da lei.

Artigo 1478º

As pessoas, que não podem contratar, não podem aceitar, sem autorização das pessoas a quem pertence concedê-las, doações condicionais ou onerosas. Porém as doações puras e simples, feitas a tais pessoas, produzem efeito, independentemente de aceitação, em tudo o que aproveitar aos donatários.

Artigo 1479º

Os nascituros podem adquirir por doação, contanto que estejam concebidos ao tempo da mesma doação, e nasçam com vida.

Artigo 1480º

São nulas as doações feitas por homem casado à sua concubina. Esta nulidade, porém, só pode ser declarada a requerimento da mulher do doador ou dos herdeiros legitimários dela, não

SECTION II
PERSONS WHO MAY MAKE OR RECEIVE DONATIONS

Article 1476

All those who may enter into contracts and dispose of their patrimony may make donations.

Article 1477

All those who are not especially prohibited by law from doing so may accept donations.

Article 1478

Persons who may not enter into contracts may not accept, without the permission of the persons empowered to give it, conditional or onerous donations. However, pure and simple donations, made to such persons, produce their effects, regardless of acceptance, in all that is advantageous to the donees.

Article 1479

Those yet to be born may acquire property through a donation, as long as they have been conceived at the time of the said donation and are born alive.

Article 1480

Donations made by a married man to his concubine are null and void. This nullity may, however, only be declared at the request of the donor's wife or of her mandatory heirs, the legal action in

podendo todavia a respectiva acção ser intentada senão dentro de dois anos depois de dissolvido o matrimónio.

question having to be initiated within the two years following the dissolution of the matrimony.

Artigo 1481º

As doações feitas a pessoas inábeis, quer sejam feitas simuladamente, quer o sejam com aparência de outro contrato, ou por interposta pessoa, não produzem efeito algum.

§ único) São havidas como interpostas pessoas os descendentes, ascendentes ou consortes dos inábeis.

Article 1481

Donations made to incapable persons, be they simulated or made under the appearance of a different contract, or through an intermediate person, shall produce no effects.

Single §) The descendants, ascendants and consorts of the incapable persons shall be considered intermediate persons.

SECÇÃO III
DA REVOGAÇÃO E REDUÇÃO DAS DOAÇÕES

SECTION III
REVOCATION AND REDUCTION OF DONATIONS

Artigo 1482°

As doações consumadas só podem ser revogadas, além dos casos em que o pode ser qualquer contrato:

1°) Por superveniência de filhos, legítimos, sendo o doador casado ao tempo da doação;

2°) Por ingratidão do donatário;

3°) Por inoficiosidade.

Veja o Assento de 21 de Dezembro de 1928: "*A redução nas doações inoficiosas faz-se sempre em substância*" (D.G., II série, de 15-1-1929)

Article 1482

Completed donations may only be revoked, aside from the cases in which any contract may be revoked:

1) Due to supervenience of legitimate children, if the donor was married at the time of the donation;

2) Due to ingratitude of the donee;

3) Due to inofficiousness.

See the case-law creating judgment of 21 December 1928: "*The reduction of inofficious donations is always done in substance*" (O.G., Series II, of 15/01/1929)

Artigo 1483º

A doação não será revogada por superveniência de filhos:

1º) Se o doador já tiver algum filho ou descendente legítimo, vivo ao tempo da doação;

2°) Sendo a doação feita para casamento.

Article 1483

The donation shall not be revoked due to supervenience of children:

1) If the donor already had a child or legitimate descendant, living at the time of the donation;

2) If the donation was made for a marriage.

Artigo 1484º

Rescindida a doação por superveniência de filhos, serão restituídos ao doador os bens doados, ou, se o donatário os houver alienado, o valor deles.

§ 1°) Se os bens se acharem hipotecados, subsistirá a hipoteca; mas poderá ser expurgada pelo doador, com regresso contra o donatário, pelo que o dito doador despender por essa causa.

§ 2°) Quando os bens não puderem ser restituídos em espécie, o valor exigível será o que os ditos bens tinham ao tempo da doação.

Article 1484

If the donation is rescinded due to supervenience of children, the donated property or, if the donee has alienated it, its corresponding value shall be returned to the donor.

§ 1) If the property is mortgaged, the latter shall remain in place; but the mortgage may be paid by the donor, with the right to seek compensation from the donee for the amount the donor spends with such payment.

§ 2) When the property may not be returned in kind, the demandable value shall be that of the said property at the time of the donation.

Artigo 1485°

Pertencem ao donatário os frutos ou rendimentos dos bens doados, até o dia em que for proposta a acção de revogação por superveniência de filhos do doador.

Article 1485

The fruits or income of the donated property belong to the donee, up to the day in which the legal action for revocation due to supervenience of children of the donor is initiated.

Artigo 1486°

O doador não pode renunciar o direito de revogação por superveniência de filhos.

Article 1486

The donor may not renounce the right of revocation due to supervenience of children.

Artigo 1487°

A acção de revogação, por superveniência de filhos, só se transmite a estes e a seus descendentes legítimos.

Article 1487

The legal action for revocation due to supervenience of children is only transmissible to the latter and to their legitimate descendants.

Artigo 1488º

A doação pode ser revogada por ingratidão:

1º) Se o donatário cometer algum crime contra a pessoa, bens, ou honra do doador;

2º) Se o donatário acusar iudicialmente o doador por crime, em que o Ministério Público tenha acção, salvo se houver sido cometido contra o próprio

Article 1488

A donation may be revoked due to ingratitude:

1) If the donee commits a crime against the person, property or honour of the donor;

2) If the donee presents a criminal complaint against the donor, in proceedings where the Public Prosecutor is empowered to act, except if the crime

donatário, sua mulher ou filhos, que estejam debaixo do pátrio poder;

3º) Se, caindo o doador em pobreza, o donatário recusar socorrê-lo de modo proporcionado à importância que, deduzidos os encargos, teve a doação.

was committed against the donee himself, against his wife or against his children, placed under parental authority;

3) If, when the donor has fallen into poverty, the donee refuses to help him/her in a manner proportional to the value of the donation, after the deduction of its burdens.

Artigo 1488º

A doação pode ser revogada por ingratidão:

1º) Se o donatário for condenado por algum crime contra a pessoa, bens ou honra do doador;

2º) Se o donatário acusar judicialmente o doador por qualquer crime, salvo se houver sido cometido contra o próprio donatário, sua mulher, seus ascendentes, ou seus descendentes;

3º) Se, caindo o doador em pobreza, o donatário recusar socorrê-lo de modo proporcionado à importância que, deduzidos os encargos, teve a doação.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Article 1488

A donation may be revoked due to ingratitude:

1) If the donee is convicted of a crime against the person, property or honour of the donor;

2) If the donee presents a criminal complaint against the donor, except if the crime was committed against the donee himself, his wife, his ascendants or his descendants.

3) If, when the donor has fallen into poverty, the donee refuses to help him/her in a manner proportional to the value of the donation, after the *deduction* of its burdens.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Artigo 1489º

É aplicável à revogação da doação por ingratidão o que fica disposto nos Artigos 1483.°, n.° 2°, 1484.° e 1485°.

Article 1489

The provisions of Articles 1483(2), 1484 and 1485 are applicable to the revocation of a donation due to ingratitude.

Artigo 1490º

A acção de revogação por ingratidão não pode ser renunciada antecipadamente, e prescreve por um ano, contado desde o facto que lhe deu causa, ou desde que houve notícia dele.

Article 1490

One may not renounce beforehand the right to initiate a legal action of revocation due to ingratitude, and such action is time barred one year after the fact on which it is based, or since this fact became known.

Artigo 1491º

Esta acção não pode ser intentada, nem contra os herdeiros do donatário ingrato, nem pelos herdeiros do doador, mas será transmissível, se, porventura, se achar pendente ao tempo da morte do doador.

Artigo 1492º

A doação, seja quem for o donatário, pode ser revogada ou reduzida por inoficiosa, se envolver prejuízo da legítima dos herdeiros legitimários do doador.

§ 1º) Mas, se o prejuízo da legítima não abranger o valor total da doação, será esta reduzida em tanto quanto for necessário, para que a dita legítima seja preenchida.

§ 2º) O cálculo da terça, para se conhecer se há ou não inoficiosidade, será feito pelo modo estabelecido no título das sucessões.

§ 2º) O cálculo da metade, para se conhecer se há ou não inoficiosidade, será feito pelo modo estabelecido no título das sucessões.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Artigo 1493º

A redução das doações inoficiosas começará pelas doações testamentárias ou legados, e só se estenderá às doações entre vivos, se não chegarem os bens legados.

Artigo 1494º

Se bastar redução parcial dos legados, será esta rateada entre os legatários, salvo se o testador houver ordenado, que para

Article 1491

This legal action may not be initiated against the heirs of the ungrateful donee, nor by the heirs of the donor, but it is transmissible to them if it is pending at the time of the donor's death.

Article 1492

A donation, regardless of who the donee is, may be revoked or reduced as inofficious, if it affects the legitime of the donor's mandatory heirs.

§ 1) But, if it is not the total value of the donation that affects the legitime, the donation shall be reduced only insofar as necessary to complete the legitime.

§ 2) In order to determine if there was inofficiousness, the disposable third shall be calculated in the way foreseen in the title on succession.

§ 2) In order to determine if there was inofficiousness, the moiety shall be calculated in the way foreseen in the title on succession.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Article 1493

Inofficious donations shall be reduced first with testamentary donations or legacies, the reduction continuing to donations *inter vivos* only if the legated property does not suffice.

Article 1494

If a partial reduction of the legacies suffices, this shall be divided among the legatees, except if the testator has orde-

este efeito seja preferido um deles, ou que algum fique isento de tal encargo.

Artigo 1495º

Se for necessário recorrer às doações entre vivos, começar-se-á pela última, em todo ou em parte; e, se não bastar, passar-se-á à imediata, e assim por diante, enquanto doações houver.

Artigo 1496º

Havendo diversas doações, feitas no mesmo acto ou da mesma data, far-se-á a redução entre elas rateadamente.

Artigo 1497º

Consistindo a doação em objectos mobiliários, atender-se-á, na redução, ao valor que eles tinham ao tempo da doação.

§ único. Não será imputada ao donatário a perda ou deterioração dos objectos mobiliários, se tiverem desaparecido, ou estiverem deteriorados por causa fortuita ou força maior.

Artigo 1497º

Consistindo a doação em objectos mobiliários, atender-se-á, na redução, ao valor que eles tinham ao tempo da doação.

§ único) São aplicáveis neste caso as disposições dos §§ 2º e 3º do Artigo 2107º.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Artigo 1498º

Consistindo a doação em objectos imobiliários, será a redução feita em espécie.

red that one of them be preferred for this purpose, or that any of them be exempted from such burden.

Article 1495

If it is necessary to resort to donations *inter vivos*, the reduction shall start with the last one, in whole or in part; and if this one does not suffice, the reduction shall continue with the one immediately preceding it, and so on, as long as there are donations.

Article 1496

If there are several donations, made in the same act or on the same day, the reduction between them shall be *pro rata*.

Article 1497

If the donation consists of movable objects, one shall take into account, in the reduction, the value of these at the time of the donation.

Single §) The donee shall be responsible for the loss or deterioration of movable objects, if they have gone missing, or if they were deteriorated by accident or by force majeure.

Article 1497

If the donation consists of movable objects, one shall take into account, in the reduction, the value of these at the time of the donation.

Single §) The provisions of §§ 2 and 3 of Article 2107 shall be applicable in this case.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Article 1498

If the donation consists of immovable objects, the reduction shall be made *in natura*.

§ 1º) A estas doações é aplicável o que fica disposto no § único do Artigo antecedente.

§ 2º) O valor dos bens imobiliários doados será calculado com relação à época, em que se houver de fazer a redução, não se incluindo no cálculo, nem o aumento de valor proveniente de benfeitorias feitas pelo donatário, nem, por outra parte, a diminuição desse valor procedida de deteriorações imputáveis ao mesmo donatário.

§ 1) The single § of the preceding article shall be applicable to these donations.

§ 2) The value of the donated immovable property shall be calculated by reference to the time at which the reduction takes place, the calculation neither taking into account the added value deriving from improvements carried out by the donee, nor, on the other hand, the decrease of that value deriving from damage ascribable to the same donee.

Artigo 1499º

Se algum imóvel não puder ser dividido sem detrimento, observar-se-á o seguinte:

§ 1º) Se a importância da redução exceder metade do valor, haverá o donatário o resto em dinheiro.

§ 2º) Se a redução não exceder a dita metade, reporá o donatário a importância da redução.

Article 1499

If an immovable property may not be divided without detriment, the following shall be observed:

§ 1) If the amount of the reduction exceeds half of the value, the donee shall have the remainder in currency.

§ 2) If the reduction does not exceed the said half, the donee shall pay the amount of the reduction.

Artigo 1500º

Se, porém, o donatário for também co-herdeiro, só poderá reter o imóvel doado, se o valor desse imóvel não exceder o da legítima do co-herdeiro acumulado com o da doação reduzida. No caso contrário, o donatário entrará com o imóvel doado para o casal, e será pago da legítima e da doação reduzida, em conformidade das regras gerais que regulam as partilhas.

Article 1500

If, however, the donee is also a co-heir, he will only keep the donated immovable property if its value does not exceed that of the co-heir's legitime together with that of the reduced donation. Otherwise, the donee shall bring the immovable property to the estate, and shall be paid from the legitime and from the reduced donation, in conformity with the general rules on partitions.

Artigo 1501º

É aplicável à revogação, ou redução por inoficiosidade, o que fica disposto nos arts. 1483º, nº 2º, e 1484º.

Article 1501

The provisions of articles 1483(2) and 1484 are applicable to the revocation or to reduction due to inofficiousness.

Artigo 1501º

É aplicável à redução por inoficiosidade o disposto no Artigo 1484.° e bem assim o disposto no Artigo 1483º, nº 2°, tratando-se de doações entre esposados.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Article 1501

The provisions of articles 1484 and 1483(2) are applicable to reduction due to inofficiousness, in the case of donations between engaged persons.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Artigo 1502º

Se os imóveis se não acharem, ao tempo da revogação ou redução, em poder do donatário, será este responsável pelo valor deles ao tempo da doação.

Article 1502

If the donee no longer has the immovable property at the time of the revocation or reduction, he/she will be responsible for its value at the time of the donation.

Artigo 1502º

Se os imóveis se não acharem, ao tempo da revogação ou redução, em poder do donatário, será este responsável pelo valor deles à data da abertura da herança, sem prejuízo do disposto no § 7º do Artigo 2107º.

(*Redacção dada pelo Decreto nº 19.126, de 16 de Dezembro de 1930*)

Article 1502

If the donee no longer has the immovable property at the time of the revocation or reduction, he/she will be responsible for its value at the time of the opening of the inheritance, not precluding the provisions of § 7 of Article 2107.

(*As revised by Decree no. 19.126, of 16 December 1930*)

Artigo 1503º

Esta acção prescreve, não sendo intentada dentro de dois anos, contados desde o dia em que o herdeiro legitimário haja aceitado a herança.

Article 1503

This legal action is time-barred if it is not initiated at the latest two years after the day when the mandatory heir accepted the inheritance.

Artigo 1504º

Se a doação consistir em móveis, e o donatário se achar insolvente, só poderão os interessados demandar o imediato adquirente, pelo valor desses móveis ao tempo da aquisição, tendo sido transferidos gratuitamente, e não obstando a prescrição.

Article 1504

If the donation consists of movable property, and the donee is found insolvent, interested parties may only initiate legal proceedings against the immediate transferee, for the value of that property at the time of the acquisition, if it was transferred gratuitously and if the limitation period has not yet been reached.

Artigo 1505º

O donatário, sobre quem recai revogação ou redução de doação por inoficiosidade, só responde pelos frutos e rendimentos desde que é demandado; salvo sendo co-herdeiro, porque, nesse caso, responde por eles desde a morte do doador.

Article 1505

The donee, subject to a revocation or a reduction of an inofficious donation, is liable only for fruits and income from the moment the legal action is initiated; except if he/she is a co-heir, since, in this case, he/she is liable for them from the moment of the donor's death.

COMMENTARY TO ARTICLES 1452 TO 1505

The donation contract is regulated in articles 1452 *et seq.* of the Civil Code, being defined therein as "*a contract through which one person gratuitously transfers to another a part or all of his/her existing property*"; it is, therefore, a contract through which ownership is transferred gratuitously.

There must be an *animus donandi*, the intention to make a generosity, leading to the enrichment of the donee's patrimony.

Requiring an agreement between the parties – except in the case of a pure and simple donation to an incapable person (see article 1478), donations hold a decisive role in legal trade.

With regard to their object, donations may only encompass present property (see articles 1452 and 1453), i.e., "*property already existing in the donor's patrimony at the time the contract is signed*".

However, it is possible to donate future property (this concept is clarified in article 1453) in the case of donations for a marriage, be they between engaged persons or from third parties to engaged persons, to be discussed in further detail below.

On the other hand, donations may be *inter vivos*, i.e., donations which produce their effects during the life of the contracting parties, or *mortis causa*, i.e., donations which only come into effect after the donor's death (see articles 1456 and 1457).

Donations *inter vivos* may not be revoked, except when specifically allowed by law.

Formalities are governed by articles 1458 and 1459. One may wonder, with regard to donations *mortis causa* and in light of the referral of article 1457, whether the rules on formalities of wills are also applicable.

Regarding active capacity, article 1476 states: "*All those who may enter into contracts and dispose of their patrimony may make donations*"; and passive

capacity is defined in article 1477 thus: "*All those who are not especially prohibited by law from doing so may accept donations*".

The provisions of article 1480 are noteworthy, insofar as they penalise "*donations made by a married man to his concubine*" by rendering them null and void, defining the deadline and the legitimacy to invoke this nullity.

A brief note concerning article 1471, which prescribes that values donated, in money or movable property, by the husband without the wife's consent are to be deducted from his moiety, except in the case of remuneratory or insignificant donations.

Finally, articles 1492 to 1505 include the rules on the reduction of inofficious donations, which may only be required by the mandatory heirs after the opening of the inheritance, i.e., after the donor's death.

Indeed, since the legitime of the donor's mandatory heirs is endangered, these are allowed to resort to reduction to protect their rights. Donations shall only be reduced insofar as required to complete the legitime (see article 1492, § 1).

The value of the disposable portion is a relevant element in this respect; article 1790 must be applied for this calculation, in other words, arriving at a fictitious sum, adding all the generosities *inter vivos* to the property left by the deceased and deducting the respective debts.

We would also note that there is a discrepancy between the legal options concerning the determination of the value of the donated property for different purposes, as can be seen by comparing articles 1497 (value at the time of the donation), 1790, § 2 (value at the time of the opening of the inheritance), and 2107, § 3 (value at the time of the opening of the inheritance).

Donations are reduced in the following order: starting with *mortis causa* dispositions and, if they are insufficient, moving on to *inter vivos* donations.

If only legacies are at stake, the reduction will affect the several legatees proportionately, unless the donor stipulated otherwise,

namely by exempting a certain legacy from reduction; such a stipulation by the donor is, however, always limited by the need to guarantee the rights of the mandatory heirs.

If only *inter vivos* donations are at stake, they shall be reduced chronologically, i.e., starting with the most recent donation in relation to the time of the donor's death, followed by the donation which immediately preceded it, and so on, the reduction being proportional in the case of donations on the same date.

With regard to the reduction of donations of immovable property, the law (article 1498) foresees that it should be made *in natura*, further taking into account whether the asset in question may be divided, so as to determine whether to return that asset or to pay compensation for the amount that exceeded the disposable portion, when it is less than half the value of the asset. Regarding the liability of the insolvent donor, under article 1504, it is possible to initiate legal proceedings against the immediate transferee, but only in the case of movable property, if it was transferred gratuitously and if the limitation period has not yet been reached (see article 1503). In current Portuguese law, the regime is different: first, because article 2176 of the Civil Code of 1966 does not distinguish between movable and immovable property; second, because it determines that the donor's insolvency, having alienated or burdened the donated property, the donation being deemed inofficious, "*does not imply the liability of third persons*".

As for the fruits and income of the donated assets subject to reduction, only after the date of the application for reduction is there an obligation to return them (article 1505). However, this does not apply to a donee who is a co-heir, who is liable for fruits and income from the moment of the donor's death. Conversely, the Portuguese Civil Code of 1966 requires heirs subject to collation (under the letter of the law, the descendants) to return the fruits obtained starting from the opening of the succession, but only these are subject to this obligation (article 2111), because of the collation and not in the context of inofficiousness.

The limitation period for the exercise of the right of reduction due to inofficiousness is two years (article 1503).

4. Sucessões

Successions

4.1. Artigos 1735-2166 do Código Civil de 1867

Articles 1735-2166 of the Civil Code of 1867

Código Civil de 1867

TÍTULO II
DAS SUCESSÕES

CAPÍTULO I
DISPOSIÇÕES PRELIMINARES

Artigo 1735º

Pode qualquer suceder, por morte de outrem, em todos os seus bens, ou em parte deles, tanto quando for por disposição da última vontade, como quando for em virtude da lei. No primeiro caso, dá-se a sucessão testamentária; no segundo, a sucessão legítima.

Artigo 1736º

Diz-se herdeiro aquele que sucede na totalidade da herança, ou em parte dela, sem determinação de valor ou de objecto. Diz-se legatário aquele, em cujo favor o testador dispõe de valor, ou objectos determinados, ou de certa parte deles.

Artigo 1737º

A herança abrange todos os bens, direitos e obrigações do autor dela, que não forem meramente pessoais, ou exceptuados por disposição do dito autor, ou da lei.

Artigo 1738º

Se o autor da herança, e os seus herdeiros, ou legatários, perecerem no mesmo desastre, ou no mesmo dia, sem que se possa averiguar quais foram os que se finaram primeiro, reputar-se-ão falecidos todos ao mesmo tempo, e não se verificará entre eles a transmissão da herança, ou do legado.

Civil Code of 1867

TITLE II
SUCCESSIONS

CHAPTER I
PRELIMINARY PROVISIONS

Article 1735

Any person may succeed, upon the death of another, to all his/her property, or to a part thereof, as a result of a disposition of a will or of the law. In the first case, there is testamentary succession; in the second, intestate succession.

Article 1736

An heir is a person who succeeds to all of the inheritance, or to a part thereof, without specification of value or object. A legatee is a person in favour of whom the testator disposes of a sum of money, or of specified objects, or of a part thereof.

Article 1737

The inheritance encompasses all the property, rights and obligations of the deceased, which are not of a strictly personal nature and are not excluded by a disposition of the deceased or by law.

Article 1738

If the deceased and his/her heirs or legatees die in the same disaster, or on the same day, without it being possible to determine who died first, all will be deemed to have died at the same time, and there shall be no transmission of inheritance or legacy among them.

COMMENTARY TO ARTICLES 1735 TO 1738

The preliminary provisions of this second Title of the Civil Code do not define the concept of succession. According to legal doctrine, the word "succession", already used in article 1735, means the replacement of a dead person, who held a certain patrimony, by a living person, with regard to their rights and obligations[52]. The Portuguese Civil Code of 1966 defined "succession" in article 2024: *"Succession is the calling of one or more persons to become holders of the patrimonial legal relations of a deceased person and the resulting devolution of the property that belonged to the latter"*.

Legal persons are excluded from the concept of succession, since they cease to exist through dissolution rather than through death[53].

Succession is divided into several phases, someone's death being only the first of these phases. Another important aspect is that there must be a successor, and he/she must have outlived the author of the inheritance. It is therefore important to determine the exact moment of death. Succession occurs even if the successor outlived the deceased for only brief moments. Article 1738 tackles the issue of simultaneous deaths: if there are doubts as to who died first – if it was the author of the inheritance or his heirs or legatees –, possibly because they died in the same disaster, it is deemed that they died at the same time. This means that the inheritance or legacy will not have been transmitted. If the successor does not outlive the author of the inheritance (because he/she died before or at the same time as that author), the testamentary provision relating to him/her shall no longer be in force (article 1759, no. 1).

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[52] See Cunha Gonçalves, *Tratado*, Vol. IX, page 459; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 361, footnote 1.

[53] Cunha Gonçalves, *Tratado*, Vol. IX, page 463.

Article 1735 also relates to the several types of succession: as to its origin, succession may be intestate or testamentary, depending on whether it derives from the law or from a will; within intestate succession, we should further highlight mandatory succession. Despite its name, as pointed out by Cunha Gonçalves[54], intestate succession may coexist with a will, when it does not encompass all of the inheritance or when it is rendered void. Mandatory succession is also called necessary, because the author of the inheritance is forbidden by law from freely disposing of the portion of his/her property awarded to the mandatory heirs, to their detriment. This portion is called the legitime, in accordance with article 1784.

According to Cunha Gonçalves[55], article 1735 should also explicitly prohibit succession through a contract, not precluding the possibility of donations for a marriage. Even though it is not explicit, the prohibition of contracts relating to the inheritance or succession of a living person derives from article 2042, as well as from articles 1453, 1457 and 1556. This prohibition includes two exceptions, laid down in articles 1171 and 1175, relating to donations for a marriage.

Article 1736 distinguishes between heirs and legatees, using an objective criterion, which is not dependent on the terminology used by the author of the inheritance. The heir is considered a universal successor, because he/she receives the patrimony of the author of the inheritance as an abstract unit, or as a fraction of that unit. On the other hand, a legatee is called a "specific" successor, because he/she receives a determined object or ensemble of objects.

The expression "*or to a part thereof*" of article 1736 is complemented by article 1791, which states that the heirs "*shall continue to be considered as such, even if their portions are assigned to them in a certain proportion*", i.e., in the proportion of ½, ¼, etc. If the testator stipulates that he/she leaves all his property to a certain person, or ¼ of that property, that

[54] *Tratado*, Vol. IX, page 464.

[55] *Tratado*, Vol. IX, page 492.

person will be an heir, even if the testator calls him/her a legatee. A successor should also be considered an heir when the testator, after disposing of certain determined assets in favour of several persons, disposes of the remainder in favour of a friend[56].

Regarding legacies, article 1736 is complemented by article 1796. Both provisions state that a determined object left to a successor is a legacy. There is a legacy when the testator leaves Bernard an immovable property, or when he/she leaves half of his house on Castilho street, in Lisbon, to Manuel. However, there are some exceptions, where the object does not have to be determined: a legacy of undetermined movable property, included in a certain kind (a horse, for example) or sort (an automobile of a specific brand, for example), is considered a legacy by articles 1805 and 1827[57].

According to Cunha Gonçalves[58], there are also inheritances when there are two dispositions which, by themselves, encompass all of the testator's patrimony. In this case, taken separately, such dispositions appear to be legacies. However, they should be considered inheritances, since the testator considered them to be connected to each other, which means that they were conceived of as a portion of a whole, even though they were not expressed as numeric portions.

For example, when the testator leaves all his/her movable property to Anthony, and all his/her immovable property to Ben, these are not legacies of determined objects or of part of them, in accordance with article 1736. In the opinion of Cunha Gonçalves, these are actual

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[56] Cunha Gonçalves, *Tratado*, Vol. IX, page 481; Pires de Lima e Antunes Varela, *Noções Fundamentais*, page 369.

[57] Cunha Gonçalves, *Tratado*, Vol. IX, pages 481 and 482.

[58] *Tratado*, Vol. IX, pages 482 and 483. A different opinion is expressed by Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 373, footnote 1. These authors identify the situation mentioned in the text with the one contemplated in article 1839, i.e. the distribution of the entire inheritance through legacies.

inheritances, because there are no other assets which could be the remainder of the inheritance, aside from the movable or immovable property. It would be different if the testator legated to one person the assets located in one region, to another the assets located in another region, and to another person the remaining assets. In this case, the legacy of the remaining property, even if worth much less than the other legacies, would be an inheritance, because it was conceived as a portion of a whole, while the others would indeed be legacies, because they would relate to determined objects.

A disposition of a right of usufruct is always a legacy, even if it encompasses all of the inheritance. In the opinion of Cunha Gonçalves[59], this is the consequence of articles 1833, 1834 and 1870. On the other hand, under article 1788, a usufruct worth more than the disposable portion is also a legacy. For the above mentioned author, this is due to the fact that usufruct is a temporary right, which allows someone to temporarily and fully enjoy a thing or a right belonging to someone else. Once the usufruct has ceased, the thing or right in question will necessarily revert back to the original owner. Pires de Lima and Antunes Varela[60] also point out that the usufructuary holds only a specifically determined right, which is the usufruct, which means that he/she is a legatee, even if this right encompasses all of the inheritance.

The distinction between an heir and a legatee is important, since the heir is liable for the debts and burdens of the inheritance, in proportion to his/her part of it, and may be obliged to pay for them from his/her own property, when he/she does not accept it under the benefit of inventory; on the other hand, the legatee may never be liable beyond the respective legacy (articles 1792 and 1793). There are other differences between the heirs and the legatees, such as with the right of accretion, only granted to heirs (articles 1853 and 1854).

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[59] *Tratado*, Vol. IX, page 484.

[60] *Noções Fundamentais*, page 373, footnote 1.

Article 2030 of the Portuguese Civil Code of 1966 solved some of these problems, clarifying the distinction between heir and legatee. That provision states the following: "*1. Successors are heirs or legatees. 2. An heir is a person that succeeds to all or to a portion of the deceased's property and a legatee is a person that succeeds to determined assets or values. 3. A person is considered an heir if he/she succeeds to the remainder of the deceased's property, when this is not specified. 4. A usufructuary, even when the usufruct encompasses all of the patrimony, is considered a legatee. 5. The terminology used by the testator to designate the successors does not grant them the status of heirs or legatees when this would contradict the provisions of the previous numbers*".

Unresolved was the issue of dispositions which encompass all the inheritance and which the testator considered to be connected to each other. This issue is still currently debated by Portuguese authors, who have not yet reached a consensus.

Article 1737 defines inheritance, stating that it encompasses all the property, rights and obligations of its author. However, there may be no property left in the inheritance, since the author of the inheritance may leave only debts at the time of his/her death. As was pointed out by Cunha Gonçalves[61], "*an abstract possibility of unknown rights belonging to the deceased is enough to constitute an inheritance*".

In order to be included in the inheritance, the property, rights and obligations may not be strictly personal, i.e., "*instituted for a specific person*"[62]. If they are, they are not transmittable to the heirs. This is the case with rights whose duration is limited to their holder's lifespan, such as usufruct, lifelong pension and maintenance[63]. Article 1737 also does not encompass in the inheritance the assets excluded by its author, i.e., the legated assets, which article 1792 considers equal to the testator's debts. Thus, it may be said that the inheritance is the

[61] *Tratado*, Vol. IX, page 489.

[62] Pires de Lima e Antunes Varela, *Noções Fundamentais*, page 365.

[63] Cunha Gonçalves, *Tratado*, Vol. IX, page 490 ; Pires de Lima e Antunes Varela, *ibidem*.

ensemble of all the patrimonial values transmittable upon the death of its author[64].

[64] Pires de Lima e Antunes Varela, *Noções Fundamentais*, page 367.

Código Civil de 1867

CAPÍTULO II
DA SUCESSÃO TESTAMENTÁRIA

SECÇÃO I
DOS TESTAMENTOS EM GERAL

Artigo 1739º

Diz-se testamento o acto, pelo qual alguém dispõe, para depois da sua morte, de todos, ou de parte dos próprios bens.

Artigo 1740º

O testamento é acto pessoal, que não pode ser feito por procurador, nem deixar-se dependente do arbítrio de outrem, quer pelo que toca à instituição de herdeiros e de legatários, quer pelo que respeita ao objecto da herança, quer, finalmente, pelo que pertence ao cumprimento, ou não cumprimento, do mesmo testamento.

§ único) O testador pode, todavia, cometer a terceiro a repartição da herança, quando institui certa generalidade de pessoas.

Ver o Assento de 21 de Julho de 1944: «O testador não pode encarregar outrem de escolher herdeiro ou legatário, ainda que indique as pessoas dentre as quais a escolha deva ser feita» (Diário do Governo, I série, de 24 de Agosto de 1944).

Artigo 1741º

Não produzirá efeito algum a disposição, que depender de instruções,

Civil Code of 1867

CHAPTER II
TESTAMENTARY SUCCESSION

SECTION I
WILLS IN GENERAL

Article 1739

A will is an act through which a person disposes of all or of a part of his/her property, to take effect after his/her death.

Article 1740

A will is a personal act, which may not be made through an attorney, nor may it be left up to the discretion of another person with regard to the appointment of heirs and legatees, the object of the inheritance or the execution or non-execution of the said will.

Single §) The testator may, however, entrust the distribution of the inheritance to a third party, when he/she appoints as successors a certain class of persons.

See case-law creating judgment of 21 July 1944: "The testator may not entrust another person with choosing an heir or legatee, even if he/she indicates the persons from among whom this choice is to be made" (Official Gazette, Series I, of 24 August 1944).

Article 1741

A disposition shall have no effect if it is dependent on instructions or recommendations made to another

ou de recomendações, feitas a outrem secretamente, ou que se referir a documentos não autênticos, ou não escritos e assinados pelo testador, ou que, enfim, seja feita a favor de pessoas incertas, que, por algum modo, se não possam tornar certas.

person in secret, if it refers to non--authentic documents or to documents that were not written and signed by the testator, or if it is made in favour of uncertain persons who cannot be ascertained by any means.

Artigo 1742º

A disposição a favor dos parentes do testador, ou dos de outra pessoa, sem designação de quais, reputar-se-á feita a favor dos mais próximos do testador, ou da pessoa indicada, conforme a ordem da sucessão legal.

Article 1742

A disposition in favour of the testator's relatives, or of another person's relatives, without naming them, shall be deemed to have been made in favour of the relatives nearest to the testator or to the indicated person, in accordance with the order of legal succession.

Artigo 1743º

O testador pode dispor, quer pura e simplesmente, quer com certas condições, contanto que estas não sejam impossíveis, absoluta, ou relativamente, ou contrárias à lei.

§ único) As condições impossíveis, absoluta, ou relativamente, ou contrárias à lei, têm-se por não escritas, e não prejudicam os herdeiros, ou os legatários, ainda que o testador disponha o contrário.

Ver o Assento de 14 de Dezembro de 1937: «*O legado de certa coisa a uma pessoa, sob a condição de passar a terceira, se aquela falecer sem descendentes, é condicional e válido, e não substituição fideicomissária*» (Diário do Governo, I série, de 28 de Dezembro de 1937)

Article 1743

The testator may dispose either purely and simply or with certain conditions, as long as these are neither absolutely nor relatively impossible, nor contrary to the law.

Single §) Conditions which are absolutely or relatively impossible, or contrary to the law, are considered as not having been written, and shall not cause detriment to the heirs or the legatees, even if the testator stipulates otherwise.

See the case- law creating judgment of 14 December 1937: "*The legacy of a specific thing to a person, under condition that it be passed on to a third person if that person dies without descendants, is conditional and valid, and it is not a fideicommissary substitution*" (Official Gazette, Series I, of 28 December 1937)

Artigo 1744º

Se o cumprimento da condição for impedido por alguém, que tenha interesse em que ela se não cumpra, ter-se--á por cumprida.

Article 1744

If the fulfillment of the condition is prevented by someone with an interest in its non-fulfillment, it shall be considered as having been fulfilled.

Artigo 1745º

A invocação de uma causa falsa será tida por não escrita, excepto se do próprio testamento resultar, que o testador não teria feito tal disposição, se conhecesse a falsidade da causa.

Article 1745

If a false cause is mentioned, it shall be considered as not having been written, except if it can be understood from the will itself that the testator would not have made the disposition in question had he/she been aware of the falsity of the said cause.

Artigo 1746º

A invocação de uma causa, quer falsa, quer verdadeira, contrária à lei, produz sempre a nulidade da disposição.

Article 1746

If a cause contrary to the law is mentioned, be it false or true, the disposition is always rendered null and void.

Artigo 1747º

A designação do tempo, em que deva começar, ou cessar o efeito da instituição de herdeiro, ter-se-á por não escrita.

Article 1747

The determination of the time at which the effects of the appointment of an heir are to begin or to cease shall be considered as not having been written.

Artigo 1748º

É nulo o testamento extorquido por violência, ou captado por dolo, ou fraude.

Article 1748

A will extorted through violence, or obtained through deceit or fraud, is null and void.

Artigo 1749º

Quem, por dolo, fraude, ou violência, impedir, que alguém faça as suas últimas disposições, será punido nos termos da lei penal; e, sendo herdeiro ab-intestato, ficará, além disso, privado do seu direito à herança, que passará às pessoas, a quem competiria, se tal her-deiro já não existisse.

Article 1749

Whoever, through deceit, fraud or violence, prevents someone from making his/her will, shall be punished in accordance with criminal law; and, if the person in question is an intestate heir, he/she shall furthermore be deprived of the right to the inheritance, which shall be passed on to the persons it would belong to if the heir in question no longer existed.

Artigo 1750º

A autoridade administrativa, que tiver notícia de que alguém impede outrem de testar, apresentar-se-á, sem demora, em

Article 1750

An administrative authority that is informed or becomes aware that someone is preventing another person

casa da pessoa impedida, com um tabelião e as necessárias testemunhas; e, verificado o estado de coacção, fará lavrar o competente auto, para ser remetido ao ministério público, e colocará a dita pessoa em estado de liberdade, para fazer as suas disposições.

from making a will shall go at once to the home of the person thus prevented, with a public notary and the necessary witnesses; and, after confirming the situation of coercion, it shall have the respective report drawn up, to be sent to the Public Prosecutor, and shall set the said person at liberty to make his/her will.

Artigo 1751º

É nulo o testamento, em que o testador não expresse cumprida e claramente a sua vontade, mas sim por sinais ou monossílabos tão somente, em resposta a perguntas que se lhe fizessem.

Article 1751

A will is null and void if the testator does not fully and clearly express his/her intention, but does so only through signs or monosyllables in reply to questions posed to him/her.

Artigo 1752º

O testador não pode proibir, que se impugne o testamento nos casos em que haja nulidade declarada pela lei.

Article 1752

The testator may not prohibit the will from being challenged in cases of nullity imposed by law.

Artigo 1753º

Não podem testar no mesmo acto duas ou mais pessoas, quer em proveito comum, quer em proveito de terceiro.

§ único) Esta proibição não abrange os testamentos de mão comum, que tiverem data autêntica ao tempo da promulgação do presente Código, e não forem revogados.

Article 1753

Two or more persons may not make their will in the same document, be it for their reciprocal benefit or for the benefit of a third party.

Single §) This interdiction shall not encompass joint wills which already have an authentic date at the time of the enactment of the present Code and which are not revoked.

Artigo 1754º

O testamento pode ser livremente revogado, no todo ou em parte, pelo testador, que não pode renunciar este direito.

Article 1754

A will may be freely revoked, in whole or in part, by the testator, who may not renounce this right.

Artigo 1755º

A revogação, porém, do testamento, no todo ou em parte, só pode ser feita em

Article 1755

However, a will may only be revoked, in whole or in part, either in another

outro testamento, com as solenidades legais, ou por escritura pública, ou pelo facto de haver o testador alienado, antes da sua morte, os objectos testados.

§ único) Se o testamento revogatório contiver também disposição de bens, e, nesta parte, for anulado por falta de alguma solenidade, surtirá, contudo, a revogação o seu efeito, se ele puder valer como escritura pública.

will with the formalities required by law, or in a deed, or as a result of the testator having, before his/her death, disposed of the objects contemplated in it.

Single §) If the will that revokes a preceding one also contains dispositions relating to property and is, in this part, annulled due to the omission of a formality, the revocation shall nonetheless produce its effects if the document can be considered a deed.

Artigo 1756º

A feitura de segundo testamento, que não mencione o primeiro, só revogará este na parte que lhe for contrária.

§ único) Se aparecerem dois testamentos da mesma data, sem que se possa verificar qual foi o posterior, e implicarem contradição, haver-se-ão por não escritas em ambos as disposições contraditórias.

Article 1756

The making of a second will that does not mention the first one shall only revoke the first one in so far as it contradicts it.

Single §) If two wills of the same date are produced, without it being possible to determine which was the latter one, and if they contradict each other, both contradictory dispositions shall be considered as not having been written.

Artigo 1757º

A revogação produzirá o seu efeito ainda que o segundo testamento caduque pela incapacidade do herdeiro ou dos legatários novamente nomeados, ou pela renúncia daquele ou destes.

Article 1757

The revocation shall take effect even if the second will lapses due to the legal incapacity of the once again appointed heir or legatees, or due to the heir's or the legatees' renunciation.

Artigo 1758º

O testamento anterior recobrará, todavia, a sua força, se o testador, revogando o posterior, declarar, que é sua vontade, que o primeiro subsista.

Article 1758

The previous will shall, however, be once again in force if the testator, while revoking the subsequent one, declares that he/she wishes the first to subsist.

Artigo 1759º

As disposições testamentárias caducam, e ficam sem efeito, em relação aos herdeiros ou aos legatários:

1º) Finando-se estes antes do testador;

Article 1759

Testamentary dispositions shall lapse, and shall no longer be in force, in relation to the heirs or legatees:

1) If these die before the testator;

2°) Se a instituição de herdeiro ou o legado estiver dependente de condição, e os herdeiros ou legatários se finarem, antes que esta se verifique;

3°) Se os herdeiros ou os legatários se tornarem incapazes de adquirir a herança ou o legado;

4°) Se o herdeiro ou o legatário renunciar o seu direito.

2) If the appointment of the heir or legatee is dependent on a condition, and if the heirs or legatees die before that condition is met;

3) If the heirs or legatees become legally incapable of acquiring the inheritance or legacy;

4) If the heir or legatee renounces his/her rights.

Artigo 1760º

Existindo filhos ou outros descendentes do testador, que este não conhecesse ou julgasse mortos, ou tendo o testador filhos, que nascessem depois da morte dele, ou, ainda antes desta, mas, depois de feito o testamento, este só valerá em quanto à terça.

Article 1760

If the testator has children or other descendants whom he/she was unaware of or thought they were dead, or if the testator has children born after his/her death, or even before his/her death but after the will was made, the latter shall only be valid with regard to the disposable third.

Artigo 1760º

Existindo filhos ou outros descendentes do testador, que este não conhecesse ou julgasse mortos, ou tendo o testador filhos que nascessem depois da morte dele, ou, ainda, antes da morte, mas depois de feito o testamento, este só valerá quando à quota disponível e aos legados, nos termos dos §§ 1° e 2° do Artigo 1814°.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1760

If the testator has children or other descendants which he/she was unaware of or thought they were dead, or if the testator has children born after his/her death, or even before his/her death but after the will was made, the latter shall only be valid with regard to the disposable portion and the legacies, in accordance with §§ 1 and 2 of article 1814.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1761º

Em caso de dúvida sobre a interpretação da disposição testamentária, observar-se-á o que parecer mais ajustado com a intenção do testador, conforme o contexto do testamento.

Article 1761

In case of doubt regarding the interpretation of a testamentary disposition, whatever seems most compatible with the intention of the testator, in light of the will's context, shall be complied with.

Artigo 1762º

Os testamentos com data autêntica anterior à promulgação do presente Código, que não forem conformes com

Article 1762

Wills with an authentic date preceding the enactment of the present Code which do not comply with its

as disposições dele, quanto a fórmulas ou solenidades externas, produzirão efeito, não sendo revogados, se tiverem os requisitos exigidos pela legislação vigente ao tempo em que foram feitos.

provisions regarding formulas and external formalities shall be effective, if they are not revoked, as long as they meet the conditions required by the legislation in force at the time they were made.

COMMENTARY TO ARTICLES 1739 TO 1762

Section I of Chapter II begins with a definition of a will. Despite the definition presented in article 1739, a will is also an act with no disposition of property *post mortem*. This act may be used for another purpose, such as to provide instructions for the funeral or grave or to reveal secrets concerning filiation[65].

A will is characterised by being self-made, revocable, unipersonal and solemn[66]. Article 1740 relates to the first characteristic, defining a will as a personal act. The single § of this article gave rise to some interpretation issues concerning the expression "*distribution of the inheritance*". After analysing the different opinions on this issue, Cunha Gonçalves[67] concludes that the interdiction in article 1740 relates only to situations where the successors in question are determined and have been appointed by name. In this case alone, article 1740 prevents a person other than the testator from determining the content and scope of the inheritance or of the successors' shares, since that would be the meaning of the expression "*object of the inheritance*".

The legislator intended otherwise with regard to the cases encompassed by the single § of article 1740, in other words, with regard to the cases where the testator appoints as successors a certain class of persons. This is the case of a legacy in favour of the most disadvantaged orphans of a certain town, for example[68].

Even though, to Cunha Gonçalves, this is the conclusion that "*fits precisely with the provisions of article 1740 and of its single §*", articles 669 *et*

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[65] Cunha Gonçalves, *Tratado*, Vol. IX, page 499.

[66] Cunha Gonçalves, *Tratado*, Vol. IX, page 504; Pires de Lima e Antunes Varela, *Noções Fundamentais*, page 469 et seq.

[67] *Tratado*, Vol. IX, pages 504 to 506.

[68] Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 471.

seq. of the Code of Civil Procedure in force in Portugal in 1934 revoked, therein, this single §, depriving the person appointed by the testator to split the inheritance of both the possibility of determining the heirs appointed generically, and of distributing the inheritance. According to these articles, is up to the person responsible for distributing the inheritance to request the court to notify the interested parties; after being notified, these parties will agree on how to distribute the inheritance among them.

Further in connection with article 1740, the case-law creating judgment of 21 July 1944 established that the testator may not give another person the authority to choose an heir or legatee, even if he/she indicates a range of persons from whom to choose.

Article 1741 refers to the so-called will *per relationem*, i.e., the appointment of heirs or indication of property by reference to other documents. The regulation included in this article aims at guaranteeing that the will is self-made. This provision implies that nullity is only excluded for dispositions referring to authentic documents with the testator's intervention, or to documents that were written and signed by the testator, as well as for dispositions in favour of undetermined persons when they may be determined somehow. Otherwise, it would be easy to disrespect the testator's last will, or the latter would be dependent on a third person's opinion, which would run counter to the above mentioned characteristic of a will.

Thus, to Cunha Gonçalves[69], a legacy written as follows would be null and void: "*I leave 5.000 escudos to the person that has written this year's best novel*". For such a legacy to be valid, the testator must indicate how to determine the person in question, and this manner of determination must derive from the will itself and not be dependent on the opinion of a third party, as in this case[70].

[69] *Tratado*, Vol. IX, page 510.

[70] Cunha Gonçalves, *Tratado*, Vol. IX, page 511.

On the other hand, the same author presents the following examples of valid dispositions: "*I appoint as my universal heir the person to whom I already donated my building on number X of street Y of this city*", or "*I again appoint as my heir the person already appointed in my previous will*". In both cases, the testator refers to an authentic document, in the first case the donation deed, in the second case the revoked public will.

Another consequence of the will's characteristic of being self-made is that the testator's intentions must be freely expressed. This freedom is guaranteed by the legislator through several civil and criminal sanctions, as well as through preventive means. Articles 1748, 1749, 1750 and 1782 should be interpreted in this context. In the case of article 1750, the public authority should also intervene when someone intends to force another person to make, to revoke or not to revoke a will[71].

The free exercise of the right to make a will further implies that the testator may revoke it, and that he/she may not renounce this right (article 1754). Otherwise, the will would not express the person's last will[72]. This characteristic is called revocability.

Just as in the case of the revoked will, a revocation is also a personal act. It may be explicit, when the testator declares in a new will or in a deed that the previous will or a part of it is revoked (article 1755, *in limine*), and it may be tacit, when it derives from an act of the testator which is incompatible with the will's provisions, such as when the testator alienates the objects which he/she had disposed of in the will (article 1755, *in fine*). If the testator did not alienate, but he/she transformed the legated thing, article 1811 is applicable. There is also tacit revocation when the provisions of different wills are incompatible (article 1756). Furthermore, a revocation may be total, when the testator revokes the entire previous will, or partial, when only a part of it is revoked (article 1754).

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[71] Cunha Gonçalves, *Tratado*, Vol. IX, page 516.

[72] *Idem, ibidem.*

The above mentioned manners of revocation relate, mainly, to public wills. In the case of a closed will, there is a simpler way to revoke it, which is to destroy the will. The legislator refers to this manner of revocation, indirectly, in articles 1940, 1942 and 1943, when mentioning wills that have been obliterated, torn or cut into pieces. According to these provisions, when the closed will is found torn among the testator's possessions, it is assumed that it was torn by the testator with the intent to revoke it[73].

Cunha Gonçalves[74] considers that the tearing, cancelling or obliterating of a closed will that revoked a previous one implies that the previous will is once again valid, since the destruction of the revoking will represents the destruction of the intention to revoke.

As was mentioned above, a will is also a unipersonal act, since article 1753 does not allow so-called *common wills*: situations where, in the same act, two or more persons make wills for their reciprocal benefit or for the benefit of a third party. This rule is a logical consequence of the provisions of article 1740.

Finally, a will is a solemn act, surrounded with strict formalities, so as to guarantee that the testator's last will is precisely complied with, at a time when he/she will no longer be alive to clarify it. As was pointed out by Pires de Lima and Antunes Varela[75], the Code of Seabra abolished all non-solemn forms of wills, because these did not provide the necessary assurances for such an important act.

In a will, a testator may subject legacies to conditions. The term "conditions", used in article 1743, encompasses, among other things, conditions *stricto sensu*, modal clauses and terms[76]. A *stricto sensu* condition is a future, uncertain and possible fact which is required for the act to come fully into force (suspensive condition) or for the

[73] Cunha Gonçalves, *Tratado*, Vol. IX, page 616.
[74] Cunha Gonçalves, *Tratado*, Vol. IX, page 617.
[75] *Noções Fundamentais*, page 481.
[76] Cunha Gonçalves, *Tratado*, Vol. IX, page 528.

effects already produced to be terminated (resolutive condition); see articles 678 and 680.

Regarding suspensive conditions, after the condition has been met, the appointment is purely and simply enforced starting from the time of the testator's death, retroactively (article 678). If it is impossible to fulfill the condition, it becomes void (article 678); however, if the fulfillment is prevented by someone with an interest in its non-fulfillment, it shall be considered as having been fulfilled (article 1744). Regarding resolutive conditions, as long as the condition has not been fulfilled, the successor enjoys the inheritance or legacy as if no condition existed; if the condition is fulfilled, the appointment becomes void and the inheritance or legacy revert back to the estate, with retroactive effects starting from the opening of the succession.

Conditions may be contrary to the law or impossible. In both cases, they must be considered as not having been written. Regarding conditions that are contrary to the law, public policy rules and good customs are at stake. There is no general criterion to determine if the condition is illegal or immoral. One must take into account the factual circumstances in which the condition is to be fulfilled, rather than considering the condition objectively[77].

Some particularly controversial conditions are especially regulated. One example is the condition, mentioned in article 1808, to be or not to be married, the law aiming at avoiding marriages motivated by convenience. The interdiction of this condition was, in practice, revoked by the single § of the same article, added by Decree 19.126, even if it appears to be merely an exception[78]. So as to ensure individual freedom, the final part of article 1808 further states that a condition obliging a successor to take ecclesiastical vows or to take on a specific profession should be considered as not having been written.

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[77] Cunha Gonçalves, *Tratado*, Vol. IX, pages 534 and 535.

[78] Cunha Gonçalves, *Tratado*, Vol. IX, page 538.

There are also special rules for conditions of reciprocity, deemed null and void by article 1809, since they are an obstacle to the free exercise of the right to make a will. This condition is similar to a succession agreement, rendered null and void by article 2042.

Different from a condition is a term. Whereas a condition relates to a future and uncertain fact, a term indicates a day, month and year or time when the disposition is to produce or to cease producing effects[79]. In accordance with article 1747, an appointment of an heir subject to a term is considered as not having been written. The same does not apply to legatees, as can be inferred from articles 1835 and 1849. This difference is rooted in historic reasons[80].

Aside from *stricto sensu* conditions and terms, article 1743 also encompasses modal clauses. In the opinion of Cunha Gonçalves, a modal clause is an "*accessory clause included in gratuitous acts, i.e., wills and donations, by which the donor or testator imposes upon the donee, heir or legatee certain charges or installments in favour of specific persons, or restrictions relating to the aim or use of the donated or legated things*". The following are examples of modal clauses: legacies of maintenance, lifelong pensions, religious services and suffrages, pious purposes or any other positive or negative act, for which the heir or main legatee is responsible, and which may be in favour of the testator or of another person, in accordance with articles 1775, 1831, 1836, 1838, § 3, 1841, 1848, 1851, 1872, etc.

A modal clause is different from a suspensive condition because it requires a payment or action rather than a casual fact. This means that its compliance may be coercively enforced by the interested parties, unlike the condition, which merely suspends the effects of the legacy in question. Rather than taking into account the use of the word "condition", what is essential is to determine if the testator intended to impose an obligation upon the heir or legatee, or instead

[79] Cunha Gonçalves, *Tratado*, Vol. IX, page 564.

[80] Cunha Gonçalves, *Tratado*, Vol. IX, page 561.

intended for the effectiveness of the disposition to be dependent on a certain future and uncertain act or fact[81].

A modal clause is also different from a legacy: for a legacy to be valid and effective, the legatee must exist at the time of death, with the exception allowed in article 1777; whereas in a modal clause in favour of a third party it is not necessary for that third party to exist at the time of the testator's death[82]. If the modal clause is impossible or contrary to the law, article 1743 is applicable, since it is not limited to *stricto sensu* conditions.

Since a will is a solemn act, it cannot produce effects if it does not comply with the necessary requisites. These requisites relate both to the content of the will (called substantial requisites) and to its form (called formal requisites). Although the absence of one or several of these requisites implies that the will is null and void, when there is a substantial problem the nullity is absolute and "incorrigible"; conversely, formal problems may be "corrected", so that the will produces its effects. Rules concerning nullity are so important that the testator may not prohibit the will from being challenged in cases of nullity imposed by law (article 1752).

Article 1748 states that a will extorted through violence, or obtained through deceit or fraud, is null and void. "*There is deceipt or fraud, particularly, in the case of slander, intrigue, lies, anonymous letters, pretending or deceiving, etc., carried out not just to distance the testator from his/her relatives, or from friends that he/she would otherwise benefit, but also to obtain the testator's blind friendship for oneself and to thus gain access to the inheritance*"[83]. Despite the expression "*a will (...) is null and void*", article 1748 should be interpreted to mean that only the dispositions of the testator which were thus obtained or extorted are null and void.

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[81] Cunha Gonçalves, *Tratado*, Vol. IX, pages 565 and 566.

[82] Cunha Gonçalves, *Tratado*, Vol. IX, page 567.

[83] Cunha Gonçalves, *Tratado*, Vol. IX, page 584.

The legislator does not directly mention situations where the testator is in error. However, articles 1745 and 1746, relating to causes that are false or contrary to the law, should be seen as errors concerning the law or facts. In these articles, a "cause" is the reason which led the testator to make a certain disposition. Additionally, article 1837 refers to a mistake concerning the legatee's person or the legated thing, which is also an error concerning the person or the object of the legacy[84].

Aside from nullity, a will may also be ineffective if it lapses. A lapsed disposition is not null, nor was it revoked, it simply ceases to produce effects due to a subsequent reason, independent from the testator's intentions, or due to a legal provision. The main causes for a disposition to lapse are those indicated in articles 1759 and 1811. Cunha Gonçalves[85] also takes into account the situations mentioned in articles 1738, 1749, 1782, 1814, 1937, 1938 and 1940, although there is no consensus on this issue.

Article 1759 indicates several reasons for a disposition to lapse. The first of these conditions, already mentioned above (when the heirs or legatees die before the testator), as well as the second one (when the heirs or legatees die before the condition is fulfilled, if the disposition was subject to a condition) are both justified by the fact that the testator's dispositions were directed at a specific person. The reasons which led the testator to make a disposition in favour of a specific person (such as affection or gratitude) may not be applicable to that person's heirs. Therefore, one may not oblige the testator to benefit the heirs of the person which he/she intended to benefit, when he/she did not stipulate that these could take that person's place[86].

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[84] Cunha Gonçalves, *Tratado*, Vol. IX, page 580.

[85] *Tratado*, Vol. IX, page 622.

[86] Cunha Gonçalves, *Tratado*, Vol. IX, page 623.

The supervenience of the testator's children is considered by Cunha Gonçalves as one of the most important causes for the expiry of a disposition[87]. To clarify some of the doubts which arose in the interpretation of articles 1760 and 1814, which regulate this issue, Decree 19.126 revised both articles. In this respect, Cunha Gonçalves[88] clarifies some additional questions. Thus, in accordance with article 1814, the appointment of a testamentary heir becomes absolutely expired in the case of the supervenience of the testator's legitimate children or other legitimate descendants, even if posthumous. If there are only acknowledged children, i.e., illegitimate ones, the appointment of an heir is only preserved with regard to the disposable portion, so as to safeguard the legitime of those acknowledged children, as prescribed by article 1760, and by § 1 of article 1814. Legacies are preserved in both cases and may only be reduced due to inofficiousness.

The provisions in question relate to the following cases of supervenience of the testator's children: the birth of legitimate children or descendants, while the testator was alive but after the will was made, their birth after the testator's death (posthumous children), the legitimation of illegitimate children, the acknowledgment of illegitimate children after the will was made, and the appearance of legitimate or acknowledged children which the testator was unaware of or thought to be dead.

The expiry of these dispositions is based on the idea that, if the testator knew that he/she had children or other descendants, he/she would not have wanted to make them, without taking those children or descendants into account. Under the Portuguese Civil Code of 1966, this is no longer a reason for the expiry of the dispositions.

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[87] *Tratado*, Vol. IX, page 628.

[88] *Tratado*, Vol. IX, pages 630 and 631.

Article 1761 relates to doubts regarding the interpretation of the will, since, despite the provisions of article 1751, the testator does not always express him/herself clearly. To interpret a will, a judge must take into account the context of that solemn act, as well as the documents mentioned in article 1741, when wills *per relationem* are allowed. There are some special rules to facilitate the interpretation of wills, such as those included in articles 1742, 1797, 1798, 1799, etc. On the other hand, several provisions interpret clauses of wills relating to the determination of the legated things: articles 1801 to 1807, 1817 to 1821 and 1827 *et seq*.

Código Civil de 1867

SECÇÃO II
DOS QUE PODEM TESTAR E DOS QUE PODEM ADQUIRIR POR TESTAMENTO

ARTIGO 1763º

Podem testar todos aqueles a quem a lei expressamente o não proíbe.

Artigo 1764º

É proibido testar:

1º) Aos que não estiverem em seu perfeito juízo;

2º) Aos condenados, nos termos do Artigo 355º;

3º) Aos menores de catorze anos, de um e outro sexo;

4º) Às religiosas professas, enquanto se não secularizarem, ou as suas comunidades não forem suprimidas.

§ único) Os cegos, os que não podem ou não sabem ler, não podem testar em testamento cerrado.

Artigo 1764º

É proibido testar:

1º) Aos que não estiverem em seu prefeito juízo;

2º) Aos menores de catorze anos de um e outro sexo.

§ único) Os cegos e os que não podem ou não sabem ler não podem testar em testamento cerrado.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Civil Code of 1867

SECTION II
THOSE WHO MAY MAKE A WILL AND THOSE WHO MAY ACQUIRE THROUGH A WILL

Article 1763

Wills may be made by all those who are not explicitly forbidden by law from doing so.

Article 1764

The following persons are forbidden from making a will:

1) Those who are not entirely of sound mind;

2) Convicted persons, in accordance with article 355;

3) Those under the age of fourteen, of either gender;

4) Sworn religious women, before they become secularised or their communities are abolished.

Single §) Blind persons and those who cannot or do not know how to read may not make a closed will.

Article 1764

The following persons are forbidden from making a will:

1) Those who are not entirely of sound mind;

2) Those under the age of fourteen, of either gender.

Single §) Blind persons and those who cannot or do not know how to read may not make a closed will.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1765º

A capacidade do testador será regulada pelo estado em que se achar, ao tempo em que o testamento for feito.

Artigo 1766º

Os casados, segundo o costume do reino, não podem dispor determinadamente de certos bens do casal, salvo se esses bens lhes tocarem em partilha, ou não tiverem entrado em comunhão.

Artigo 1766º

Os casados segundo o costume do país não podem, sob pena de nulidade, dispor determinadamente de certos bens do casal, salvo se esses bens lhes tocarem em partilha, ou não tiverem entrado em comunhão, ou se a disposição tiver sido feita por um dos cônjuges em favor do outro, ou se o outro cônjuge manifestar por forma autêntica a sua aquiescência.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1767º

O menor não pode testar em benefício do seu tutor, salvo se estiver emancipado, e o tutor tiver dado conta da sua gerência.

§ único) Esta proibição não abrange os testamentos em favor dos ascendentes e dos irmãos do menor.

Artigo 1768º

Do mesmo modo é proibido aos menores testar em favor dos seus mestres, ou pedagogos, ou de quaisquer outras pessoas a cujo cuidado estejam entregues.

Article 1765

The testator's capacity shall be assessed in relation to his/her status at the time the will was made.

Article 1766

Persons married according to the custom of the kingdom may not dispose of specific property of the couple, except if such property becomes theirs as a result of a partition or if it was not included in the communion.

Article 1766

Persons married according to the custom of the country may not, under sanction of nullity, dispose of specific property of the couple, except if such property is theirs as a result of a partition, or if it was not included in the communion, or if the disposition was made by one of the spouses in favour of the other, or if the other spouse expresses his/her approval by authentic form.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1767

A minor may not make a will benefiting his/her guardian, unless he/she is emancipated and the guardian has accounted for his/her management.

Single §) This interdiction does not encompass wills in favour of the minor's ascendants and siblings.

Article 1768

Minors are equally forbidden from making wills benefiting their instructors or school masters, or any other person to whose care they have been entrusted.

Artigo 1769º

Não produzirão efeito as disposições do enfermo em favor dos facultativos, que lhe assistirem na sua moléstia, ou dos confessores que, durante ela, o confessarem, se morrer dessa moléstia.

Artigo 1770º

A proibição dos dois Artigos precedentes não abrange:

1º) Os legados remuneratórios dos serviços recebidos pelo menor, ou pelo enfermo;

2º) As disposições, quer por título universal, quer por título particular, em favor dos parentes do testador, até o quarto grau inclusivamente, não havendo herdeiros legitimários.

Artigo 1771º

O cônjuge adúltero não pode dispor a favor do seu cúmplice, se o adultério tiver sido provado judicialmente antes da morte do testador.

Artigo 1772º

O testador não pode dispor em favor do tabelião que lhe faz o testamento público, ou auto de aprovação do testamento cerrado, nem da pessoa que lhe escreve este, nem finalmente das testemunhas que intervêm no testamento público, ou no auto de aprovação do testamento cerrado.

Artigo 1773º

O que fica disposto nos Artigos 1767º, 1768º, 1769º, 1771º e 1772º só produz a nulidade da parte das disposições testamentárias a que os mesmos Artigos se referem.

Article 1769

Dispositions of an ill man/woman in favour of physicians who assisted him/her during the illness, or of confessors who heard his/her confession during the illness, shall have no effects if he/she dies from that illness.

Article 1770

The interdiction of the two preceding articles does not encompass:

1) Remuneratory legacies for services provided to the minor or ill person;

2) Dispositions in favour of relatives of the testator, up to and including the fourth degree of lineage, either as universal heirs or as legatees, if there are no mandatory heirs.

Article 1771

An adulterous spouse may not dispose freely in favour of his/her accomplice, if the adultery was proven in court before the testator's death.

Article 1772

The testator may not dispose in favour of the notary public who drafted the will in a public form or who was responsible for the act approving a closed will, nor in favour of the person who wrote the latter for him/her, nor finally in favour of the witnesses who intervened in the will in public form or in the act approving a closed will.

Article 1773

The provisions of articles 1767, 1768, 1769, 1771 and 1772 entail only the nullification of the part of the testamentary dispositions referred to in those articles.

Artigo 1774º

As pessoas obrigadas à prestação de legítima, só podem dispor da quota, que a lei lhes permite testar.

Artigo 1775º

Ninguém pode determinar, que se consuma em sufrágios por sua alma mais do que o terço da terça dos bens que deixa.

(*Artigo revogado pela Concordata de 1940*)

Artigo 1776º

Só podem adquirir por testamento as criaturas existentes, entre as quais é contado o embrião.

§ único) Reputa-se existente o embrião, que nasce com vida e figura humana dentro de trezentos dias, contados desde a morte do testador.

Artigo 1777º

Será, contudo, válida a disposição a favor dos nascituros, descendentes em primeiro grau de certas e determinadas pessoas vivas ao tempo da morte do testador, posto que o futuro herdeiro ou legatário venha à luz fora do prazo dos trezentos dias.

Artigo 1778º

A capacidade para adquirir por testamento é a que o adquirente tiver ao tempo da morte do testador, e, no caso de instituição de herdeiro com condição, ou no de legado condicional, atender-se-á, também, ao tempo do cumprimento da condição.

Artigo 1779º

Não podem adquirir por testamento, salvo a título de alimentos ou por legado em dinheiro, ou em outras coisas mobiliárias:

Article 1774

Persons obliged to reserve the legitime may only dispose of the portion allowed by law.

Article 1775

No one may determine that more than a third of the disposable third of the property left by him be spent with suffrages.

(*Revoked by the Concordat of 1940*)

Article 1776

Only existing creatures may acquire through a will, including the embryo.

Single §) An embryo is deemed to exist if it is born alive and with human shape within the three hundred days following the death of the testator.

Article 1777

However, a disposition in favour of children not yet conceived, descendants in the first degree of certain and specified persons alive at the time of the testator's death, shall be valid, even if the future heir or legatee is born beyond the three hundred days deadline.

Article 1778

The capacity to acquire through a will shall be determined in relation to the time of the testator's death and, in the case of appointment of an heir subject to a condition, or of a conditional legacy, the time at which the condition is fulfilled shall also be relevant.

Article 1779

The following persons may not acquire through a will, except as maintenance or as a legacy in currency or in other movable property:

1º) *As religiosas professas, enquanto se não secularizarem, ou as suas comunidades não forem suprimidas.*

2º) *Os condenados, nos termos do Artigo 355º.*

Artigo 1779º

Não podem adquirir por sucessão testamentária as pessoas incapazes de adquirir por sucessão legítima.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1780º

Perderão o que lhes for deixado em testamento o testamenteiro, ou o tutor testamentário, que se escusarem, ou forem removidos pelos motivos especificados no nº 3º do Artigo 235º

Artigo 1781º

As pessoas morais podem suceder por testamento, tanto a título de herdeiras, como de legatárias.

§ *único) Exceptuam-se as corporações de instituição eclesiástica, as quais só poderão suceder até o valor do terço da terça do testador.*

(*Artigo revogado pela Concordata de 1940*)

Artigo 1782º

Os que forem condenados por haverem atentado contra a vida do testador, ou concorrido de qualquer forma para tal delito, e os que impedirem, por violências, ou com ameaças, ou fraude, que o testador revogue o seu testamento, não poderão aproveitar-se das disposições feitas em seu favor.

§ único) No caso, porém, de tentativa contra a vida do testador, sobrevivendo este, será válida a disposição posterior ao crime, se o testador teve conhecimento dele, bem como a disposição anterior

1) *Sworn religious women, before they become secularised or their communities are abolished;*

2) *Convicted persons, in accordance with article* 355;

Article 1779

Persons incapable of acquiring through intestate succession may not acquire through testamentary succession.

(*As revised by Decree no.* 19.126, of 16/12/1930)

Article 1780

A testamentary executor or guardian shall lose all that has been left to him/her in the will if he/she discharges himself/herself or is removed on the grounds foreseen in no. 3 of article 235.

Article 1781

Legal entities may succeed by will, both as heirs and as legatees.

Single §) The Church's corporations, however, may only succeed up to the value of a third of the disposable third of the deceased.

(*Revoked by the Concordat of* 1940)

Article 1782

Those who are convicted for having committed an offence against the life of the testator, or who abetted such an offence in any way, and those who prevented the deceased, through violence, threats or fraud, from revoking his/her will, may not benefit from the dispositions made in their favour.

Single §) However, in the case of an attempt against the life of the testator, if he/she survives, a disposition made after the crime shall be valid, if the testator was aware of the crime; a previous disposition

poderá surtir efeito, se o testador declarar, por modo autêntico, que persiste nela.

Artigo 1783º

É aplicável às disposições testamentárias o que fica ordenado no Artigo 1481º.

may also remain in force, if the testator declares, in an authentic manner, that he/she so intends it.

Article 1783

The provisions of article 1481 are applicable to testamentary dispositions.

COMMENTARY TO ARTICLES 1763 TO 1783

The legislator determines those who may make a will negatively, by indicating only which situations render them incapable of doing so. As a rule, anyone may make a will, incapacities therefore being exceptions. This Section deals both with active and with passive capacity. Active capacity is the capacity to dispose of property in a will, and passive capacity is the capacity to acquire through another person's will. Not all those who may receive through a will may also make a will, as in the case of unborn children.

The incapacity to make a will may be a protective measure, as in the case of minors or unsound persons, it may aim at preventing extortion, as in the case of doctors, confessors and public notaries, and it may also be a sanction, as in the case of the adulterous spouse[89].

Article 1764 prescribes that those who are not entirely of sound mind may not make a will. For this provision to be applicable it is not necessary for the testator to be insane; instead, it is sufficient for him/her not to have a clear perception of the meaning and reach of the act in question due to being temporarily disturbed[90]. Excessive anger may lead the testator not to be entirely of sound mind, as can drunkenness[91].

Under the same article, minors under the age of fourteen may also not make a will. This is an absolute interdiction. In the Portuguese Civil Code of 1966, non-emancipated minors may not make wills. Under this Code of 1966, majority is reached at the age of eighteen (article 122). However, minors become emancipated through marriage (article 132). Article 1601, clause a), allows sixteen-year-

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[89] Cunha Gonçalves, *Tratado*, Vol. IX, page 654.

[90] Cunha Gonçalves, *Tratado*, Vol. IX, page 658; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 483.

[91] Cunha Gonçalves, *Tratado*, Vol. IX, page 661.

old minors to be married, even though an authorisation is required (article 1612). This means that, under the Portuguese Civil Code of 1966, under no circumstances may a minor under the age of sixteen make a will.

Finally, the single § of article 1764 imposes a prohibition, repeated in article 1923, due to the fact that, in the cases mentioned therein, there are few guarantees that that was the intention of the testator.

The testator's capacity to make a will is assessed in relation to the time when the will was made (article 1765). This means that it is irrelevant if the testator is deprived of that capacity after making the will.

Aside from these general testamentary incapacities, there are special incapacities, mentioned in articles 1766 to 1775. The first concerns the fact that it is not possible to dispose of the couple's common property, in accordance with article 1766. In this article, the expression "*married according to the custom of the kingdom*" is the same as "*married under the regime of general communion of property*"; however, it is applicable to any property regime which includes common property, since this does not occur only in the case of the regime of general communion of property. On the other hand, the partition mentioned therein is a future partition: the legacy will only be valid if the property in question is attributed to the testator in a subsequent partition. This means that the testamentary disposition in question may only become null and void after the opening of the inheritance, since only at that time can one know if the testator disposed of determined common property[92]. In the opinion of Cunha Gonçalves[93], this nullity only affects the determination of the common property; the value of the legacy in question is preserved, since it

[92] Cunha Gonçalves, *Tratado*, Vol. IX, pages 680 *et seq.*; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 487, footnote 1.

[93] *Tratado*, Vol. IX, page 686.

was only the determination of the common property that brought detriment to the other spouse. This was the option followed in the Portuguese Civil Code of 1966, which states in article 1685, no. 2, that *"a disposition relating to a certain and determined thing included in the common patrimony grants its beneficiary only the right to demand the respective value in cash"*.

Minority implies relative incapacities, i.e., incapacities relating only to certain persons. This is the case of article 1767, which aims at protecting the minor against pressure from the guardian. Article 1768 further prohibits the minor from making wills benefiting their instructors or school masters, or any person to whose care they have been entrusted. These would be persons carrying out similar functions to those of the guardian or instructor, such as directors and teachers at orphanages, asylums, schools, private tutors, nannies, advisors, etc.[94].

Within the conditions referred to in article 1769, the testator may not dispose in favour of the physicians who assisted him/her during his/her illness or of his/her confessors. This interdiction is aimed at preventing the testator from being the victim of extortion, as was previously mentioned, due to his/her especially fragile situation. To Cunha Gonçalves[95], the word "physicians" encompasses not only certified doctors, but also pharmacists, nurses, midwives, healers, charlatans, etc., since in many places these replace doctors in providing care. Furthermore, in theses cases of "contraband doctors", extortion is all the more likely, since they do not offer guarantees and their clientele is usually made up of less educated persons. The Portuguese Civil Code of 1966 only foresees the nullity of dispositions in favour of doctors or nurses.

There are two exceptions to the nullities mentioned in articles 1767, 1768 and 1769, laid down in article 1770; in these cases, even

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[94] Cunha Gonçalves, *Tratado*, Vol. IX, page 668; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 489.

[95] *Tratado*, Vol. IX, page 669. Pires de Lima and Antunes Varela have the same opinion (*Noções Fundamentais*, page 489, footnote 6).

though the conditions of those articles are fulfilled, it is deemed that the disposition should be valid[96].

Article 1771 relates to the case of an adulterous spouse and, as was mentioned above, functions as a sanction for that spouse. The incapacity determined in the following article (article 1772) is a legal precaution, to prevent the testator's intentions from being defrauded by persons who participated in the will, such as the notary or the witnesses[97]. Article 1774 simply states the same as article 1784, which will be discussed in the next Section.

The final special incapacity is determined in article 1775. This article aims at preventing the testator from spending all of his/her property or a large part of it in suffrages; thus, a limit is set for dispositions with that purpose. Suffrages are prayers held on certain days of the year on behalf of the deceased; among Catholics, these prayers are carried out through Masses[98]. The limit that had been set was "*a third of the disposable third*", i.e., 1/9 of the inheritance. This limit was reduced to half, i.e., to 1/18 of the inheritance, by the Decree of 20 April 1911, called *Act on the Separation between Church and State*, a Decree which was subsequently revoked. Finally, articles I to V of the Concordat between Portugal and the Holy See of 7 May 1940, revoked article 1775, even if not explicitly[99].

With regard to passive capacity to acquire from a will, article 1776 enshrines the general principle: only existing creatures may be benefited by a will, since the inheritance cannot remain in a vacuum, or be distributed to uncertain persons[100]. The single § of article 1776

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[96] On the reasons for these exceptions, see Cunha Gonçalves, *Tratado*, Vol. IX, page 668 and 673.

[97] Cunha Gonçalves, *Trtado*, Vol. IX, page 677.

[98] Cunha Gonçalves, *Tratado*, Vol. IX, pages 689 and 690.

[99] Cunha Gonçalves, *Tratado*, Vol. IX, page 688; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 493, footnote 1.

[100] Cunha Gonçalves, *Tratado*, Vol. IX, page 701; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 493.

defines what is an "existing creature". In order for it to exist, the embryo must have extra-uterine life, even if he/she dies immediately afterwards. Thus, an embryo is deemed to exist, subject to the suspensive condition that he/she be born (single § of article 1776)[101].

There is one exception to article 1776, laid down in article 1777, relating to persons that have not yet been conceived; however, this exception is only allowed when the future heir or legatee is the child of certain and specified persons, so as to avoid the economic disadvantages of the property remaining for a long time without a specified beneficiary. These persons must be alive at the time of the testator's death.

Doctrine debates whether it is essential to appoint both parents, or if it is enough to appoint one of them. To Cunha Gonçalves[102], one must determine both parents, otherwise the child would be of only one certain and specified person (in the singular), which does not conform to the drafting of the article. However, the Portuguese Civil Code of 1966 chose a different wording, in article 2033, no. 2, clause a): "2. *The following are capable for testamentary or contractual succession: unborn children that have not yet been conceived, if they are the children of a determined person, who is alive at the time of the opening of the succession*".

In article 1778, the word "also" implies that, when appointing a conditional heir or legacy, the benefited person must be capable both at the time of the opening of the will and at the time when the condition is fulfilled. The interpretation suggested by Cunha Gonçalves[103] seems to be better, insofar as it suggests that capacity should only be assessed at the time of the fulfillment of the condition.

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[101] Cunha Gonçalves, *Tratado*, Vol. IX, page 702.

[102] Cunha Gonçalves, *Tratado*, Vol. IX, pages 704 *et seq*. A different opinion is presented in Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 497, footnote 4, as well as in some of the case-law mentioned therein.

[103] *Tratado*, Vol. IX, pages 700 and 701, where the author replies to the arguments put forward by the opposite side of the controversy.

This Section concludes with a reference to persons who are incapable of acquiring through testamentary succession, due to being incapable of acquiring through intestate succession (article 1779), to inheritances and legacies in favour of testamentary executors and guardians (article 1780) and to the cases of the heir's or legatee's indignity (article 1782).

Indignity is an "*extremely serious ingratitude of the heir or legatee despite the disposition through which the testator benefited him/her*"[104], and it is regulated, with regard to wills, in articles 1748, 1749, 1782, 1937, 1938 and 1940. As was already mentioned in the comments to the previous Section, all these cases are situations where testamentary dispositions lapse. It is a civil sanction imposed by the legislator on persons who were previously capable of acquiring, due to illegal acts which they carried out. The legislator also regulated the cases of disinheritance in article 1875 *et seq.*, relating to intestate succession, even though they are regulated in the chapter relating to wills.

The regulation of indignity is separated by dissimilar provisions. There are some causes of indignity which are only mentioned regarding disinheritance, but which are not mentioned in the provisions regulating testamentary succession. However, as is highlighted by Cunha Gonçalves[105], these causes of indignity may be uniformised regarding testamentary and intestate succession, due to article 1779 and article 1798.

In article 1782, the legislator considers a cause of indignity being convicted for committing an offence against the testator's life, but, in article 1876, disinheritance is allowed on lesser grounds. This difference is due to the fact that, in the other cases of ingratitude, the testator is physically capable of revoking the will in favour of the

[104] Cunha Gonçalves, *Tratado*, Vol. IX, page 715.

[105] Cunha Gonçalves, *Tratado*, Vol. IX, page 716.

ungrateful person if he/she so wishes. A further difference between the indignity of mandatory and of testamentary heirs is that mandatory heirs may be disinherited in a will, since their rights derive from the law, whereas testamentary heirs do not need to be disinherited, as they lose the right to the inheritance or legacy automatically, *ipso jure*, with no need for a revoking will. In any case, due to article 1978, an heir also loses the right to the legitime in the cases of article 1782, even in the absence of disinheritance[106].

Another case of indignity is committing an offence against the testator's freedom. Opposing the right to testate implies that the undignified person loses the right to intestate succession, if he/she had this right, since there is no will (article 1749); opposing the right to revoke a will implies that the undignified person loses the right both to the property legated in the will which the testator intended to revoke (article 1782), and to intestate succession (article 1977).

The third cause for indignity derives from acts that go against the full effectiveness of another person's will (articles 1937, 1938 and 1940). Article 1780 also indicates a cause for indignity relating to the testamentary executor, reproducing the provisions of article 1889.

Regarding this Section, it is also important to mention article 1781, which is applicable to all public and private legal persons, as well as article 1783, which refers to article 1481, regarding testamentary dispositions. The latter states that "*donations made to persons, be they simulated or made under the appearance of a different contract, or through an intermediate person, shall produce no effects*". The single § of the same article states that descendants, ascendants and consorts of the incapable persons are considered intermediate persons.

[106] Cunha Gonçalves, *Tratado*, Vol. IX, page 718.

Código Civil de 1867

SECÇÃO III
DA LEGÍTIMA E DAS DISPOSIÇÕES INOFICIOSAS

Artigo 1784º

Legítima é a porção de bens, de que o testador não pode dispor, por ser aplicada pela lei aos herdeiros em linha recta ascendente, ou descendente.

§ único) Esta porção consiste nas duas terças partes dos bens do testador, salva a disposição do Artigo 1787º.

Artigo 1784º

Entende-se por legítima a porção de bens de que o testador não pode dispor, por ser aplicada pela lei aos herdeiros em linha recta descendente ou ascendente.

§ único) Esta porção consiste em metade dos bens do testador, salvo a disposição dos Artigos 1785º, nº 2º, e 1787º.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Ver o assento de 20 de Dezembro de 1935: «*É de metade a quota disponível deixada por cônjuge a outro na herança aberta posteriormente ao decreto nº 5.644, de 10 de Maio de 1919, quer o casamento tenha sido anterior, quer posterior a esse diploma*» (Diário do Governo, I série, de 6 de Setembro de 1936).

Artigo 1785º

Se o testador tiver, ao mesmo tempo, filhos legítimos, ou legitimados, e filhos perfilhados, observar-se-á o seguinte:

Civil Code of 1867

SECTION III
LEGITIME AND INOFFICIOUS DISPOSITIONS

Article 1784

The legitime is the portion of the property which the testator may not dispose of, since it is reserved by law to the heirs who are relatives in ascending or descending direct line.

Single §) This portion consists of two thirds of the property of the testator, not precluding the provisions of article 1787.

Article 1784

The legitime is the portion of the property which the testator may not dispose of, since it is reserved by law to the heirs who are relatives in ascending or descending direct line.

Single §) This portion consists of half of the property of the testator, not precluding the provisions of articles 1785, no. 2, and 1787.

(*As revised by Decree no. 19.126, of 16/12/1930*)

See the case-law creating judgment of 20 December 1935: "*The disposable portion left by one spouse to the other in a succession open after decree no. 5.644, of 10 May 1919, is half of the estate, regardless of whether the marriage preceded or followed this decree*" (Official Gazette, Series I, of 6 September 1936).

Article 1785

If the testator has, at the same time, legitimate or legitimated children and acknowledged children, the following shall apply:

1º) *Se os filhos perfilhados o estavam ao tempo em que o testador contraiu o matrimónio, de que veio a ter filhos legítimos, a porção daqueles será igual à legítima destes, menos um terço;*

2º) *Se os filhos forem perfilhados depois de contraído o matrimónio, a sua porção não excederá a legítima dos outros menos um terço, e sairá só da terça disponível da herança.*

Artigo 1785º

Se o testador tiver, ao mesmo tempo, filhos legítimos ou legitimados, ou descendentes deles com direito de representação, e filhos perfilhados, ou descendentes deles com direito de representação, observar-se-á o seguinte:

1º) Se os filhos perfilhados o estavam ao tempo em que o testador contraiu matrimónio de que veio a ter os filhos legítimos, a legítima daqueles será igual à legítima destes menos um terço;

2º) Se os filhos forem perfilhados depois de contraído o matrimónio, a sua legítima não excederá a legítima dos outros menos um terço, calculada nos termos do nº 1º, e sairá só da quota disponível de herança, considerando-se inoficiosas as disposições ou doações feitas em prejuízo desta legítima, anteriores e posteriores à perfilhação, conforme as regras gerais.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Ver o assento de 20 de Dezembro de 1935: «*É de metade a quota disponível deixada por cônjuge a outro na herança aberta posteriormente ao decreto nº 5.644, de 10 de Maio de 1919, quer o casamento tenha sido anterior, quer posterior a esse diploma*» (Diário do Governo, I série, de 6 de Setembro de 1936).

1) *If the acknowledged children had already been so at the time the testator contracted a marriage from which legitimate children were born, their portion shall be the same as the legitime of the latter, minus one third;*

2) *If the children were acknowledged after the marriage had been contracted, their portion shall not exceed the other children's legitime, minus one third, and shall be taken exclusively from the disposable third of the inheritance.*

Article 1785

If the testator has, at the same time, legitimate or legitimated children, or their descendants with the right of representation, and acknowledged children, or their descendants with the right of representation, the following shall apply:

1) If the acknowledged children had already been so at the time the deceased contracted a marriage from which legitimate children were born, their legitime shall be the same as the legitime of the latter, minus one third;

2) If the children were acknowledged after the marriage had been contracted, their legitime shall not exceed the other children's legitime, minus one third, calculated in accordance with no. 1, and it shall be taken exclusively from the disposable portion of the inheritance, any dispositions or donations made in detriment to this legitime, preceding or following the acknowledgment, being considered inofficious, in accordance with general rules.

(*As revised by Decree no. 19.126, of 16/12/1930*)

See the case-law creating judgment of 20 December 1935: "*The disposable portion left by one spouse to the other in a succession open after decree no. 5.644, of 10 May 1919, is half of the estate, regardless of whether the marriage preceded or followed this decree*" (Official Gazette, Series I, of 6 September 1936).

Artigo 1786º

Se o testador, ao tempo da sua morte, não tiver filhos, mas tiver pai ou mãe vivos, consistirá a legítima dos pais nos dois terços da herança.

Artigo 1786º

Se o testador, ao tempo da sua morte, não tiver filhos ou descendentes, mas tiver pai ou mãe vivos, consistirá a legítima dos pais em metade da herança.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1787º

Se o testador só tiver, ao tempo da sua morte, outros ascendentes, que não sejam pai ou mãe, consistirá a legítima deles em metade dos bens da herança.

Artigo 1787º

Se o testador só tiver, ao tempo da sua morte, outros ascendentes que não sejam pai ou mãe, consistirá a legítima deles na terça parte dos bens da herança.

(*Redacção dada pelo Decreto nº 19.126, de 12/12/1930*)

Artigo 1788º

Se o testador dispuser de certo usufruto, ou de alguma pensão vitalícia, cujo valor exceda a sua quota disponível, poderão os herdeiros legitimários cumprir o legado, ou entregar ao legatário, tão somente a quota disponível.

Artigo 1789º

Se o testador houver doado, ou disposto de mais bens do que aqueles de que lhe é permitido dispor, poderão os

Article 1786

If the testator, at the time of his/her death, has no children, but has a living father or mother, the parents' legitime shall consist of two thirds of the inheritance.

Article 1786

If the testator, at the time of his/her death, has no children or descendants, but has a living father or mother, the parents' legitime shall consist of half of the inheritance.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1787

If the testator, at the time of his/her death, only has ascendants other than the father or mother, their legitime shall consist of half of the inheritance.

Article 1787

If the testator, at the time of his/her death, only has ascendants other than the father or mother, their legitime shall consist of a third of the inheritance.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1788

If the testator disposes of a right of usufruct or of a lifelong pension, the value of which exceeds the disposable portion, the mandatory heirs may comply with the legacy or simply surrender to the legatee the disposable portion.

Article 1789

If the testator donated or disposed of more property than that which he/she was allowed to dispose of, the mandatory heirs may, at the time of the opening of

herdeiros legitimários requerer, na abertura da herança, que a doação, ou deixa, seja reduzida, nos termos declarados nos Artigos 1493º e 1494º.

Ver o assento de 21 de Dezembro de 1928: «*A redução nas doações inoficiosas faz-se sempre em substância*» (Diário do Governo, I série, de 15 de Janeiro de 1929)

Artigo 1790º

O cálculo da terça, para o efeito da redução, será feito da maneira seguinte:

§ 1º) Somar-se-á o valor de todos os bens, que o autor da herança houver deixado, feita a dedução das dívidas da herança; ajuntar-se-á à soma restante o valor dos bens, que o falecido houver doado, e a quota disponível será calculada com relação a esta soma total.

§ 2º) O valor dos bens doados será o que tiverem na época em que a doação produzir os seus efeitos.

§ 3º) Se a coisa doada houver perecido, sem que o donatário para isso concorresse directamente, não será compreendida na massa da herança para o cálculo das legítimas.

Artigo 1790º

O cálculo da quota disponível, para o efeito da redução, será feito da maneira seguinte:

§ 1º) Somar-se-á o valor de todos os bens que o autor da herança houver deixado, feita a dedução das dívidas da herança; ajuntar-se-á à soma restante o valor dos bens que o falecido houver doado, e a quota disponível será calculada com relação a esta soma total.

§ 2º) O valor dos bens doados será o que tiverem à data da abertura da herança, e esta mesma data regulará para o cômputo da extensão da quota disponível.

the inheritance, request that the donation or legacy be reduced, in accordance with articles 1493 and 1494.

See the case-law creating judgment of 21 December 1928: "The reduction of inofficious donations is always made *in specie*" (Official Gazette, Series I, of 15 January 1929).

Article 1790

For the purposes of reduction, the disposable third shall be calculated as follows:

§ 1) The value of all the property left by the estate-leaver shall be added together, deducting the inheritance's debts; the resulting amount shall be added to the value of the property which the deceased donated, and the disposable portion shall be calculated in relation to this total sum.

§ 2) The value of the donated property will be its value at the time the donation produces its effects.

§ 3) If the donated thing has perished, without the direct responsibility of the donee, it shall not be included in the inheritance for the calculation of the legitimes.

Article 1790

For the purposes of reduction, the disposable portion shall be calculated as follows:

§ 1) The value of all the property left by the estate-leaver shall be added together, deducting the inheritance's debts; the resulting amount shall be added to the value of the property which the deceased donated, and the disposable portion shall be calculated in relation to this total sum.

§ 2) The value of the donated property will its value at the time of the opening of the inheritance, and this same date

§ 3º) Se a coisa doada tiver perecido, sem que o donatário para isso concorresse directamente, não será compreendida na massa da herança para o cálculo das legítimas, salvo disposição em contrário.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

shall be applicable to calculate the extension of the disposable portion.

§ 3) If the donated thing has perished, without the direct responsibility of the donee, it shall not be included in the inheritance for the calculation of the legitimes, unless otherwise stated by a legal provision.

(*As revised by Decree no. 19.126, of 16/12/1930*)

COMMENTARY TO ARTICLES 1784 TO 1790

As was already mentioned in the comments to Chapter I, mandatory succession, which is addressed in this Section, is included within intestate succession[107], which means that mandatory succession is subject to all the rules on intestate succession[108]. Mandatory succession is also called necessary succession, because, by law, the author of the inheritance may not freely dispose of the portion of his/her property reserved for the mandatory heirs, thus causing them detriment. This limitation to the freedom to make a will has the advantage of avoiding abuses and injustices and is based on the idea of protecting the family.

The portion of property which the testator may not freely dispose of is called the legitime, in accordance with article 1784. The testator's remaining property, which is not included in the legitime, and which he/she can freely dispose of in a will, makes up the disposable portion. Both the legitime and the disposable portion are parts of a whole and, therefore, they are inheritances and not legacies.

Only the ascendants and the descendants of the author of the inheritance are mandatory heirs. In this respect, the Portuguese Civil Code of 1966 is different, since therein the spouse is also a mandatory heir (article 2157).

The legitime is intangible, which means that the author of the inheritance may not impose upon it any burden, except for that which is determined in article 1788, which allows mandatory heirs

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[107] The Portuguese Civil Code of 1966 made a different option, regulating mandatory succession autonomously, in Title III of Book V, after regulating intestate succession in Title II of the same Book.

[108] Cunha Gonçalves, *Tratado*, Vol. IX, page 739.

an alternative[109]. The author of the inheritance may, however, designate the property which is to make up the legitime, since no legal provision imposes its qualitative composition[110]. In this respect, the option taken in the Portuguese Civil Code of 1966 was a little different. Article 2163 of this Code states that: "*the testator may not impose burdens on the legitime, nor designate the property which should be used to meet it, against the will of the heir*". This means that the testator needs the heir's consent to designate the property which is to make up the legitime.

The order in which the mandatory heirs are called upon is provided for in article 1969, no.s 1 and 2. Thus, the first are the descendants, and only afterwards the ascendants. These succeed in accordance with the general rules on intestate succession.

The legitime consists of half of the property of the inheritance, but there are two exceptions to this rule (single § of article 1784). The first relates to a situation where legitimate and illegitimate children compete for an inheritance (if there are only illegitimate children, the general rules apply). In this case, the legitime will be divided differently, depending on whether the illegitimate children were acknowledged before or after the marriage of the author of the inheritance, in accordance with article 1785 and its §§ and with articles 1991 and 1992.

In accordance with article 1785, no. 1, if illegitimate children are acknowledged before the marriage of the author of the inheritance, their mandatory portion shall be the same as the legitime of the legitimate children, minus one third. The formula to calculate the legitime of legitimate and illegitimate children followed by the courts and put forward in doctrine[111] is the following: a) you

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[109] Cunha Gonçalves, *Tratado*, Vol. IX, page 742; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 455, footnote 1.

[110] Cunha Gonçalves, *Tratado*, Vol. IX, pages 754 to 756; Pires de Lima and Antunes Varela, *ibidem*.

[111] Cunha Gonçalves, *Tratado*, Vol. X, pages 399 and 400, even though interpreting article 1785 differently from what was argued in Vol. IX, page 748, recognising

multiply the number of legitimate children by three and the number of illegitimate children by two, and add the results; b) you divide the amount of the legitime, which is half of the inheritance, calculated in accordance with article 1790 and its §§, by the number obtained in the previous addition; c) you multiply the result of this last division by three, to obtain the share of each legitimate child, and by two to obtain the share of each illegitimate child.

To give a concrete example, if the calculated inheritance is 1800, and if there are two legitimate children and three illegitimate children, acknowledged before the marriage which resulted in the birth of the legitimate children, we have: a) (*number of legitimate children* X 3) + (*number of illegitimate children* X 2) = (2 X 3) + (3 X 2) = 6 + 6 = 12; b) (*half of the value of the inheritance*) : 12 = 900 : 12 = 75; c) *legitime of the legitimate children* = 75 X 3 = 225 / *legitime of the illegitimate children* = 75 X 2 = 150. In this situation, the legitime of the legitimate children is 225 and the legitime of the illegitimate children is 150, which is precisely the legitime of the other children minus one third.

In accordance with no. 2 of this article, if there are both legitimate and illegitimate children and the latter are acknowledged after the marriage, their legitime is calculated in the same way as in the case of children acknowledged before the marriage of the author of the inheritance; however, and so as to protect the legitime of the legitimate children against an acknowledgment made after the marriage, the mandatory share of children acknowledged after the marriage shall be paid only from the property included in the disposable portion of the author of the inheritance. If the disposable portion is insufficient for all the acknowledged children to receive a portion equal to that of the legitimate children minus one third, this portion will be divided proportionately among them (article 1992).

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that the latter position is not sure and may lead to unfair results which were not intended by the legislator; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 413 and, more specifically, page 457.

Only this second case is an exception to the half referred to in the single § of article 1784, since the half of the inheritance will be used to pay the legitime of the legitimate children and of the children acknowledged before the marriage, if there are any, and the portion of the acknowledged children will be taken from the disposable portion. Article 1992 refers to the "disposable third", since, until 31 October 1910, the disposable portion was a third of the testator's property. Even after 1910, some provisions continue to refer to the "disposable third" in the sense of "disposable portion"; however, this may lead to some confusion, since other provisions in the Civil Code refer to "third" in the sense of a "one third fraction"[112].

Looking at another concrete example, if the inheritance is 1600 and the author of the inheritance leaves four legitimate children and seven illegitimate children, three of which were acknowledged before the marriage, and four after the marriage, we must first make the same calculations as in the previous example: a) (*number of legitimate children* X 3) + (*total number of illegitimate children* X 2) = (4 X 3) + (7 X 2) = 12 + 14 = 26; b) (*half of the value of the inheritance*) : 26 = 800 : 26 = 30.769231; c) *legitime of the illegitimate children acknowledged after the marriage* = 30.769231 X 2 = 61.538462.

The legitime of children acknowledged after the marriage would be 61.538462. This value would be entirely taken from the disposable portion. Since there were four children acknowledged after the marriage, the total value to be taken from the disposable portion would be 246.15385. 553.84615 is left in the disposable portion, so there is no need to apply article 1992.

After determining the value of the legitime of children acknowledged after the marriage, and since that value is taken only from the disposable portion, the total remaining legitime must be

[112] Cunha Gonçalves, *Tratado*, Vol. X, page 400; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 453, footnote 1.

distributed among the legitimate children and the illegitimate children acknowledged before the marriage, the only children which will be taken into account in the calculations: a) (*number of legitimate children* X 3) + (*number of illegitimate children acknowledged before the marriage* X 2) = (4 X 3) + (3 X 2) = 12 + 6 = 18; b) (*half of the value of the inheritance*) : 18 = 800 : 18 = 44.44; c) *legitime of the legitimate children* = 44.44 X 3 = 133.32 / *legitime of the illegitimate children acknowledged before the marriage* = 44,44 X 2 = 88.88.

The legitimate children should receive a total of 533.28, since there are four of them. The illegitimate children acknowledged before the marriage should receive a total of 266.64. The sum of these two sums adds up to 800, which is the value of half of the inheritance, i.e., the value of the legitime.

In such cases, the dispositions and donations made from the disposable portion shall be inofficious if they are detrimental to the legitime of the illegitimate children acknowledged after the marriage, since the latter is taken from that portion (article 1785, no. 2). In any case, one should take into account that articles 1169, no. 2, and 1501, prohibit the reduction due to inofficiousness of a donation made in a prenuptial agreement between engaged persons. Therefore, if the acknowledging father donated the disposable portion to his future wife in the prenuptial agreement, a child acknowledged after the marriage shall receive nothing[113].

If one of the children (legitimate or acknowledged) died before the author of the inheritance, having left children who are still living and who compete in the succession with their uncles and aunts, that child's legitime shall be divided among those children, the grandchildren of the author of the inheritance, who succeed through right of representation (article 1785, no. 1). This right of representation is regulated in articles 1983 to 1984, which prescribe an equal distribution among the various children.

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[113] Cunha Gonçalves, *Tratado*, Vol. IX, page 750.

The Portuguese Civil Code of 1966 does not establish any difference concerning the portion of legitimate and of illegitimate children.

The second exception to the half rule, included in the single § of article 1784, is that of article 1787, according to which the legitime shall be one third of the testator's property when, at the time of his/her death, there were only ascendants other than the father or mother. If only the father or the mother of the testator are living, this parent will receive all of the legitime and the other parent's heirs shall not have a right of representation, since that right does not exist in the ascending line (article 1981). Also for the purposes of article 1787, the paternal and maternal grandparents have the same rights and they succeed individually (article 1997). This rule is applicable even if the grandparents are illegitimate, since no distinction is made[114].

Regarding mandatory succession, the rules of the Portuguese Civil Code of 1966 are quite different, given that, as was mentioned above, the spouse is also a mandatory heir. On the other hand, the value of the legitime varies depending on the mandatory heirs in question. If the spouse is not competing with other ascendants, nor with descendants, the legitime is half of the inheritance (article 2158), but if he/she is competing with children, the legitime is $^{2}/_{3}$ of the inheritance (article 2159, no. 1). In the absence of a surviving spouse, the children's legitime is half or $^{2}/_{3}$ of the inheritance, depending on whether there is one or more children (article 2159, no. 2). If the spouse competes only with ascendants, the legitime is $^{2}/_{3}$ of the inheritance (article 2161, no. 1). Finally, if the author of the inheritance does not leave a spouse, or living descendants, the ascendants' legitime is half or $^{1}/_{3}$ of the inheritance, depending on whether the parents or the ascendants of the second degree and beyond are called upon (article 2161, no. 2).

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[114] Cunha Gonçalves, *Tratado*, Vol. IX, page 754.

Article 1790 regulates the method to calculate the disposable portion, ordering in § 1 that one takes into account the value of the property left by the deceased after deducting the respective debts, and adding thereto the value of the assets donated by the testator. If these assets were not taken into account, the author of the inheritance would always be able to defraud the rights of the mandatory heirs, resorting to *inter vivos* donations, rather than resorting to testamentary dispositions. This part of the article in question must be read together with article 1455, according to which, in donations subject to charges, only the part which exceeds that charge is considered a donation and, therefore, only that value should be considered when calculating the disposable portion. On the other hand, in accordance with § 3 of article 1790, one should also not take into account, when calculating the disposable portion, donated things which have perished, to no fault of the donee.

The possibility granted to mandatory heirs to request that the testator's donations and testamentary dispositions be reduced, insofar as they exceed the limits imposed by law for the benefit of the mandatory heirs (article 1789), is simply the logical consequence of taking into account donations when calculating the disposable portion. The donations which exceed the disposable portion are deemed inofficious and they are reduced only so far as needed to meet the legitime. Although the reduction mechanism is aimed at guaranteeing the legitime of the mandatory heirs, in the opinion of Cunha Gonçalves[115], nothing prevents using the property returned to the hereditary mass through reduction to pay creditors for the inheritance's debts.

When the donations are made to mandatory heirs, they must often be considered as having been made on account of the legitime, due to the phenomenon of collation (article 2098 *et seq.*).

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[115] Cunha Gonçalves, *Tratado*, Vol. IX, pages 767 and 768.

Further with regard to calculating the disposable portion, there is great confusion as to the relevant moment to determine the value of the donated property. Thus, firstly, § 2 of article 1790 contradicts the provisions of article 1497, since the latter refers to the value at the time of the donation, whereas article 1790, § 2, refers to the value at the time of the testator's death. Secondly, article 2107, § 3, also conflicts with article 1790, § 2, because, concerning self-moving or fungible objects, or objects subject to deterioration, it orders one to take account of their condition at the time they came into the donee's possession. Thirdly, article 1498, § 2, orders that the value of donated immovable property be assessed in relation to the time when the reduction takes place, which is subsequent to the opening of the inheritance, which is referred to in article 1790, § 2. Finally, the same article 1498, § 2, excludes increases in value that originate from improvements made by the donee, as well as decreases in value due to deteriorations ascribable to the donee, something which was not taken into account by article 1790, § 2.

In the opinion of Cunha Gonçalves[116], the issue should be solved as suggested by Dias Ferreira, in other words, following two distinct processes, one to calculate the legitime and another for the purposes of reduction. The first process is used to determine by how much a donation exceeded the disposable portion, considering the value of the donated property at the time of the opening of the succession, but without taking into account the increases or decreases that are not due to natural, accidental or purely economic causes (article 1498, § 2). Once the extent of the inofficiousness has been determined, a second appraisal is needed to determine which property should be removed to meet the legitime, i.e., for the purposes of reduction. This assessment shall be made in accordance with article 1497 and its single § for movable property, and in accordance with article 1498 and its §§ for immovable property.

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[116] Cunha Gonçalves, *Tratado*, Vol. VIII, page 217.

Finally, as was mentioned above, the case foreseen in article 1788 is an exception to the principle of the legitime's quantitative intangibility. In this case, mandatory heirs have the option to comply with the legacy or to surrender to the legatee the disposable portion. This alternative is known as the Socinian caution, after its creator, the medieval jurist Socino Gualdense. In the opinion of Cunha Gonçalves[117], the mandatory heirs have more to gain by keeping the disposable portion than they have to lose by not having the usufruct of their legitime during the rest of the usufructuary's life: usufruct is limited and the disposable portion is perpetual and is worth more than the usufruct. However, the legislator allowed the mandatory heirs the possibility of choosing, since, in a specific situation, it may be more advantageous to surrender the disposable portion. For example, where the usufructuary is very young, it is foreseeable that the usufruct will remain in place for quite some time, and for this reason it would then be more advantageous for the mandatory heirs to surrender the disposable portion.

[117] Cunha Gonçalves, *Tratado*, Vol. IX, page 758.

Código Civil de 1867

SECÇÃO IV
DA INSTITUIÇÃO DE HERDEIROS, E DA NOMEAÇÃO DE LEGATÁRIOS, E DOS SEUS DIREITOS E OBRIGAÇÕES

Artigo 1791º

Podem ser instituídos herdeiros uma, ou mais pessoas, e não deixarão de ser havidos por tais, ainda que as suas quotas lhes sejam assinadas em certa proporção.

Artigo 1792º

O herdeiro responde por todas as dívidas, e legados do autor da herança, até por seus próprios bens, salvo se aceitar a herança a benefício de inventário.

Artigo 1793º

O legatário, porém, não responde pelos encargos do legado, senão até onde chegarem as forças do mesmo legado.

Artigo 1794º

Se a herança for toda distribuída em legados, serão as dívidas e encargos dela rateados entre todos os legatários, em proporção dos seus legados, salvo se o testador houver ordenado o contrário.

Artigo 1795º

Se os bens da herança não chegarem para cobrir todos os legados, serão estes pagos pro-rata, salvo os que forem deixados em recompensa de serviços;

Civil Code of 1867

SECTION IV
APPOINTMENT OF HEIRS AND NOMINATION OF LEGATEES, AND THEIR RIGHTS AND OBLIGATIONS

Article 1791

One or more persons may be appointed as heirs, and they shall continue to be considered as such, even if their portions are assigned to them in a certain proportion.

Article 1792

The heir is liable for all the debts and legacies of the estate-leaver, even with his/her own property, unless he/she accepts the inheritance subject to an inventory.

Article 1793

The legatee, however, is not liable for the burdens of the legacy, except up to what is covered by the legacy itself.

Article 1794

If the inheritance is entirely distributed in legacies, its debts and burdens shall be divided among all the legatees, in proportion to their legacies, except if the testator stipulated otherwise.

Article 1795

If the inheritance's property does not suffice to cover all the legacies, these shall be paid *pro rata*, except those left as a reward for services; since, in this case,

pois, nesse caso, serão considerados como dívida da herança.

Artigo 1796º

Se o testador houver disposto só de certa e determinada parte da herança, será esta parte havida como legado.

Artigo 1796º

Se o testador houver disposto só de determinado valor, ou de objecto designado, ou de certa parte não alíquota da herança, será essa disposição considerada como legado.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1797º

Se o testador nomear certos herdeiros individualmente e outros colectivamente, e, por exemplo, disser «instituo por meus herdeiros Pedro e Paulo e os filhos de Francisco», serão havidos por individualmente nomeados os que o foram colectivamente.

Artigo 1798º

Se o testador instituir, em geral, seus irmãos e os tiver germanos, consanguíneos e uterinos, conferir-se-á a herança como se fora ab-intestato.

Artigo 1799º

Se o testador chamar certa pessoa e seus filhos, entender-se-á, que são todos instituídos simultaneamente, e não sucessivamente.

they shall be considered as a debt of the inheritance.

Article 1796

If the testator disposed only of a specific and determined part of the inheritance, this part shall be considered a legacy.

Article 1796

If the testator disposed only of a specific value, or of a determined object, or of a specific non aliquot part of the inheritance, this disposition shall be considered a legacy.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1797

If the testator appoints certain heirs individually and others collectively and, for example, says "I appoint as my heirs Pedro and Paulo and Francisco's children", those who are appointed collectively shall be deemed as individually appointed.

Article 1798

If the testator appoints, generally, his/her siblings, and has full blood, consanguine and uterine siblings, the inheritance shall be distributed as though through intestate succession.

Article 1799

If the testator appoints a specific person and his/her children, it shall be considered that all are appointed simultaneously, rather than successively.

Artigo 1800º

O herdeiro ou herdeiros, que tiverem administrado a herança absorvida por legados, só terão direito a serem indemnizados pelos legatários das despesas que houverem feito com a herança, se a tiverem aceitado a benefício de inventário.

Article 1800

The heir or heirs who managed the inheritance absorbed by legacies shall only be entitled to be compensated by the legatees for the expenses which they incurred in relation to the inheritance, if they accepted under the benefit of inventory.

Artigo 1801º

É nulo o legado de coisa alheia; mas, se do testamento se depreende, que o testador ignorava que lhe não pertencia a coisa legada, deverá o herdeiro adquiri-la, para cumprir a disposição, e se isto não for possível, pagará ao legatário o valor dela.

Article 1801

A legacy of someone else's property is null and void; but, if one may conclude through the will that the testator was unaware that the legacy in question did not belong to him/her, the heir is to acquire it, so as to comply with the disposition, and if this is not possible, he/she is to pay the legatee its value.

Artigo 1802º

Se a coisa legada, que não pertencia ao testador no momento da feitura do testamento se tiver depois tornado sua por qualquer título, terá efeito a disposição relativa a ela, como se ao tempo do testamento pertencesse ao testador.

Article 1802

If the thing which was legated did not belong to the testator at the time of the will, and subsequently became his/hers, through whatever title, the disposition relating to it shall be valid, as if the thing belonged to the testator at the time of the will.

Artigo 1803º

Se o testador ordenar, que o herdeiro ou o legatário entregue a outrem coisa que pertença a qualquer deles, serão obrigados a cumprir o disposto pelo dito testador, ou a entregar o valor da coisa, se não preferirem renunciar a herança ou o legado.

Article 1803

If the testator orders the heir or legatee to surrender to someone else something belonging to any of them, they shall be obliged to comply with this disposition, or to pay the value of the thing, unless they prefer to renounce the inheritance or legacy.

Artigo 1804º

Se o testador, o herdeiro ou o legatário for senhor tão somente de parte da coisa legada, ou só tiver algum direito a essa

Article 1804

If the testator, the heir or the legatee owns only a part of the legated thing, or has only a certain right to it, the legacy

coisa, não valerá o legado senão pelo que tocar a essa parte ou a esse direito, salvo se constar, que o testador estava persuadido, de que a coisa lhe pertencia integralmente, ou ao herdeiro ou ao legatário; pois, nesse caso, se observará o que fica disposto no Artigo 1801º.

Artigo 1805º

O legado de coisa móvel indeterminada, incluída em certo género ou espécie, será válido, posto que tal coisa não exista entre os bens do testador ao tempo da sua morte.

Artigo 1806º

Se o testador legar coisa própria, designando-a singularmente, será nulo o legado, se ao tempo da sua morte tal coisa se não achar na herança.

Artigo 1807º

Se a coisa mencionada no Artigo precedente existir na herança, mas não na quantidade ou porção designada, haverá o legatário o que existir, nem mais, nem menos.

Artigo 1808º

A condição, que inibir o herdeiro ou o legatário de casar-se, ou de deixar de casar-se, excepto sendo imposta, ao viúvo ou viúva com filhos, pelo cônjuge falecido, ou pelos ascendentes ou descendentes deste, e, bem assim, a que o obrigar a tomar ou deixar de tomar o estado eclesiástico ou certa e determinada profissão, haver-se-á por não escrita.

Artigo 1808º

A condição que inibir o herdeiro ou o legatário de casar-se ou de deixar de

shall be valid only regarding that part or that right, except if it is known that the testator was convinced that the thing belonged to him entirely, or to the heir or legatee; since, in this case, the provisions of article 1801 shall apply.

Article 1805

A legacy of undetermined movable property, included in a certain kind or sort, shall be valid, even if the said thing does not exist among the property of the testator at the time of his/her death.

Article 1806

If the testator legates a thing of his/her own, singling it out, the legacy shall be null and void if, at the time of his/her death, the thing was not found in the inheritance.

Article 1807

If the thing mentioned in the preceding article exists in the inheritance, but not in the indicated quantity or portion, the legatee shall have what does exists, no more, no less.

Article 1808

A condition which prohibits the heir or legatee from marrying, or from not marrying, unless it is imposed by the deceased spouse on the widow(er) with children, or by his/her ascendants or descendants, as well as a condition obliging him/her to take ecclesiastical vows or to take on a specific and determined profession, shall be considered as not having been written.

Article 1808

A condition which prohibits the heir or legatee from marrying, or from not

casar-se, excepto sendo imposta ao viúvo ou à viúva com filhos, pelo cônjuge falecido ou pelos ascendentes ou descendentes deste, e bem assim a que o obrigar a tomar ou deixar de tomar o estado eclesiástico ou certa e determinada profissão, haver-se-á por não escrita.

§ único) Não se acham compreendidas neste Artigo as disposições testamentárias que limitam a duração de benefícios ao estado de solteiro, casado, ou viúvo do respectivo herdeiro ou legatário.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

marrying, unless it is imposed by the deceased spouse on the widow(er) with children, or by his/her ascendants or descendants, as well as a condition obliging him/her to take ecclesiastical vows or to take on a specific and determined profession, shall be considered as not having been written.

Single §) This article does not encompass testamentary dispositions which limit the duration of benefits to the respective heir's or legatee's status of single, married or widowed.

(As revised by Decree no. 19.126, of 16/12/1930)

Artigo 1809º

É nula a disposição feita sob condição, de que o herdeiro ou o legatário faça igualmente em seu testamento alguma disposição em favor do testador ou de outrem.

Article 1809

A disposition made under the condition that the heir or legatee also includes in his/her will a disposition in favour of the testator or of a third person shall be null and void.

Artigo 1810º

A condição, que apenas suspender por certo tempo a execução da disposição, não impedirá que o herdeiro ou o legatário adquira direito à herança ou ao legado, e o possa transmitir a seus herdeiros.

Article 1810

A condition that merely suspends for a certain period the enforcement of the disposition shall not prevent the heir or legatee from acquiring the right to the inheritance or legacy, and from transmitting it to his/her heirs.

Artigo 1811º

O legado ficará sem efeito:

1º) Se o testador alienar por qualquer forma a coisa legada;

2º) Se a coisa legada não estiver em comércio;

3º) Se o testador transformar a coisa legada de modo que não conserve nem a forma, nem a denominação que tinha;

4º) Se a coisa legada for evicta, ou perecer de todo durante a vida do testa-

Article 1811

The legacy shall be without effect if:

1) The testator alienates the legated thing in any way;

2) The legated thing is out of commerce;

3) The testator transforms the legated thing in such a way that it does not retain its previous shape or name;

4) The legated thing was evicted or entirely perishes during the life of the testator, or is evicted or perishes subse-

dor, ou se for evicta, ou perecer depois, sem que o herdeiro para isso haja concorrido.

§ único) Aquele, que é obrigado a prestar a coisa legada, responderá, todavia, pela evicção, se esta coisa prestada não houver sido determinada em espécie.

Artigo 1812º

Se forem legadas duas coisas alternativamente, e perecer alguma delas, subsistirá o legado na restante. Perecendo só parte de uma coisa, será devido o resto.

Artigo 1813º

O legatário não pode aceitar uma parte do legado e repudiar outra, nem rejeitar um legado onerado, e aceitar outro que o não seja; mas o herdeiro, que for ao mesmo tempo legatário, pode renunciar a herança e aceitar o legado, e vice-versa.

Artigo 1814º

A instituição de herdeiro, feita por pessoa que não tinha filhos, ao tempo do testamento, ou que ignorava tê-los, caduca de direito pela superveniência de filhos, ou outros descendentes legítimos, ainda que póstumos, ou pela legitimação dos ilegítimos, em virtude de subsequente matrimónio.

§ 1º) A perfilhação, posterior ao testamento, de filhos ilegítimos, havidos antes ou depois dele, não anula a instituição de herdeiro, mas limita-a à terça do testador.

§ 2º) O legado não caduca, por nenhum dos casos sobreditos, mas pode ser reduzido por inoficioso.

Artigo 1814º

A instituição de herdeiros, feita por pessoa que não tinha filhos legítimos ao

quently, without the heir having contributed to it.

Single §) Whoever is obliged to surrender the legated thing shall be liable, however, for the eviction, if the thing in question was not specified in sort.

Article 1812

If two things are legated alternatively, and one of them perishes, the legacy shall subsist regarding the remaining one. If only a part of a thing perishes, the rest shall be owed.

Article 1813

The legatee may not accept a part of the legacy and repudiate another part, nor reject a legacy with burdens and accept another without burdens; but the heir who is at the same time a legatee, may renounce the inheritance and accept the legacy, and vice-versa.

Article 1814

The appointment of an heir, made by a person who does not have children at the time of the will, or who was unaware of such children, lapses by law as a result of the supervenience of children or other legitimate descendants, even if posthumous, or as a result of the legitimation of illegitimate children through a subsequent marriage.

§ 1) An acknowledgment, after the will, of illegitimate children, born before or after the will, does not annul the appointment of an heir, but it limits it to the disposable third of the deceased.

§ 2) A legacy does not lapse for any of the above indicated reasons, but it may be reduced due to inofficiousness.

Article 1814

The appointment of heirs, made by a person who does not have legitimate

tempo do testamento, ou que ignorava tê-los, caduca de direito pela superveniência de filhos ou outros descendentes legítimos, ainda que póstumos, ou pela legitimação dos ilegítimos.

§ 1º) A perfilhação, posterior ao testamento, de filhos ilegítimos, havidos antes ou depois dele, não anula a instituição de herdeiro, mas limita-a à quota do testador, nos termos do Artigo 1760º.

§ 2º) O legado não caduca por nenhum dos casos sobreditos, mas pode ser reduzido por inoficioso, nos termos do mesmo Artigo 1760º.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

children at the time of the will, or who was unaware of such children, lapses by law as a result of the supervenience of children or other legitimate descendants, even if posthumous, or as a result of the legitimation of illegitimate children.

§ 1) An acknowledgment, after the will, of illegitimate children, born before or after the will, does not annul the appointment of an heir, but it limits it to the portion of the deceased, in accordance with article 1760.

§ 2) A legacy does not lapse for any of the above indicated reasons, but it may be reduced due to inofficiousness, in accordance with article 1760.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1815º

Se os filhos supervenientes falecerem primeiro que o testador, produzirá a disposição os seus efeitos, se não for revogada pelo mesmo testador.

Article 1815

If supervenient children die before the testator, the disposition shall have effect, unless it is revoked by the same testator.

Artigo 1816º

Se a coisa legada se achar empenhada, será desempenhada por conta da herança.

Article 1816

If the legated thing is pawned, it shall be redeemed at the inheritance's expense.

Artigo 1817º

O legado de coisa ou quantidade, que deva ser recebida em lugar designado, só poderá ter efeito até onde chegar a porção que se encontrar nesse mesmo lugar.

Article 1817

A legacy of a thing or quantity, to be received in a specific location, shall only have effect up to the limits of the portion which is found at that same location.

Artigo 1818º

Se o testador legar certa coisa, ou certa soma, como por ele devida ao legatário, será válido o legado, ainda que tal soma ou coisa realmente devida não fosse, salvo sendo o legatário incapaz de a haver por doação.

Article 1818

If the testator left a specific thing or sum as a legacy, due to it being owed to the legatee, the legacy shall be valid, even if the sum or thing was not really owed, unless the legatee is incapable of receiving it as a donation.

Artigo 1819º

Se a dívida depender de termo, não será o legatário obrigado a esperar, que chegue esse termo para exigir o pagamento.

§ único) O legado ficará, todavia, sem efeito se o testador, sendo devedor ao tempo da feitura do testamento, pagar a dívida depois.

Artigo 1820º

O legado feito a um credor, sem que se refira a dívida do testador, não será considerado como compensação da mesma dívida.

Artigo 1821º

Se o testador legar algum crédito que tenha, quer seja contra terceiro, quer contra o próprio legatário, ou der a este quitação da dívida, o herdeiro satisfará, entregando ao legatário os títulos respectivos.

§ único) Se o crédito se mostrar compensado, no todo ou em parte, poderá o legatário exigir do herdeiro o equivalente do crédito, ou da parte compensada; mas se a extinção da dívida provier de outra causa, não poderá exigir coisa alguma.

Artigo 1822º

Se o herdeiro for instituído debaixo de condição suspensiva, será posta a herança em administração, até que se cumpra a condição, ou haja certeza de que não poderá cumprir-se.

§ único) A administração será entregue ao co-herdeiro testamentário incondicional, se entre este e o condicional puder dar-se o direito de acrescer.

Article 1819

If the debt is to be paid at a certain time, the legatee shall not be obliged to wait for that time before demanding payment.

Single §) The legacy shall, however, be without effect if the testator, having a debt at the time of the will, subsequently paid it.

Article 1820

A legacy left to a creditor, without mention of the debt of the testator, shall be considered as compensation for the said debt.

Article 1821

If the testator legated a credit, against a third party or against the legatee him/herself, or leaves him/her acquittance from the debt, the heir shall comply with this stipulation by surrendering the respective titles to the legatee.

Single §) If the credit is found to have been extinguished by compensation, in whole or in part, the legatee may demand from the heir the equivalent to that credit, or to the part that was compensated; but if the extinction of the debt was due to another reason, he/she may not demand anything.

Article 1822

If the heir is appointed subject to a suspensive condition, the inheritance shall be placed under administration until that condition is fulfilled, or it is certain that it is impossible to fulfill it.

Single §) Administration shall be awarded to the unconditional testamentary co-heir, if there is a possible right of accretion between him/her and the conditional heir.

Artigo 1823º

Se o herdeiro condicional não tiver co-herdeiros, ou se, tendo-os, não puder dar-se entre eles o direito de acrescer, será encarregado da administração o herdeiro legítimo presumido, salvo se o herdeiro condicional tiver justo motivo de oposição.

§ único) O herdeiro condicional poderá tomar conta da herança, prestando caução.

Artigo 1824º

As disposições dos dois Artigos precedentes são aplicáveis às heranças deixadas aos nascituros.

Artigo 1825º

Os administradores, mencionados nos Artigos precedentes, terão os mesmos direitos e obrigações, que os curadores provisórios dos bens dos ausentes.

Artigo 1826º

O legado puro e simples confere ao legatário direito transmissível, contado desde o dia em que o testador se finar.

Artigo 1827º

Quando o legado for de coisa indeterminada, compreendida entre outras da mesma espécie, pertencerá a escolha dela a quem dever prestá-la, devendo ser essa escolha regulada por um termo médio, pelo que toca às qualidades da coisa.

Artigo 1828º

Se a escolha for atribuída ao legatário, por disposição expressa do testador, escolherá o dito legatário, entre as coisas

Article 1823

If there are no co-heirs of the conditional heir, or, if such co-heirs do exist, if there is no possible right of accretion among them, administration shall be entrusted to the presumed intestate heir, unless the conditional heir has a just cause to object to this.

Single §) The conditional heir may take charge of the inheritance, providing a security.

Article 1824

The provisions of the two preceding articles are applicable to inheritances left to children yet to be born.

Article 1825

The administrators mentioned in the preceding articles shall have the same rights and obligations as the provisional curators of the property of absentees.

Article 1826

A pure and simple legacy grants the legatee a transmissible right, starting from the day on which the testator dies.

Article 1827

When the legacy relates to an undetermined thing, included in others of the same sort, its choice shall belong to the person who is to provide it, such choice having to comply with a criterion of average, at least regarding the thing's qualities.

Article 1828

If the choice is given to the legatee, by an explicit disposition of the testator, the said legatee shall choose from among

da mesma espécie, a que bem lhe parecer, e, se não houver coisa alguma da mesma espécie, tocará ao herdeiro escolher essa coisa que há-de prestar, e que não será, nem da melhor, nem da pior qualidade.

Artigo 1829º

Se o legado for alternativo, pertencerá ao herdeiro a escolha, se esta não for conferida expressamente ao legatário.

Artigo 1830º

Se o herdeiro, ou o legatário, não puder fazer a escolha, nos casos em que lhe é atribuída, passará este direito aos seus herdeiros; mas, feita ela, será irrevogável.

Artigo 1831º

O legado de alimentos abrange sustento, vestuário, habitação, e, sendo o legatário menor, educação.

§ 1º) Esta obrigação de subsídio para educação dura até que o alimentado haja adquirido a perícia, ou a habilitação regular, no ofício ou profissão que tiver adoptado. Não tendo adoptado algum ofício ou profissão, cessará esta obrigação.

§ 2º) À dita obrigação é aplicável o que fica disposto no Artigo 181º.

§ 3º) A doutrina dos parágrafos antecedentes é aplicável ao legado, deixado unicamente para despesas de educação.

Artigo 1832º

Sendo legada uma casa com tudo o que se achar dentro dela, não se entenderá, que são também legadas as dívidas activas, ainda que na casa se

the things of the same sort that he/she sees fit and, if there is nothing of the same sort, the heir shall have the right to choose the thing to be provided, which will be of neither better nor worse quality.

Article 1829

If the legacy is alternative, the heir shall have the right to choose, if such a right is not explicitly granted to the legatee.

Article 1830

If the heir or legatee is unable to choose, in the cases in which he/she is entitled to choose, this right shall be passed to his/her heirs; but, once it is made, it shall be irrevocable.

Article 1831

A legacy of maintenance includes subsistence, lodging, clothing, and, if the legatee is a minor, education.

§ 1) This obligation of contributing for education lasts until the person entitled to maintenance has acquired the skill or the due qualification for the chosen craft or profession. If he/she has not chosen a craft or profession, this obligation shall cease.

§ 2) The provisions of article 181 are applicable to the said obligation.

§ 3) The provisions of the preceding paragraphs are applicable to the legacy left exclusively for education expenses.

Article 1832

If a house is left as a legacy, together with all that is inside it, active debts shall not be considered to have also been legated, even if the deeds and documents

encontrem as escrituras e os documentos respectivos a tais dívidas.

Artigo 1833º

O legado de usufruto, sem determinação de tempo, entender-se-á, que é feito para enquanto durar a vida do legatário.

Artigo 1834º

Se o legatário de usufruto, sem determinação de tempo, for alguma corporação perpétua, sê-lo-á por espaço de trinta anos, e não mais.

Artigo 1835º

O legado deixado a um menor, para quando chegar à maioridade, não poderá ser por ele exigido antes desse tempo, ainda que emancipado seja.

Artigo 1836º

O legado para obras pias, sem outra declaração, entender-se-á, que é feito para obras de beneficência e caridade.

Artigo 1837º

O equívoco do testador a respeito da pessoa do legatário, ou da coisa legada, não anulará o legado, se puder mostrar-se claramente qual era a intenção do testador.

Artigo 1838º

O legatário requererá ao herdeiro o cumprimento do legado, se não se achar de posse da coisa legada.

§ 1º) Se os herdeiros se demorarem em tomar conta da herança, poderão ser citados para que a aceitem ou renunciem.

relating to such debts are to be found within the house.

Article 1833

A legacy of a right of usufruct, without specification of duration, shall be considered to have been made for the entire life of the legatee.

Article 1834

If the legatee of a right of usufruct, without specification of duration, is a perpetual corporation, it shall have the right of usufruct for thirty years, and no more.

Article 1835

A legacy left to a minor, for when he/she reaches the age of majority, may not be requested by him/her before that time, even if he/she becomes emancipated.

Article 1836

A legacy for pious purposes, with no other stipulation, shall be considered as having been made for welfare and charity purposes.

Article 1837

A mistake of the testator relating to the person of the legatee, or to the legated thing, shall not annul the legacy if the intention of the author can be clearly shown.

Article 1838

The legatee will require the heir to comply with the legacy, if he/she is not in possession of the legated thing.

§ 1) If the heirs procrastinate in taking charge of the inheritance, they may be summoned to accept or renounce it.

§ 2º) Se os herdeiros renunciarem a herança, poderão os legatários requerer, que seja nomeado curador à herança jacente, e a este pedirão a entrega do legado.

§ 3º) Se o legado recair, como encargo, sobre outro legado, deve ser pedido ao legatário deste.

§ 2) If the heirs renounce the inheritance, the legatees may request a curator to be appointed for the vacant inheritance.

§ 3) If the legacy consists of a burden on another legacy, it shall be requested from the latter's legatee.

Artigo 1839º

Se a herança tiver sido toda distribuída em legados, e o testador não houver nomeado testamenteiro, será havido por executor do testamento o legatário mais beneficiado. Em igualdade de circunstâncias, será o que for designado pelos legatários, e, se não puderem acordar, ou se houver entre os legatários algum menor, ausente ou interdito, será o executor designado judicialmente.

Article 1839

If the inheritance has been entirely distributed in legacies, and the testator did not appoint an executor, the most benefited legatee shall be appointed executor. Where the legatees are in equal circumstances, the one indicated by the legatees shall be appointed, and, if these cannot reach an agreement, or if the legatees include a minor or an absentee or interdicted person, the executor shall be appointed by the court.

Artigo 1840º

O legatário tem direito, desde a morte do testador, aos frutos ou rendimentos da coisa legada, excepto se este houve ordenado o contrário.

Article 1840

The legatee is entitled, from the death of the testator, to the fruits or income of the legated thing, except if otherwise stipulated by the latter.

Artigo 1840º

O legatário tem direito, desde a morte do testador, aos frutos e rendimentos da coisa legada, bem como aos juros de mora nos legados em dinheiro, desde a expiração do prazo para o cumprimento desses legados, excepto se o testador houver ordenado o contrário.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1840

The legatee is entitled, from the death of the testator, to the fruits and income of the legated thing, as well as to interest in the case of legacies in cash, from the expiry of the deadline for their payment or provision, unless the testator stipulated otherwise.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1841º

Se o testador legar qualquer prestação periódica, correrá o primeiro período desde a morte dele, e terá o legatário

Article 1841

If the testator leaves as a legacy a periodical installment, the first term shall start from his/her death, and the legatee

direito à dita prestação, apenas recomece novo período, ainda que faleça antes do termo dele.

§ único) O legado não será, porém, exigível, senão no fim de cada período, excepto sendo a título de alimentos, nos termos do Artigo 184º.

shall be entitled to the said installment, as soon as a new period begins, even if he/she dies before it is over.

Single §) The legacy may not, however, be demanded other than at the end of each period, except as maintenance, in accordance with article 184.

Artigo 1842º

As despesas, que se fizerem com a entrega da coisa legada, ficarão a cargo da herança, se o testador não dispuser o contrário.

Article 1842

Expenses made with the delivery of the legated thing shall be paid for from the inheritance, unless the testator stipulated otherwise.

Artigo 1843º

A coisa legada deve ser entregue com os seus acessórios, no lugar onde, e no estado em que estiver ao tempo da morte do testador.

§ único) Se o legado consistir em dinheiro, em jóias ou em outros valores, representados por títulos, qualquer que seja a espécie destes, será entregue no lugar onde se abrir a herança, salvo havendo disposição do testador ou convenção das partes em contrário.

Article 1843

The legated thing must be delivered along with its accessories at the location where and in the condition it is found at the time of the death of the testator.

Single §) If the legacy consists of cash, jewelry or other valuables, represented by documents, whatever their sort, it shall be delivered at the location where the inheritance is opened, unless there is a stipulation of the testator or an agreement amongst the parties to the contrary.

Artigo 1844º

Se aquele, que legar alguma propriedade, lhe ajuntar depois novas aquisições, estas, ainda que contíguas, não farão parte do legado sem nova declaração do testador.

§ único) Isto não se entenderá, porém, a respeito das benfeitorias necessárias, úteis ou voluptuárias feitas no próprio prédio legado.

Article 1844

If a person who leaves certain immovable property as a legacy subsequently adds new acquisitions to it, the latter, even if contiguous, shall not be part of the legacy without a new declaration from the testator.

Single §) The same shall not be understood, however, regarding necessary, useful or luxurious improvements made to the legated immovable property itself.

Artigo 1845º

Se a coisa legada se achar onerada com algum foro, quinhão, servidão ou

Article 1845

If the legated thing is burdened with a canon, share in the rent, easement or

qualquer outro encargo, que lhe seja inerente, passará com o mesmo encargo ao legatário.

§ único) Se, porém, a coisa estiver obrigada por foros, quinhões, ou outros ónus atrasados, serão estes pagos por conta da herança.

any other burden that is inherent to it, it shall be passed to the legatee along with this burden.

Single §) If, however, the thing is burdened with previously owed canons, shares in the rent or other onus, these shall be paid for from the inheritance.

Artigo 1846º

Os imóveis, que os herdeiros houverem do testador, ficarão, nos termos do Artigo 906º, nº 8º, hipotecariamente obrigados ao pagamento dos legados.

§ único) Se, porém, algum dos herdeiros for especialmente obrigado a esse pagamento, só poderá o legatário exercer o seu direito hipotecário sobre os imóveis, que couberem em partilha ao dito herdeiro.

Article 1846

Immovable property received by the heirs from the testator shall be, in accordance with no. 8 of article 906, charged with a mortgage, for the payment of the legacies.

Single §) If, however, one of the heirs is especially liable for that payment, the legatee may only exercise his/her right corresponding to the mortgage over the immovable property awarded to the said heir in the partition.

Artigo 1847º

Se o testador legar coisa de algum dos co-herdeiros, serão os outros obrigados a indemnizá-lo proporcionalmente, se o testador outra coisa não dispuser.

Article 1847

If the testator leaves a thing belonging to one of the co-heirs, the other heirs shall be obliged to compensate him/her proportionately, unless the testator stipulated otherwise.

Artigo 1848º

Se a herança ou o legado for deixado sob a condição, de que o herdeiro ou o legatário não dê ou não faça tal coisa, poderão ser obrigados os ditos herdeiro ou legatário, a requerimento dos interessados, a prestar caução de que assim o cumprirão, salvo o que fica disposto no Artigo 1808º.

Article 1848

If the inheritance or legacy is left subject to the condition that the heir or legatee abstain from giving away or doing something, the said heir or legatee may be obliged, at the request of the interested parties, to provide a security for the fulfillment of the condition, not precluding the provisions of article 1808.

Artigo 1849º

Se o legado for deixado condicionalmente, ou só para ter efeito passado

Article 1849

If the legacy is left conditionally, or only to come into force after a certain

certo tempo, poderá o legatário exigir, que aquele que deve prestar esse legado dê caução para segurança deste.

Artigo 1850º

Se o testamento for declarado nulo depois do pagamento do legado, tendo esse pagamento sido feito em boa fé, ficará quite o herdeiro nomeado para com o verdadeiro herdeiro, entregando o resto da herança, salvo o direito deste contra o legatário.

§ único) A mesma disposição é aplicável aos legados com encargos.

Artigo 1851º

Se o legatário com encargo não receber, por culpa sua, todo o legado, será o encargo reduzido proporcionalmente, e, se a coisa legada for evicta, poderá o legatário repetir o que houver pago.

Artigo 1852º

Se algum dos co-herdeiros instituídos falecer primeiro que o testador, repudiar a herança ou se tornar incapaz de a receber, acrescerá a sua parte aos outros co-herdeiros, salvo se o testador houver disposto outra coisa.

Artigo 1852º

Se algum dos co-herdeiros instituídos falecer primeiro que o testador, repudiar a herança ou se tornar incapaz ou indigno de a receber, acrescerá a sua parte aos outros co-herdeiros instituídos, salvo se o testador houver disposto outra coisa.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

period, the legatee may demand that the person who is to pay the legacy provide a security to ensure its safety.

Article 1850

If the will is declared null and void after the payment of the legacy, this payment having been made in good faith, the appointed heir shall have no liability to the true heir, surrendering the rest of the inheritance, notwithstanding the right of the latter against the legatee.

Single §) The same provision is applicable to burdened legacies.

Article 1851

If the burdened legatee does not receive, due to a fault of his/her own, the entire legacy, the burden shall be reduced proportionately, and if the legated thing is evicted, the legatee may have what he/she paid returned to him/her.

Article 1852

If one of the appointed co-heirs dies before the testator, repudiates the inheritance or becomes legally incapable of receiving it, his/her portion shall accrue to the remaining co-heirs, unless the testator stipulated otherwise.

Article 1852

If one of the appointed co-heirs dies before the testator, repudiates the inheritance or becomes legally incapable or unworthy of receiving it, his/her portion shall accrue to the remaining appointed co-heirs, unless the testator stipulated otherwise.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1853º

O direito de acrescer também competirá aos herdeiros, se os legatários não quiserem ou não puderem receber o respectivo legado.

Artigo 1854º

Entre legatários não haverá direito de acrescer; mas, se a coisa legada for indivisível, ou não puder dividir-se sem deterioração, terá o co-legatário opção, ou para conservar o todo, repondo aos herdeiros o valor da parte caduca, ou para haver deles o valor do que direitamente lhe pertencer, entregando-lhes a coisa legada.

§ único) Se, porém, sendo o legado onerado com algum encargo, este caducar, lucrará o legatário o proveito que daí lhe resultar, se o testador não tiver ordenado o contrário.

Artigo 1855º

Os herdeiros, que houverem o acrescido sucederão em todos os direitos e obrigações, que caberiam àquele que não quis ou não pôde receber a deixa, se a houvera aceitado.

Artigo 1856º

Os herdeiros, a quem a dita porção acrescer, poderão repudiá-la, se ela tiver encargos especiais impostos pelo testador; mas, neste caso, a dita porção reverterá para a pessoa ou pessoas, a favor de quem esses encargos houverem sido constituídos.

Artigo 1857º

Os legatários têm o direito de reivindicar de qualquer terceiro a coisa legada, quer mobiliária quer imobiliária, contanto que seja certa e determinada.

Article 1853

Heirs shall also have the right of accretion if the legatees are unwilling or unable to receive the respective legacy.

Article 1854

Amongst the legatees there shall be no right of accretion; but if the legated thing is indivisible, or cannot be divided without deterioration, the co-legatee shall have the option to keep the whole, paying the heirs for the value of the lapsed part, or to receive from these the value duly belonging to him/her, surrendering to them the legated thing.

Single §) If, however, the legacy is somehow burdened and the burden lapses, the legatee shall enjoy the benefit resulting therefrom, unless the testator stipulated otherwise.

Article 1855

Heirs who receive the accruement shall succeed in all the rights and obligations that would belong to the person or persons who were unwilling or unable to receive the legacy, if he/she had accepted it.

Article 1856

Heirs who receive the said accruement may repudiate it, if it has special burdens imposed by the testator; but, in this case, the portion in question shall revert to the person or persons in favour of whom those burdens have been created.

Article 1857

Legatees are entitled to demand the legated thing from any third party, be it movable or immovable property, as long as it is certain and specified.

COMMENTARY TO ARTICLES 1790 TO 1857

This Section deals, *inter alia*, with the distinction between an heir and a legatee. As was mentioned above, this is an important distinction considering the differences between their respective legal regimes, particularly with regard to liability for the inheritance's debts and charges[118]. In order to interpret it correctly, regarding the heirs' liability, article 1792 must be read together with article 2019, which apparently contradicts it. According to Cunha Gonçalves[119], article 2019 completes articles 1792. When the latter states that "*the heir is liable for all the debts of the inheritance*", article 2019 adds "*insofar as they can be paid from the inheritance itself*"; and when article 1792 states "*even with his/her own property*", the single § of article 2019 adds "*if he/she cannot prove that the inheritance did not contain any other property aside from that which he/she put forward and was executed by the creditors*".

Legatees are not liable for the legacy's charges beyond what can be supported by that same legacy and they are themselves creditors of the heirs (articles 1792, 2056 and 2060). Creditors may only initiate legal proceedings against the legatees after exhausting the heirs' property (article 2061). Different rules apply if the inheritance was entirely distributed in legacies (article 1794).

Another important difference between the regime applicable to heirs and the regime applicable to legatees concerns the right of accretion, which is only given to heirs (articles 1852, 1853 and 1854)[120]. Conversely, under the Portuguese Civil Code of 1966, there is a right of accretion between legatees, when these are appointed in relation to the same object (article 2302).

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[118] See commentary to articles 1735 to 1738.

[119] *Tratado*, Vol. X, page 18.

[120] On the reasons for this legal regime, see Cunha Gonçalves, *Tratado*, Vol. X, page 25.

Article 1852's listing of cases of right of accretion is exhaustive, as can be deduced from article 1968, which does not allow for this right in any other case aside from the ones mentioned in that provision[121]. Articles 1852 and 1853 must be read together with article 1759, no.s 1, 3 and 4. In the cases of expiry of the testamentary disposition mentioned in the latter article, the property in question is not transmitted to the intestate or testamentary heirs of the appointed heir or legatee, whose right has expired, nor to the intestate heirs of the author of the inheritance, but instead it accrues to the testamentary co-heirs.

Since the right of accretion derives from the law, once its requisites are met, the co-heirs benefiting from it need not accept the inheritance again. The accruing heirs succeed to all the rights and obligations of the person who could not or did not want to accept (article 1855), but if the accrued share has special charges, the heirs may repudiate it (article 1856). The law thus prevents overly burdensome charges from complicating the situation of the person with the right of accretion. Aside from this exception, co-heirs may not repudiate the accrued part and accept the rest of the inheritance (article 2022).

Cunha Gonçalves[122] argues that the partition of the accrued share shall be proportional to the hereditary share of each heir, rather than equally split. This option was included in the Portuguese Civil Code of 1966, which states in article 2301, no. 2, that: "*If the heirs' share are unequal, the part of the heir who could not or did not want to accept is divided among the others, in accordance with their respective proportions*". The author of the inheritance may prevent the accruement from taking place if, having foreseen the expiry of his/her disposition relating to a certain heir, he/she appoints a substitute (article 1852).

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[121] Cunha Gonçalves, *Tratado*, Vol. X, page 27, where the author uses additional arguments to reach the above mentioned conclusion.

[122] *Tratado*, Vol. X, page 32.

Several of this Section's provisions aim at facilitating the interpretation of the will, such as articles 1797, 1798, 1799, 1831, 1832 and 1836, as well as interpreting clauses of wills relating to the specification of the legated things, such as articles 1801 to 1807, 1817 to 1821 and 1827 *et seq*. Other provisions included in this Section were already mentioned above. Thus, articles 1808 and 1809 regulate some of the particularly discussed conditions[123]; articles 1811 and 1814 indicate some of the cases of expiry of testamentary dispositions[124]; articles 1833 and 1834 regulate the legacy of the right of usufruct[125]; articles 1835 and 1849 indicate the admissibility of the appointment of a legatee subject to a term[126]; and article 1837 regulates errors concerning the person or object of the legacy[127].

With regard to this Section, it is also important to mention article 1838 *et seq*., which regulate how to comply with a legacy. In accordance with article 1838 and its single §, the heirs are jointly liable for surrendering the legacies. However, in most cases, this is an obligation of the executor of the will. The same article, as well as article 1839, implies that the legatee may not take possession of the legated thing, since he/she must request its surrendering and possession from the person upon whom the law or the testator imposed this obligation. The person surrendering the legacy may, thus, previously confirm the right of the legatee and, therefore, the surrendering of the legacy is not required for the transmission of the property of the legated thing, since it legally functions as an approval of the legacy[128].

We conclude the comments to this Section with a reference to two mistakes made by the legislator therein, pointed out by Cunha

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[123] See comments under Section I of Chapter II.

[124] *Idem*.

[125] See comments under Chapter I.

[126] See comments under Section I of Chapter II.

[127] *Idem*.

[128] Cunha Gonçalves, *Tratado*, Vol. X, page 102.

Gonçalves. Firstly, article 1800 subjects the right to the inheritance administration expenses to there having been an acceptance under the benefit of inventory. To this author[129], the legislator should have changed this provision, to render it compatible with what was foreseen in article 2019. In the original version of the Code, the heir's limited liability was dependent on acceptance under the benefit of inventory. Since that no longer occurs, the right in question should not depend on that form of acceptance, which would be "unfair", in the words of Cunha Gonçalves. Secondly, we should take note of the error included in article 1851. Where it is written "*due to a fault of his/her own*", it should be written "*to no fault of his/her own*", since this is the "*natural, logical and just*" solution, according to the same author[130].

[129] Cunha Gonçalves, *Tratado*, Vol. X, pages 22 and 23.

[130] Cunha Gonçalves, *Tratado*, Vol. X, page 122.

Código Civil de 1867

SECÇÃO V
DAS SUBSTITUIÇÕES

Artigo 1858º

Pode o testador substituir uma ou mais pessoas ao herdeiro, ou herdeiros instituídos, ou aos legatários, para o caso em que os herdeiros ou os legatários não possam ou não queiram aceitar a herança ou o legado: é o que se chama substituição vulgar ou directa.

§ único) Esta substituição expira, logo que o herdeiro aceite a herança.

Artigo 1859º

O testador, que tiver filhos ou outros descendentes debaixo do pátrio poder, os quais não hajam de ficar por morte do testador sob poder de outro ascendente, poderá substituir-lhes os herdeiros e os legatários que bem lhe parecer, para o caso em que os ditos filhos ou outros descendentes faleçam, antes que perfaçam catorze anos de idade, sem distinção de sexo: é o que se chama substituição pupilar

Artigo 1860º

A substituição pupilar ficará sem efeito, logo que o substituído perfaça a idade mencionada no Artigo precedente, ou faleça, deixando descendentes sucessíveis.

Artigo 1861º

A disposição do Artigo 1859º é aplicável, sem distinção de idade, ao caso em que o filho ou outro descendente

Civil Code of 1867

SECTION V
SUBSTITUTIONS

Article 1858

The testator may substitute the appointed heir or heirs or legatees with one or more persons, in case these are unable or unwilling to accept the inheritance or legacy: this is called common or direct substitution

Single §) This substitution lapses as soon as the heir accepts the inheritance.

Article 1859

The testator who has children or other descendants subject to parental authority, who, upon his/her death, will not be placed under the authority of another ascendant, may substitute them with the heirs and legatees that he/she sees fit, for the eventuality of the said children or other descendants dying before reaching the age of fourteen, regardless of gender: this is called pupilar substitution.

Article 1860

Pupilar substitution shall be without effect as soon as the substituted person reaches the age mentioned in the preceding article, or dies leaving descendants that can succeed him/her.

Article 1861

The provisions of article 1859 are applicable, regardless of age, to the case where the child or other descendant is of

seja demente, contanto que a demência tenha sido judicialmente declarada: é o que se chama substituição quase pupilar.

unsound mind, as long as the unsoundness has been declared by a court of law: this is called quasi-pupilar substitution.

Artigo 1862º

A substituição, mencionada no Artigo precedente, ficará sem efeito, se o demente recuperar o juízo.

Article 1862

The substitution mentioned in the preceding article shall be without effect if the unsound person becomes sane.

Artigo 1863º

A substituição mencionada nos Artigos 1859º e 1861º só pode abranger os bens, de que o substituto poderia dispor, não se achando impedido ao tempo da sua morte, e que haja adquirido por via do testador.

Article 1863

The substitution mentioned in articles 1859 and 1861 may only encompass the property which the substitute could have disposed of, not being prevented at the time of his/her death, and which he/she acquired through the testator.

Artigo 1864º

Os chamados à substituição recebem a herança ou o legado com os mesmos encargos, excepto no que for puramente pessoal, com que os receberiam os herdeiros ou os legatários substituídos, salvo se outra coisa tiver sido declarada.

Article 1864

Those called to substitute others shall receive the inheritance or legacy with the same burdens, except for what is purely personal, that the substituted heirs or legatees would have received them with, unless it has been otherwise declared.

Artigo 1865º

Quando os co-herdeiros ou os legatários por partes iguais forem substituídos reciprocamente, entender-se-á, que o foram na mesma proporção.

§ único) Se, porém, os chamados à substituição forem mais que os instituídos, e nada se declarar, entender-se-á, que foram substituídos por partes iguais.

Article 1865

When co-heirs or legatees with equal shares are reciprocally substituted, it shall be considered that they were so in the same proportion.

Single §) If, however, those called to substitute others are in greater number than the appointed ones, and nothing is declared, it shall be considered that they were substituted in equal shares.

Artigo 1866º

A disposição testamentária, pela qual algum herdeiro ou legatário é encarregado, de conservar e transmitir por sua morte a um terceiro a herança ou o

Article 1866

A testamentary disposition according to which an heir or legatee is entrusted with preserving and transmitting the inheritance or legacy to a third party,

legado, diz-se substituição fideicomissária ou fideicomisso.

Ver também o assento de 14 de Dezembro de 1937: «*O legado de certa coisa a uma pessoa, sob a condição de passar a terceira, se aquela falecer sem descendentes, é condicional e válido e não substituição fideicomissária*» (Diário do Governo, I série, de 28 de Dezembro de 1937)

upon his/her death, is called fideicommissary substitution or *fidei commissum*.

See also the case-law creating judgment of 14 December 1937: "*The legacy of a specific thing to one person, under condition that it be passed on to a third person if that person dies without descendants, is conditional and valid, and it is not a fideicommissary substitution*" (Official Gazette, Series I, of 28 December 1937)

Artigo 1867º

São proibidas para o futuro as substituições fideicomissárias, excepto:

1º) Sendo feitas por pai ou mãe nos bens disponíveis, em proveito dos netos, nascidos ou por nascer;

2º) Sendo feitas em favor dos descendentes, em primeiro grau, de irmãos do testador.

Article 1867

Fideicommissary substitutions for the future are forbidden, except if:

1) They are made by a father or mother regarding the disposable property, for the benefit of grandchildren, already born or yet to be born;

2) They are made in favour of descendants, in the first degree, of the testator's siblings.

Artigo 1867º

São proibidas as substituições fideicomissárias em mais de um grau.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1867

Fideicommissary substitutions for more than one degree are forbidden.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1868º

O fideicomissário adquire direito à sucessão, desde o momento da morte do testador, ainda que não sobreviva ao fiduciário. Este direito passa aos seus herdeiros.

Article 1868

The fideicommissary acquires the right to the succession, from the moment of the death of the testator, even if he/she does not outlive the fiduciary. This right is passed on to his/her heirs.

Artigo 1868º

Se o fideicomissário não aceitar a herança ou legado, ou se falecer antes do fiduciário, caducará a substituição, ficando o fiduciário com a propriedade definitiva dos bens.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1868

If the fideicommissary does not accept the inheritance or legacy, or if he/she dies before the fiduciary, the substitution shall lapse, and the fiduciary shall have the definitive ownership of the property.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1869º

A nulidade da substituição fideicomissária não envolverá a nulidade da instituição ou do legado: apenas se haverá por não escrita a cláusula fideicomissária.

Artigo 1870º

Não se reputará fideicomisso a disposição, pela qual algum testador deixe o usufruto de certa coisa a uma pessoa, e a propriedade a outra, contanto que o usufrutuário ou o proprietário não seja encarregado de transmitir a outrem por sua morte, o dito usufruto ou a dita propriedade.

Artigo 1870º

Não são substituições fideicomissárias as disposições pelas quais o testador deixe o usufruto a uma pessoa e a propriedade a outra, ou o usufruto sucessivo, nos termos do Artigo 2199º. O usufruto sucessivo só nos termos deste Artigo é permitido.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1871º

Serão havidas por fideicomissárias e, como tais, defesas:

1º) As disposições com proibição de alienar;

2º) As disposições, que chamarem um terceiro ao que restar da herança ou do legado, por morte do herdeiro ou do legatário;

3º) As disposições, que impuserem ao herdeiro ou ao legatário o encargo de prestar a mais de uma pessoa, sucessivamente, certa renda ou pensão.

Artigo 1871º

São havidas como fideicomissárias e, como tais, válidas num grau:

Article 1869

The nullity of the fideicommissary substitution shall not imply the nullity of the heir institution or of the legacy: the fideicommissary clause shall simply be considered as not having been written.

Article 1870

A disposition by which the testator leaves the right of usufruct of a certain thing to one person, and its ownership to another, shall not be considered a fidei commissum, as long as the person with the right of usufruct or the owner is not entrusted with transmitting to another person, upon his/her death, the said usufruct or ownership.

Article 1870

Dispositions by which the author of a will leaves the right of usufruct to one person and the ownership to another, or the right of successive usufruct, in accordance with article 2199, shall not be considered fideicommissary substitutions. Successive usufruct is only allowed in accordance with this article.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1871

The following shall be considered fideicommissary and, therefore, forbidden:

1) Dispositions with prohibition of alienating;

2) Dispositions calling a third party to receive whatever is left of the inheritance or legacy upon the death of the heir or legatee;

3) Dispositions which impose on the heir or legatee the burden of paying a certain rent or pension to more than one person, successively.

Article 1871

The following shall be considered fideicommissary and, therefore, valid only within one degree:

1º) As disposições com proibição de alienar por actos inter vivos;

2º) As disposições que chamarem um terceiro ao que restar da herança ou do legado por morte do herdeiro ou do legatário.

§ único) A faculdade de alienar atribuída ao fiduciário, por força do nº 2º, só lhe é permitida depois de o fiduciário não ter bens alguns próprios, com exclusão do prédio da sua residência habitual, e depois de ter obtido para isso autorização do fideicomissário, ou o seu suprimento judicial.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

1) Dispositions with prohibition of alienating by *inter vivos* acts;

2) Dispositions calling a third party to receive whatever is left of the inheritance or legacy upon the death of the heir or legatee.

Single §) The possibility of alienating, granted to the fiduciary as a result of no. 2, is only available after the fiduciary no longer has property of his/her own, aside from the immovable property in which he/she usually resides, and after obtaining the authorisation of the fideicommissary for this purpose, or after this authorisation is overcome by a court of law.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1872º

A proibição do Artigo precendente não abrange as prestações de qualquer quantia, impostas aos herdeiros ou aos legatários a favor dos indigentes, para dote de raparigas pobres, ou a favor de qualquer estabelecimento ou fundação de mera utilidade pública.

§ 1º) Neste caso, porém, o encargo deverá ser consignado em certos e determinados prédios, e será sempre lícito ao herdeiro, ou ao legatário onerado, converter a prestação no pagamento do capital correspondente em dinheiro.

§ 2º) Os herdeiros ou os legatários obrigados a tais encargos, não ficarão, todavia, sujeitos a nenhuma ordem especial de sucessão, que não seja a ordenada na lei geral.

Article 1872

The prohibition of the preceding article does not encompass installments of any amount, imposed upon heirs and legatees in favour of indigent persons, for the dowry of poor girls, or in favour of an establishment or foundation of public utility.

§ 1) In this case, however, the burden should be imposed upon specific and determined immovable property, and the encumbered heir or legatee may at any time convert the installment in a payment of the corresponding capital in cash.

§ 2) The heirs or legatees thus burdened shall not, however, be subject to any special order of succession, other than the one provided for under general law.

Artigo 1872º

São válidas as disposições que impuserem ao herdeiro ou legatário o encargo de pagar sucessivamente prestações de qualquer quantia a favor de indigentes, para dotes de raparigas pobres, ou a favor de qualquer estabelecimento ou fundação de utilidade pública.

Article 1872

Dispositions that impose upon an heir or legatee the burden of paying successive installments of any amount in favour of indigent persons, for the dowry of poor girls, or in favour of an establishment or foundation of public utility, are valid.

§ 1º) Neste caso, porém, o encargo deverá ser consignado em certos e determinados prédios, e será sempre lícito ao herdeiro, ou ao legatário onerado, converter a prestação no pagamento do capital correspondente em dinheiro.

§ 2º) Os herdeiros ou os legatários, obrigados a tais encargos, não ficarão, todavia, sujeitos a nenhuma ordem especial de sucessão que não seja a ordenada na lei geral.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1873º

Os herdeiros, ou os legatários cujas heranças ou cujos legados estiverem sujeitos a substituições fideicomissárias, serão havidos por meros usufrutuários.

Artigo 1873º

É permitido, para fins de utilidade pública, deixar os bens com a condição de que, se se extinguir a instituição que tinha de cumprir a vontade do testador, os mesmos bens passarão para outra instituição ou pessoa moral por ele designada.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1874º

Os fideicomissos temporários de pretérito só produzirão o seu efeito no primeiro grau de substituição, achando-se abertos por morte do testador, ao tempo da promulgação do presente código.

Artigo 1874º

As disposições dos Artigos antecedentes aplicam-se igualmente aos fideicomissos de pretérito e de futuro.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

§ 1) In this case, however, the burden should be imposed upon specific and determined immovable property, and the encumbered heir or legatee may at any time convert the installment in a payment of the corresponding capital in cash.

§ 2) The heirs or legatees thus burdened shall not, however, be subject to any special order of succession, other than the one provided for under general law.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1873

Heirs or legatees whose inheritances or legacies are subject to fideicommissary substitutions shall be considered as merely having the right of usufruct.

Article 1873

For the purposes of public utility, property may be left with the condition that, if the institution that was to comply with the will of the testator is extinguished, the same property shall be pass to another institution or legal entity appointed by him/her.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1874

A previous temporary fidei commissum shall only produce its effects in the first degree of substitution if it has been opened, due to the death of the testator, at the time of the enactment of the present code.

Article 1874

The provisions of the preceding articles are applicable both to a past and to a future *fidei commissum*.

(*As revised by Decree no. 19.126, of 16/12/1930*)

COMMENTARY TO ARTICLES 1858 TO 1874

According to Cunha Gonçalves[131], substitution is "*a disposition through which the testator appoints a second heir or legatee, in case the one appointed in the first place cannot or does not want to succeed him/her, dies before the age of puberty, or becomes incapable of making a will or of enjoying the inheritance or legacy and meeting the aims of the appointment, or through which he/she transmits the property at once to the second appointed person, but so that he/she only begins to benefit from it after the death of the first appointed person*". The legislator foresaw five types of substitution in articles 1858, 1859, 1861 and 1866, and all of them originate from Roman Law.

In direct substitution, also called common, since it is the most frequent type, there is no intermediary between the testator and the substituted person, and there is a second appointment subject to the suspensive condition that the first appointed person does not accept the inheritance. Thus, when the first appointed person accepts the inheritance, the substitution expires, in accordance with article 1858, single §. According to the same legal provision, the testator substitutes one or more persons to the heir or legatee, in case these cannot or do not want to accept the inheritance or legacy. The first appointed person cannot accept the inheritance or legacy in the following situations: when the appointment expires, including situations of right of accretion (articles 1738, 1759, 1811, 1852 and 1853), as well as in the case of the appointed person's absence or incapacity to receive (articles 1776 *et seq.*, 1235 and 1236) and, finally, when the suspensive condition upon which the appointment is dependent is not complied with[132].

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[131] *Tratado*, Vol. X, page 129.

[132] Cunha Gonçalves, *Tratado*, Vol. X, page 131.

Article 1859 relates to another type of substitution: pupilar substitution. In case the heir dies, this substitution serves to prevent the property he/she received from the testator, and which will no longer be returned to ascendants or descendants, from belonging to persons that the testator does not want to benefit, since they are not family or blood relatives, for example, even though they are intestate heirs to the minor in question, or even to prevent the property in question from reverting to the State, in the absence of heirs. This is applicable both when the heir is the child of the author of the inheritance, as well as when the heir is his/her legitimate or illegitimate grandchild or great-grandchild[133]. Taking this purpose into account, the substitution may only encompass property which the minor received from the testator, as an intestate or mandatory heir, and which the substituted person could dispose of if he/she had not been prevented at the time of his/her death (article 1863)[134].

The aim of pupilar substitution shows that it is not the exercise of parental authority that is at stake, but rather the exercise of testamentary freedom. Therefore, the reference to parental authority should not be considered to be very important, which means that pupilar substitution should not depend on the existence of that authority[135]. The legislator made a mistake in the legal provision in question, supposing that the testator could have parental authority over grandchildren or great-grandchildren, because this authority is awarded exclusively to the parents[136].

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[133] Cunha Gonçalves, *Tratado*, Vol. X, page 135.

[134] In this article the legislator clearly made a mistake, since it stipulates that substitution may only encompass the property which the "substitute" could have disposed of, not being prevented at the time of his/her death. In fact, it is the "substituted person" (a minor) that is prevented, and not the "substitute". Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 517, footnote 2.

[135] Cunha Gonçalves, *ibidem*; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 515, footnote 1.

[136] Cunha Gonçalves, *ibidem*; Pires de Lima and Antunes Varela, *ibidem*.

On the other hand, Pires de Lima and Antunes Varela[137] argue that, despite what is foreseen in article 1859, the testator may exercise this right regardless of whether the minor, upon the death of the testator, remains under the authority of any other ascendant. Thus, for example, if the mother has already died, the father may substitute the child with a successor, even if the child has living grandparents. At the core of this issue is the very reason for the existence of pupilar substitution. For this reason, and unlike these authors, we do not believe that the fact that ascendants are awarded legitimes (article 1863) is enough to exclude the legal requirement that the minor in question not be placed under the authority of any other ascendant, upon the death of the testator. This does not mean that the legislator could not have made a different choice, but the fact is he did not.

The Portuguese Civil Code of 1966 clarified some of these issues, when regulating pupilar substitution in article 2297. This article reads as follows: "1. *The parent who is not totally or partially prevented from exercising parental authority may substitute his/her children with the heirs or legatees he/she deems fit, in case the said children die before reaching the age of eighteen: this is called pupilar substitution. 2. The substitution becomes void as soon as the substituted person reaches the age of eighteen, or he/she dies leaving descendents or ascendants*"[138].

Quasi-pupilar substitution, regulated in article 1861, is very similar to the previous type of substitution, and they both have the same basis. These similarities lead Cunha Gonçalves[139] to argue that quasi-pupilar substitution also expires when the person of unsound mind dies leaving descendants in a position to succeed, as a result of article 1860, even though that situation is not included in article 1862, which relates only to situations when that person becomes sane.

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[137] *Ibidem*.

[138] Our underlining.

[139] *Tratado*, Vol. X, page 139.

There is also reciprocal substitution, when, after appointing several heirs and legatees, the testator stipulates that these will replace each other reciprocally. The legislator refers only to situations when the heirs or legatees are appointed with equal shares (article 1865). However, when they are appointed with unequal shares, the respective proportion should be observed when distributing the share of the substituted person[140]. For example, if Bernard is appointed with half of the inheritance and Albert and Paul are each appointed with ¼, and if the testator stipulates that Bernard, Paul and Albert shall substitute each other reciprocally, then, when Paul has to be substituted, Bernard shall receive ? of Paul's share, and Albert shall receive ? of that share. This situation is not encompassed by the single § of article 1865, since it includes an equal number of appointed persons and of persons called to the succession.

Despite the similarity between reciprocal substitution and the right of accretion, there is one fundamental difference: the right of accretion is imposed by law, with no need for renewed acceptance; conversely, substitution may be rejected by those who are to substitute someone else[141].

Fideicommissary substitution is the most important of the above mentioned types of substitution, considering the difficulties it raised in both doctrine and jurisprudence. In the case of fideicomissary substitution, there is a double disposition, in favour of the fiduciary and of the fideicomissary, as well as a charge imposed upon the fiduciary (who is substituted) to preserve and transmit the property, upon his/her death, to the fideicomissary (who substitutes him/her) (article 1866). Substitutions are not allowed for more than one degree (article 1867), so as to avoid fideicomissary substitutions in an exaggerated number of degrees, with the economic inconvenience

[140] Cunha Gonçalves, *Tratado*, Vol. X, page 141.

[141] Cunha Gonçalves, *Tratado*, Vol. X, page 142.

that the fiduciary becomes, in a way, an owner subject to a resolutive condition[142].

Substantial controversy developed around the issue of whether a conditional *fidei comissum* should be considered a *fidei comissum* and thus be subject to the applicable restrictive provisions. The case-law creating judgment of 14 December 1938 solved the issue by stating that "*the legacy of a certain thing to a person, subject to the condition that it be passed on to a third party, if that person dies without descendants, is conditional and valid and not a fideicomissary substitution*".

A *fidei comissum* is different from a legacy of lifelong usufruct to one person and a legacy of bare ownership to another one, since the fiduciary's right is not limited to usufruct over the respective property: he/she is an actual owner (article 1870).

If the fideicomissary does not accept the inheritance or legacy or if he/she dies before the fiduciary, the substitution expires and the fiduciary keeps the definitive ownership of the property in question (article 1868). However, these are not the only cases of expiry of the substitution, since it may also expire in the cases determined in articles 1759 and 1811, or due to previous incapacity or any other nullity of the fideicomissary appointment[143]. To Cunha Gonçalves[144], the main difference between a *fidei comissum* and a disposition of usufruct for one person together with ownership for another person is that the nullity or expiry of the right of the property's heir or legatee does not make the property revert to the usufruct legatee, unless this is explicitly stipulated by the testator. That property reverts to the testator's intestate heirs, in the absence of accruement (articles 1852 and 1853).

The nullity of a fideicomissary substitution does not imply the nullity of the appointment of an heir or legatee (article 1869), nor

[142] Cunha Gonçalves, *Tratado*, Vol. X, page 181.
[143] Cunha Gonçalves, *Tratado*, Vol. X, page 176.
[144] *Ibidem*.

does the nullity of that appointment, due to the first appointed person's incapacity to acquire, affect the substitution. In the latter case, which is not foreseen by the legislator, the fideicomissary becomes the direct heir or legatee[145]. The doctrine presented herein, relating to the nullity of the appointment, is applicable to cases of expiry (articles 1759 and 1811) and of the fiduciary's repudiation of the inheritance or legacy[146].

One final reference should be made to the cases foreseen in article 1871, which, even though they are not actual fideicomissary substitutions, share the same economic inconveniences and are, therefore, subject to the same legal regime.

[145] Cunha Gonçalves, *Tratado*, Vol. X, page 175.

[146] Cunha Gonçalves, *ibidem*.

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SECÇÃO VI
DA DESERDAÇÃO

Artigo 1875º

Os herdeiros legitimários podem ser privados pelo testador da sua legítima, ou deserdados, nos casos em que a lei expressamente o permite.

Artigo 1876º

Pode ser deserdado por seus pais:

1º) O filho, que contra a pessoa deles cometer delito a que caiba pena superior à de seis meses de prisão;

2º) O filho, que judicialmente acusar ou denunciar seus pais por delito que não seja conta a pessoa dele, ou contra as de seus cônjuges, ascendentes, descendentes ou irmãos;

3º) O filho, que, sem justa causa, recusar a seus pais os devidos alimentos.

Artigo 1877º

Os descendentes dos deserdados, que sobreviverem ao testador, haverão a legítima, de que seus ascendentes forem privados; mas não poderão estes gozar do usufruto dela.

Artigo 1878º

Os pais podem ser deserdados pelo filho, quando contra este praticarem algum dos factos mencionados no Artigo 1876º, aplicando aos pais o que ali se diz acerca dos filhos; e bem assim o pai, se

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SECTION VI
DISINHERITANCE

Article 1875

Mandatory heirs may be deprived of their legitime by the testator, or disinherited, in the cases explicitly allowed by law.

Article 1876

The following may be disinherited by the respective parents:

1) A child who commits an offence against their person subject to a penalty exceeding six months of imprisonment;

2) A child who judicially accuses or denounces his/her parents for an offence other than against his/her person, or against that of his/her spouses, ascendants, descendants or siblings;

3) A child who, without just cause, refuses due maintenance to his/her parents.

Article 1877

Descendants of disinherited persons, who outlive the testator, shall have the legitime of which their ascendants were deprived; but the latter may not enjoy its usufruct.

Article 1878

Parents may be disinherited by a child when they commit against him/her one of the facts mentioned in article 1876, what is said therein concerning children being applicable to the parents; the

atentar contra a vida da mãe, ou esta, se atentar contra a vida do pai, e não se houverem reconciliado.

father may also be disinherited if he makes an attempt on the life of the mother, as may be the mother, if she makes an attempt on the life of the father, if they have not reconciled themselves.

Artigo 1879º

As disposições dos Artigos 1876º e 1878º são aplicáveis tanto aos pais como aos outros ascendentes, e tanto aos filhos como aos seus descendentes.

Article 1879

The provisions of articles 1876 and 1878 are applicable both to parents and to other ascendants, and both to children and to their descendants.

Artigo 1880º

A deserdação só pode ordenar-se em testamento, e com expressa declaração da causa.

Article 1880

Disinheritance may only be ordered in a will, and with the explicit declaration of its grounds.

Artigo 1881º

Sendo contestada a exactidão da causa da deserdação, incumbe a prova dela aos interessados em que essa deserdação se verifique.

Article 1881

When the accuracy of the grounds for the disinheritance is challenged, the interested parties in the verification of the disinheritance shall have the burden of proving it.

Artigo 1882º

A deserdação feita sem causa expressa, ou que se não prove, ou por causa ilegítima, fará caducar só as disposições do testador, que prejudicarem a legítima do deserdado.

Article 1882

A disinheritance made without explicit grounds, or with grounds that are not proven, or with illegitimate grounds, shall cause only the dispositions of the testator which brought detriment to the disinherited person's legitime to lapse.

Artigo 1883º

O que se aproveita dos bens, de que foi excluído o deserdado, é obrigado a prestar alimentos a este, se ele não tiver outros meios de subsistência, mas não além dos rendimentos dos ditos bens, salvo se por outra causa dever os ditos alimentos.

Article 1883

The one benefiting from the property from which the disinherited person was excluded is obliged to pay maintenance to the said person, if he/she has no other means of subsistence, but not beyond the income of the said property, unless the maintenance is owed due to other reasons.

Artigo 1884º

A acção do deserdado para impugnar a deserdação prescreve dentro de dois anos, contados desde a abertura do testamento.

Article 1884

The legal action of the disinherited person to challenge the disinheritance is time-barred after two years, starting from the opening of the will.

COMMENTARY TO ARTICLES 1875 TO 1884

We have already mentioned disinheritance when discussing indignity[147]. Disinheritance is an act through which the author of the inheritance deprives a mandatory heir from his/her mandatory portion, as punishment for ingratitude (article 1875). As is indicated by Cunha Gonçalves[148], heirs do not have an absolute right to their mandatory portion. Indeed, they have a moral obligation to be grateful to the author of the inheritance. The option to disinherit is thus *"the necessary counterweight to benefits awarded to heirs who are excessively inclined to ingratitude and malice"*[149]. If the mandatory heirs are ungrateful, disinheritance is an adequate civil sanction which, as all sanctions, has strictly personal effects (article 1877). This act may only be carried out in a will and with an explicit indication of its grounds (article 1880); however, it is terminated by the revocation of the will.

Unlike the provisions of article 1782, in order for disinheritance to occur, it is not necessary for the delinquent to be convicted, sufficing that he/she be morally condemned by the author of the inheritance. To Cunha Gonçalves[150], the testimony of the author of the inheritance close to the time of his/her death should not be doubted.

To conclude, and as was mentioned above[151], with regard to indignity, the legislator foresaw a more benevolent regime for mandatory succession than for testamentary succession, only excluding the heirs when the author of the inheritance manifests that intention in his/her will[152].

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[147] See commentary to articles 1763 to 1783.

[148] Cunha Gonçalves, *Tratado*, Vol. X, page 189.

[149] *Ibidem*.

[150] *Tratado*, Vol. X, page 191.

[151] See commentary to articles 1763 to 1783.

[152] Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 527, footnote 1.

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SECÇÃO VII
DOS TESTAMENTEIROS

Artigo 1885º

O testador pode nomear uma ou mais pessoas que fiquem encarregadas da fazer cumprir o seu testamento no todo ou em parte: estas pessoas são denominadas testamenteiros.

Artigo 1886º

Só podem ser testamenteiros os que podem contrair obrigações.

Artigo 1887º

A mulher casada não pode ser testamenteira sem autorização de seu marido, salvo achando-se judicialmente separada de pessoa e bens. Essa autorização pode ser judicialmente suprida, sendo a mulher casada com separação de bens.

Artigo 1888º

Os menores não emancipados não podem ser testamenteiros, ainda que sejam para isso autorizados por seus pais ou por seus tutores.

Artigo 1889º

Os testamenteiros nomeados podem recusar o encargo; mas, se por causa da testamentaria, lhes for deixado algum legado, não o poderão exigir.

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SECTION VII
EXECUTORS

Article 1885

The testator may appoint one or more persons to be in charge of having the will complied with, in whole or in part: these persons are called executors.

Article 1886

Only those who can contract obligations may be executors.

Article 1887

A married woman may not be an executor without her husband's authorisation, unless she is judicially separated of persons and property. This authorisation may be overcome by a court of law, if the woman is married in the regime of separation of property.

Article 1888

Non-emancipated minors may not be executors, even if they are authorised for this purpose by their parents or guardians.

Article 1889

Appointed executors may refuse this office; but, if a legacy was left to them on account of their appointment as executors, they may not claim it.

Artigo 1890º

O nomeado, que pretender escusar-se, deve fazê-lo nos três dias imediatos àquele em que tiver conhecimento do testamento, perante a autoridade a quem o registo dele competir, sob pena de perdas e danos.

Article 1890

An appointed executor who intends to discharge him/herself must do so in the three days immediately following the one on which he/she becomes aware of the will, before the authority competent to register it, failing which he/she shall be liable for losses and damage.

Artigo 1891º

O nomeado, que aceitar o encargo, não pode demitir-se sem motivo justificado, precedendo audiência dos interessados, e despacho do juiz respectivo; aliás responderá por perdas e danos.

Article 1891

An appointed executor who accepts the office may not resign without justified grounds, and only after a hearing of the interested parties and an order from the respective judge; otherwise he/she will be liable for losses and damage.

Artigo 1892º

O encargo de testamenteiro é gratuito, salvo se alguma retribuição lhe foi assinada pelo testador.

Article 1892

The office of executor is gratuitous, except if the testator awarded him/her some retribution.

Artigo 1893º

No impedimento, ou por escusa do testamenteiro, incumbe aos herdeiros o cumprimento do testamento, com as seguintes declarações:

1º) Se as porções hereditárias forem desiguais, pertencerá o encargo ao mais avantajado;

2º) Se forem iguais, será encarregado da testamentaria o que for designado por nomeação dos interessados, e, não se acordando estes, ou sendo algum dos herdeiros menor, interdito ou ausente, o respectivo juiz nomeará um de entre eles.

Article 1893

In the case of impediment or discharge of the executor, it is for the heirs to comply with the will, with the following specifications:

1) If the portions of the inheritance are unequal, the office shall belong to the most benefited heir;

2) If they are equal, the office of executor shall be awarded to the person appointed by the interested parties and, in the absence of an agreement among them, or if one of the heirs is a minor or an interdicted or absentee person, the respective judge shall appoint the executor from among them.

Artigo 1894º

Os testamenteiros terão as atribuições que o testador lhes conferir, dentro dos limites da lei.

Artigo 1895º

Se o testador deixar herdeiros legitimários, não poderá autorizar o testamenteiro, para se apoderar da herança, mas só ordenar, que esses herdeiros não possam tomar conta dela, a não ser por inventário, com citação do testamenteiro.

Artigo 1896º

Se o testador deixar herdeiros não-legitimários, poderá autorizar o testamenteiro, para que se apodere da herança, mas não dispensá-lo de inventário.

Artigo 1897º

Os herdeiros, mencionados no Artigo precedente, podem evitar a detenção pelo testamenteiro, entregando-lhe as somas necessárias para suprimento das despesas a seu cargo.

Artigo 1898º

Se não houver na herança dinheiro bastante para as despesas a cargo do testamenteiro, e não quiserem, ou não puderem os herdeiros, adiantar as somas necessárias, será lícito ao dito testamenteiro promover a venda dos móveis, e, não bastando estes, a de algum ou de alguns imóveis, mas sempre com audiência dos herdeiros.

§ único) Se, todavia, algum dos herdeiros for menor, ausente ou interdito, a venda, tanto dos móveis como dos imóveis, será feita em hasta pública.

Article 1894

Executors shall have the powers awarded to them by the testator, within legal limits.

Article 1895

If the testator has mandatory heirs, he/she may not authorise the executor to take charge of the inheritance, but may only order those heirs not to be allowed to take charge of it, except by way of inventory, the executor being summoned thereto.

Article 1896

If the testator has non-mandatory heirs, he/she may authorise the executor to take charge of the inheritance, but he/she may not dispense him/her from the inventory.

Article 1897

The heirs mentioned in the previous article may avoid the executor's taking charge of the property by giving him/her the necessary sums to cover the expenses at his/her charge.

Article 1898

If the inheritance does not include enough cash for the expenses at the charge of the executor, and the heirs are unable or unwilling to advance the necessary sums, the executor may promote the sale of movable property and, if this is insufficient, of one or more immovable property, but always after hearing the heirs.

Single §) If, however, one of the heirs is a minor or an absentee or interdicted person, the sale of both movable and immovable property shall be made at public auction.

Artigo 1899º

Se o testador não especificar os deveres do testamenteiro, consistirão estes no seguinte:

1º) Em cuidar no enterro e funeral do testador, e em pagar as despesas e sufrágios respectivos, conforme a disposição do mesmo testador ou, na falta desta, conforme o costume da terra;

2º) Em fazer registar no registo competente o testamento, se o tiver em seu poder, dentro de oito dias, contados desde que teve conhecimento da morte do testador;

3º) Em vigiar pela execução das disposições testamentárias, e em sustentar, se for necessário, a validade delas em juízo e fora dele;

4º) Em facultar aos interessados o exame do testamento, se o tiver em seu poder, e em permitir, que se extraiam as cópias legais que forem exigidas.

Article 1899

If the testator did not specify the duties of the executor, these shall be the following:

1) Taking care of the burial and funeral of the testator, and paying the respective expenses and prayers for the deceased, in accordance with the disposition of the same testator or, in its absence, in accordance with the custom of the land;

2) Having the will registered in the appropriate registry, if he/she has it in his/her possession, within eight days starting from the moment he/she becomes aware of the death of the testator;

3) Supervising the enforcement of the testamentary dispositions and, if need be, defending their validity in and out of court;

4) Allowing interested parties to examine the will, if he/she has it in his/her possession, and allowing the required legal copies of it to be made.

Artigo 1900º

Sendo os herdeiros maiores, não procederá o testamenteiro a inventário judicial, salvo se assim o requerer algum dos interessados.

§ único) O testamenteiro não tomará, porém, conta dos bens do testador, sem que os faça arrolar por um escrivão ou tabelião, com citação dos interessados.

Article 1900

If the heirs are majors, the executor shall not move for a judicial inventory, unless one of the interested parties requires it.

Single §) The executor shall not, however, take charge of the deceased's property without having a list of it drawn up by a court clerk or public notary, summoning the interested parties.

Artigo 1901º

Havendo herdeiros ou legatários menores, interditos ou ausentes, dará o testamenteiro conhecimento da herança, ou do legado, ao respectivo juiz.

Article 1901

If some of the heirs or legatees are minors, interdicted persons or absentees, the executor shall inform the respective judge of the inheritance or legacy.

Artigo 1902º

Se o testador houver encarregado o testamenteiro, de empregar o produto de certa parte da herança em alguma fundação, ou aplicação pia, ou de utilidade pública, será o testamenteiro igualmente obrigado a proceder ao inventário, e à venda dos ditos bens em hasta pública, com citação dos interessados, ou seus legítimos representantes, e intervenção do Ministério Público.

Artigo 1902º

Se o testador houver encarregado o testamenteiro de empregar o produto de certa parte da herança em alguma fundação ou aplicação pia ou de utilidade pública, será o testamenteiro igualmente obrigado a proceder ao inventário e à venda dos ditos bens em hasta pública, com citação dos interessados, ou de seus legítimos representantes e intervenção do Ministério Público.

§ único) Esta disposição não se aplica no caso de a herança ou legado serem deixados, para os mencionados fins, a corporação já existente com capacidade jurídica.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

Article 1902

If the deceased has entrusted the executor with using the product of a certain part of the inheritance for a foundation or pious use, or for public utility, the executor shall also be obliged to carry out an inventory, and to sell the said property at a public auction, after summoning the interested parties or their legal representatives and with the intervention of the Public Prosecutor.

Article 1902

If the deceased has entrusted the executor with using the product of a certain part of the inheritance for a foundation or pious use, or for public utility, the executor shall also be obliged to carry out an inventory and to sell the said property at a public auction, after summoning the interested parties or their legal representatives, and with the intervention of the Public Prosecutor.

Single §) This provision shall not apply in the case of an inheritance or legacy left, for the above mentioned purpose, to an already existing legally capable corporation.

(As revised by Decree no. 19.126, of 16/12/1930)

Artigo 1903º

Quando no testamento não houver sido assinado prazo para o seu cumprimento, deve o testamenteiro cumpri-lo dentro de um ano, contado desde o dia em que tomar conta do dito encargo, ou desde aquele em que terminar o litígio, que, porventura, se haja suscitado sobre a validade ou nulidade do testamento.

§ 1º) O testamenteiro, todavia, conserva sempre o direito de vigiar pela execução das disposições não cumpridas,

Article 1903

When the will did not foresee a deadline for its execution, the executor must do so within one year, starting from the day in which he/she took charge of the office, or from the day in which the dispute concerning the validity or nullity of the will is concluded, if such a dispute arose.

§ 1) However, the executor will always have the right to supervise the execution of dispositions that have not been com-

e de requerer as providências conservatórias, que parecerem necessárias.

§ 2º) O testamenteiro pode, outrossim, no caso do Artigo 1902º, continuar na execução do testamento, pelo tempo que for necessário para cumprir o legado, ou legados, se o testador assim o houver determinado.

§ 3º) Se o testamenteiro não executar, podendo, o seu encargo no tempo assinado, perderá a retribuição, que lhe tiver sido deixada, e será executado o testamento por aqueles a quem tocaria cumpri-lo, se testamenteiro não houvesse.

plied with, and to request the conservatory measures deemed necessary.

§ 2) The executor may also, in the case of article 1902, continue the execution of the will for as long as required to comply with the legacy or legacies, if the testator so determined.

§ 3) If the executor does not execute his/her charge in the determined period, and could have done so, he/she shall lose the retribution that had been left to him/her, and the will shall be executed by those who would have this obligation if there were no executor.

Artigo 1904º

Se mais de um testamenteiro tiver aceitado a testamentaria, e algum ou alguns, depois, se abstiverem de tomar parte na execução do testamento, valerá o que os restantes fizerem; mas serão todos solidariamente responsáveis pelos bens da herança, de que tiverem tomado conta.

§ único) Se os testamenteiros, que tiverem aceitado não puderem vir a acordo, quanto ao modo de executar o testamento, caducará a testamentaria, passando a execução do testamento a quem competiria, se os testamenteiros faltassem.

Article 1904

If more than one executor accepted this office and one or some of them subsequently fail to take part in the execution of the will, the actions of the remaining executors shall be valid; but all will be jointly liable for the property of the inheritance that they took charge of.

Single §) If the executors which accepted the office are unable to reach an agreement as to the manner of executing the will, the appointment of the executors shall lapse, the said execution being entrusted to the person who would have this obligation if there were no executors.

Artigo 1905º

Os testamenteiros são obrigados a dar conta da sua gerência aos herdeiros.

§ único) No caso do Artigo 1902º, as contas serão dadas à competente autoridade administrativa.

Article 1905

The executors are obliged to account for their management to the heirs.

Single §) In the case of article 1902, the accounts shall be presented to the competent administrative authority.

Artigo 1905º

Os testamenteiros são obrigados a dar conta da sua gerência aos herdeiros, ou aos legítimos representantes destes.

Article 1905

The executors are obliged to account for their management to the heirs and to their legal representatives.

§ único) No caso do Artigo 1902º as contas serão dadas por apenso ao inventário.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Single §) In the case of article 1902, the accounts shall be presented as appended to the inventory.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1906º

O encargo do testamenteiro não se transmite a herdeiros, nem pode ser delegado.

Article 1906

The office of executor is not transmissible to heirs, nor may it be delegated.

Artigo 1907º

Se o testador houver legado aos testamenteiros conjuntos alguma retribuição, a parte, do que se escusar, ou não puder aceitar o encargo, acrescerá à dos outros.

Article 1907

If the testator left the joint executors some form of retribution, the part thereof of the person who discharges him/herself or is unable to accept the office, shall accrue to the part of the others.

Artigo 1908º

As despesas feitas pelo testamenteiro, no cumprimento do seu encargo, serão abonadas pela massa da herança.

§ único) As despesas miúdas, de que não é costume exigir-se recibo, serão abonadas pela declaração jurada do dito testamenteiro.

Article 1908

Expenses made by the executor, in exercising his/her office, shall be paid from the inheritance.

Single §) Small expenses, for which it is not a custom to ask a receipt, shall be paid upon a sworn statement of the said executor.

Artigo 1909º

O testamenteiro, que se houver com dolo ou má fé no cumprimento do seu encargo, será responsável por perdas e danos, e poderá ser judicialmente removido a requerimento dos interessados.

Article 1909

An executor who is considered to have used deceit or to have been in bad faith while exercising his/her office, shall be liable for losses and damage, and may be removed by a court of law at the request of the interested parties.

COMMENTARY TO ARTICLES 1885 TO 1909

The testator may appoint one or more persons to be in charge of having his/her will complied with (article 1885). Such persons are called executors. However, it is not necessary to appoint an executor, since it is the heirs' obligation to comply with the will, as was mentioned relating to articles 1838 and 1839[153]. Thus, if the executor is legally prevented from carrying out these functions, or discharges him/herself or is removed, or if the respective appointment expires, it is up to the heirs to comply with the will (article 1893).

Article 1886 relates to persons who are capable of being executors, and the following articles mention some of the incapacities for this purpose (article 1887 and 1888). The relevant moment to determine this capacity is that of the testator's death, since it is then that the executor begins to carry out his/her functions[154].

The office of executor is gratuitous, unless the testator stipulated otherwise (article 1892), and personal (article 1906). However, this does not mean that the executor cannot grant someone else a mandate in his/her name, since in doing so he/she does not delegate functions, but instead carries them out through an auxiliary[155]. This charge may further imply the executor's liability for losses and damage caused when exercising his/her office with deceit or in bad faith (article 1909).

It was already mentioned[156] that article 1780 also includes a cause of indignity relating to the executor, reproducing the provisions of article 1889. Even though the latter provision indicates that the

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[153] See commentary to articles 1763 to 1783.

[154] Cunha Gonçalves, *Tratado*, Vol. X, page 210.

[155] Cunha Gonçalves, *Tratado*, Vol. X, page 211.

[156] See commentary to articles 1763 to 1783.

executor may not claim what was left to him/her in the will, when he/she discharges him/herself or is removed, with no further distinction, we agree with Cunha Gonçalves[157] that, in this case, the executor only loses what was left to him/her in the will on account of the office of executor. Otherwise, a legacy based only on friendship could be jeopardised, for example, which seems to go beyond the aim of the provision in question.

Executors have the powers awarded to them by the testator, within legal limits (article 1894). Their main function is to surrender the legacies, which should be considered included in the expenses mentioned in articles 1897 and 1898. As discussed above, concerning article 1838, legacies should only be requested from the heirs when there is no executor. In the latter case, heirs are legally in possession of the assets – they are the ones who owe the assets –, but it is the executor who actually surrenders those assets[158].

The executor's obligation to pay the expenses that come with this office, in accordance with articles 1897 and 1898, does not encompass the payment of succession debts. This payment is not included in the execution of the will, which is the executor's function. However, article 1894 is wide enough to allow the testator to award the executor the responsibility for paying his/her debts, especially considering that legacies may only be paid after those debts[159].

In accordance with article 1895, if there are mandatory heirs, the testator may not authorise the executor to take charge of the inheritance, since, if he/she did so, those heirs would be deprived of the possession of the property corresponding to their mandatory portion, since that property is included in the inheritance. If the mandatory heirs take charge of the inheritance, the integrity of the disposable portion, which includes the legacies that should be

[157] *Tratado*, Vol. X, pages 211 and 212.

[158] Cunha Gonçalves, *Tratado*, Vol. X, page 224.

[159] Cunha Gonçalves, *Tratado*, Vol. X, page 225.

surrendered by the executor, is guaranteed through the inventory which the testator may impose upon those heirs (article 1985). In any case, the executor may claim the material objects left to legatees, since these belong to the disposable portion, not to the mandatory portion.

If there are no mandatory heirs, the testator may authorise the executor to take charge of the inheritance (article 1896). This authorisation is only possible when all the heirs are majors, capable and known for sure to exist, otherwise an inventory relating to orphans must be conducted and all the inheritance's property must be surrendered to the respective head of the family[160]. This is a *de facto* possession, as was mentioned above, since the legal possession of the inheritance is transmitted to the heirs upon the testator's death (article 2011). Being in possession of the inheritance's property, the executor may more easily conclude his/her function of surrendering the legacies and may prevent the heirs from diverting movable property[161].

Article 1898 indicates that the executor may promote the sale of movable property, but always after hearing the heirs. However, this provision is only applicable when the testator did not award the executor the power to sell the property in question[162].

Article 1899 indicates the executor's powers, in case the testator fails to do so. However, these powers are not limited to the ones listed therein, including also the ones mentioned in articles 1898, 1900 to 1902, etc.

The listing mentioned in the single § of article 1900 is the inventory referred to in article 1896[163]. This listing is a measure of

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[160] Cunha Gonçalves, *Tratado*, Vol. X, page 226.

[161] *Ibidem*.

[162] Cunha Gonçalves, *Tratado*, Vol. X, pages 228 and 229, where the author answers the arguments used to justify the position opposite to the one mentioned above.

[163] Cunha Gonçalves, *Tratado*, Vol. X, pages 235 and 236.

caution both for the heirs and for the executor; without it, the executor may not allege that certain assets were not included in the inheritance, for example.

The appointment of an executor is subject to a strict one year deadline, to avoid the executor's negligence in carrying out his/her functions. Nonetheless, the testator may grant the executor a longer deadline, and there is no deadline for exercising the responsibility for supervising the execution of dispositions that have not yet been met (§§ 1 and 2 of article 1903).

Joint executors may be appointed, with or without division of tasks between them. This situation is mentioned in articles 1904 and 1907. As for article 1904, it should be noted that joint liability only encompasses the assets which the executors took charge of, including accounting for their actions (article 1905) and returning the balance of the remaining assets. They are not jointly liable if the assets were lost due to only one of the executor's fault or bad management[164].

The appointment of an executor is terminated with the executor's death (1906), with the complete execution, with the executor's voluntary resignation (article 1891) or with his/her removal (article 1909).

[164] Cunha Gonçalves, *Tratado*, Vol. X, page 245.

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SECÇÃO VIII
DA FORMA DOS TESTAMENTOS

SUBSECÇÃO I
DISPOSIÇÕES PRELIMINARES

Artigo 1910º

O testamento, quanto à sua forma, pode ser:

1º) Público;

2º) Cerrado;

3º) Militar;

4º) Marítimo;

5º) Externo, ou feito em país estrangeiro.

SUBSECÇÃO II
DO TESTAMENTO PÚBLICO

Artigo 1911º

O testamento chama-se público, quando é escrito por tabelião no seu livro de notas.

Artigo 1912º

O testador, que quiser fazer testamento por esta forma, declarará a sua última vontade perante qualquer tabelião, e cinco testemunhas idóneas.

Artigo 1913º

Tanto o tabelião como as testemunhas devem conhecer o testador, ou certificar-se, por algum modo, da sua identidade, e de que o mesmo testador estava em seu perfeito juízo, e livre de toda e qualquer coacção.

Civil Code of 1867

SECTION VIII
THE FORM OF WILLS

SUBSECTION I
PRELIMINARY PROVISIONS

Article 1910

With regard to its form, a will may be:

1) Public;

2) Closed;

3) Military;

4) Maritime;

5) External, or made in a foreign country.

SUBSECTION II
PUBLIC WILL

Article 1911

A will is called public when it is written by a public notary in his/her registry.

Article 1912

The testator who wishes to make a will in this form shall declare his/her last wishes before any public notary and five capable witnesses.

Article 1913

Both the public notary and the witnesses must know the testator or confirm, in some way, his/her identity, and that the said testator was in perfectly sound mind and free from any coercion.

Artigo 1914º

A disposição será datada, com a indicação do lugar, dia, mês e ano, escrita e lida em voz alta, na presença das mesmas testemunhas, pelo tabelião ou pelo testador, se o quiser, e assinada por todos.

Artigo 1915º

Se alguma das testemunhas não souber escrever, fará o seu sinal; mas é indispensável, que três testemunhas assinem com o seu nome por extenso.

Artigo 1916º

Se o testador não souber, ou não puder escrever, o tabelião assim o declarará; devendo, neste caso, assistir à disposição seis testemunhas, qualquer das quais assinará a rogo do mesmo testador.

Artigo 1917º

Quem for inteiramente surdo, mas souber ler, deverá ler o seu testamento, e se não souber ler, designará a pessoa que o há-de ler em seu lugar, sempre na presença das testemunhas.

Artigo 1918º

Todas estas formalidades serão praticadas em acto contínuo, e o tabelião portará por fé, como todas foram cumpridas.

Artigo 1919º

Faltando algumas das sobreditas formalidades, ficará o testamento sem efeito, mas será o tabelião responsável por perdas e danos, e perderá o seu ofício.

Article 1914

The disposition shall be dated, indicating the place, day, month and year, and it shall be written and read out loud, in the presence of the said witnesses, by the public notary or by the testator, if he/she wishes to do so, and shall be signed by all.

Article 1915

If one of the witnesses does not know how to write, he/she shall put his/her mark; but it is indispensable that three witnesses sign with their full name.

Article 1916

If the testator does not know how to or is unable to write, the public notary shall state this; in this case, the disposition must be witnessed by six persons, any of them signing at the request of the author.

Article 1917

Whoever is completely deaf, but knows how to read, must read his/her will and, if he/she does not know how to read, he/she shall appoint a person to read it in his/her place, always in the presence of witnesses.

Article 1918

All these formalities shall be carried out in a continuous act, and the public notary shall state faithfully that all were complied with.

Article 1919

If any of the above mentioned formalities is lacking, the will shall have no effect, but the public notary shall be liable for losses and damage and shall be deprived of his/her office.

SUBSECÇÃO III
DO TESTAMENTO CERRADO

Artigo 1920º

O testamento cerrado pode ser escrito e assinado pelo testador, ou por outra pessoa a seu rogo, ou ser escrito por outra pessoa, a rogo do testador e por este assinado.

§ único) A pessoa, que assinar o testamento, deve rubricar todas as folhas dele. O testador só pode deixar de assinar o testamento, não sabendo, ou não podendo fazê-lo, o que no mesmo testamento será declarado.

Artigo 1921º

O testador apresentará a qualquer tabelião a sobredita disposição, perante cinco testemunhas, declarando como aquela é a sua última vontade.

Artigo 1922º

Em seguida, e sempre na presença das sobreditas testemunhas, o tabelião, vendo o testamento, sem o ler, lavrará um auto de aprovação, que principiará logo em seguida à assinatura do mesmo testamento, e será continuado, sem interrupção, na mesma página e nas seguintes. Nesse auto declarará o tabelião:

1º) Se o testamento é escrito e assinado pelo testador;

2º) O número de páginas que contém;

3º) Se está rubricado por quem o assinou;

4º) Se tem ou não algum borrão, entrelinha, emenda, ou nota marginal;

5º) Que o testador foi reconhecido, e que foi verificada a sua identidade;

SUBSECTION III
CLOSED WILL

Article 1920

A closed will may be written and signed by the testator, or by another person at his/her request, or be written by another person, at the request of the testator, and signed by the latter.

Single §) The person who signs the will must initial all of its pages. The testator may only not sign it if he/she does not know how to or is unable to do so, which shall be stated in the will itself.

Article 1921

The testator shall present to any public notary the said disposition, in the presence of five witnesses, declaring that it represents his/her last wishes.

Article 1922

Subsequently, and always in the presence of the said witnesses, the public notary, seeing the will without reading it, shall draw up an act of approval, which shall begin immediately after the signature of the said will, and shall continue, without interruption, on the same page and on the following ones. In this act, the public notary shall state:

1) If the will is written and signed by the testator;

2) The number of pages it contains;

3) If it is initialled by the person who signed it;

4) If it contains any smudge, interlineation, amendment or side note;

5) That the testator was recognised, and that his/her identity was confirmed;

6º) Que o testador estava em seu perfeito juízo, e livre de toda e qualquer coacção;

7º) Finalmente, que pelo mesmo testador lhe foi apresentado o seu testamento, pelo modo que fica ordenado na lei.

§ 1º) O auto será lido, datado, e assinado na conformidade do que fica disposto na subsecção precedente.

§ 2º) Em seguida, e ainda na presença das mesmas testemunhas, o tabelião coserá e lacrará o testamento, lavrando na face exterior da folha, que servir de invólucro, uma nota que declare a pessoa a quem pertence o testamento ali conteúdo. O testador pode prescindir destas formalidades externas; mas, em tal caso, far-se-á menção no auto de aprovação, de que elas se omitiram por vontade do testador.

6) That the testator was of perfectly sound mind, and free from any and all coercion;

7) Finally, that the will was presented to him/her by the said testator, in accordance with the law.

§ 1) The act shall be read, dated and signed in accordance with the provisions of the preceding subsection.

§ 2) Subsequently, and still in the presence of the same witnesses, the public notary shall stitch and seal the will, drawing up on the outside of the sheet of paper wrapping it a note indicating the person to whom the will contained therein belongs to. The said testator may dispense of these external formalities; but, in this case, the act of approval shall mention that they were omitted as per the wishes of the testator.

Artigo 1923º

Os que não sabem, ou não podem ler, são inábeis para dispor em testamento cerrado.

Article 1923

Those who do not know how to or are unable to read may not make a closed will.

Artigo 1924º

O surdo-mudo pode fazer testamento cerrado, contanto que este seja todo escrito, assinado, e datado de sua mão, e que, ao apresentá-lo ao tabelião perante cinco testemunhas, o testador escreva na presença de todos, sobre a face externa do testamento, que aquela é a sua última vontade, e que vai por ele escrita e assinada.

§ único) O tabelião declarará, no auto de aprovação, como o testador assim o escreveu, e se observará o mais que fica disposto no Artigo 1922º.

Article 1924

A deaf-mute person may make a closed will, as long as it is entirely written, signed and dated by his/her hand, and that, when presenting it to the public notary before five witnesses, the testator writes, in the presence of all of them, on the external side of the will, that it corresponds to his/her last wishes, and that it was written and signed by him/her.

Single §) The public notary shall declare, in the act of approval, that the testator so wrote, and what is furthermore provided for in article 1922 shall be applied.

Artigo 1925º

O testamento cerrado, a que faltar alguma das sobreditas formalidades, ficará sem efeito, e será o tabelião responsável, nos termos do Artigo 1919º.

§ único) A falta de qualquer das declarações a que se referem os n.os 3º e 4º do Artigo 1922º não invalida o testamento, desde que este se encontre realmente rubricado, ou não contenha borrão, emenda, entrelinha ou nota marginal.

(§ *aditado pelo Decreto nº 19.126, de 16/12/1930*)

Article 1925

A closed will missing some of the above mentioned formalities shall have no effect, and the public notary shall be liable in accordance with article 1919.

Single §) The absence of any of the statements mentioned in no.s 3 and 4 of article 1922 do not render the will null and void, as long as it has been initialled or does not contain any smudge, interlineation, amendment or side note.

(§ *added by Decree no. 19.126, of 16/12/1930*)

Artigo 1926º

Aprovado e encerrado o testamento, será entregue ao testador, e lançará o tabelião nota no seu livro do lugar, dia, mês e ano em que o testamento foi aprovado e entregue.

Article 1926

Once the will has been approved and closed, it shall be delivered to the testator, and the public notary shall make a note in his registry of the place, day, month and year in which it was approved and delivered.

Artigo 1927º

O testador pode conservar o testamento na sua mão, cometer a guarda dele a pessoa de sua confiança, ou depositá-lo no arquivo testamentário de qualquer distrito administrativo.

Article 1927

The testator may keep the will with him/herself, give it to another person whom he/she trusts, or deposit it in the testamentary archive of any administrative district.

Artigo 1928º

Para o fim mencionado no Artigo precedente, haverá na secretaria de cada governo civil um cofre forte com duas chaves, uma das quais estará na mão do governador civil, outra na mão do secretário geral.

Article 1928

For the purpose mentioned in the previous article, the secretariat of each civil government shall have a safe with two keys, one of which shall be kept by the civil governor, and the other by the secretary general.

Artigo 1929º

O testador, que quiser depositar o seu testamento no arquivo testamentário, apresentar-se-á com ele perante o governador civil, e este fará lavrar num

Article 1929

The testator who wishes to deposit his/her will in the testamentary archive shall present it personally to the civil governor, and the latter shall have a

livro de registo, ordenado para tal efeito, um termo de entrega, e depósito, que será assinado pelo governador civil, pelo seu secretário geral, e pelo testador.

§ único) A apresentação, e o depósito podem ser feitos por procurador; neste caso a procuração ficará unida ao testamento.

record of the delivery and deposit drawn up in a registry kept for this purpose, which shall be signed by the civil governor, by his secretary general and by the testator.

Single §) The presentation and deposit may be made by attorney; but in this case the power of attorney shall be annexed to the will.

Artigo 1930º

O testador pode retirar, quando lhe aprouver, o seu testamento; mas a restituição far-se-á com as mesmas solenidades com que é feito o depósito.

Article 1930

The testator may remove his/her will, when he/she so deems fit; but its restitution shall be made with the same formalities as its deposit.

Artigo 1931º

A procuração para a extracção do testamento será feita por tabelião, e assinada por quatro testemunhas, ficando registada no competente livro.

Article 1931

A power of attorney for the removal of the will shall be made by a public notary and signed by four witnesses, being recorded in the respective registry.

Artigo 1932º

O testamento cerrado será aberto, ou publicado pela forma seguinte.

Article 1932

A closed will shall be opened or published in accordance with the following provisions.

Artigo 1933º

Verificada a morte do testador, ou no caso do Artigo 66º, se o testamento cerrado existir em poder de algum particular, ou aparecer no espólio do finado, será levado ao administrador do concelho, o qual, na presença do apresentante e de duas testemunhas, fará lavrar o auto de abertura, ou publicação, onde se declarará o estado em que o testamento é apresentado, e se está, ou não, nos termos indicados no encerramento.

§ único) Quando, por qualquer circunstância, não for possível recorrer prontamente ao administrador do

Article 1933

After the death of the testator, or in the case of article 66, if the closed will is in possession of a private person, or appears among the possessions of the deceased, it shall be taken to the borough administrator, who shall, in the presence of the person presenting it and of two witnesses, have the act of opening or publication drawn up, stating the condition in which the will is presented and if it is, or not, as indicated in its closing.

Single §) When, due to any circumstance, it is not possible to promptly resort to the borough administrator, the

concelho, poderá o testamento ser levado ao regedor da paróquia, o qual, para o efeito deste Artigo, fará as vezes do administrador do concelho.

Artigo 1934º

O auto, mencionado no Artigo precedente, será lançado em livro numerado, rubricado e encerrado pelo governador civil.

§ único) Quando a abertura for feita pelo regedor da paróquia, lavrar-se-á este auto na folha exterior do testamento, ou, não havendo espaço nesta, em folha conjunta; e será remetido o dito testamento com o auto, dentro das vinte e quatro horas seguintes, ao administrador do concelho, para ser lançado no livro competente, e para os demais efeitos, de que trata o Artigo 1935º.

Artigo 1935º

Lançado no livro o auto de abertura, ou publicação, fará o administrador registar o testamento no livro competente, e devolvê-lo-á aos interessados com a nota rubricada pelo mesmo administrador, de como foi aberto e registado, e se apareceu ou não coisa que dúvida fizesse.

§ único) Se não houver interessados, que reclamem o testamento, será este arquivado na administração do concelho com a devida segurança, e sob responsabilidade do administrador.

Artigo 1935º

Lançado no livro o auto de abertura ou publicação, fará o administrador registar o testamento no livro competente, lançando no original a nota, rubricada pelo mesmo administrador, de como foi aberto e registado e se apareceu ou não coisa que dúvida fizesse.

will may be taken to the head of the parish, who shall, for the purposes of this article, act in the place of the borough administrator.

Article 1934

The act mentioned in the previous article shall be made in a numbered registry, initialled and closed by the civil governor.

Single §) When the opening is made by the head of the parish, this act shall be drawn up on the external sheet of the will, or, if there is no space on it, on a joined sheet of paper; and the act shall be sent together with the will, within the following twenty four hours, to the borough administrator, to be included in the respective registry, and for the other purposes foreseen in article 1935.

Article 1935

Once the act of opening or publication has been drawn up in the registry, the administrator shall have the will recorded in the respective registry and shall return it to the interested parties with a note initialed by the same administrator stating that it was opened and recorded and if any reason for doubt arose.

Single §) If no interested parties claim the will, it will be filed in the borough administration with the due safety and under the responsibility of the administrator.

Article 1935

Once the act of opening or publication has been drawn up in the registry, the administrator shall have the will recorded in the respective registry, adding to the original a note, initialled by the administrator him/herself, stating that it was opened and recorded and if any reason for doubt arose.

§ único) O original do testamento ficará sempre arquivado na administração do concelho, com a devida segurança, sob a responsabilidade do administrador.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Single §) The original of the will will always be filed in the borough administration, with the due safety and under the responsibility of the administrator.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1936º

Se o testamento tiver sido depositado no arquivo do governo civil, aí, verificada a morte do testador, será aberto na presença do governador civil, de quem requerer a abertura, e de mais duas testemunhas, e se observará o mais que a tal respeito fica disposto.

Article 1936

If the will was deposited at the archive of the civil government, at this location, after the death of its author has been confirmed, it shall be opened in the presence of the civil governor, of whoever requests the opening and of two other witnesses, and the remaining provisions in this respect shall be complied with.

Artigo 1937º

Toda a pessoa, que tiver em seu poder testamento cerrado, e, no caso do Artigo 66º, não o apresentar, ou, no caso do falecimento do testador, não o apresentar dentro de três dias, contados desde o conhecimento do mesmo falecimento, será responsável por perdas e danos. Se a não apresentação provier de dolo, perderá, além disso, qualquer direito à herança do testador, que porventura tivesse, afora ficar sujeito à punição, em que nos termos da lei penal tiver incorrido.

Article 1937

Any person in possession of the closed will who, in the case of article 66, does not present it, or, in the case of the death of its author, does not present it within three days, starting from the date where he/she became aware of the said death, shall be liable for losses and damage. If the will is deceitfully not presented, he/she shall also lose any right to the inheritance of the deceased which he/she might have had, aside from being subject to the applicable sanctions under criminal law.

Artigo 1938º

Às mesmas perdas e danos, perda de herança, e imposição de penas, ficará sujeito, quem subtrair dolosamente o testamento do espólio do testador, ou do poder de qualquer pessoa, na mão da qual esteja depositado.

Article 1938

Whoever deceitfully removes the will from the possessions of its author, or of another person who was entrusted with it, shall also be liable for the same losses and damage, and subject to the loss of inheritance and applicable sanctions.

Artigo 1939º

Se o testamento se achar aberto, quer seja no espólio do testador, quer seja em poder de terceiro, mas sem nenhum outro viciamento, não será anulado por isso.

§ único) Neste caso será apresentado, como estiver, na administração do respectivo concelho, onde se lavrará auto disso mesmo, e se observará o mais que fica disposto nos Artigos 1933º, 1934º e 1935º.

Artigo 1940º

Se o testamento aparecer aberto e viciado, ou dilacerado, far-se-ão as seguintes distinções: se o testamento se achar cancelado e obliterado, ou dilacerado, quer seja no espólio do testador, quer seja em poder de outrem, de modo que se não possa ler a primitiva disposição, haver-se-á por não escrito; mas, provando-se, que o viciamento fora operado por qualquer pessoa, que não fosse o testador, será aplicado à tal pessoa o que fica disposto no Artigo 1937º, para os que dolosamente ocultam ou subtraem testamento.

Artigo 1941º

O viciamento presumir-se-á feito pela pessoa, a cuja guarda o testamento estiver confiado, enquanto o contrário se não provar.

Artigo 1942º

Se o testamento se achar só alterado, ou emendado em parte por letra do testador, com ressalva e assinatura, não será anulado por isso, e valerão as ditas emendas, como se fossem parte dele.

Article 1939

If the will is found opened, be it in the possessions of its author or of a third party, but with no other vitiation, it shall not be annulled for this reason.

Single §) In this case it shall be presented, as it is found, to the administration of the respective borough, where an act of this presentation shall be drawn up, and the remaining provisions of articles 1933, 1934 and 1935 shall be complied with.

Article 1940

If the will is found opened and vitiated, or torn, the following distinctions shall be made: if it has been cancelled and obliterated, or torn, be it in the possessions of its author or of another person, in such a way that its original disposition cannot be read, it shall be considered as not having been written; but if it is proven that this vitiation was made by any person other than the testator, the person in question shall be subject to the provisions of article 1937 relating to persons who deceitfully hide or remove the will.

Article 1941

The vitiation shall be presumed to have been made by the person the will was entrusted to, until proven otherwise.

Article 1942

If the will is found merely altered or amended in part in the handwriting of its author, with an errata note and signature, it shall not be annulled for this reason, and the said amendments shall be valid as if they belonged to the will.

Artigo 1943º

Se o testamento se achar dilacerado, ou feito em pedaços, no espólio do testador, haver-se-á por não escrito, ainda que possam reunir-se os fragmentos e ler-se a disposição, excepto provando-se plenamente que o facto acontecera depois da morte do testador, ou por ele fora praticado em estado de demência.

Article 1943

If the will is found torn, or cut into pieces, in the possessions of its author, it shall be considered as not having been written, even if all the fragments can be collected and the disposition can be read, except if it is entirely proven that this fact happened after the death of the testator, or was carried out by the testator in a condition of dementia.

SUBSECÇÃO IV
DO TESTAMENTO MILITAR

SUBSECTION IV
MILITARY WILL

Artigo 1944º

Testamento militar é o que podem fazer os militares, e os empregados civis do exército em campanha fora do reino, ou ainda dentro do reino, estando cercados em praça fechada, ou residindo em terra, cujas comunicações com outras estejam cortadas, se nessa praça ou terra não houver tabelião.

Article 1944

A military will is the one which members of the military may make, as well as civilian army employees, while on campaign away from the kingdom, and even within the kingdom, being under siege in a closed fortress, or residing in a place whose communications to other places have been cut, if there is no public notary in that fortress or place.

Artigo 1945º

O militar, ou empregado civil do exército, que quiser fazer testamento, declarará a sua última vontade na presença de três testemunhas idóneas, e do auditor da divisão respectiva, ou, na falta deste, na de algum oficial de patente. O auditor, ou o oficial que suprir a sua falta escreverá a disposição testamentária.

§ 1º) Se o testador se achar ferido ou doente, a falta de auditor ou de oficial poderá ser suprida pelo capelão, ou pelo facultativo do hospital onde estiver o doente ou ferido.

Article 1945

A member of the military or a civilian army employee who wants to make a will, shall state his/her final wishes in the presence of three capable witnesses and of the auditor of the respective division, or, in his/her absence, of an officer of rank. The auditor, or the officer who substitutes him/her, shall write the testamentary disposition.

§ 1) If the testator is injured or sick, the absence of an auditor or officer may be overcome by the chaplain, or by the doctor of the hospital where the injured or sick person is.

§ 2º) A disposição será lida, datada e assinada, conforme fica disposto nos Artigos 1914º e 1915º.

§ 3º) Este testamento será remetido, com a possível brevidade, ao quartel general, e dali ao Ministério da Guerra, que o fará depositar no arquivo testamentário do distrito administrativo, onde o dito testamento há-de ter efeito.

§ 4º) Falecendo o testador, fará o governo noticiar a sua morte no periódico oficial, designando o arquivo onde o testamento se acha depositado.

§ 5º) Este testamento ficará sem efeito passado um mês depois do regresso do testador ao reino, ou de ter cessado o cerco, ou a incomunicabilidade da terra onde o mesmo testamento foi feito.

§ 2) The disposition shall be read, dated and signed, in accordance with articles 1914 and 1915.

§ 3) This will shall be sent, as soon as possible, to the general quarters and, from there, to the Ministry of War, which shall have it filed in the testamentary archive of the administrative district where the said will shall have effect.

§ 4) If the testator dies, the government shall announce his/her death in the official gazette, indicating the archive where the will is deposited.

§ 5) This will shall be without effect after one month has passed since the return of its author to the kingdom, or since the end of siege or of the incommunicability of the place where it was made.

Artigo 1946º

Se o militar ou o empregado civil souber escrever, poderá fazer testamento por seu próprio punho, contanto que o date e assine por extenso, e o apresente, aberto ou cerrado, na presença de duas testemunhas, ao auditor, ou ao oficial de patente que para esse fim o substituir.

§ 1º) O auditor ou o oficial, a quem o dito testamento for apresentado, escreverá, em qualquer parte dele, uma nota do lugar, dia, mês e ano em que foi apresentado; esta nota será assinada por ele e pelas sobreditas testemunhas, e dar-se-á ao testamento a direcção indicada no § 3º do Artigo antecedente.

§ 2º) Se o testador estiver doente ou ferido, poderá o capelão ou o facultativo fazer as vezes do auditor ou do oficial.

§ 3º) É aplicável a esta espécie de testamento o que fica disposto nos §§ 4º e 5º do Artigo antecedente.

Article 1946

If the member of the military or civilian military employee knows how to write, he/she may write his/her own will, as long as it is dated and signed in full, and as long as he/she presents it, opened or closed, before two witnesses, to the auditor, or to the officer of rank who substitutes him/her for this purpose.

§ 1) The auditor or officer to whom the said will is presented, shall write, in any part of it, a note of the place, day, month and year in which it was presented; this note shall be signed by him/her and by the above mentioned witnesses, and the will shall be forwarded as indicated in § 3 of the previous article.

§ 2) If the testator is sick or injured, the chaplain or the physician may replace the auditor or officer.

§ 3) The provisions of §§ 4 and 5 of the previous article are applicable to this kind of will.

Artigo 1947º

O testamento militar, a que faltar alguma das formalidades ordenadas nos Artigos 1945º e §§ 1º e 2º, e 1946º, §§ 1º e 2º, não produzirá efeito algum.

Article 1947

A military will lacking any of the formalities required by article 1945, and its §§ 1 and 2, and by article 1946, §§ 1 and 2, shall have no effect.

SUBSECÇÃO V
DO TESTAMENTO MARÍTIMO

SUBSECTION V
MARITIME WILL

Artigo 1948º

Testamento marítimo é o que é feito no alto mar, a bordo dos navios do estado, por militares ou empregados civis em serviço público.

Article 1948

A maritime will is one which is made in the high seas, onboard ships of the State, by members of the military or civilian employees in public service.

Artigo 1949º

A disposição será escrita pelo escrivão da embarcação, ou por quem suas vezes fizer, na presença de três testemunhas idóneas e do comandante, e será lida, datada e assinada, como fica dito no Artigo 1914º.

Article 1949

The disposition shall be written by the ship's clerk, or by whoever replaces him/her, in the presence of three capable witnesses and of the captain, and it shall be read, dated and signed in accordance with article 1914.

Artigo 1950º

Se o comandante ou o escrivão quiser fazer testamento, tomarão o seu lugar os que devem substituí-los.

Article 1950

If the captain or clerk want to make their will, their functions shall be carried out by whoever should replace them.

Artigo 1951º

Se o militar ou o empregado civil souber escrever, poderá fazer testamento por seu próprio punho, contanto que o date e assine por extenso, e o apresente, aberto ou cerrado, na presença de duas testemunhas e do comandante da embarcação, ao escrivão desta, ou a quem suas vezes fizer.

§ único) O escrivão da embarcação escreverá em qualquer parte do mesmo testamento uma nota do lugar, dia, mês e ano em que foi apresentado, e esta nota

Article 1951

If the member of the military or the civilian employee knows how to write, he/she may write the will him/herself, as long as he/she dates it and signs it in full, and presents it, opened or closed, before two witnesses and the captain of the ship, to its clerk, or to whoever replaces him/her.

Single §) The ship's clerk shall write in any part of the said will a note of the place, day, month and year in which it was presented, and this note shall be

será assinada por ele, e pelas testemunhas, e rubricada pelo comandante.

signed by him/her and by the witnesses, and initialled by the captain.

Artigo 1952º

O testamento marítimo deverá ser feito em duplicado, guardado entre os papéis de bordo, e mencionado no diário da embarcação.

Article 1952

A maritime will must be made in duplicate, be kept among the ship's papers and be mentioned in the ship's log.

Artigo 1953º

Se o navio entrar em algum porto estrangeiro, onde haja cônsul ou vice-cônsul português, fará o comandante da embarcação depositar em poder do dito cônsul, ou vice-cônsul um dos exemplares do testamento, fechado e selado, com uma cópia da nota, que deve ter sido lançada no diário da embarcação.

Article 1953

If the ship enters a foreign port, where there is a Portuguese consul or vice-consul, the ship's captain shall deposit with the said consul or vice-consul one of the copies of the will, closed and sealed, with a copy of the note which should have been entered in the ship's log.

Artigo 1954º

Aportando a embarcação a território português, será o outro exemplar, ou ambos, se nenhum deles for deixado em outra parte, entregue à autoridade marítima do lugar, na forma declarada no Artigo antecedente.

Article 1954

If the ship enters a port in Portuguese territory, the other copy, or both, if none of them was left somewhere else, shall be delivered to the local maritime authority, in the manner foreseen in the previous article.

Artigo 1955º

Em qualquer dos casos mencionados nos dois Artigos precedentes, o comandante do navio haverá recibo da entrega, e o mencionará por cota no competente lugar do diário da embarcação.

Article 1955

In any of the cases mentioned in the two previous articles, the ship's captain shall ask for a receipt of the delivery, and shall mention this as an addendum in the respective item of the ship's log.

Artigo 1956º

Os ditos cônsules, vice-cônsules ou autoridades marítimas farão, logo que recebam os exemplares acima mencionados, um termo de entrega, e, com a possível brevidade, o remeterão com os mesmos exemplares ao Ministério da Marinha.

Article 1956

The said consuls, vice-consuls or maritime authorities shall draw up, as soon as they receive the above mentioned copies, an act of delivery and, as soon as possible, shall send it with the said copies to the Ministry of the Navy.

Artigo 1957º

Por este ministério será o testamento mandado depositar, na forma ordenada na última parte do § 3º do Artigo 1945º.

Artigo 1958º

O testamento marítimo só produzirá efeito, falecendo o testador no mar, ou dentro de um mês, contado desde o desembarque do dito testador em território português.

Artigo 1959º

Se o testador falecer no mar, observar-se-á o que fica disposto no § 4º do Artigo 1945º.

Artigo 1960º

O testamento marítimo, a que faltar alguma das solenidades requeridas nos Artigos 1949º, 1950º e 1951º, não produzirá efeito algum.

SUBSECÇÃO VI
DO TESTAMENTO EXTERNO OU FEITO EM PAÍS ESTRANGEIRO

Artigo 1961º

Os testamentos, feitos por portugueses em país estrangeiro, produzirão os seus efeitos legais no reino, sendo formulados autenticamente, em conformidade da lei do país onde forem celebrados.

Artigo 1962º

Os cônsules ou vice-cônsules portugueses poderão servir de tabeliães, na celebração e aprovação dos testamentos dos súbditos portugueses, contanto que se conformem com a lei

Article 1957

This Ministry shall have the will deposited in the manner foreseen in the last part of § 3 of article 1945.

Article 1958

A maritime will shall only come into effect if the testator dies at sea or within a month from when the testator came ashore on Portuguese territory.

Article 1959

If the testator dies at sea, the provisions of § 4 of article 1945 shall apply.

Article 1960

A maritime will lacking any of the formalities required by articles 1949, 1950 and 1951 shall have no effect.

SUBSECTION VI
EXTERNAL WILL OR WILL MADE IN A FOREIGN COUNTRY

Article 1961

Wills made by Portuguese persons in a foreign country shall produce all legal effects in the kingdom if they were made in authentic form, in accordance with the laws of the respective countries.

Article 1962

Portuguese consuls or vice-consuls may act as public notaries in the writing and approval of wills of Portuguese subjects, as long as they comply with Portuguese law, except with regard to

portuguesa, excepto no que diz respeito à nacionalidade das testemunhas, que poderão, neste caso, ser estrangeiras.

Artigo 1963º

Os cônsules ou vice-cônsules, logo que hajam formulado algum testamento em nota pública, transmitirão uma cópia ao Ministério dos Negócios Estrangeiros, que dará a esta a direcção indicada no § 3º do Artigo 1945º.

Artigo 1964º

Se o testamento for cerrado, o cônsul ou vice-cônsul, que o houver aprovado, lançará por cópia na respectiva nota o termo de aprovação, e assim o participará ao governo pelo Ministério dos Negócios Estrangeiros.

§ único) Se o testamento for dado a guardar ao cônsul ou vice-cônsul, o depositário fará menção desta circunstância, e passará recibo da entrega.

Artigo 1965º

O testamento, feito por súbdito não português fora de Portugal, produzirá neste reino os seus efeitos legais, ainda com relação aos bens nele existentes, observando-se no testamento as disposições da legislação do país onde for feito.

SUBSECÇÃO VII
DISPOSIÇÕES COMUNS ÀS DIVERSAS FORMAS DE TESTAMENTO

Artigo 1966º

Não podem ser testemunhas em testamento:
1º) Os estrangeiros;
2º) As mulheres;

the nationality of the witnesses, who, in this case, may be foreigners.

Article 1963

Consuls or vice-consuls, as soon as they have formulated a will in a public record, shall transmit a copy thereof to the Ministry of Foreign Affairs, who shall forward it in accordance with § 3 of Article 1945.

Article 1964

If the will is closed, the consul or vice-consul who approved it shall draw up the act of approval in the respective record, and shall transmit it as such to the government through the Ministry of Foreign Affairs.

Single §) If the will is entrusted to the consul or vice-consul, the depositary shall mention this circumstance and draw up a receipt of the delivery.

Article 1965

The will made by a non-Portuguese subject outside of Portugal shall produce its legal effects in this country, even in relation to property existing therein, as long as the provisions of the law of the country where it was made were abided by.

SUBSECTION VII
PROVISIONS COMMON TO THE DIFFERENT FORMS OF WILL

Article 1966

The following may not be witnesses to a will:
1) Foreigners;
2) Women;

3º) *Os que não estiverem em seu juízo;*

4º) *Os menores não emancipados;*

5º) *Os surdos, os mudos, os cegos e os que não entenderem a língua em que for escrito o testamento, sendo público, ou o auto de aprovação, sendo o testamento cerrado;*

6º) *Os filhos, os amanuenses do tabelião, que escrever ou aprovar o testamento;*

7º) *Os declarados por sentença incapazes de serem testemunhas instrumentárias.*

§ único) *A idade legal para ser testemunha em testamento, ou em aprovação dele, cumpre tê-la na conjuntura em que é feito o dito testamento ou aprovação.*

3) *Those who are not of sound mind;*

4) *Non-emancipated minors;*

5) *Deaf, mute and blind persons, as well as those who do not understand the language in which the will is written, if it is public, or in which the act of approval is written, if it is closed;*

6) *Children and clerks of the public notary who writes or approves the will;*

7) *Those declared incapable of being instrumental witnesses by a judgment of a court of law;*

Single §) The legal age to be a witness to a will, or to its approval, must be reached at the time at which the said will or approval is made.

Artigo 1966º

Não podem ser testemunhas, abonadores ou intérpretes, em testamento:

1º) Os estrangeiros;

2º) Os menores não emancipados;

3º) Os que não estiverem em seu perfeito juízo;

4º) Os surdos, os mudos, os cegos e os que não entendam a língua portuguesa;

5º) Os que tiverem interesse directo no testamento;

6º) O marido e a mulher conjuntamente;

7º) Os ascendentes, o marido e o sogro ou a sogra, respectivamente nos testamentos dos descendentes, da mulher e do genro ou da nora, e vice-versa;

8º) Os ascendentes, descendentes e cônjuges, bem como os ajudantes, amanuenses e empregados dos notários que intervierem nos testamentos, e os notários por quem os ajudantes estiverem servindo.

§ 1º) A intervenção, como testemunha, de alguma das pessoas mencionadas nos n.os 5º e 7º só produz a nulidade

Article 1966

The following may not be witnesses, certifiers or interpreters to a will:

1) Foreigners;

2) Non-emancipated minors;

3) Those who are not of sound mind;

4) Deaf, mute and blind persons, as well as those who do not understand the Portuguese language;

5) Those with a direct interest in the will;

6) A husband and wife jointly;

7) The ascendants, husband and father-in-law or mother-in-law, respectively in the wills of descendents, of the wife and son-in-law or daughter-in-law, and vice-versa;

8) The ascendants, descendants and spouses, as well as assistants, clerks and employees of public notaries intervening in the wills, and the public notaries for whom the assistants are working.

§ 1) The intervention as a witness of any of the persons mentioned in no.s 5 and 7 only produces the nullity of the respective appointment as heir or legatee.

da respectiva instituição de herdeiro ou legatário.

§ 2º) O erro comum geral, a respeito da capacidade das testemunhas instrumentárias, não produz a nulidade do respectivo acto.

(*Redacção dada pelo Decreto nº 19126, de 16/12/1930. Alterado pelo Artigo 78º, do Decreto 8.373, de 1922, que permite que os estrangeiros sejam intérpretes em testamento*)

§ 2) A general common mistake concerning the capacity of the instrumental witnesses does not lead to the nullity of the respective act.

(*As revised by Decree no. 19.126, of 16/12/1930. Modified by article 78 of Decree 8.373, which allows foreigners to be interpreters in a will*)

Artigo 1967º

A acção de nulidade de testamento, por defeito de fórmulas, ou de solenidades externas, prescreve por três anos, contados desde que o testamento tenha sido registado, nos termos do Artigo 1935º, ou começado a executar, se não estiver sujeito a registo.

Article 1967

The legal action for nullity of a will, due to a fault in form or external formalities, is time-barred after three years, starting from when the will was recorded, in accordance with article 1935, or from when it began to be executed, if it did not have to be recorded.

COMMENTARY TO ARTICLES 1910 TO 1967

Since a will is a solemn act of final wishes, this Section deals with the forms that wills must obey to allow the author of the inheritance to express his/her intentions validly and effectively.

Código Civil de 1867

CAPÍTULO III
DA SUCESSÃO LEGÍTIMA

SECÇÃO I
DISPOSIÇÕES GERAIS

Artigo 1968º

Se qualquer pessoa se finar, sem dispor de seus bens, ou dispuser só em parte, ou se, havendo disposto, o testamento for anulado, ou caducar, os seus herdeiros legítimos haverão os ditos bens, ou a parte deles de que o testador não dispuser.

Artigo 1968º

Se qualquer pessoa se finar sem dispor dos seus bens, ou dispuser só em parte, ou se, havendo disposto, o testamento for anulado, revogado, ou caducar, os seus herdeiros legítimos haverão os ditos bens, ou a parte deles, de que o testador não dispuser.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1969º

A sucessão legítima defere-se na ordem seguinte:

1º) *Aos descendentes;*

2º) *Aos ascendentes, salvo no caso do Artigo 1236º;*

3º) *Aos irmãos e seus descendentes;*

4º) *Ao cônjuge sobrevivo;*

5º) *Aos transversais não compreendidos no nº 3º, até o décimo grau;*

6º) *À fazenda nacional.*

Civil Code of 1867

CHAPTER III
INTESTATE SUCCESSION

SECTION I
GENERAL PROVISIONS

Article 1968

If a person dies without disposing of his/her property, or only partly does so, or if, he/she having made stipulations, the will is annulled or lapses, his/her intestate heirs shall have the said property, or the part thereof in relation to which there were no stipulations.

Article 1968

If a person dies without disposing of his/her property, or only partly does so, or if, he/she having made stipulations, the will is annulled, revoked or lapses, his/her intestate heirs shall have the said property, or the part thereof in relation to which there were no stipulations.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1969

Intestate succession shall occur in the following order:

1) *To the descendants;*

2) *To the ascendants, except in the case of article 1236;*

3) *To the siblings and their descendants;*

4) *To the surviving spouse;*

5) *To collateral relatives not included in no. 3, up to the tenth degree;*

6) *To the State treasury.*

Artigo 1969º

A sucessão legítima defere-se na ordem seguinte:

1º) Aos descendentes;

2º) Aos ascendentes, salvo o disposto no Artigo 1236º;

3º) Aos irmãos e seus descendentes;

4º) Ao cônjuge sobrevivo;

5º) Aos transversais não compreendidos no nº 3º até o sexto grau;

6º) Ao Estado, salvo o disposto no Artigo 1663º

§ único) Nos casos dos n.os 1º, 2º e 3º, consideram-se como bens próprios do cônjuge sobrevivo os géneros e frutos colhidos ou pendentes, destinados e necessários ao consumo do casal, desde que à data da abertura da herança não haja pendente ou julgada acção de divórcio ou de separação de pessoas e bens.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1969

Intestate succession shall occur in the following order:

1) To the descendants;

2) To the ascendants, except in the case of article 1236;

3) To the siblings and their descendants;

4) To the surviving spouse;

5) To collateral relatives not included in no. 3, up to the sixth degree;

6) To the State, with the exception of the provisions of article 1663.

Single §) In the cases of no.s 1, 2 and 3, the commodities and fruits gathered or pending, destined and necessary for the couple's consumption, shall be considered as exclusive property of the surviving spouse, as long as there was no pending or decided legal action for divorce or for separation of persons and property at the time of the opening of the inheritance.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1970º

O parente mais próximo em grau excluirá o mais remoto, salvo o direito de representação, nos casos em que este vigora.

Artigo 1970º

O parente mais próximo em grau excluirá, dentro de cada grupo a que se refere o Artigo anterior, o mais remoto, salvo o direito de representação, nos casos em que este vigora.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1970

The closest relative in degree shall exclude the most remote one, not precluding the right of representation, in the cases in which this right exists.

Article 1970

The closest relative in degree shall exclude, within each of the groups mentioned in the previous article, the most remote one, not precluding the right of representation, in the cases in which this right exists.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1971º

Os parentes, que se acharem no mesmo grau, herdarão por cabeça ou em partes iguais.

Article 1971

Relatives in the same degree shall inherit per capita or in equal parts.

Artigo 1971º

Os parentes, que se encontrarem no mesmo grau, herdarão por cabeça, ou em partes iguais, salvo o disposto no Artigo 1983º.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 1971

Relatives in the same degree shall inherit *per capita*, or in equal parts, with the exception of what is foreseen in article 1983.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 1972º

Se os parentes mais próximos repudiarem a herança, ou forem insucessíveis, passará a dita herança aos parentes do grau subsequente; mas, se tão somente algum dos co-herdeiros repudiar a sua parte, esta acrescerá à dos outros co-herdeiros.

Article 1972

If the closer relatives repudiate the inheritance, or cannot succeed, the said inheritance shall pass to the relatives of the subsequent degree: but if only some of the co-heirs repudiate their part, this portion shall accrue to the other co-heirs.

Artigo 1973º

Cada geração forma um grau, e a série dos graus constitui o que se chama linha de parentesco.

Article 1973

Each generation constitutes a degree, and the series of degrees constitutes what is called a line of relationship.

Artigo 1974º

A linha diz-se recta ou transversal; a recta é constituída pela série dos graus entre pessoas que descendem umas das outras; a transversal é constituída pela série dos graus entre pessoas que não descendem umas das outras, bem que procedam de um progenitor ou tronco comum.

Article 1974

The line is said to be lineal or collateral; the lineal one is made up of the series of degrees between persons descending ones from the others; the collateral one is made up of the series of degree between persons who do not descend ones from the others, although they derive from a common progenitor or stock.

Artigo 1975º

A linha recta é ou descendente ou ascendente: descendente, quando se considera como partindo do progenitor para o que dele procede; ascendente,

Article 1975

The lineal line is either descendant or ascendant: descendant when it is considered as starting from the progenitor to the one who proceeds

quando se considera como partindo do que procede para o progenitor.

Artigo 1976º

Na linha recta, os graus contam-se pelo número de gerações, excluindo o progenitor.

Artigo 1977º

Na linha transversal os graus contam-se pelo número de gerações, subindo por uma das linhas ao tronco, e descendo pela outra, mas sem contar o progenitor.

Artigo 1978º

As pessoas incapazes de adquirir por testamento também não podem adquirir por sucessão legítima.

Artigo 1979º

A incapacidade do herdeiro termina nele. Os seus filhos e descendentes, havendo-os, sucedem como sucederiam, se o incapaz houvesse falecido, e não tivesse havido tal incapacidade.

from him/her; ascendant when it is considered as starting from the one who proceeds from the progenitor to him/her.

Article 1976

In the lineal line, degrees are counted by the number of generations, excluding the progenitor.

Article 1977

In the collateral line, degrees are counted by the number of generations, going up one of the lines up to the stock, and coming down the other line, excluding the progenitor.

Article 1978

Persons who are incapable of acquiring through a will may not acquire through intestate succession.

Article 1979

The incapacity of the heir ends with him/her. His/her children and descendants, if there are any, succeed as they would if the incapable person had died, and such incapacity had not occurred.

COMMENTARY TO ARTICLES 1968 TO 1979

As was mentioned in the comments to Chapter I, intestate succession occurs automatically, *ipso jure*. In order for it to apply, there must be a total or partial absence of a will, and the successor in question must have a certain legal relation with the deceased.

The first requisite is foreseen in article 1968. Regarding the second one, only legitimate or illegitimate consanguine relatives, the spouse and the State are intestate heirs, thus excluding relatives by affinity (article 1969). Since the first category is very broad, it is divided into succession groups or a succession order (descendants, ascendants, etc.). Each group is further divided into classes (children, grandchildren, grandparents, great-grandparents, etc.). Article 1969 indicates the order of succession. No successor from one of the groups is called upon while there is a successor from the previous group. Within each succession group, the applicable principle is that of preference to the closest relatives in degree over the more remote ones (article 1970). These are the two fundamental principles at the basis of intestate succession: the principle of proximity of the succession group and the principle of proximity of degree within each succession group[165].

Concerning the determination of the degrees of relation, article 1973 indicates that each generation is a degree and that the series of degrees constitutes a line of relationship. This line is divided into lineal and transversal or collateral. The persons in the lineal line are each other's successive descendants – great-grandparent, grandparent, parent, child, grandchild, great-grandchild (article 1974) – and the number of degrees corresponds to the number of

[165] Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 389.

generations starting from the author of the inheritance, who is not counted (article 1976). The lineal line may be ascendant or descendant. The first one is made up of the ensemble of persons from whom the author of the inheritance descended and whose generations preceded him/her; the second one is made up of the persons who are the descendants of the author of the inheritance. Thus, regarding the descending line, and since the author of the inheritance is not counted, his/her children are in the 1st degree, the grandchildren are in the 2nd degree, the great-grandchildren are in 3rd degree, etc. Regarding the ascending line, his/her parents are in the 1st degree, the grandparents are in the 2nd degree, the great-grandparents are in the 3rd degree, etc.

The persons included in the collateral line do not descend from each other, but they descend from a common ascendant, called the stock. This is the case of an uncle and nephew or cousins. The degrees in the collateral line are counted by adding the number of generations going up one of the line up to the stock, and then down the other line, excluding the common progenitor (article 1977). Thus, a nephew's (Daniel) relation to his deceased uncle (Alexander) is calculated as follows: the author of the inheritance (Alexander) is the 1st degree (the stock – Alexander's father – is not counted); Alexander's brother, Daniel's father, is the 2nd degree; and Daniel is the 3rd degree. Daniel is Alexander's relative in the 3rd degree of the collateral line.

Article 1970 implies, for example, that if the author of the inheritance left children and grandchildren, the children exclude the grandchildren, who may not be called to the succession. However, if one of the children of the author of the inheritance died before him/her and also left children, these may exercise their right of representation. This right is an important exception to the principle of proximity of degree within each succession group. In any case, proximity of degree should only be taken into account when the relatives belong to the same group. Otherwise, the legal order of succession should be respected. For example, the uncles and nephews

of the author of the inheritance are all relatives in the 3rd degree of the collateral line, but the nephews belong to the 3rd group, while the uncles belong to the 5th group, which means that they do not have equal rights to the succession (article 1969). Therefore, the collateral relatives within this 3rd group are called privileged. This means that the relatives mentioned in article 1971 must not only be of the same degree, they must also be included in the same succession group.

Proximity of degree is terminated when the closest relatives repudiate the inheritance or cannot succeed; however, if only some of the co-heirs repudiate their share, it will accrue to the other co-heirs (article 1972).

Código Civil de 1867

SECÇÃO II
DO DIREITO DE REPRESENTAÇÃO

Artigo 1980º

Dá-se o direito de representação, quando a lei chama certos parentes duma pessoa falecida a suceder em todos os direitos, em que essa pessoa sucederia, se viva fosse.

Artigo 1981º

O direito de representação dá-se sempre na linha recta descendente, mas nunca na ascendente.

Artigo 1982º

Na linha transversal, só se dá o direito de representação em favor dos filhos de irmãos do falecido, quando concorrem com algum irmão do dito falecido.

Artigo 1982º

Na linha transversal, dá-se o direito de representação em favor dos descendentes de irmãos do falecido.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

Artigo 1983º

Os representantes só podem herdar, como tais, o que herdaria o representado, se vivesse.

Artigo 1984º

Sendo vários os representantes da mesma pessoa, repartirão entre si, com igualdade, o que teria de caber ao representado, se fosse vivo.

Civil Code of 1867

SECTION II
RIGHT OF REPRESENTATION

Article 1980

There is right of representation when the law calls certain relatives of a deceased person to succeed in all of the rights which that person would have succeeded in if he/she were still alive.

Article 1981

Right of representation always occurs in lineal descent, but never in lineal ascent.

Article 1982

In the collateral line, there is right of representation only in favour of the children of the deceased's siblings, when they compete with any sibling of the deceased.

Article 1982

In the collateral line, there is right of representation only in favour of the descendants of the deceased's siblings.

(As revised by Decree no. 19.126, of 16/12/1930)

Article 1983

Representatives may only inherit, as such, what the represented person would inherit if he/she were still alive.

Article 1984

If there are several representatives of the same person, they shall divide among themselves, in equal portions, what would belong to the represented person if he/she were still alive.

COMMENTARY TO ARTICLES 1980 TO 1984

Intestate succession may derive from someone's own right, as a result of that person's position in the relationship line, but it may also be a right of "substitution", similar to that which occurs in testamentary succession, even though, in the latter case, the substitution is based on the intentions of the author of the inheritance, rather than on the law. This right of "substitution" is called a right of representation[166].

The right of representation is, thus, *"that which the law grants the descendant of a close relative to the author of the inheritance, so as to replace that relative in the succession, when the relative in question is prevented from succeeding due to having died before the author of the inheritance, or due to being incapable or absent, and when the said descendant competes with other relatives of closer degree"*[167]. This means that there is only right of representation when relatives of different degrees, or at least of different strands, are called to the succession. For example, if the author of the inheritance left only one grandchild, he/she succeeds by his/her own right and not through a right of representation. The right of representation excludes the rule included in article 1970, as was mentioned in the comments to the previous Section, since it implies that relatives of a more remote degree compete with closer ones in the succession. The definition of right of representation also implies that the represented person need not necessarily have died. For the purposes of right of representation, persons who are incapable of succeeding (article 1979) or are absent (article 72) are treated as though they were deceased. On the other hand, people who repudiate the inheritance may not be represented, as foreseen in article 2035.

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[166] Cunha Gonçalves, *Tratado*, Vol. X, page 376.

[167] Cunha Gonçalves, *Tratado*, Vol. X, pages 376 and 377.

The right of representation should not be mistaken with the transmission of the right to succeed. In the case of a right of representation, the represented person never succeeded and, therefore, did not transmit his/her portion. There is merely a transmission, from the author of the inheritance to the representative, who succeeds him/her directly (the representative is not the successor of the represented person). Regarding the transmission of the right to succeed, these are situations when the successor dies before accepting or repudiating the inheritance and, therefore, that right is passed on to his/her heirs (article 2032). In this case, there are two successive transmissions in a short period of time.

In accordance with articles 1981 and 1982, only descendants benefit from the right of representation. The representative may represent a person whose succession he/she renounced, or a person from whose succession he/she was excluded due to indignity or specific incapacity, since he/she is a direct successor to the deceased and not to the represented person. On the other hand, as the direct successor to the author of the inheritance, he/she must be personally capable of succeeding as though he were the represented person. This means that the representative may not succeed if he/she is debarred (indignity) or incapable of succeeding in relation to the deceased[168]. The Portuguese Civil Code of 1966 solved the first of these issues, stating in article 2043 that "*descendants represent their ascendant, even if they have repudiated his/her succession or are incapable with regard to that ascendant*".

In accordance with article 1981, there are no limits to the right of representation in the lineal descending line. Here too, descendants of a closer degree exclude those of a more remote degree (article 1970). On the other hand, in the collateral line, the right of representation is given to the descendants of the deceased's siblings, but not to their ascendants.

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[168] Cunha Gonçalves, *Tratado*, Vol. X, pages 380 and 381.

As was mentioned above, there is only right of representation if relatives of different degree, or at least of different strands, are called to the succession. The following is an example of the first case: if Anthony dies leaving one living child, Mark, two grandchildren, Iris and John, the children of Bernard, already deceased, and a great-grandchild, Laura, the only daughter of Louis and the only grandchild of Charles, both already deceased, Charles' portion will be given entirely to Laura, his grandchild, through right of representation, and Bernard's portion shall be divided between Iris and John, in accordance with article 1983.

The following is an example of the second case, where different relatives of the same degree but of different strands are called to the succession: Anthony dies leaving nine grandchildren, three being the children of Mark, two the children of Bernard and four the children of Charles. In this case, assuming all of Anthony's children have died at the time of his death, Mark's portion shall be divided in three, Bernard's portion shall be divided in two, and Charles's portion shall be divided in four parts. This means that there is a division according to strand, even if that means that relatives with the same degree of relation, in this case grandchildren, receive different portions, as a result of article 1984. The "*equal portions*" referred to in this article are calculated within each strand, and for this reason the situation foreseen therein is actually an exception to article 1971.

If there are relatives of the same degree, but from different strands, the right of representation is not useless, even if all the strands have an equal number of descendants. If Anthony had three children, all deceased, and each of them had two children, it could seem, at first, that the right of representation would be irrelevant, since, with or without it, the portion of each grandchild would be the same. However, there are differences depending on whether Anthony's grandchildren succeed in their own right or through right of representation. Since the right of representation is used to regulate succession according to strands, if one of the grandchildren repudiates the inheritance, the right to accrue applies only within the

respective strand, which means that, in the case of Anthony's grandchildren, only the sibling of the repudiating grandchild may benefit from this, through the right to accrue. If, on the other hand, all the grandchildren succeed in their own right, the portion of the repudiating grandchild shall accrue to all of Anthony's grandchildren, in equal parts, in accordance with article 1972[169]. In any case, as was mentioned above, in order for there to be a right of representation there must be different strands, as can be deduced from article 1987. Article 2045 of the Portuguese Civil Code of 1966 solved this latter issue differently: "*representation occurs even if all the members of the several strands share the same degree of relation to the deceased or if there is one single strand*"[170].

According to articles 1980 and 1983, the representative succeeds to all the rights and obligations which would be awarded to the represented person if he/she were still alive. Thus, for example, if the represented person had received a donation from the author of the inheritance, the representative is obliged to bring it to the collation[171].

There is no right of representation in testamentary succession, since this right is regulated in intestate succession and derives from the law itself. In testamentary succession, as was discussed above, when one of the appointed co-heirs dies before the testator, his/her share is accrued to the remaining co-heirs and his/her descendants may not exercise the right of representation (article 1852). Also on this point, the option of the Portuguese Civil Code of 1966 was different. Article 2041, no. 1, of this Code indicates that "*the descendants of the person who died before the testator or who repudiated the inheritance or legacy enjoy the right of representation in testamentary succession, if there are no other grounds for the expiry of the call to the succession*".

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[169] Cunha Gonçalves, *Tratado*, Vol. X, page 390; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 407, footnote 1.

[170] Our underlining.

[171] Cunha Gonçalves, *Tratado*, Vol. X, page 387.

Código Civil de 1867

SECÇÃO III
Da sucessão dos descendentes

SUBSECÇÃO I
DA SUCESSÃO DOS DESCENDENTES LEGÍTIMOS

Artigo 1985º

Os filhos legítimos e seus descendentes sucedem aos pais e demais ascendentes, sem distinção de sexo nem idade, posto que procedam de casamentos diversos.

Artigo 1986º

Se os descendentes se acharem todos no primeiro grau, sucederão por cabeça, dividindo-se a herança em tantas partes, quantos forem os herdeiros.

Artigo 1987º

Se concorrerem todos, ou parte deles representativamente, sucederão por estirpes ou formando ramos, pelos quais será distribuída a herança, e subdividida nos ramos em que houver mais de um herdeiro, observando-se sempre a mesma regra de igualdade.

Artigo 1988º

São compreendidos entre os filhos legítimos os legitimados por subsequente matrimónio, conforme o que fica disposto no Artigo 119º.

Civil Code of 1867

SECTION III
SUCCESSION BY DESCENDANTS

SUBSECTION I
SUCCESSION BY LEGITIMATE DESCENDANTS

Article 1985

Legitimate children and their descendants succeed to their parents and other ascendants, with no distinction of gender or age, if they derive from different marriages.

Article 1986

If the descendants are all in the first degree, they shall succeed *per capita*, the inheritance being divided in as many parts as there are heirs.

Article 1987

If all or part of them compete in representation, they shall succeed by strands or by forming branches, among which the inheritance shall be distributed and subdivided in the branches in which there is more than one heir, the same rule of equality always being applied.

Article 1988

Legitimate children shall include those who have been legitimated through a subsequent marriage, in accordance with article 119.

SUBSECÇÃO II
DA SUCESSÃO DOS FILHOS ILEGÍTIMOS

Artigo 1989º

Para os filhos ilegítimos sucederem ab intestato a seus pais devem ser perfilhados, ou reconhecidos legalmente.

Artigo 1989º

Os filhos ilegítimos e seus descendentes, sendo perfilhados ou reconhecidos legalmente, sucedem ab intestato, não só a seus pais, mas também aos demais ascendentes.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 1990º

Se o filho ilegítimo, perfilhado ou reconhecido não concorrer com posteridade legítima, herdará todos os bens de seus pais.

Artigo 1991º

Se o filho ilegítimo concorrer à herança com filho ou filhos legítimos, herdará na proporção e nos termos declarados no Artigo 1785º.

Artigo 1992º

Se, por serem muitos os filhos ilegítimos, não chegar a terça para o complemento das porções assinadas no § 2º do Artigo 1785º, nem por isso terão direito a mais coisa alguma, e será a terça rateada entre eles.

SUBSECTION II
SUCCESSION BY ILLEGITIMATE CHILDREN

Article 1989

For illegitimate children to succeed their parents intestate they must have been acknowledged or legally recognised.

Article 1989

Illegitimate children and their descendants, if they were acknowledged or legally recognised, succeed intestate not only to their parents, but also to the other ascendants.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 1990

If an illegitimate child, acknowledged or recognised, does not compete with legitimate children, he/she shall inherit all the property of his/her parents.

Article 1991

If an illegitimate child competes for the inheritance with one or several legitimate children, he/she shall inherit in the proportion and in accordance with the provisions of article 1785.

Article 1992

If, due to the existence of many illegitimate children, the disposable third is insufficient for the portions assigned in § 2 of article 1785, they shall not be entitled to anything more, and the disposable third shall be divided among them pro rata.

COMMENTARY TO ARTICLES 1985 TO 1992

After indicating, in article 1969, no. 1, that descendants have priority in the legal order of succession, the legislator regulates in this Section the manner in which the descendants are to succeed, and how the inheritance should be divided between them.

Regarding legitimate children, although article 1985 states that *"legitimate children and their descendants succeed to their parents"*, this provision should be read together with articles 1970, 1971 and 1974, as well as articles 1980 to 1984. Taking all these provisions into account, it should be concluded that descendants do not all compete jointly in the succession of their parents and ascendants[172].

In the opinion of Cunha Gonçalves, if a legitimate child, deceased before the author of the inheritance, leaves an illegitimate acknowledged child, that child will succeed through right of representation and his/her illegitimacy will have no bearing on the succession of his/her grandparent, although it may have some bearing on the succession of the represented parent[173]. Conversely, Pires de Lima and Antunes Varela[174] argue that illegitimate children representing a legitimate child are not entitled to the share that would belong to the legitimate child, but only to the share that would belong to a child acknowledged before the marriage. This interpretation does not appear to be the most accurate one, since it contradicts the provisions of article 1983.

Children legitimated by a subsequent marriage are deemed equal to legitimate children (article 1988). In Goa, intestate or testamentary succession and the marital property regime is governed by the Code of Seabra, except for the special provisions included in articles 24 to

[172] Cunha Gonçalves, *Tratado*, Vol. X, page 394.
[173] Cunha Gonçalves, *Tratado*, Vol. X, page 395.
[174] *Noções Fundamentais*, page 413, footnote 1 and page 463, footnote 1.

26 of the Code of Gentile Hindu Usages and Customs of Goa, of 16 December 1880. Thus, in Goa, the adoptive children of Hindus are also considered equal to legitimate children (article 15 of the Code of Usages and Customs of 1880). They compete in intestate succession with the legitimate children of the author of the inheritance, who are usually born subsequently (article 26 of the same Code). According to Cunha Gonçalves, unlike most of the other laws of the time, this is the only situation where Portuguese law considers adoptive children to be intestate successors[175]. The possibility of adoption by gentile Hindus is regulated in articles 10 to 15 of the Code of Usages and Customs of 1880. It is justified by the principle that it is indispensable for a Hindu to have a male descendant or someone who is *"the perfect image of a child"*[176].

Going back to the Code of Seabra, article 1986 indicates how to divide the inheritance and article 1987 foresees an exception to the previous rule, in case some or all of the descendants succeed through the right of representation.

With regard to the succession of illegitimate children, only after the acknowledgment or legal recognition may such children be called to the intestate succession of their parents and other ascendants (article 1989). Without an acknowledgment, the filiation is a fact with no legal consequences[177]. In Goa, there is also a restriction to the applicability of the Code of Seabra in this respect. In accordance with article 9 of the Code of Usages and Customs of 1880, acknowledging illegitimate children is not allowed. The single § of the same article makes an exception for the illegitimate children of dancers and other unmarried women, who may be recognised and acknowledged by their mothers and may, therefore, succeed to them, in accordance with the single § of article 25. In any case,

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[175] *Tratado*, Vol. X, page 397.

[176] Cunha Gonçalves, *Direito Hindú e Mahometano*, page 233.

[177] Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 409, footnote 1.

whenever acknowledgment is forbidden, illegitimate children are entitled to maintenance, both under Portuguese law and under Hindu law. These children may also be appointed heirs in a will, just like any other person[178].

In this Section, article 1990 should be read with some caution: firstly, it should be noted that the child in question will inherit all the property, except for what was legated to another person in a will and for what was held under the right of usufruct; secondly, the child in question will only succeed his/her parents if both acknowledged him/her, otherwise he/she will only inherit the property of the acknowledging parent.

When an illegitimate child competes with one or several legitimate children, his proportion will be determined in accordance with article 1785, which is rendered applicable by article 1991. The same rule is to be applied when legitimate children compete with the descendants of illegitimate children, or when the descendants of legitimate children compete with the descendants of illegitimate children, all successors through right of representation[179].

In the Portuguese Civil Code of 1966, there is no difference between the share of legitimate children and that of illegitimate children (article 2139).

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[178] Cunha Gonçalves, *Direito Hindú e Mahometano*, page 230.

[179] On this issue, see commentary to articles 1784 to 1790, where there is also a reference to the provisions of article 1992.

Código Civil de 1867

SECÇÃO IV
DA SUCESSÃO DOS ASCENDENTES

SUBSECÇÃO I
DA SUCESSÃO DOS PAIS LEGÍTIMOS

Artigo 1993º

Se o filho legítimo falecer sem descendentes, suceder-lhe-ão seu pai e sua mãe por partes iguais, ou na totalidade da herança, se existir só algum deles.

§ único) Exceptua-se da disposição deste Artigo o que fica disposto no Artigo 1236º.

SUBSECÇÃO II
DA SUCESSÃO DOS PAIS ILEGÍTIMOS

Artigo 1994º

Se o filho ilegítimo falecer sem posteridade, e sem consorte sobrevivo, devolver-se-á a herança por inteiro aos pais que o houverem reconhecido.

Artigo 1995º

Se, porém, ao filho ilegítimo falecido sem posteridade sobreviver consorte, haverá este, enquanto vivo for, o usufruto de metade da herança.

Civil Code of 1867

SECTION IV
SUCCESSION BY ASCENDANTS

SUBSECTION I
SUCCESSION BY LEGITIMATE PARENTS

Article 1993

If a legitimate child dies without descendants, his/her father and mother shall succeed to him/her in equal portions, or in the whole inheritance, if only one of them is alive.

Single §) The provisions of article 1236 constitute an exception to what is foreseen in this article.

SUBSECTION II
SUCCESSION BY ILLEGITIMATE PARENTS

Article 1994

If an illegitimate child dies without descendants and without a surviving spouse, the inheritance shall be awarded in full to the parents who have recognised him/her.

Article 1995

If, however, there is a surviving spouse of the illegitimate child without descendants, the spouse shall have, while he/she is alive, the right of usufruct of half of the inheritance.

SUBSECÇÃO III
DA SUCESSÃO DOS ASCENDENTES DE SEGUNDO GRAU E SEGUINTES

Artigo 1996º

Na falta de pais, será a herança do falecido conferida aos ascendentes do segundo grau e dos seguintes.

Artigo 1997º

Se os ascendentes sobrevivos estiverem todos no mesmo grau, será a herança repartida entre eles por iguais porções, seja qual for a linha a que pertençam.

Artigo 1998º

Se os ascendentes se não acharem no mesmo grau, será a herança conferida ao mais próximo, sem distinção de linha.

Artigo 1999º

O que fica disposto nesta secção é aplicável à herança de filho perfilhado ou reconhecido, salva a limitação do Artigo 1995º.

SUBSECTION III
SUCCESSION BY ASCENDANTS IN THE SECOND AND FOLLOWING DEGREES

Article 1996

In the absence of parents, the deceased's inheritance shall be awarded to the ascendants in the second and following degrees.

Article 1997

If the surviving ascendants are all in the same degree, the inheritance shall be divided among them in equal portions, regardless of which line they belong to.

Article 1998

If the ascendants are not in the same degree, the inheritance shall be awarded to the closest relative, regardless of the line.

Article 1999

The provisions of this section are applicable to the inheritance of the acknowledged or recognised child, not precluding the limitation contained in article 1995.

COMMENTARY TO ARTICLES 1993 TO 1999

In accordance with article 1969, no. 2, if the author of the inheritance was a legitimate child and had no descendants, he/she is succeeded by the ascendants. Due to the principle of proximity of degree of relationship, article 1993 indicates that, in the absence of descendants, the father and mother succeed first, in equal portions. If only one of the parents is left, he/she will inherit all of the inheritance, even if there are grandparents, since there is no right of representation in favour of ascendants.

The single § of the same article excludes from its provisions the case mentioned in article 1236. According to the latter article, a father or mother who was remarried does not succeed to the ownership, but only to the usufruct of the property which the deceased child inherited from the other parent, also deceased, or from that parent's ascendants, whenever there are full blood siblings or descendents of such siblings. In order to protect the full blood siblings of the author of the inheritance from their parent's second marriage, they are awarded the ownership of the property in question. Otherwise, upon the death of the parent, the property in question would have to be divided with the unilateral siblings resulting from the second marriage.

If the author of the inheritance, being an illegitimate child, dies without descendants or living consort, the inheritance shall go to the acknowledging parents (article 1994). If only one of the parents acknowledged the child, he/she will be the only heir. Pires de Lima and Antunes Varela[180] consider that an acknowledgment *post mortem* is fully effective, even though, in most cases, it is immoral. So as to

[180] *Noções Fundamentais*, page 423, footnote 2.

avoid acknowledgments out of interest, the Portuguese Civil Code of 1966 indicated, in article 1856, that "*an acknowledgment subsequent to the child's death only produces effects in favour of his/her descendants*".

If the author of the inheritance, still being an illegitimate child, dies without descendants, but leaves a surviving spouse and ascendants, the spouse will be entitled to lifelong usufruct of half of the inheritance (article 1995), even if he/she remarries[181]. The half of the inheritance in question here is the disposable half, since the spouse is not a mandatory heir.

If the author of the inheritance has neither descendants nor parents, the ascendants in the second degree and remaining degrees are called to succeed. The latter are only called upon, however, in the absence of ascendants in the second degree. Firstly, the grandparents are called, and the inheritance is divided between them in equal portions, regardless of whether they are paternal or maternal grandparents. Thus, for example, if two paternal grandparents and one maternal grandmother are still living, the inheritance will be divided into three equal portions, and if one paternal grandfather and one maternal grandmother are still living, the inheritance will be divided into two equal portions. When there are ascendants of different degrees, the inheritance shall be awarded to those of the closest degree, be they maternal or paternal ascendants (article 1998).

If the author of the inheritance is an illegitimate child, just as he/she would succeed to his/her illegitimate ascendants, these also succeed to him/her, in accordance with article 1999. However, this article does not mention the possibility of the author of the inheritance being an illegitimate grandchild or great-grandchild, even if a legitimate child. For example, if John is Charles' illegitimate child, Andrew, John's legitimate child, is Charles' illegitimate grandchild. In the opinion of Pires de Lima and Antunes Varela, we should also apply article 1999 in this case, which orders the application of article

[181] Cunha Gonçalves, *Tratado*, Vol. X, page 404.

1995, since the legislator aimed at reserving for the surviving spouse the usufruct of half of the inheritance whenever the ascendant called to succeed is illegitimate. To these authors, the scope of the spouse's rights could not be dependent on whether the break in legitimacy occurred in the 1st or in the 2nd degree of the lineal ascendant line. This solution may cause some problems, as those authors recognise, since legitimate and illegitimate ascendants may be called simultaneously to the succession. In this case, the proposed solution, which seems to be the most reasonable, is to only award the surviving spouse the usufruct of half of the portion or portions awarded to the illegitimate ascendants[182].

Regarding succession of ascendants, as well as in relation to children, the Portuguese Civil Code of 1966 makes no distinction between legitimate and illegitimate ascendants (article 2142). On the other hand, when the ascendants compete with the spouse, the latter shall be awarded $^2/_3$ of the inheritance and the ascendants shall receive $^1/_3$ of it (article 2142, no. 1). In the absence of spouse, the ascendants are called to all of the inheritance (article 2142, no. 2).

[182] *Noções Fundamentais*, pages 429 to 431, footnote 1.

Código Civil de 1867

SECÇÃO V
DA SUCESSÃO DOS IRMÃOS E DOS SEUS DESCENDENTES

Artigo 2000º

Se o falecido não deixar descendentes nem ascendentes, e não dispuser dos seus bens, herdarão os irmãos legítimos e os descendentes destes.

Artigo 2000º

Se o falecido, sendo filho legítimo, não deixar descendentes nem ascendentes e não dispuser de seus bens, herdarão os irmãos legítimos e os descendentes legítimos destes, sem prejuízo do disposto no § único do Artigo 2003º.

§ único) Na falta de irmãos legítimos e descendentes legítimos destes, herdarão do mesmo modo os irmãos perfilhados ou reconhecidos, os descendentes destes e os descendentes ilegítimos de irmãos legítimos, sem prejuízo do disposto no § único do Artigo 2003º

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2001º

Se o falecido deixar, ao mesmo tempo, irmãos germanos e irmãos consanguíneos ou uterinos, haverão os irmãos germanos dobrado parte da herança.

§ único) A mesma disposição se observará, quando concorrerem descendentes de irmãos germanos com descendentes de irmãos consanguíneos ou uterinos.

Civil Code of 1867

SECTION V
SUCCESSION BY SIBLINGS AND THEIR DESCENDANTS

Article 2000

If the deceased does not leave descendants or ascendants, and has not disposed of his/her property, his/her legitimate siblings and their descendants shall inherit.

Article 2000

If the deceased, being a legitimate child, does not leave descendants or ascendants, and has not disposed of his/her property, his/her legitimate siblings and their legitimate descendants shall inherit, not precluding the provisions of the single § of article 2003.

Single §) In the absence of legitimate siblings and their legitimate descendants, acknowledged or recognised siblings, their descendants and the illegitimate descendants of legitimate siblings shall inherit in the same way, not precluding the provisions of the single § of article 2003.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2001

If the deceased leaves, at the same time, full blood siblings and consanguine or uterine siblings, the full blood siblings shall have a double portion of the inheritance.

Single §) The same provision shall be applied when several descendants of full blood siblings compete with descendants of consanguine or uterine siblings.

Artigo 2001º

Se o falecido deixar ao mesmo tempo irmãos germanos e irmãos consanguíneos ou uterinos, haverá cada um dos irmãos germanos o dobro da parte que pertencer a cada um dos outros irmãos.

§ único) A mesma disposição se observará quando concorrerem descendentes de irmãos germanos com descendentes de irmãos consanguíneos ou uterinos.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2001

If the deceased leaves, at the same time, full blood siblings and consanguine or uterine siblings, each of the full blood siblings shall have double the portion of that which shall belong to each of the other siblings.

Single §) The same provision shall be applied when several descendants of full blood siblings compete with descendants of consanguine or uterine siblings.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2002º

Na falta de irmãos legítimos e de descendentes seus, herdarão do mesmo modo os irmãos perfilhados ou reconhecidos.

Article 2002

In the absence of legitimate siblings and their descendants, acknowledged or recognised siblings shall inherit in the same way.

Artigo 2002º

Se o falecido, sendo filho ilegítimo, não deixar descendentes, nem ascendentes, e não dispuser de seus bens, herdarão todos os irmãos e seus descendentes, sem prejuízo do disposto no § único do Artigo 2003º e observada também a diferença estabelecida no Artigo antecedente a favor dos irmãos germanos.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2002

If the deceased, being an illegitimate child, does not leave descendants, nor ascendants, and has not disposed of his/her property, all the siblings and their descendants shall inherit, not precluding the provisions of the single § of article 2003 and also complying with the difference foreseen in the previous article in favour of full blood siblings.

(*As revised by Decree no. 19.126, of 16/12/1930*)

COMMENTARY TO ARTICLES 2000 TO 2002

According to article 1969, no. 3, in the absence of descendants and ascendants, the siblings and their descendants are called to succeed. More specifically, article 2000 indicates that, in this case, firstly, legitimate siblings and their legitimate descendants are called to succeed. It should also be understood here that the legitimate descendants of legitimate siblings do not succeed jointly with their parents, due to the principle of proximity of degree of relationship.

The rights to succeed vary according to the type of siblings in question. They may be full blood siblings (children of the same father and mother), consanguine siblings (children of the same father and different mothers) or uterine siblings (children of the same mother and different fathers). When full blood siblings compete with consanguine or uterine siblings in the succession, the full blood siblings are awarded twice as much as the consanguine or uterine siblings. "*The reason for this difference is that the full blood sibling is twice a sibling, from the father's and from the mother's side. Conversely, the others are 'unilateral siblings'; in common language, they are even called 'half-siblings'*"[183].

The portion of full blood siblings[184], which should be twice as much as the portion of unilateral siblings, should be calculated as follows: a) one adds the number of consanguine and uterine siblings to the number of full blood siblings multiplied by two; b) the inheritance is then divided by the resulting fictitious total number of siblings; c) the result of that division is the value of the portion of the consanguine and uterine siblings, and that result multiplied by two is the value of the portion of the full blood siblings. For example, if

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[183] Cunha Gonçalves, *Tratado*, Vol. X, page 407.

[184] Cunha Gonçalves, *ibidem*; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 433.

there are 3 uterine and consanguine siblings, and there are 2 full blood siblings, and if the inheritance is valued at 900, the following calculations should be made: a) 3 (*uterine and consanguine siblings*) + 2 (*full blood siblings*) X 2 = 3 + 4 = 7; b) 900 : 7 = 128.57143; c) *share of the consanguine and uterine siblings* = 128.57143 / *share of the full blood siblings* = 128.57143 X 2 = 257.14286. To confirm the result, we add (128.57143 X 3 *uterine and consanguine siblings*) + (257.14286 X 2 *full blood siblings*) = 385.71429 + 514.28572 = 900, i.e., the total value of the inheritance.

The single § of article 2001 refers to a situation where descendants of full blood siblings compete with descendants of consanguine and uterine siblings. In this case, one must first make the respective division as if all the siblings were living, and then each of the resulting portions shall be divided among the children that are exercising the right of representation, since the descendants make up strands.

In accordance with the single § of article 2000, which further refers to the situation where the author of the inheritance is a legitimate child, in the absence of legitimate siblings and of their legitimate descendants, the heirs are the acknowledged or legally recognised siblings, their descendants, and the illegitimate descendants of legitimate siblings. Just as in the previous cases, the principle of proximity of degree of relationship is also applicable here, unless there is right of representation. This means that the illegitimate siblings acknowledged by the common progenitor are the first to succeed. When the author of the inheritance is not survived by any siblings, the heirs are the illegitimate descendants of legitimate siblings, and the legitimate or illegitimate descendants of illegitimate siblings. In accordance with the single § of the same provision, the above mentioned successors inherit "*in the same way*". This means that, if the author of the inheritance is only outlived by his/her nephews, the division shall be made according to strands, each group of nephews receiving the portion that would belong to

their parent if he/she were alive, in a similar situation to the right of representation[185].

If the author of the inheritance is an illegitimate child, all his/her siblings and their descendants inherit, regardless of whether those siblings are legitimate or illegitimate children. In any case, the proportions foreseen in article 2001 should be abided by (article 2002).

In all situations of succession of legitimate or illegitimate siblings or descendants of siblings, when the author of the inheritance leaves a surviving spouse, the provisions of the single § of article 2003 are applicable to the latter.

The Portuguese Civil Code of 1966, even though it preserves the difference between the portions of full blood siblings and the portions of consanguine and uterine siblings (article 2146), eliminated the difference between the succession rights of legitimate siblings and their legitimate descendants and those of illegitimate siblings and their descendants, as well as those of the illegitimate descendants of legitimate siblings (article 2145).

[185] Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 437 and footnote 2 of the same page.

Código Civil de 1867

SECÇÃO VI
DA SUCESSÃO DO CÔNJUGE SOBREVIVO E DOS TRANSVERSAIS

Artigo 2003º

Na falta de descendentes, ascendentes, e irmãos e descendentes destes, sucederá o cônjuge sobrevivo, excepto achando-se judicialmente separado de pessoa e bens por culpa sua.

Artigo 2003º

Na falta de descendentes, ascendentes, irmãos e descendentes destes, sucederá o cônjuge sobrevivo, se ao tempo da morte do outro não estavam divorciados ou separados de pessoas e bens, por sentença passada em julgado.

§ único) Na falta de descendentes e ascendentes, nos termos dos Artigos 2000º e 2002º, o cônjuge sobrevivo será usufrutuário da herança do cônjuge falecido, se ao tempo da morte deste não estivessem divorciados ou separados de pessoas e bens, com sentença transitada em julgado.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2004º

Na falta de todos os parentes e do cônjuge, mencionados no Artigo antecedente, serão chamados à herança os transversais não designados precedentemente, achando-se dentro do décimo grau.

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SECTION VI
SUCCESSION BY THE SURVIVING SPOUSE AND BY COLLATERAL RELATIVES

Article 2003

In the absence of descendants, of ascendants and of siblings and their descendants, the surviving spouse shall succeed, except if he/she is judicially separated of persons and property due to his/her own fault.

Article 2003

In the absence of descendants, of ascendants and of siblings and their descendants, the surviving spouse shall succeed if, at the time of the other spouse's death, they were not divorced or separated of persons and property by a judgment in a condition of *res judicata*.

Single §) In the absence of descendants and of ascendants, in accordance with articles 2000 and 2002, the surviving spouse shall have the right of usufruct over the deceased spouse's inheritance, if at the time of latter's death they were not divorced or separated of persons and property by a judgment in a condition of *res judicata*.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2004

In the absence of all the relatives and of the spouse, mentioned in the previous article, collateral relatives not yet mentioned shall be called to the inheritance, if they are relatives up to the tenth degree.

Artigo 2004º

Se o falecido, sendo filho legítimo, não deixar pessoa alguma das mencionadas nos n.os 1º, 2º, 3º e 4º do Artigo 1969º e não dispuser de seus bens, serão chamados à herança os transversais legítimos indicados no nº 5º do mesmo Artigo.

§ único) Na falta de transversais legítimos dentro do sexto grau herdarão os transversais ilegítimos, estando eles mesmos dentro deste grau.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2004

If the deceased, being a legitimate child, does not leave any of the persons mentioned in no.s 1, 2, 3 and 4 of article 1969, and has not disposed of his/her property, the legitimate collateral relatives indicated in no. 5 of the same article shall be called to the inheritance.

Single §) In the absence of legitimate collateral relatives up to the sixth degree, the illegitimate collateral relatives shall inherit, if they are relatives up to the same degree.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2005º

Os filhos ilegítimos, posto que perfilhados ou reconhecidos, não sucedem ab intestato aos transversais de seus pais, nem estes parentes aos filhos ilegítimos, excepto, em ambos os casos, não havendo outros parentes dentro do décimo grau.

Article 2005

Illegitimate children who have been acknowledged or recognised do not succeed intestate to their parents' collateral relatives, nor do these parents succeed to the illegitimate children, except, in both cases, if there are no other relatives up to the tenth degree.

Artigo 2005º

Se o falecido, sendo filho ilegítimo, não deixar pessoa alguma das mencionadas nos n.os 1º, 2º, 3º e 4º do Artigo 1969º, e não dispuser de seus bens, herdarão indistintamente os seus transversais, até o sexto grau, nos termos gerais.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2005

If the deceased, being an illegitimate child, does not leave any of the persons mentioned in no.s 1, 2, 3 and 4 of article 1969, and has not disposed of his/her property, his/her collateral relatives shall inherit without distinction, up to the sixth degree, in accordance with general provisions.

(*As revised by Decree no. 19.126, of 16/12/1930*)

COMMENTARY TO ARTICLES 2003 TO 2005

The spouse holds the fourth place in the order of intestate succession, in accordance with article 1969, no. 4. This is confirmed by article 2003, which indicates that the spouse shall succeed in the absence of descendants, of ascendants, and of siblings and their descendants. However, in order for the surviving spouse to be able to succeed, he/she may not be divorced or separated of persons and property from the deceased by a judgment in a condition of *res judicata* (article 2003). If the author of the inheritance dies before the divorce is decreed, the surviving spouse may inherit.

Additionally, when the spouse competes in the succession with siblings or with the descendants of siblings of the author of the inheritance, he/she further enjoys the usufruct of all the inheritance (article 2003, single §). This usufruct was introduced by Decree 19.126, in a way, so as to compensate for lowering the spouse's place in the order of succession, in relation to what had been foreseen in the Decree of 31 October 1910[186].

As was mentioned relating to mandatory succession, the spouse also receives a privileged position in intestate succession under the Portuguese Civil Code of 1966. In accordance with article 2133, no. 1, clause a), the spouse is in the first succession group, competing with the descendants. Additionally, in this case, the spouse may never receive less than ¼ of the inheritance (article 2139, no. 1), even if doing so requires reducing the children's portion, when there are more than three children. This rule is also applicable to mandatory succession, as a result of the referral included in article 2157.

[186] Cunha Gonçalves, *Tratado*, Vol. X, page 418; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 443.

In the absence of descendants, the spouse competes with the ascendants (article 2133, no. 1, clause b))[187]. Considering his/her privileged position, it is no longer necessary to award the usufruct of the inheritance to the spouse in the situations where this was done in the Code of Seabra.

On the other hand, according to article 2004, if the author of the inheritance is a legitimate child and there are no descendants, ascendants, siblings and their descendants, or spouse, the remaining collateral relatives mentioned in article 1969, no. 5, are called to the succession. These include the relatives between the 3rd and the 6th degree of the collateral line, i.e., collateral relatives who share the same grandparent, great-grandparent, great-great-grandparent, etc. Here too, the relatives of a closer degree exclude those of a more remote one.

There may be collateral relatives of the same degree from lines originating from different stocks. For example, a great-uncle and a first cousin are both relatives in the 4th degree of the collateral line. Regarding the great-uncle: the author of the inheritance constitutes the 1st degree, his father the 2nd degree, his grandfather the 3rd degree (the great-grandfather is not counted, since he is the common stock), and the great-grandfather's child, i.e., the great-uncle of the author of the inheritance, the 4th degree. Regarding the first cousin: the author of the inheritance constitutes the 1st degree, his father the 2nd degree (his grandfather is not counted, since he is the common stock), his uncle the 3rd degree and that uncle's child, a first cousin to the author of the inheritance, the 4th degree. In this case, both great-uncle and first cousin are called to the succession, as equals, under article 1971[188].

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[187] The terms in which this occurs have already been mentioned in the commentary to articles 1993 to 1999.

[188] Cunha Gonçalves, *Tratado*, Vol. X, page 420; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 447.

Further in a situation where the author of the inheritance is a legitimate child, if there are no legitimate collateral relatives, within the 6th degree, the illegitimate collateral relatives shall inherit, as long as they are within that degree (article 2004, single §). This means that legitimate collateral relatives exclude illegitimate ones, even if the latter are closer relatives than the legitimate collateral relatives. Illegitimate collateral relatives are, for example, an illegitimate uncle, or an illegitimate great-uncle and all of his descendants, be they legitimate or illegitimate. This means that the legitimate children of an illegitimate collateral relative are also illegitimate collateral relatives, even if they are their parents' and siblings' legitimate relatives[189].

When the deceased is an illegitimate child with no descendants, no ascendants, no siblings and their descendants and no spouse, his/her collateral relatives up to the 6th degree are called to the succession, with no distinction between legitimate and illegitimate relatives. As was stressed by Cunha Gonçalves, the expression "*without distinction*" is unnecessary, since all the mentioned collateral relatives shall be illegitimate relatives of the author of the inheritance[190].

With regard to intestate succession, the Portuguese Civil Code of 1966 reduced the relevant relationship in the collateral lines from the 6th to the 4th degree, in accordance with article 2133, no. 1, clause d), and with article 2147. On the other hand, these provisions make no distinction between legitimate collateral relatives and illegitimate collateral relatives.

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[189] Cunha Gonçalves, *Tratado*, Vol. X, page 421.

[190] Cunha Gonçalves, *ibidem*; Pires de Lima and Antunes Varela, *Noções Fundamentais*, page 449.

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SECÇÃO VII
DA SUCESSÃO DA FAZENDA NACIONAL

Artigo 2006º

Na falta de todos os herdeiros testamentários ou legítimos, sucederá o Estado.

Artigo 2007º

Os direitos e obrigações do Estado, relativamente à herança, serão os mesmos que os de qualquer outro herdeiro.

Artigo 2008º

O Estado não poderá tomar posse da herança, sem que preceda sentença que declare o seu direito, nos termos do Código de Processo.

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SECTION VII
SUCCESSION BY THE NATIONAL TREASURY

Article 2006

In the absence of all testamentary or intestate heirs, the State shall succeed to the inheritance.

Article 2007

The rights and obligations of the State, in relation to the inheritance, are the same as those of any other heir.

Article 2008

The State may not take charge of the inheritance before a judgment has been issued confirming its right to do so, in accordance with the Code of Civil Procedure.

COMMENTARY TO ARTICLES 2006 TO 2008

The courts have deemed that the State takes charge of the inheritance in the exercise of the right of sovereignty, and not as an heir[191].

[191] Cunha Gonçalves, *Tratado*, Vol. X, page 427.

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CAPÍTULO IV
DISPOSIÇÕES COMUNS À SUCESSÃO TESTAMENTÁRIA E À SUCESSÃO LEGÍTIMA

SECÇÃO I
DA ABERTURA E TRANSMISSÃO DAS HERANÇAS

Artigo 2009º

A herança abre-se pela morte do seu autor; o lugar da abertura da herança determinar-se-á nos termos seguintes:

§ 1º) Se o finado tiver domicílio, abrir-se-á a herança no lugar desse domicílio.

§ 2º) Na falta de domicílio, abrir-se-á a herança no lugar onde o finado tiver bens imóveis.

§ 3º) Se tiver bens imóveis em diversos lugares, abrir-se-á a herança onde se achar a maior parte desses bens, sendo esta parte calculada pela respectiva contribuição directa.

§ 4º) Se o finado não tiver domicílio nem bens imóveis em parte alguma, abrir-se-á a herança no lugar onde ele se finar.

Artigo 2010º

Havendo justo receio de que se extraviem valores mobiliários da herança,

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CHAPTER IV
PROVISIONS COMMON TO TESTAMENTARY SUCCESSION AND INTESTATE SUCCESSION

SECTION I
OPENING AND TRANSMITTING INHERITANCES

Article 2009

The inheritance is opened as a result of the death of the estate-leaver; the place of the opening of the inheritance shall be determined in accordance with the following provisions:

§ 1) If the deceased had a domicile, the inheritance shall be opened at the place of that domicile.

§ 2) In the absence of a domicile, the inheritance shall be opened at the place where the deceased had immovable property.

§ 3) If the deceased had immovable property in different places, the inheritance shall be opened where most of that property is found, this assessment being made in relation to the respective land revenue.

§ 4) If the deceased does not have a domicile or immovable property anywhere, the inheritance shall be opened in the place where he/she died.

Article 2010

If there is just fear that valuable movable property of the inheritance may be

poderá qualquer autoridade judicial, a requerimento de algum dos interessados ou do curador geral, e ainda *ex-officio*, ordenar a imposição de selos, conforme se determinar no Código de Processo.

lost, any judicial authority may, at the request of an interested party or of the curator general, and also on its own initiative, order the imposition of seals, in accordance with the Code of Civil Procedure.

Artigo 2011º

A transmissão do domínio e posse da herança para os herdeiros, quer instituídos, quer legítimos, dá-se desde o momento da morte do autor dela.

Article 2011

The transmission of the ownership and possession of the inheritance to the testamentary or intestate heirs shall occur at the moment of the death of the estate-leaver.

Artigo 2012º

Se o herdeiro se achar ausente, ou for menor ou interdito, proceder-se-á judicialmente a inventário e a partilha, se esta houver de fazer-se.

Article 2012

If the heir is an absentee, or is a minor or an interdicted person, the court shall carry out the inventory and the partition, if the latter has to be done.

Artigo 2012º

Se o herdeiro se achar ausente, for menor, interdito ou desconhecido, proceder-se-á judicialmente a inventário, e partilha, se esta houver de fazer-se.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2012

If the heir is an absentee, or is a minor or an interdicted or unknown person, the court shall carry out the inventory and the partition, if the latter has to be done.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2013º

Se os herdeiros forem todos maiores, e não houver entre eles ausentes ou interditos, poderão concertar-se, como entenderem, acerca da partilha, contanto que seja feita por escritura pública ou auto público.

Article 2013

If all the heirs are majors, and they do not include absentees or interdicted persons, they may agree, as they see fit, on the partition, as long as this is done by deed or document executed under seal.

Artigo 2014º

Os herdeiros sucedem em todos os direitos e obrigações do autor da herança, que não forem puramente pessoais, ou exceptuados pela lei, ou pelo dito autor.

Article 2014

The heirs succeed to all the rights and obligations of the estate-leaver, as long as these are not strictly personal or excluded by law or by the said estate--leaver.

Artigo 2015°

Sendo várias as pessoas chamadas simultâneamente à mesma herança, será o seu direito indivisível, tanto a respeito da posse como do domínio, enquanto a partilha se não fizer.

Artigo 2016°

Cada um dos co-herdeiros pode pedir a totalidade da herança, a que for chamado conjuntamente com outros, sem que o demandado possa opor-lhe a excepção, de que a herança lhe não pertence por inteiro.

Artigo 2017°

O direito de petição de herança prescreve, pelo mesmo tempo e forma, por que prescrevem os direitos imobiliários.

Article 2015

If several people are called simultaneously to the same inheritance, their right over it shall be indivisible, both regarding the possession and the ownership, for as long as there is no partition.

Article 2016

Each of the co-heirs may request the totality of the inheritance to which he/she is called jointly with others, without the person against whom this request has been made being able to object that the inheritance is not totally his/hers.

Article 2017

The right to claim the inheritance becomes time-barred in the same time and manner as do rights relating to immovable property.

COMMENTARY TO ARTICLES 2009 TO 2017

Succession is opened by the death of a person holding a patrimony which should be partitioned, the heirs acquiring thereupon the right to succeed.

As was mentioned by CUNHA GONÇALVES (*Tratado de Direito Civil*, Vol. X, Coimbra Editora Limitada, Coimbra, 1935, pages 436-437), "*it is absolutely crucial to determine the exact moment a succession was opened for the following reasons: a) it is by reference to the moment of the opening of the succession that the deceased's heirs are determined; the right to succeed is acquired by that person or persons at the precise instant, with no hiatus (...) and it immediately becomes transmissible to the heirs of the successor(s) in question; b) It is by reference to the moment of the opening of the succession that one determines if the heirs are legally capable of succeeding; and it is from that moment that there will be retroactive effects of a succession subject to a suspensive condition; c) If some time goes by between the death of the author of the inheritance and the partition of that inheritance, when there are two or more successors, there will necessarily be an undivided mass; but the effects of legal acts carried out during that period are produced from the moment of the opening of the succession; d) The succession tax is calculated according to the value of the property at the time of the opening of the inheritance (Regul. of 23 December 1899, article 41, single §)*".

In this context, it should be noted that absence, even a lasting one, does not equal death, since it does not bring about the opening of the succession. CUNHA GONÇALVES notes that "*even if 20 years go by after the definitive curatorship or after the absent person has reached the age of 95, this only implies a probability of death*", and criticises the criterion of 95 years, as well as the fact that the absent person is not deemed dead even "*after the maximum known duration for human life has been surpassed, such as 180 or 200 years*" (*Tratado*, vol. X, pages 438-439).

Once the succession is opened, the property is legally transmitted, except in certain situations such as that of the submission of a testamentary inheritance to a suspensive condition (see articles

1759, no. 2, and 1822) or of an inheritance left to a child of determined persons who was not yet born or conceived (see articles 1777 and 1824), since in these cases that transmission occurs at a later date, but with retroactive effects.

The heirs succeed to all of the deceased's rights and obligations, except for the so-called purely personal rights (see article 2014), which include: public rights, such as the rights of an elector or public servant, nobility and honorary titles, academic degrees (doctorate, undergraduate, etc.), rights associated to status (such as marriage or filiation), rights of a lifelong or temporary nature, such as usufruct, use or habitation, and also *"the rights which the author of the inheritance held subject to a suspensive condition, when that condition was not fulfilled while the deceased was alive, since the deceased did not actually acquire the rights in question (see article 1759, no. 2)"* (CUNHA GONÇALVES, *Tratado*, Vol. X, pages 445-447).

As for non-transmissible personal obligations, the same author provides the following examples: *"obligations of a public nature: the obligation to do military service, to testify in court, to be sanctioned for crimes one committed, etc. However,* ex delicto *obligations of a patrimonial nature are transmitted, such as a fine, (...) the costs of a suit, liability for losses and damage (...); obligations based on someone else's trust, in contracts carried out* intuitu personae, *such as those relating to mandates or domestic service, are not transmissible (...)"* (*Tratado*, Vol. X, page 450).

Any heir may exercise the right to petition for the inheritance.

A petition for the inheritance is a *"claim by an heir, be it for his/her portion of a still undistributed inheritance, be it for the portion of an already distributed inheritance, when he/she was excluded from that distribution, or be it for the property assigned to his/her portion and which is still in possession of a co-heir or of a third party"* (CUNHA GONÇALVES, *Tratado*, vol. X, page 478).

This suit is, generally, initiated against the so-called *apparent heir*, i.e., the person who illegitimately, and in the quality of an heir, in good or bad faith, holds all or part of the inheritance – such is the case of a testamentary heir appointed by a will which was revoked, forged or null and void, or of an heir who is legally incapable or has

been debarred from succeeding. Good faith is terminated with the summons for the suit, in accordance with article 495, § 5.

The right to petition for the inheritance (article 2017) is time--barred in the case of possession of the inheritance, be it by a third party, by a co-heir or by the State, lasting longer than 30 years, in the absence of opposition by the lawful successor; this deadline starts from the opening of the succession (if there has also been possession since then). Regarding property which is not held by anyone (such as a collected and vacant inheritance), even if that period has lapsed it will still be possible to claim the respective succession rights.

In this regard, CUNHA GONÇALVES notes: "*Therefore, time-barring always requires 30 years, even if the inheritance is composed exclusively of movable property. It is not enough for this property to be held for 3 to 10 years, in accordance with the provisions of article 532, since a universality is not a movable thing (...), and since the possession must be complemented with the heir's inaction for 30 years. (...). This limitation period is suspended or interrupted in accordance with general rules. But a suspension or interruption relating to a specific heir may not be invoked to benefit the remaining heirs*" (*Tratado*, vol. X, page 492).

A limitation period that results in the holder of certain property becoming its owner is limited to this effect, and it is not grounds for becoming an heir.

Regarding general provisions on partition, it should be noted that there are different ways of partitioning the inheritance, depending on the type of heirs that are involved – if all are majors, legally capable, present and known (article 2013) or if some are minors or interdicted, absent or unknown persons.

In the first case, the partition may be made by agreement, namely by describing the property in a partition chart, granted legal force by the respective deed.

If an heir is unduly excluded, the act in question is not invalid, but that heir is granted the right to demand his/her portion, "*and may never demand the complete annulment of the partitions, since that would exceed his/her interest, the exceeding part being illegitimate*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 473).

A partition is indivisible – there is one single inheritance, although to be divided; thus, if the heirs unilaterally dispose of property belonging to the inheritance, before it has been divided, these acts will be null and void (see article 2015, and also articles 1566 and 2177). A partition is also retroactive – it is effective from the date of the death of the estate-leaver (article 2011), and merely declarative – it does not create or transfer the right in question –, since the ownership of the property is considered to be acquired from the moment of the opening of the succession.

As was mentioned, before the partition the inheritance is indivisible, and the rights of the heirs relate to all of the hereditary mass, and not to one or several specific assets.

These are equal, abstract hereditary portions, befalling on the whole, but to be filled with specific assets.

None of the heirs may claim possession or ownership of a specific asset, even if its value is the same as his/her portion, nor is he/she entitled to alienate it. While he/she may alienate his/her abstract portion, it is necessary to give preference to the other heirs, the general rules on co-propriety being applicable; on the other hand, the distribution of the inheritance implies or requires the agreement of the remaining heirs and a partition procedure, assigning to each successor specific assets to meet their hereditary portions.

Thus, each heir has an absolute right to demand a partition and to dispose of his/her portion, as long as he/she respects the other heirs' right of preference.

As to this right of preference, it is wondered "*whether this right may be exercised in the inventory proceedings of the respective inheritance, or if the co-heir must initiate an ordinary suit against the alienating party for that purpose. The correct doctrine and case-law allow for this claim to be raised in the inventory proceedings, when the issue may be settled by a simple inspection of the documents, in light of the provisions of articles 2087 of this Code* [i.e. the Civil Code of 1867] *and 724, § 1, of the Code of Civil Procedure; of course, this does not preclude the rights of the third party resulting from the eviction*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 468).

Since there is no time limit for the inheritance to remain undivided —article 2185 is not applicable to this situation—, such a limit may be agreed upon by a verbal or written agreement.

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SECÇÃO II
DA ACEITAÇÃO E DO REPÚDIO DA HERANÇA

Artigo 2018°

A herança pode ser aceita pura e simplesmente, ou sê-lo a benefício do inventário.

Artigo 2019°

O herdeiro não é obrigado a encargos além das forças da herança.

§ único) Porém, se a herança for aceita pura e simplesmente, incumbe ao herdeiro provar que ela não consta de bens suficientes para pagamento dos encargos. Se for aceita a benefício de inventário, e este se fizer, incumbe aos credores a prova, de que na herança há outros bens além dos inventariados.

Artigo 2020º

Quem repudia a herança, que lhe sobrevém por um lado, não fica por isso inibido de aceitar a que lhe tocar por outro.

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SECTION II
ACCEPTANCE AND REPUDIATION OF THE INHERITANCE

Article 2018

The inheritance may be accepted purely and simply, or under the benefit of inventory.

Article 2019

The heir is not liable for charges beyond those which can be covered by the inheritance.

Single §) However, if the inheritance is accepted purely and simply, the heir must prove that it does not contain sufficient property to pay the charges. If it is accepted under the benefit of inventory, and if the latter is carried out, it is up to the creditors to prove that the inheritance includes other property aside from that which was listed in the inventory.

Article 2020

A person who repudiates an inheritance to which he/she is entitled for one reason, is not prohibited as a result thereof from accepting the inheritance he/she is entitled to for a different reason.

SUBSECÇÃO I
DA ACEITAÇÃO SIMPLES E DO REPÚDIO DA HERANÇA

Artigo 2021º

A aceitação ou o repúdio da herança é um acto inteiramente voluntário e livre.

Artigo 2022º

Ninguém pode aceitar ou repudiar a herança em parte, com termo ou condicionalmente.

Artigo 2023º

Podem aceitar ou repudiar a herança todos os que têm a livre administração de seus bens.

Artigo 2024º

A mulher casada não pode validamente aceitar ou repudiar a herança sem autorização do marido, nem o marido sem consentimento da mulher. A autorização do marido e o consentimento da mulher podem ser supridos judicialmente.

Artigo 2025º

A herança, deixada aos menores e aos interditos, só pode ser aceita a benefício de inventário por aqueles que os representam.

Artigo 2026º

Os surdo-mudos, que não estiverem em tutela, e souberem escrever, aceitarão ou repudiarão a herança, ou por si, ou por seu bastante procurador; mas, se não souberem escrever, será a herança aceita

SUBSECTION I
SIMPLE ACCEPTANCE AND REPUDIATION OF THE INHERITANCE

Article 2021

The acceptance or repudiation of the inheritance is entirely voluntary and free.

Article 2022

No one may accept or repudiate the inheritance in part, with a term or conditionally.

Article 2023

All those with the right to freely manage their property may accept or repudiate the inheritance.

Article 2024

A married woman may not validly accept or repudiate an inheritance without the husband's authorisation, nor may the husband without the wife's consent. The husband's authorisation and the wife's consent may be overcome by a court of law.

Article 2025

An inheritance left to minors or to interdicted persons may only be accepted under the benefit of inventory by those representing them.

Article 2026

Deaf-mutes who are not subject to guardianship and know how to write, shall accept or repudiate the inheritance, themselves or through an attorney; but, if they do not know how to write, the

a benefício de inventário por um curador, que será nomeado em conselho de família.

Artigo 2027°

A aceitação é expressa ou tácita.

§ l°) É expressa, quando o herdeiro toma este título ou qualificação em algum acto público ou privado.

§ 2°) É tácita, quando o herdeiro pratica algum facto de que necessariamente se deduz a intenção de aceitar, ou de tal natureza, que ele não poderia praticá-lo senão na qualidade de herdeiro.

Artigo 2028°

Os actos puramente conservatórios, ou de administração e guarda provisória da herança, não implicam aceitação dela.

Artigo 2029°

A cessão da herança não envolve aceitação dela, sendo feita gratuitamente em favor de todos os co-herdeiros, a quem deveria pertencer na falta do cedente.

Artigo 2030°

O que for declarado herdeiro por sentença passada em julgado, ou condenado nessa qualidade expressamente, será havido por herdeiro, tanto em relação aos credores ou aos legatários, que hajam figurado no processo, como em relação a quaisquer outros.

Artigo 2031°

Se os herdeiros se não acordarem sobre a aceitação ou sobre o repúdio da herança, poderão uns aceitá-la, e repudiá-la outros;

inheritance shall be accepted under the benefit of inventory by a curator, who shall be appointed by the family council.

Article 2027

The acceptance is explicit or tacit.

§ 1) It is explicit when the heir uses this title or designation in any public or private act.

§ 2) It is tacit when the heir carries out any fact from which the intention to accept is necessarily deduced, or which is of such a nature that he/she could not carry it out unless he/she were an heir.

Article 2028

Acts of a purely conservatory nature, or of provisional administration and custody of the inheritance, do not imply its acceptance.

Article 2029

The cession of the inheritance does not imply its acceptance if it is done gratuitously in favour of all the co-heirs, to whom it would belong in the absence of the person who has carried out the cession.

Article 2030

The person declared an heir by a judgment in a condition of *res judicata*, or convicted explicitly in that quality, shall be considered an heir, both in relation to the creditors and to the legatees who took part in the case and in relation to any others.

Article 2031

If the heirs do not agree on the acceptance or repudiation of the inheritance, some may accept it and others repudiate

mas, se uns quiserem aceitá-la simplesmente, e outros a benefício de inventário, haver-se-á por aceitada beneficiariamente.

it; but, if some want to accept it simply, and others want to accept it under the benefit of inventory, it shall be considered as having been accepted under the benefit of inventory.

Artigo 2032°

Se o herdeiro falecer sem aceitar ou repudiar a herança, passará a seus herdeiros o direito de aceitar ou repudiar.

Article 2032

If the heir dies before accepting or repudiating the inheritance, the right to accept or repudiate shall pass to his/her heirs.

Artigo 2033º

O herdeiro, que tiver aceitado a herança do falecido, pode repudiar a herança que este não tivesse aceitado ao tempo da sua morte; mas o repúdio da herança do falecido trará consigo o repúdio de toda e qualquer herança que lhe fosse conferida.

Article 2033

An heir who has accepted the inheritance of the deceased may repudiate the inheritance that the latter had not accepted at the time of his/her death; but the repudiation of the inheritance of the deceased shall imply the repudiation of all and any inheritance to which he/she was entitled.

Artigo 2034º

O repúdio deve ser feito por termo, assinado pelo repudiante, ou por seu procurador, perante o juiz do lugar da abertura da herança.

§ 1º) Estes termos serão lançados em um livro numerado, rubricado e encerrado pelo juiz.

§ 2º) Se o repúdio for feito por procurador, será a procuração conservada no cartório respectivo.

Article 2034

Repudiation may be carried out by way of a record, signed by the repudiating party or by his/her attorney, before the judge of the place where the inheritance was opened.

§ 1) These records shall be made in a numbered book, initialled and signed at the end by the judge.

§ 2) If the repudiation is made through an attorney, the power of attorney shall be kept in the respective office.

Artigo 2035º

Entende-se, que o herdeiro que repudia nunca foi herdeiro, nem pode haver, em tal caso, direito de representação; mas o repúdio da herança não priva o repudiante do direito de haver os legados, que lhe tenham sido deixados.

Article 2035

An heir who repudiates the inheritance is considered to have never been an heir, and he/she may not, in such a case, have the right of representation; but the repudiation of the inheritance does not deprive the repudiating party

from the right to legacies that may have been left to him/her.

Artigo 2036°

Ninguém pode reclamar a aceitação que haja feito, excepto:

1°) Em caso de violência;

2°) Tendo sido induzido à aceitação dolosamente;

3°) Achando-se a herança absorvida em mais de metade, em consequência de testamento desconhecido ao tempo da aceitação.

Article 2036

No one may complain against an acceptance he/she has already made, except:

1) In the case of violence;

2) Having been deceitfully led to accept;

3) If more than half of the inheritance is absorbed as a result of a will which was not known at the time of the acceptance.

Artigo 2037°

A disposição do Artigo antecedente é aplicável ao repúdio, excepto o n° 3.

Article 2037

The provisions of the previous article are applicable to repudiation, with the exception of no. 3.

Artigo 2038°

O herdeiro, que é chamado à herança por testamento e *ab-intestato*, e a repudia pelo primeiro título, pressupõe-se que a repudia igualmente pelo segundo; mas se a repudiar como herdeiro *ab-intestato*, sem ter notícia do testamento, bem pode aceitá-la por este título, não obstante aquele repúdio.

Article 2038

An heir who is entitled to the inheritance through testamentary and intestate succession, and who repudiates it under the first title, is presumed to have repudiated it also under the second; but if he/she repudiates it as an intestate heir, without knowing about the will, he/she may well accept it under this title, notwithstanding the above mentioned repudiation.

Artigo 2039°

Do repúdio da herança do testador, que dispôs da sua parte disponível, não se deduz o repúdio da parte legitimária, que deve ser expresso.

Article 2039

A repudiation of the inheritance of the deceased, who left his/her disposable portion, does not imply the repudiation of the mandatory portion, which must be explicit.

Artigo 2040°

Os credores daquele, que repudia a herança em prejuízo deles, podem ser autorizados judicialmente a aceitá-la no

Article 2040

Creditors of a person who repudiates the inheritance to their detriment may be authorised by the court to accept in

lugar e em nome do devedor; mas o remanescente da herança, pagos os credores, não aproveitará ao repudiante, mas sim aos herdeiros imediatos.

place and in the name of the debtor; but the remainder of the inheritance, after the creditors have been paid, shall not benefit the person who repudiated it, and instead shall benefit the immediate heirs.

Artigo 2041°

Quando alguém tiver interesse, em que o herdeiro declare, se aceita ou repudia a herança, poderá requerer, passados nove dias, desde a abertura dela, que o juiz do domicílio do herdeiro assine a este um prazo razoável, que não excederá a trinta dias, para que, dentro desse prazo, faça a sua declaração, sob pena de haver-se a herança por aceitada.

Article 2041

When anyone has an interest in the heir declaring if he/she accepts or repudiates the inheritance, he/she may request, after nine days have passed since the opening of the inheritance, that the judge of the domicile of the heir award the latter a reasonable deadline, not exceeding thirty days, to make the above mentioned declaration, failing which the inheritance shall be deemed to have been accepted.

Artigo 2042°

Ninguém pode, nem sequer por contrato antenupcial, renunciar à sucessão de pessoa viva, ou alienar, ou obrigar os direitos, que eventualmente possa ter à sua herança.

Article 2042

No-one may, not even through a prenuptial agreement, renounce the succession of a living person, or dispose of or charge the rights that he/she may have over the inheritance.

Artigo 2043°

Os efeitos da aceitação, ou do repúdio da herança, retrotraem-se ao dia da abertura dela.

Article 2043

The effects of the acceptance or repudiation of the inheritance are retroactive, starting from the day of its opening.

COMMENTARY TO ARTICLES 2018 TO 2043

The acceptance of the inheritance functions as a suspensive condition for its transmission, in light of article 2011. Before this takes place, the successor merely has the right to accept (or to repudiate) the inheritance.

The volume of the inheritance's charges is relevant to choose between a pure and simple acceptance (a more natural option when the value of the assets of the inheritance exceeds that of its debts) and an acceptance under the benefit of inventory (when there are doubts as to which is greater, the value of the assets or the debts). If the debts exceed the assets, the most common solution is to repudiate the inheritance. Repudiation may also be of interest to an heir who received a donation *inter vivos* of significant value, as a means to avoid being subject to collation (article 2099).

Acceptance under the benefit of inventory is mandatory for legally incapable persons (article 2025). Article 2025 completes articles 137, 243, no. 11, and 321, which relate to these situations of legal incapacity.

This type of acceptance duly protects the interests of the legally incapable person, with no mention of the possibility of repudiation by his/her representatives. Thus, regarding absent persons, one should refer to article 77 (relating to inheritances preceding the disappearance or the last time the person was heard from) and to article 72, § 1 (relating to subsequent inheritances).

The choice between pure and simple acceptance and acceptance under the benefit of inventory is extremely relevant with regard to assigning the burden of proof of the inheritance's patrimonial capacity to pay its debts, keeping in mind that these debts shall be paid insofar as possible from the inheritance, but not beyond that.

Acceptance and repudiation are subject to the principle of indivisibility – the inheritance may not be accepted or repudiated

only in part (article 2022). However, there are exceptions to this rule, foreseen in articles 2038 and 2039.

First, if an heir who is entitled to the inheritance through testamentary and intestate succession repudiates it as an intestate heir, he/she may accept it as a testamentary heir, if he/she did not know about the will.

Second, "*the repudiation of the inheritance of a testator who disposed of the disposable portion does not imply a repudiation of the mandatory portion*" (PIRES DE LIMA/ANTUNES VARELA, *Noções Fundamentais*, 1944-45, page 535).

The law also does not allow an acceptance subject to a term or condition – article 2022.

An acceptance or repudiation by a married person, of either gender, requires the consent of the respective spouse (article 2024).

Although the husband is free to manage his property, as well as the wife's and the common property (articles 1104 and 1189), he may not by his exclusive will impose acceptance of an inheritance, particularly since that could raise moral dilemmas for the heiress in question.

However, it is necessary to reconcile articles 1120 and 2024, and to take into account the property regime in force. Indeed, since the existence of a communion regime seems to be at the basis of the solution adopted in article 2024, this solution becomes senseless in the case of separate property.

As was mentioned by CUNHA GONÇALVES, "*In the case of spouses married under absolute separation or dowry, if the inheritance's property belongs exclusively to the husband and, therefore, if the wife cannot be liable for the debts relating to that property, article 2024 cannot prevail over article 1127, which regulates the effects of such a prenuptial agreement. Nor should it be argued that article 2024 makes no distinction according to the couple's property regime; because this article is merely a variation of the provisions of article 1120, which implies the existence of that distinction. One should not lose sight of the fact that article 2024 aims at preventing one of the spouses from being liable for the charges of an inheritance received by the other spouse, and at preventing one of the spouses from suffering losses*

as a result of the other spouse repudiating the inheritance. None of this can occur in relation to the exclusive property of a husband married under absolute separation or dowry" (*Tratado*, vol. X, page 517).

In the current Portuguese system, neither spouse requires the other's consent to accept donations, inheritances or legacies (article 1683, no. 1, of the Portuguese Civil Code of 1966); and the law clearly excludes the need for the other spouse's consent in order to repudiate an inheritance, in the case of a separation of property regime (article 1683, no. 2, of the Civil Code of 1966).

An acceptance may be explicit or tacit – article 2027. Thus, there is explicit acceptance when, for example, *"one individual produces before a court of law or a public office a petition, stating at once: 'Mr. X, heir of Mr. Y', or indicating that, upon the death of the author of the inheritance, the applicant became his/her heir, or one of his/her heirs"* (CUNHA GONÇALVES, *Tratado*, vol. X, pages 522-523).

As for tacit acceptance, CUNHA GONÇALVES mentions the following examples: *"in relation to immovable property, the ordering of crops and sale of fruits, the carrying out of non-urgent repairs, the carrying out of improvements, the payment of contributions; but it is not an act of tacit acceptance to pick the fruits which were already fully matured and at risk of being lost, or to order absolutely urgent repairs, or even, upon an order of a public authority. In relation to movable property, the successor accepts the inheritance if he/she uses, rents, lends, sells or consumes that property; but not when he/she merely stores it, at a leased location, or in his/her own home, so as not to pay a lease"* (*Tratado*, vol. X, page 526).

However, acts of a purely conservatory nature or of provisional administration and custody of the inheritance are not deemed to imply tacit acceptance (article 2028), the same applying to the gratuitous cession of the inheritance in favour of all the co-heirs.

An acceptance has retroactive effects (article 2043).

Unlike an acceptance, a repudiation must be explicit and, in formal terms, it must be carried out by way of a record, signed by the repudiating party, or by his/her attorney, before the judge of the place where the inheritance was opened, in accordance with article 2034.

In accordance with article 2035, repudiation has retroactive effects, the repudiating heir being considered as though he/she was never an heir, and everything after the repudiation takes place as though he/she had never been called to the succession.

Therefore, the law does not grant a right of representation to the descendants of the repudiating party, since, for all legal purposes, it is as if that heir had never been called to the succession (article 2035).

Thus, even if the repudiating party has children, these shall not represent him/her (article 2035), differently from that which occurs in the cases of disinheritance or legal incapacity (see articles 1877 and 1979).

Let us note the example provided by PIRES DE LIMA and ANTUNES VARELA: "Mr. *A dies without a will and leaves two sons, B and C. The inheritance is returned to these two children. If B repudiates his half, this shall not be transmitted, as we know, to his children, under the right of representation, and it is C who shall have all of the inheritance, since this would be returned to him in full if his brother B did not exist. But if C also repudiates his portion, then all of the inheritance is passed on to the grandchildren, now called upon in their own right, and not through the right of representation. In the absence of descendants of the repudiating parties, the inheritance shall be awarded to the parents of the deceased, and so on*" (*Noções Fundamentais*, 1944-45, page 541).

The subsequent heir will thus be called upon, first within the same class, failing which the next class will be called upon.

And another example: "*Assuming that A has died, leaving one son (B) and two grandsons (D and E), who are the children of another son (C), who passed away before A. If D repudiates his part of the inheritance, this part shall not accrue jointly and in equal portions to his brother E and to his uncle B, but only to his brother E, since he would receive the entire portion of the deceased son (C), had D not existed*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 539).

The repudiating party is not deprived of the right to receive the legacies that were left to him/her (article 2035), notwithstanding the possibility of repudiating those as well.

In the current Portuguese system, repudiation is a necessary requisite for the right of representation, both in intestate and

mandatory succession – article 2042 of the Civil Code of 1966 – and in testamentary succession – article 2041 of the Civil Code of 1966.

Thus, within intestate and mandatory succession, if there are representatives, the right of representation is enforced; if there are no representatives, the respective portion is accrued to the co-heirs (article 2137, no. 2).

In the case of repudiation within testamentary succession, and if none of the priority indirect callings is applicable (see the hierarchy of indirect callings foreseen in articles 2041, no. 2, clause a), and 2034) – first, direct substitution (articles 2281 *et seq.*), then the right of representation (articles 2039 *et seq.*) – accruement takes places, but only between the testamentary successors, in accordance with articles 2301 and 2302.

In the case of donation *inter vivos* to the repudiating party, on behalf of the legitime, these are to be deducted from the legitime, and not from the disposable portion (article 2114, no. 2, of the Portuguese Civil Code of 1966).

In the framework of the Code of Seabra, ignorance or error relating to the value of the respective portion is not a reason to question a repudiation or acceptance already carried out, except, for acceptance, in the case foreseen in article 2036, no. 3, i.e., when more than half of the inheritance is "consumed" by a will which was unknown at the time of the acceptance.

On the other hand, article 2062 allows for repudiation by an heir after he/she accepted the inheritance under the benefit of inventory, when these proceedings have begun, *inter alia* because that inventory may reveal debts and other circumstances unknown to the heir until then and which would determine the repudiation.

The validity of an acceptance or repudiation may be challenged in the cases of violence and deceit (articles 2036 and 2037) and, in the case of acceptance, on the basis of the above mentioned "consumption" of more than half the inheritance (article 2036, no. 3).

Three important articles should further be noted: article 2040, which allows the creditors of an insolvent heir who repudiates an inheritance, to their detriment, to take that heir's place in the acceptance of the inheritance, as long as duly authorised by a court of law; article 2041, which protects those with an interest in clarifying whether the heir accepted the inheritance or not, allowing them to bring legal suit to obtain that declaration from the successor, in the absence of which the inheritance shall be deemed to have been accepted; finally, the rule which prohibits an anticipated renunciation of succession rights, even in a contract, as well as an alienation or burdening of rights which are still to be awarded through succession (article 2042).

This section also foresees the transmission of the right to succeed, in article 2032 (completed by article 2033).

The requisites are the following: the heir (B) must have been called, which implies that he survived the deceased (A) and that he is legally capable of succeeding; that heir (B) must have died, logically after the *de cuius* (A), without accepting or repudiating the inheritance to which he had been called (relating to A).

For the transmission to take place – in favour of the heirs of the second deceased person (B) – the heirs must accept the inheritance of the transmitter (B), since it is this inheritance which includes the right to accept or to repudiate A's inheritance, a right which they will be able to exercise in one sense or the other.

On the distinction between the right of representation and the transmission of the right to succeed, CUNHA GONÇALVES notes: "*1) The requisite for representation is the physical and legal impossibility for the represented person to accept the inheritance; the requisite for succession by transmission is that the acceptance by the heir was legally and physically possible, but was not exercised due to a factual circumstance; (...) 3) The representative-successor is obliged to collate the donations received from the* de cuius; *conversely, the successor by transmission, even if he/she received donations from the first author of the inheritance, has no such obligation, since his/her immediate transmitter did not have it; 5) The representative-successor may receive the inheritance of the* de cuius *even*

if he/she is excluded from the succession of the represented person or if he/she has repudiated this succession; conversely, the heir of an heir must accept the latter's inheritance, and must not be excluded from it due to legal incapacity; (...) 8) Representation only takes place in lineal or collateral descent, and only in favour of certain collateral relatives; an acceptance by transmission may be carried out by relatives of any line or degree, as long as they are called to succeed" (*Tratado*, vol. X, page 539).

A final word relating to the vacant inheritance, i.e., the inheritance of a *de cuius* with unknown or, more precisely, uncertain heirs or, if there are known heirs, when these do not accept the inheritance.

As for the possibility of the inheritance being vacant only in part, if one of the known co-heirs repudiates only his/her portion, CUNHA GONÇALVES notes that this will not happen because that repudiated portion shall accrue to the portions of the co-heirs, *"regardless of whether that heir and the other co-heirs are testamentary (article 1852) or intestate heirs (article 1972)"* (*Tratado*, vol. X, page 455).

Before the vacant inheritance is declared as befalling to the State, the unknown heirs must be summoned, and even after the inheritance has been surrendered to the State, those heirs may still claim it and demand its restitution. As for what should be restituted, CUNHA GONÇALVES wonders whether *"it is possible to annul the sales made at public auction, so as to convert the inheritance into cash, in accordance with the provisions of articles 691 and 693 of the Code of Civil Procedure"*. And the same author replies: *"In principle, anything carried out by a court, under the assumption that there were no heirs, must be annulled. It is all* res inter alios acta; *it is subject to the tacit resolutory condition of more of the deceased's intestate or testamentary heirs surfacing. Therefore, these heirs may claim their own property from the inheritance, restituting its respective price, i.e., the product of the sale (...)"* (*Tratado*, vol. X, p. 458).

As for the obligation to pay interest for the capital surrendered to the State, an issue which is raised when some time goes by between the liquidation of the inheritance and the claim by the heirs, and differently from the option under French doctrine – according to which heirs may only request interest and fruits after the restitution

suit, since there was good faith in the preceding period –, CUNHA GONÇALVES notes that the State should not be considered equal to a mere holder in good faith, and that the inheritance is surrendered to it subject to a resolutory condition – the surfacing of heirs –, and one which has retroactive effects (*Tratado*, vol. X, p. 459).

However, restitution is time-barred after 30 years, because the State is not prevented from invoking the limitation period for the right to petition for the inheritance, in accordance with article 2017.

Código Civil de 1867

SUBSECÇÃO II
DA ACEITAÇÃO A BENEFICIO DE INVENTÁRIO

Artigo 2044°

O herdeiro maior ou emancipado, em cujo poder estiver a herança, ou parte dela, e que pretender aceitá-la a benefício de inventário, requererá ao juiz competente, dentro de dez dias, desde a morte do autor da herança, se este falecer em sua companhia, ou dentro de vinte dias depois de receber a notícia da morte, se com ele não estivesse vivendo, que mande proceder ao respectivo inventário.

§ único) Se o herdeiro for testamentário, este prazo contar-se-á, desde que ele tiver conhecimento do testamento.

Artigo 2045°

Se o herdeiro não tiver em seu poder a herança, ou parte dela, não perderá o seu direito ao benefício de inventário, enquanto não for constrangido a declarar-se, conforme o que fica disposto no Artigo 2041°, ou não decorrerem vinte dias desde que tomar conta da herança, ou de parte dela, ou não prescrever o seu direito, na conformidade do que se ordena no Artigo 2017°.

Artigo 2046°

Se os herdeiros forem menores, ou interditos, ou o for algum deles,

Civil Code of 1867

SUBSECTION II
ACCEPTANCE UNDER THE BENEFIT OF INVENTORY

Article 2044

A major or emancipated heir, in whose possession the inheritance, or part of it, is found, and who intends to accept it under the benefit of inventory, shall request the competent judge to order the carrying out of the respective inventory, at the latest ten days after the death of the estate-leaver, if he/she dies in his/her company, or twenty days after receiving the news of his/her death, if he/she did not live with him/her.

Single §) In the case of a testamentary heir, this deadline shall start from the moment in which he/she becomes aware of the will.

Article 2045

If the heir does not have the inheritance, or part of it, in his/her possession, he/she shall not lose the right to accept it under the benefit of inventory, as long as he/she is not ordered to make this declaration, in accordance with article 2041, or as long as twenty days have not elapsed since taking charge of the inheritance, or of part of it, or as long as his/her right is not time-barred, in accordance with article 2017.

Article 2046

If the heirs are minors or interdicted persons, or any of them is, the provisions

observar-se-á acerca da herança o que fica disposto no Artigo 2025°.

Artigo 2047°

Sendo vários os herdeiros, se algum, ou alguns quiserem aceitar a herança a benefício de inventário, e outros não, observar-se-ão as disposições do Artigo 2031°.

Artigo 2048°

O juiz do inventário fará citar por éditos de trinta dias os credores do finado, e os legatários desconhecidos, ou domiciliados fora da comarca, e pessoalmente os credores e os legatários conhecidos e domiciliados nela, para assistirem, querendo, ao processo do inventário.

Artigo 2049°

O inventário será começado dentro de trinta dias, contados desde aquele em que expirar o prazo assinado aos credores e legatários, e será concluído dentro de outros sessenta dias.

Artigo 2050°

Se, em razão de se acharem os bens a grandes distâncias, ou por serem numerosos, ou por alguma outra justa causa, parecerem insuficientes os sessenta dias sobreditos, poderá o juiz prolongar este prazo, conforme for necessário.

Artigo 2051°

Não se dando princípio ao inventário, e não se concluindo este, por culpa do beneficiário, nos prazos declarados,

of article 2025 shall be applied regarding the inheritance.

Article 2047

If there are several heirs and one or some of them wish to accept the inheritance under the benefit of inventory, and others do not, the provisions of article 2031 shall be complied with.

Article 2048

The inventory judge shall have the creditors of the deceased and the legatees who are unknown or whose domicile is outside the judicial division notified through thirty-day edicts, and he/she shall have the creditors and legatees who are known and whose domicile is within the judicial division notified in person to attend, if they so wish, the inventory proceedings.

Article 2049

The inventory shall be initiated at the latest thirty days after the expiry of the deadline given to the creditors and legatees, and shall be concluded within a further sixty days.

Article 2050

If, due to the property being located at great distances, or being numerous, or due to any other just cause, the above mentioned sixty days are deemed insufficient, the judge may prolong this deadline as necessary.

Article 2051

If the inventory is not begun, and if it is not concluded, due to the fault of the beneficiary, within the assigned

haver-se-á a herança por aceitada pura e simplesmente.

deadlines, the inheritance shall be deemed to have been accepted purely and simply.

Artigo 2052º

O herdeiro beneficiário, que se achar na posse efectiva da herança, será mantido nela, mas poderá ser constrangido a prestar caução, havendo perigo de extravio; e, se o herdeiro não a prestar, será a administração conferida a outrem pelo juiz, ouvidos os interessados.

§ único) Se o beneficiário não estiver na posse efectiva da herança, o juiz proverá, sendo requerido, sobre a guarda e administração dela.

Article 2052

The beneficiary heir who is in actual possession of the inheritance shall be maintained in the same, but may be obliged to provide a security, if there is danger of loss; and, if the heir does not provide it, its administration shall be granted to another person by the judge, after hearing the interested parties.

Single §) If the beneficiary is not in actual possession of the inheritance, the judge shall take necessary steps, if so requested, concerning its custody and administration.

Artigo 2053°

Os herdeiros, que sonegarem no inventário alguns bens da herança, perderão o direito ao benefício do mesmo inventário.

Article 2053

Heirs who withhold from the inventory some of the inheritance's property shall lose the right of acceptance under the benefit of the said inventory.

Artigo 2054º

O administrador da herança, quer seja o próprio herdeiro, quer outra pessoa, não poderá exercer, sem autorização judicial, actos que não sejam de mera administração.

Article 2054

The administrator of the inheritance, be it the heir him/herself or another person, may not carry out, without an authorisation of the court, acts which go beyond mere administration.

Artigo 2055º

Se houver de proceder-se à venda dos bens hereditários, será esta feita em hasta pública, salvo se todos os herdeiros, credores e legatários concordarem no contrário.

Article 2055

If the hereditary property must be sold, this sale shall be carried out at public auction, except if all the heirs, creditors and legatees agree otherwise.

Artigo 2056°

Durante a formação do inventário poderão ser pagos pelo administrador da herança os legados e as dívidas passivas, quando no pagamento concordarem todos os herdeiros, credores e legatários.

§ lº) Não concordando no pagamento algum destes interessados, poderão, tanto os credores, como os legatários, demandar judicialmente os herdeiros; e, se, quando obtiverem sentença passada em julgado, ainda não estiver concluído o inventário, poderão ser pagos; devendo, porém, os legatários prestar caução.

§ 2°) O pagamento de dívida e a entrega de legado, feitos por modo diferente do estabelecido neste Artigo e no § 1º, são nulos, e o administrador da herança, que os fizer, responderá pelo desfalque, que a dívida ou o legado tenha de padecer, em razão de não chegar a herança para inteiro pagamento das dívidas e dos legados.

Article 2056

During the inventory proceedings, the administrator of the inheritance may pay the legacies and debts, when all the heirs, creditors and legatees agree to this payment.

§ 1) If some of these interested parties do not agree to the payment, both the creditors and the legatees may initiate a legal action against the heirs; and if, when they obtain a judgment in a condition of *res judicata*, the inventory has still not been concluded, they may be paid; legatees must, however, provide a security.

§ 2) A payment of a debt and a delivery of a legacy made differently from that which is foreseen in this article and in § 1, is null and void, and the administrator of the inheritance who carries them out shall be liable for the detriment to the debt or legacy due to the inheritance being insufficient to fully pay the debts and legacies.

Artigo 2057°

No caso de execução, poderão quaisquer credores acudir a ela com os seus protestos ou preferências e serão pagos na ordem em que forem graduados.

Article 2057

In the case of execution proceedings, any creditors may intervene in them with their objections or preferences and they shall be paid in the order in which they are ranked.

Artigo 2058º

Se não se apresentarem credores com sentença executória contra a herança, e os bens desta chegarem para pagamento de todos os credores, serão estes pagos pela ordem em que se forem apresentando, e, só, depois de todos haverem sido inteirados dos respectivos créditos, serão satisfeitos os legados, e declaradas

Article 2058

If no creditors present themselves with an executable judgment against the inheritance, and the property of the latter is sufficient for the payment of all the creditors, these shall be paid in the order in which they present themselves, and, only after all of them have been satisfied for their respective credits, shall

caducas as cauções prestadas pelos legatários já pagos.

Artigo 2059°

Não chegando os bens para pagamento de dívidas e legados, deverá o administrador dar contas da sua administração aos credores e aos legatários, e será responsável pelos prejuízos, que a herança haja padecido por culpa ou negligência dele.

§ 1°) Neste caso, mandará o juiz satisfazer as dívidas, trazendo para o monte, ou a totalidade dos legados, ou a quota de cada um deles, proporcionada ao que faltar.

§ 2°) Se, ainda assim, não for suficiente o todo para pagamento dos credores, e estes não concordarem em ser pagos rateadamente, poderão recorrer aos meios ordinários para obter pagamento.

Artigo 2060°

Pagos os credores e os legatários, ficará o herdeiro beneficiário no livre gozo do que restar da herança, e, se a herança houver sido administrada por outra pessoa, será esta obrigada a prestar-lhe contas, debaixo da responsabilidade imposta no Artigo 2059°.

Artigo 2061°

Se, depois de pagos os legatários, aparecerem outros credores, estes só terão regresso contra os ditos legatários, não restando da herança bens suficientes para seu pagamento.

the legacies be complied with and the securities provided by legatees who have already been paid be declared as lapsed.

Article 2059

If the property is not sufficient to pay the debts and legacies, the administrator must account for his/her administration to the creditors and legatees, and he/she shall be liable for damage to the inheritance due to his/her fault or negligence.

§ 1) In this case, the judge shall have the debts repaid, including in the pool either the totality of the legacies or the share of each of them, in the proportion of what is lacking.

§ 2) If, even so, the entire inheritance is insufficient to pay the creditors, and these do not agree to be paid *pro rata*, they may resort to the normal means of obtaining payment.

Article 2060

Once the creditors and legatees have been paid, the beneficiary heir shall freely enjoy what remains of the inheritance, and, if it was managed by another person, this person shall be obliged to account to him/her, subject to the liability imposed by article 2059.

Article 2061

If, after the legatees have been paid, other creditors appear, these shall only have the right to seek compensation from the said legatees, if there is not sufficient property remaining in the inheritance to pay them.

Artigo 2062°

O inventário, que houver sido feito pelo herdeiro em primeiro grau, que depois repudiasse a herança, aproveitará aos substituídos e aos herdeiros *ab-intestato*, mas estes terão um mês para deliberarem, contado desde o dia em que houverem conhecimento do repúdio.

Article 2062

An inventory made by the heir in the first degree who subsequently repudiates the inheritance shall benefit those who replace him and the intestate heirs, but these shall have a month to decide, starting from the day in which they become aware of the repudiation.

Artigo 2063°

As custas do inventário, das contas e, bem assim, das demandas que o herdeiro houver intentado, ou tiverem sido propostas contra ele por causa da herança, ficarão a cargo da mesma herança, excepto se o herdeiro houver sido condenado pessoalmente por seu dolo ou má fé.

Article 2063

The costs of the inventory, of the accounts and also of the legal actions which the heir has initiated, or which were initiated against him/her on account of the inheritance, shall be paid for from the inheritance, except if the heir was personally convicted due to his/her deceit or bad faith.

SECÇÃO III
DO INVENTÁRIO

SECTION III
INVENTORY

Artigo 2064º

Haverá sempre inventário, quando qualquer dos herdeiros for menor, interdito, ausente ou desconhecido.

§ 1°) Em casos tais, o inventário será concluído dentro de sessenta dias, contados desde aquele em que for principiado; salvas as disposições do Artigo 2050°.

§ 2°) Cessando a causa, pela qual se procede a inventário, este não prosseguirá, salvo havendo quem o requeira de entre os co-herdeiros.

Article 2064

There will always be an inventory when any of the heirs is a minor, or an interdicted, absentee or unknown person.

§ 1) In such cases, the inventory shall be concluded within sixty days, starting from when it is begun, not precluding the provisions of article 2050;

§ 2) If the reason for why the inventory was carried out ceases, this shall not continue unless one of the co-heirs requests it.

Artigo 2065°

Entre maiores, que tenham a livre administração de seus bens, ou que não estejam compreendidos no Artigo

Article 2065

Among majors with the free administration of their property, or who are not included in the previous article,

precedente, só poderá fazer-se inventário judicial, sendo requerido por algum dos co-herdeiros.

Artigo 2066º

Quando este inventário houver de produzir também os efeitos da aceitação beneficiária da herança, ser-lhe-á aplicável o que fica disposto nos Artigos 2044°, 2048°, 2049º, 2050º e 2051°.

a judicial inventory may only be carried out if it is requested by one of the co-heirs.

Article 2066

When this inventory also has to produce the effects of the acceptance of the inheritance under the benefit of inventory, the provisions of articles 2044, 2048, 2049, 2050 and 2051 shall be applicable to it.

COMMENTARY TO ARTICLES 2044 TO 2066

An inventory is a description or a listing of the inheritance's property and debts, followed by their respective appraisal and by the determination of the total value of the assets and liabilities. Once debts and costs have been paid, the net value of the inheritance is finally obtained.

In this respect, the law is concerned with the withholding of property. As to the concept of withholding property, CUNHA GONÇALVES mentions that it may relate to any property and take on several forms, such as the omission of a credit of the inheritance, when the successor intends to collect it later; simulation of debts for one's own profit or for that of a third party; destruction of documents proving the heir's debts to the estate; hiding property entrusted to the person in question by the testator or returned by a third party to the estate, among other cases (*Tratado de Direito Civil*, vol. X, Coimbra Editora Limitada, Coimbra, 1935, page 563).

It should be noted that, in order for there to be a withholding of property, the concealment of that property must be made with the intention of keeping it for one's own benefit or for someone else's benefit.

The sanction is foreseen in article 2053. If the withholder is the head of the family, article 2079 is brought into play.

Conversely, in the case of non-compliance with the obligation to restore property subject to collation, or in the case of the denial of the existence of such property, "*the restoring heir may only be sued for the refused property; and, if he/she is convicted by a court of law, he/she must return the property in question or it shall be included in his/her portion; and the remaining property assigned to that heir will also be burdened by this liability*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 563).

In the case of minors, interdicted persons, non-interdicted deaf--mutes who cannot write and legal persons, it is mandatory to accept the inheritance under the benefit of inventory.

In this case, the inventory aimed at granting this benefit shall be completed as soon as the respective net balance is determined, i.e., after the payments to the creditors and legatees.

A claim for debts within the scope of an inventory dispenses the creditors from suing each heir in the proportion of their liability, going instead after the undivided inheritance.

It should further be noted that the deadlines foreseen in articles 2044 and 2045 must be considered as public policy requirements.

Regarding the time-barring of the right to accept under the benefit of inventory, foreseen at the end of article 2045, it is directly related to the time-barring of the right to petition for the inheritance; the maximum limitation period for rights relating to immovable property is 30 years.

An essential consequence of an acceptance under the benefit of inventory is the separation of patrimonies – the property of the inheritance is separated from the heir's patrimony, both preceding and following the opening of the succession. Only the property belonging to the inheritance is assigned to the payment of the deceased's debts, the resulting net inheritance then going to the heirs (article 2060).

As for some of the effects of this separation of patrimonies, it should be noted that: "*a) the payment of the inheritance's debts may only be demanded from the respective property; (...) naturally, the confusion between the patrimony of the* de cuius *and that of the heir ceases; (...) c) if the heir was entitled to maintenance from the inheritance, he/she loses that right; he/she may not claim maintenance from the* de cuius' *creditors; d) although the separation of patrimony does not imply the solidarity of the heirs for the inheritance's debts, nor the indivisibility of the property, despite the partition of those debts and property, the creditors always retain the right to bring suit against the entirety of the inheritance; e) the said separation does not affect the rights of preference between the inheritance's*

creditors, nor the preferential payment of creditors over legatees (...)" (CUNHA GONÇALVES, *Tratado*, Vol. X, page 576).

There are orphan inventories (article 2064) – when some of the heirs are orphaned minors or are legally incapable – and inventories between majors – when all are legally capable, freely administer their property and are known and present (article 2065). The concept of minors encompasses both those that have already been born and those that have not yet been born or even conceived at the time of the opening of the succession.

As for specifying the types of interdiction that fall within the scope of articles 2012 and 2064, CUNHA GONÇALVES considers that only those interdicted on the basis of insanity are encompassed, and possibly also persons interdicted due to severe deaf-muteness, when they are deemed absolutely incapable of governing their property, taking into account that article 339 places these two interdictions in parallel to each other.

CUNHA GONÇALVES further considers that, regarding an heir who is of unsound mind, and for the mandatory inventory to be applicable, there must have been an interdiction ordered by a judgment issued in the respective legal proceedings (*Tratado*, vol. X, page 597).

Regarding absent persons, one should resort to the concept used in articles 55 *et seq.*, since only disappeared-absent persons, subject to provisional or definite curatorship, are considered equal to minors and interdicted persons (see Executive Order of 22 March 1905), even though some judgments considered the inventory to be mandatory simply because one of the heirs was absent at an unknown location.

As for unknown persons, this expression encompasses both an heir who is not known and one who is difficult to identify or uncertain, even though he/she was mentioned in the deceased's will.

If the grounds that justify the orphan inventory cease to exist (e.g., the minor reaches the age of majority, or the interdiction is lifted), the inventory does not proceed in the same terms, unless an heir requests it (see article 2064), and instead it proceeds as an inventory between majors.

Código Civil de 1867

SUBSECÇÃO I
DO CABEÇA-DE-CASAL, E DO ARROLAMENTO E DESCRIÇÃO DE BENS

Artigo 2067°

Diz-se cabeça-de-casal a pessoa, que é encarregada de arrolar e dar à descrição e partilha os bens da herança.

Artigo 2068°

Este encargo incumbe:

1°) Ao cônjuge sobrevivo, nos casamentos por comunhão, e nos outros tão-sòmente na parte em que ele pode ter partilha;

2°) Na falta de cônjuge sobrevivo, e nos casos em que ele não pode ser cabeça-de-casal, ao filho ou co-herdeiro que estivesse vivendo com o falecido, não sendo incapaz;

3°) Se nenhum dos filhos ou herdeiros estivesse vivendo com o falecido, ou se, pelo contrário, o estivessem todos, ao filho varão ou herdeiro mais velho, e, na falta destes, à irmã ou herdeira mais velha, não sendo incapazes;

4°) Se uma parte dos filhos ou herdeiros estivessem vivendo com o falecido e outra não, àquele de entre os primeiros a quem for aplicável a disposição do número antecedente.

Artigo 2068°

Este encargo incumbe:

1°) Ao cônjuge sobrevivo, excepto no caso de não ter partilhas em nenhum dos bens a inventariar e não serem herdeiros descendentes seus, ainda menores;

Civil Code of 1867

SUBSECTION I
HEAD OF THE FAMILY AND LISTING AND DESCRIPTION OF THE PROPERTY

Article 2067

The person entrusted with listing and presenting for description and partition the inheritance's property is called the head of the family.

Article 2068

This office shall be entrusted to:

1) The surviving spouse, in marriages under communion, and in other marriages only regarding the part he/she may have in the partition;

2) In the absence of a surviving spouse, and in the cases in which he/she may not be the head of the family, the child or co-heir who lived with the deceased, if he/she is not incapable;

3) If none of the children or heirs lived with the deceased, or if, on the contrary, all lived with the deceased, the male child or oldest male heir and, in their absence, the sister or oldest female heir, if they are not incapable;

4) If part of the children or heirs were living with the deceased and others were not, to the person among the first group to whom the provision of the previous number is applicable.

Article 2068

This office shall be entrusted to:

1) The surviving spouse, except if he/she is not entitled to a portion of any of the property to be included in the inventory and if none of his/her descendants, still minors, are heirs;

2°) Aos filhos capazes, e, na falta destes, aos outros descendentes capazes;

3°) Aos outros herdeiros capazes.

§ 1°) Dentro das categorias dos n.°s 2° e 3° preferem:

a) Os filhos legítimos aos ilegítimos,

b) Os herdeiros que estiverem vivendo com o inventariado aos outros;

c) Os varões às mulheres;

d) E, havendo mais do que um na mesma circunstância, prefere o mais velho.

§ 2°) Só se considera como herdeiro vivendo com o inventariado aquele que permanentemente residir no domicílio e na companhia do mesmo inventariado.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

2) The legally capable children and, in their absence, the other legally capable descendants;

3) The other legally capable heirs.

§ 1) Within the categories of no.s 2 and 3, the following shall have preference:

a) Legitimate children over illegitimate ones;

b) Heirs who were living with the deceased over others;

c) Males to females;

d) And, if there is more than one person in the same circumstances, the oldest shall have preference.

§ 2) Only an heir who permanently resided in the domicile and in the company of the decedent shall be considered as one who was living with the decedent.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2069°

Não havendo irmão ou irmã, ou co-herdeiro maior, ou sendo todos incapazes, servirá de cabeça-de-casal o tutor.

Artigo 2069°

Não havendo cônjuge sobrevivo, nem herdeiros, nos termos do Artigo precedente, pertencerá o cabeçalato ao tutor dos incapazes, e, havendo mais de um grupo destes com tutores diferentes, àquele dos tutores que o juiz escolher, e, enquanto não houver tutor nomeado, o juiz nomeará provisoriamente um cabeça-de-casal entre os parentes mais próximos do incapaz.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2069

If there is no brother or sister, or a co-heir who is a major, or if all are legally incapable, the guardian shall act as head of the family.

Article 2069

If there is no surviving spouse, nor heirs, in accordance with the previous article, the guardian of the legally incapable persons shall hold the office of head of the family and, if there is more than one group of legally incapable persons with different guardians, the said office shall be entrusted to the guardian chosen by the judge and, as long as no guardian has been appointed, the judge shall provisionally appoint a head of the family from among the closest relatives of the legally incapable person.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2070º

Os co-herdeiros, que tiverem a posse de certos bens da herança, serão considerados como cabeças-de-casal quanto a esses bens.

Artigo 2070º

Os co-herdeiros que, à data da abertura da herança, tiverem posse de certos bens da mesma herança, e os conferentes de bens doados, serão considerados como cabeça-de-casal quanto a esses bens.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

Artigo 2071º

O cabeça-de-casal, havendo co--herdeiro menor ou incapaz, procederá a inventário, nos termos dos Artigos 157° e 189°.

Artigo 2072º

O cabeça-de-casal deverá declarar:

1º) O nome e estado do autor da herança, o dia, mês e ano em que, e o lugar onde este houver falecido;

2º) O nome, estado, idade e capacidade dos herdeiros testamentários ou legítimos, sem excluir os que possam existir em estado de concepção conhecida;

3°) Se o autor da herança faleceu com testamento, e neste caso apresentará o original ou cópia autêntica do dito testamento;

4º) Se o autor da herança, sendo casado, o foi precedendo escritura, e neste caso apresentará um traslado ou cópia autêntica dela.

Artigo 2073°

O cabeça-de-casal dará à descrição, fielmente e debaixo de juramento, todos os bens da herança.

Article 2070

Co-heirs in possession of certain property of the inheritance shall be considered as heads of the regarding that property.

Article 2070

Co-heirs who, at the time of the opening of the inheritance, are in possession of certain property of the same inheritance, and those who are to restore donated property, shall be considered heads of the family regarding that property.

(As revised by Decree no. 19.126, of 16/12/1930)

Article 2071

The head of the family, if one of the co-heirs is a minor or a legally incapable person, shall carry out an inventory, in accordance with articles 157 and 189.

Article 2072

The head of the family should declare:

1) The name and status of the estate-leaver, the day, month and year and the place in which he/she died;

2) The name, status, age and legal capacity of the testamentary or intestate heirs, not excluding those who may already be known to have been conceived;

3) If the estate-leaver had a will and, in this case, presenting the original or an authenticated copy of the said will;

4) If the estate-leaver, being married, had a prenuptial agreement, presenting in this case a transcript or authentic copy of the said agreement.

Article 2073

The head of the family shall present for description, faithfully and under oath, all of the inheritance's property.

Artigo 2073º

O cabeça-de-casal dará à descrição, fielmente e sob compromisso de honra, todos os bens da herança.

§ único) Feita a descrição, pode qualquer dos interessados requerer que seja distribuída pelos co-herdeiros até metade dos rendimentos dos bens não legados, tomando-se em consideração o valor que lhes tenha sido atribuído; o cabeça-de-casal, que não cumprir o que a esse respeito for ordenado pelo juiz, será imediatamente removido e responderá por perdas e danos.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2074º

Os bens móveis serão especificados pelos seus sinais característicos, e de forma que não possam trocar-se ou confundir-se com outros.

Artigo 2075º

Os bens imóveis serão descritos com as suas confrontações, nomes ou números, pertenças e servidões, e quando deverem passar precípuos, serão descritas as benfeitorias, que tiverem recebido e que forem partíveis.

Artigo 2076º

Os fundos consolidados serão descritos, especificando-se a sua natureza, e os números que tiverem.

Artigo 2077º

A descrição das dívidas activas e passivas será acompanhada da declaração dos títulos em que se fundam.

Article 2073

The head of the family shall present for description, faithfully and upon his/her word, all of the inheritance's property.

Single §) Once the description has been made, any of the interested parties may request that up to half of the income of the non-legated property be distributed to the co-heirs, taking into account the value that was awarded to it; the head of the family who does not comply with what is ordered by the judge in this respect shall be immediately removed and shall be liable for losses and damage.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2074

Movable property shall be specified by its characteristic markings, in such a way that it may not be exchanged or confused with other property.

Article 2075

Immovable property shall be described with its boundaries, names or numbers, appurtenances and easements, and whenever it should devolve in preferential manner, the improvements which it received and which are separable shall be described.

Article 2076

Consolidated funds shall be described, specifying their nature and the numbers they bear.

Article 2077

The description of active and passive debts shall be accompanied by the statement of the documents on which they are based.

Artigo 2078º

Se existirem na herança alguns bens, que pertençam a terceiro, ou que devam passar precìpuamente a algum herdeiro, serão arrolados separadamente, ajuntando-se os respectivos títulos.

§ único) Os bens, que pertencerem a terceiro, não lhe serão entregues, havendo alguma dúvida, sem que o dito terceiro prove o seu direito.

Article 2078

If the inheritance includes property belonging to a third party, or which should devolve to any heir in preferential manner, it shall be listed separately, the respective documents being annexed.

Single §) Property belonging to a third party shall not be delivered to him/her, if any doubt exists, unless the said third party proves his/her right to it.

Artigo 2079º

Pelo facto de sonegar bens da herança, o cabeça-de-casal perderá, em benefício dos co-herdeiros, o direito que possa ter a qualquer parte dos bens sonegados, e, se não for herdeiro, incorrerá na pena de furto.

Article 2079

If he/she withholds property from the inheritance, the head of the family shall lose, to the benefit of the co-heirs, any right which he/she might have to any part of the withheld property and, if he/she is not an heir, he/she shall be subject to the penalty for theft.

Artigo 2080º

O cabeça-de-casal, que dolosamente descrever créditos, direitos ou encargos que se fundem em títulos simulados, falsos ou falsificados, será obrigado a reparar o prejuízo causado, e, além disso, punido com as penas de furto ou de falsificação, conforme as circunstâncias.

Article 2080

The head of the family who deceitfully describes credits, rights or charges based on simulated, false or forged documents shall be obliged to repair the damage caused and, aside from this, shall be punished with the penalties for theft or forgery, according to the circumstances.

Artigo 2081º

O cabeça-de-casal, que dolosamente ocultar títulos necessários para o conhecimento da natureza ou dos encargos de bens partíveis, será responsável pelos prejuízos que dessa omissão resultarem.

Article 2081

The head of the family who deceitfully hides documents necessary to know the nature or the burdens of property subject to partition shall be liable for damage arising from that omission.

Artigo 2082º

O cabeça-de-casal continuará na administração da herança que tiver, até se ultimarem as partilhas, excepto no que tocar aos bens não partíveis, que

Article 2082

The head of the family shall continue to manage the inheritance, until the conclusion of the partition, except regarding property not subject to the

houverem de passar precìpuamente a outros herdeiros ou sucessores.

partition, which is to devolve in preferential manner to other heirs or successors.

Artigo 2083º

O cabeça-de-casal exercerá todos os direitos conservatórios, e promoverá a cobrança e arrecadação das dívidas activas, quando essa cobrança e arrecadação possam perigar na demora.

§ único) Se, para a arrecadação das dívidas, de que se trata neste Artigo, o cabeça-de-casal propuser alguma acção ou promover alguma execução, qualquer dos co-herdeiros poderá intervir no processo.

Article 2083

The head of the family shall exercise all the conservatory rights, and shall promote the recovery and collection of active debts when the said recovery and collection may be endangered by waiting.

Single §) If, for the collection of the debts referred to in this article, the head of the family initiates a legal action or promotes execution proceedings, any of the co-heirs may intervene in the proceedings.

Artigo 2084º

Os credores da herança poderão igualmente usar, contra o cabeça-de-casal, dos meios conservatórios; mas não poderão demandá-lo nas questões do domínio ou por dívidas da herança, sem citação de todos os co-herdeiros.

Article 2084

The creditors of the inheritance may also resort to conservatory measures against the head of the family; but these may not initiate legal actions against him/her in matters of ownership or relating to debts of the inheritance, without summoning all the co-heirs.

Artigo 2085º

O cabeça-de-casal, como administrador da herança, receberá todos os frutos e rendimentos dos bens, cuja posse tiver, e satisfará os encargos ordinários, com obrigação de dar contas, se o usufruto dos ditos bens lhe não pertencer; mas não poderá alhear bens alguns da herança, excepto os frutos e outros objectos que não puderem ser conservados sem perigo de se deteriorarem.

Article 2085

The head of the family, as administrator of the inheritance, shall receive all the fruits and income of the property which he/she has possession of, and shall pay the normal charges, subject to an obligation to account for this, if he/she does not have the right of usufruct over the property in question; but he/she may not alienate any of the inheritance's property, except for the fruits and other objects which cannot be kept without danger of deterioration.

Artigo 2086°

O cabeça-de-casal tem direito de ser inteirado das despesas, que fizer à sua custa por conta da herança, e delas poderá exigir juros; mas não será obrigado a pagá-los das somas que receber por conta da herança, senão desde que se achar em mora.

Article 2086

The head of the family has the right to be reimbursed for expenses which he/she paid for on account of the inheritance, and may request interest thereof; but he/she shall not be obliged to pay interest for the sums received on account of the inheritance, except from the time he is in default.

Artigo 2087°

As questões, que se suscitarem sobre a habilitação dos herdeiros indicados pelo cabeça-de-casal, ou dos que concorrerem ao inventário, ou acerca da propriedade dos bens hereditários, ou da sua qualidade de não partíveis, que não possam ser resolvidas por simples inspecção de documentos autênticos, serão resolvidas pelas vias ordinárias sem prejuízo de continuação do inventário e partilha.

Article 2087

Issues which arise concerning the qualification of heirs indicated by the head of the family, or of those who intervene in the inventory, or concerning the ownership of the hereditary property, or whether the said property is or is not subject to partition, which may not be solved by simple examination of authentic documents, shall be solved through the normal means, not precluding the continuation of the inventory and partition.

Artigo 2087°

As questões que se suscitarem sobre a habilitação dos herdeiros indicados pelo cabeça-de-casal, ou dos que concorreram ao inventário, acerca da propriedade dos bens hereditários ou da sua qualidade de não partíveis, que não possam ser resolvidas pela simples inspecção de documentos autênticos ou autenticados, serão resolvidas pelas vias ordinárias, sem prejuízo de continuação do inventário e partilha.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2087

Issues which arise concerning the qualification of heirs indicated by the head of the family, or of those who intervene in the inventory, or concerning the ownership of hereditary property or whether the said property is or is not subject to partition, which may not be solved by simple examination of authentic or authenticated documents, shall be solved through the normal means, not precluding the continuation of the inventory and partition.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2088°

O cabeça-de-casal, que dolosamente demorar a prossecução do inventário, poderá ser removido a requerimento

Article 2088

The head of the family who deceitfully delays the inventory may be removed at the request of the interested

dos interessados, entregando-se a outrem a administração provisória da herança, para o que será preferido o co-herdeiro mais idóneo.

parties, another person being given the provisional administration of the inheritance, the most capable co-heir being preferred for this purpose.

COMMENTARY TO ARTICLES 2067 TO 2088

The office of head of the family is personal and non-transmittable – it cannot even be transmitted by succession or by cession of the right of the heir exercising it.

The office is entrusted to the persons mentioned in article 2068, in order of precedence.

For this purpose, it is not enough to have one of the legal titles mentioned therein, or to be in possession of the inheritance's property, or to be a testamentary or intestate heir; a court appointment is also needed (even in the case of the surviving spouse), following which the head of the family swears to carry out his/her duties faithfully and diligently.

If the testator left the right of usufruct over his inheritance separate from its ownership, the head of the family must be the owner, since the holder of the right of usufruct is a legatee, not an heir.

Concerning some of the dubious cases, in light of the drafting of article 2068, CUNHA GONÇALVES highlights the following: "*If none of the children or heirs lived with the inventoried person, which one should be preferred? This possibility was foreseen in no. 3 of the old article 2068, which used to give preference to the eldest, exactly the same as when all lived with the inventoried person. Now, this preference is mentioned only for the situation where all lived with the deceased; and, certainly by omission, clause b) of the mentioned § 1 did not include the possibility of none living with the deceased. The eldest should, therefore, still be preferred.*

(...) If two spouses die at the same time or successively, while no descendants or heir lived with them, to whom will the office of head of the family be awarded? Certainly, the oldest male of the heirs of both spouses.

(...) *If, instead of children, there are only grandchildren or other legitimate and illegitimate heirs, who has preference? By analogy with the provisions of clause a) of § 1, the legitimate heirs should be preferred over the illegitimate ones*" (*Tratado*, vol. X, pages 615-617).

The obligations of the head of the family are foreseen, mainly, in article 2072 of the Civil Code, as well as in article 695 of the Code of Civil Procedure of 1939.

The head of the family has a duty of integrity.

In order to prove the withholding of property by the head of the family, it is necessary to produce: "*a) evidence that the assets in question belonged to the inventoried person; b) that those assets are in the possession of the head of the family; c) that the latter is aware of the assets' ownership; d) the omission of those assets from the description in the inventory, based on his/her exclusive decision; e) deceit or an intent to cause damage to the co-heirs. (...) Therefore, there is no withholding of property: a) when the head of the family is unaware of the existence of the claimed assets, or that they belonged to the inventoried person, or when he/she is not in possession of those assets; b) when the assets were omitted because the head of the family is or believes him/herself to be their exclusive owner, or knows that they belong to a third party; c) when the concealment was made in agreement with the remaining co-heirs, which is frequently the case, since all agree to conceal property from the tax authorities; d) when the omission did not occur in the description produced by the head of the family; e) when the omission was involuntary*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 641).

As to the issue of knowing whether the withheld assets may be acquired through time-barring (after ten years, in the case of movable property, and after thirty years in the case of immovable property), even if the author of the inventory was in bad faith when he/she denied possession of those assets of the inheritance, this effect may occur since he/she has reverted the title and deemed the withheld property to be his/her own, exercising possession over them in his/her own name.

As for the consequences of a breach of procedural duties, see the provisions of article 2088 of the Civil Code and article 735 of the Code of Civil Procedure, i.e., the possibility of the removal of the head of the family from this office, implying the surrendering of provisional administration to another person.

The powers of the head of the family include the power to receive all the fruits and income of the property he/she is in possession of, as well as the power to collect all pending income.

It is also up to the author of the inventory to administer all the property of the inheritance, carrying out the actions required for the purposes of conservation, which includes the disposal of fruits, of perishable assets or of assets generated by an industrial or commercial establishment included in the inheritance. These same powers allow him/her to continue to explore that establishment, which is essential to keep the clients and, consequently, the level of profit.

However, he/she is also obliged to pay the current debts of the inheritance with the collected income (article 2085). If he/she uses personal assets to pay for charges of the inheritance, he/she has the right to be compensated for those expenses, in accordance with article 2086.

The head of the family may be required to account for his/her actions – see article 2085, as well as article 739 of the Code of Civil Procedure (and also article 738 of the same Procedural Code, when the initiative to account for the administration comes from the head of the family him/herself).

Código Civil de 1867

SUBSECÇÃO II
DAS AVALIAÇÕES

Artigo 2089º

Os bens do inventário entre maiores serão avaliados por louvados nomeados por acordo entre eles.

§ único) Não se acordando os herdeiros na escolha dos louvados ou de parte deles, serão todos os que faltarem escolhidos pelo juiz, mas não de entre os propostos pelos herdeiros.

Artigo 2090º

Se o inventário for só de bens de menores, serão os louvados nomeados pelo conselho de família.

Artigo 2091º

Se o inventário for entre maiores e menores, será nomeado um louvado pelo conselho de família, outro por parte dos maiores, e o terceiro pelo juiz, para o caso de empate.

§ único) O louvado, que for chamado para o desempate, será obrigado a conformar-se com um dos outros louvados.

Artigo 2092º

As jóias e os objectos de ouro e prata serão avaliados pelos contrastes e ensaiadores, no seu valor intrínseco, acrescendo metade do feitio, se merecerem ser conservados.

Civil Code of 1867

SUBSECTION II
APPRAISALS

Article 2089

Property included in an inventory among majors shall be appraised by an appraiser appointed by agreement among them.

Single §) If the heirs do not agree on the choice of the appraisers or of some of them, all the missing ones shall be chosen by the judge, but not from among those proposed by the heirs.

Article 2090

If the inventory relates only to property of minors, the appraisers shall be appointed by the family council.

Article 2091

If the inventory is between majors and minors, one appraiser shall be appointed by the family council, another one on behalf of the majors, and a third one by the judge, for the eventuality of a disagreement.

Single §) The appraiser who is called to solve a disagreement shall be obliged to agree with one of the other appraisers.

Article 2092

Jewels and gold and silver objects shall be appraised by the assayers and testers, in their intrinsic value, to which half of the value of the workmanship shall be added, if they deserve to be preserved.

Artigo 2093º

Os objectos especiais, que os louvados não souberem avaliar, serão estimados por peritos, ou pessoas competentes, nomeados pelo juiz, salva qualquer legítima oposição dos interessados, ou dos seus representantes.

Article 2093

Special objects which the appraisers do not know how to appraise shall be assessed by experts, or competent persons, appointed by the judge, unless there is a legitimate objection by the interested parties or by their representatives.

Artigo 2094º

Os prédios rústicos e urbanos serão estimados pelos louvados, com atenção ao seu rendimento ou produto médio, ao tempo por que podem continuar a dar o mesmo produto ou renda, às circunstâncias da localidade onde são situados, aos seus encargos, e às despesas de amanho e de conservação, declarando-se, em todo o caso, as bases que se tomaram para a avaliação.

Article 2094

Rural and urban immovable property shall be assessed by the appraisers, taking into account its average income or product, the period of time it can continue to yield the same product or income, the circumstances of the place where it is located, its charges and the tilling and maintenance expenses, stating, in any case, the grounds on which the appraisal was made.

Artigo 2095º

O valor do domínio útil dos prazos será calculado conforme as regras estabelecidas no Artigo precedente, abatida a importância do domínio directo.

Article 2095

The value of the possessory title of the emphyteusis shall be calculated in accordance with the general rules indicated in the previous article, minus the value of the ownership.

Artigo 2096º

O valor do domínio directo será reputado igual a vinte pensões anuais, e se, além das pensões anuais, abranger alguma prestação eventual, acrescerá a importância duma dessas prestações.

§ único) Se o valor da prestação nem for conhecido nem estiver declarado na lei, será arbitrado conforme o costume da terra.

Article 2096

The value of the ownership shall be deemed to equal twenty annual pensions, and if, aside from the annual pensions, it encompasses any possible installment, the amount of one of these installments shall be added.

Single §) If the value of the installment is neither known nor declared in the law, it shall be decided on in accordance with the custom of the land.

Artigo 2097º

As benfeitorias, mencionadas no Artigo 2075º, consistirão só naquelas que efectivamente tiverem aumentado o valor dos prédios, e serão avaliadas em relação a esse aumento.

Article 2097

Improvements mentioned in article 2075 shall consist only of those which have actually increased the value of the immovable property, and shall be appraised in relation to that increase.

COMMENTARY TO ARTICLES 2089 TO 2097

The appraisal of the property is a decisive element in partition proceedings. These articles foresee rules for the appointment of appraisers, i.e., of the persons who will appraise the inheritance's property, as well as the criteria for that appraisal, which vary according to the nature of the asset in question. This issue is further regulated by the Code of Civil Procedure.

In relation to appraisal criteria for rural or urban immovable property, see article 2094.

Código Civil de 1867

SUBSECÇÃO III
DAS COLAÇÕES

DIVISÃO I
DAS COLAÇÕES RELATIVAS AOS BENS PARTÍVEIS

Artigo 2098º

Diz-se colação a restituição, que os herdeiros legitimários, que pretendem entrar na sucessão, devem fazer à massa da herança, dos valores que lhes houverem sido doados pelo autor dela, para o cálculo da terça e igualação da partilha.

Artigo 2098º

Diz-se colação a restituição que os herdeiros legitimários, que pretendem entrar na sucessão, devem fazer, à massa da herança, dos valores que lhes houverem sido doados pelo autor dela, para o cálculo da metade e igualação da partilha.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

Artigo 2099º

A colação poderá escusar-se entre os herdeiros legitimários, se o doador o houver assim declarado, ou o donatário repudiar a herança, salvo o direito de redução, no caso de inoficiosidade.

Artigo 2100º

Quando os netos sucederem aos avós, representando seus pais, trarão à colação

Civil Code of 1867

SUBSECTION III
COLLATIONS

PART I
COLLATIONS RELATING TO PROPERTY SUBJECT TO PARTITION

Article 2098

Collation is the restitution which the mandatory heirs, if they wish to take part in the succession, must make to the inheritance, relating to values which were donated to them by the estate-leaver, so as to calculate the disposable third and the equality of the partition.

Article 2098

Collation is the restitution which the mandatory heirs, if they wish to take part in the succession, must make to the inheritance, relating to values which were donated to them by the estate-leaver, so as to calculate the disposable half and the equality of the partition.

(As revised by Decree no. 19.126, of 16/12/1930)

Article 2099

Collation may be dispensed among mandatory heirs, if the donor so declared it, or if the donee repudiates the inheritance, not precluding the right of reduction in case of inofficiousness.

Article 2100

When grandchildren succeed their grandparents, in representation of their

tudo aquilo que os ditos seus pais devessem conferir, ainda que o não hajam herdado.

parents, they shall bring to the collation everything which the said parents should have collated, even if they did not inherit it.

Artigo 2101º

Os pais não são obrigados a conferir na herança de seus ascendentes o que foi doado por estes a seus filhos, nem os filhos o que lhes foi doado pelos ascendentes, sucedendo-lhes representativamente.

Article 2101

Parents are not obliged to restore to the inheritance of their ascendants what was donated by these to their children, nor are the children obliged to restitute what was donated to them by their ascendants, succeeding them in representation.

Artigo 2101º

Os pais não são obrigados a conferir na herança de seus ascendentes o que foi doado por estes a seus filhos, nem os filhos o que em vida de seus pais lhes foi doado pelos ascendentes, se vierem a suceder-lhes representativamente

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2101

Parents are not obliged to restore to the inheritance of their ascendants what was donated by these to their children, nor are children obliged to restitute what was donated to them by their ascendants while their parents were alive, if they succeed to them through representation.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2102º

Os ascendentes, que concorrem à sucessão do descendente doador, não são obrigados à colação.

Article 2102

Ascendants competing in the succession of the donor descendant shall not be subject to collation.

Artigo 2103º

As doações feitas ao consorte do filho não estão sujeitas à colação; mas, se forem feitas conjuntamente aos dois consortes, será o filho obrigado a conferir metade do valor ou da coisa doada.

Article 2103

Donations made to the child's consort are not subject to collation; but if they were made jointly to both consorts, the child shall be obliged to restore half of the value of what was donated.

Artigo 2104º

Todo o dispêndio, que o falecido tiver feito em favor de seus filhos, quer em dote e enxoval, quer como património para ordenação, quer com estudos maiores ou com serviço militar,

Article 2104

All the expenses which the deceased has made in favour of his/her children, as a dowry or trousseau, as patrimony for ordination, whether with higher education or with military service, or for

ou para estabelecimento deles ou pagamento de suas dívidas, será conferido.

§ 1º) Mas, no cômputo desse dispêndio, haverá sempre atenção, para serem abatidos, aos gastos ordinários, a que os pais seriam, aliás, obrigados, e poderão os mesmos pais dispensar a colação, contanto que não haja excesso da quota disponível.

§ 2º) Devem igualmente abater-se no valor conferido os valores, que os filhos houverem prestado a seus pais sem ser por doação.

their establishment or payment of their debts, shall be restored.

§ 1) However, in calculating these expenses, normal expenditures which parents would always be obliged to pay shall be taken into account, to be excluded therefrom, and the said parents may dispense with the collation, as long as the disposable portion is not exceeded.

§ 2) The amounts which the children have given to their parents other than in donation should also be excluded from the amount to be restored.

Artigo 2105º

As despesas de alimentos, e as doações remuneratórias de serviços, ou feitas para indemnizar os filhos de quaisquer bens distraídos pelos pais, não serão sujeitas à colação.

Article 2105

Expenses with maintenance, and donations made to remunerate services or to compensate children for any property embezzled by the parents shall not be subject to collation.

Artigo 2106º

Os frutos e lucros da coisa doada serão contados, para virem à colação, desde o dia da abertura da herança.

Article 2106

Fruits and profits of something which was donated shall be considered, to be included in the collation, starting from the day the inheritance is opened.

Artigo 2107º

A colação far-se-á, não em substância, mas pelo valor que as coisas dotadas ou doadas tinham ao tempo do dote ou da doação, ainda que então não fossem estimadas, excepto se os interessados, sendo maiores, concordarem em que a colação se faça em substância.

§ único) O aumento ou a deterioração, que as coisas doadas ou dotadas tiverem, posteriormente ao dote ou à doação, será por conta do donatário, e até a perda total da coisa, excepto se a deterioração ou a perda resultar de causa fortuita, de força maior, ou do natural uso da coisa doada ou dotada.

Article 2107

The collation shall be made, not in specie, but with the value which the property given as dowry or donated had at the time of the dowry or donation, even if it had not been appraised at that time, unless the interested parties, being majors, agree that the collation be made in specie.

Single §) The donee shall be entitled to or liable for the increase or deterioration of the things which were donated or given as dowry, after the dowry or donation, and up to the total loss of the thing in question, except if the deterioration or loss happened by chance, force majeure or resulted from the normal use of the thing donated or given as dowry.

Artigo 2107º

A colação far-se-á pelo valor que as coisas doadas tiverem à data da abertura da herança, podendo fazer-se em substância quando houver acordo de todos os interessados.

§ lº) 0 valor das benfeitorias, feitas pelo donatário nos bens doados, e a descontar na avaliação destes, será calculado em atenção à data da abertura da herança.

§ 2º) As deteriorações ou diminuições de valor, causadas aos bens doados, por acto ou negligência do donatário ou dos seus representantes, são da responsabilidade deles.

§ 3º) Nas colações do valor de semoventes, de objectos fungíveis, ou sujeitos a deteriorações pelo uso, atender-se-á ao estado em que se encontravam ao tempo em que entraram na posse do donatário; e na colação de papéis de crédito, que não se encontrem em poder do donatário, atender-se-á ao valor que tinham quando alienados, se for superior ao da data da abertura da herança.

§ 4º) Se o valor dos bens doados exceder a parte que ao donatário caiba na herança, a reposição do excesso será feita em substância, ficando-lhe a faculdade de escolher entre os bens doados os necessários para preenchimento da sua quota na herança e dos encargos na doação, sem direito a licitar nos bens que tiver que repor para os outros co-herdeiros. No caso de haver entre os bens doados algum prédio indivisível, que não caiba na sua totalidade na quota do donatário, será conferido em substância, podendo ele intervir na sua licitação.

Article 2107

The collation shall be made with the value of the donated property at the time of the opening of the inheritance, and it may be made *in specie* when all the interested parties so agree.

§ 1) The value of improvements made by the donee to the donated property, to be deducted from their appraisal, shall be calculated in relation to the time of the opening of the inheritance.

§ 2) The donee and his/her representatives are liable for deteriorations or decreases in value caused to the donated property through their action or negligence.

§ 3) In collations of the value of self--moving or fungible objects, or of objects subject to deterioration through use, one shall consider their condition at the time they came into the donee's possession; and in the collation of credit notes, which are not in the donee's possession, one shall consider the value which they had at the time they were alienated, if that is superior to their value at the time of opening of the inheritance.

§ 4) If the value of the donated property exceeds the portion belonging to the donee as inheritance, the restitution of the excess shall be made *in specie*, the donee having the option of choosing from among the donated property that which is necessary to meet his/her portion in the inheritance and the donation's charges, without having the right to bid for the property which he/she must restitute for the other co-heirs. Where the donated property includes an indivisible immovable property, which exceeds the portion of the donee, it shall be restored *in specie*, the

§ 5º) As entradas em dinheiro feitas pelo donatário, o pagamento de dívidas do doador ou de encargos a favor de terceiros, incluindo o pagamento a quaisquer co-herdeiros por conta da sua parte no valor dos bens doados, serão actualizados em atenção ao coeficiente da valorização ou desvalorização da nossa moeda entre a data desses pagamentos e a da abertura da herança.

O mesmo se observará com relação à colação e doações em dinheiro.

§ 6º) No acto das doações ou posteriormente pode, com intervenção de todos os interessados, fixar-se em documento autêntico o valor dos bens doados e a parte que a cada um deles deva caber nesse valor, e, no caso de se não fazerem logo os respectivos pagamentos, tomar-se-ão em consideração, quando eles se realizarem, as oscilações do valor da moeda entre essa data e a do acordo.

§ 7º) A obrigação da colação constitui um ónus real sobre os bens imobiliários doados, não podendo fazer-se o registo da respectiva transmissão sem se fazer, simultâneamente, o desse ónus.

§ 8º) As disposições deste Artigo e seus parágrafos, bem como as dos Artigos 1497º, § único, 1502º, 1790º, § 2º, 2101º e 2108º e seus parágrafos, aplicar-se-ão também às heranças já abertas que ainda não estiverem partilhadas, quer extrajudicialmente, quer judicialmente com sentença transitada em julgado, sem prejuízo de quaisquer decisões proferidas em despacho ou sentença definitivos.

(Redacção dada pelo Decreto nº 19.126, de 16/12/1930)

donee having the right to intervene in the respective licitation.

§ 5) The payments in cash made by the donee, the payments of the donor's debts or of charges in favour of third parties, including the payment to any co-heirs on behalf of their portion in the value of the donated property, shall be updated taking into account the rate of inflation or deflation of our currency between the date of those payments and the date of the opening of the inheritance.

The same shall be complied with in relation to the collation and to donations in cash.

§ 6) In the act of the donations or subsequently, the value of the donated property and the part of that value belonging to each party may be determined in an authentic document with the intervention of all interested parties, and, in case the respective payments are not made immediately, the variations of the value of the currency between that date and the date of the agreement shall be taken into account when the payments are made.

§ 7) The obligation of collation constitutes a burden *in rem* over the donated immovable property, which must be recorded simultaneously with the record of the respective transmission.

§ 8) The provisions of this article and its paragraphs, as well as those of articles 1497, single §, 1502, 1790, § 2, 2101 and 2108 and its paragraphs, shall be applied to inheritances that have already been opened but have not yet been partitioned, be it outside of court or by a court of law with a judgment in a condition of *res judicata*, not precluding

any decisions issued in a definitive order or judgment.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2108º

Sendo feita a doação por ambos os cônjuges, conferir-se-á metade no inventário de cada um deles: se a doação tiver sido feita só por um deles, a colação far-se-á só no seu inventário.

Artigo 2108º

Sendo a doação de bens comuns feita por ambos os cônjuges, conferir-se-á metade à morte de cada um deles; os bens doados, próprios de cada cônjuge, conferir-se-ão na totalidade por seu falecimento.

§ 1º) Para os bens que não hajam sido doados, a avaliação dos bens comuns, uma vez feita, vale para a segunda partilha, tendo-se em consideração a oscilação do valor da moeda entre os dois actos.

§ 2º) No caso de se fazer simultâneamente a partilha por falecimento dos dois doadores, os bens comuns doados serão objecto de uma só avaliação por seu valor à data da abertura da herança do predefunto, devendo esse valor figurar na segunda herança corrigido pela oscilação do valor da moeda entre as datas da abertura duma e doutra.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2109°

Os co-herdeiros do donatário serão inteirados em bens da mesma espécie e natureza, sendo isto possível.

Article 2108

If the donation was made by both spouses, half of it shall be restored to the inventory of each of them: if the donation was made by only one of them, the collation shall be made only in his/her inventory.

Article 2108

In the case of a donation of common property made by both spouses, half of it shall be restored upon the death of each of them; donated property which was exclusive to each spouse shall be restored in full at the time of his/her death.

§ 1) For the property which was not donated, the appraisal of the common property, once made, is valid for the second partition, taking into account the oscillation of the value of the currency between the two acts.

§ 2) Where the partition is made simultaneously due to the death of both donors, the common donated property shall be subject to just one appraisal of its value at the time of the opening of the inheritance of the predeceased, this value being used in the second inheritance, corrected for any oscillation of the value of the currency between the dates of the opening of one and the other.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2109

The donor's co-heirs shall be satisfied with property of the same sort and nature, if this is possible.

Artigo 2110°

Não podendo os co-herdeiros ser inteirados do sobredito modo, se os bens doados forem imóveis, terão os ditos co-herdeiros direito a serem indemnizados em dinheiro, e, não o havendo na herança, vender-se-ão em hasta pública tantos bens, quantos forem necessários para obter as devidas quantias. Se, porém, os bens doados forem móveis, terão os co-herdeiros direito a serem inteirados em outros móveis da herança, pelo seu justo valor.

Article 2110

If the co-heirs may not be satisfied in the above mentioned manner, and if the donations relate to immovable property, the said co-heirs shall have the right to be compensated in cash, and, if there is no cash in the inheritance, as much property as necessary shall be sold at public auction so as to obtain the required amounts. If, however, the donations relate to movable property, the co-heirs shall have the right to be satisfied with other movable property of the inheritance, for the just value.

Artigo 2111°

Quando o valor dos bens doados exceder a porção legitimária do donatário, será o excesso computado na terça dos doadores, e, se ainda assim, houver excesso da legítima e terça, será o donatário obrigado a repor esse excesso.

§ 1°) Se houver diversos donatários, e a terça não chegar para os inteirar a todos, observar-se-á o que fica disposto nos Artigos 1495° e 1496°.

§ 2°) Neste caso, se o autor da herança houver disposto da terça em proveito de outrem, não terá efeito essa disposição.

Article 2111

When the value of the donated property exceeds the mandatory portion of the donee, the excess shall be included in the donor's disposable third, and if, even so, the donation exceeds the legitime and the disposable third, the donee shall be obliged to restitute the excess.

§ 1) If there are several donees, and the disposable third is insufficient to satisfy all of them, the provisions of articles 1495 and 1496 shall be applied.

§ 2) In this case, if the estate-leaver has destined the disposable third to another person, that disposition shall have no effect.

***Artigo* 2111°**

Quando o valor dos bens doados exceder a porção legitimária do donatário, será o excesso computado na metade dos doadores, e se, ainda assim, houver excesso da legítima e metade, será o donatário obrigado a repor esse excesso.

§ 1°) Se houver diversos donatários e a metade não chegar para os inteirar a todos, observar-se-á o que fica disposto nos Artigos 1495° e 1496°.

***Article* 2111**

When the value of the donated property exceeds the mandatory portion of the donee, the excess shall be included in the donor's disposable half, and if, even so, the donation exceeds the legitime and the disposable half, the donee shall be obliged to restitute the excess.

§ 1) If there are several donees and the disposable half is insufficient to satisfy all of them, the provisions of articles 1495 and 1496 shall be applied.

§ 2°) *Neste caso, se o autor da herança houver disposto da metade em proveito de outrem, não terá efeito essa disposição.*

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2112°

Se ocorrer entre os co-herdeiros disputa sobre a obrigação de conferir, ou sobre os objectos da colação, não deixará por isso de se prosseguir na partilha, prestando o conferente caução.

DIVISÃO II
DAS COLAÇÕES RELATIVAS AOS BENS NÃO PARTÍVEIS

Artigo 2113°

O sucessor de quaisquer bens, que houverem de passar precípuos, é obrigado a conferir as benfeitorias pelo que houverem aumentado o valor dos prédios.

Artigo 2114°

Se os bens, que passarem precípuos, tiverem sido adquiridos por título oneroso, será conferido ou o seu preço ou a estimação deles, à escolha do sucessor.

§ 2) *In this case, if the estate-leaver has destined the disposable half to another person, that disposition shall have no effect.*

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2112

If there is a dispute between the co-heirs concerning the obligation to collate, or the objects of the collation, the partition shall nonetheless proceed, the person bound to collate providing a security.

PART II
COLLATIONS RELATING TO PROPERTY NOT SUBJECT TO PARTITION

Article 2113

The successor of any property which is to devolve in a preferential manner is obliged to restore the improvements that have increased the value of the immovable property.

Article 2114

If the property, which is to devolve in a preferential manner, was acquired non-gratuitously, its price or the estimation of its price, as the successor chooses, shall be restored.

COMMENTARY TO ARTICLES 2098 TO 2114

The obligation to collate – "the restitution which the mandatory heirs, if they wish to take part in the succession, must make to the inheritance, relating to values which were donated to them by the estate-leaver, so as to calculate the disposable half and the equality of the partition" – is imposed on the descendants and aims at guaranteeing the reconstitution of the *de cuius*' patrimony, as if he/she had not made those donations to those heirs, so that the portion of each is identical to that of the others.

Thus, "*for collation to occur, the following elements are required: a) there must have been a donation; b) this must have been made by the* de cuius; *c) the beneficiary must have been a descendant mandatory heir; d) this heir must be competing in the succession with other descendant mandatory heirs*" (CUNHA GONÇALVES, *Tratado*, vol. X, page 695).

It is different from fictitious collection (see article 1790 and its §§), since within the latter, which aims at calculating the legitime or the disposable portion, there is neither a renunciation by the donee, nor a practical revocation of the donations, nor an increase of the hereditary mass; on the other hand, all donations are encompassed, whereas for the collation only donations made to descendants are relevant, as foreseen in the law.

Collation is also different from reduction due to inofficiousness, even if they share the consequence that the donees are deprived of the value of the donated assets in favour of the hereditary mass. However, they have different aims: reduction aims at preserving the legitime, while collation aims at assuring absolute or relative equality; they also have a different object: reduction affects other dispositions aside from donations. And they are aimed at different persons – reduction affects any legal heir, as well as third parties benefited by the dispositions, whereas collation relates only to descendants.

Collation and imputation are also different, namely because the obligation to impute befalls on all dispositions and not just on donations.

Ascendants are not subject to collation (article 2102), and neither is the surviving spouse, nor collateral heirs, such as siblings or nephews, nor third parties. Only the descendants have the obligation to collate, including the acknowledged ones, since they are mandatory heirs, and despite the inequality of their respective portions (since collation aims at guaranteeing that each heir receives the portion he/she would be entitled to if the donations had not occurred, which does not imply that those portions be necessarily of equal value).

In the case of one of the children (B) dying before the donor (A), leaving representatives (C and D, for example), the latter shall be obliged to collate, even if they did not benefit from the donated assets (article 2100). This obligation continues to exist even if they repudiate the inheritance of their ascendant (B), who they represent in the succession of the deceased donor (A).

Those to whom the right of succession is transmitted are also obliged to collate, in accordance with article 2014.

Collation is only justified when the donation is viewed as an anticipation of the inheritance, and for this reason a donation to grandchildren (C and D, for example), when their respective ascendant (B) is still alive, is not subject to collation, even if those grandchildren end up representing their ascendant (B), in the event of his death before that of the *de cuius* donor (A).

However, as mentioned by CUNHA GONÇALVES, "*articles 2100 and 2101, however, are only applicable when the grandchildren succeed to the grandparent through representation, i.e., competing with their uncles. Yet, when all the mandatory heirs are the deceased's grandchildren, when he/she survived all of his/her children, if any of them is a donee, he/she will be obliged to restore the donated property to the succession, since all succeed in their own right, and not through the right of representation*" (*Tratado*, vol. X, pages 702-703).

Donations made to the child's consort (son or daughter-in-law) are not subject to collation, but if the donation was made to both

spouses, the part of the donor's descendant shall be subject to collation (see article 2103). However, when the donation is made to a descendant married under the regime of general communion of property, the collation shall be made in its entirety, i.e., by reference to the total value of the asset, despite the respective spouse having acquired the right to half of the asset.

Only mandatory co-heirs may request collation, and they are also obliged to restore if they are donees, since the objective of equalising the partition encompasses all of them (while heirs who repudiate the inheritance or are excluded from the succession due to indignity or legal incapacity are not subject to collation, since they do not compete in the succession, which does not protect them from a possible inofficiousness, with its respective consequences – article 2099). Neither creditors nor testamentary heirs or legatees may request it, even if they are relatives.

Collation thus requires two or more mandatory heirs, subject to collation, to compete for the inheritance, since only then is there a need to guarantee their portions' equality.

However, the law allows dispensation from collation – article 2099, which obviously does not exclude reduction due to inofficiousness. CUNHA GONÇALVES provides the following examples of explicit dispensation from collation (implicit dispensation is only possible for manual donations): "*I leave my property to my children Anthony, John and Peter, in equal portions, with the exception of the assets which I already donated to Anthony in his prenuptial agreement*" – *a dispensation relating to the property donated to Anthony*; "*the donated assets shall not be taken into account in the donee's legitime*"; or "*upon his death, the donee shall share the remaining property with the other heirs*" (*Tratado*, vol. X, page 711).

Certain cases of dispensation derive from the nature of the donation in question: this is the case of a remuneratory donation (article 2105) and of donations made with a reservation or a *fidei comissum* clause.

On the other hand, marital donations are subject to collation (see articles 1483, no. 2, 1489 and 1501).

Manual donations, allowed in accordance with article 1450, § 1, must be restored.

Certain expenses made by the deceased in favour of descendants are subject to collation (article 2104). An example of such an expense is the payment by the parent of his child's debt, as long as this debt was enforceable in a court of law.

The dispensation may be carried out in the act of the donation or subsequently, *inter alia* through an act with the same formalities as the donation or through a will, and it must be accepted by the donee.

The donee may renounce the dispensation from the collation, explicitly or implicitly, inclusively by restoring the value of the assets in the inventory.

There shall be no collation of donated assets which perished fortuitously or for a reason other than an action or omission of the donee, in accordance with the provisions of article 2107, § 2.

Necessary and useful improvements should be taken into account for the purposes of collation. Luxurious improvements need not be refunded, and the donee may remove them if this is possible with no detriment to the assets.

In the case of a decrease in the value of the donated asset, caused by an act or by negligence of the donee or of his/her representatives, the asset must be appraised as if there had been no deterioration or reduction of its value.

The fruits and income of the donated asset acquired after the opening of the succession are subject to collation. As for the ones pending at that time, CUNHA GONÇALVES notes that "*if the pending fruits are natural, they must be restored in full; if they are civil, they shall be shared in proportion to the time preceding and following the opening of the inheritance; and the same is applicable to pending income*" (*Tratado*, vol. X, page 739).

The collation may be made in value (by imputing the value of the donated asset in the respective hereditary portion) or in substance (by restoring the asset itself to the inheritance), and it must be made in value when the asset has already been alienated.

When the donated asset exceeds the donee's mandatory portion – see article 2111 –, this excess will be imputed in the donors' disposable portion, and only when it exceeds it will the donee be obliged to return the exceeding part. As was mentioned by CUNHA GONÇALVES, "*the word 'half' (...) means, certainly, the disposable portion, which may not be half, but rather a third (see article 1787); and this provision explains not only which is the exceeding part to be restored which is mentioned in § 4 of article 2107, but also that in a collation one proceeds as under testamentary succession (article 1790), including in the donor's disposable portion whatever exceeded the donee's mandatory portion. (...) what the legislator meant to say was, doubtlessly, 'if even so the value of the donation exceeds the sum of the values of the donee's legitime and of the donor's disposable portion', the exceeding part must be restored, and in substance, i.e., with the corresponding portion of the donated assets*" (*Tratado*, vol. X, page 759).

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SUBSECÇÃO IV
DO PAGAMENTO DAS DÍVIDAS

Artigo 2115°

A herança responde solidàriamente pelo pagamento das dívidas do autor dela; mas, depois de feitas a partilhas, os co-herdeiros só respondem em proporção da parte que lhes coube na herança.

Artigo 2116°

As despesas do funeral serão pagas pela herança ainda indivisa, haja ou não herdeiros legitimários. A nenhumas outras despesas com sufrágios por alma do falecido é obrigada a herança ou a terça dela, não tendo sido ordenadas em testamento, nos termos do Artigo 1775°.

Artigo 2117°

Nos inventários de maiores serão atendidas as dívidas, consentindo todos os interessados.

Artigo 2118º

Nos inventários de menores, interditos ou ausentes, só serão atendidas as dívidas, cujo pagamento for autorizado pelo conselho de família, não havendo oposição de algum co-herdeiro maior.

Artigo 2118º

Nos inventários de menores, interditos, ausentes ou desconhecidos,

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PART IV
PAYMENT OF DEBTS

Article 2115

The inheritance is jointly and severally liable for the payment of the estate-leaver's debts; but, after the partition has been made, the co-heirs shall be liable only in the proportion of the portion of the inheritance which was awarded to them.

Article 2116

The funeral expenses shall be paid for by the inheritance before the partition, regardless of whether there are any mandatory heirs. The inheritance or its disposable third shall not be liable for other expenses with suffrages for the soul of the deceased, if these were not ordered in a will, in accordance with article 1775.

Article 2117

In inventories among majors, the debts shall be considered if all the interested parties agree thereto.

Article 2118

In inventories with minors or with interdicted persons or absentees, the debts shall only be considered if their payment is authorised by the family council and none of the major co-heirs opposes it.

Article 2118

In inventories with minors or with interdicted, absentee or unknown

só serão atendidas as dívidas cujo pagamento for autorizado pelo conselho de família, não havendo oposição de algum co-herdeiro maior.

§ único) Os credores que concorrerem ao inventário, pedindo o pagamento dos seus créditos, deverão apresentar os títulos em que se funda o seu direito.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2119º

O pagamento, nos casos em que for admissível, será feito, nos inventários de maiores, em dinheiro ou em bens separados para esse fim.

§ único) Se o credor não quiser receber os ditos bens, serão estes vendidos em hasta pública, e será pago o mesmo credor pelo produto deles.

Artigo 2120°

Nos inventários de menores, ou de pessoas semelhantes, será o pagamento feito em dinheiro, ou, não o havendo na herança, em móveis ou imóveis; mas, em tal caso, serão os bens postos em praça, e só não havendo lançador, serão adjudicados ao credor, querendo este recebê-los pela sua estimação.

Artigo 2121º

Se os imóveis da herança se acharem onerados com hipotecas, ou com prestações remíveis, qualquer dos co-herdeiros poderá exigir, havendo dinheiro disponível na herança, que os ditos encargos sejam remidos antes da partilha.

persons, the debts shall only be considered if their payment is authorised by the family council, and if none of the major co-heirs opposes it.

Single §) Creditors who intervene in the inventory, requesting the payment of their credits, must present the documents on which their right is based.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2119

The payment, in the cases in which it is admissible, shall be made, in the inventories among majors, in cash or with property separated for that purpose.

Single §) If the creditor does not wish to receive the said property, this shall be sold at public auction, and the creditor shall be paid with the proceeds from this sale.

Article 2120

In inventories with minors, or with similar persons, the payment shall be made in cash or, if there is none in the inheritance, with movable or immovable property; but, in this case, the property shall be placed at auction, and only if there is no bidder will it be awarded to the creditor, if the latter wants to receive it for its assessed value.

Article 2121

If the immovable property of the inheritance is burdened with mortgages, or with redeemable installments, any of the co-heirs may demand, if there is cash available in the inheritance, that the said burdens be redeemed before the partition.

Artigo 2122º

Se os imóveis entrarem em partilha com os sobreditos encargos, ou com quaisquer outros, serão estimados como se tais encargos não tivessem; deduzir-se-á depois o capital correspondente ao encargo, e o herdeiro, que ficar com o imóvel, pagará exclusivamente o dito encargo.

Article 2122

If immovable property enters the partition with the above mentioned burdens, or with any others, it shall be assessed as if it did not have such burdens; the capital corresponding to the burden shall then be deducted, and the heir who keeps the immovable property shall be exclusively liable for paying the said burden.

Artigo 2123º

O co-herdeiro, que, por efeito de hipoteca cujo encargo não fosse descontado, pagar mais do que a parte que lhe competir na dívida comum, só terá regresso contra os outros co-herdeiros pela parte que a cada um deles tocar, em proporção da sua quota hereditária, e isto ainda quando o co-herdeiro, que houver pago, se tiver feito sub-rogar nos direitos do credor.

§ único) Em caso de insolvência de algum dos co-herdeiros, será a sua parte repartida entre todos proporcionalmente, se ao tempo da partilha o encargo era desconhecido, ou era questionada a sua existência.

Article 2123

A co-heir who, as a result of a mortgage whose burden was not deducted, pays more than the part that was his/hers to pay from the common debt, shall only have the right to demand from the other co-heirs the part corresponding to each of them, in the proportion of their hereditary portion, even if the co-heir who paid the charge became subrogated in the rights of the creditor.

Single §) In the case of insolvency of any of the co-heirs, his part shall be divided between all proportionately, if at the time of the partition the charge was not known, or its existence was questioned.

Artigo 2124º

Os títulos de execução aparelhada contra o autor da herança, terão a mesma força contra os próprios herdeiros, mas não poderão os credores prosseguir na execução, sem que os herdeiros sejam habilitados e novamente citados, com o prazo de dez dias, a fim de pagarem ou de se prosseguir nos termos da execução.

Article 2124

The documents of execution proceedings against the estate-leaver shall have the same legal force against the heirs themselves, but the creditors may not proceed with the execution unless the heirs are qualified as such and notified again, within ten days, so as to pay or to have the execution proceedings continue.

Artigo 2125º

Se as dívidas atendíveis excederem a massa da herança, e os credores concor-

Article 2125

If the admissible debts exceed the decedent's estate, and the creditors agree

darem no rateio ou nas preferências, que possam dar-se, observar-se-á o seu acordo; se não se acordarem, socorrer-se-ão aos meios competentes.

on their division *pro rata* or on the order of preference to be observed, their agreement shall be complied with; if they do not reach an agreement, they shall resort to the applicable remedies.

COMMENTARY TO ARTICLES 2115 TO 2125

The inheritance's debts are described by the head of the family.

They shall be paid immediately when they are approved by the heirs, at the conference of interested parties, as long as all those present agree to it.

The inheritance is jointly liable for the deceased's debts, as long as it remains undivided; after the partition, the heirs are only liable in proportion to their portion of the inheritance. Indeed, and notwithstanding the provisions of article 2115, *"each co-heir may only be sued for his/her portion, even though all the heirs may be jointly summoned, for the payment of the entirety of each debt"* (CUNHA GONÇALVES, *Tratado*, vol. X, page 469).

In accordance with articles 731 and 757 (which set out the rule of individual and proportional liability for debts of each heir), even before the partition, the creditors may request their credits in full from all the heirs jointly, or from each of them in proportion to their portion.

Testamentary heirs and legatees are also liable for debts, in proportion to the assets they received (see article 1793).

However, legatees may be sued jointly, in accordance with article 2061.

The cession of the hereditary portion does not exclude the heir's liability for the debts of the inheritance.

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SUBSECÇÃO V
DA LICITAÇÃO E DA PARTILHA

Artigo 2126º

Feita a descrição e avaliação, como dito é, serão ouvidos os interessados sobre a forma da partilha, e, se algum deles pretender licitar algum prédio ou outro objecto, assim o declarará na sua resposta.

Artigo 2127º

A licitação precederá o acto da partilha, sendo citados todos os interessados, e entre eles, tão-sòmente, se procederá, como se fora em acto de arrematação.

Artigo 2128°

Se a declaração, de que trata o Artigo 2126º, recair em coisa, que, por sua natureza ou sem detrimento, não possa ser dividida, e em que algum co-herdeiro tenha a maior parte, ou recair em coisa na qual necessariamente ele haja de ser encabeçado, esse co-herdeiro poderá impugnar a licitação, e requerer que a avaliação seja rectificada.

Artigo 2129º

Se a dita declaração recair em coisas, cujo valor exceda a porção que o declarante deve ter nos bens partíveis, e o mesmo declarante não se obrigar a entrar desde logo em depósito com o valor excedente, as coisas licitadas serão postas em hasta pública, e arrematadas pelo maior lanço que obtiverem acima da avaliação.

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SUBSECTION V
LICITATION AND PARTITION

Article 2126

Once the description and appraisal have been carried out, as already stated, the interested parties shall be heard on the form of partition and if any of them intends to bid on an immovable property or on any other object, he/she shall state so in his/her reply.

Article 2127

The licitation shall precede the act of the partition, all the interested parties being summoned, and it shall occur among them only, as if it were an auction.

Article 2128

If the statement referred to in article 2126 relates to something which, by its nature or without detriment, cannot be divided, and of which a co-heir has the largest part, or if it relates to something which must necessarily be awarded to him/her, this co-heir may impeach the licitation and request that the appraisal be rectified.

Article 2129

If the said statement relates to things with a value exceeding the portion of the property subject to partition which was awarded to the author of the statement, and the same author does not take on the obligation to immediately deposit the exceeding value, the things which were bid on shall be placed at

§ único) Não havendo lanço que cubra a avaliação, será tida por não feita a declaração de licitação, e prosseguir-se-á no processo da partilha, como se tal declaração não houvera.

Single §) If there is no bid which covers the appraisal, the statement of bid shall be considered as not having been made, and the partition proceedings shall continue, as if there had been no such statement.

Artigo 2130º

Nos inventários de menores ou semelhantes, serão estes admitidos a licitar, sendo representados por seus tutores ou curadores, devidamente autorizados pelos respectivos conselhos de família, nos casos em que os deve haver.

Article 2130

In inventories with minors or similar persons, these shall be allowed to bid, being represented by their guardians or curators, duly authorised by the respective family councils, whenever their existence is required.

Artigo 2131º

A licitação legalmente feita não pode retractar-se.

Article 2131

A lawfully made bid may not be withdrawn.

Artigo 2132°

Se algum dos interessados entender, que é exorbitante a avaliação de alguma coisa, assim o declarará no acto de responder sobre a forma da partilha, declarando ao mesmo tempo o maior preço em que reputa a dita coisa.

Article 2132

If any of the interested parties considers that the appraisal of something is exorbitant, he/she shall so state when replying on the form of partition, stating at the same time the highest price with which he/she has assessed the thing in question.

Artigo 2133°

Se todos os interessados, sendo maiores, concordarem no preço declarado, por esse preço, e não pelo da avaliação, será regulada a partilha.

Article 2133

If all the interested parties, being majors, agree on the stated price, that price, and not the one resulting from the appraisal, shall be considered for the partition.

Artigo 2134°

Se algum dos interessados for menor, ou se, sendo todos maiores, não concordarem no preço declarado, será a coisa, a

Article 2134

If any of the interested parties is a minor or, if, being all majors, they do not agree on the stated price, the thing

que a declaração se referir, posta em hasta pública, com o dito preço, e arrematada pelo maior lanço que acima dele tiver, ainda que não chegue ao da avaliação.

that the statement refers to shall be placed at public auction, with the said price, and sold for the highest bid obtained above it, even if it does not reach that of the appraisal.

Artigo 2135°

Se algum dos interessados, sendo maior, declarar, que aceita a coisa, a que a declaração se refere, pelo valor que lhe foi dado na avaliação, e ela couber na porção que ele deve ter nos bens partíveis, ou, não cabendo, ele se obrigar a entrar em depósito com o valor excedente; e também sendo o inventário de maiores, se eles concordarem, em que se lhe adjudique sem depósito, não se procederá a hasta pública, e prosseguir-se-á no processo da partilha, como se nenhuma declaração houvera.

Article 2135

If any of the interested parties, being major, declares that he/she accepts the thing that the statement refers to for the value given to it in the appraisal, and if the thing in question fits in that party's portion of the property subject to partition or, if it exceeds it, if he/she takes on the obligation to deposit the exceeding value; and also, in the case of an inventory among majors, if these agree that the thing be awarded to that party without deposit, there shall be no public auction, and the partition proceedings shall continue as if there had been no statement.

Artigo 2136°

Nas hipóteses dos Artigos 2129° e 2134°, todos os interessados serão admitidos a arrematar, inclusivamente os menores ou semelhantes, representados nos termos do Artigo 2130°.

Article 2136

In the cases of articles 2129 and 2134, all the interested parties are admitted to the bidding, including the minors and similar persons, represented in accordance with article 2130.

Artigo 2137°

Se a adjudicação for feita a algum estranho, depositará este, no mesmo acto, o preço da arrematação, ou dará caução ao pronto pagamento; sendo, porém, feita a algum dos interessados, só será obrigado a depositar, ou dar caução, pelo valor excedente à porção, que ele verosìmilmente virá a ter nos bens partíveis.

Article 2137

If the adjudication is made to a stranger, he/she shall deposit, in the same act, the price of the bid, or shall provide a security for its payment; if, however, the adjudication is made to one of the interested parties, he/she shall only be obliged to deposit or provide security in the amount exceeding that of the portion of the property subject to partition which he/she is likely to receive.

§ único) O preço da arrematação, ou seja depositado ou não, entrará na massa partível.

Single §) The price of the bid, regardless of whether or not it is deposited, shall enter the pool subject to partition.

Artigo 2138°

Concluídas as licitações, prosseguir-se-á na partilha, separando-se em primeiro lugar os bens necessários, para pagamento das dívidas, que estiverem no caso de serem atendidas, e, em seguida, os necessários para o preenchimento da meação do cônjuge sobrevivo, ou da terça, se esta separação houver de fazer-se.

Article 2138

Once the bidding has been concluded, the partition shall proceed, first separating the property required for the payment of debts, which are fit to be considered, and subsequently the property required to fill up the moiety of the surviving spouse, or the disposable third, if such a separation is to be made.

Artigo 2139°

Tendo havido licitações entre os co-herdeiros, ou colações, serão os não licitantes ou não conferentes inteirados em outro tanto, nos termos indicados nos Artigos 2109° e 2110°.

Article 2139

If there were bids among the co-heirs, or collations, those who did not bid or did not restore shall be satisfied with so much of their property, in accordance with articles 2109 and 2110.

Artigo 2140°

Os bens restantes serão repartidos à sorte entre os co-herdeiros, por lotes iguais.

Article 2140

The remaining property shall be divided at random among the co-heirs, in equal lots.

Artigo 2141°

Se os herdeiros, ou algum deles, não tiverem direito a porção igual, formar-se-ão tantos lotes, quantos forem necessários para que cada um possa inteirar-se da sua parte.

Article 2141

If the heirs, or any of them, are not entitled to equal portions, as many lots shall be formed as necessary so that each may receive his/her portion.

Artigo 2142°

Os lotes serão formados com a maior igualdade, entrando, quanto seja possível, em cada um deles igual porção de bens do mesmo género, ou da mesma espécie.

Article 2142

The lots shall be composed with the greatest equality, and each shall include, as much as possible, an equal portion of property of the same kind or sort.

Artigo 2143º

Havendo divisão de prédios, que torne indispensáveis novas servidões, far-se-á delas a devida declaração.

Artigo 2143º

Havendo divisão de prédios que torne indispensáveis novas servidões, far-se-á delas a devida declaração.

§ único) Se da partilha resultar a encravação de qualquer prédio rústico ou urbano, por inobservância do disposto neste Artigo, poderá o respectivo proprietário exigir judicialmente a constituição das servidões necessárias, nos termos dos Artigos 2309º e seguintes, correndo por conta de todos os interessados na partilha, tanto a indemnização ao proprietário serviente, como as despesas com o respectivo processo.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2144º

Formados os lotes, poderão os interessados fazer as reclamações, que se lhes oferecerem a bem da sua igualdade.

Artigo 2145º

Se houver entre os bens partíveis algum objecto, que não tenha sido licitado, e que não caiba nos lotes nem possa dividir-se por sua natureza, ou sem detrimento, deliberarão os interessados ou os seus representantes, se deve ser vendido e como, ou se há-de ser adjudicado a algum dos herdeiros, repondo as devidas tornas, ou, finalmente, se preferem usufruí-lo em comum.

Article 2143

If there is a division of immovable property, making new easements indispensable, these shall be duly declared.

Article 2143

If there is a division of immovable property, making new easements indispensable, these shall be duly declared.

Single §) If the partition results in a rural or urban immovable property becoming enclosed, for failure to comply with the provisions of this article, the respective owner may judicially require the constitution of the necessary easements, in accordance with articles 2309 et seq., all of the interested parties in the partition being liable both for the compensation of the servient owner and for the expenses with the respective proceedings.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2144

Once the lots have been formed, the interested parties may make claims they deem fit for the sake of equality.

Article 2145

If there is any object among the property subject to partition that has not been bid on and which does not fit in the lots nor can be divided, by its very nature or without detriment, the interested parties or their representatives shall decide if it should be sold and how, or if it should be awarded to any of the heirs, paying the due compensation for the owelty of partition, or, finally, if they prefer to have a joint right of usufruct over it.

Artigo 2146°

Se algum dos interessados declarar, que não quer sujeitar-se a dar tornas, não será obrigado a isso, se as ditas tornas excederem um terço do seu lote, e proceder-se-á à venda do mencionado objecto em hasta pública.

§ único) A esta arrematação será aplicável o que fica disposto no Artigo 2137°.

Article 2146

If any of the interested parties declares that he/she does not want to be subject to paying compensation for the owelty of partition, he/she shall not be so obliged if the said compensation exceeds one third of his/her lot, and the said object shall be sold at public auction.

Single §) The provisions of article 2137 shall be applicable to this sale at public auction.

Artigo 2147°

Se o objecto não achar comprador, e o inventário for de maiores, far-se-á a respeito desse objecto aquilo em que estes concordarem, e se o inventário for de menores, far-se-á o que for decidido pelo conselho de família.

Article 2147

If there is no buyer for the object, and if the inventory is among majors, the said object shall be disposed of as these agree to, and in the case of an inventory with minors, whatever is decided by the family council shall be done.

Artigo 2148°

Se o autor da herança em partilha, entre herdeiros legitimários menores ou semelhantes, houver legado alguma pensão vitalícia anual para ser paga pela sua quota disponível, sem que esta seja posta especialmente a cargo de algum herdeiro ou legatário, separar-se-á um capital equivalente a vinte pensões, e este capital será entregue ao legatário, que ficará sujeito a todas as obrigações de mero usufrutuário, fazendo-se, contudo, desde logo a partilha desse capital entre os interessados.

Article 2148

If the estate-leaver, in a partition among mandatory heirs who are minors or similar persons, has legated a lifelong annual pension to be paid from his/her disposable portion, without it being put specially in charge of any heir or legatee, a capital equivalent to twenty pensions shall be separated, and this capital shall be delivered to the legatee, who shall be subject to all the obligations of a mere usufructuary, the said capital being, however, at once partitioned among the interested parties.

Artigo 2149°

Se a pensão legada for imposta na herança, que se há-de repartir entre vários herdeiros maiores, e estes não escolherem dentre si aquele, que deve tomar a seu cargo pagar a mencionada pensão,

Article 2149

If the legated pension is imposed on the inheritance, to be divided among several major heirs, and these do not choose one of them to take at his/her charge the payment of the said pension,

observar-se-á o que fica disposto no Artigo precedente.

Artigo 2150º

Se, no caso do Artigo 2148º, os bens da quota disponível não chegarem, para a formação do capital aí mencionado, será entregue ao legatário a dita quota, como usufrutuário, e ficará sendo a pensão aquilo que a mesma quota render.

Artigo 2151°

Havendo de ser separados bens para pagamento de dívidas, em inventário de menores, sempre serão preferidos para esse fim os móveis, e dentre esses os menos preciosos, ou de mais difícil conservação.

Artigo 2152º

Nos inventários de maiores a separação para o pagamento de dívidas será feita a aprazimento dos interessados, e, se não concordarem entre si, observar-se-á a mesma regra.

Artigo 2153°

Finda a partilha, devem ser entregues a cada um dos co-herdeiros os títulos relativos aos objectos que lhes couberam, se tais títulos existirem.

Artigo 2154°

Os títulos das propriedades divididas serão entregues ao que maior parte nelas tiver, com obrigações de os comunicar, sendo necessário, ao seu consorte.

the provisions of the previous article shall apply.

Article 2150

If, in the case of article 2148, the property of the disposable portion is insufficient to make up the capital mentioned therein, the said portion shall be delivered to the legatee, as usufructuary, and the pension shall consist of the proceeds of the same portion.

Article 2151

If property must be separated for the payment of debts, in an inventory with minors, the movable property shall always be preferred for this purpose, and within such property that which is least precious or of more difficult preservation shall be preferred.

Article 2152

In inventories among adults, the separation of property for the payment of debts shall be made in accordance with the wishes of the interested parties and, if these do not reach an agreement, the same rule shall apply.

Article 2153

Once the partition has been concluded, each of the co-heirs shall be given the title deeds relating to the objects awarded to them, if such title deeds exist.

Article 2154

The title deeds of divided properties shall be delivered to the person with the largest part of them, with the obligation to share them with his/her joinder, if necessary.

Artigo 2155º

Os títulos dos consortes em partes iguais, ou comuns a toda a herança, ficarão em poder do co-herdeiro, que os interessados escolherem, ou que o juiz nomear, na falta de acordo entre eles.

Artigo 2156°

Destas entregas se fará no inventário um termo, que será assinado pelo juiz, e por aquele que receber os títulos.

Artigo 2157º

As custas do inventário serão pagas pelo cabeça-de-casal ou inventariante, que as descontará na entrega dos quinhões aos co-herdeiros, ou as haverá destes executivamente.

SUBSECÇAO VI
DOS EFEITOS DA PARTILHA

Artigo 2158°

A partilha legalmente feita confere aos co-herdeiros a propriedade exclusiva dos bens, que são repartidos entre eles.

Artigo 2158°

A partilha, legalmente feita, de bens sobre que não tenha havido reclamação, confere aos co-herdeiros a propriedade exclusiva dos bens que são repartidos entre eles.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Article 2155

The title deeds of joinders in equal portions, or common to all, shall remain in possession of the co-heir chosen by the interested parties or appointed by the judge, in the absence of an agreement among the interested parties.

Article 2156

A record of these deliveries shall be included in the inventory and signed by the judge and by the person who receives the title deeds.

Article 2157

The costs of the inventory shall be paid by the head of the family or person who carried out the inventory, who shall deduct them from the portions delivered to the co-heirs, or shall obtain them by way of execution.

SUBSECTION VI
EFFECTS OF THE PARTITION

Article 2158

A partition made in accordance with the law grants the co-heirs the exclusive ownership of the property divided amongst them.

Article 2158

A partition, made in accordance with the law, of property concerning which there was no objection grants the co-heirs the exclusive ownership of the property divided amongst them.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2159º

Os co-herdeiros são recìprocamente obrigados a indemnizar-se, em caso de evicção, dos objectos repartidos.

Article 2159

The co-heirs are reciprocally liable for paying compensation to each other, in case of eviction of the partitioned objects.

Artigo 2160°

Esta obrigação cessa, havendo convenção em contrário, ou se a evicção acontecer por culpa do evicto, ou por causa posterior à partilha.

Article 2160

This liability ceases if there is an agreement to the contrary or if eviction occurs due to the fault of the evicted person, or due to a cause subsequent to the partition.

Artigo 2161°

O evicto será indemnizado pelos co-herdeiros, na proporção das suas quotas hereditárias; mas, se algum deles se achar insolvente, responderão os demais co-herdeiros pela parte deste, na dita proporção, deduzida a quota que corresponderia ao indemnizado.

Article 2161

The evicted person shall be compensated by the co-heirs, in proportion to their hereditary portions; but, if any of them is insolvent, the remaining co-heirs shall be liable for his/her part, in the said proportion, after deducting the share which would correspond to the compensated person.

Artigo 2162°

A acção pela garantia, mencionada nos Artigos precedentes, prescreve, conforme as regras gerais, contando-se desde o dia da evicção.

Article 2162

A legal action for the security, mentioned in the previous articles, is subject to a limitation period in accordance with general rules, starting from the day of the eviction.

COMMENTARY TO ARTICLES 2126 TO 2162

Concerning licitation and partition, it should be noted that the licitation – an act through which an heir intends to assign certain assets in the inheritance to fill his/her portion – may extend to all the inventoried assets, and it only takes place when there are partition proceedings, since if all of the inheritance is divided into legacies, each legatee shall receive only the assets legated to him/her, not precluding a possible reduction due to inofficiousness.

Obviously, assets which were donated and brought to the collation may not be bid on, since the collation is generally done in value, not in substance, and to allow such a licitation would imply imposing that collation in substance.

On the other hand, donated assets subject to reduction due to inofficiousness may be bid on, since, having returned to the inheritance, they are once again within the mass of assets to be partitioned.

The right to bid is regulated in article 2126, which provides that there may be bids by all the interested parties among which the hereditary mass is to be shared, i.e., the moiety holder, if he/she exists, and the heirs, regardless of whether they are mandatory or testamentary. The legatee may not bid, since the object of his right is already certain and determined; equally, a holder of a right of usufruct may also not bid, since he/she is a simple legatee of fruits.

In accordance with article 2131, the bidder may not decline to receive the assets he/she bid on to fill his/her portion, as long as that bid was made in accordance with the applicable rules and no subsequent fact justifies that change, such as the discovery of a burden placed upon the asset in question, which implies the reduction of the respective value from the appraisal of that asset.

Regarding partition, we would highlight the principle foreseen in article 2142 (see also articles 2109 and 2139, following a similar philosophy), on the imputation of assets in the heirs' portions –

according to this principle, "*each portion or lot shall be composed with the greatest equality, and each shall include, as much as possible, an equal portion of property of the same kind or of the same sort, or of the same kind and nature*" (CUNHA GONÇALVES, *Tratado de Direito Civil*, Vol. XI, Coimbra Editora Limitada, Coimbra, 1936, page 67).

In order to carry out the partition, the respective chart is drawn up, describing each category of property, the total sum of its value and the deductions to be made. Once the portion of each interested party has been calculated and assets have been assigned to fill that portion – with the possibility of complaints –, the lots are then drawn, the respective act is drafted and, finally, the partition judgment is issued.

Concerning whether a partition has an attributive or a merely declarative nature, CUNHA GONÇALVES considers that "*a partition is no more than a determination or materialisation of the abstract or ideal right of the co-proprietor of an undivided inheritance. (...) There is no transferal of rights among the co-heirs as a result of the partition; articles 2011 and 2014 clearly show that they only succeed to the rights of the author of the inheritance, upon his/her death*". The partitioned property is thus owned by the beneficiaries since the opening of the inheritance, the partition being the "*declaration of that retroactivity*" (*Tratado*, Vol. XI, page 84).

To guarantee the partition, i.e., to react if an heir is deprived of the assets that composed his/her portion, *inter alia* because they were claimed by their rightful owner, see article 2159, which imposes the distribution of the "lost" value among the remaining heirs, so that the loss be shared by all of them.

However, in order for such a guarantee to be activated, the conditions of article 2160 must be complied with, starting with the condition that the eviction not be imputable to the evicted person him/herself.

CUNHA GONÇALVES notes that there is eviction when: "*a) there is a dilapidation of cash or values entrusted to a depositary, to an executor or to the head of the family, so that they no longer existed at the time of the partition; b) the extinction of an invention patent or of another form of industrial property; c) the*

extinction of a credit due to time-barring or due to the prior insolvency of the debtor (…)", among other situations (*Tratado*, vol. XI, page 97).

As for the value of the compensation owed to the evicted person, when discussing whether the relevant value of the assets is its value at the time of the partition or at the time of the eviction, CUNHA GONÇALVES chooses the second option, *inter alia* because this is suggested by analogy with article 2165, and because that is the value which the evicted person was actually deprived of (*Tratado*, vol. XI, pages 100-101).

The guarantee suit is time barred after 20 or 30 years, in accordance with article 535, starting from the day of the eviction.

Código Civil de 1867

SUBSECÇÃO VII
DA RESCISÃO DA PARTILHA

Artigo 2163°

As partilhas, feitas extrajudicialmente, só podem ser rescindidas nos casos em que o podem ser os contratos.

Artigo 2164°

As partilhas, judicialmente feitas, e confirmadas por sentença passada em julgado, não podem ser rescindidas, excepto nos casos de nulidade do processo.

Artigo 2164°

As partilhas, judicialmente feitas e confirmadas por sentença passada em julgado, não podem ser rescindidas, excepto nos casos de nulidade de processo e naqueles em que pode ser revogado o caso julgado.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

Artigo 2165°

Se as partilhas forem feitas com preterição de algum dos co-herdeiros, não serão rescindidas, não se provando dolo ou má fé da parte dos outros interessados; mas, serão estes obrigados a compor ao preterido a sua devida parte.

Artigo 2165°

Se as partilhas judiciais forem feitas com preterição de algum dos co-herdeiros, ou de quem como tal venha a ser julgado, não serão rescindidas sem

Civil Code of 1867

SUBSECTION VII
RESCISSION OF THE PARTITION

Article 2163

Partitions made extrajudicially may only be rescinded in cases in which the contracts may be so.

Article 2164

Partitions made judicially, and confirmed by a judgment in a condition of res judicata, *may not be rescinded, except in the cases of nullity of the proceedings.*

Article 2164

Partitions made judicially and confirmed by a judgment in a condition of *res judicata* may not be rescinded, except in the cases of nullity of the proceedings and in those in which the *res judicata* may be revoked.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Article 2165

If the partitions excluded one of the co-heirs, they shall not be rescinded, if deceit or bad faith on behalf of the other interested parties is not proven; but these shall be obliged to make up the due portion of the excluded heir.

Article 2165

If the judicial partitions excluded one of the co-heirs, or one who has been so declared by a court of law, they shall not be rescinded without proof of deceit or

se provar dolo ou má fé da parte dos outros interessados; mas serão estes obrigados a compor ao preterido a sua devida parte em moeda corrente, tendo-se em atenção o valor dos bens à data da composição.

(*Redacção dada pelo Decreto nº 19.126, de 16/12/1930*)

bad faith by the other interested parties; but these shall be obliged to make up the due portion of the excluded heir in the prevailing currency, taking into account the value of the property at the time when this obligation is complied with.

(*As revised by Decree no. 19.126, of 16/12/1930*)

Artigo 2166°

A omissão de alguns objectos na partilha não é motivo para esta se desfazer, e tão-sómente se fará partilha adicional desses objectos.

Article 2166

The omission in the partition of some of the objects is not grounds to undo it, and only the additional partition of these objects shall be carried out.

COMMENTARY TO ARTICLES 2163 TO 2166

These rules may encompass several situations, such as the total and partial annulment of the partition, the composition of the portion of an heir who was overlooked (e.g. because he/she was unknown at the time of the partition), or an additional partition.

The law foresees specific rules depending on whether the partition is judicial (article 2164, but which was derogated by article 732 of the Code of Civil Procedure, with an enumeration of the grounds to amend the partition, deemed to be non-exhaustive), or extra-judicial (article 2163). An extra-judicial partition may be rescinded in the same cases as contracts may be so, namely due to error, deceit, bad faith, coercion, legal incapacity of the parties, among others.

As for the provisions of article 2165, the deceit or bad faith mentioned therein "*necessarily implies an 'intent to cause damage to a co-heir, concealing his/her right to the inheritance'*", and "*such deceit cannot come from the other co-heirs, but only from the author of the inventory, who declares who the deceased's heirs are*" (CUNHA GONÇALVES, *Tratado*, Vol. XI, page 113).

If an heir was overlooked in the partition – i.e., if he/she was excluded, because the head of the family failed to indicate his/her name (see article 2072, no. 2) – this does not imply the rescission of the partition, but merely the composition of his/her portion in cash (article 2165).

It should be stressed that an omission in the description of property, due to being unaware of that property or of intending to withhold it, is not grounds to rescind the partition, implying merely an additional partition.

Article 2166 is applicable to both types of partition, judicial and extra-judicial (*Tratado*, Vol. XI, page 121).

As for the effects of the partition's invalidity, the partition is only affected in full "*when the nullity is absolute and affects all of the partition*" (CUNHA GONÇALVES, *Tratado*, Vol. XI, page 114); otherwise, the

partition is preserved insofar as it complied with the law; in other words, the partition shall only be reviewed with regard to the portion affected by the invalidity.

CUNHA GONÇALVES is clearly in favour of the preservation of the sale to a third party of assets belonging to the portion whose partition was invalidated, noting: "*The annulment of the partition is, for third parties,* res inter alios acta; *the third parties are only interested in determining who was the owner of the thing at the time of the sale*" (*Tratado*, vol. XI, page 116).

When the partition is invalidated, if the value of the partitioned assets has fortuitously increased or decreased, both situations are subsumable to the inheritance; on the other hand, if those events are owed to the heir who benefited from those assets, the increase or decrease in value shall be imputed to his/her portion. It is further necessary to restore the obtained fruits and income, since the invalidity has retroactive effects starting from the time the partition was carried out.

The invalidity of an extra-judicial partition, due to relative nullity, may be overcome by ratification (see article 696). The right to sue for the annulment of the partition is time-barred in accordance with general rules – e.g., in the case of vices of consent, in accordance with articles 689 and 690.

4.2. Artigos 1369º-1447º do Código de Processo Civil de 1939 (inventário)

Articles 1369-1447 of the Code of Civil Procedure of 1939 (inventory)

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

Capítulo XVII
DO INVENTÁRIO

SECÇÃO I
DECLARAÇÕES DO CABEÇA-DE-CASAL. CITAÇÃO DOS INTERESSADOS. OPOSIÇÕES

Artigo 1369º

(*Petição para o inventário. Declarações do cabeça-de-casal*)

O processo de inventário somente será admitido em face da respectiva certidão de óbito e mediante requerimento de algum interessado, ou do Ministério Público quando haja interessado sujeito à jurisdição orfanológica.

O cabeça-de-casal será notificado para prestar o juramento de desempenhar com todo o escrúpulo e fidelidade as suas funções e para fazer as declarações exigidas no Artigo 2072º do Código Civil, devendo também declarar quais as pessoas que segundo a lei hão-de compor o conselho de família, no caso de inventário orfanológico, se há valores a conferir e os nomes dos conferentes, se há donatários não conferentes, legatários e credores e quais sejam.

§ 1º) Não havendo registo de óbito, a respectiva certidão será substituída nos termos e pelos meios de prova admitidos pelo Código do Registo Civil.

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

CHAPTER XVII
INVENTORY

SECTION I
DECLARATIONS OF THE HEAD OF THE FAMILY. SUMMONS OF THE INTERESTED PARTIES. CHALLENGES

Article 1369

(*Application for inventory. Declarations of the head of the family*)

Inventory proceedings shall only be admitted upon presentation of the respective certificate of death and upon request from an interested party, or from the Public Prosecutor when an interested party is subject to orphan's jurisdiction.

The head of the family shall be notified to take an oath to carry out his/her functions scrupulously and faithfully and to declare what is required by article 2072 of the Civil Code; he/she must also declare who the persons are that will, in accordance with the law, make up the family council, in the case of an inventory relating to orphans, if there are values to be restored and the names of those who are to restore them, and if there are donees without the obligation to restore, legatees and creditors, and who they are.

§ 1) In the absence of a registry of death, the respective certificate shall be replaced in the manner and by the evidence allowed by the Code of Civil Registry.

§ 2º) A palavra interessado abrange o herdeiro, o meeiro do inventariado e as pessoas contempladas com o usufruto de parte da herança, sem determinação de valor ou de objecto.

§ 3º) No acto das declarações o cabeça-de-casal juntará os documentos a que se referem os nºs 3 e 4 do Artigo 2072º do Código Civil e quaisquer outros que sejam pertinentes à causa.

§ 4º) Para designar o cabeça-de-casal, o juiz poderá colher as informações que julgar convenientes e, se pelas declarações da pessoa designada verificar que o encargo compete a outro, deferi-lo-á a quem competir.

§ 2) The expression interested party encompasses the heir, the holder of the moiety of the decedent and the persons with the right of usufruct over part of the inheritance, without the specification of a value or object.

§ 3) In the act of the declarations, the head of the family shall annex the documents mentioned in no.s 3 and 4 of article 2072 of the Civil Code and any others relevant for the case.

§ 4) To appoint the head of the family, the judge may collect the information deemed convenient and if, as a result of the declarations of the appointed person, it is observed that a different person should be appointed, the judge will proceed to do so.

Artigo 1370º

(*Valor das declarações do cabeça-de-casal*)

As declarações do cabeça-de-casal, tanto as iniciais como as posteriores, fazem fé até prova em contrário, salvo se forem produzidas no seu interesse pessoal, ou se disserem respeito a factos para que a lei exija certo meio de prova ou o acordo de todos ou da maioria dos interessados.

Article 1370

(*Worth of the declarations of the head of the family*)

The declarations of the head of the family, both the initial and the subsequent ones, shall be deemed true until proven otherwise, except if they are made in personal interest, or if they relate to facts for which the law requires a certain means of evidence or the agreement of all or of most of the interested parties.

Artigo 1371º

(*Citação dos interessados*)

O processo será arquivado quando pelas declarações do cabeça-de-casal se reconhecer que não há fundamento para o inventário.

Em caso contrário marcar-se-á o prazo para a apresentação da relação de bens e dos documentos que o cabeça-de-casal não possa juntar imediatamente e serão

Article 1371

(*Summons of the interested parties*)

The proceedings shall be shelved when, in light of the declarations of the head of the family, it is considered that there are no grounds for the inventory.

Otherwise, a deadline shall be set for the presentation of a list of property and of the documents which the head of the family is not able to produce imme-

citados, para os termos do processo, o Ministério Público, os herdeiros, os cônjuges destes, salvo se o casamento for com separação absoluta de bens, e os legatários e credores, não devendo porém ser citado o cabeça-de-casal, ainda que seja herdeiro ou representante de herdeiro.

Aos donatários, conferentes ou não, será designado dia para prestarem o juramento de bem exercer as funções de cabeça-de-casal quanto aos bens que lhes tenham sido doados.

Todas estas determinações ficarão exaradas no auto de declarações do cabeça-de-casal, sempre que seja possível.

§ 1º) A falta de citação dos herdeiros, dos seus cônjuges e do Ministério Público está sujeita ao regime da falta de citação do réu.

§ 2º) Se os herdeiros houverem de ser citados por éditos ou por carta a expedir para as colónias ou para país estrangeiro, não se sustará o andamento do inventário enquanto ocorrer o prazo da citação.

§ 3º) Tendo-se requerido o inventário orfanológico com o fundamento de ausência, o processo será arquivado se pelas declarações do cabeça-de-casal e ouvido o requerente ou em virtude de informações oficiais o juiz adquirir a convicção de que a ausência é em parte certa, mesmo em país estrangeiro ou nas colónias.

§ 4º) Serão citados por éditos os legatários e credores desconhecidos ou residentes fora da comarca.

diately, and summons to the case shall be issued to the Public Prosecutor, the heirs, their spouses, except if the marriage is in the regime of absolute separation of property, and the legatees and creditors, but the head of the family shall not be summoned, even if he/she is an heir or representative of an heir.

A day shall be ordered for the donees, regardless of whether or not they are subject to the obligation to restore, to swear an oath to duly carry out their functions of head of the family regarding the property donated to them.

All these orders shall be included in the act of the declarations of the head of the family, whenever possible.

§ 1) The absence of summons to the heirs, their spouses and the Public Prosecutor is subject to the rules governing absence of summons to the defendant.

§ 2) If the heirs must be summoned by edicts or by letter to be sent to the colonies or to a foreign country, the continuation of the inventory shall not be suspended while the deadline for the summons has not elapsed.

§ 3) If the inventory relating to orphans was requested on the grounds of absence, the proceedings shall be shelved if, in light of the declarations of the head of the family and upon hearing the applicant, or in light of official information, the judge is convinced that the location of the absentee is known, even if in a colony or foreign country.

§ 4) Legatees and creditors who are unknown or reside outside the division shall be summoned by edicts.

Artigo 1372º

(*Revelia. Que notificações se fazem aos não revéis e aos revéis*)

Feitas as citações, ficam na situação de revelia os herdeiros e o meeiro do inventariado que, residindo fora da sede da comarca, não constituam mandatário ou não escolham domicílio na mesma sede e os legatários e credores que, residindo fora da área da comarca, não constituam mandatários ou não escolham domicílio na sede dela.

Os herdeiros e meeiros que não forem revéis serão notificados da sentença final e dos despachos que designarem dia para conferências de interessados, reuniões do conselho de família, licitações e sorteios, do que ordenar o exame do mapa da partilha e do que lhes mandar pagar sisa. Aos que forem revéis não será feita notificação alguma se residirem fora da área da comarca; residindo dentro dela, serão notificados da sentença final, do despacho que lhes mandar pagar sisa e dos que marcarem dia para licitações e para a conferência ou para o conselho de família destinado à aprovação do passivo e forma do seu pagamento.

Os legatários que não forem revéis serão notificados da sentença e do despacho que designar dia para a conferência ou para o conselho de família destinado à aprovação das dívidas e forma do seu pagamento quando toda a herança for dividida em legados ou quando da aprovação das dívidas resultar redução dos legados; os credores não revéis serão notificados da sentença que atender os seus créditos e do despacho que marcar dia para a conferência ou para o conselho de família destinado à aprovação do passivo.

Article 1372

(*Ex parte hearing. Which notifications are to be made to those who are and to those who are not ex parte*)

Once the summons have been made, the following shall be considered to be in a situation of *ex parte*: the heirs and the holders of the moiety of the decedent who, residing outside the seat of the division, do not appoint an agent or do not elect a domicile in the said division seat, and the legatees and creditors who, residing outside the division seat, do not appoint an agent or do not elect a domicile in the said seat.

The heirs and holders of the moiety of the decedent who are not in a situation of *ex parte* shall be notified of the final judgment and of the orders deciding on a date for conferences of interested parties, meetings of the family council, auctions and draws, as well as of decisions on the examination of the partition chart and of those which require them to pay tax on conveyance Those who are in a situation of *ex parte* shall receive no notification if they reside outside the division; if they reside within the division, they shall be notified of the final judgment, of orders obliging them to pay tax on conveyance and deciding on a date for licitations and for the conference or family council aimed at approving liabilities and deciding on the manner of their payment.

The legatees who are not in a situation of *ex parte* shall be notified of the judgment and of the orders deciding on a day for the conference or the family council aimed at approving liabilities and deciding on the manner of their payment when the entire inheritance is

Aos legatários e credores revéis não será feita notificação alguma.

divided into legacies or when the approval of the debts results in a reduction of the legacies; the creditors who are not in a situation of *ex parte* shall be notified of the judgment concerning their credits and of the order deciding on a day for the conference or family council aimed at approving the liabilities.

Legatees and creditors in a situation of *ex parte* shall receive no notification.

Artigo 1373º

(*Representação do incapaz e do ausente*)

O incapaz será representado no inventário pelo seu representante legal e só quando este concorra com ele à partilha se lhe nomeará um curador que o represente em todos os actos.

O ausente em parte incerta quando não compareça nem tiver sido deferida a curadoria será também representado por um curador.

§ 1º) Se o incapaz puder ser representado por seus pais, não intervirá o conselho de família, competindo àqueles as atribuições deferidas a este.

§ 2º) Findo o processo, se os bens adjudicados ao ausente carecerem de administração, serão entregues ao curador nomeado, mediante caução quando se repute necessária. O curador ficará tendo, em relação a esses bens, os poderes e obrigações do curador provisório, cessando a sua administração logo que seja deferida a curadoria.

Article 1373

(*Representation of the legally incapable person and of the absentee*)

The legally incapable person shall be represented in the inventory by his/her legal representative, and only when the latter competes with that person in the partition will a curator be appointed to represent him/her in all acts.

The absentee in an unknown location that does not appear in court and when no curatorship has been decreed will also be represented by a curator.

§ 1) If the legally incapable person is represented by his/her parents, the family council shall not intervene, the parents having the powers granted to the latter.

§ 2) When the proceedings are concluded, if the property awarded to the absentee requires administration, it shall be delivered to the appointed curator, upon payment of security when deemed necessary. The curator shall have, in relation to such property, the powers and obligations of the provisional curator, his/her administration ceasing as soon as the curatorship is decreed.

Artigo 1374º

(*Impugnações*)

O Ministério Público e qualquer dos interessados pode, no prazo de dez dias a contar da sua citação, deduzir oposição ao inventário, impugnar a sua própria legitimidade ou a das outras pessoas citadas, salvo se o tiverem sido como credores, e a competência do cabeça-de-casal.

Deduzida a oposição ou impugnação, serão logo notificados, para responderem, o impugnado e os outros interessados. Com o requerimento e resposta se requererão todas as providências e, efectuadas as diligências estritamente indispensáveis, será a questão imediatamente decidida.

§ 1º) É admissível a oposição parcial ao inventário, tendente a restringir a descrição e a partilha a certos bens por já estarem legalmente partilhados os restantes.

§ 2º) A oposição ao inventário ou a impugnação pode também ser deduzida pelo cabeça-de-casal no prazo de dez dias a contar do despacho que ordenar as citações.

§ 3º) Se a oposição ou a impugnação for deduzida antes de citados todos os herdeiros residentes no continente ou na ilha onde o inventário correr, não se decidirá sem estarem feitas as referidas citações e sem se ouvirem, por meio de notificação, esses herdeiros. Pelos herdeiros residentes no estrangeiro ou nas colónias será ouvido o Ministério Público.

§ 4º) O disposto neste Artigo é igualmente aplicável à impugnação da competência do cabeça-de-casal nomeado no decurso do processo,

Article 1374

(*Challenges*)

The Public Prosecutor and any of the interested parties may, within ten days after having been summoned, oppose the inventory or challenge their own legitimacy or that of other summoned persons, except if they were summoned as creditors, as well as the competence of the head of the family.

Once the opposition or the challenge has been presented, the challenged person and other interested parties shall at once be notified to reply. The application and reply shall include all requests for measures and, once the strictly indispensable diligences have been carried out, the issue shall be immediately decided.

§ 1) Partial opposition to the inventory is admissible, if it aims at restricting the description and partition to certain property on the grounds that the remaining property has already been legally partitioned.

§ 2) Opposition to the inventory or challenges may also be put forward by the head of the family within ten days after the ordering of the summons.

§ 3) If the opposition or the challenge is presented before all the heirs residing on the continent or island where the inventory is taking place have been summoned, there shall be no decision before the said summons has been made and those heirs have been heard, following a notification. The Public Prosecutor shall be heard on behalf of the heirs residing abroad or in the colonies.

§ 4) The provisions of this article are also applicable to challenges to the competence of the head of the family

contando-se neste caso os dez dias da data em que a nomeação haja sido notificada ou em que deva presumir-se que chegou ao conhecimento do impugnante.

appointed during the proceedings, the ten-day period starting, in this case, from the date on which the appointment was notified or on which it should be presumed that the challenging party became aware of it.

Artigo 1375º

(*Processo para a habilitação como interessado, legatário ou credor*)

Pretendendo alguém ser admitido a intervir no inventário como interessado, legatário ou credor, deduzirá a sua pretensão em qualquer altura, indicando logo todos os meios de prova.

Notificados o cabeça-de-casal e os interessados para dizerem o que se lhes oferecer, seguir-se-á o mais que vai disposto no Artigo anterior.

Article 1375

(*Proceedings to qualify as an interested party, legatee or creditor*)

If someone intends to be admitted to intervene in the inventory as an interested party, a legatee or a creditor, he/she shall present this claim at any time, indicating at once all the means of evidence.

After the head of the family and the interested parties have been notified to give their say, the remaining provisions of the previous article shall be applied.

Artigo 1376º

(*Exercício do direito de preferência*)

Se algum dos herdeiros tiver feito cessão da sua quota a um estranho sem oferecer preferência aos co-herdeiros, podem estes exercer o direito de preferência no processo de inventário, quando o cessionário vier deduzir a sua habilitação.

Apresentando-se a preferir mais do que um herdeiro, observar-se-á o disposto no § único do Artigo 1514º.

Article 1376

(*Exercise of the right of preference*)

If any of the heirs has transferred his portion to a stranger without giving preference to the co-heirs, these may exercise the right of preference in the inventory proceedings, when the transferee requests to be admitted to the proceedings in that quality.

If more than one heir requests the exercise of the right of preference, the provisions of the single § of article 1514 shall be applied.

GENERAL COMMENTARY TO CHAPTER XVII

One must take into account Articles 1369 to 1447 of the Portuguese Code of Civil Procedure, approved by Decree-Law no. 29637, of 28 May 1939, in order to fully grasp the regime of several features of the Civil Code, such as partition of the couple's property, reduction due to inofficiousness and partition within a succession.

The Code of Civil Procedure of 1939 was in force not only in the current territory of the Portuguese State, but also in the territory of the Portuguese Colonial Empire, including the so-called State of India, in accordance with article 6 of the mentioned Decree-Law no. 29637, of 28 May 1939, and Order no. 9677, of 30 October 1940.

Thus, articles 1369 to 1447 of the Code of Civil Procedure of 1939 are still in force in the territory of the State of Goa, where it is essential to take those provisions into account together with the provisions of the Civil Code of 1867.

An inventory is a *sui generis* judicial proceeding (see. ALBERTO DOS REIS, *Processos Especiais*, vol. II, reprint of a posthumous work, Coimbra, Coimbra Editora, 1982, pages 380-381). Inventory proceedings are judicial in nature because they resolve issues in relation to which the interested parties are in conflict, e.g.: issues concerning the very *raison d'être* of inventory proceedings (article 1374 of the Code of Civil Procedure), the position of the notified persons (article 1374 of the Code of Civil Procedure), the property to be inventoried (article 1379 *et seq.* of the Code of Civil Procedure) and the payment of debts (articles 1394 *et seq.* of the Code of Civil Procedure). However, inventory proceedings are quite different from the usual proceedings, i.e. declarative proceedings. In declarative proceedings, there is an applicant and a defendant, and the proceedings are centred on a dispute between these two parties. In inventory proceedings, there are no applicants or defendants; there are main interested parties (head of the family, heirs, holder of a moiety) and secondary

interested parties (legatees and creditors), and for this reason, unlike in declarative proceedings, the proceedings are not initiated by one person against another.

According to the aim pursued, there are two types of inventory: the listing-inventory and the distributory-inventory. The only aim of the listing-inventory, mentioned in article 1437 of the Code of Civil Procedure, is to describe and appraise the property. The distributory-inventory further aims at the partition of the described and appraised property. Its ultimate objective is to fill up the interested parties' portions or quotas of an inheritance or of another mass of property. This second type of inventory is regulated in articles 1369 to 1428 of the Code of Civil Procedure.

The distributory-inventory has four main phases (see ALBERTO DOS REIS, *Processos Especiais* II cit., pages 381-382): the preliminary phase, encompassing the declarations of the head of the family, the summons of the interested parties and the challenges; the instruction phase, encompassing the description and appraisal of the property; the discussion phase, when the lawyers and the Public Prosecutor examine and inspect the case file so as to offer any comment they deem fit on the manner of partition; and the trial phase, wherein the order determining the partition is issued.

The provisions relating to the inventory proceedings are, mostly, organised according to these phases. The preliminary phase is regulated in Section I, called "Declarations of the head of the family. Summons of the interested parties. Challenges" (articles 1369 to 1376 of the Code of Civil Procedure). The instruction phase is regulated in the three following Sections: Section II, "List of property. Appointment of appraisers. Appraisal. Description" (articles 1377 to 1390 of the Code of Civil Procedure); Section III, "Conference of interested parties" (articles 1391 to 1404 of the Code of Civil Procedure); and Section IV, "Second appraisal. Licitations" (articles 1405 to 1413 of the Code of Civil Procedure). As summarized by ALBERTO DOS REIS (*Processos Especiais* II cit., pages 384-385), the rules relating to the instruction phase are presented in the following

sequence: a) presentation of the listing of property by the head of the family; b) indication, by him/her, of the value of the listed property; c) appraisal of the property by an appraiser; d) final description of the property and debts by the clerk's office; e) first and second examination and inspection of the case file by the lawyers and Public Prosecutor; f) conference of interested parties; g) second appraisal; h) licitations.

The discussion and trial phases are regulated in Section V, "Partition" (articles 1414 to 1424 of the Code of Civil Procedure). The discussion phase coincides with the third examination and inspection of the case file by the lawyers and the Public Prosecutor (see article 1414, I, of the Code of Civil Procedure). The trial phase is composed of the judge's order on the manner of partition (see article 1414, II, of the Code of Civil Procedure).

However, the first five Sections relate to the normal sequence of the paradigmatic inventory proceedings (the distributory-inventory, with the aim of partitioning an inheritance).

The chapter of the Code of Civil Procedure relating to inventory contains other sections: Section VI, "Amendment and rescission of the partition" (articles 1425 to 1428 of the Code of Civil Procedure); Section VII, "General provisions" (articles 1429 to 1438 of the Code of Civil Procedure); Section VIII, "Incidental proceedings within the inventory" (articles 1439 to 1443 of the Code of Civil Procedure); and Section IX, "Partition of property in special cases" (articles 1444 to 1447 of the Code of Civil Procedure).

Section VI regulates situations of extinction or modification of the partition, after the judgment homologating becomes *res judicata*. Section VII relates to the following issues: qualification of the successors of deceased interested parties, new inventory, inventory of the surviving spouse, consolidation of inventories, additional partition, appeals, definitely solved issues, rules applicable to the inventory for description and appraisal, and manners of carrying out the sale and leases for which a public auction is mandatory.

Section VIII regulates the so-called incidents, implying a detour from the normal steps in the inventory proceedings: removal of the head of the family; exemption from guardianship, proguardianship, curatorship and family council; exemption from the office of head of the family; exclusion or removal of the guardian or proguardian; exclusion or removal of the curator and the members of the family council. Section IX relates to a set of possibilities falling within the scope of the partition of the couple's property, different from partition within a succession.

Each of the above mentioned nine Sections shall be commented on separately. However, before beginning that analysis, we should point out the difference between an inventory relating to orphans and an inventory between majors, depending on the persons interested in the inventory. If the interested parties are capable, there is an inventory between majors; if the interested parties are minors or similar persons, there is an inventory relating to orphans. Inventories between majors are optional, whereas inventories relating to orphans are mandatory (see articles 2064 and 2065 of the Civil Code of 1867) and are characterised by the active intervention of the Public Prosecutor, of the representatives of the incapable persons and of the family council. This classification is not mirrored in the structure of the Code of Civil Procedure of 1939. Differently from the Portuguese Code of Civil Procedure of 1876, which dealt with the entire regime of inventories relating to orphans after having prescribed the general rules for inventory proceedings, the Code of 1939 presents the specificities of inventories relating to orphans when it mentions acts which include, or may include, an intervention from the Public Prosecutor, the representatives of the legally incapable persons and of the family council (see, *inter alia*, articles 1369, I, 1371, § 3, 1379, 1393, II, and 1414, I, of the Code of 1939).

COMMENTARY TO ARTICLES 1369 TO 1376

Articles 1369 to 1376 regulate the preliminary phase of inventory proceedings.

These proceedings are initiated with a request, in accordance with article 1369, I. If the judge has no reason to reject the request *in limine*, the proceedings continue with the declarations of the head of the family, referred to in articles 1369 and 1370. On the basis of these declarations, the judge verifies whether or not there are grounds for an inventory. If no such grounds exist, the proceedings shall be shelved (article 1371, I). Otherwise, the interested parties and the Public Prosecutor are summoned (article 1371, II). After the summons, the Public Prosecutor and any of the interested parties may oppose the inventory, challenge their own legitimacy or that of other summoned persons, as well as the competence of the head of the family (article 1374, I). If the opposition to the inventory is successful, the judge orders the proceedings to be shelved; if a challenge relating to legitimacy is successful, the summoned person(s) in question shall be excluded from the inventory; if the challenge to the competence of the head of the family is successful, he/she is replaced by the due person.

An inventory may be requested by any interested party and must be requested by the Public Prosecutor when one of the interested parties is subject to orphan's jurisdiction. In accordance with article 1369, § 2, the expression "interested party" encompasses "*the heir, the holder of the moiety of the decedent and the persons with the right of usufruct over part of the inheritance, without the specification of a value or object*". There is an inventory relating to orphans – therefore, a mandatory inventory – when the interested party is a minor or an interdicted, absent or unknown person (article 2064 of the Civil Code, read together with article 1369 of the Code of Civil Procedure).

However, it was disputed whether an inventory was mandatory when the spouse of one of the heirs was a minor or an interdicted, absent or unknown person. Some authors considered that it was not (e.g. ALBERTO DOS REIS, *Processos especiais* II cit., page 360), on the basis of article 1369, § 2: the explicit reference to "*the holder of the moiety of the decedent*" would exclude the holder of the moiety of any heir. Others argued that it was mandatory (e.g. PEREIRA E SOUSA, *Guia elementar do processo de inventário*, Coimbra, Coimbra Editora, 1923, page 9), since the key criterion to determine whether an inventory was mandatory was the legal impossibility of reaching an amicable partition of the inheritance. And others considered that the inventory would be mandatory if the marriage was solemnised according to the general communion of property (J. A. LOPES CARDOSO, *Partilhas Judiciais. Teoria e prática*, vol. I, Coimbra, Coimbra Editora, 1954, page 47), considering that the heir's portion was included in the communion, which granted the respective spouse the position of interested party in the partition. The case-law creating judgment of 12/01/1965 (Official Gazette, Series I, of 29/01/1965) followed the latter interpretation, stating that "*in the framework of the Procedural Code of 1939, a spouse who is the holder of the moiety of an heir is also a main interested party in the inventory proceedings*".

The intervention in an inventory of an interested party who is a minor (or an interdicted person) is ensured by that person's legal representative, unless the latter is also competing for the partition, in which case the incapable person shall be appointed a curator to represent him/her in all acts (article 1373).

Although article 1369 associates inventory proceedings to a situation following someone's death, they may also be requested on the basis of absence or divorce, separation of persons or annulment of a marriage. Articles 1444 *et seq.* regulate the partition of property in the special cases of divorce, separation of persons and annulment of the marriage. Article 1371, § 3, refers to an inventory requested on the basis of absence, prescribing that the proceedings shall be shelved if "*the judge is convinced that the location of the absentee is known*".

Despite the letter of this provision, which suggests, *a contrario sensu*, that only absence in an unknown location allows for an inventory, CUNHA GONÇALVES (*Tratado de Direito Civil em comentário ao Código Civil português*, vol. XIV, Coimbra, Coimbra Editora, 1940, pages 815-816) argues that the inventory relating to orphans should be requested in the case of absence, be it at a known or unknown location.

Article 1370 sets the value of the head of the family's declarations, prescribing that these shall be deemed true until proven otherwise, except if they are made in personal interest, or if they relate to facts for which the law requires a certain means of evidence or the agreement of all or of most of the interested parties. Thus, declarations on "*issues relating directly and exclusively to the person or function of the head of the family, his/her accounting and responsibility or his/her portion of the inheritance*" (CUNHA GONÇALVES, *Tratado*, vol. XIV, page 817), shall not be deemed true, because they were made in their author's personal interest; the same applies to declarations relating to relationship made by the heirs in the inventory, since they require a certain means of evidence, and to declarations relating to debts, since these must be approved by the interested parties (article 1394).

In the declarations, the head of the family must mention, *inter alia*, the name of the heirs, the donees without the obligation to restore, the legatees and the creditors (article 1369, II). Regardless of this, any interested party, legatee or creditor who was not identified by the head of the family may request to intervene in the inventory proceedings at any time, indicating at once all the means of evidence (article 1375). A third party who was benefited by the transfer of the portion of one of the heirs is also awarded the option of requesting to be admitted to the proceedings. If the transfer occurred without the transferring heir having given the co-heirs the due right of preference, the latter may request to exercise it in the inventory proceedings, precisely when the transferee requests to be admitted to the proceedings (article 1376, I). If more than one heir requests the exercise of the right of preference, the one with the largest portion is given priority; if the portions are identical, the issue is

solved through licitation (article 1376, II, which orders the application of the single § of article 1514)

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

SECÇÃO II
RELAÇÃO DE BENS. NOMEAÇÃO DE LOUVADOS. AVALIAÇÃO. DESCRIÇÃO.

Artigo 1377º

(*Relações dos bens*)

O cabeça-de-casal apresentará as relações dos bens dentro do prazo que for designado.

Os bens serão especificados por verbas numeradas, começando-se pelas dívidas activas, papéis de crédito, direitos e acções, seguindo-se o dinheiro, moedas estrangeiras e objectos de ouro, prata e pedras preciosas e semelhantes, depois todos os restantes bens móveis e semoventes, os imobiliários e por fim as dívidas passivas. Entre cada verba deixar-se-á um espaço de cinco linhas.

Relacionar-se-ão em separado os bens que devam ser avaliados por pessoas ou meios diferentes.

As relações serão rubricadas e no fim assinadas pelo cabeça-de-casal, ou por outrem a seu rogo, quando aquele não souber ou não puder escrever.

§ 1º) A menção dos bens será acompanhada de todas as circunstâncias necessárias para a sua identificação.

§ 2º) Serão incluídos numa única verba, com a declaração dos respectivos números, todas as acções e papéis de crédito da mesma espécie, salvo se forem emitidos por entidades diferentes.

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECTION II
LIST OF PROPERTY. APPOINTMENT OF APPRAISERS. APPRAISAL. DESCRIPTION

Article 1377

(*List of property*)

The head of the family shall present a list of the property within the appointed deadline.

The property shall be listed in numbered items, starting with active debts, securities, rights and actions, followed by cash, foreign currency and objects in gold, silver and precious stones and other such materials, then all the remaining movable and self-moving property, immoveable property and, finally, passive debts. Each item shall be separated by a space of five lines.

A separate list shall be made for the property to be appraised by different persons or means.

The lists shall be initialled and, at the end, signed by the head of the family or by another at his/her request, when he/she cannot or does not know how to write.

§ 1) The mention of the property shall be accompanied with all the circumstances required for its identification,

§ 2) All the shares and securities of the same sort shall be included in a single item, with the indication of their respective numbers, except if they were

Englobar-se-ão também numa única verba os móveis da mesma natureza a que pela sua matéria, utilidade e estado de conservação deva ser atribuído o mesmo valor.

§ 3º) As benfeitorias pertencentes à herança serão descritas em espécie quando puderem separar-se do prédio em que foram feitas, e como dívida activa no caso contrário.

As benfeitorias feitas por terceiro em prédio da herança serão descritas como dívida passiva quando não puderem ser levantadas por quem as fez.

issued by different entities. The moveable property of the same nature and which, by its nature, purpose and state of preservation, should be assigned identical value, shall also be listed in a single item.

§ 3) The improvements belonging to the inheritance shall be described in kind when they can be separated from the immovable property on which they were made, and as an active debt when this is not possible.

The improvements made by a third party on immovable property included in the inheritance shall be described as a passive debt when they cannot be removed by the one who made them.

Artigo 1378º

(*Bens cujo valor deve ser indicado pelo cabeça-de-casal*)

Além de descrever os bens, o cabeça-de-casal indicará o seu valor nos casos seguintes:

1º) Quando se tratar de prédios inscritos na matriz;

2º) Quando se tratar de papéis de crédito, moedas estrangeiras e objectos de ouro, prata e pedras preciosas e semelhantes;

3º) Quando se tratar de dívidas activas e de qualquer direito e acção;

4º) Quando se tratar de estabelecimento comercial ou industrial;

5º) Quando se tratar de acções e de partes ou quotas em sociedade.

§ 1º) No caso do nº 1, o valor será o que resultar do rendimento colectável.

§ 2º) No caso do nº 3, o cabeça-de-casal declarará o valor se as dívidas ou o direito forem líquidos; não o sendo, mencionará esses bens como ilíquidos.

Article 1378

(*Property the value of which the head of the family must indicate*)

Aside from describing the property, the head of the family will indicate its value in the following cases:

1) In the case of immovable property registered in the revenue records;

2) In the case of securities, foreign currency and objects in gold, silver, precious stones and similar materials;

3) In the case of active debts and of any actionable claim;

4) In the case of a commercial or industrial establishment;

5) In the case of shares and parts or quotas in a company;

§ 1) In the case of no. 1, the value shall be the one resulting from income subject to taxes;

§ 2) In the case of no. 3, the head of the family shall declare the value if the debts or right are ascertained; if they are not, he/she will mention them as unascertained.

§ 3º) No caso do nº 5, se a morte do inventariado determinar a dissolução da sociedade o valor será o que resultar da liquidação e, enquanto esta não estiver concluída, as partes ou quotas sociais descrever-se-ão como ilíquidas, mencionando-se entretanto o valor que tinham segundo a cotação ou o último balanço.

§ 4º) O disposto neste Artigo e no anterior é igualmente aplicável ao donatário.

§ 3) In the case of no. 5, if the death of the decedent determines the dissolution of the company, the value shall be that resulting from the liquidation and, while this has not yet been concluded, the parts or quotas shall be described as unascertained, indicating in the meantime their value according to the quotation or the last balance sheet.

§ 4) The provisions of this article and of the previous one are also applicable to the donee.

Artigo 1379º

(*Exame e vista do processo*)

Apresentadas as relações dos bens ou findo o prazo em que deviam ser, facultar-se-á o exame do processo, por quarenta e oito horas, a cada um dos herdeiros que tiver constituído advogado, segundo a ordem das procurações, depois ao advogado do donatário e do cabeça-de-casal, e por fim dar-se-á vista, pelo mesmo prazo, ao Ministério Público, quando o inventário for orfanológico.

Durante o prazo do exame ou da vista podem os advogados e o Ministério Público acusar falta de descrição de bens ou dizer o que se lhes oferece no caso de o cabeça-de-casal ou o donatário negar a existência de bens em seu poder ou a obrigação de conferir, ou levantar questão sobre quais sejam os bens que recebeu e quem tem obrigação de conferir.

O mesmo podem fazer, por meio de requerimento, até ao termo dos exames, os herdeiros e o meeiro que não tiverem constituído advogado.

§ único) A falta de descrição de bens pode ser acusada posteriormente em

Article 1379

(*Examination and inspection of the case file*)

Once the lists of the property have been presented or the deadline for their presentation has expired, the examination of the case file shall be allowed, for forty eight hours, to each of the heirs who has appointed a lawyer, according to the order of the powers of attorney, then to the lawyer of the donee and the head of the family, and finally inspection shall be given, in the same deadline, to the Public Prosecutor, in the case of an inventory relating to orphans.

During the period for the examination or inspection the lawyers and the Public Prosecutor may raise an absence of description of the property or comment as they see fit if the head of the family or the donee deny the existence of property in their possession or the obligation to restore, or raise issues concerning which property they received or are obliged to restore.

The same is allowed, upon request, up to the end of the examinations, to the heirs and owners of the moiety of the inventoried property who have not appointed a lawyer.

qualquer altura; mas o arguente procurará convencer de que só teve conhecimento da existência dos bens na data em que deduz a arguição. Seguir-se-ão depois os termos prescritos no Artigo imediato.

Single §) The absence of a description of the property may be invoked subsequently at any time; but the person invoking it shall attempt to demonstrate that he/she only became aware of the existence of that property at the time of the said invocation. The provisions of the following article shall then be applied.

Artigo 1380º

(*Termos a seguir quando se acusar a falta de descrição de bens*)

Acusando-se falta de descrição de bens, será notificado o cabeça-de-casal ou donatário para descrever os bens ou dizer o que se lhe oferecer.

Se o notificado, confessando a existência dos bens e reconhecendo que pertencem à herança, os não puder descrever logo, pedirá que lhe seja concedido prazo para a descrição.

Se negar a existência dos bens ou declarar que não pertencem à herança, o juiz convidará os interessados a produzir quaisquer provas, mandará proceder às diligências que julgar necessárias e por fim decidirá se os bens devem ser descritos.

Se a questão não puder ser resolvida sumariamente nos termos indicados por haver necessidade de mais larga indicação, os interessados serão remetidos para o processo comum, continuando o inventário quanto aos outros bens.

§ único) A falta de resposta dentro do prazo, tendo a notificação sido pessoal, equivale, para todos os efeitos, à confissão da existência dos bens e da obrigação de serem descritos.

Article 1380

(*Procedure when the absence of description of property is invoked*)

When the absence of description of property is invoked, the head of the family or donee shall be notified to describe the property or give his/her say.

If the notified party, having confessed to the existence of the property and recognising that it belongs to the inheritance, is unable to describe it at once, he/she shall request a deadline for the description.

If he/she denies the existence of the property or states that it does not belong to the inheritance, the judge shall invite the interested parties to produce any evidence, shall order the diligences deemed necessary and finally shall decide if the property should be described.

If the issue cannot be summarily solved as indicated above for need of more in-depth analysis, the interested parties shall be directed to pursue the normal form of proceedings, the inventory continuing with regard to the other property.

Single §) The absence of a reply within the deadline, if the notification was made in person, is equivalent, for all purposes, to the confession of the existence of the property and the obligation of describing it.

Artigo 1381º

(*Questões sobre a existência de bens ou a obrigação de conferir*)

Se o cabeça-de-casal ou o conferente negar a existência dos bens em seu poder ou a obrigação de os descrever ou conferir, ou levantar qualquer questão sobre quais sejam os bens que recebeu e tem de conferir, a questão será decidida em face dos documentos apresentados e das outras provas que os interessados produzirem e forem de admitir, ou das diligências oficiosamente ordenadas.

É aplicável a estes casos o disposto na última alínea do corpo do Artigo anterior.

§ único) Não podendo a questão ser resolvida no inventário respectivo, o cabeça-de-casal ou o conferente não receberá os bens que lhe couberem em partilha sem prestar acaução correspondente ao valor dos bens sobre que houver dúvidas.

Article 1381

(*Issues relating to the existence of the property and the obligation to restore it*)

If the head of the family or the person obliged to restore denies the existence of the property in his/her possession or the obligation to describe or restore it, or raises any issue on which is the property that he/she received and must restore, this dispute shall be decided in light of the documents put forward and other admissible evidence produced by the interested parties, or the diligences ordered *ex officio* by the court.

The provisions of the last sub-paragraph of the previous article shall be applicable to such cases.

Single §) If the dispute cannot be solved within the respective inventory, the head of the family or the person with the obligation to restore shall not receive the property ascribed to him/her in the partition without providing a security corresponding to the value of the property subject to dispute.

Artigo 1382º

(*Impossibilidade de descrição pelo cabeça-de--casal*)

Se o cabeça-de-casal declarar que não pode descrever alguns bens pertencentes à herança por se encontrarem em poder de certo co-herdeiro, deve este ser notificado para os descrever dentro do prazo que for designado.

Feita a notificação, observar-se-á o que fica disposto no Artigo 1380º.

Article 1382

(*Impossibility of description by the head of the family*)

If the head of the family states that he/she cannot describe some of the property belonging to the inheritance due to it being in possession of a co-heir, the latter must be notified to describe it within an imposed deadline.

After the notification, the provisions of article 1380 shall apply.

Artigo 1383º

(*Questões sobre a exclusão de bens*)

Se algum co-herdeiro ou outra pessoa se arrogar a propriedade dos bens descritos

Article 1383

(*Issues relating to the exclusion of property*)

If a co-heir or another person claims ownership of the described property

e requerer que tais bens sejam excluídos da descrição, a questão será decidida, ouvido o cabeça-de-casal e a pessoa que descreveu os bens, se for diferente, produzidas as provas e obtidas as informações que se julgarem necessárias.

and requests that such property be excluded from the description, this issue shall be decided, after hearing the head of the family and the person who described the property, if this was a different person, and after the evidence has been produced and all the information deemed necessary has been obtained.

Artigo 1384º

(*Conceito de sonegação. Em que caso pode a questão ser decidida no inventário*)

Entender-se-á que se verifica a sonegação quando houver dolo na falta de descrição de bens ou na negação da existência dos bens acusados.

§ único) Decidir-se-á no inventário se houve sonegação e aplicar-se-á a sanção respectiva, quando a questão puder resolver-se em face das respostas dos interessados e dos documentos e elementos existentes no processo.

No caso contrário, serão os interessados remetidos para os meios comuns.

Article 1384

(*Concept of withholding property. In which case may the issue be decided in the inventory*)

It will be understood that the property is being withheld when, deceitfully, property is not described or the existence of the indicated property is denied.

Single §) The existence of a situation of withholding of property, and the application of the respective sanction, shall be decided upon in the inventory, when this issue may be solved in light of the replies of the interested parties and of the documents and elements existing in the case file.

Otherwise, the interested parties shall be directed to pursue the normal form of proceedings.

Artigo 1385º

(*Reclamação de créditos*)

O credor pode reclamar no inventário, por simples requerimento, a aprovação e pagamento de dívidas que não tenham sido descritas pelo cabeça-de-casal.

Esta reclamação é admissível até ser proferido o despacho sobre a forma da partilha, salvo se o respectivo credor tiver sido citado pessoalmente para os termos do inventário, porque neste caso só pode declarar o seu crédito até à

Article 1385

(*Claiming credits*)

A creditor may claim in the inventory, by simple request, the approval and payment of debts that have not been described by the head of the family.

This claim is admissible until the order on the partition has been issued, except if the creditor in question was notified in person for the purposes of the inventory, because in this case he/she may only claim the credit up to the

conferência de interessados destinada à aprovação do passivo.

§ único) O credor citado pessoamente que não reclamar os seu crédito até à conferência de interessados não fica inibido de exigir o pagamento pelos meios comuns; mas se recorrer a estes meios e os réus não deduzirem oposição, fica obrigado ao pagamento das custas, qualquer que seja o resultado do processo.

conference of interested parties for approval of debts.

Single §) A creditor who was notified in person and does not claim his/her credit up to the conference of interested parties is not prohibited from demanding payment in accordance with normal proceedings; but if he/she resorts to such proceedings and the defendants do not raise objections, he/she shall be ordered to pay the costs, regardless of the outcome of the proceedings.

Artigo 1386º

(*Negação de dívida activa*)

Se uma dívida activa, relacionada pelo cabeça-de-casal, for negada pelo pretenso devedor, a descrição deverá manter-se ou eliminar-se depois de ouvido o cabeça-de-casal e obtidos todos os esclarecimentos necessários.

Sendo mantida a descrição, a dívida reputar-se-á litigiosa; sendo eliminada, entender-se-á que fica salvo aos interessados o direito de exigir o pagamento pelos meios competentes.

Article 1386

(*Denying an active debt*)

If an active debt described by the head of the family is denied by the alleged debtor the description shall be maintained or eliminated after hearing the head of the family and obtaining all the necessary clarifications.

If the description is maintained, the debt shall be deemed to be contested; if it is eliminated, it shall be understood that interested parties shall retain the right to demand payment in accordance with the law.

Artigo 1387º

(*Avaliação de bens por louvado*)

Quando se não suscitarem questões sobre a descrição ou resolvidas as que forem levantadas, proceder-se-á à avaliação dos bens dentro do prazo que for designado. A avaliação será feita por um único louvado nomeado pelo juiz; mas pode este nomear louvados diferentes para a avaliação das várias espécies de bens se a natureza especial destes o exigir.

Não dependem de avaliação os bens a que se refere o Artigo 1378º.

Article 1387

(*Appraisal of the property by an appraiser*)

When there are no issues on the description or any such issues have been solved, the property shall be appraised within an assigned deadline. The appraisal shall be made by a single appraiser, appointed by the judge; but the appraiser may appoint other appraisers for the appraisal of the different types of property if their special nature so requires.

The property referred to in article 1378 is not subject to appraisal.

Artigo 1388º

(*Apontamento do resultado da avaliação*)

Ao louvado serão entregues, com o mandato de avaliação, as respectivas relações.

Em seguida a cada verba, no espaço deixado em branco nas relações, escreverá os valores respectivos, as alterações ou adicionamentos à descrição que julgue necessários e as declarações relativas às bases da avaliação.

Article 1388

(*Note on the result of the appraisal*)

The appraiser shall be given, along with the mandate for the appraisal, the respective lists.

After each item, in the blank space following the descriptions, he/she shall write down the respective value, the changes or additions to the description he/she deems necessary and the statements concerning the basis of the appraisal.

Artigo 1389º

(*Avaliação pelo chefe da secretaria*)

Se houver bens cujo valor deva ser determinado pelo chefe da secretaria, ser-lhe-ão continuados os autos para esse efeito logo em seguida à entrega das relações ao louvado. O valor será determinado dentro de cinco dias.

Article 1389

(*Appraisal by the head of the clerk's office*)

If there is property the value of which is to be determined by the head of the clerk's office, the case file shall be sent to him/her for this purpose, immediately following the delivery of the lists to the appraiser. The value shall be determined within five days.

Artigo 1390º

(*Descrição final*)

Concluída a avaliação, a secretaria fará, dentro de oito dias, a descrição final dos bens e das dívidas, com a indicação dos valores.

Para a descrição dos móveis de pequeno valor, ainda que de diversa natureza, serão formados lotes, de modo que, tanto quanto possível, em cada verba se compreendam bens de valor não inferior a 50$.

Article 1390

(*Final description*)

Once the appraisal has been completed, the clerk's office shall produce, within eight days, the final description of the property and debts, with the indication of their value.

For the description of the movable property of small value, even of differing nature, lots shall be made, so that, insofar as possible, each item includes property worth at least 50$.

COMMENTARY TO ARTICLES 1377 TO 1390

The presentation of the listing of property by the head of the family initiates the inventory instruction phase. As is stated in article 1377, II, the head of the family indicates in the listing of property, in numbered items: 1) immaterial property (active debts, securities, rights and actions); 2) movable valuable property (cash, foreign currency, jewelry, silver, precious stones and other such materials); 3) other movable property (furniture, clothing, kitchenware, machines, books, etc.); 4) immoveable property (rural and urban plots or buildings); 5) passive debts.

There are doubts as to whether one should include property located abroad in an inventory initiated in Portugal, given that it is possible that some States, where the said property is located, would not grant effectiveness to the judgments of the Portuguese courts (J. A. LOPES CARDOSO, *Partilhas Judiciais* I cit., pages 396 *et seq.*). According to LOPES CARDOSO, property located abroad must always be listed in inventory proceedings initiated in Portugal, under article 1 of the Hague Convention of 17 September 1905 (which Portugal ratified), according to which successions are governed by the national law of the deceased, regardless of the nature of the assets and of the State where they are located.

Aside from the description of the property, the head of the family must also indicate the value of some of the following assets that have been listed (see article 1378): immovable property registered in the revenue records; securities, foreign currency, objects in gold, silver, precious stones and similar materials; active debts and actionable claims; commercial or industrial establishments; shares and parts or quotas in a company. The remaining property shall be appraised by an expert, appointed by the judge (article 1387).

Once the evaluation has been concluded, the clerk's office shall produce the final description of the property and debts (article 1390).

However, before the final description and after the lists of the property have been presented or the deadline for their presentation has expired, the examination of the case file shall be allowed to the lawyers of the heirs, of the donee, of the head of the family and, in the case of an inventory relating to orphans, also to the Public Prosecutor (article 1379). The lawyers and the Public Prosecutor, as well as the heirs and the holder of the moiety who have not appointed a lawyer, may invoke the absence of description of certain property (see article 1380, which regulates the procedure to be followed in this case) or give their say on the head of the family's or the donee's denial of the existence of that property in his/her possession or of the obligation to describe or restore it (see, particularly, article 1381).

The absence of description of property or the denial of the existence of the invoked property, when deceitful, is considered as withholding it (article 1384), which implies applying to the person in question the sanction mentioned in article 2079 of the Civil Code (loss of the withheld property or sanction of theft). CUNHA GONÇALVES (*Tratado*, vol. XIV, page 819) criticises the drafting of article 1384, considering that the expression "*existence of the indicated property is denied*" is obscure. And LOPES CARDOSO, highlighting the requirement of deceit in the absence of description of property, considers that it is very difficult to prove a situation of withholding property, since, in most cases, the head of the family claims to have acted in good faith, arguing that he/she was unaware of the non-described property (*Partilhas Judiciais* I cit., page 490).

Finally, it should be noted that a creditor may claim in the inventory, by simple request, the approval and payment of debts that have not been described (under passive debts) by the head of the family, in accordance with article 1385.

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECÇÃO III CONFERÊNCIA DE INTERESSADOS

SECTION III CONFERENCE OF INTERESTED PARTIES

Artigo 1391º

(*Segundo exame e vista do processo*)

Feita a descrição, observar-se-á o disposto na primeira parte do Artigo 1379º.

Durante o prazo do exame ou da vista pode reclamar-se contra o excesso da avaliação, requerer-se a convocação da conferência de interessados e fazer-se a declaração de licitação em certos e determinados bens, indicando-se o valor que se oferece acima da avaliação.

O mesmo podem fazer, até ao termo dos exames, os interessados que não tiverem constituído advogado.

§ único) As licitações só podem ser requeridas até ao termo dos exames. Exceptua-se o disposto no Artigo 1404º e o caso de, em consequência de inoficiosidade, terem de ser restituídos à massa da herança bens doados ou legados. Neste caso as licitações podem ser requeridas até ao exame do processo para a forma da partilha.

Article 1391

(*Second examination and inspection of the case file*)

Once the description has been made, the provisions of the first part of article 1379 shall apply.

During the period for the examination or inspection, one may: object to an excessive appraisal, request the convening of a conference of interested parties and make a declaration of licitation for certain specified property, indicating the value offered over that of the appraisal.

Interested parties who have not appointed a lawyer may also do so up to the end of the examination.

Single §) Licitations may only be requested up to the end of the examination, with the exceptions of the provisions of article 1404 and the case of donated or legated property having to be returned to the inheritance due to inofficiousness. In this case, licitations may be requested up to the examination of the case file regarding the partition.

Artigo 1392º

(*Convocação do conselho de família*)

Quando não haja conferência de interessados, logo em seguida ao termo

Article 1392

(*Convening the family council*)

When there is no conference of interested parties, the family council

dos exames deve ser convocado o conselho de família, quando deva intervir, para deliberar sobre a licitação por parte dos incapazes.

must be convened immediately after the end of the examination, when it must intervene to deliberate on a licitation by a legally incapable person.

Artigo 1393º

(*Assuntos a submeter à conferência de interessados*)

A conferência de interessados será convocada, oficiosamente ou a requerimento, para deliberar sobre:

a) Aprovação do passivo e forma do seu pagamento;

b) Encabeçamento de prazos;

c) Reclamação contra o excesso da avaliação;

d) Quaisquer dúvidas ou dificuldades que possam influir na determinação da partilha.

Para a conferência serão notificados os vogais do conselho de família, sendo orfanológico o inventário e devendo ele intervir, quando haja de deliberar-se sobre as matérias designadas nas alíneas a) e b).

§ único) A deliberação dos interessados presentes obriga os que não comparecerem, salvo se não tiverem sido notificados, devendo sê-lo.

Article 1393

(*Issues to be presented to the conference of interested parties*)

The conference of interested parties shall be convened, at the court's own initiative or upon request, to decide on:

a) Approval of the debts and the manner of their payment;

b) Entrustment of emphyteusis as a head;

c) Complaint against an excessive appraisal;

d) Any doubts or difficulties which may affect the determination of the partition.

The members of the family council shall be summoned for the conference, in the case of an inventory relating to orphans and if the family council must intervene, to decide on the matters described in (a) and (b).

Single §) The deliberation of the interested parties present is binding upon those who are not present, except if they should have been and were not notified.

Artigo 1394º

(*Aprovação de dívidas por todos os interessados*)

As dívidas passivas, descritas ou reclamadas, que forem aprovadas pelos interessados maiores e pelo conselho de família ou pelos pais por parte dos menores, consideram-se judicialmente reconhecidas, devendo ordenar-se o seu pagamento na sentença que julgar a partilha, se até essa altura não estiver satisfeita a importância respectiva.

Article 1394

(*Approval of debts by all the interested parties*)

Passive debts, described or claimed, that are approved by the interested parties who are majors and by the family council or by the parents on behalf of minors, are considered legally acknowledged; their payment must be ordered in the judgment that decides on the partition, if up to this time the respective amount has not been paid.

§ único) Quando a lei exigir certa espécie de prova documental para a demonstração da existência da dívida, não poderá o conselho de família ou o representante do incapaz aprová-la sem que se junte ou exiba essa prova ou outra de valor equivalente ou superior.

Single §) When the law requires a specific type of documental evidence to demonstrate the existence of the debt, the family council or the representative of the legally incapable person cannot approve it unless the said evidence, or other evidence of equivalent or greater value, is included or produced.

Artigo 1395º

(*Verificação de dívidas pelo juiz*)

Se todos os interessados maiores e o conselho de família ou os pais dos menores forem contrários à aprovação da dívida reclamada, o juiz reconhecerá, apesar disso, a sua existência, desde que o credor exiba prova documental suficiente para esse efeito, salvo se a prova for arguida de falsa ou invalidada por outra de força igual ou superior ou se forem suscitadas questões que não possam ser decididas no processo de inventário.

Article 1395

(*Verification of debts by the judge*)

If all the interested parties who are majors and the family council or the parents of minors oppose the approval of the claimed debt, the judge shall nonetheless acknowledge its existence, as long as the creditor produces sufficient documental evidence for that purpose, except if the evidence is challenged to be false or is invalidated by other evidence of equal or greater value, or if there are issues raised which cannot be decided upon in the inventory proceedings.

Artigo 1396º

(*Divergências entre os interessados sobre a aprovação de dívidas*)

Havendo divergências sobre a aprovação de dívida, descrita ou reclamada, entre os interessados maiores ou entre estes e o conselho de família ou os pais dos menores, considerar-se-á reconhecida a dívida na quota parte relativa aos interessados que a aprovarem; quanto à parte restante, o credor terá de socorrer-se dos meios comuns, salvo se, nos termos do Artigo anterior, puder verificar-se a existência da dívida no próprio processo de inventário.

Article 1396

(*Differences among the interested parties on the approval of the debt*)

If there are differences on the approval of a described or claimed debt among the interested parties who are majors, or between these and the family council or the parents of minors, the debt shall be considered acknowledged with regard to the share relating to the interested parties who approve it; with regard to the remaining share, the creditor must resort to normal proceedings, except if, in accordance with the preceding article, the existence of the debt may be confirmed in the inventory proceedings.

Artigo 1397º

(*Pagamento das dívidas aprovadas por todos*)

As dívidas vencidas e aprovadas por todos os interessados têm de ser pagas imediatamente, se o credor exigir o pagamento. Não havendo na herança dinheiro suficiente, proceder-se-á à venda de bens para esse efeito, designando o juiz os que hão-de ser vendidos, segundo a ordem estabelecida na lei civil, quando não haja acordo a tal respeito entre os interessados maiores ou entre estes e o conselho de família ou os pais dos menores.

Se o credor quiser receber em pagamento os bens indicados para venda, ser-lhe-ão adjudicados esses bens pelo preço que se ajustar.

§ 1º) A venda será extrajudicial se todos os interessados estiverem de acordo ou, sendo orfanológico o inventário, se o juiz o julgar preferível, ouvido o conselho de família ou os representantes dos menores e o Ministério Público. A essa venda aplicar-se-ão as disposições dos Artigos 887º e 888º.

§ 2º) O que fica disposto aplica-se igualmente às dívidas cuja existência for verificada pelo juiz, nos termos dos Artigos 1394º e 1396º, se o respectivo despacho transitar em julgado antes da organização do mapa da partilha.

Article 1397

(*Payment of debts approved by all*)

Debts due and approved by all the interested parties must be paid immediately, if the creditor demands their payment. If the inheritance does not include enough cash, property shall be sold for this purpose, the judge deciding on which property will be sold, in accordance with the order foreseen in civil law, in the absence of an agreement in this regard among the interested parties who are majors or between these and the family council or the parents of minors.

If the creditor wishes to receive as payment the property put up for sale, this property will be given to him/her for the determined price.

§ 1) The sale shall be extrajudicial if all the interested parties agree or, in the case of an inventory relating to orphans, if the judge considers it preferable, after hearing the family council or the representatives of minors and the Public Prosecutor. The provisions of articles 887 and 888 shall be applicable to this sale.

§ 2) These provisions shall also apply to debts the existence of which is confirmed by the judge, in accordance with articles 1394 and 1396, if the respective order becomes *res judicata* before the drawing up of the partition chart.

Artigo 1398º

(*Pagamento de dívidas aprovadas por alguns*)

Se a dívida se mostrar vencida mas tiver sido aprovada somente por alguns dos interessados, pode o credor exigir a estes o pagamento da parte que lhes tocar. O pagamento efectuar-se-á logo, havendo dinheiro, pela quota que nele tiverem os que aprovaram a dívida; não

Article 1398

(*Payment of debts approved by some*)

If the debt is due but was only approved by some of the interested parties, the creditor may demand from these the payment of their respective share. The payment shall be made immediately, cash being available, in the proportion of the share of those who approved the

o havendo, far-se-á depois da partilha pelos bens atribuídos aos mesmos interessados.

debt; if cash is not available, it shall be made after the partition, in relation to the property assigned to the same interested parties.

Artigo 1399º

(*Por que formas pode ser feito o pagamento*)

Ainda que os credores não exijam o pagamento das dívidas vencidas e aprovadas, podem os interessados deliberar sobre a forma por que hão-de ser satisfeitas, separando dinheiro ou outros bens para esse fim, pondo o pagamento a cargo de algum ou alguns dos responsáveis, ou resolvendo que o passivo seja repartido por todos em proporção do activo que cada um receber.

Podem igualmente os interessados deliberar sobre a forma de pagamento das dívidas aprovadas, mas ainda não vencidas.

§ 1º) A deliberação que ponha o pagamento das dívidas a cargo de algum ou alguns dos interessados obriga os credores; mas se estes não conseguirem fazer-se pagar integralmente pelos bens que tenham sido entregues ao interessado ou interessados incumbidos do pagamento, podem fazer excutir os bens adjudicados aos outros interessados.

§ 2º) Quando as dívidas forem aprovadas unicamente por alguns dos interessados, por si, pelo conselho de família ou pelos pais dos menores, só a eles compete deliberar sobre a forma de pagamento.

Article 1399

(*How the payment may be made*)

Even if the creditors do not demand the payment of debts that are due and were approved, the interested parties may deliberate on the manner of their payment, setting aside cash or other property for that purpose, charging one or some of the responsible persons with the payment, or deciding that the debt be divided by all of them in proportion to the assets to be received by each.

Interested parties may also deliberate on the manner of payment of the approved debts that are not yet due.

§ 1) A deliberation charging the payment of debts to one or some of the interested parties is binding upon the creditors; but if these are unsuccessful in receiving full payment from the property delivered to the interested party or parties charged with the payment, they may resort to the property assigned to the other interested parties.

§ 2) When the debts are approved only by some of the interested parties, acting by themselves, by the family council or by the parents of minors, only they are entitled to deliberate on the manner of payment.

Artigo 1400º

(*Em que casos compete aos legatários deliberar sobre as dívidas*)

Aos legatários compete deliberar sobre o passivo e forma do seu pagamento quando toda a herança for dividida em

Article 1400

(*In which cases legatees are to deliberate on the debts*)

Legatees are to deliberate on debts and the manner of their payment when the entire inheritance is divided into

legados ou quando da aprovação das dívidas resultar redução de legados.

legacies or when the approval of the debts shall result in a reduction of legacies.

Artigo 1401º

(*Insolvência por excesso do passivo sobre o activo*)

Se as dívidas aprovadas ou reconhecidas excederem a massa da herança, observar-se-ão os termos do processo de insolvência que forem adequados, aproveitando-se o processado.

Article 1401

(*Insolvency due to excess of debts over the credits*)

If the approved or acknowledged debts exceed the inheritance assets, the appropriate provisions of the insolvency proceedings shall be applied, using the existing case file.

Artigo 1402º

(*Deliberação sobre o encabeçamento de prazos*)

Fazendo parte da herança algum domínio útil, deve deliberar-se sobre o seu encabeçamento. Se nenhum dos interessados quiser o prazo, será este vendido e repartir-se-á o preço; se o prazo for disputado e não se chegar a acordo quanto ao encabeçamento, será este determinado por meio de licitação, a que se procederá no mesmo acto.

Article 1402

(*Deliberation on the point of entrustment of emphyteusis as a head*)

If the inheritance includes a possessory title, a deliberation must be made as to whom it shall be entrusted as a head. If none of the interested parties wants the emphyteusis, this shall be sold and its price shared; if the emphyteusis is disputed and there is no agreement as to its allotment, this shall be determined through licitation, to be carried out in the same act.

Artigo 1403º

(*Deliberação sobre o excesso da avaliação*)

Se algum dos interessados achar excessivo o valor atribuído a quaisquer bens, declarará o valor que reputa exacto e a conferência deliberará se deve manter-se ou baixar-se a avaliação, fixando-se neste último caso o valor em que devem ser computados os bens.

Mas não poderá baixar-se o valor se algum interessado declarar que aceita a coisa pela avaliação. Esta declaração equivale a licitação. Se mais do que um interessado aceitar, abrir-se-á logo licitação entre eles e será a coisa adjudicada ao

Article 1403

(*Deliberation on excessive appraisal*)

If any of the interested parties finds the value with which some property has been appraised excessive, he/she shall indicate the value he/she deems to be correct and the conference shall deliberate if the appraisal should be maintained or reduced, and in the latter case deciding on the value to be ascribed to the property in question.

However, the value may not be reduced if any interested party accepts the thing in question for the value of the appraisal. This acceptance equals a licita-

que oferecer maior lanço. Se a conferência não chegar a fixar o valor, subsistirá o que tinha sido atribuído.

§ único) A reclamação contra o excesso da avaliação pode ser feita verbalmente na conferência.

tion. If more than one interested party accepts, the licitation among them shall immediately be opened and the thing in question shall be sold to the highest bidder. If the conference does not determine the value, the one already given shall prevail.

Single §) A complaint against an excessive appraisal may be made orally at the conference.

Artigo 1404º

(*Deliberação do conselho de família sobre licitação por parte de incapazes*)

Tendo de reunir-se a conferência para algum dos fins designados no Artigo 1393º, pode qualquer interessado, enquanto ela durar, declarar verbalmente que pretende licitar em determinados bens.

O conselho de família, se intervier, deliberará se os incapazes devem concorrer à licitação ou tomar a iniciativa dela.

Quando o conselho não haja de intervir na conferência, será convocado para, no dia do seu encerramento e antes dele, deliberar sobre a licitação por parte dos incapazes.

§ único) A deliberação do conselho será inserta na acta da conferência.

Article 1404

(*Deliberation of the family council on licitation by legally incapable persons*)

If a conference is to be convened for any of the purposes foreseen in article 1393, any interested party may, while it lasts, orally declare that he/she intends to bid for certain property.

The family council, if it intervenes, shall deliberate if legally incapable persons should compete or initiate the licitation.

When the council is not to intervene in the conference, it shall be convened, on the day of its closing and before it, to deliberate on the licitation by legally incapable persons.

Single §) The deliberation of the council shall be included in the minutes of the conference.

COMMENTARY TO ARTICLES 1391 TO 1404

Once the final description has been made, it is time for the second examination and inspection of the case file (article 1391). The lawyers, the interested parties who have not appointed a lawyer and the Public Prosecutor may then object to an excessive appraisal, request the convening of a conference of interested parties, make declarations of licitation for certain specified property and raise an absence of description of property or any other issues relating to the partition (see J. A. LOPES CARDOSO, *Partilhas Judiciais. Teoria e prática*, vol. II, Coimbra, Coimbra Editora, 1955, page 7).

After deciding issues which cannot wait, a conference of interested parties is held, aimed at deciding on any issues which may affect the determination of the partition, including the approval of the debts and the manner of their payment, entrustment of emphyteusis as a head and complaint against an excessive appraisal (article 1393). During the conference, any interested party may declare that he/she intends to bid for certain property. If there are legally incapable interested parties, it is up to the family council to decide if they should participate in the licitation or initiate it (article 1404). The family council is competent with regard to licitation by the legally incapable persons even if there is no conference of interested parties (article 1392).

However, normally there is a conference of interested parties. Article 1402 relates to the deliberation of the conference on the entrustment of emphyteusis as a head; article 1403 regulates the deliberation relating to the complaint against an excessive appraisal.

Articles 1394 to 1401 regulate the important issues of the approval of the debts and the manner of their payment. The legatees shall be called to intervene whenever the inheritance is divided into legacies or when the approval of the debts implies a reduction of the legacies (articles 1400).

Passive debts, described or claimed, that are approved by the interested parties who are majors and by the family council or by the parents on behalf of minors, are considered legally acknowledged, and their payment is ordered in the judgment that decides on the partition (article 1394). Even if all the interested parties who are majors, the family council and the parents of interested parties who are minors do not approve a certain debt claimed by a creditor, the judge may order that it be paid, as long as the creditor has produced sufficient documental evidence (article 1395).

If there are differences on the approval of a described or claimed debt among the interested parties who are majors, or between these and the family council or the parents of minors, the debt shall be considered acknowledged with regard to the share relating to the interested parties who approve it; to obtain the acknowledgment of the remaining share, the creditor must present sufficient documental evidence or resort to normal proceedings (article 1396).

Debts due and approved must be paid immediately with the existing cash or, it this is insufficient, with the profits of the sale of property for this purpose separated, or through an adjudication to the creditor of the property put up for sale (article 1397, which diverges from the provisions of articles 2119 and 2129 of the Civil Code). In the case of debts approved by only some of the interested parties, they will also be paid with cash, but only with regard to the share of the persons who approved them; in the absence of cash, the payment is carried out with the property awarded in the partition to the interested parties in question (article 1398).

Even if the creditors do not claim the payment of approved debts, the interested parties may decide on the manner in which to pay them, either setting aside property for this purpose, charging one or more of the responsible persons or dividing the debt among all of them, in proportion to the assets to be received by each (article 1399).

If the approved or acknowledged debts exceed the value of the inheritance assets, the appropriate provisions of the insolvency proceedings shall be applied, i.e., articles 1357 *et seq.* (article 1401).

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECÇÃO IV
SEGUNDA AVALIAÇÃO. LICITAÇÕES.

SECTION IV
SECOND APPRAISAL. LICITATIONS.

Artigo 1405º

(*Segunda avaliação da coisa em que algum co-herdeiro tenha a maior parte*)

Se algum interessado declarar que pretende licitar sobre coisa que, por sua natureza ou sem detrimento, não possa ser dividida e em que algum co-herdeiro tenha a maior parte por título diverso de casamento, sucessão, doação ou deixa do autor da herança, não terá lugar a licitação se esse co-herdeiro se opuser; mas pode neste caso requerer-se segunda avaliação da referida coisa.

Proceder-se-á igualmente a segunda avaliação quando o respectivo co-herdeiro a requerer, alegando que à coisa em que tem a maior parte e não pode ser dividida foi atribuído valor excessivo.

§ 1º) O cabeça-de-casal, ao relacionar os bens, pode logo suscitar a questão da indivisibilidade. Se o fizer, deve o louvado pronunciar-se sobre ela no acto da avaliação.

Sendo a questão levantada posteriormente e não chegando os interessados a acordo, decidir-se-á, ouvido o louvado.

Se a coisa não estiver sujeita a avaliação por louvado, a questão da indivisibilidade será decidida, na falta de acordo, pelo juiz, depois de inspeccionado o prédio por perito da sua nomeação.

Article 1405

(*Second appraisal of something of which a co-heir owns the largest share*)

If an interested party states that he/she intends to bid on something which may not be divided, by its nature or without detriment, and of which a co-heir owns the largest share through a title other than marriage, succession, donation or legacy from the estate-leaver, the licitation shall not take place if the co-heir opposes it; but in this case a second appraisal of the thing in question may be requested.

A second appraisal shall also be made when the respective co-heir requests it, alleging that the appraisal of the indivisible thing of which he/she owns the largest share was excessive.

§ 1) The head of the family, while listing the property, may at once invoke the issue of indivisibility. If he/she does so, the appraiser must comment on this issue in the act of the appraisal.

If the issue is raised subsequently and the interested parties do not reach an agreement, a decision shall be reached after hearing the appraiser.

If the thing is not subject to appraisal by the appraiser, the issue of indivisibility shall be decided, in the absence of an

§ 2º) O que fica disposto neste Artigo e § 1º é também aplicável ao caso de não haver herdeiros legitimários e de a um dos co-herdeiros, legítimos ou testamentários, ter sido doada, pelo autor da herança, a maior parte de uma coisa que, por sua natureza ou sem detrimento, não possa ser dividida, assim como ao caso de se tratar de coisas que, por força da lei ou de contrato, não possam ser licitadas.

agreement, by the judge, after the immovable property has been inspected by an expert appointed by him.

§ 2) The provisions of this article and § 1 are also applicable where there are no mandatory heirs and one of the intestate or testamentary co-heirs received in donation, from the estate-leaver, the largest share of something which may not be divided, by its nature or without detriment, or in the case of things which, by law or contract, may not be subject to licitation.

Artigo 1406º

(*Segunda avaliação de bens doados*)

Declarando algum interessado que pretende licitar sobre bens doados pelo inventariado, a oposição do donatário, seja ou não conferente, terá como consequência requerer-se segunda avaliação dos bens a que se referir a declaração.

Feita a segunda avaliação e concluídas as licitações nos outros bens, a declaração ficará sem efeito se vier a apurar-se que o donatário não é obrigado a repor bens alguns.

Quando se reconheça que a doação é inoficiosa, observar-se-á o seguinte:

a) Se a declaração recair sobre prédio susceptível de divisão, será admitida licitação sobre a parte que o donatário tem de repor, não sendo admitido a ela o donatário;

b) Se a declaração recair sobre o prédio que, por sua natureza ou sem detrimento, não possa ser dividido, abrir-se-á licitação sobre ele, a que será admitido o donatário;

Article 1406

(*Second appraisal of donated property*)

If an interested party declares that he/she intends to bid on property donated by the decedent, the objection of the donee, regardless of whether the latter is under the obligation to restore, shall result in the request of a second appraisal of the property to which the declaration pertains.

Once a second appraisal has been made and licitations on the other property have been concluded, the declaration shall be void if it is found that the donee is not obliged to return any property.

When it is found that the donation is inofficious, the following shall be applied:

a) If the declaration relates to immovable property susceptible of division, licitation shall be admissible with regard to the part to be returned by the donee, the donee not being allowed to bid;

b) If the declaration relates to immovable property which cannot be divided, by its nature or without detriment to it, licitation on it shall be initiated and the donee shall be allowed to bid.

c) Não se dando o caso previsto nas alíneas anteriores, o donatário poderá escolher, entre os bens doados, os necessários para o preenchimento da sua quota na herança e dos encargos na doação, reporá os que excederem o seu quinhão e sobre os bens repostos abrir-se-á licitação, se for requerida ou já o estiver, não sendo o donatário admitido a licitar.

§ 1º) A oposição do donatário deve ser declarada no prazo do exame a que se refere o Artigo 1391º, se a esse tempo já estiver requerida a licitação nos bens doados, ou no próprio acto da conferência, se a licitação for aí requerida e o donatário estiver presente. Não se verificando qualquer destes casos, deve o donatário ser notificado, antes da licitação, para, dentro de três dias, manifestar a sua oposição.

A segunda avaliação pode ser requerida até ao termo das licitações, havendo-as, e, no caso contrário, até ao exame do processo para a forma da partilha.

§ 2º) Independentemente da declaração a que se refere este Artigo, o donatário pode requerer segunda avaliação de todos ou alguns dos bens doados quando da primeira avaliação resultar que a doação é inoficiosa.

c) Other than in the cases foreseen in (a) and (b), the donee may choose, from among the donated property, that necessary to fill up his quota in the inheritance and the donation's burdens, he/she shall return the property that exceeds his/her portion and licitation shall be opened on the returned property, if this is or has already been requested, the donee not being allowed to bid.

§ 1) The objection of the donee must be stated within the period for the examination referred to in article 1391, if by then the licitation on the donated property has already been requested, or in the act of the conference, if the licitation is required at that time and the donee is present. Other than in the above described cases, the donee must be notified, before the licitation, to raise his/her objection within three days.

The second appraisal may be requested up to the end of the licitations, if they take place, and, if they do not, up to the examination of the case file regarding the form of partition.

§ 2) Regardless of the declaration referred to in this article, the donee may request a second appraisal of all or some of the donated property when from the first appraisal it is found that the donation is inofficious.

Artigo 1407º

(Segunda avaliação de bens legados)

Se algum interessado declarar que pretende licitar sobre bens legados, será notificado o legatário para, dentro de três dias, se pronunciar.

Se o notificado se opuser, não terá lugar a licitação, mas é lícito aos herdeiros

Article 1407

(Second appraisal of legated property)

If an interested party declares that he/she intends to bid on legated property, the legatee shall be notified to give his/her say within three days.

If the notified person does not object, there shall be no licitation, but the heirs

requerer a segunda avaliação dos bens referidos quando a sua baixa avaliação lhes possa causar prejuízo.

Na falta de oposição por parte do legatário, os bens entrarão na licitação e o legatário terá direito ao valor respectivo.

§ único) Ao prazo para se requerer a segunda avaliação é aplicável o disposto no § 1º do Artigo anterior.

may request a second appraisal of the mentioned property when their low evaluation may cause detriment to them.

In the absence of objection from the legatee, the property shall be subject to licitation and the legatee shall have the right to the respective value.

Single §) The provisions of § 1 of the preceding article are applicable to the deadline for requesting the second appraisal.

Artigo 1408º

(*Segunda avaliação a requerimento de legatário*)

Quando da primeira avaliação resultar que o legado é inoficioso, pode o legatário, independentemente da declaração a que se refere o Artigo anterior, requerer segunda avaliação ou dos bens legados ou de quaisquer outros que ainda não tenham sido avaliados pela segunda vez.

Pode também o legatário requerer segunda avaliação dos outros bens da herança quando se reconhecer, em face da segunda avaliação dos bens legados e das licitações, que o legado tem de ser reduzido por inoficiosidade.

§ único) A segunda avaliação a que se refere este Artigo pode ser requerida até ao exame do processo para a forma da partilha.

Article 1408

(*Second appraisal at the request of a legatee*)

When the first appraisal results in the legacy being inofficious, the legatee may, regardless of the declaration mentioned in the preceding article, request a second appraisal of the legated property or of any other property that has not yet been appraised for a second time.

The legatee may also request a second appraisal of other property in the inheritance when it is found, in light of a second appraisal of the legated property and of the licitations, that the legacy must be reduced due to inofficiousness.

Single §) The second appraisal referred to in this article may be requested up to the examination of the case file regarding the form of partition.

Artigo 1409º

(*Consequências da inoficiosidade do legado*)

Se o legado for inoficioso, o legatário reporá, em substância, a parte que exceder, podendo sobre essa parte haver licitação, a que não será admitido o legatário.

Article 1409

(*Consequences of the legacy's inofficiousness*)

If the legacy is inofficious, the legatee shall return, in kind, the exceeding part, with the possibility of licitation over that part, the legatee not being allowed to bid.

Não podendo, pela sua natureza ou sem detrimento, ser dividida a coisa legada, observar-se-á o seguinte:

1º) A reposição será feita em valor, quando a parte inoficiosa for inferior à outra parte, podendo neste caso qualquer dos interessados requerer segunda avaliação da coisa legada;

2º) A reposição será feita em substância no caso de a parte inoficiosa ser igual ou superior à outra parte, podendo então o legatário requerer licitação da coisa legada.

É aplicável também ao legatário o disposto na alínea c) do Artigo 1406º.

If the legated property may not be divided, by its nature or without detriment to it, the following shall be applied:

1) The return shall be made in cash, when the inofficious part is less than the other part, and in this case any of the interested parties may request a second appraisal of the legated property.

2) The return shall be made in kind if the inofficious part is equal or greater than the other part, and in this case the legatee may request licitation on the legated property.

Clause (c) of article 1406 shall also be applicable to the legatee.

Artigo 1410º

(*Outros casos de segunda avaliação. Por quem é feita*)

A segunda avaliação só pode ter lugar nos casos que ficam mencionados e naqueles a que se referem os Artigos 1428º e 1447º.

A diligência será feita por três louvados nomeados por acordo dos interessados. Na falta de acordo, observar-se-ão as regras gerais, entendendo-se que o co-herdeiro, donatário ou legatário, a que se referem os Artigos 1405º, 1406º e 1407º, forma uma parte e que os restantes interessados, capazes ou incapazes, formam a outra parte. Os menores e pessoas equiparadas serão representados no acto da louvação ou pelos pais ou pelos tutores e curadores.

§ único) Havendo mais do que um co-herdeiro, donatário ou legatário nas condições dos Artigos 1405º a 1407º, todos aqueles cujo interesse seja comum formarão uma parte contra os restantes interessados.

Article 1410

(*Other cases of second appraisal. Who carries it out*)

A second appraisal may only be made in the above mentioned cases and in those mentioned in articles 1428 and 1447.

It shall be carried out by three appraisers appointed by agreement of the interested parties. In the absence of an agreement, general rules shall be applied, it being considered that the co-heir, donee or legatee, referred to in articles 1405, 1406 and 1407 constitute one party, and that the remaining interested parties, capable or incapable, constitute the other party. Minors and similar persons shall be represented at the time of the appraisal by the parents or by the guardians and curators.

Single §) If there is more than one co-heir, donee or legatee in accordance with articles 1405 to 1407, all those who share a common interest shall

Artigo 1411º

(*Em que altura se faz a licitação*)

A licitação terá lugar, sendo possível, no mesmo dia da conferência de interessados e logo em seguida a ela.

Pode desistir-se da declaração de que se pretende licitar até ao momento em que a respectiva verba seja posta a lanços; mas nesse caso qualquer outro interessado será admitido a requerer que se abra licitação sobre a mesma verba.

Artigo 1412º

(*Como se faz a licitação*)

A licitação é uma arrematação a que somente são admitidos os herdeiros e o cônjuge meeiro, salvos os casos especiais em que, nos termos dos Artigos anteriores, deva ser admitido o donatário ou o legatário. Pode recair sobre os bens da herança que não devam ser necessariamente atribuídos a determinado interessado.

Cada verba será licitada de per si, salvo se todos concordarem na formação de lotes para este efeito, ou se houver algumas que não possam separar-se sem inconveniente. Podem diversos interessados, por acordo, licitar na mesma verba ou lote para lhes ser adjudicado em comum na partilha.

Artigo 1413º

(*Anulação da licitação*)

Se o Ministério Público entender que o representante de algum incapaz não defende ou não defendeu devidamente,

constitute one party against the remaining interested parties.

Article 1411

(*When to carry out licitation*)

Licitation shall take place, when possible, on the same day as the conference of interested parties and immediately following it.

One may withdraw the declaration of intention to bid up to the moment in which the respective item is opened for bidding; but in this case any other interested party shall be allowed to request that licitation be opened on that same item.

Article 1412

(*How to carry out licitation*)

A licitation is an auction to which only the heirs and the moiety holder spouse are admitted, not precluding special cases in which, in accordance with the preceding articles, the donee or the legatee are to be admitted. It may relate to the inheritance's property which is not necessarily to be awarded to a specific interested party.

Each item shall be put to bid separately, except if all agree to form lots for this purpose, or if there are items which cannot be separated without inconvenience. Several interested parties may agree to bid on the same item or lot, in order for it to be awarded to them jointly in the partition.

Article 1413

(*Annulment of licitation*)

If the Public Prosecutor considers that the representative of a legally incapable person did not or does not properly defend

na licitação, os direitos e interesses do representado, requererá imediatamente, ou dentro do prazo de cinco dias a contar da licitação, que o acto seja anulado na parte respectiva, especificando claramente os fundamentos da sua arguição.

Ouvido o arguido, conhecer-se-á da arguição e, sendo procedente, decretar-se-á a anulação, mandando-se repetir o acto e cometendo-se ao Ministério Público a representação do incapaz.

§ único) No final da licitação de cada dia pode o Ministério Público declarar que não requererá a anulação do que nesse dia se tiver feito.

the rights of that person in a licitation, he/she will request at once, or within the five days following the licitation, that the act be annulled in the respective part, clearly specifying the grounds for this application.

After the defendant has been heard, the application shall be assessed and, if it is to be accepted, the annulment shall be decreed and an order issued for the act to be repeated, entrusting the Public Prosecutor with the representation of the legally incapable person.

Single §) At the end of each day's licitation, the Public Prosecutor may declare that he/she will not request the annulment of what has been done during the day.

COMMENTARY TO ARTICLES 1405 TO 1413

The instruction phase is concluded with the second appraisal and the licitations. Articles 1405 to 1410 relate to the second appraisal; articles 1411 to 1413 govern the licitations.

In an inventory, there is generally no second appraisal. However, there are exceptions to this rule. As clarified by LOPES CARDOSO (*Partilhas Judiciais* II cit., page 83), "*whenever the assets cannot be put up for licitation, they are subject to a second appraisal, if the interested party to whom the said assets are to be awarded challenges the licitation*". This occurs when an heir declares that he/she intends to bid on something of which a co-heir owns the largest share (article 1405, I), or on something that was donated (article 1406) or legated (article 1407). There are other possibilities of second appraisal. For example, when the co-heir alleges that something of which he/she owns the largest share was awarded an excessive value (article 1405, II); and when the first appraisal results in the inofficiousness of a donation (article 1406, § 2) or legacy (article 1408, I).

Despite the wording of article 1406, § 2, which refers to the possibility of the donee requesting "*a second appraisal of all or some of the donated property when from the first appraisal it is found that the donation is inofficious*", a historical and logical interpretation allows the non--restoring donee to be granted the option of requesting a second appraisal of any property in the inheritance which is, furthermore, granted to the legatee (see LOPES CARDOSO, *Partilhas Judiciais* II cit., pages 94-98).

Once the second appraisal has been ordered, it is carried out by three appraisers appointed by agreement between the interested parties (article 1410, II). In the absence of an agreement, each group of interested parties shall appoint an appraiser, and the judge shall appoint the third one. Judicial inspection is allowed when the

appraisers' opinions diverge (see LOPES CARDOSO, *Partilhas Judiciais* II cit., page 104).

This being so, let us look at the provisions of the Code of Civil Procedure relating to licitations. Article 1412, I, states that "*a licitation is an auction to which only the heirs and the moiety holder spouse are admitted, not precluding special cases in which, in accordance with the preceding articles, the donee or the legatee are to be admitted*". This article defines licitation from a formal perspective. From a perspective of substance, a licitation in inventory proceedings is an act through which a co-heir, or someone else allowed to bid, offers for the inheritance's property a higher price than the one resulting from the appraisal, so that this property may be used to fill his/her portion.

A person with a right of usufruct over part of the inheritance and, in principle, an heir's moiety holding spouse are allowed to bid (see LOPES CARDOSO, *Partilhas Judiciais* II cit., pages 134-137). On the other hand, the heir's transferee may bid, since he/she takes the place of the transferor and benefits, therefore, from the same rights that would belong to the heir.

Usually, the licitation takes place on the same day as the conference of interested parties, and immediately after it.

Given its structure based on bids, a licitation is similar to a judicial sale, and for this reason, in principle, a licitation may be annulled in the same cases when the law allows the annulment of a judicial sale (LOPES CARDOSO, *Partilhas Judiciais* II cit., pages 151, 155 to 156). Aside from these cases, a licitation may be annulled, upon request of the Public Prosecutor, when the representative of a legally incapable person did not properly defend within it that person's interests and rights (article 1413); or if the bidder does not deposit, within the legal deadline, the owed compensation (article 1417, clause c), according to the interpretation of LOPES CARDOSO, *Partilhas Judiciais* II cit., pages 154, 259 *et seq.*).

As a similar act to a judicial sale, a licitation transfers the ownership of the property that was bid on, but there is no consensus as to the moment when this transfer occurs. LOPES CARDOSO (*Partilhas*

Judiciais II cit., pages 156 to 158) considers that this transfer occurs only after the judgment ordering the partition becomes *res judicata*. A different opinion is put forward by CUNHA GONÇALVES (*Tratado*, vol. XIV, pages 824 to 825). The illustrious lawyer from Goa argues that the ownership is transferred with the licitation, and that the partition judgment is merely a suspensive condition. Thus, according to the latter author, the income of the property that was bid on, relating to the period between when the licitation was concluded and when the partition judgment became *res judicata*, belongs to the respective persons who were awarded that property in the licitation, something which is disputed by LOPES CARDOSO.

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

Secção V
Partilha

Artigo 1414º

(*Terceiro exame e vista do processo. Despacho sobre a forma da partilha*)

Satisfeito o que fica disposto nos Artigos anteriores, será o processo facultado para exame, por cinco dias, aos advogados dos herdeiros e do cabeça-de-casal, e depois continuado com vista, por igual prazo, ao Ministério Público, se o inventário for orfanológico, para dizerem o que se lhes oferecer sobre a forma da partilha.

Nos dez dias seguintes proferir-se-á despacho determinando-se o modo como deve ser organizada a partilha.

Neste despacho serão resolvidas todas as questões que ainda o não tiverem sido e que seja necessário decidir para a organização do mapa da partilha, podendo mandar-se proceder à produção que se julgar necessária.

Mas se houver questões de facto que exijam larga instrução, serão os interessados remetidos nessa parte para os meios comuns.

§ 1º) Não deverão reservar-se para o despacho sobre a forma da partilha as questões que seja necessário resolver anteriormente sobre o andamento regular do inventário.

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECTION V
PARTITION

Article 1414

(*Third examination and inspection of the file. Order as to the form of partition*)

Once the preceding articles have been complied with, the lawyers of the heirs and of the head of the family will be allowed to examine the case file, for five days, and then the file shall be sent for inspection by the Public Prosecutor, with the same deadline, in the case of an inventory relating to orphans, so that he/she may give his/her say on the form of partition.

In the subsequent ten days an order shall be issued deciding on how the partition should be organised.

This order shall decide on any issues that have not yet been decided, if such decision is required for the organisation of the partition chart, it being possible to order the production of the evidence deemed necessary.

However, if there are issues of fact that require long proceedings, the interested parties shall be directed in that part to the normal proceedings.

§ 1) The issues that must be decided before the order on the form of partition, concerning the normal course of the inventory, shall not be left to be decided in that order.

§ 2º) Não cabe recurso especial do despacho a que se refere este Artigo, pode, porém, o despacho ser impugnado na apelação interposta da sentença de partilha.

§ 2) No special appeal shall be admissible relating to the order mentioned in this article; however, the order may be challenged in the appeal of the judgment relating to the partition.

Artigo 1415º

(*Regras sobre o preenchimento dos quinhões*)

No preenchimento dos quinhões, observar-se-ão as seguintes regras:

a) Os bens doados ou licitados serão adjudicados ao respectivo donatário ou licitante;

b) Aos não conferentes ou não licitantes serão atribuídos bens da mesma espécie e natureza dos doados e licitados; e, quando isto não seja possível, dar-se-á cumprimento ao disposto no Artigo 2110º do Código Civil.

O mesmo se observará em benefício dos co-herdeiros não legatários quando alguns herdeiros tiverem sido contemplados com legados;

c) Os bens restantes serão repartidos à sorte entre os interessados por lotes iguais;

d) As dívidas activas que forem litigiosas, as que não estiverem suficientemente comprovadas e os bens que não tiverem valor serão distribuídos proporcionalmente pelos interessados; a mesma distribuição se fará quanto às dívidas passivas aprovadas por todos os interessados, salvo se tiver sido acordada outra forma de pagamento.

Article 1415

(*Rules on the filling up of the portions*)

The portions shall be filled up in accordance with the following provisions:

a) Donated property or property that was bid on shall be awarded respectively to the donee or the person who bid on it;

b) Those who do not restore or did not bid shall be awarded property of the same type and nature as the donated or bid property; and, when this is not possible, the provisions of article 2110 of the Civil Code shall be applied.

The same shall apply in favour of non-legatee co-heirs when some of the heirs benefited with legacies.

c) The remaining property shall be divided at random between the interested parties in equal lots;

d) Active debts that are contended, those that are not sufficiently proven and property without value shall be distributed proportionately among the interested parties; the same distribution shall occur with regard to passive debts approved by all the interested parties, unless a different manner of payment has been agreed upon.

Artigo 1416º

(*Mapa da partilha*)

Recebido o processo com o despacho a que se refere o Artigo 1414º, a secretaria, dentro de oito dias, organizará o mapa da

Article 1416

(*Partition chart*)

If the case file is received with the order referred to in article 1414, the clerk's office shall, within eight days,

partilha, em harmonia com o mesmo despacho e com o disposto no Artigo anterior.

Para a formação do mapa achar-se-à, em primeiro lugar, a importância total do activo, somando-se os valores de cada espécie de bens conforme as avaliações e licitações e deduzindo-se as dívidas passivas, legados e encargos que devam ser abatidos; em seguida determinar-se-á o montante da quota de cada interessado e a parte que lhe cabe em cada espécie de bens; por fim far-se-á o preenchimento de cada quota com referências aos números das verbas da descrição.

Os lotes que deverem ser sorteados serão designados por letras.

§ 1º) Os valores serão indicados somente por algarismos. Os números das verbas da descrição serão indicados por algarismos e por extenso e quando forem seguidos apontar-se-ão só os limites entre os quais fica compreendida a numeração. Se aos co-herdeiros couberem fracções de verbas, terá de mencionar-se a fracção.

§ 2º) Em cada lote deve sempre indicar-se a espécie de bens que o constituem.

§ 3º) O juiz rubricará todas as folhas do mapa e confirmará a ressalva das emendas, rasuras ou entrelinhas.

organise the partition chart, in accordance with the same order and with the provisions of the preceding article.

In order to organise the chart, one will first calculate the total amount of the assets, by adding the values of each type of property in accordance with the appraisals and licitations and deducting the passive debts, legacies and burdens that are to be deducted; next the amount of the quota of each interested party and the part of each type of property belonging to him/her shall be determined; finally, each quota shall be specified by reference to the items' numbers in the description.

The lots which are to be awarded by drawing lots shall be described with letters.

§ 1) The values shall be indicated by figures only. The numbers of the description's items shall be written in figures and in full and when they are in sequence only the initial and final numbers shall be indicated. If co-heirs are to be awarded fractions of items, the fraction will have to be identified.

§ 2) In each lot, the type of the property included therein must always be indicated.

§ 3) The judge shall initial each of the chart's pages and shall confirm the errata note on amendments, deletions or interlineations.

Artigo 1417º

(*Termos a observar quando os bens doados ou licitados excederem a quota do interessado*)

Se a secretaria verificar, no acto de organização do mapa, que os bens doados ou licitados excedem a quota do respectivo interessado ou a parte

Article 1417

(*Proceedings to be applied when the donated or bid property exceeds the quota of the interested party*)

If the clerk's office conclude, when organising the chart, that the donated or bid property exceeds the quota of the

disponível do inventariado, lançará no processo uma informação, sob forma de mapa, indicando previamente o montante do excesso, e em seguida observar-se-á o seguinte:

a) Se entre os bens doados a co-herdeiro, houver algum prédio indivisível que não caiba, na totalidade, na quota do donatário, esse prédio entrará na massa dos bens partíveis como os outros prédios da herança; nos outros casos será notificado o donatário para, em três dias, exercer o direito de escolha que lhe concede o § 4º do Artigo 2107º do Código Civil, sob pena de a sua quota ser constituída pelos bens que o juiz designar;

b) Se a doação feita a estranho for inoficiosa, será reduzida nos termos dos Artigos 1493º e seguintes do Código Civil;

c) Os não licitantes a quem hajam de caber as tornas devidas pelos licitantes serão notificados para, dentro de três dias, reclamarem, querendo, o pagamento. Se o reclamarem, será notificado o licitante para depositar a importância das tornas, sob pena de ficar sem efeito a licitação.

Não sendo reclamado o pagamento, as tornas vencerão os juros legais desde a data da sentença de partilhas e os credores delas poderão fazer registar hipoteca legal sobre os bens adjudicados ao devedor.

respective interested party or the decedent's disposable portion, he shall include in the file a note, in the form of a chart, first indicating the exceeding amount, and subsequently the following provisions shall be applied:

a) If the property donated to a co-heir includes indivisible immovable property which exceeds the quota of the donee, the said immovable property shall be included in the pool of the property subject to partition, as the other immovable property; otherwise, the donee shall be notified to, within three days, exercise the right of choice granted by § 4 of article 2107 of the Civil Code; if the donee fails to do so, his/her quota shall be specified with the assets ordered by the judge;

b) If a donation to a stranger is inofficious, it shall be reduced in accordance with article 1493 et seq. of the Civil Code;

c) Those who did not bid and have the right to a compensation for the owelty of partition shall be notified to, within three days, if they so wish, demand payment. If they demand it, the bidder shall be notified to deposit the amount of the compensation for the owelty of partition, failing which the licitation shall be void.

If the payment is not demanded, legal interest shall apply to compensation for the owelty of partition, starting from the date of the judgment relating to the partition, and its creditors may register a legal mortgage over the property awarded to the debtor.

Artigo 1418º

(*Reclamação contra o mapa*)

Organizado o mapa, poderão os interessados requerer qualquer rectificação ou reclamar contra qualquer irregularidade e nomeadamente contra a desigualdade dos lotes ou contra a falta de observância do despacho que determinou a partilha.

As reclamações serão decididas nos oito dias seguintes, podendo convocar-se os interessados a uma conferência quando alguma reclamação tiver por fundamento a desigualdade dos lotes.

No mapa far-se-ão as modificações impostas pela decisão das reclamações. Se for necessário, organizar-se-á novo mapa.

Article 1418

(*Objection against the chart*)

Once the chart has been organised, the interested parties may request any rectification or object to any irregularity and namely against the unevenness of the lots or against the infringement of the order that determined the partition.

Objections shall be decided in the following eight days, with the possibility of convening a conference of interested parties when the unevenness of the lots is the grounds for an objection.

The chart shall be modified in accordance with the decision on the objections. If necessary, a new chart shall be organised.

Artigo 1419º

(*Sorteio dos lotes*)

Em seguida proceder-se-á ao sorteio dos lotes, se houver lugar a ele.

Entrarão numa urna tantos papéis quantos os lotes a sortear, tendo-se escrito em cada papel a letra correspondente ao lote que representa.

Na extracção dos papéis dar-se-á o primeiro lugar ao meeiro do inventariado; quanto aos co-herdeiros regulará a ordem alfabética dos seus nomes. O juiz tirará as sortes pelos interessados que não comparecerem; e, à medida que se for efectuando o sorteio, averbará, por cota no processo, o nome do interessado a que couber cada lote.

Concluído o sorteio, poderão os interessados trocar entre si os lotes que lhes tiverem cabido. Para a troca de lotes pertencentes a incapazes é necessária a autorização judicial, ouvido o Ministério Público. Tratando-se de interdito por

Article 1419

(*Drawing lots*)

Subsequently the draw of the lots shall take place, when applicable.

As many papers as the lots to be drawn, each paper containing the letter corresponding to the respective lot, shall be inserted in an urn.

To extract the papers, the first place shall be given to the person with a moiety of the decedent; the co-heirs shall extract the papers by the alphabetical order of their names. The judge shall extract the papers for the interested parties who are not present; and, as the draw takes place, he/she shall add, as a note in the file, the name of the interested party to which each lot belongs.

When the draw has been concluded, the interested parties may exchange among themselves the lots which have fallen to them. For the exchange of lots belonging to legally incapable persons,

prodigalidade, a troca não pode fazer-se sem que o pródigo dê a sua anuência.

court permission is required, after hearing the Public Prosecutor. In the case of interdiction due to prodigality, the exchange may not occur without the consent of the prodigal person.

Artigo 1420º

(*Segundo e terceiro mapa*)

Quando haja cônjuge meeiro, o mapa constará de dois montes; e determinado que seja o do inventariado, organizar-se-á segundo mapa para a divisão dele pelos seus herdeiros.

Se os quinhões destes forem desiguais por haver alguns que sucedam por direito de representação, achada a quota do representado formar-se-á o terceiro mapa para a divisão dela pelos representantes.

Se algum herdeiro houver de ser contemplado com maior porção de bens, formar-se-ão, sendo possível, os lotes necessários para que o sorteio se efectue entre lotes iguais.

§ único) Quando o segundo mapa não puder ser organizado ou sorteado no acto do sorteio dos lotes do primeiro e quando o terceiro também o não possa ser no acto do sorteio dos lotes do segundo, observar-se-ão não só quanto à organização, mas também quanto ao exame e sorteio do segundo e terceiro mapa, as regras que ficam estabelecidas relativamente ao primeiro.

Article 1420

(*Second and third chart*)

When there is a moiety holder spouse, the chart shall be divided in two parts; once the part of the decedent has been determined, a second chart shall be organised for its distribution among the heirs.

If the heirs' portions are uneven due to some of them succeeding by representation, once the quota of the represented party is determined, a third chart shall be organised for its distribution among the representatives.

If an heir is to be benefited with a larger amount of property, the necessary lots shall be formed, if possible, so that the draw may be made with identical lots.

Single §) When the second chart may not be organised or drawn during the draw of the lots of the first chart, and when the third chart also may not be so drawn during the draw of the lots of the second chart, the provisions relating to the first chart shall be applied not only with regard to their organisation, but also with regard to the examination and draw of the second and third chart.

Artigo 1421º

(*Vista ao Ministério Público para efeitos de sisa*)

O processo será concluso ao juiz para, no prazo de quarenta e oito horas, proferir sentença homologando a partilha constante do mapa e as operações do sorteio. Desta sentença cabe recurso de

Article 1421

(*Inspection by the Public Prosecutor for court costs purposes*)

The case file shall be returned to the judge so that, within forty eight hours, he/she may issue a judgment ratifying the partition chart and the draws. This

apelação, com efeito meramente devolutivo.

(*Artigo alterado pelo art. 4º da Lei nº 2047, de 25 de Maio de 1951, que, não obstante a mudança de teor, manteve a anterior epígrafe*)

judgment is subject to appeal, which shall not suspend its effects.

(*This article was revised by article 4 of Law no. 2047, of 25 May 1951, which kept the previous title, despite the change in content*)

Artigo 1422º

(*Responsabilidade pelas custas*)

As custas do inventário serão pagas pelos herdeiros e pelo meeiro, na proporção do que receberem.

No caso previsto no Artigo 1794º do Código Civil a responsabilidade pelas custas incumbe, na mesma proporção, aos legatários.

§ único) Às custas dos incidentes e recursos são aplicáveis as disposições dos Artigos 456º e seguintes.

Article 1422

(*Liability for court costs*)

The court costs of the inventory shall be paid by the heirs and the moiety holder, in the proportion of what they are awarded.

In the case foreseen in article 1794 of the Civil Code, the legatees shall also be liable for the court costs, in the same proportion.

Single §) The court costs of incidental proceedings and appeals shall be governed by the provisions of articles 456 et seq.

Artigo 1423º

(*Cautelas a observar para a entrega de bens antes do trânsito da sentença em julgado*)

Se algum dos interessados quiser receber os bens que lhe tiverem cabido em partilha antes de passar em julgado a sentença, observar-se-á o seguinte:

1º) No título que se passar para o registo e posse dos bens imobiliários declarar-se-á que a sentença não passou em julgado, e o conservador não poderá registar a transmissão sem mencionar esta circunstância;

2º) Os papéis de crédito sujeitos a averbamento serão averbados pela entidade competente com a declaração de que o interessado não pode dispor deles enquanto a sentença não passar em julgado;

Article 1423

(*Precautions to be taken for the delivery of property before the judgment becomes res judicata*)

If one of the interested parties wants to receive the property awarded to him/her before the judgment has become *res judicata*, the following provisions shall be applied:

1) The title deed issued for the purposes of registration and possession of immovable property shall state that the judgment is not yet *res judicata*, and the registrar may not register the transmission without mentioning this circumstance;

2) Securities subject to annotation, shall be annotated by the competent entity along with the indication that the interested party may not dispose of them before the judgment becomes *res judicata*;

3º) Quaisquer outros bens só serão entregues se o interessado prestar caução, que não compreenderá os rendimentos, juros e dividendos.

§ 1º) As cautelas prescritas neste Artigo observar-se-ão igualmente no caso de estar pendente acção de filiação, de anulação de testamento ou outra que possa ter como consequência a modificação da partilha, na medida em que a decisão da causa seja susceptível de alterar o que se achar estabelecido.

§ 2º) As declarações feitas no registo ou no averbamento produzem o mesmo efeito que o registo das acções. Este efeito subsistirá enquanto, por despacho judicial, não for declarado extinto.

Artigo 1424º

(*Nova partilha*)

Tendo de proceder-se a nova partilha por efeito da decisão do recurso ou da causa, o cabeça-de-casal entrará imediatamente na posse dos bens que deixaram de pertencer ao interessado que os recebeu.

O inventário só se reformará na parte estritamente necessária para que a decisão seja cumprida, subsistindo sempre a avaliação e a descrição, ainda que haja completa substituição de herdeiros.

§ 1º) Na sentença que julgar a nova partilha, ou por despacho, quando não tiver de proceder-se a nova partilha, serão mandados cancelar os registos ou averbamentos que deverem caducar.

§ 2º) Se o interessado deixar de restituir os bens mobiliários que recebeu, será executado por eles no mesmo processo, e também o será pelos rendi-

3) Any other property shall only be delivered if the interested party produces a security, which shall not include the income, interests and dividends.

§ 1) The precautions foreseen in this article shall also be applied in the case of pending legal proceedings relating to filiation, annulment of the will or some other situation which may result in the modification of the partition, insofar as the decision of such a case may change what has already been established.

§ 2) The declarations made in the registry or in the annotation produce the same effects as the registration of legal actions. This effect shall last as long as it is not declared extinct by a court order.

Article 1424

(*New partition*)

If a new partition must be made due to the decision of the appeal or the legal action, the head of the family will immediately come into possession of the property that no longer belongs to the interested party that received it.

The inventory shall only be changed in what is strictly necessary to comply with the decision, the appraisal and description always being kept, even in the case of complete replacement of the heirs.

§ 1) The judgment or order that decides the new partition, when no new partition is required, shall order the cancellation of the registrations or annotations that should elapse.

mentos que dever restituir prestando contas como se fosse cabeça-de-casal.

A execução seguirá por apenso.

§ 2) If the interested party does not return the movable property he/she received, he/she shall be subject to execution proceedings in relation to that property in the same case, as well as for the income to be returned, accounting for this as if he/she were a head of the family.

The execution shall be processed in annex.

COMMENTARY TO ARTICLES 1414 TO 1424

This section regulates the discussion and trial phases.

Once the instruction phase has been concluded, there is a third examination and inspection of the case file: the examination of the case file is allowed to the lawyers of the heirs and of the head of the family, and then inspected by the Public Prosecutor, in the case of an inventory relating to orphans, so that they may give their say on the form of partition (see ALBERTO DOS REIS, *Processos especiais* II cit., page 387).

In the opinion of ALBERTO DOS REIS (*Processos especiais* II cit., pages 385 and 386), the provisions of article 1379, III, should, at this time, be applied by analogy, allowing for the intervention of the moiety holder of the inventoried person who is not the head of the family, upon request, up to the end of the third examination. A different opinion is put forward by LOPES CARDOSO (*Partilhas Judiciais* II cit., page 164) who, based on a literal interpretation of article 1414, excludes the intervention of the lawyer of the moiety holder of the inventoried person, when he/she is not the head of the family.

The trial phase consists of the issuing of the order determining the partition (article 1414, II). In this order, the judge begins by solving any issues concerning the organisation of the partition chart that have not been previously decided (article 1414, III), e.g.: "*issues relating to marital property regime, second marriages, validity of donation, validity of testamentary dispositions, interpretation of clauses of the will, appointment of heirs, intestate succession*" (ALBERTO DOS REIS, *Processos especiais* II cit., pages 387 and 388). Once the order has been issued, it is enforced by the clerk's office, which organizes the partition chart (article 1416, I).

When organising the chart (see article 1416, II), one first calculates the total amount of the assets; passive debts, legacies and burdens are deducted; the amount of the quota of each interested party and the part of each type of property belonging to him/her is determined;

finally, each quota is filled, in accordance with the provisions of article 1415.

There may be objections to the chart (article 1418). Once the objections have been decided, the lots are drawn, if need be (article 1419, I). Finally, the case file is returned to the judge, so that he/she may issue a judgment ratifying the partition chart (article 1421); inventory proceedings come to a close, normally, when this judgment becomes *res judicata*.

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECÇÃO VI EMENDA E RESCISÃO DA PARTILHA

SECTION VI AMENDMENT AND RESCISSION OF THE PARTITION

Artigo 1425º

(*Emenda da partilha por acordo*)

A partilha, ainda depois de passar em julgado a sentença, pode ser emendada no mesmo inventário por acordo de todos os interessados ou dos seus representantes, se tiver havido erro de facto na descrição ou qualificação dos bens ou qualquer outro erro susceptível de viciar a vontade das partes.

§ único) O disposto neste Artigo não obsta à aplicação do Artigo 667º.

Article 1425

(*Amendment of the partition by agreement*)

The partition, even after the judgment has become *res judicata*, may be amended in the same inventory by agreement of all the interested parties or of their representatives, if there was a factual error in the description or qualification of the property or any other error which may vitiate the will of the parties.

Single §) The provisions of this article do not prevent the application of article 667.

Artigo 1426º

(*Emenda da partilha na falta de acordo*)

Quando se verifique algum dos casos previstos no Artigo anterior e os interessados não estiverem de acordo quanto à emenda, pode esta pedir-se por acção ordinária ou sumária, conforme o valor, sendo necessário, para que a acção proceda, que o conhecimento do erro seja posterior à sentença.

Article 1426

(*Amendment of the partition in the absence of agreement*)

In the case of the circumstances described in the previous article, when the interested parties do not agree on the amendment, the latter may be requested through a normal or summary legal action, depending on the value, it being necessary, for the legal action to proceed, that the error became known after the judgment.

Artigo 1427º

(*Rescisão da partilha*)

A rescisão da partilha judicial confirmada por sentença passada em julgado só pode ser requerida:

1º Quando se der algum dos casos mencionados no Artigo 771º;

2º Quando tiver havido preterição ou falta de intervenção de algum dos co-herdeiros e se mostre que os outros interessados procederam com dolo ou má fé, quer esta conduta maliciosa diga respeito à preterição, quer diga respeito ao modo como foi preparada a partilha.

A rescisão fundada no nº 1 obter-se-á pela interposição do recurso de revisão; a fundada no nº 2 por meio de acção ordinária ou sumária, conforme o valor.

§ único) A acção de rescisão e a de emenda a que se referem este Artigo e o anterior serão dependência do processo de inventário.

Article 1427

(*Rescission of the partition*)

The rescission of a partition confirmed by a judgment in a condition of *res judicata* may only be requested:

1) In one of the cases mentioned in article 771;

2) When one of the co-heirs has been overlooked or failed to intervene and it is shown that the other interested parties acted deceitfully or in bad faith, whether this malicious conduct refers to the overlooking or to the manner in which the partition was prepared.

A rescission with the grounds of no. 1 shall be obtained by filing an appeal to revise the judgment; a rescission with the grounds of no. 2 shall be sought through a normal or summary legal action, depending on the value.

Single §) The rescission and amendment referred to in this article and in the preceding one shall be attached to the inventory case file.

Artigo 1428º

(*Composição da quota ao herdeiro preterido*)

Pretendendo o herdeiro, nos termos do Artigo 2165º do Código Civil, que lhe seja composta a sua parte em moeda corrente, requererá no processo de inventário que seja convocada a conferência de interessados para se determinar o montante da sua quota.

Se os interessados não chegarem a acordo, serão avaliados novamente os bens sobre cujo valor houver divergência, podendo requerer-se segunda avaliação dos mesmos bens e depois fixar-se-á a importância a que o herdeiro tem direito. Organizar-se-á novo mapa da partilha para se ficarem conhecendo as alterações

Article 1428

(*Composition of the quota of the overlooked heir*)

If the heir, in accordance with article 2165 of the Civil Code, wishes to have his part made up of currency in force, he/she shall request in the inventory proceedings that a conference of the interested parties be convened to determine the amount of his/her quota.

If the interested parties do not reach an agreement, the property the value of which is disputed shall be reappraised, with the possibility of requesting a second appraisal of the same property, and then the amount the heir is entitled to shall be determined. A new partition chart shall be organised so as to describe

que sofre o primitivo mapa em consequência dos pagamentos necessários para o preenchimento do quinhão do preterido.

§ único) Feita a composição da quota, o herdeiro pode requerer que os devedores sejam notificados para efectuarem o pagamento, sob pena de ficarem obrigados a compor-lhe em bens a parte respectiva, sem prejuízo, porém, das alienações já feitas.

Se não for exigido o pagamento, será aplicável o disposto na parte final da alínea c) do Artigo 1417º.

the changes to the original chart as a result of the necessary payments to fill up the quota of the overlooked heir.

Single §) Once the quota has been composed, the heir may request that the debtors be notified to carry out the payment, failing which they shall be obliged to compose in property the respective portion, not precluding, however, the alienations of property already made.

If payment is not demanded, the final part of article 1417 (c) shall apply.

COMMENTARY TO ARTICLES 1425 TO 1428

As was mentioned above, as a rule, the judgment that ratifies the partition chart concludes the inventory proceedings. However, it is possible for the partition to be altered or deprived of efficacy in the following cases: by rectification, by a simple order of the judge, if the judgment includes typos or miscalculations, or any material inexactitude due to an omission or manifest slip (article 1425, single §); by amendment, based on an agreement between all the interested parties, if there were factual errors in the description or qualification of the property or any error which may vitiate the will of the parties (article 1425); by a suit to amend the partition, based on an error subsequent to the judgment (article 1426); by a suit to rescind the partition, in any of the situations indicated in article 771 (article 1427, no. 1); and by a suit to rescind the partition, when one of the co-heirs was overlooked or failed to intervene and it is shown that the other interested parties acted deceitfully or in bad faith (article 1427, no. 2), i.e., that they acted maliciously and with the intent to cause damage (see CUNHA GONÇALVES, *Tratado*, vol. XIV, page 826).

The cases mentioned in article 771, which are grounds for a suit to rescind the partition, are those applicable to a revision of a judgment, i.e.: "*1) When it is shown, by a criminal convicting judgment in a condition of* res judicata, *that the judgment to be reviewed was issued with bribery, corruption or prevarication*"; "2) *When a document or judicial act upon which the judgment was based is alleged to be false, this issue not having been discussed in the proceedings where the judgment in question was issued; or when a judgment in a condition of* res judicata *is produced which confirms that depositions or statement by experts which may have determined the decision in question were false*"; "3) *When a new document is produced which the party did not have nor was aware of and which, by itself, is sufficient to destroy the evidence upon which the judgment was based*"; "4) *When the confession, withdrawal or transaction upon which the judgment was based is revoked, or there are grounds to revoke it*"; "5) *When the confession, withdrawal*

or transaction referred to in article 298 et seq. *is null and void, due to an irregular proxy or insufficient powers of the proxy, except if the ratification judgment was personally notified to the person who issued the proxy*"; "6) *When, if the suit and execution took place in the absence of the defendant, it is shown that the defendant was not summoned or that this summons was null and void*"; "7) *When the judgment contradicts a previous judgment which constitutes* res judicata *for the parties, if the defeated party shows that he/she was not aware of it while the proceedings were pending*".

It should be noted that, if any of the heirs was overlooked in the partition, without deceit or bad faith from the other interested parties, this is not grounds for rescission, implying only that the portion of the overlooked heir be made up of currency in force, in accordance with article 1428.

Código de Processo Civil (aprovado pelo DL nº 29367, de 28 de Maio de 1939)

SECÇÃO VII
DISPOSIÇÕES GERAIS

Artigo 1429º

(*Habilitação dos sucessores dos interessados falecidos*)

Se falecer o meeiro ou algum herdeiro antes de concluído o inventário, o cabeça-de-casal indicará os herdeiros do falecido, notificando-se esta indicação aos outros interessados e citando-se para o inventário as pessoas indicadas.

A legitimidade dos herdeiros poderá ser impugnada por parte dos citados ou notificados, nos termos do Artigo 1374º.

Na falta de impugnação, ter-se-ão como habilitadas as pessoas indicadas, sem prejuízo do disposto no Artigo 1375º.

Se falecer algum legatário ou credor que tenha sido citado para o inventário, podem os seus herdeiros fazer-se admitir no processo usando do meio estabelecido no Artigo 1375º.

Artigo 1430º

(*Novo inventário*)

Se depois de feita a partilha falecer algum interessado que não deixe outros bens além dos que lhe foram adjudicados, o inventário a que haja de proceder-se terá lugar no mesmo processo, deferindo-se juramento de cabeça-de-casal a quem competir e seguindo-se os mais termos.

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECTION VII
GENERAL PROVISIONS

Article 1429

(*Bringing on record the successors of deceased interested parties*)

If the moiety holder or an heir dies before the inventory has been concluded, the head of the family shall indicate the heirs of the deceased person, this indication being notified to the other interested parties and the indicated persons being summoned to the inventory.

The legitimacy of the heirs may be challenged by the summoned or notified persons, in accordance with article 1374.

In the absence of challenge, the indicated persons shall be considered as qualified, not precluding the provisions of article 1375.

If a legatee or creditor dies before the inventory has been concluded, his/her heirs may have themselves admitted to the case, using the procedure established in article 1375.

Article 1430

(*New inventory*)

If, after the partition has been made, one of the interested parties dies without leaving any property besides that which was assigned to him/her, the inventory which is to take place shall be held in the same case file, the rightful person being sworn in as head of the family and the remaining procedure being applied.

Artigo 1431º

(*Inventário do cônjuge supérstite*)

Quando o inventário do cônjuge supérstite haja de correr no tribunal em que se procedeu a inventário por óbito do cônjuge predefunto, os termos necessários para a segunda partilha serão lavrados no processo da primeira.

Se houver outros bens a partilhar além dos que foram aformalados ao falecido no inventário anterior, serão esses bens descritos com os números de ordem que se seguirem ao da última verba do primeiro inventário.

Article 1431

(*Inventory of the surviving spouse*)

When the inventory of the surviving spouse is to take place in the same court in which the inventory of the predeceased spouse took place, the proceedings required for the second partition shall be included in the case file of the first partition.

If there is other property to be partitioned aside from that listed for the deceased in the previous inventory, such property shall be described with the numbers in the order that follows those of the last item of the first inventory.

Artigo 1432º

(*Aproveitamento da avaliação e da descrição feitas noutro inventário*)

Os bens que já tiverem sido avaliados noutro inventário não serão objecto de nova avaliação, salvo se houver razões sérias para crer que o seu valor se alterou.

No caso de mudança de valor da moeda, tomar-se-á em consideração essa mudança.

Além da avaliação aproveitar-se-á também a descrição feita em inventário anterior, reproduzindo-se ou não conforme o processo for diferente ou o mesmo.

Article 1432

(*Availing of the appraisal and of the description made in another inventory*)

Property that has already been appraised in another inventory shall not be subject to new appraisal, unless there are serious reasons to believe that its value has changed.

In the case of the change in the value of the currency, this fact shall be taken into account.

Besides the appraisal, the description made in a previous inventory shall also be availed of and it shall also be reproduced or not, depending on whether the case is identical or different.

Artigo 1433º

(*Cumulação de inventários*)

É permitida a cumulação de inventários para a partilha de heranças diversas:

1º) Quando forem as mesmas as pessoas pelas quais hajam de ser repartidos os bens;

Article 1433

(*Consolidation of inventories*)

It is lawful to have consolidation of inventories for the partition of different inheritances:

1) When the property is to be divided among the same persons;

2) In the case of inheritances left by two spouses;

2º) Quando se tratar de heranças deixadas pelos dois cônjuges;

3º) Quando uma das partilhas esteja dependente da outra ou das outras. Se a dependência for total, por não haver numa das partilhas, outros bens a adjudicar além dos que ao inventariado hajam de ser atribuídos na outra partilha, não pode deixar de ser admitida a cumulação. Se a dependência for parcial, por haver outros bens, será autorizada ou não a cumulação, conforme parecer conveniente ou inconveniente, tendo-se em atenção os interesses das partes e a boa ordem do processo.

§ único) Não obstará à cumulação a incompetência relativa do tribunal para algum dos inventários nem o facto de só num haver herdeiros incapazes.

3) When one of the partitions is dependent on the other or others. In the case of total dependency, due to the inexistence of property in one of the partitions other than that which is to be awarded, as a result of another partition, to the decedent, the consolidation shall not be refused. In the case of partial dependency, due to the existence of other property, the consolidation shall be authorised or not, depending on whether it is deemed convenient or inconvenient, taking into account the interests of the parties and the good order of the case file.

Single §) The consolidation of the inventories shall not be prevented by the relative lack of jurisdiction of the court in relation to one of inventories, nor by the fact that only one of the inventories includes legally incapable heirs.

Artigo 1434º

(*Partilha adicional*)

Reconhecendo-se, depois de feita a partilha judicial, que houve omissão de alguns bens, proceder-se-á no mesmo processo a partilha adicional, com observância, na parte aplicável, do que se ache disposto nesta secção e nas anteriores.

§ único) No inventário a que se proceder por óbito do cônjuge supérstite se descreverão e partilharão os bens omitidos no inventário do cônjuge predefunto, quando a omissão só venha a descobrir-se por ocasião daquele inventário.

Article 1434

(*Additional partition*)

If it is recognised, after the judicial partition has been concluded, that some property was omitted, an additional partition shall be carried out in the same case file, complying with the provisions of this section and of the preceding ones, as applicable.

Single §) In the inventory carried out as a result of the death of the surviving spouse, the property omitted from the inventory of the predeceased spouse shall be described and partitioned, if the omission is disclosed only at the time of the former inventory.

Artigo 1435º

(*Regime dos recursos*)

Nos inventários de valor até 10.000$00 aplicar-se-á o regime de recursos do processo sumário.

Nos inventários de valor superior observar-se-á o seguinte:

a) Subirá imediatamente, nos próprios autos, o agravo interposto de decisão que ponha termo ao processo, e com ele subirão os agravos interpostos de despachos anteriores, se os houver;

b) Subirá também imediatamente, mas em separado, o agravo interposto dos despacho que exclua do processo determinado interessado ou que exclua ou remova alguém das funções de cabeça-de-casal, tutor, curador ou vogal do conselho de família, subindo com eles os agravos interpostos de despachos anteriores;

c) Os agravos interpostos de outros despachos proferidos até ao termo da descrição dos bens só subirão ao tribunal superior, conjuntamente e em separado dos autos principais, quando estiver finda a descrição;

d) Os agravos interpostos de despachos proferidos posteriormente até à conclusão do processo para o despacho sobre a forma da partilha subirão ao tribunal superior, conjuntamente e em separado dos autos principais, quando o processo estiver em termos de ser determinada a forma da partilha;

e) Os agravos interpostos do despacho que determinar a partilha e dos despachos posteriores subirão, nos próprios autos, ao tribunal superior, com a apelação interposta da sentença que homologar a partilha.

Article 1435

(*Rules applicable to appeals*)

Inventories up to the value of 10,000$00 shall be subject to the regime of appeals in a summary legal action.

For inventories of greater value, the following provisions shall apply:

a) The appeal of a decision ending the case shall be forwarded at once, along with the appeals relating to previous orders, if there were any;

b) The appeal of a decision excluding an interested party from the case or excluding or removing someone from the functions of head of the family, guardian, curator or member of the family council shall also be forwarded at once, but separately, along with the appeals relating to previous orders;

c) Appeals relating to other orders issued up to the end of the description of the property shall only be forwarded to the superior court, jointly and separately from the main case file, when the description has been concluded;

d) Appeals relating to orders issued subsequently, up to the conclusion of the proceedings for the order on the form of partition, shall be forwarded to the superior court, jointly and separately from the main case file, when the proceedings are at the point when the form of partition is to be determined.

e) Appeals relating to orders determining the partition and to subsequent orders shall be forwarded, in the same case file, to the superior court, along with the appeal against the judgment that homologated the partition.

§ único) Fica salvo o disposto no Artigo 735º.

Artigo 1436º

(*Questões definitivamente resolvidas*)

As questões que forem decididas no inventário consideram-se definitivamente resolvidas, tanto em relação ao cabeça-de-casal e às pessoas citadas na qualidade de herdeiros, como em relação àqueles que intervierem na solução, salvo se for expressamente ressalvado o direito às acções competentes.

Esta ressalva não é admissível quando se tratar de questões de direito ou de questões de facto que possam ser resolvidas em face dos documentos produzidos ou requisitados. Quanto às questões de facto que demandem a produção de outras provas, só devem remeter-se as partes para os meios comuns, ou decidir-se provisoriamente, deixando salvo o direito às acções competentes, quando a resolução definitiva se não compadeça com a instrução sumária do processo de inventário.

§ único) Entender-se-á que intervieram na solução de uma questão as pessoas que a suscitaram ou sobre ela se pronunciaram, e ainda as que foram ouvidas, embora não tenham dado resposta.

Artigo 1437º

(*Regime do inventário para descrição e avaliação*)

Ao inventário que tiver unicamente por fim a descrição e avaliação de bens serão aplicáveis as disposições deste capítulo, na parte em que o puderem e deverem ser.

Single §) This article does not preclude the provisions of article 735.

Article 1436

(*Definitely solved issues*)

Issues decided in the inventory shall be considered definitely solved, both regarding the head of the family and the persons summoned as heirs and regarding persons intervening in the solution, unless the right to the due legal proceedings is explicitly safeguarded.

This safeguard is not admissible in the case of issues of law or fact that may be solved in light of the produced or requested documents. As to the issues of fact that require the production of additional evidence, only when the definitive solution is not compatible with the summary proceedings of the inventory should the parties be directed to the normal legal actions, or should a provisional decision be reached, safeguarding the right to the due legal proceedings.

Single §) It shall be considered that persons who raised or commented on an issue intervened in it, the same being applicable to people who were heard, even if they did not reply.

Article 1437

(*Rules applicable to the inventory for description and appraisal*)

The provisions of this chapter shall be applied, if they can and should be applied, to an inventory aimed exclusively at describing and appraising the property

Artigo 1438º

(Por que formas podem ser feitas a venda e o arrendamento para que se exige hasta pública)

Quando a lei civil mandar fazer a venda ou o arrendamento de bens em hasta pública, poderá aquela ou este revestir as formas estabelecidas no processo de inventário. Ouvidos os interessados e o conselho de família, o juiz designará a forma que deve ser adoptada, observando-se depois os termos prescritos nos Artigos 884º a 888º ou nos arts. 889º e seguintes, conforme o que houver sido determinado.

Article 1438

(How to carry out the sale and leases for which a public auction is mandatory)

When civil law directs the sale or lease of property at a public auction, the said sale or lease may take on the forms foreseen for inventory proceedings. After hearing the interested parties and the family council, the judge shall decide on the form to be used, subsequently applying the provisions of articles 884 to 888 or of 889 et seq., in accordance with what has been determined.

COMMENTARY TO ARTICLES 1429 TO 1438

Section VII deals with several issues: bringing on record the successors of deceased interested parties, new inventory, inventory of the surviving spouse, consolidation of inventories, additional partition, appeals, definitely solved issues, rules applicable to the inventory for description and appraisal, how to carry out the sale and leases for which a public auction is mandatory.

Bringing on record the successors of deceased interested parties (article 1429) is an incident that occurs if the moiety holder of the inventoried person or any heir dies before the inventory is concluded. The head of the family is consulted and indicates the heirs of the deceased, who shall be summoned. In the absence of challenge to their legitimacy, the indicated persons are brought on record.

If, after the partition has been made, an interested party dies without leaving any property besides that which was assigned to him/her, a new inventory takes place, in the same case file.

A similar procedural connection is observed when the inventory of the surviving spouse is to take place in the same court in which the inventory of the predeceased spouse took place: the proceedings required for the second partition shall be included in the case file of the partition relating to the inheritance of the predeceased spouse (article 1431).

It is possible to consolidate inventories for the partition of different inheritances (article 1433) in three situations: when the property is to be divided among the same persons; in the case of inheritances left by the two spouses (if there was no inventory made upon the death of the predeceased spouse: see judgment of the Supreme Court of 3/4/1951, *Boletim do Ministério da Justiça*, no. 24, 1951, page 218); and when one of the partitions is totally or partially dependent on the other or others.

An additional partition (article 1434) takes place when it is recognised, after the judicial partition has been concluded, that some property was omitted. If this omission is noticed before the judgment that ratifies the partition chart, the appropriate means is different: the absence of description of property should be invoked, in accordance with the single § of article 1379 (LOPES CARDOSO, *Partilhas Judiciais* II cit., page 348).

Appeals in inventory proceedings are subject to the regime prescribed in article 1435, which varies according to the inventory's value.

Article 1436, I, orders that the issues decided in the inventory be considered definitely solved, both in relation to the head of the family and persons summoned as heirs, and to those who intervene in the solution, except if the right to the competent suits is explicitly awarded. The principle of definitiveness encompasses these issues, regardless of when they were decided (LOPES CARDOSO, *Partilhas Judiciais* II cit., pages 183 and 184).

Article 1437, under the title "*Rules applicable to the inventory for description and appraisal*", orders the application to the listing-inventory of the provisions of the distributory inventory (on these two types of inventories, see above the commentary preceding article 1369), *mutatis mutandis*.

In accordance with article 1438, the sale and lease for which a public auction is required (see, *inter alia*, article 2110 of the Civil Code) may take on the forms foreseen for inventory proceedings.

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SECÇÃO VIII
INCIDENTES DO INVENTÁRIO

Artigo 1439º

(*Remoção do cabeça-de-casal*)

Pode ser removido o cabeça-de-casal:

1º) Quando demorar a descrição, deixar de indicar os bens aos louvados, não comparecer, não juntar documentos, não prestar as declarações que lhe forem exigidas ou por um qualquer outro modo deixar de cumprir, no processo, as obrigações a seu cargo;

2º) Quando administrar mal os bens da herança.

A remoção pode ser requerida por qualquer interessado, ou pelo Ministério Público se o inventário for orfanológico. Será notificado o cabeça-de-casal para responder no prazo de três dias; e nos cinco dias seguintes, inquiridas as testemunhas que tenham sido indicadas no requerimento ou na resposta, em número não superior a três por cada parte, se decidirá.

Removido o cabeça-de-casal, será nomeado outro, nos termos da lei civil.

Se a remoção tiver por causa a falta de prática de qualquer acto para que haja sido devidamente notificado, o cabeça-de-casal incorrerá na pena correspondente ao crime de desobediência qualificada, devendo entregar-se ao Ministério Público a certidão do facto,

Code of Civil Procedure (approved by Decree-Law no. 29367, of May 28th 1939)

SECTION VIII
INCIDENTAL PROCEEDINGS WITHIN THE INVENTORY

Article 1439

(*Removal of the head of the family*)

The head of the family may be removed:

1) When he/she delays the description, does not indicate to the appraisers the property, does not present him/herself, does not produce documents, does not provide the declaration required of him/her or in any other way fails to comply, within the proceedings, with his/her obligations;

2) When he/she manages the inheritance's assets badly.

The removal may be requested by any interested party, or by the Public Prosecutor in the case of an inventory relating to orphans. The head of the family shall be notified to reply within three days; and in the following five days, after the witnesses indicated in the application or in the reply have been heard, in a maximum number of three per party, this issue shall be decided.

Once the head of the family has been removed, a new one shall be appointed, in accordance with civil law.

If the removal was based on the omission of an act for which he/she was duly notified, the head of the family shall be liable to be punished for the offence of qualified disobedience; a

para que promova o respectivo procedimento criminal.

§ 1º) Ocorrendo a remoção depois das licitações, podem os licitantes requerer que lhes sejam entregues os bens em que licitaram. Quanto aos bens que receber, o licitante terá a posição de cabeça-de-casal.

§ 2º) O disposto neste Artigo será igualmente aplicável ao conferente que deixar de cumprir as obrigações de cabeça-de-casal que lhe incumbem relativamente aos bens a conferir.

certificate of this fact shall be sent to the Public Prosecutor, to initiate the respective criminal proceedings.

§ 1) If the removal occurs after the licitations, the bidders may request that the property they bid on be delivered to them. In relation to the property thus received, the bidder shall have the position of head of the family.

§ 2) The provisions of this article shall also apply to the person who is to restore if this person ceases to comply with his/her obligations as head of a family, with regard to the property to be restored.

Artigo 1440º

(*Escusa da tutela, da protutela, da curadoria e do conselho de família*)

Querendo alguém escusar-se de exercer a tutela, a curadoria, a protutela ou o cargo de vogal do conselho de família, deve alegar em requerimento os fundamentos da escusa, oferecendo logo as provas.

A decisão será proferida depois de ouvidos, se for necessário, os interessados e de se colherem as informações convenientes.

Article 1440

(*Exemption from guardianship, proguardianship, curatorship and family council*)

If someone wants to be exempted from exercising the functions of guardian, curator, proguardian or member of the family council, he/she must include in the respective request the grounds of the exemption and offer evidence at once.

The decision shall be issued after hearing, if necessary, the interested parties and gathering the convenient information.

Artigo 1441º

(*Escusa do encargo de cabeça-de-casal*)

O cabeça-de-casal pode pedir escusa do encargo:

1º) Quando tiver setenta anos de idade;

2º) Quando se encontrar impossibilitado, por doença, de exercer convenientemente as suas funções;

3º) Quando residir fora do continente ou da ilha onde ocorre o inventário.

Ao processo de escusa é aplicável o disposto no Artigo anterior.

Article 1441

(*Exemption from the office of head of the family*)

The head of the family may request exemption from his/her office:

1) When he/she is seventy years old;

2) When he/she is unable, due to illness, to conveniently exercise his/her functions;

3) When he/she does not reside in the continent or island in which the inventory is taking place.

O que fica disposto no Artigo antecedente é aplicável aos processos de isenção.

Artigo 1442º

(*Exclusão ou remoção do tutor ou do protutor*)

A exclusão ou remoção do tutor ou do protutor podem ser requeridas pelo Ministério Público, por qualquer vogal do conselho de família ou parente do tutelado, até ao sexto grau, e pelo tutor com relação ao protutor, assim como por este em relação àquele, devendo especificar-se com toda a precisão os fundamentos.

O arguido deverá ser notificado para responder sobre a arguição.

Em seguida será convocado o conselho de família para deliberar, devendo notificar-se para assistir o requerente e o arguido. As testemunhas serão inquiridas pelo juiz perante o conselho, escrevendo-se no auto os depoimentos, por extracto. O requerente e o arguido podem justificar, em breve alegação oral, a matéria do requerimento e da resposta, e por fim o conselho decidirá, ouvido o Ministério Público, quando este não seja o requerente.

Da decisão do conselho de família, qualquer que seja, cabe recurso para o conselho de tutela.

Artigo 1443º

(*Exclusão ou remoção do curador e dos vogais do conselho de família*)

O que fica disposto no Artigo antecedente, é aplicável à exclusão ou remoção do curador do pródigo, do

The provisions of the previous article are applicable to the exemption proceedings.

Article 1442

(*Exclusion or removal of the guardian or proguardian*)

The exclusion or removal of the guardian or proguardian may be requested by the Public Prosecutor, by any member of the family council or by a relative, up to the sixth degree, of the ward, and by the guardian with regard to the proguardian, as well as by the proguardian with regard to the guardian, the grounds for the request being indicated precisely.

The defendant shall be notified to reply to the application.

Subsequently, the family council shall be convened to deliberate, the applicant and the defendant being notified to be present. The witnesses shall be questioned by the judge before the council, their depositions being written down, by extract, in the records. The applicant and the defendant may justify, in a brief oral statement, the content of the application and of the reply, and finally the family council shall decide, after hearing the Public Prosecutor when he/she was not the applicant.

The decision of the family council, whatever it may be, is subject to appeal to the guardianship council.

Article 1443

(*Exclusion or removal of the curator and the members of the family council*)

The provisions of the previous article shall be applicable to the exclusion or removal of the curator of a prodigal

curador provisório do ausente e dos vogais do conselho de família, com as seguintes modificações:

1º) O pródigo será sempre ouvido e poderá também requerer a exclusão ou remoção;

2º) Não haverá intervenção do conselho de família, competindo ao juiz a decisão, da qual caberá o recurso de agravo.

person, of the provisional curator of an absentee, and of the members of the family council, with the following modifications:

1) The prodigal person will always be heard and may also request the exclusion or removal;

2) The family council shall not intervene, the decision being up to the judge, subject to appeal.

COMMENTARY TO ARTICLES 1439 TO 1443

This section regulates the following incidental proceedings specific to inventory proceedings: removal of the head of the family; exemption from guardianship, proguardianship, curatorship, family council and office of head of the family; exclusion or removal of the guardian, proguardian, curator and members of the family council. Removal, exemption and exclusion are defined by ALBERTO DOS REIS (*Processos Especiais* II cit., pages 390 and 391): removal is a sanction which consists in removing from a certain office a person who did not exercise it correctly; exemption is a benefit granted to persons who would be charged with a certain office and who, under certain circumstances, may request dispensation from that charge; exclusion is an inhibition which prevents the exercise of functions by persons who are in certain conditions or circumstances.

The grounds for removal of the head of the family are listed in article 1439: non-compliance, in the inventory proceedings, with the obligations of that office (e.g. delay in listing the property, failing to indicate the property to the appraisers, absences, failing to produce documents, failing to make declarations, when these attitudes are unjustified); mismanagement of the assets of the inheritance. Both grounds encompass the situation of withholding property of the inheritance (LOPES CARDOSO, *Partilhas Judiciais* II cit., page 371). Removal proceedings take place as follows: request; order; notification; reply; production of evidence; and decision.

The grounds for exemption from the offices of guardian and proguardian are the ones indicated in articles 227 and 228 of the Civil Code; the grounds for the exemption of members of the family council are the ones foreseen in article 227, no.s 7 and 8, and 228, as a result of the provisions of article 233, all of the Civil Code. The exemption proceedings consecrated in article 1440 take place as

follows: request; hearing of the interested parties; information; and decision.

The proceedings for exemption from the office of head of the family follow the same steps, but their grounds are the ones governed by article 1441: being at least 70 years old; being unable, due to illness, to conveniently exercise the functions in question; not residing in the continent or island in which the inventory is taking place.

The grounds for exclusion of the guardian, proguardian and members of the family council are the ones mentioned in article 234 of the Civil Code: the same article is applicable, by analogy, to the exclusion of the curator (ALBERTO DOS REIS, *Processos Especiais* II cit., page 393). The grounds for removal of the guardian and proguardian are mentioned in article 235 of the Civil Code. There is an omission concerning the grounds for removal of the members of the family council and of the curator, which must be overcome by resorting to article 235 of the Civil Code, insofar as it is applicable (ALBERTO DOS REIS, *Processos Especiais* II cit., page 394).

Proceedings for exclusion and removal are identical. Proceedings for exclusion or removal of the guardian and proguardian are subject to article 1442, which implies the following steps: request; order; notification; reply; instruction and discussion before the family council; decision by the family council.

Proceedings for exclusion or removal of the curator and the members of the family council follow those same steps, with only two changes: hearing of the person interdicted by prodigality, when he/she is not the author of the request; decision by the judge, rather than by the family council.

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SECÇÃO IX
PARTILHA DE BENS NALGUNS CASOS ESPECIAIS

Artigo 1444º

(*Como pode ser feita a partilha em consequência de divórcio, separação ou anulação do casamento*)

Decretado o divórcio ou a separação de pessoas ou anulado o casamento, podem os cônjuges partilhar os bens por escritura pública ou por auto lavrado no processo em que se proferir a sentença.

Artigo 1445º

(*Especialidades do inventário resultante de divórcio, separação ou anulação do casamento*)

Havendo inventário, incumbirão as funções de cabeça-de-casal ao marido nos casamentos por comunhão e ao marido e à mulher em relação aos bens de cada um nos casamentos com separação. Mas os rendimentos dos bens de qualquer espécie vencidos até à sentença serão sempre descritos pelo marido.

O inventário correrá por apenso ao processo de divórcio, separação ou anulação e seguirá os termos prescritos nas secções anteriores.

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SECTION IX
PARTITION OF PROPERTY IN SPECIAL CASES

Article 1444

(*How to carry out a partition as a result of divorce, separation or annulment of the marriage*)

Once the divorce or separation of persons has been decreed, or once the marriage has been annulled, the spouses may partition the property through a deed or act included in the case file in which the judgment is delivered.

Article 1445

(*Special features of an inventory resulting from a divorce, separation or annulment of the marriage*)

Where an inventory is made, the functions of the head of the family shall be performed by the husband in marriages under the regime of communion, and by the husband and the wife in relation to each person's property in marriages under the regime of separation of property. However, the income of the property of any type, due up to the judgment, shall always be described by the husband.

The inventory shall proceed in annex to the case file relating to the divorce, separation or annulment, and shall comply with the provisions of the preceding sections.

Artigo 1446º

(*Responsabilidade pelas custas*)

As custas do inventário serão pagas pelo cônjuge culpado. Não o havendo, serão pagas por ambos os cônjuges.

Article 1446

(*Liability for court costs*)

The inventory's court costs shall be paid by the guilty spouse. If there is none, they shall be paid by both spouses.

Artigo 1447º

(*Processo para a separação de bens em casos especiais*)

Requerendo a mulher separação de bens no caso do Artigo 10º do Código Comercial ou tendo de proceder-se a separação em consequência da insolvência ou da falência do marido, aplicar-se-á o disposto no Artigo 1445º, com as seguintes modificações:

1º) O exequente no caso do Artigo 10º do Código Comercial ou qualquer credor no caso de insolvência ou falência terá o direito de promover o andamento do inventário;

2º) Não poderão ser aprovadas dívidas que não estejam devidamente documentadas;

3º) A mulher tem o direito de escolher os bens com que há-de ser formada a sua meação. Se usar deste direito, serão notificados da escolha os credores e poderão reclamar contra ela, fundamentando a sua queixa.

O juiz, se julgar atendível a reclamação, ordenará, sob a sua presidência, segunda avaliação dos bens que lhe parecerem mal avaliados. A diligência será feita por três louvados, um nomeado pela mulher, outro pelos credores e o terceiro pelo juiz.

Quando a segunda avaliação modificar o valor dos bens escolhidos pela mulher, poderá esta, dentro dos três dias a contar do termo da diligência, declarar que desiste da escolha. Se fizer esta declaração,

Article 1447

(*Proceedings for separation of property in special cases*)

If the wife has requested separation of property in the case of article 10 of the Commercial Code or if separation must take place due to the husband's insolvency or bankruptcy, the provisions of article 1445 shall apply, with the following modifications:

1) The applicant of the execution proceedings, in the case of article 10 of the Commercial Code, or any creditor in the case of insolvency or bankruptcy, shall be entitled to move forward the inventory proceedings;

2) Debts which are not duly documented may not be approved;

3) The wife is entitled to choose the property with which her moiety is to be formed. If she uses this right, the creditors shall be notified of the choice and may object to it, justifying their complaint.

The judge, finding grounds for the complaint, shall order a second appraisal of the property that he/she deems not to have been correctly appraised, to be presided over by him. This proceeding shall be carried out by three appraisers, one appointed by the wife, another by the creditors, and a third one by the judge.

When the second appraisal changes the value of the property chosen by the wife, she may, within the three days following the conclusion of this proceeding, declare that she gives up her

as meações serão adjudicadas por meio de sorteio.

choice. If this declaration is made, the moieties shall be awarded by means of a draw.

COMMENTARY TO ARTICLES 1444 TO 1447

This Section regulates situations of partition of the couple's common property independent from the death of one of the spouses: partition as a result of divorce, separation or annulment of the marriage; and the partition resulting from the application of article 10 of the Commercial Code or resulting from the husband's insolvency or bankruptcy.

If the spouses agree, the partition of the couple's property as a result of divorce, separation or annulment of the marriage may be carried out through a deed or an act included in the case file in which the judgment is delivered (article 1444). In the absence of an agreement, an inventory takes place. Inventory proceedings resulting from a divorce, separation or annulment of a marriage run together with the divorce, separation or annulment proceedings and obey the procedural rules of an inventory upon someone's death, with the modifications foreseen in article 1445, I. Thus, the husband exercises, in principle, the functions of head of the family.

Article 1447 regulates inventory proceedings for the separation of property in special cases, encompassing marriages where one of the following three situations occurs: the attachment of the couple's common property, in an execution against the husband due to debt, under article 10 of the Commercial Code; the husband's insolvency; the husband's bankruptcy. Inventory proceedings in the case of the husband's insolvency or bankruptcy may only run their course after the issuing, in the insolvency or bankruptcy proceedings, of the judgment confirming or declaring the wife's right to separate her moiety from the bankrupt or insolvent patrimony (see ALBERTO DOS REIS, *Processos Especiais* II cit., page 396).

The above mentioned article 10 of the Commercial Code, under the title "Husbands' commercial debts", states:

"*The payment of the husband's commercial debts, which must be made by his moiety in the common property, may be demanded before the marriage is dissolved or separation occurs, the wife being, however, summoned to, if she so intends, request the judicial separation of property in the ten days following the attachment.*

"§ 1) *If the wife has requested the judicial separation of property, this shall run its course annexed to the execution proceedings, the latter being suspended until the partition, the payment being made only after the partition has been concluded, and only with the property of the husband's moiety, any attachment that had been imposed on property belonging to the wife's moiety becoming void.*

"§ 2) *When the wife did not request the separation, nor explicitly assumed liability for the debt in question, the amount of any payment carried out in accordance with this article shall be taken into account in the husband's moiety whenever the separation of moieties takes place.*"

Proceedings for separation of property in special cases follow the same steps as inventory proceedings as a result of divorce, separation or annulment of the marriage, as modified by article 1447: the applicant of the execution proceedings and the creditors are granted the right to move forward the inventory proceedings; only duly documented debts may be approved; and the wife of the executed, insolvent or bankrupt person is entitled to choose the property with which her moiety is to be formed.

Anexo:
Código de usos e costumes de hindus gentios de Goa
(Decreto de 16 de Dezembro de 1880)

Annex:
Code of gentile Hindu usages and customs of Goa
(Decree of 16 December 1880)

Código de usos e costumes de hindus gentios de Goa (Decreto de 16 de Dezembro de 1880)

Artigo 1º

São mantidos e ressalvados aos hindus gentios de Goa, sem distinção de Velhas e Novas Conquistas, os seus usos e costumes especiais e privativos, revistos e codificados nas disposições seguintes.

Artigo 2º

O casamento celebrado entre contraentes hindus gentios segundo o seu rito religioso produz todos os efeitos civis que as leis do reino reconhecem no casamento católico e no civil.

Artigo 3º

Não produz, porém, efeitos civis o casamento que o hindu gentio varão contrair por poligamia simultânea, excepto unicamente nos casos seguintes:

1º) Na absoluta falta de filhos da mulher do anterior leito, até esta perfazer a idade de vinte e cinco anos;

2º) Na absoluta falta de filho varão, tendo a mulher do anterior leito trinta anos completos, e tendo menor idade, passados dez anos depois da última gestação;

3º) No caso de separação por qualquer das causas legais, sendo esta proveniente da mulher, e quando não haja prole masculina;

4º) No caso de dissolução do casamento anterior previsto no Artigo 5º.

Code of gentile Hindu usages and customs of Goa (Decree of 16 December 1880)

Article 1

The gentile Hindu special and private usages and customs of Goa, as revised and codified in the following provisions, with no distinction between Old and New Conquests, are hereby preserved and guaranteed to them.

Article 2

A marriage contracted between gentile Hindus in accordance with their religious rite produces all the civil effects which the laws of the kingdom ascribe to a Catholic or civil marriage.

Article 3

However, the marriage entered into by the male gentile Hindu in simultaneous polygamy shall not produce civil effects, except in the following cases:

1) Absolute absence of children from the wife of the previous marriage, until the latter reaches the age of twenty five;

2) Absolute absence of a male child, if the wife of the previous marriage has reached the age of thirty, or, if she is younger, if ten years have passed since the last pregnancy;

3) Separation based on any legal grounds, if the said separation is owed to the wife, and when there are no male children;

4) Dissolution of the previous marriage as foreseen in Article 5.

Artigo 4º

São condições indispensáveis do casamento simultâneo:

1º) A justificação judicial de alguma das circunstâncias mencionadas no artigo precedente;

2º) O consentimento da mulher de anterior leito, expresso em escritura pública, nos casos dos números primeiro e segundo do mesmo Artigo 3º.

Artigo 5º

O casamento entre hindus gentios pode dissolver-se unicamente por adultério da mulher, com as formalidades seguintes:

1º) Justificando-se em juízo a causa da dissolução;

2º) Procedendo-se depois, com as solenidades do rito gentílico, a cerimónia denominada "gothacrià";

§ único) No caso da dissolução, a mulher tem direito a alimentos.

Artigo 6º

O casamento emancipa o cônjuge varão tendo dezoito anos completos, e a mulher perfazendo dezasseis anos, excepto tendo faltado o consentimento dos pais ou do maioral da família.

Artigo 7º

O casamento celebrado entre contraentes não católicos será inscrito no respectivo registo civil, na conformidade dos regulamentos em vigor.

Artigo 8º

São respeitados para todos os efeitos civis e jurídicos, como factos consumados, os casamentos por poligamia

Article 4

The following are indispensable conditions for a simultaneous marriage:

1) The judicial confirmation of any of the circumstances foreseen in the preceding article;

2) The consent of the wife of the previous marriage, expressed in a deed, in the cases of numbers one and two of article 3.

Article 5

A marriage between gentile Hindus may be dissolved only due to the wife's adultery, with the following formalities:

1) Confirmation by a court of the cause for the dissolution;

2) Carrying out, as solemnly required by the gentile rite, the ceremony known as "gothacria";

Single §) In the case of dissolution, the wife is entitled to maintenance.

Article 6

Marriage emancipates the male spouse if he has reached the age of eighteen, and the female spouse if she has reached the age of sixteen, except if the consent of the parents or of the head of the family was lacking.

Article 7

A marriage contracted between non-Catholic partners shall be recorded in the respective civil registry, in accordance with regulations in force.

Article 8

Marriages in simultaneous polygamy carried out until the date of the present decree, without the conditions foreseen

simultânea verificados até à data do presente decreto sem as condições mencionadas no artigo 3º.

in article 3, shall be held valid for all civil and legal purposes.

Artigo 9º

Não é permitida a perfilhação de filhos ilegítimos, de qualquer qualidade.

§ único) Porém os filhos ilegítimos das bailadeiras e outras mulheres não casadas podem ser reconhecidos e perfilhados por suas mães.

Article 9

The acknowledgment of illegitimate children of any type is not allowed.

Single §) However, the illegitimate children of dancers and other unmarried women may be recognised and acknowledged by their mothers.

Artigo 10º

Na falta de filhos legítimos masculinos, é permitido aos hindus gentios, de qualquer casta, tomar um adoptivo varão com as cerimónias prescritas pelo seu rito religioso.

Article 10

In the absence of legitimate male children, gentile Hindus, regardless of caste, may adopt a male child in accordance with the ceremonies set out in their religious rite.

Artigo 11º

O adoptivo será tirado de entre os parentes sucessíveis do adoptante, preferindo os segundo-genitos de seus irmãos, e entre brahmanes e kxatrias de entre os ainda não iniciados na cerimónia de linha.

§ único) Existindo um adoptivo é proibido adoptar outro.

Article 11

The adopted son shall be chosen from the relatives of the adopting parent who are entitled to inherit from him/her, with preference to the second born of his brothers, and, between Brahmins and Kshatriyas, from those not yet initiated into the thread ceremony.

Single §) If there is already an adopted son, one may not adopt another.

Artigo 12º

As viúvas hindus gentias também podem tomar um adoptivo, nos termos e com as condições declaradas nos artigos precedentes.

§ único) Quando, porém, o tomarem com autorização que seus maridos lhes deixarem em escritura pública, e com indicação de pessoa ou sem ela, esse adoptivo será considerado, para todos os efeitos, como tomado na constância do matrimónio.

Article 12

Gentile Hindu widows may also take an adoptive son, under the terms and conditions foreseen in the preceding articles.

Single §) When, however, the adoptive son is taken under permission left by the widow's husband in a deed, with or without the indication of a specific person, the adoptive son will be considered, for all purposes, as adopted within the constancy of marriage.

Artigo 13º

Às bailadeiras e bavinas é permitida a adopção de um parente da própria casta, somente, na absoluta falta de filhos.

Artigo 14º

Para a adopção é essencial a escritura pública e o expresso consentimento do adoptivo, sendo púbere, e dos seus pais legítimos; na falta destes o do maioral, da avó ou de tutor competentemente nomeado.

Artigo 15º

Os adoptivos saem, pela adopção, e se tornam inteiramente estranhos às famílias dos seus pais, e gozam nas dos adoptantes de todos os direitos de filhos legítimos aos quais são equiparados para os efeitos civis e religiosos.

Artigo 16º

É considerada, para todos os efeitos judiciais e civis, como família ou sociedade familiar a reunião de hindus gentios, de um e outro sexo, que habitam a mesma casa e vivem com a mesma economia doméstica.

Artigo 17º

Todos os bens, direitos e acções que uma família possui, tudo quanto um membro dela adquire é comum e fica sujeito à administração do respectivo maioral.

§ único) São, porém, próprios e privativos de qualquer membro, e serão por estes exclusivamente administrados:

Article 13

Dancers and "Bhavinas" are allowed to adopt a relative of the same caste, but only in the absolute absence of children.

Article 14

Adoption may only be carried out through a deed and with the explicit consent of the adoptive son, if he is pubescent, and of his legitimate parents; in the absence of legitimate parents, with the permission of the head of the family, of the grandmother or of a duly appointed guardian.

Article 15

Through adoption, adopted sons are removed and become complete strangers to the families of their parents, and they enjoy within the family of the adoptive parents all the rights of legitimate children, to which they are considered equal for civil and religious purposes.

Article 16

A partnership of gentile Hindus of different sexes, inhabiting the same house and living with the same domestic economy, is considered, for all judicial and civil purposes, as a family or family grouping.

Article 17

All the property, rights and shares of a family, everything that a member of a family acquires is to be held in common and shall be managed by the respective head of the family.

Single §) However, the following are private and personal to any member of the family and will be managed exclusively by that member:

1º) Os bens ou rendimentos que lhe foram doados ou deixados com expressa cláusula de não entrarem na massa comum;

2º) Os que houver herdado de parentes que fossem membros de outra família;

3º) Os que adquirir por sua indústria, sem ser com fundos comuns;

4º) Todos os mais bens que pela lei geral são considerados próprios e privativos dos sócios.

1) The property or income donated to him/her or which was left with the explicit clause that it not form part of the common pool;

2) Those inherited from relatives which were members of a different family;

3) Those acquired through his/her own work, without resorting to common funds;

4) All other property which, under general law, is considered private and personal of partners.

Artigo 18º

A sociedade familiar é regida, administrada e representada pelo membro varão mais velho em idade e civilmente capaz.

§ único) Na ausência ou impedimento do maioral, será a administração exercida pelo varão hábil imediato em idade, e na falta de varão hábil pela mulher do dito maioral ausente ou impedido.

Article 18

The family grouping is ruled, managed and represented by its oldest male member of age and legally capable.

Single §) In the absence or impediment of the head of the family, administration will be exercised by the able male member of the family who follows him in age, and, in the absence of an able male member of the family, by the wife of the said absent or impeded head of the family.

Artigo 19º

O maioral administrador pode praticar todos os actos de mera administração segundo o disposto na lei geral, salvo o acordo expresso ou especial autorização da sociedade por escritura pública.

§ único) O administrador é obrigado a prestar contas da sua administração, e transmite a sua responsabilidade aos seus herdeiros.

Article 19

As the administrator, the head of the family may carry out all acts of mere management in accordance with the general law, except for the grouping's explicit agreement or special authorisation through a deed.

Single §) The administrator must account for his management and transmits his liability to his heirs.

Artigo 20º

Os contratos feitos pelo maioral revertem em benefício da família, excepto sendo feitos com fundos próprios, reconhecidos pela sociedade

Article 20

Contracts executed by the head of the family revert to the benefit of the family, except if they are made with his/her own funds, recognised as such by the

ou competentemente provados como tais. Os contratos de qualquer membro da família só obrigam o quinhão respectivo, e só revertem em seu proveito, quando feitos com fundos privativos, como tais reconhecidos ou provados.

grouping or duly proven as such. The contracts of any member of the family are only binding upon his/her respective share, and only revert to that member's benefit, as long as they were made with personal funds, recognised or proven as such.

Artigo 21º

Os membros de família, seja qual for o grau de parentesco, têm direito a alimentos pelas rendas comuns enquanto viverem associados e sob o mesmo tecto e economia.

Article 21

The members of the family, regardless of their degree of relationship, are entitled to maintenance based on the common income while they live within the grouping and share the same roof and economy.

Artigo 22º

A sociedade familiar dissolve-se pelos casos e pela forma estatuída na lei geral, e às partilhas entre os sócios são aplicáveis as regras gerais que regulam as partilhas entre co-herdeiros.

§ único) Porém a dissolução da sociedade por morte ou separação de algum dos sócios não obsta a que os outros continuem a viver associados, conservando-se em comum os respectivos quinhões por acordo expresso em escritura pública.

Article 22

The family grouping is dissolved in the cases and in the manner foreseen by the general law, and the general rules on partition among co-heirs are applicable to partitions among the members of the grouping.

Single §) However, the dissolution of the grouping due to the death or separation of any of its members does not prevent the other members from continuing to live in a grouping, their respective shares being kept in common through an agreement expressed in a deed.

Artigo 23º

São aplicáveis aos hindus gentios de Goa as prescrições da lei geral sobre sucessão e partilhas, salvas somente as excepções seguintes.

Article 23

The rules of general law on succession and partitions shall be applicable to the gentile Hindus of Goa, with the following exceptions.

Artigo 24º

As mulheres de leitos simultâneos terão conjuntamente direito à meação da herança do marido comum, salvo

Article 24

The wives of simultaneous marriages shall jointly be entitled to the moiety of the inheritance of the common husband,

contrato antenupcial celebrado nos termos da lei geral.

§ 1º) Esta meação se dividirá por todas em porções iguais, e por falecimento de qualquer delas passará o quinhão aos filhos ou herdeiros respectivos.

§ 2º) A outra metade, pertencente ao marido, passará por sua morte, também em porções iguais, aos filhos que ele deixar de todos os leitos, nascidos ou com direito a suceder nos termos da lei geral.

except when otherwise foreseen in a prenuptial agreement executed in accordance with the terms of the general law.

§1) The moiety of the inheritance shall be divided in equal portions for all, and, in case one of them has deceased, her share shall be passed on to her respective children or heirs.

§2) The other half, belonging to the husband, shall be passed on at the time of his death, also in equal portions, to his children of all marriages, already born or entitled to succeed under the terms of the general law.

Artigo 25º

Os filhos e descendentes ilegítimos não sucedem a seus pais ou ascendentes e mais parentes respectivos, nem estes àqueles.

§ único) Porém os filhos ou descendentes das bailadeiras, das mulheres solteiras, das viúvas ou das separadas por adultério sucedem às suas mães e parentes maternos; bem assim estas àqueles.

Article 25

Illegitimate children and descendants do not succeed from their parents or ascendants and respective relatives, nor do the latter succeed from them.

Single §) However, the children or descendants of dancers, of single women, of widows or of women separated due to adultery succeed from their mothers and maternal relatives, as do the latter in relation to them.

Artigo 26º

Os adoptivos, quer tomados quando existam filhas, quer no caso de superveniência de filhos, de qualquer sexo, sucedem e concorrem com estes, por igual, como herdeiros legítimos dos adoptantes e parentes respectivos.

§ 1º) Não podem, porém, suceder aos seus pais legítimos ou parentes do lado deles, salvo unicamente quando os mesmos pais não tiverem outros herdeiros legítimos ou testamentários.

§ 2º) O disposto neste artigo é aplicável aos adoptivos tomados pelas

Article 26

Adoptive sons, whether they were taken when there were daughters or in the case of supervening children, of any gender, succeed and compete with these, in equal terms, as intestate heirs of the adoptive parents and respective relatives.

§1) They may not, however, succeed from their legitimate parents or the relatives of these, except when these parents have no other intestate or testamentary heirs.

§2) This article is applicable to adoptive sons taken by widows, dancers

viúvas e pelas bailadeiras e bavinas, com respeito à sucessão delas.

Artigo 27º

Os hindus brahmanes prestarão sempre em juízo o juramento da pustoca de Xri Bhagavat Guitá, e os de outras castas o de côco, betle, areca e arroz.

§ único) No caso de juramento decisório poderão as partes exigir que ele seja prestado perante a divindade Malsá, sendo pagas pelo requerente as despesas de transporte, os emolumentos dos juízes, os honorários dos advogados e os salários dos empregados de justiça.

Artigo 28º

A excomunhão gentílica (boiscrot) e a aplicação ou levantamento de penas religiosas aos hindus gentios, de qualquer classe ou casta, são da exclusiva competência do respectivo prelado ou suami, na conformidade dos ritos gentílicos.

§ único) Os poderes públicos intervirão em tais actos unicamente no que respeita à manutenção da ordem pública.

Artigo 29º

Os habitantes não católicos de Goa, que não forem hindus gentios, poderão observar e lhes serão aplicáveis as disposições deste decreto em tudo o que não for contrário aos seus ritos religiosos; e igualmente lhes são ressalvados os seus usos privativos, no que se não oposer à moral ou à ordem pública.

Artigo 30º

Nos casos em que as partes a que aproveitar a excepção do presente decreto optarem, de comum acordo, pela aplica-

and "Bhavinas", regarding their succession.

Article 27

When in court, Brahmin Hindus shall always be sworn in through the oath of the "Shree Bhagwad Gita" book, and those of other castes through the oath of the coconut, betel, areca and rice.

Single §) In the case of a decisive oath, the parties may require that it be made before the deity Mhalsa, the transport expenses, the emoluments of the judges, the lawyers' fees and the salaries of the legal clerks being paid by the applicant.

Article 28

Gentile excommunication (boiscrot) and the applying or lifting of religious sanctions on gentile Hindus, of any class or caste, are the exclusive competence of the respective religious leader or Swami, in conformity with the gentile rites.

Single §) The public authorities shall intervene in such acts only in relation to maintaining public order.

Article 29

Non-Catholic inhabitants of Goa, who are not gentile Hindus, may observe the provisions of this decree, and these shall be applicable to them, in anything which is not contrary to their religious rites; their personal usages are also guaranteed, insofar as they do not run counter to morality or public order.

Article 30

When the parties entitled to enjoy the exception established in the present decree choose, by common agreement,

ção do código civil e mais legislação do reino, será esta aplicada.

to apply the civil code and remaining legislation of the kingdom, these shall be applied.

Artigo 31º

Desde que as disposições deste decreto começarem a vigorar será extensiva a todo o território de Goa, sem distinção de Velhas e Novas Conquistas, no estado da Índia, a legislação do reino, tanto geral como especial, em tudo o que não estiver especificado no mesmo decreto.

Article 31

From the moment the provisions of this decree enter into force, and beyond that which is foreseen in the present decree, the legislation of the kingdom, both general and special, shall extend to all the territory of Goa, with no distinction between Old and New Conquests, in the State of India.

Artigo 32º

Fica revogada a legislação em contrário.

Article 32

All legislation contrary to the present decree is hereby revoked.