

Tractate I

§1.1.0 The first tract deals with the rights of the primogenit<sup>1</sup> of the French king, and the primogenit's administration when the living king is prevented from ruling because of madness, or the like. This first tract is divided into four articles, which show the amplitude of the rights of the present primogenit in France, the Dauphin Charles, The first article asks whether the Kingdom of France passes to him by hereditary patrimony, or by simple succession. The second article asks what rights the French king's primogenit has by reason of filiation and primogeniture, so that rulership belongs to him when the king is prevented from ruling. The third article asks whether these laws vouchsafe the rule of the kingdom to the primogenit if he is less than 25 years old. The fourth article asks whether the king, if he should himself be impeded from ruling, can deprive the primogenit from ruling by naming a substitute or governor.

First Article of the First tract

*Conclusion 1.* Some things are possessed patrimonially, such as houses, meadows, and other things belonging to individuals, and some things in no way patrimonially, such as public roads, rivers and the sea, dignities of the church, royal authority and public offices both secular and ecclesiastical. [*Inst.* 2, 1 and *Dig.* 1, 1]

§1.1.2 *Conclusion 2.* There are two kinds of succession. First, patrimonial which Canon law calls hereditary, but by others is termed "by transmission"; it may or may not involve a testament. Second, simple succession, which may be patrimonial but not hereditary; in it, one person takes another's place, so that some call it successor by removal but properly it should be termed succession in the place of another--that is, by successive position. [*Dig.* 28, 2, 29; *Cod.* 6, 28, 2; *Dig.* 28, 3, 13]. It prevails in dignities and offices, in royal authority, benefices, and the like. [*Dig.* 1, 17, 10; *Cod.* 1, 49, 1]. This distinction is held and approved in Canon law. [*Decrees*, VIII,3 & 6; *Decretals* 1, 6, 34; Joh. Mona.<sup>2</sup> comments [PENDING] on *Decretals* 2, 16 & 3, 5 and on *Lib. Sext.* 1, 6, 43]

§1.1.3 *Conclusion 3.* Simple succession which is not hereditary or patrimonial, but "by removal", holds sway in kingdoms, magistracies, offices and dignities. [*Decrees* VIII,1,5] Some places it proceeds by acclamation by the people, some places by reason of consanguinity; some places by the habitual operation of propinquity, so that rulership is transferred to the nearest of kin just as it is in the inheritance of estates. [*Decrees* VIII, 1, 15]. Furthermore, dignities and offices and ecclesiastical administrations are not possessed by hereditary right. [*Decrees* VIII, 1,

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<sup>1</sup> I.e., "first-born son". The archaic English word "primogenit" will be used very often in this translation, since it maintains the kind of verbal affinity with sister terms, like "primogenitary" and "primogeniture", which one finds in the Latin original.

<sup>2</sup> Probably his *Glossa aurea nobis priorii loco super Sexto Decretalium libro addita* [Aalen, 1968, Harvard Law.]

5 and 79, 10. The rest of this conclusion, dealing with various kinds of royal succession from the old testament, and a few further roman and canon law places, is omitted.]

§1.1.4

*Conclusion 4.* In kingdoms, dukedoms and similar dominions, hereditary and patrimonial session can hold sway in accordance with custom, so that kingdoms pass to the heirs by right of heredity. Canon law says that the king of Hungary's son, who had succeeded him in the kingdom, may be deprived of the benefits of heredity if he does not fulfil the vows made to his father, and so renders himself unworthy to be his successor. [*Decretals.* 3,23,6] This text says that the kingdom is hereditary. Canon law further reveals that in Portugal, the custom of the land calls for the kingdom to pass to the king's brother should the kind die without offspring. [*Lib. Sext.* 1, 8, 2; cf. gloss on *Decrees VIII*, 1, 5]; This custom is both reasonable and useful for the public, therefore the best kind. [*Decretals*, 1, 4, 11] Aristotle and Gilles of Rome say that is more useful for the kingdoms to be transmitted by succession, quasi-hereditarily to the primogenit, than by election to whomever you will. [Aristotle, *Politics*, 1286b; Aeg. Romanos, *De reg. prin.*, III:2, 5 (p.404)]

§1.1.5

*Conclusion 5.* Nevertheless, there have been and can effective. modes of succession to kingdoms and dominions other 'than those given in the foregoing. A specific manner of succession can be introduced by law: [*Inst.* 3, 11 & 3, 12]. By the same token, it can be introduced by custom, for what the law can do, custom can do also. [*Dig.* 1, 3, 31 & 50, 4, 11; *Lib. Feud.* 1, 5 or 1, 17]

§1.1.6

*Conclusion 6.* Succession to kingdoms and like dominions, which is determined by custom may be either hereditary or non-hereditary. If not determined by custom, it is ,fixed by common law; for whatever is not found contrary in statutes or custom is left to be regulated by laws and "constitutions" [*Cod.* 7, 62, 32; *Nov.* 7, 2; gloss on *Dig.* 39, 6, 25; *Clementines*, 3,13. "Constitutions" in this context refer to a special kind of law promulgated by the Emperor.]

§1.1.7

*Conclusion 7.* In a way, the custom observed in succession to kingdoms and like dominions seems to be contrary to common law. In some instances it obviously does, as in Aragon where succession is determined by testament, as I have seen in public documents. The same is true in Hungary [*Decretals* 3, 34, 6]. Elsewhere, however, as in France, succession does not take place my testamentary succession. Nor is there intestate succession, for things which by their nature cannot be testated cannot be passed on ab interstate [*Dig.* 38, 17].

§1.1.8

*Conclusion 8.* Custom alone is recognized in succession to the kingdom of France. From the force of custom alone, simple succession is conferred upon the first-born males out of the direct line, and in the absence of these to males of the collateral line, according to the privilege of degree of relationship. It is not strange that royal succession in France comes by the force of custom alone, since in other places it happens by the force of law alone [*Inst.* 3, 2 and 3, 3] and law and custom are of equal potency [*Dig.* 1, 3, 31 & 2]. Many divine and human laws approximate this custom of succession in the realm of France. Divine in so far as it conforms with Mosaic law: "If a man have two wives, and one beloved, and the other hated,...and if the

first-born son be hers that was hated (and the second-born son hers that was loved)...he may not make the son of the beloved the first-born before the son of the hated, who is the first-born; but he shall acknowledge the first-born, the son of the hated, by giving him a double portion of all that he hath." [Deuteronomy 21, 15-16] Hence it was said concerning Solomon's brother Adonijah, David's first-born son, that the kingdom belonged to him by primogenitural right but was transferred to Solomon by divine disposition. [1 Kings 2, 15; gloss on Decrees 8, 1, 2]. The aforesaid custom also agrees with divine law in so far as descent by direct line is preferred to the collateral line. [2 Kings 1, 17; Lib. Sext. 1, 8, 2] It agrees with Civil law, where those of lineal descent are preferred to those of collateral lines, [Nov. 7, 2] with the laws of the Apostles which say "If a son, then an heir," [Gelatinus 4, 7; Romans 8, 17] and with good custom and the utility of the people according to Aristotle and Aegates Romanos [Aristotle, Politics. 1585a; Age. Romanos, De reg. prin., III:2, 5 (p. 462-65)]. For many reasons, therefore, it is more advantageous for kingdoms to be conferred by succession than by election.

§1.1.9 *Conclusion 9.* At no time have the kings of France made testamentary provisions concerning the kingdom, but have always allowed royal succession to proceed by the force of custom, as mentioned in the previous conclusion. This conclusion is arrived at negatively, and so proven only to the extent that the contrary is not proven [Cod. 12, 33, 6], as well as in the manifest evidence out of the law as adduced in the previous conclusion. [cf. Lib. Sext. 1, 6, 6]

§1.1.10 *Conclusion 10.* At no time has a French king ever made, nor can a present-day king make, a testament regarding the kingdom, or make the first-born or anyone else heir to the kingdom. This follows from the fact that wherever custom has not prevailed and sanctioned royal succession to be testamentary, common law prevails according to which royal testamentary succession is not allowed--nor, likewise, hereditary succession. For whatever in common law is not derogated by custom or statute is reserved to common law. [Cod. 7, 62, 32; Auth. 2, 1; Cod. 6, 30, 22, and places alleged above in conclusion 6.]

§1.1.11 *Conclusion 11.* Even as it is true that according to custom in the French realm that royal succession is not conferred by testamentary will, so neither can it be ceded to the successor by the deceased's tacit volition; for the kingdom is conferred upon the successor by the force of custom alone. This conclusion is proven in the first place because it cannot be found in custom that succession in the kingdom obtains either by testament or intestacy from the active or direct will of the king; according to common law, kingdoms are not the place for this kind of succession [Cod. 7, 62, 32; gloss to Dig. 39, 6, 25; 6<sup>th</sup> and 8<sup>th</sup> conclusions above.] It is proven in like manner in the law of tutorship [Dig. 26, 1, 1], which does not devolve to the tutor's son by hereditary right but does go to him, nonetheless, by reason of consanguinity; so to this effect, etc., with respect to the guardian of the king.

§1.1.12 *Conclusion 12.* From the foregoing it follows that the primogenit or any other one succeeding to the French realm is not, and cannot properly be said to be, the heir of him to whom he succeeds, nor his patrimonial successor; but successor only by some simple and nonhereditary succession which confers the succession upon him by the force of custom alone. This succession

can be called quasi hereditary, however, by dint of similitude. [*Cod.* 12, 57, 5; *Cod.* 12, 48, 1-2]. And it can be called a third kind of succession.

§1.1.13 *Conclusion 13.* Wherever customary law determines that patrimonial things pass to the primogenit, the successor is said to obtain the succession from him to whom he succeeds, and to be his heir. In respect to royal succession, however, when the realm passes to the primogenit or some other person according to the rules of custom, the successor may not be said to obtain it from the king to whom he succeeds, nor to be his heir. Certainly the successor in a patrimonial domain has a much fuller right than the king in his kingdom, for he can sell, alienate, diminish and even transfer the patrimony to others, things the king cannot do.

§1.1.14 *Conclusion 14.* From the foregoing it is evident that succession in the kingdom of France is either hereditary nor elective--because no one elects, and election is an act of the will according to Aristotle [PENDING; cf. also *Decretals* 1, 6, 42]--but is a kind of simple succession operating by custom according to which a new thing is acquired by, or a "new status" conferred upon, certain persons fortuitously, as is clear from earlier conclusion. For, if neither elective nor hereditary, then it must be of another species produced out of the law--that is, by the custom of the kingdom. According to canon law, the king may succeed to the kingdom by law [*Lib. Sext.* 1, 8, 2], for custom can introduce new forms and species in succession [*Inst.* 3, 12 and above, concl. 5]

§1.1.15 *Conclusion 15.* From the foregoing it may be inferred that the French kings are wont to hold the realm not by patrimonial or hereditary means but by a royal power and authority which has the express approbation and disposition of God. The first part of the conclusion is proven because custom in France does not uphold either patrimonial or hereditary succession, and even less so election (as said in the previous conclusion), therefore must hold it by manner of succession, by a simple authority, and by a royal imperium out of the force of custom alone, as said before. The second part of the conclusion is proven by what was said in the prologue concerning the lord's endowing the kingdom of France to the exclusion of all other kingdoms and secular monarchies) with his holy oil used at royal coronations, said oil having been delivered from heaven by an angel in the form of a dove, and it is avowed by the history of St. Remi. For what reason would this oil have been transmitted if not as a mark of the divine disposition or express heavenly approbation of this particular kingdom? For it is written in Isaiah and in the Gospels, "the Spirit of the Lord over me, he who anointeth me."

§1.1.16 *Conclusion 16.* That custom confers a right upon the primogenit by reason of filiation or primogeniture, but not as an heir, makes it not astonishing that primogeniture operates in royal succession; for in patrimonies many patrimonial things are conferred upon sons, *as sons*, but not as heirs. For instance, certain duties which a freedman owes his patron are transferred to the patron's son *as son*, and are owed to him even if he may not be his father's heir [*Dig.* 38, 1, 29]; the same is true in respect to succession of freedmen, who pass to the children of the patron *as children*, even if they are not his heirs [*Dig.* 38, 2, 2]; the same is true in the law of burial in the sepulture of the parents, which is transmitted to the children, *as children*, even if they are not the

father's heirs [*Dig.* 11, 7, 6, inter alia]; the same is true of guardians [*Dig.* 26, 1] and dignities or the use of them [*Cod.* 1, 5].

§1.1.17

*Conclusion 17.* Succession to the throne in France does not entail imposition upon the new king of either the onera or the particular advantages of him whom he succeeds. This is proven because he does not succeed patrimonially or by way of hereditary, wherefore the onera or other particular hazards of the kingdom do not follow him. Feudal law says that if the nearest agnate succeeds a certain vassal in his fief, but not in his hereditary, he is not compelled to recognize or make good his hereditary debts. Moreover, things transferred to sons as sons, as in the case of freedmen's sons, have nothing in common with hereditary or the possession of goods [*Dig.* 38, 1, 4]. The reason for this is evident, because he does not hold the realm by his predecessor's disposition (for he cannot deprive him of it) consequently he does not have to fear its particular onera. The law says that an adopted son, does not have to bear onera inflicted by the adoptive father except to the extent of the fourth portion which he acquires by the law of filiation; for he owes this portion not to the adoptive father but to the provisions of the law. Thus the successor gains the kingdom out of the disposition of custom, not of him to whom he succeeds. The civil law principles (which are omitted here for the sake of brevity) are clear for their part; suffice it to cite *Dig.* 35, 2, 86 & 28, 5, 84.

§1.1.18

*Conclusion 18.* The king of France cannot deny the succession of him who is the successor-to-be, for he is fore-ordained. This is proven because the successor succeeds not from the king's dispositive will but against his will, according to the dictates of custom. So, the father cannot prejudice the son's filiational portion in respect to legitimate debts, nor disembarass him from it, for the son acquires not from him but from the provisions of law. These words were quoted earlier [*Dig.* 1, 7, 22] in respect to burdens placed upon the son [cf. also *Dig.* 35, 2, 86]. What is more, all added burden, since invalid, may be taken away; thus it is said concerning a burden in regard to legitimate debts, that everything is removed and remains to the son without burden [*Cod.* 3, 28, 32]. Wherefore in Deuteronomy 21 we read that the father cannot give the hereditary according to birth and remove the primogeniture. [*Lib. Sext.* 1, 8, 2].

§1.1.19

*Conclusion 19.* The first-born son or the successor does not lose the succession on account of ingratitude or similar cause committed against the king of France, nor can the king deprive him from the succession by force of his will or like reason. This conclusion follows, because the successor does not gain the kingdom from him but from operative custom, as has been said, therefore, etc. According to the law alleged above [*Dig.* 1, 7, 22], where the text says that the patron cannot deprive a freedman the freedom, once conceded by means of another disposition or ordinance because of ingratitude, for he gave him nothing gratuitously (by freeing him) but only restored to him a debt (his freedom) owed him [*Cod.* 6, 7, 2 & 6, 3, 22; *Dig.* 38, 1, 2 & 48, 22, 2]. But the primogenit who succeeds, gets the realm by custom, as has been said. Therefore the realm is not the king's as a patrimony, nor transferred through his active or effective agency to the successor; but strictly speaking, the effectiveness is transferred to him in as much as custom is the effective and active principle, so that no causality can be attributed to the king to whom he succeeds, nor causality of the instrument produced and acquired for this

reason, etc. Otherwise is it regarding a patron who is the productive cause in law of patronage, and for this reason can prejudge his sons [*Dig.* 38, 2, 10], which applies here and agrees with the aforementioned [*Dig.* 38, 2, 10].

§1.1.20 *Conclusion 20.* Since the primogenit success in the French realm, the king's other children do not have, according to common law, the right of legitimate portions in the kingdom to which they are entitled by natural law. Portions are reeked in patrimonial goods to which many persons can succeed in a divisible manner; the kingdom of France, however, is not of this kind, because it is given to only one person according to custom; hence, many cannot succeed to it, nor should they, according to Aristotle and Gilles of Rome [*Politics* PENDING; *De Regimine Principum* PENDING]. For kingdoms are indivisible [*Lib. Feud.* 2, 52; gloss on *Decretals* 3, 34, 6].

§1.1.21 *Conclusion 21.* Other children of the king of France cannot complain nor remonstrate because the succession of the kingdom excludes them and passes undivided to the primogenit. For the father himself does not hold by patrimonial right in the kingdom, and consequently neither the thing itself nor hope of it--therefore nothing--is taken from his children, just as no injury is done to heirs of ecclesiastical prelates, because they do not succeed in the church [*Decretals* 1, 17, 3 & 11]. Verily it can be said of this custom, speaking to sons: "Friend I do thee no wrong... Is it not lawful for me to do what I will with mine own? Or is thine eye evil because I am good, etc. Good in this, that I give the regnum to the first-born son of the king, just as it is that I am permitted, and evil is your eye in that which it covets, because I give the regnum to the first-born son and not anything to you." [*Matthew* 20]

§1.1.22 *Conclusion 22.* Although sons are barred by common law in royal succession from legitimate portions usually owed them by natural right, there may still be owed them portions of the kingdom which are assigned to them and are held by them in fief as vassals of the king. The first part of the conclusion is proven because through custom there are constituted rights in these things, [gloss ad verb. Moses in *Decrees* 8, 1, 5; *Lib. Sext.* 1, 8, 2 as in the 4th concl.] Much reasoning about natural and divine things support this. Something should be given to sons and their families so that they may live according to a decent standard, just as Abraham gave the bulk of what he owned to his son Isaac, but also gave bountiful gifts to others [*Genesis* 25], conceding that a double portion of patrimonial goods was owed to the first born son but that others should be allotted and assigned some things [*Deuteronomy* 21]. The second part of this conclusion befits well the law and the natural indivisibility of the kingdom [*Lib. Feud.* 2, 52], for indivisible means perforce that it must belong to one person [*Decretals* 3, 34, 6]. By this token, moreover, neither the rights of the crown nor the royal dignity is divided.

§1.1.23 *Conclusion 23.* If any king deserved to be deprived of his kingdom, the primogenit would not on that account be deprived of the succession, for the kingdom is not deferred to the successor by the father, nor through his active means or productivity, therefore, etc. The law says that a trespass of the law by the father takes nothing away from his children, except those things which he may have provided them if they should succeed to him intestate as the heir. Those things which are not derived from the father, but from the family or city or the nature of

things, remain firmly to the children and are not withdrawn by any crime of the father [*Dig.* 48, 22, 2-3]. But the primogenit succeeds in the kingdom not from the father but from deference of custom, therefore he loses naught by the father's crime. Things owed to the sons as sons are not lost by a delict of the parents, because they are not paused on by the active or productive medium of the father, nor by patrimonial rules [*Dig.* 2, 4, 8 & 1, 9, 7 & 9; gloss on *Dig.* 37, 14, 17; *Cod.* 6, 4, 1]. Roman law says that paternal children's rights are not lost on account of the crime of lese-majesty committed by the father, but pass to him and not to the fisc.

§1.1.23a

It follows from these things that if the king be deprived, the kingdom passes to the successor according to custom, not to any other person for any reason. The first part is proved by Roman law arguments which make it clear that those rights of the father which are not lost by any actionable offense pass to the son [*Dig.* 37, 14]. Even more important is this connection is the fact that kingdoms are not transferable to other persons, because they are controlled by custom [*Decrees* 8, 1, 5]. Kingdoms are secured to the primogenit because he has an established right during the king's lifetime, as said previously. Therefore, when the king is deprived, his successor is fulfilled [*Dig.* 38, 4, 5 or 9 & 38, 29, 24; *Cod.* 10, 14, 1]. According to Roman law, the deficient right of any person is acquired by any other person who has an established right in it [*Dig.* 28, 2, 11]; now, the first-born son has rights in the kingdom during his father's lifetime, as declared in previous articles, therefore it falls to him should the king be deprived.

§1.1.23b

From these things it is evident that the gloss in Canon Law [*Lib. Sext.* 1, 8, 2] which says that when the king is deprived because of a delict, the nearest of kin does not succeed, but those who have the charge [?] elect a successor [cf. gloss on *Decretals* 1, 6, 34J should be understood to apply in kingdoms conferred by election, because in this case the canon specifies the agency of succession. The gloss3tors disagree among themselves on this matter, for the text speaks about succession and really applies to kingdoms which are deferred by hereditary rights [*Decretals* 3, 34, 6], and indeed in patrimonies conferred by hereditary rights a father's delict *can* deprive the son of the succession, as much as of others things [*Dig.* 37, 14, 17 & 2, 4, 8]. This is proven in the legal gloss [*Dig.* 38, 2 or *Cod.* 6, 4] which says that the father's delict sometimes injures the sons in those things which belong to them as heirs, but never in those things which are theirs as sons. And the kingdom of France (as has often been said) does not defer by hereditary right; therefore, etc. This legal gloss applies when the heir-successor is not the son, but a brother or the like [*Lib. Sext.* 1, 8, 2], as in the case of the king of Portugal who had a brother, not a son. But the son as successor-to-be has established rights in the kingdom while the king is still alive, for his dominion by primogenitural right has great efficacy, as will be shown below in the second article. Therefore it is not strange that things are reserved for him when the father is deprived of the kingdom on account of some delict, or otherwise, for in that moment his rights are fulfilled [*Dig.* 2, 4, 8], more so than with succession by another person, such as a brother or relative, for that person, unlike the primogenit, does not have any established right by nature; by filiation, or by primogeniture while the king is alive, but has only some kind of simple right. It is not to be wondered that simple right can be lost on account of a delict of the king, as

in the case of elective succession, if the gloss on *Digest* 2, 4, 8 is understood this way, although it can be denied that it deals with it perfectly.

§ 1.1.24

*Conclusion 24.* The king of France cannot make a "constitution" or law regulating succession according to patrimonial or hereditary right, which he has got by custom, because the custom regarding this was already introduced by the consent of the three estates and the entire civil and mystical body of the kingdom which customarily directs the institution and election of the king according to common law; the glosses on canon law say that the "army of the people" creates the king or the emperor; 2 Kings 11 & 14 declares that the people make him king, therefore, etc. Moreover, dispositions concerning the election of the head of the body politic cannot be made by the incumbents [*Decrees* 8, 1, 1 & 2]. Dignities attached to the realm belong to the whole civil or mystical body of the realm, just as ecclesiastical dignities belong to churches; in neither case can the head do anything prejudicial to the dignities or without their concurrence [*Dig.* 39, 3, 8 & 8, 3, 11]. But by regulating the succession he would in effect be judging himself, and would make a law in favor of his successors who are held to be the same person as he, and therewith a favor which cannot be [*Dig.* 22, 3, 9 & *Cod.* 3, 5]. Canon law says that the king cannot legitimize a bastard only son, if he has one, so that he may then succeed him just as others would succeed [gloss on *Decretals* 4, 17, 13]. Therefore he has no right of disposition in respect to the realm. The disposition of kings and princes belongs to the people, that is to say, to the estates of the realm and the republic, therefore, etc. The king may not change things which are regulated by the public estate of the realm [*Decrees*, 25, 1, 3]; similarly the gloss on *Decrees* 1, 79, 10 which says that the Pope cannot make a successor to himself, because this would change the state of the church. etc.

§ 1.1.24a

Out of all the foregoing conclusions it has been demonstrated that during the lifetime of the French king his first-born son, the Dauphin has such a firmly established right of royal succession that he cannot be deprived of it by the will or disposition of the king or any other person. This is not true with respect to other children or generally in successions to patrimonial goods, where the parent may block children's rights of succession by means of alienations, testamentary debts, outright disinheritance, some crime on the part of the parents, or other ways. Thus primogenitary right is more firm and solid than that of children to their parent's patrimony. The primogenit has rights and prerogatives before all other children in the parental goods during their father's lifetime, as being a kind of lord [*Dig.* 28, 2, 11]. The next article will show that the Dauphin holds more efficacious and fuller prerogatives in the kingdom during the lifetime of the father than the other children, by dint of more potential reason; for more potent causes produce more potent effects, according to the laws [*Cod.* 8, 11] and Aristotle, as will be shown more clearly in the ensuing.

## SECOND ARTICLE

§1.2.0 In this second article, which will deal with rights of the first-born son of the King of France in the kingdom during his father's lifetime, by reason of filiation or of primogeniture, I shall set forth two sets of conclusions: first (§1.2a), rights by reason of *filiation*; second (§1.2b) by reason of *primogeniture*.

§1.2a.1 *Conclusion 1.* Granted that the father and the son may be differentiated by the subordination of one to the other, they may nevertheless be taken as one and the same species and nature--not only because is a man but also in the particular nature of the father. The conclusion follows from what Aristotle says to the effect that in the semen of man there is a kind of active impressed force derived from the soul of the progenitor, and his remote parents; and such is the identity of the particular nature of the father and the son, according to St. Thomas. This is what the glossator wished to say, in other words when he said [gloss in *Dig.* 50, 16, 220] that the nature of the father is conserved in the sons--namely, his very own particular nature. He does not, however, speak of nature in common, for this is conserved in every individual man; wherefore Aristotle says that the son is the soul of the father, even part of him. And for the affirmation of these things stands the sayings of Aristotle in *Concerning Animals* and *Concerning the Soul* [cf. Aristotle, *De gen. animal.*, 767a-768b]; *Genesis*, 21, 12, . where it is said, "Your semen, etc." *Genesis* 22, 17, "I will multiply thy seed as the stars of the heavens, etc."; *Decrees*, 30, 3, 13, where it is said "Father and son are esteemed to be one flesh, etc."; Aristotle, [*Nic. Ethics*, 1162a & 1184b]: "thus, at least the sons have been born from the parents just if they were inseparable from each other, etc."

§1.2a.2 *Conclusion 2.* By reason of this identity, custom transfers the realm and the succession of rulership to the first-born son. This conclusion is a consequence of the custom whereby succession is conferred upon the first-born son. So when one speaks about an abbot or another prelate, or any secular or ecclesiastical office, it is understood that the prelature or office as such is being referred to, and not the individual incumbent [*Decretals* 1, 29, 14; *Dig.* 2, 14, 41]. For filiation is nothing else than the immanent identity of a particular nature penetrating into the son [*Dig.* 50, 15, 220]. The saying of the Apostle speaks for this custom: "If the son, therefore the heir," [*Gelatins* 10; *Romans* 8].

§1.2a.3 *Conclusion 3.* During the father's lifetime the son is, by nature, co-master with his father of the father's possessions. For even as he is of the same nature as the father, when the father is alive, therefore is he master with the fathers, admitting that they may be differentiated by the subordination of one to the other. Thus the saying of Paul, "If the son, therefore the heir." For *heres* is said to derive from *herus* [master of the household], who is the master, whence *herus*, *heri*, *hero*--i.e., that which the master, etc. [*Dig.* 9, 2, 11] So speaks the Gospels in one place, in the words of the son of God [*John* 16, 15]: "All things whatsoever the Father hath are mine"; and another time in these terms evoking the identity of paternal nature [*Luke* 15, 31]: "Son, thou are ever with me," and "all that is mine is thine." etc. This conclusion will be confirmed more amply by civil law, in the next paragraph.

§1.2a.4 *Conclusion 4.* Because the son is one with the father when he is alive, he is

himself something of the father [Aristotle, as above]. And for this reason he is involved in the power of the father according to civil law, as Aristotle says [*Ethics* PENDING; cf. *Inst.* 1, 9]. Because of this reason of nature and society, civil law holds that the son and the father should be reputed as the same person [*Cod.* 6, 26, 10], "since the father and the son are of one nature, so they are understood almost to be one and the same person." The text says "almost", or "quasi" because they are not really the same person, since on personal grounds they may be differentiated; but by the artifice of law and in the effect of the law they are understood as the same person. Wherefore legal texts say that the father and the son are esteemed to be one flesh [*Decrees* 30, 3, 1-3] and "the voice of the father is the voice of the son, and vice versa" [*Inst.* 3, 19].

§1.2a.5

*Conclusion 5.* In way of summing up: the civil law says that the son is, in a way, the master of the father's possessions along with the father during the father's lifetime, so that after his death he does not acquire a new hereditary but continues his existent dominion in a more complete manner by achieving full administration of it [*Dig.* 28, 2, 11]. Another legal text says that this son who succeeds his father does not acquire the goods of the father but retains them [*Cod.* 6, 4, 3].

§1.2a.6

*Conclusion 6.* There exists today a difference in the old laws of paternal power and emancipation, by taking into account reasons of nature [*Auth.* PENDING]. Most clearly this appears in instances where testamentary succession is not involved [PENDING], but even in the old law things which passed to sons as sons [PENDING] took the remote parental power into account, for nature's sake [*Dig.* PENDING; *Cod.* PENDING]. Therefore, where the realm passes to the primogenit as such, the single reason of natural filiation is headed according to the remote civil and paternal power.

§1.2a.7

*Conclusion 7.* Viewing the matter with regard alone to the nature of things, it is evident that the son is "of the father" by being the same flesh and same particular nature, and held to be the same person by the operation of paterfamilial power in civil affairs; independent of the fact that the primogenit is master together with his father during the latter's lifetime, so that the son does not come upon a new dominion by his father's demise, but only realizes the full administration of the kingdom [*Dig.* 28, 2, 11; *Decrees*, 30, 3]. And more truly is he said to retain than to acquire anew [*Dig.* 38, 2, 9], for, of things transferred by custom, rulership of the realm passes more efficaciously and fully to the primogenit than do patrimonial goods to children, as said at the end of the preceding article. If the son is said to be master while the father lives, in patrimonies [*Dig.* 28, 2, 11], then much more effectively ought the primogenit be called master during the king's lifetime. It will be more fully evident in what follows that what operates here is not the civil power of the head of the family (*paterfamilias*) but the nature of things as elucidated in the previous conclusion.

§1.2a.8

*Conclusion 8.* So great is the authority of the son's co-dominion over property during the father's lifetime that either the father or the son may be called master of the family and of its goods. They are distinguished only by reason of paternity and filiation, one being called the

father, the other the son, but both are called the family--family, that is, in the sense of the substance of its goods [gloss on *Dig.* 28, 2, 11].

Just so, therefore, the son's legal succession in patrimonial things takes place according to the dictates of nature during the father's lifetime [*Auth.* PENDING; *Inst.* 3, 5 & 2, 19]. Just as the son is master with his father in paternal things on account of the identity of their particular nature and persons, so much more surely does the succession to the French realm go to the first-born son, for a more efficacious custom is in operation; and the supposed identity in nature and person of the king and his son ought to be such that the son is lord and king with the father while the father still lives; wherefore, not without cause was Abraham's servant accustomed to refer to Abraham's son Isaac as "my lord" while Abraham still lived, as said in *Genesis* 24, 65.

§1.2a.9

*Conclusion 9.* Granted that a "certain something" common to father and son makes the son master of the father's things while the latter lives, not however, contrariwise, does this "certain something" cause the father to be lord of the son's things according to common law. The reason for this difference is that succession (with which we are dealing) is natural; it stems from the demise of the parents, most plainly from the father to the son. Not, however, does the reverse occur unless by a confusion of the right order of things [*Dig.* 5, 2, 5 & 38, 7, 6]. For sons should not amass a treasure for parents, but the parents for the sons [*Gelatinus* 6; *Dig.* 29, 2, 79; *Cod.* 6, 61, 6].

§1.2a.10

*Conclusion 10.* When we say that the son is, in a certain manner, master while the father lives the term "in a certain manner" (*quoddammodo*) suggests that it does not exactly suit the dominion of the son in the patrimony; but contrariwise, it does suit the state of affairs in the kingdom of France and like places. The reason for the difference is that the son's dominion in the patrimony during the father's lifetime may be subjected to many fluctuations and depredations, since as it has been said often already it can be taken away by alienations, testaments, legations, voluntary debts, crimes of the father, and so forth; but not so the dominion appropriate to the king of France's primogenit while the father is alive, as said in Article 1, conclusion 18 and following. Therefore, this term "in a certain manner" does not denigrate the dominion befitting the primogenit in the French kingdom, etc. For the confirmation of this, consider St. Gregory's calling the son of the king "king" while his father was still alive, without any sign of impropriety, as in article one, conclusions 6 and 7.

§1.2a.11

*Conclusion 11.* The primogenit's dominion in the kingdom and the children's in patrimonial things while the father is alive, is theirs in a true and real fashion, just as any other dominion. For when the father dies, the son acquires no other class or species of dominion than what he had while his father lived, but rather continues in the same one. Thus the law says that the son's dominion appears to be prolonged after the death of the father [*Dig.* 28, 2, 11], so that the time before the death and the time afterwards do not differ except in the greater fullness of administration. The text says on this point "but no one doubts that the dominion of the son after the death of his father is a true thing, just as any other dominion".

§1.2a.12

*Conclusion 12.* The first-born son in the kingdom, like the son in the patrimony is

master of the realm and his father's affairs relating to that dominion [*Dig.* 41, 5, 3 (41,6); gloss on *Dig.* 28, 2, 11].

§1.2a.13

*Conclusion 13.* Just as dominion belonging to the primogenit in the realm, or to another son in the patrimony of the father, confers the right of possession while the father is alive, so also does it confer the right of administering the kingdom and paternal matters while the father is alive. For the effect of dominion is proven in the definition of the word, namely that dominion confers the right of disposition regarding the thing [*Bartolus* on *Cod.* 4, 35, 21; *Dig.* 42, 4, 3]. Otherwise, dominion would be useless, which is not allowable, for that which the master is *in re* he also is *in effectu* [*Cod.* 1, 3 (6), 26]. *Digest* 28, 2, 11 says implicitly that the son has the administration--but not the full administration--while the father lives.

§1.2a.14

*Conclusion 14.* Dominion belonging to first-born sons in kingdoms endow them with possession and administration during the father's lifetime, but yet it is not full nor free; for if he attains full or free rule *after* the father's death, then he did not have it before, as is proven textually in *Digest* 28, 2, 11 where it says "after the death of the father [the son does not acquire] the heredit, but rather the free administration."

Be it known, nevertheless, that full administration is the same as free administration, for full and free signify the same will [*Dig.* 30, 1, 81; *Cod.* 6, 21, 1 or *Dig.* 29,1,1] as the experts say, from which it follows that the son does not have full power or full administration during the father's lifetime because he cannot alienate, give away or put an end to the estate. He who does not have free and full power cannot alienate the goods, for he cannot help himself to that which he is charged to preserve [*Cod.* 2, 12 (13), 6 (16) & 2, 12, 16 & 5, 37]. Further in this regard, the kind of administration belonging to the son cannot be called full in respect to the father's administration, which belongs to the father freely, principally and prior; to the son, however, it belongs less principally, posterior and less freely, as it has been said. For this reason the father has precedence when he wishes to act, and the son is placed after him. Similarly regarding restitutions belonging to the son, for they belong in the first place to the father, and after him to the son. Thus public actions belong to many people, but the exercise and administration of them is given to the one who happens to have them fuller or greater [*Dig.* 40, 16, 5, plus glosses]. So also in the church, both the prior and the bishop of their own right act in defense of the church, but still the latter is preferred because (according to Pope Innocent III) his interest is greater, his right is fuller, and his administration more ample [*Decretals* 2, 13, 12 & 2, 19, 2]. So, the son's administration is not in his own right except posteriorly and less principally, or, as the text of *Digest* 28, 2, 11 says "in a certain manner" in deference to another person's superior position.

§1.2a.15

*Conclusion 15.* Because the son has patrimonial dominion, possession and administration of the father's goods while the father lives--albeit not freely so--and he can rule and administer while the father lives--albeit not freely so--I maintain that the first-born son holds much fuller and solidier administration in the kingdom of France than children do in the father's patrimony. This follows because the king's primogenit's dominion is more solid than the son's in the patrimony, and confers upon him a more solid and perfect effect and administration, because more potent

causes induce more potent effect. I say, nevertheless, that the first-born son does not have free administration while the father lives, nor should he rule as head, unimpeded [*Dig.* 28, 2, 11].

§1.2a.16

*Conclusion 16.* Despite the fact that the son's administration during the father's lifetime is not full, that his power is not derived from major effects, and that therefore it exists chiefly as an intellectual conception [gloss on *Dig.* 28, 2, 11], nevertheless in essence it is always alive, as is clear from the foregoing, especially the 11th conclusion. The law holds that heredity (which is an essence) is spoken of as an intellectual act [*Cod.* 3, 31,3].

§1.2a.17

*Conclusion 17.* From the fact that the primogenit has dominion and administration when the father is active and capable of ruling, that much more does he have solid administration and rule when the father is prevented from ruling by madness, absence or otherwise. It is proven by cases-of administration which are not patrimonial [*Dig.* 26, 7, 25 & 1, 10, 1; *Lib. Sext.* 1, 14, 8], where it is clear that although exercise of jurisdiction may belong to one person by preempted rights, and not to a second person, nevertheless administration and exercise of jurisdiction is transferred to the co-delegate. to whom otherwise it belongs minimally when the first person is impaired by infirmity. Canon law calls for the firm executory right to one who would not otherwise be executor, when the principal is impaired. So, where the king or any other ruler is impaired from ruling, the firm rulership and governance is transferred to another person; and obviously to a son who already has dominion when the father is alive. Also, in patrimonies the action of dowry is common to the father and the son [cf. *Dig.* 24, 3, 2], but when the father is impaired by madness, control is transferred to the son [*Dig.* 24, 3, 23 & 2, 4, 12 & 23, 2, 11]. Too, if the possibility of future accession transfers the power of ruling to an agnate heir when the possessor is prevented from ruling [*Inst.* 1, 23; *Dig.* 26, 4, 1], all the more so does the lordship already belonging to the son in the father's realm entitle the son to full rule of the realm when the father is impaired, because then the dominion is already in action, for the agnate enjoys the possibility of future succession only in the case of contingency, while the son holds a kind of administration in regard to the dominion and therefore has a greater claim than any outsider, who would be acquiring a new thing, when the father is impaired. For it is more difficult to bring something into existence than to just to fulfill something already existent [*Dig.* 42, 8(9), 19].

So it appears demonstrated that when the father is impaired from ruling, the rule of the kingdom with lordly powers, which the primogenit had already had while his father was alive, belongs to him more fully and solidly than to anyone else. Whence the truth of Luke 4: "You do not understand because ion these things (which are mine from the father)) it is fitting to be mine, etc."; therefore, etc. And these dicta suffice in so far as rights of filiation conferred upon the son.

§1.2b.0

Regarding the right of primogeniture I pose the following conclusions.

§1.2b.1

*Conclusion 1.* The custom by which royal succession passes to the primogenit is in accord with divine law, as it is held in *Deuteronomy* 21, 16-17. And in the preceding article, conclusion 8, I mentioned 1 Kings 2,15, where Adohijah, David's first-born son, said to Bathsheba "Thou knowest that the kingdom was mine, and that [all Israel set their faces on me, etc. ...the kingdom is become [my brother' s], etc." There is, moreover, the warranty of civil law reasoning, in the question of real rights or their approximation, where the first in time has the

stronger right; therefore, when a certain thing has been given or sold to two people, the stronger claim belongs to the one to whom it was transferred first, or who first had been established as master [*Cod.* 3, 32, 15] and holds it in quasi-lordship; the same is true in regard to other real rights [*Cod.* 8, 17] and regularly with respect to prior claims. But successions and dominions, too, are real rights, therefore whenever custom allows the primogenit to be master by reason of his being the first-born [*Dig.* 28, 2, 11; *Inst.* 2, 19], he is and ought to be prior to any other person because he is prior in time. Just as the primogenit's right is supported by civil law reasons, so also is it supported by moral law, upholding the highest common good, for it is suitable for the eldest to be preferred to juniors in royal succession because the juniors are held to yield to him, according to Aristotle and Gilles of Rome [PENDING].

§1.2b.2 *Conclusion 2.* The rights of the primogenit are multifold. He is usually dressed in a special costume on festive occasions. He receives a double portion at meals. He gives the benediction to his brothers. He makes the offering before others on festive occasions. He antecedes the others in succession [*Deuteronomy* 21]. He is lord of his brothers and his brothers genuflect before him [*Genesis* 27]. He holds the seat at the right hand of the father [gloss on *Decrees* 7, 1, 8--comm. of Magister Historiarum on *Genesis* 26].

§1.2b.3 *Conclusion 3.* In kingdoms, duchies, and baronies, the primogenitural right is observed in succession, in honorific genuflection when being introduced to a primogenit, in the sons of kings and dukes being seated before any others (except, of course, the king or duke himself), and everywhere, besides, in the matter of benedictions, double portions and means, offering and special robes, etc.; so *Genesis* 43,33 says that at a banquet Joseph seated his brothers "the first born according to his birthright, and the youngest according to his age."

§1.2b.4 *Conclusion 4.* To sit at the right hand of the father belongs by primogenitural right to the first-born son, according to the gloss in canon law [*Decrees*, 7, 1, 8]. To sit at the right hand of the father, moreover, is none other than to co-rule with him, according to Augustine and Thomas, for he who sit as at the king's right hand rules and judges along with him [PENDING]. Scripture says that the first-born son should be thought to sit in his father's seat [*Exodus* 11 & 12].

§1.2b.5 *Conclusion 5.* Since the king of France's first-born son, Charles, Dauphin of Vienne, has primogenitural right, he should rule and have dominion with his father even while the father is in full good health, and so to co-reign with the father.

§1.2b.6 *Conclusion 6.* Because the first-born son holds dominion and administration with the king because of filiation and primogeniture, and co-reigns with him, therefore he should be called the "young king" (*rex juvenis*), as he is in fact designated by St. Gregory [*Dialogues* III, 31], and canon law discloses openly in the text and the gloss that while the king is alive the primogenit can be called not only ~u~u but also lord (*dominus*) [*Decrees* 24, 1, 42]. So also Abraham's servant called Abraham's son Isaac "my lord" while Abraham still was alive, as is related in *Genesis* 24.

§1.2b.7 *Conclusion 7.* In order to respect some preeminence for the father's position in rulership, he should be called simply *rex* while the primogenit ought to be called, with a bit less gravity, *rex juvenis*. Although the word *juvenis* may indicate some degree of difference, nevertheless each of them is called *rex*, as by St. Gregory [*Dialogues* III, 31] and in canon law [*Decrees* 24, 1, 42].

The latter text says that both the father and the son are lords, and should not in this sense be differentiated; for, though one is the father and the other the son, each is called lord in respect to the family and its goods.

§1.2b.8 *Conclusion 8.* If during the king's lifetime his first-born son can be called king according to St. Gregory, and lord according to Roman law [*Dig.* 28, 2, 11], then the clearly the rule of the kingdom belongs to him while the king is alive, even if the king is capable of ruling. It is proven because otherwise the king may be called king to no purpose, but this is just not done, because names should be harmonious with things [*Inst.* 2,7] and if such is the word, it should be the effect [*Cod.* 1, 3(6), 26; *Decrees* 23, 5, 23]; wherefore it is said that if he is deprived of the name, he is deprived of the effect, and consequently the name has the effect [*Cod.* 3, 12, 4].

§1.2b.9 *Conclusion 9.* If dominion, administration and co-rulership with the father belong to the primogenit while his father is alive and not impaired from ruling, it follows necessarily that rule and administration of the kingdom belong to him much more firmly, freely and fully when the king is impaired by absence, madness or infirmity [*Lib. Sext.* 1, 14, 8 & 3, 11, 2; *Dig.* 1, 10, 1; allegations in conclusion 17 above]. In Roman law, the judge and assessor may have no more power than to sit alongside the president, as do most judges in Languedoc, but when the president is impaired from presiding by being absent or the like, the judge and assessor can preside and exercise the power of president [*Auth.* 10, 82]. So, in the present case, I submit that the first-born son alone should have the power of sitting along with the king: (in fact, he has more power than that, as has been said) and that when the king is impaired from ruling, the complete and free power of rulership is transferred to the first-born son [*Lib. Sext.* 1, 8, 2]. One canon put the case principally--and correctly so, in my judgement--upon the basis that the primogenit sits with the father; he does not simply sit *alongside*, but *with* the father according to Augustine, which is supported by 2 Kings 15, 5 which says that when Azariah the king of Judah was impaired from ruling by leprosy, the rule of the kingdom was transferred to his son Jotham. For this reason the rule of the kingdom belongs to the lord Dauphin, because certainly insanity is a greater impediment to the king than leprosy, for the former impairs judgment and discretion but the latter not; thus the former impedes more the faculty of ruling because it is completely debilitating.

§1.2b.10 *Conclusion 10.* Administration and rulership belong to the primogenit while the father is alive, whether or not the father is able to rule (as declared before) and even if the father is unwilling, because said rulership belongs to him by his own proper right of filiation and primogeniture, and is not affected by his unwillingness [*Dig.* 1, 7, 22 & 35, 2, 86 & 50, 17, 3]. He can be willing or unwilling, can repudiate or accept, but the rights, based on primogenitural filiation, of succession and administration do not derive from the king's will.

From the foregoing, therefore, it is plainly revealed that when the king is impaired from ruling by madness or any other reason, rule of the kingdom belongs to the first-born son, even if the king is unwilling.

§1.2b.11 Finally, so that no one may be doubtful about the meaning of the word *primogenitus*, let it be clear that while the primogenit is he whom no one precedes, another may follow. The *primogenitus* is sometimes called the *unigenitus*, whom no one precedes nor follows [*Matthew* 1,

25]. In the question of filiation, the Dauphin stands forth as the only son, thus having been noted by Giovanni Balbi in his dictionary called *Catholicon*. The final word is given in *Luke 2, 7*, where it is said that Mary brought forth her first born son, and yet afterwards no one was born, etc. Therefore, *Decretals 5, 40, 5* says most correctly that the primogenitural rights are invested above all in him, and belong to him. Furthermore, the primogenit--and also the unigenit--is said to be he who in his actions has no brother, although he had one who died. For Solomon calls himself the only begotten son in the parables, although Scripture attests that a brother preceded him from the womb [2 *Samuel 12, 15*]. On this question see also Canon law, in the gloss [on *Decretals 5, 40, 3*] where it is said "he is not regarded as having been born who does survive beyond birth" (*ita non videtur fuisse qui non duravit*).