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The commentaries of Gaius and Rules of Ulpian

Gaius, Ulpian, John Thomas Abdy, Bryan ...
Gaius.

THE COMMENTARIES OF

GAIUS

AND RULES OF ULPIAN

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THE COMMENTARIES OF

GAIUS

AND

RULES OF ULPIAN

TRANSLATED WITH NOTES BY

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JUDGE OF COUNTY COURTS,
LATE REGIUS PROFESSOR OF LAWS IN THE UNIVERSITY OF CAMBRIDGE,
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AND

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LATE FELLOW AND LECTURER OF CORPUS CHRISTI COLLEGE,
AND FORMERLY LAW STUDENT OF TRINITY HALL;

...nique Romarum jura... scribitur

...ptitale cum Romanorum jureconsulorum scriptis comparati
...tum nervi inest, tantum profundiatis. ...nitz.

NEW EDITION.

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PREFACE TO THE FIRST EDITION.

No one who watches the progress of legal literature in England can fail to observe the recent remarkable development of the study of Roman law in our country. Fourteen years ago the learned author of Ancient Law, in his admirable essay on Roman Law and Legal Education, pointed out the fact as even then visible. In that essay, which for its exhaustive reasoning and eloquent advocacy of the merits of the law of Rome can never be too often noticed nor too frequently perused, the writer mentions one special cause why Roman Law has a peculiar value to Englishmen. "It is," he says, "not because our own jurisprudence and that of Rome were once alike that they ought to be studied together; it is because they will be alike. It is because in England we are slowly and perhaps unconsciously or unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought and to the same conceptions of legal principles to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation." Nor should it be forgotten, as he points out, that the literature in which Roman legal thought and legal reasoning are enshrined is the product of men singularly remarkable for wide learning, deep research, rare gifts of logical acumen, and "all the grand qualities which we identify with one or another of the most distinguished of our own greatest lawyers and greatest thinkers."

It is then a matter for congratulation that what may be fairly called a revival has taken place in this branch of learning;

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1 Cambridge Essays, published by J. W. Parker and Son in 1856.
and that in our own University the study of Roman Law, which has always had a footing here, although in later times frequently but a feeble one, has fixed its hold more firmly amongst the other studies of the place. Unfortunately our knowledge of Roman Law has been for many years past circumscribed within very narrow limits. Its excellencies, literary and juridical, have been judged of from one work alone; and whilst the whole range of classical writers has been eagerly travelled over by the teacher and the student, the author and the reader, the style, the language, and the logic of some of Rome’s greatest thinkers and ablest administrators have been utterly neglected, or at best noticed in vague and careless reference. If in addition to the Institutes of Justinian the reviving taste for Roman jurisprudence shall promote a closer and more careful study of the language and thought of the old jurists, as exhibited in the books of the Digest, it may confidently be predicted that in every department of knowledge will the student of imperial Rome be a gainer; that our store of information as to her manners and customs, her legislation, the private life of her citizens, and, last though not least, her language itself, will be largely increased.

The University of Cambridge has, however, wisely confined the attention of its law students for the present to the great work of Gaius, (a translation of which is now offered to the public,) and to the Institutes of Justinian, so far as an acquaintance with the original language of the legal sources is concerned. For the present we say, because it is to be hoped that the Digest itself may after a while be recognized as a fit subject for the student’s preparation, when with increased facilities an increased taste for the fontes usitassini juris has been engendered; and that excerpts of its most practical parts may be made hereafter to constitute a portion of his legal course. Indeed there seems no reason to doubt that far more extensive use will in time be made of the sources of Roman law, and that the writings of Ulpian, Gaius, and others of the ante-Justini-anean compilers of legal histories and legal forms, will be as much recognized as forming a part of Roman Law study as the Institutes of Justinian have been and are.
On Gaius himself, his name, his country, the works he composed, his position amongst the lawyers of Rome, his fame in later times, the story of the loss and wonderful recovery of his Commentaries⁴, and the influence of that work on the treatise of Justinian, there is no need to dilate. All that can be told the reader on these and other points in connection with his life and writings is so fully and ably narrated in the *Dictionary of Greek and Roman Biography* by Dr Smith, that it is sufficient to refer him to it. There are, however, one or two matters deserving of more particular attention.

In the first place, as regards Gaius himself, it is important to remember that whatever reputation he acquired in later days, and however enduring has been his fame as the model for all systematic treatise-writers on law, in his own time he was only a private lecturer. Unlike many of the distinguished lawyers who preceded him, and others equally distinguished who were his contemporaries, he never had the privilege *condendi jura, in jure respondendi*. That he was a writer held in eminent distinction in Justinian’s time is clear from the large number of extracts from his works to be found in the Digest⁵, and there is good reason to believe that he was a successful and popular lecturer; but it is strange that with all his rare knowledge and laborious research he did not emerge from his comparative obscurity. It may be that the very learning for which he was pre-eminent unfitted him for public life. His love of investigation, his strong liking for classification and arrangement, and his

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¹ Niebuhr discovered the MS. in 1816. It then contained 126 pages. One page, which had become detached, was found earlier, and published by Maffei in 1740, and again by Haubold in 1816. This corresponds to what is now Book IV, §§ 134—144, beginning with the words: TIONE FORMULAE DET. T 1, and ending PRO HEREDE AUT PRO POSSESSOR. Niebuhr’s manuscript was far from complete, wanting three entire pages besides fragments of pages here and there.

² A catalogue of these *excerpta* will be found in the article above-mentioned in the *Dictionary of Greek and Roman Biography*. The *Index Florosimus* merely gives the titles of the books composed by Gaius. An analysis of the passages from these quoted in the Digest, of which there are as many as 535, is laborously worked out in the *Jurisprudentia Restituta* of Abraham Wieling, pp. 7—10, and in the *Palimpsest* of C. F. Hommel, Vol. 1. pp. 55—126.
studious habits, possibly gave him a distaste for actual practice, in which all these qualities are of much less importance than rapidity of judgment, prompt decision, and aptness for argumentative disputation. He was one of those men like our own John Austin; lawyers admirably fitted for the quiet thought and learned meditation of the study, but averse from the stir and bustle of the forum; yet not the less valuable members of the profession which they silently adorn.

A comparison of the excerpts from the writings of Gaius in the Digest with those from Ulpian, Paulus, Papinian, and others, to whom was granted the privilege of uttering responsa, will show that there is in Gaius, as his Commentaries also evince, an unreadiness to give his own opinion upon contested questions, a strong inclination to collect and put side by side the views of opposite schools, and a constant anxiety to treat a legal doctrine from an historical rather than a judicial point of view. In Ulpian and Paulus, and men of that stamp, we meet with decisive and pithy opinions upon legal difficulties, an abundant proof of firm self-reliance and indifference to opposite views, and a lawyer-like way of looking at a doctrine as it affects the case before them, rather than accounting for its appearance as a problem of Jurisprudence or Legislature; with them it is the matter itself which is of primary importance, with Gaius it is the clearing up of everything connected with the full understanding in the abstract of the subject on which he is engaged. To this peculiar turn of his mind we are probably indebted for his keen appreciation of the help which history affords to law, and for the large amount of reference to archaic forms and ceremonies which proceeds from his pen.

From Gaius himself the transition to his Commentaries is natural. Three or four topics present themselves for notice upon that head: (1) Their nature and object; (2) the effect upon them of certain constitutional reforms that had been and at the time of their publication were being carried out at Rome; (3) the mode in which they were first presented to the public.

1st. As to the nature and object of Gaius' Commentaries:—There is an opinion pretty commonly accepted as correct, that
this volume was written, like the corresponding work of Justinian, for the express purpose of giving a general sketch of the rules and principles of the private law of Rome, and that it was intended to be a preliminary text-book for students. That this gives a very incorrect notion of the aim of Gaius and the nature of his work is clear, partly from a comparison of it with that which was intended to be a student's first book on law (viz. the Institutes of Justinian), and partly from the analysis of its subject-matter. What Gaius really had in view was, not the publication of a systematic treatise on private law, but the enunciation, in the shape of oral lectures, of matter that would be serviceable to those who were studying with a view to practice. The work itself, as we shall show presently, was not directly prepared for publication, but was a republication in a collected form of lectures (the outline of which perhaps had been originally in writing and the filling-up by word of mouth,) when the cordial reception of the same by a limited class had suggested their being put into a shape which would benefit a wider circle of students. The contents of the book will bear out this view. Thus, in the first part, Gaius speaks of men as subjects of law, shews what rights they have, points out who are personae and who are not, who are under potestas and manus, who can act alone, and who require some legal medium to render their acts valid. In fact, the main object of the whole of this first part is to render clear to his hearers how those who are of free birth stand, not only in relation to those who are not, but in relation to the law. Hence there is no attempt at explaining the nature of Law and Jurisprudence, no classification of the parts of Law, no aiming at philosophical arrangement and analysis, but a simple declaration of the Roman law as it affects its subjects, men, illustrated of course by historical as well as by technical references. Hence too we understand why there is nothing in the shape of explanation of the rules relating to marriage, of the relative position of father and son, of patron and client, nothing of the learning about the peculium, or about the administration of the property of minors and wards. In short, this portion of the Commentaries might be styled the
general Roman law of private civil rights, cleared from all rules connected with special relations. One special matter, however, is discussed with much attention and detail, viz. the position of the *Latini* in relation to private law; but of this anomaly we shall speak at more length presently.

So far for the first portion of the work:—The second is of the same nature, viz. a declaration of the general rules of law as affecting *Res*. Here the arrangement is as follows:—In the first place Gaius gives us certain divisions of *Res* drawn from their quality and specific nature; he then proceeds to explain the form and method of acquisition and transfer of separate individual *Res*, whether corporeal or incorporeal, prefacing his notes upon this part of his subject with a short account of the difference between *res mancipi* and *res nec mancipi*; from this he goes on to describe the legal rules relating to inheritances and to acquisitions of *Res* in the aggregate (*per universitatem*), interspersing his subject with the law relating to legacies and *fideicommissa*, last come obligations, which are discussed as incorporeal things not capable of transfer by mancipation, in *jure cesso* or tradition, but founded on and terminated by certain special causes. In this part of his work it is very important to bear in mind¹ that the reader is not to look for a detailed account of the force and effect of obligations, and of the specific relations existing between the parties to them by their creation and extinction, for upon these matters Gaius does not dwell. His chief aim here, as it was in the subject of inheritance, is to show how they began and how they were ended. Thus then this second part of the Commentaries may be entitled “The objects of Law, their gain and loss.”

The third part of the Commentaries is entirely confined to the subject of actions. Here too if the book be compared with the parallel part of Justinian's Institutes a striking difference in the nature of the two will be visible. Gaius's work is in every respect a book of practice: it considers actions as

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¹ We are indebted to Böcking's short but valuable *Adnotatio ad Tabulas systematicas* for this analysis of the Commentaries, especially for the particular fact here adverted to.
remedies for rights infringed; it discusses the history of the subject, because the actual forms of pleading in certain actions could not be explained without an examination into their early history; it dwells upon the various parts of the pleading with a care that is almost excessive; points out the necessity and importance of equitable remedies; in fact, goes into a very technical and very difficult subject in a way that would be uncalled for and out of place in a mere elementary treatise on law.

2nd. The influence of certain political changes then going on at Rome upon Gaius's treatise has now to be noticed. Even to an ordinary reader of the Commentaries two remarkable features in them are visible. One the elaborate attention bestowed on the relation of the _peregrini_ to the existing legal institutions of Rome, the other the constant references to the effect of the establishment of the Praetorian courts, with their equitable interpretations and fictions, upon the old Civil Law. A few words upon these two points will not be out of place. There is a chapter in Mr Mervale's able _History of the Romans under the Empire_, which is most deserving of consideration by the student of Gaius. It is the one in which he speaks of the events that marked the reign of the Emperor Antoninus Pius¹. The historian there passes in review the political elements of Roman Society at that time. Among the phenomena most deserving of attention two are especially noticed, the position of the Provincials in the state and the extension of the franchise on the one hand, and the relation of the _Jus Civile_ and the _Jus Gentium_ on the other. On the former head the narrative treats first of the struggles of the foreigners to obtain a participation in the advantages of Quiritary proprietorship, next of the gradual extension of Latin rights, and afterwards of full Roman rights, till the latter were in the end enjoyed by all the free population of the Empire. One or two passages deserve quotation simply for the sake of their illustration of the proposition we shall maintain—that Gaius held it a leading object to illustrate that part of the

¹ Ch. LXVII.
law that had the highest interest for the practitioners of the day, viz. the legal rules and the method of procedure by which the transactions and suits of the *peregrini* were affected.

Mr Merivale tells us then "that great numbers had gained their footing as Roman Citizens by serving magistracies in the Latin towns, but the Roman rights to which they had attained were still so far incomplete that they had no power of deriving an untaxed inheritance from their parents. Hence the value of citizenship thus burdened and circumscribed was held in question by the Latins. Nerva and Trajan decreed that those *new citizens*, as they were designated, who thus came in, as it was called, *through Latium*, should be put on the same advantageous footing as the old and genuine class." Again he says, "great anxiety seems to have been felt among large classes to obtain enrolment in the ranks of Rome...... Hadrian was besieged as closely as his predecessor. Antoninus Pius is celebrated on medals as a multiplier of citizens." From these facts we can draw the conclusion that a large portion of the most important and lucrative business for lawyers in Rome at the period when Gaius wrote consisted of suits in which the *Peregrini* were concerned, and therefore that a knowledge of the rules of law by which they were affected was of the highest value. Hence it is easy to account for the constant and close attention bestowed by Gaius upon the *Latinitas*, and upon all legal matters relating to it, throughout the Commentaries.

It would, however, be impossible to deal with these topics apart from that very remarkable phenomenon that must catch the eye of every reader of Roman law, viz. the *Jus Gentium* and its influence upon the Praetorian Courts. Here again Mr Merivale must be our authority, for he has shewn most clearly how useless was the civil law of Rome in respect of questions between foreigners or between citizens and foreigners. He has described the anomalous relations of the *Jus Civile* and the *Jus Gentium* in the Flavian Era, and has drawn attention to the important position occupied by the Edict of the Praetor. To his narrative we can but refer, but the inference we would draw from that narrative is that the attraction and value of
Gaius's work to its first readers lay precisely in the fact that upon all these points (points as we see of the highest value at that time to the practising lawyer), his rare knowledge of pleading and procedure and his nice appreciation of the value of equitable remedies made him an authority of the highest rank, and that these topics were never disregarded when an allusion to them or illustration from them was possible.

3rd. As to the shape in which the work of Gaius was first given to the world we have already intimated our opinion. It was not a systematic treatise composed and prepared for publication like the Institutes of Justinian, but a sketch of lectures to be delivered on the legal questions most discussed at the time, corrected and amplified afterwards by the lecturer's own recollections of his *viva voce* filling-up, or by reference to notes taken by some one of his auditors.

That the Commentaries are not intended to be a brief Compendium is plain. In a Compendium every topic is touched upon, none treated at excessive length. Gaius, on the contrary, omits many subjects altogether, as *dos, peculium castrense*, the rules as to *testamenta inofficiosa* and the *quarta legitima* (although the cognate subjects of institution and dis-inheritance are amply discussed), all the *real* contracts except *mutuum*, the "innominate" contracts, quasi-contracts, and quasi-delicts, the rules as to the inheritance of child from mother or mother from child, &c. &c. Other topics he discusses at inordinate length; the subject of the *Latinitas* is explained fully twice, viz. in I. 22 et seqq. and again in III. 56 et seqq.; the description of *agnatio* in I. 156 is repeated almost word for word in III. 10, and with the very same illustrative examples; the circumstances under which the earnings of others accrue to us are catalogued in II. 86, and again in nearly the same phraseology in III. 163; so too there is a

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1 After this conclusion had been come to by the Editors they had the satisfaction of finding their views borne out by an excellent monograph published only a few months back by Dr. Dernburg of Halle, of which they have since made free use. *Die Institutionen des Gaius, ein Collagenheft aus dem Jahre 1861 nach Christi Geburt.* Halle, 1869.
double discussion of the effect of the Litis Contestatio, first in I. 180, 181, secondly in IV. 106—108. Huschke, who assumes the Commentaries to have been from the beginning a systematic treatise, says that Gaius would not have investigated the same subject twice, nor have stayed the progress of the reader to recall him to what had been already described, unless he had allowed the earlier books to pass from his hands and so could not by reference to them discover that he was passing a second time over the same ground; and hence he frames a theory that the Commentaries were published in parts. "This hypothesis," says Huschke, "explains why on many points there is a second notice fuller and more accurate than the first."

But the second reference is not always more full and accurate than the first. Many proofs of this might be given, but we will only ask the reader to compare the passages II. 35—37 and I. 85—87, and say whether the latter adds anything to the knowledge imparted to us in the former. So also in other instances, as II. 58 and I. 201.

The lecture-hypothesis explains this peculiarity far better. When a systematic treatise is composed, the author can simply refer his reader back on the occasion of an old topic cropping up again; but in a lecture this is impossible, and to prevent a misconception or to guard against a defect of memory on the part of his audience the lecturer repeats his former statements even at the risk of being tedious. This too, if thoroughly acquainted with his subject, and if delivering a course of lectures old and familiar to him by constant repetition, he is almost certain to do, as Gaius has done, in a form identical even in its verbiage with the first enunciation.

Besides these obvious arguments for the view here adopted, Dr. Dernburg brings forward others of a more refined and subtle complexion. The abundance of examples, a well-known device of a lecturer to maintain attention; the commencement of a new subject with such examples rather than with a dry statement of a legal maxim: the introduction of sentences such as "Nunc transeamus ad fideicommissa. Et prius de hereditatibus despiciamus," which serve excellently to give the auditor time
to make his notes in a lecture-room, but are unnecessary and
wearisome in a set treatise; the repetition of an idea in a new
wording for the same end of giving rest to the hearer, as in
the description of the parts of a formula "all these parts are not
found together, but some are found and some are not found,"
&c. &c.; the marked antitheses, such as "heres sponsoris non
tendet, fidejussoris autem heres tenetur," the identity of phrase-
ology riveting attention when it proceeds from a speaker,
the want of change being wearisome on the part of a writer;
all these circumstances are pressed into the service of his and
our argument. Hence we may fairly assert that the nature of
the commentaries is such as we affirmed it to be at starting.

But whatever be the irregularities and omissions arising from
the character of the work, it must still rank high, not only
as the first law-book, on which all other legal treatises have
been based, but as possessing an intrinsic value of its own for
the light it throws upon old features of Roman life and Roman
customs, for its keen appreciation of the aid which History
lends to Law and Legislation, and for its philological spirit.
To the lawyer desirous to know the detail of Roman practice
the fourth book alone would be enough to render the volume
priceless; to the classical student seeking to acquaint himself
with the outline of Roman law for the better comprehension
of the classical historians, orators and poets, Gaius is at once
an author more agreeable to peruse, because his language
although not of the golden, is still an admirable specimen of
the silver age, and beyond all comparison superior to the
utterly debased style of Justinian, and more valuable as an
authority because his law is that of a period only a century
and a half posterior to Cicero, whilst Justinian is separated
from him by more than five hundred years.

We have now to touch upon a few points more intimately
connected with the present translation.

The text relied upon is in the main that of Gneist, but in
the fourth book frequent employment has been made of Heff-
ter’s variations and suggestions, for upon that book Heffter is
the leading authority. Gneist's edition, as is well-known, is a recension of all the German editions prior to 1857, the date of its publication. The chief of these editions we ought perhaps to enumerate; as to the others the reader will find full information in the preface to Böcking's fourth edition, published at Leipzig in 1855. The Editio Princeps of 1820 was brought out by Goschen, four years after Niebuhr's discovery of the manuscript. Upon Bluhme's fresh collation of the MS. a second edition, embodying his discoveries, corrections, and suggestions, was given to the world by Goschen in 1824. It is of this edition that Böcking remarks: "Hujus exempli quam diu nostris suus stabit honor, nunquam pretium diminuetur." Death interrupted Goschen in his task of bringing out a third edition, but his work was completed and published by Lachmann in 1842. Klenze's edition appeared in 1829, those of Böcking successively in 1837, 1841, 1850 and 1855. Heffer's elaborate commentary and carefully emended text of the fourth book bears the date 1827.

From all these and from other editions of minor importance Gneist drew up a text in 1857. To this text, as was said above, we have generally adhered, retaining also Gneist's plan of printing in italics those words and sentences which have been filled in conjecturally where lacunae appeared in the manuscript. In the troublesome task of verifying these italics we have depended on the reprint of the Verona MS. itself, which Böcking published in 1866. In the preface to this work, written by Goschen, the date of the MS. is referred to a time anterior to the age of Justinian: a conclusion in which Niebuhr and Koppe coincide.

Huschke's valuable suggestions for emendation of the text have, as the reader will observe, been frequently adopted by the editors of the present translation. These are to be found in the various works of that learned civilian which appeared between 1830 and 1855.

In the translation we have adhered as literally to the text as possible, preferring to explain difficult passages in notes rather than to paraphrase them.
The notes are not intended to give a complete outline of Roman Law, but merely to elucidate the author's meaning; and if we have erred on the side of brevity, we have done so because we desired to present to the reader Gaius himself, rather than Gaius hidden or overburdened with commentary. With this view we have remitted to an Appendix several of our longer notes.

Our quotations have been as much as possible confined to Text-books easy of access, to Classical authors, and to the Sources. Wherever a well-recognized authority has clearly explained the matter in hand a mere reference has been given. In quoting the Sources we have adopted the numerical mode of reference, thus Inst. 1. 2. 3 signifies Justinian's Institutes, first book, second title, third paragraph, and D. 4. 3. 2. 1 means Digest, fourth book, third title, second law, first paragraph. Those to whom the verification of passages in the Digest and Institutes is a novelty should take notice that the opening paragraph of every law in the former, and the opening paragraph of every title in the latter, bear no number, but are marked by the symbol pr., an abbreviation for principium.

Gaius himself is quoted without name: thus II. 100 denotes the 100th paragraph of the second commentary of Gaius.

Cambridge, March 1870.
In presenting a second edition of the Commentaries of Gaius to the public we have, as will be seen, enlarged the scope of our first labours by adding to Gaius's treatise that of another Roman Lawyer of equal celebrity as a jurist, of equal reputation as a man of learning, and in his day of higher position as a member of the great body of advocates. There are good reasons why the Rules of Ulpian, fragmentary as they now are, should be bound up with the Commentaries of Gaius.

In the first place these writers are the only two (if we except Paulus) whose works have been preserved to our day in anything like a collected form, and both treatises, so fortunately preserved, are rich in illustrations of the spirit and remarkable characteristics of the early Roman Law. No doubt there are other names in the long list of Roman lawyers from Cicero's time to that of Alexander Severus which occupy as high a position in the annals of Roman jurisprudence as those of Gaius and Ulpian; and other text-writers who claim equal respect as authoritative interpreters of Law. Between Servius Sulpicius "the most eloquent of jurisconsults and most learned of orators" and Papinian, the instructor of Ulpian and Paulus, lawyers of repute are numerous;—their writings and their opinions swell the pages of the Digest; their influence is felt even in the decisions of English Judges;—yet none of them have left continuous works that have survived to our day.

In the second place, between the two treatises here presented to the public there is a close affinity. Both are meant to exhibit the leading doctrines of the Roman Law as it affects persons in their private capacities, and both are compendia of
law equally useful to the student and to the practitioner. Each of them throws light upon the other, and each supplies the other's deficiencies.

We have already spoken at some length of the characteristics of Gaius's work, and have said something about his reputation as a jurist and his position as a professional advocate. It behoves us to add a few words upon the claim of Ulpian to rank among the leading authorities in Roman Law. But before proceeding to this special topic some short notice of the general influence and character of the jurisconsults of Rome will be an useful preliminary. The golden age of Jurisprudence is a well-known and almost proverbial expression for the 200 years that intervened between the accession of Augustus and the death of Alexander Severus. This period presents so many features of interest to the student of Roman Legislation that an exhaustive essay upon it might fill a volume, involving as it would the Social, Political and Literary history of Rome. Among the various topics which must present themselves to a writer of the History of Roman Law during the period we have mentioned, the influence and character of the lawyers would necessarily be a prominent one.

In the oldest days of Rome, when the interpretation of the law and the application of its mysteries to daily life were confined to the patricians, when the cultivation of Jurisprudence was seized and retained by the nobility, and when caste privileges dominated every portion of Roman society, the practical and professional element of the lawyer's life was unknown, and the knowledge of those customary observances that stood for law and of the acts and fictions that surrounded them was rather one of the chief instruments for attaining political power. Various causes tended to disturb this state of things; the publication of a code, the betrayal (a well-known story) of the forms and ceremonies by which the application of the law was masked, the extension of Roman power, the increase of a foreign element, all these things affected the position of the old dominant class. In process of time the ancient privileges of the patrician order in the state were diminished, their claim
to undisturbed power interfered with and their charmed circle invaded: but still the social position of the learned jurisconsult was maintained, and even down to the days of Cicero the attainment of legal honours and forensic reputation was regarded as one of the safest and surest roads to political distinction and rank. The accession of Augustus to Imperial honours led to an important change in the status of the Roman Bar. A rivalry so dangerous as that of a body of men formidable from their numbers, from their influence with the people, from their learning and from their thorough acquaintance with all the forms and practices of a state-craft coeval with the constitution itself, a body moreover allied with almost every family of distinction, was not to be endured by one who meant to consolidate his authority and to reign without a rival.

No man knew better than Augustus that force and fear were wrong weapons with which to counteract this opposing element, no man knew better than himself the sacred character of Law and Jurisprudence in the eye of every citizen of Rome, his reverence for the institutions of the city, and the respect with which the professors and expounders of the laws were regarded by him; "To strike down the Jurisconsults was to strike at the city itself," and therefore measures of a milder nature were requisite. A plan was devised and, as the result shews, crowned with success. This plan was to change the character of the profession by diverting its members from their ancient line of ambition. That was done by granting to a select body out of the whole number of Jurisconsults the hitherto unheard-of privilege of giving official opinions, which though nominally published by the emperor were in effect the authoritative decisions of certain eminent and leading lawyers. The result of this was that a new object of ambition was held up to the eyes of the Jurists and Legists of Rome—a new incentive and one of the most stirring kind was given them to achieve distinction in the ranks of their profession, but the inducement was no longer to cultivate law as a stepping-stone to political advance-

1 Giraud, Histoire du droit Romain, p. 270.
ment:—law was no longer the means to an end, but an end in itself:—and henceforth the aim and object of every leading advocate was to merit the approval of the emperor alone, who was to him that fountain of honour and reward which in old times the people had been. It is unnecessary to pursue the history of this movement further. The wise and politic designs of Augustus were recognized and improved upon by succeeding rulers, especially by Tiberius, Vespasian, Titus and Trajan. Under Adrian the dignity of the Jurisconsult was still further advanced through that well-known provision by which certain Responsa were invested with the force of law. Great as the effect of these measures was from a political point of view, from a literary point of view still greater results followed. It is impossible in these few lines to describe adequately the marvellous energy displayed in the cause of learning by the Roman Lawyers of the golden age. Law was their proper pursuit, but in every branch of literature they shone—Philosophy, Philology, Poetry, Oratory, History, Mathematical and Physical Sciences, to all they devoted themselves and in all they were eminent.

Their varied reading was reflected in their legal writings, their profound learning gave them vantage ground in their professional labours.—"The more we study their works the greater pleasure we derive from the perusal. The wonderful propriety of diction, the lucid structure of the sentences, the exquisite method of the argument, give to the performances of these writers a charm peculiarly their own." Nor must it be forgotten that their literary fame, their zeal for learning, and their vast energy, were displayed at a time when learning and science were in their decadence. But for the Jurists of Rome the cause of Letters would have perished. Of the men of genius whose names have come down to us and whose writings or whose opinions are worked into the great body of the Roman Law we may particularize five, not so much for their own dis-

1 See Gaius, i. 7.
2 Introduction to the Study of Roman Law, by John George Phillimore, p. 234.
tinctive merits, as for the importance given to their writings in the celebrated Law of Citations published about A.D. 426. Of these five, Gaius, Papinian, Modestinus, Paulus and Ulpian, the compilers of the Digest at a later period made large use.—In the Theodosian law referred to above the authority of Papinian was pre-eminent, whilst to the writings of Gaius himself a higher impress of authority was given than they had hitherto attained.

That Papinian was a man of undoubted reputation is clear from his position in the state, as well as from the fragments of his writings preserved in the Digest; fellow-pupil, friend and minister of Septimius Severus, he became at an early age Praetorian Prefect and drew upon himself the hatred and vengeance of Caracalla. Famous himself, he had as pupils the two most illustrious lawyers of the succeeding generation, Paulus and Ulpian. The former, a man of great and varied learning, occupied with Ulpian the post of Assessor to the Praetorian Prefect, and attained to high honours in the state. As for Ulpian, the fact that his writings have furnished 2461 laws to the Digest shews the reputation he left and the reverence with which his name was regarded. His chief works were a Commentary on the Edict in eighty-three books; a collection of Opinions in six books and another collection of Responsa in two books. As a lawyer he ranks high for the soundness of his views, for Jus practical common sense, and for the logical turn of his mind. As a writer he is clear and concise, well deserving the dignity of an authoritative jurisprudent by his power of marshalling facts and applying legal principles to them. As an instance at once of his juristical skill and of his natural acumen, we may point to his celebrated calculation of the present value of a life-annuity, nor would it be difficult to select other examples.

Of his public life but little is known beyond his official connection with the Emperor Alexander Severus and his assassination by the Praetorian guards. He seems to have been a man of wit and a pleasant companion, whose society was sought

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1 D. 35. 2. 68.
after by the most noble and the best in the state. Of the old writers Aelius Lampridius gives us most information regarding Ulpian and his political and professional career; but we need not enter into further details, for those who are desirous to learn all that is known about him may refer to the two accounts of his life prefixed to Schulting's *Tituli ex Corpore Ulpiani*, in that author's *Jurisprudentia Vetus Antejustinianea*, one by John Bertrand, president of Toulouse, and the other by William Groot; whilst in the *Dictionary of Greek and Roman Biography* by Smith appears a somewhat elaborate sketch of him and his writings.

Just as there is but one manuscript of Gaius' Commentaries in existence, so is there but one of Ulpian's Rules. This is now in the Vatican Library, numbered 1128 in its catalogue, having originally belonged to the abbey of St. Benedict at Fleury-sur-Loire, whence it was conveyed to Rome after the destruction of that religious house by the Calvinists in 1562. It is generally believed that all the modern editions of Ulpian's Rules are derived from this codex, Heimbach alone maintaining that the first edition of all, that of John Tilius, was derived from another codex now destroyed. But whether this be so or not is after all of little practical importance, for Heimbach himself allows that the Codex Vaticanus and the Codex Tilianus, if the latter ever existed, were either transcripts of one and the same original, or one copied from the other.

Tilius described the work, when he introduced it to the learned world at Paris in 1549, as "a mere epitome of doctrines contained in a variety of works by Ulpian;" a view now quite exploded, for almost all the best modern authorities hold that the manuscript is a genuine fragment of one and only one work of Ulpian, namely the *Liber Singularis Regularum*: so that the only point still open to debate is how far it has been mutilated, and whether intentionally or by accident. It is true that Puchta holds to the epitome theory, but even he regards the codex as an epitome of the "Rules" only, and his view meets with little favour.

Mommsen's idea is, that about Constantine's time some man, "parum doctus et incredibiliter stupidus," partly abridged
and partly rewrote the treatise to make it coincide with the law of his time. Against this theory Huschke argues that the excellent lawyers of that period would never have accepted an abridgment that did not, in the main, coincide with its original; and he further points to passages, such as I. 21; XX. 2, 10; XXVII. 1, where the ancient law is not removed from the text. From this evidence and also from the fact that important matters are lost which must have been treated of in the original work, and which certainly were in force in Constantine's reign, he maintains that the omissions are throughout the result of accident rather than of design, his theory being that the transcriber of the one surviving manuscript (apparently written about the tenth century, and probably in Gaul) put together all he could find of Ulpian's acknowledged work; but that owing partly to his inability to discover the whole, and partly to subsequent mutilation of what he managed to collect, the work has come down to us in its present dilapidated condition.

It seems pretty clear that the transcript of the tenth century, whether embracing the greater part or only a fraction of Ulpian's original treatise, has been mutilated by the loss of a large section towards its conclusion. Ulpian's work as a whole runs parallel with that of Gaius. It is true that topics are usually treated more briefly in the "Rules;" still they occur in the same order as in the "Commentaries." It is true also that particular attention is given in the first-named treatise to points which Gaius either omitted or dismissed with a word or two, such as dos, donatio inter virum et uxorem and the Lex Papia Poppaea: but these extended digressions either are introduced where Gaius' briefer notices occur, or when referring to matters upon which Gaius is absolutely silent, they are brought in just where we can imagine the older writer would have introduced them, if they had not been excluded by the plan of his work. And yet although Ulpian's treatise is parallel with that of Gaius so far as it goes, it stops abruptly, and omits not only all the matter touched upon by the earlier writer in his Fourth Commentary, but even the subjects contained in the sections run-
ning from the 55th to the end of the Third Commentary. From the evident appearance of a general parallelism, and from the fact of the sudden defect just mentioned, we hold that the missing portion at the conclusion of the "Rules" is not merely a few lines or even pages, but almost a half of the work.

If we must venture a theory as to the object with which Ulpian wrote, we should attach no little importance to what has been already named, the fact that he interpolates so largely although following the arrangement of Gaius in the main. Gaius wrote a handbook for students, with the intention of putting clearly before them the leading principles of Roman Law. His object was not so much to enter into details of practice as to present his readers with a comprehensive outline of the Roman Law as a system. On the other hand Ulpian's aim was, we venture to think, entirely different: he wished to draw up a handbook for the use of practising lawyers. Now that a book of practice is improved by a systematic arrangement is obvious: Ulpian therefore, writing in the reign of Caracalla (see xvii. 2), took, as a model, the educational treatise which his brother lawyer had published a few years previously, introducing into it important and necessary modifications. Whilst then, on the one hand, he omitted all antiquarian disquisitions as out of place in a book of practice, on the other he introduced large interpolations on such matters as diies and its retentiones. These topics Gaius (writing for beginners) had passed over unnoticed, because they involved more detail than principle, because also a student could very well comprehend the general scheme of the Roman Law, without any special acquaintance with them. Ulpian, on the contrary, in a work intended for practitioners, was obliged to treat at length the rules relating to matters of such practical value as those above mentioned. Divorces were everyday occurrences at Rome; so that suits with regard to diies and retentiones must have filled the court-lists of the time, and formed a profitable branch of a lawyer's practice: a knowledge therefore of all the regulations on these topics was to such an one of the highest importance.
The very title prefixed to Ulpian's work bears out our view. "Principles" (institutiones) are for beginners, but "Rules" (regulae) aid the memory of those who have passed through their course of study, and are now engaged in the active business of their profession.

We have adopted in the main Huschke's text according to his edition of 1861; but the words of the original manuscript are distinguished from that editor's suggestions by being printed in a different type, on the same principle which we have adopted in our text of Gaius. The chief editions of Ulpian prior to Huschke's were that of Tilius, already alluded to, bearing the date 1549: those of Hugo in 1788, 1811, 1814, 1822, 1834; of Bocking, 1831, 1836, 1845, 1855, and of Vahlen, 1856. All these have been consulted, but Huschke's has been preferred except where the authority against him seemed overpowering; in all doubtful cases the present editors have yielded to the authority of so undoubted a master of the Roman Law.

Cambridge, December, 1873.
THE COMMENTARIES OF GAIUS.

BOOK I.

DE JURE GENTIUM ET CIVILI.

1. Omnes populi qui legibus et moribus reguntur partim suoproprio, partim communi omnium hominum iure utuntur: nam quod quiscumque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium ipsius civitatis, quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium homin-

1. All associations of men which are governed by laws and customs employ a system of law that is partly peculiar to themselves, partly shared in common by all mankind: for what any such association hath established as law for its own guidance is special to itself and is called its jus Civile, the particular law, so to speak, of that state: but that which natural reason hath established amongst all men is guarded in equal degree amongst all associations and is called jus Gentium, the law, so to speak, which all nations employ1. The Roman people, therefore, make use of a system of law which is partly their

1 Austin's *Jurisprudence*, Lecture 31, 32. See also Lect. 5, pp. 117, 161 (pp. 179 and 214, third edition). Manu's *Ancient Law*, ch 3.
num iure utitur. Quae singula qualia sint, suis locis proponemus.

2. Constant autem iura ex legibus, plebiscitis, senatus-consultis, constitutionibus Principum, edictis eorum qui ius edicendi habent, responsis prudentium.

3. Lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit. Plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur. Unde olim patricii dicerant plebiscita se non teneri, quia sine auctoritate eorum facta essent. sed postea lex Hortensia lata est, qua C:lutum est ut plebiscita universum populum tenerent. itaque eo modo legis exaequata sunt.

own in particular, partly common to all mankind. What these portions of their system severally are, we shall explain in their proper places.

2. Their rules of law then are composed of leges, plebiscita, senatusconsultas, constitutions of the emperors, edicts of those who have the right of issuing edicts, and responses of the learned in the law.

3. A lex is what the populus directs and establishes. A plebiscitum is what the plebs directs and establishes: the plebs differing from the populus herein, that by the appellation of populus the collective body of the citizens, including the patricians, is denoted, whilst by the appellation of plebs is denoted the rest of the citizens, excluding the patricians. Hence in olden times the patricians used to say that they were not bound by plebiscites, because they were passed without their authority: but at a later period the Lex Hortensia was carried, whereby it was provided that plebiscites should be binding on the whole populus, and therefore in this way they were put on a level with leges.

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2 The terms of the Lex Hortensia are thus given by Pliny (Nat. Hist. xvi. 15), "Q. Hortensius dictator, quum plebs secissset in Janiculum, legem is Esculeto tulit, ut quod ea jussisset omnes Quintes teneret." Aulus Gelius (xv. 27) also says,
I. 4, 5. [Senatusconsultum and Imperial Constitution.

4. Senatusconsultum est quod senatus iubet atque constituit, idque legis vicem optinet, quamvis fuerit quae situm.

5. Constitutio Principis est quod Imperator decreto vel edicto vel epistula constituit. nec umquam dubitatum est quin id legis vicem optineat, cum ipse Imperator per legem imperium accipiat.

4. A senatusconsultum is what the senate directs and establishes, and it has the force of a lex, although this point was at one time disputed.

5. A constitution of the emperor is what the emperor establishes by his decree, edict, or rescript; nor has there ever been a doubt as to this having the force of a lex, since it is by a lex that the emperor himself receives his authority.

"Plebiscita appellantur quae tribunis plebis senatus accepta sunt; quibus rogationibus ante patres non tenentur, donec Q. Hortensius dictator eam legem tulit, ut eo jure quod plebes statusset omnes Quiites tenentur."

Nothing could be plainer than the words of the law as given by these two writers; did we not know of pre-existing laws which at first sight seem to have settled the same principles; one 163 years previously, viz. the Lex Valeria Horatia: "ut quod tributum plebes jussisset populum teneat," Livy, III. 55; the other 53 years previously, viz. the Lex Publilia: "ut plebiscita omnes Quiites teneant," Livy, VIII. 12.

Ostrolan's explanation is that the Lex Valeria Horatia was merely retrospective, rendering universally binding all plebiscites already passed in the comitia tributa, but not yet sanctioned by the comitia centuriata, nor confirmed by the auctoritas of the senate, (for both these ratifications were in olden times necessary;) whilst the Lex Publilia abrogated entirely the necessity of a re-enactment by the comitia centuriata of future plebiscites, although it did not allow them to become law against or without the auctoritas of the senate.

The Lex Hortensia therefore went a step further and established the perfect independence and equal authority of plebiscites and leges, by making the auctoritas unnecessary for the former, just as another Lex Publilia (b.c. 346) had already made it unnecessary for the latter, or, to speak more correctly, had ordered it to be given by anticipation; "ut legem quae comitiis centuriatis ferrentur ante jussimum suffragium Paties auctores ferrent" Livy, VIII. 12.

The date of the Lex Hortensia was b.c. 366.

1 Theophilus says that the force of laws was given to Seta, by the Lex Hortensia; Theoph lib. I. Tit. 2. 5. But see Nieburh's remarks on this law in his Lectures on Roman History, Vol. I. pp. 323, 324.

2 Decretum = a decision given by the emperor in his capacity of judge.

Edictum = a general constitution.

Rescriptum = epistula = the emperor's solution of a legal difficulty propounded to him by a magistrate or private person; and if by the former, preceding such magistrate's judgment and furnishing him with principles on which to base it. See
6. The magistrates of the Roman people have the right of issuing edicts; but the most extensive authority attaches to the edicts of the two praetors, Urbanus and Pergurium, the counterpart of whose jurisdiction the governors of the provinces have therein: also to the edicts of the Curule Aediles, the counterpart of whose jurisdiction the Quaestors have in the provinces of the Roman people: for Quaestors are not sent at all into the provinces of Caesar, and therefore this (Aedilian) edict is not promulgated therein.

7. The responses of the learned in the law are the decisions and opinions of those to whom license has been given to expound the laws: and if the opinions of all these are in accord, that which they so hold has the force of a lex: but if they are not in accord, the judex is at liberty to follow which opinion he pleases, as is stated in a rescript of the late emperor Hadrian.


³ In the imperial times the provinces were divided into two classes, provinciae imperatorae or Caesars, governed by legislati appointed by the emperor, and provinciae senatoriae, governed by procurati nominated by the senate. In a senatorial province the fiscal authority was lodged in the hands of a quaestor, in an imperial province in those of a procurator Caesars. This division was done away with about the middle of the 3rd century.
² The jurisprudentes in the most ancient times took up the profession at their pleasure, and gave their advice gratuitously. Augustus commanded that none should practise without a license, and it is to this licensing that the words "quibus permission est" refer. See D. 1. 2. 7. 47. With reference to the jurisconsults and their influence, see Maine's Ancient Law, ch. 11.
³ See Austin, Lect 28, on the classification of laws.
8. Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. sed prius videamus de personis.

DE JURIS DIVISIONE.

9. Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.

10. Rursus liberorum hominum alii ingenui sunt, alii libertini.

11. Ingenui sunt, qui liberi nati sunt; libertini, qui ex iusta servitute manumissi sunt.


DE DEDITICIS VEL LEGE AEELIA SENTIA

13. Lege itaque Aelia Sentia cavetur, ut qui servi a dominis poenae nomine vincti sint, quibusve stigmata inscripta sunt,

8. The whole body of law which we use relates either to persons or to things or to actions. But first let us consider about persons.

9. The primary division then of the law of persons is this, that all men are either free or slaves.

10. Of freemen again some are ingenui, some libertini.

11. Ingenui are those who have been born free: libertini are those who have been manumitted from servitude recognized by the law.

12. Of libertini again there are three classes, for they are either Roman citizens, or Latins, or in the category of the deditici. Let us consider these one by one, and first as to deditici.

13. It is provided then by the Lex Aelia Sentia, that such slaves as have been put in chains by their masters by way of

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1 Austin discusses the signification of "person" natural or legal, in Lecture 12.
2 The distinction between the law of persons and of things is treated of in Lecture 40.
3 See Appendix (A).
deve quibus ob noxam quaestitio tormentis habita sunt et in ea noxa suisse convicit sint, quique ut ferro aut cum bestiis depugnarent traditi sint, inve ludum custodiavene convecti fuerint, et postea vel ab eodem domino vel ab alio manumissi, eiusdem conditionis liberi sint, cuius conditionis sunt peregrini dediciti. [DE PEREGRINIS DEDITICIS] (14.) Vocantur autem peregrini dediciti hi qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde, ut victi sunt, se dediderunt. (15.) Huicus ergo turpitudinis servos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri demus, sed omni modo dediticorum numero constitui intellegemus. (16.) Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum, modo Latnum fieri demus. (17.) Nam in cius persona tria haec concurrunt, ut maius sit anno-

punishment, or have been branded, or examined by torture on account of misdeed, and convicted of the misdeed, or have been delivered over to fight with the sword or against wild-beasts, or cast into a gladiatorial school or a prison, and have afterwards been manumitted either by the same or another master, shall become freemen of the same class whereof are peregrini dediciti. 14. Now those are called peregrini dediciti who aforetime have taken up arms and fought against the Roman people, and then, when conquered, have surrendered themselves. 15. Slaves then who have been visited with such disgrace, in whatever manner and at whatever age they have been manumitted, even although they belonged to their masters in full title, we shall never admit to become Roman citizens or Latins, but shall under all circumstances understand to be put in the category of dediciti. 16. But if a slave have fallen under no such disgrace, we shall say that when manumitted he becomes in some cases a Roman citizen, in others a Latin. 17. For in whatsoever man's person these three qualifications are united, (1) that he be above thirty years of age; (2) the property of his master

1 "Pleno jure" = "ex jure Quiritium"; e not merely "in bonis" for the signification of which terms see II 40 Compare also § 17 below. 2 For further information as to dediciti see III. 74; Ulp. I. 11.

rum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est vindicta aut censu aut testamento, is civis Romanus fit: sin vero aliquid eorum deedit, Latinus erit.

De manumissione vel causae probatione.

18. Quod autem de aetate servi requiritur, lege Aelia Sentia introductum est. Nam ea lex minores xxx annorum servos non alter voluit manumissos cives Romanos fieri, quam si vindicta, aput consilium iusta causa manumissionis adprobata, liberati fuerint. (19.) Iusta autem causa manumissionis est veluti si quis filium filiamque, aut fratrem sororemque naturalern, aut alumnun, aut pedagogum, aut servum procuratoris habendi gratia, aut ancillam inatrimonii causa, aput consilium manumittat. [De recuperatoribus.] (20.) Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum; in provinciis autem viginti

by Quiritarian right1 and (3) liberated by a regular and lawful manumission, i.e. by vindicta, census, or testament2, such an one becomes a Roman citizen: but if any one of these qualifications be wanting he will be a Latin.

18. The requirement as to the age of the slave was introduced by the Lex Aelia Sentia. For that law prohibited slaves manumitted under thirty years of age from becoming Roman citizens unless they were liberated by vindicta after lawful cause for manumission had been approved before the council.

19. Now lawful cause for manumission is, for instance, where one manumits before the council a son or daughter or natural brother or sister, or foster-child, or personal attendant, or slave with the intent of making him his procurator3, or female slave for the purpose of marrying her.

20. Now the council consists in the city of Rome of five Senators and five Knights, Romans of the age of puberty4: in the provinces of twenty Recuperatores5, Roman citizens. And

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1 I. 54, ii. 40.
2 II. 267, 276. Sanders' Justinian, p. 91. Niebuhr is of opinion that the rights which ensued upon the various kinds of manumission, were not identical, Hist. of Rome, Vol. I. p. 594. Ulpian, i. 6, 8, 10, 12, 16.
3 1v. 84.
4 I. 196.
5 Recuperatores. See Lord Mack-
recuperatorum civium Romanorum. idque fit ultimo die conventus: sed Romae certis diebus aput consilium manumittitur. Maiores vero triginta annorum servi semper manumitti solent, adeo ut vel in transitu manumittitur, veluti cum Praetor aut Proconsule in balneum vel in theatrum cat. (21.) Praeterea minor triginta annorum servus manumissione potest civis Romanus fieri, si ab eo domino qui solvendo non erat, testamento eum liberum et heredem reliquit:—[desunt lin. 24].

22. ...manumissi sunt, Latini Iuniani dicuntur: Latini ideo, quia adsimulati sunt Latins coloniaris; Iuniani ideo, quia per legem Iuniam libertatem acceptum, cum olim servi viderentur

this proceeding (the manumission) takes place on the last day of their assembly, whereas at Rome men are manumitted before the council on certain fixed days. But slaves over thirty years of age can be manumitted at any time, so that they can be manumitted even in transitu, for instance when the Praetor or Proconsul is on his way to the bath or the theatre. 21. Further a slave under thirty years of age can by manumission become a Roman citizen, if (it were declared) by an insolvent master in his will that he was left free and heir

22. .......... are manumitted, are called Latini Juniani\(^2\); Latini because they are put on the same footing with the Latin colonists\(^3\); Iuniani because they have received their liberty under the Lex Junia\(^4\), whereas in former times they were
esse. (23.) Non *tamen* illis *permittit* lex Junia nec ipsis *testamentum facere*, nec ex *testamento alieno capere*, nec *tutores testamento dari*. (24.) *Quod autem diximus ex testamento eos capere non posse*, *ita intellegendum est*, *ut nihil directo hereditatis legatorumve nomine eos posse capere dicamus*; *aliaquin per fideicommissum capere posseunt.*

25. Hi vero quin dediticiorum numero sunt *nullo modo ex testamento capere possunt*, non magis quam qui libere *peregrini*; *nec ipsi testamentum facere possunt secundum quod *pierisque placuit*. (26.) *Pessima itaque libertas eorum est qui dediticiorum numero sunt*: *nec ulli legae aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur*. (27.) *Quin et in urbe Roma vel intra centesimum urbis Romae miliarum morari prohibentur*; et *si contra fecerint*, *ipsi bonaque eorum publice venire iubentur ea condi-

considered to be slaves¹. 23. The Lex Junia does not, however, allow them either to make a testament for themselves, or to take anything by virtue of another man’s testament, or to be appointed guardians² by testament. 24. Nevertheless our statement that they cannot take under a testament must be thus understood, that we affirm that they can take nothing directly by way of inheritance or legacy; they can, on the other hand, take by *fideicommissum*³.

25. But those who are in the category of *deditici* cannot take under a testament at all, any more than can one who is free and a foreigner; nor can they, according to general opinion, make a testament themselves⁴. 26. The liberty, therefore, of those who are in the category of *deditici* is of the lowest kind, nor is access to Roman citizenship allowed them by any *lex, senatus-consultum*, or imperial constitution. 27. Nay more, they are forbidden to dwell within the city of Rome or within a hundred miles of the city of Rome, and if they transgress this rule they themselves and their goods are ordered to be sold publicly, with the proviso that they do not serve as slaves within the

¹ In ancient times slaves manumitted irregularly only held their liberty on sufferance. Their masters could recall them into slavery, hence "*olim servi videbantur esse.*" III. 56; Ulpian, i. 12.
² I. 144 ..
³ II. 246.
⁴ III. 75; Ulp. xx. 14.
Promotion from Latinitas to Civitas. [I. 28, 29.

cione, ut ne in urbe Roma vel intra centesimum urbis Romae miliarium serviant, nee uqam manumittantur; et si manumissi fuerint, servi populi Romani esse iubentur. et haec ita lege Aelia Sentia comprehensa sunt.

**QUIBUS MODIS LATINI AD CIVITATEM ROMANAM PERVENIANT.**

28. Latini multis modis ad civitatem Romanam perveniunt. (29.) Statim enim eadem lege Aelia Sentia cautum est, ut minores triginta annorum manumissi et Latini facti, si uxores duxerint vel cives Romanas, vel Latinas coloniarias, vel eiusdem condicionis cuius et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus civibus Romanis puberibus, et filium procreaverint, et is filius anniculus fuerit, permittatur eis, si velit, per eam legem adire Praetorem vel in provinciis Praesidem provinciae, et adprobare se ex lege Aelia Sentia uxorem duxisse et ex ea filium anniculum habere; et si is aput quem causa probata est id ita esse pronuntiaverint, tunc et ipse Latinus et uxor eius, si et ipsa

city of Rome nor within a hundred miles of the city of Rome, and be never manumitted: and if they be manumitted they are ordered to become slaves of the Roman people. And these things are so laid down in the Lex Aelia Sentia.

28. Latins attain to Roman citizenship in many ways.

29. For it was expressly provided by the same Lex Aelia Sentia, that slaves manumitted under the age of thirty years and made Latins, if they have married wives who are either Roman citizens, or Latin colonists, or of the same condition of which they themselves were, and have made attestation of this in the presence of not less than seven witnesses, Roman citizens of the age of puberty, and have begotten a son, and this son have atta ned the age of one year, shall be allowed, if they please, to apply, in virtue of that law, to the Praetor, or in the provinces to the governor, and adduce proof that they have married a wife in accordance with the provisions of the Lex Aelia Sentia, and have by her a son a year old; and if he before whom the case is proved, shall declare that it is as they say, then both the Latin himself, and his wife (if she be

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1 l. 196.
of the same condition), and their son (if he also be of the same condition), are ordered to become Roman citizens. 30. For this reason do we add with reference to their son, "if he also be of the same condition," because if the wife of the Latin be a Roman citizen, the child born from her is a Roman citizen by birth in virtue of a recent senatusconsultum, which was enacted at the instance of the late emperor Hadrian.

31. Although they alone who were manumitted under thirty years of age and made Latins, had this right of obtaining Roman citizenship in virtue of the Lex Aelia Sentia, yet it was afterwards granted by a senatusconsultum, enacted in the consulship of Pegasus and Pusio, to those also who were

1 I. 66, 80; III. 73; Ulpian, III 3. There is an apparent contradiction upon this subject between Gaius and Ulpian. The former, as we see, attributes the regulations respecting the proof in these cases to the Lex Aelia Sentia, whilst the latter ascribes them to the Lex Junia Norbana. Most modern writers on the history of the old Roman law agree in affixing a later date to the Junian than to the Aelian law. To reconcile this apparent discrepancy, it is supposed that the later lex, which was passed in the reign of Tiberius, was to a very great extent a confirmatory enactment, embracing in it most of the regulations of the prior lex passed in the reign of Augustus, and therefore that the authors are right in ascribing the regulations respecting the causae probatae to either law. A French writer, M. Marcandy, has contended with considerable show of reason that the Lex Junia preceded the Lex Aelian, and was in existence in the time of Cicero: see Thiers, Tom. 8. The subject has been discussed at length by Hollweg in his Dissertatio de causae probatione.

3 The comitia or senate in early imperial times still legislated in appearance, but their legislation was according to the emperor's suggestion. The comitia being incommensurate tools, the work of legislation was usually done by the senate, the smaller and more manageable body; but the senate had no free action, these senatusconsultae were at the instance of the prince. See Austin, Vol. II. p. 300 (p. 534, third edition).

2 A.D. 75.
annorum manumissis Latinis factis concessum est. (32.)
Ceterum etiamsi ante decesserit Latinus, quam annicos fuiti
causam probarit, potest mater eius causam probare, et sic et
ipsa fiet civis Romana [desunt 39 lin. (33- 34)]. (35.) si quis
alicuus et in bonis et ex iure Quiritum sit, manumissus, ab
eodem scilicet, et Latinus fieri potest et ius Quiritum consequi.

36. Non tamen cumque volenti manumittere licet. (37.)
nam is qui in fraudem creditorum vel in fraudem patroni ma­
numittit, nihil agit, quia lex Aelia Sentia inpedit libertatem.

manumitted and made Latins when over thirty years of age.
32. Further, even if the Latine before he has proved his
case in respect of a son one year old, the mother can tender
proof, and thus she will herself also become a Roman citi­
zen.

33. 34. .....................................................
35. If a slave belong to any man both by Bonitarian and
Quiritarian right, he can when manumitted (by this same
owner, that is to say,) either become a Latin or obtain the
“Jus Quiritum” (i.e. become a Roman citizen).

36. Moreover the law does not allow every one to manu­
mit who chooses so to do. 37. For he who manumits
with the view of defrauding his creditors or his patron

1 Who were Latins, that is to say, by failure of one or other of the
conditions marked (2) and (3) in § 17 above.
2 In the 19th and 20th lines of the missing 39, Goschen proposes a
reading founded on the appearance of the MS., which at that point is
somewhat more distinct, as follows: “By the Lex Julia it was enacted
that if a Latin had expended not less than a half (sixths?) of his patri­
mony in the construction of a house at Rome, he should obtain the
Quiritarian rights.”

From Ulpian, III. 1, a portion of the missing paragraph 34 may be
thus supplied: “A Latin obtains Roman citizenship by a ship, if he
build one of not less than 10,000 mosas burden and use it for carrying
coin to Rome for six years.”

4 This passage is capable of two interpretations, either the one here
given, which is in effect that a mas­
ter could, under the conditions spe­
cified, confer upon his slave either
the Latinitas or the ebatas; (the
latter would be the result of a ma­
umision per rindulam,) or else it
may refer to the method of manu­
mission termed iterato, and this, as
Ulpian tells us, was the result of a
second manumission granted to one
who had already from a slave been
made a Latin, the second manu­
mitor being his original master.
See Ulpian, III. 4.

5 See Ulpian, I. 17—25, for a com­
plete list of the cases where manu­
mission is not allowed.
6 The patronus is the former mas­
ter of a libertinus. The jura patro­
natus were

(a) Obsequia: duties attaching
38. Item eadem lege minori xx annorum domino non aliter manumittere permittitur, quam si vindicta apud consilium iusta causa manumissionis adprobata fuerit. (39) Iustae autem causae manumissionis sunt: veluti si quis patrem aut matrem aut paedagogum aut coniunctaneum manumittat. sed et illae causae, quas superius in servo minore xxx annorum exposuit, ad hunc quoque casum de quo loquimur adferi possunt.

item ex diverso hae causae, quas in mmore xx annorum domino rettulimus, porrigi possunt et ad servum minorem xxx annorum.

effects nothing, since the Lex Aelia Sentia bars the gift of freedom'.

38. Likewise by the same law a master under twenty years of age IS not allowed to manumit except by vindicta, a lawful cause for manumission has been proved before the council. 39. Lawful cause of manumission is, for instance, if a man manumits his father, or mother, or personal attendant, or foster-brother. And those causes too which we enumerated above in reference to a slave under thirty years of age, can be applied to this case also about which we are now speaking. So, conversely, those causes which we have specified with reference to a master under twenty years of age, can be extended also to the case of a slave under thirty years of age.

upon the libertus by operation of law, e g. to furnish ransom for the patron if taken prisoner, to assist in furnishing dower for his daughter, and to contribute to his expenses in law-suits, &c.

(8) Jura in bonis: rights of succession on the part of the patronis to the goods of the libertus. 111. 39 et sequ.

(7) Operae: services reserved by special agreement as a consideration for the manumission.

It is scarcely necessary to say that a freedman is styled libertus in respect of his class, libertus in reference to his former master.

1 1. 47. Examples of the application of this clause of the Lex Aelia Senna are to be found in D. 38. 5. 55, 57, 60 and 83.

8 There is good reason for objecting to the words "except by vindicta," for though they appear in the Institutes of Justinian, they are not to be found in the Commentary of Theophillus nor in the fragments of Ulpian, and it need hardly be said that in matters of historical information upon the old Roman law, Justinian's treatise is invaluable. Besides we see from L. 41. that a master under twenty years of age could at any rate after proof of cause perform the inferior manumission inter annos and without vindicta. Niebuhr and Goschen think the passage should have the following collocation of words, "non aliter vindicta manumittere permittitur quam si eput, &c."
40. Cum ergo certus modus manumittendi minoribus xx annorum dominis per legem Aeliam Sentiam constituatus sit, evenit, ut qui xiii annos aetatis expleverit, licet testamentum facere possit, et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annorum xx, libertatem servo dare non potest. (41.) Et quamvis Latinum facere velit minor xx annorum dominus, tamen nihilominus debet aput consilium causam probare, et ita postea inter amicos manumittere.

42. Praeterea leges Furia Caninia certus modus constitutus est in servis testamento manumittendis. (43.) nam ei qui plures quam duos neque plures quam decem servos habebit, usque ad partem dimidiam eius numeri manumittere permititur. ei vero qui plures quam x neque plures quam xxx servos habebit, usque ad tertiam partem eius numeri manumittere permititur. at ei qui plures quam xxx, neque plures quam centum habebit, usque ad partem quartam manumittere per-

40. As then a certain limitation of manumitting has been imposed by the Lex Aelia Sentia on masters under twenty years of age, the result is that one who has completed his fourteenth year, although he can make a testament and institute an heir to himself and leave legacies, yet cannot, if he be still under twenty years of age, give liberty to a single slave. 41. And even though a master under twenty years of age wish to make a man a Latin (merely), yet he must still prove cause before the council and then afterwards manumit him privately (inter amicos).¹

42. Further by the Lex Furia Caninia, there was established a strict limitation of the number of slaves who can be manumitted by testament: 43. for a man who has more than two, and not more than ten slaves, is allowed to manumit to the extent of half the number. A man, again, who has more than ten and not more than thirty slaves is allowed to manumit to the extent of one-third of the number. A man, again, who has more than thirty and not more than a hundred is permitted to

¹ This was one of the modes of manumission arising out of custom, and recognized by the Praetor. It was a very simple affair, for all that was required was for the master to direct his slave to go free in the presence of five witnesses.
Lex Furia Caninia.

mittitur, nec latior licentia datur. novissime ei qui plures quam c habebit, nec plures quam d, amplius non permittitur, quam ut quintam partem neque plures manumittat. sed praescribit lex, ne cui plures manumittere liceat quam c. igitur si quis unum servum omnino aut uuos habet, de eo haec lege nihil cautum est; et ideo liberam habet potestatem manumittendi. (44.) Ac nec ad eos quod ommino haec lex pertinet, qui sine testamento manumittunt. itaque licet iis, qui vindicta aut censu aut inter amicos manumittunt, totam familiam suam liberare, scilicet si alia causa non impediat libertatem. (45.) Sed quod de numero servorum testamento manumittendorum diximus, ita intelligimus, ut ex eo numero, ex quo dimidia aut tertia aut quarta aut quinta pars liberari potest, utque tot manumittere liceat, quot ex antecedentibus numero licet. et hoc ipsa lege provisum est. erat enim sane absurdum, ut x servorum domino quinque liberare liceret, quia usque ad dimidiam partem ex eo numero manumittere ei conceditur, ulterior autem xii servos habenti non plures liceret

manumit to the extent of a fourth part, nor is greater license allowed him. Lastly, a man who has more than a hundred, and not more than five hundred, is allowed nothing further than to manumit a fifth part and no greater number. But the law prescribes that no man shall be allowed to manumit more than a hundred. If, therefore, any man have only one or two slaves, there is nothing provided in this law with respect to him, and so he has unrestrained power of manumitting.

44. Nor does this law in any way extend to those who manumit otherwise than by testament. Therefore those who manumit by vendeta, censis, or inter amicos, may set free their whole gang, provided no other cause stand in the way of the gift of freedom. 45. But what we have said about the number of slaves which can be manumitted by testament, we shall interpret thus, that from a number out of which the half, third, fourth, or fifth part can be set free, it is certainly allowed to manumit as many as could have been manumitted out of an antecedent (i.e. smaller) number. And this provision is found in the lex itself. For it would indeed be absurd that a master having ten slaves should be allowed to manumit five, because he is at liberty to manumit to the extent of half out of the number, whilst one who had a larger number, twelve,
manumittere quam IIII. at eis qui plures quam x neque [desunt lvm. 24]. (46.) Nam et si testamento scriptis in orbem servis libertas data sit, quia nullus ordo manumissionis inventur, nulli liber erunt; quia lex Fura Caninia quae in fraudem eius facita sint rescindit. sunt etiam specialia senatusconsulta, quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt. 

47. In summa scendum est, eum lege Aelia Sentia cautum sit, ut qui creditorum fraudandorum causa manumissi sint liberi non sint [37.], etiam hoc ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani); cetera vero iura eius legis ad peregrinos non pertinere.

48. Sequitur de iure personarum alia divisio. nam quaedam should not be allowed to manumit more than four¹. But that those who have more than ten and not ........².

46. For also if liberty be given by testament to slaves whose names are written in a circle, none of them will be free, since no order of manumission can be found: for the Lex Fura Caninia sets aside whatever is done for its evasion. There are also special senatusconsulta by which all devices for the evasion of that lex are set aside.

47. Finally, we must observe that the provision of the Lex Aelia Sentia, that those manumitted for the purpose of defrauding creditors are not to become free, applies to foreigners as well as citizens (etiam), (for) the senate so decreed at the instance of Hadrian: but the other clauses of the lex do not apply to foreigners ³.

48. Next comes another division of the law of persons

¹ The owner of twelve could manumit five, for he would reckon the 12 as 10, "ex antecedenti numero," and so for other cases.
² The lost portion of the MS. contained a further provision of the lex, that the slaves to be liberated should be mentioned by name, and that if the testator had nominated more than the number allowed by law, those whose names stood first on the list should be liberated in order, until the proper number had been completed. Testators having adopted the plan of writing the names in a circle to evade this regulation, the interpretation of § 46 was brought to bear against them. Ulpian, l. 28.
³ This is one of the instances of the value of the discovery of Gauz's treatise in relation to historical information. The existence of this regulation of the Lex Aelia Sentia, by which the enfranchisement of individuals for the purpose of defrauding creditors, applied to foreigners as well as citizens, was utterly unknown before the publication of these commentaries.
personae sui iuris sunt, quaedam alieno iuri sunt subjecctae.

(49.) Sed rursus earum personarum, quae alieno iuri subjecctae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt.

(50.) Videamus nunc de us quae alieno iuri subjecctae sunt: si cognovermus quae istae personae sunt, simil intellegemus quae sui iuris sunt.

51. Ac prius dispiciamus de iis qui in aliena potestate sunt.

52. In potestate itaque sunt servi dominorum. quae quidem potestas iuris gentium est: nam aput omnes peraeque gentes animadvertere possomus dominis in servos vitae necisque potestatem esse. et quodcumque per servum adquiratur, id domino adquiratur. (53.) Sed hoc tempore neque civibus Romanis, nec ullos alius hominibus qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos

For some persons are *sui juris*¹, some are subject to the *jus* (authority) of another. 49. But again of those persons who are subject to the authority of another, some are in *potestas*, some in *manus*, some in *mancipium*². 50. Let us now consider about those who are subject to another’s authority: if we discover who these persons are, we shall at the same time understand who are *sui juris*.

51. And first let us consider about those who are in the *potestas* of another.

52. Slaves, then, are in the *potestas* of their masters, which *potestas* is a creature of the *jus gentium*³, for we may perceive that amongst all nations alike masters have the power of life and death over their slaves. Also whatever is acquired by means of a slave is acquired for the master⁴. 53. But at the present day neither Roman citizens, nor any other men who are under the empire of the Roman people, are allowed

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¹ Ulpius, IV. 1. ² See Appendix (B). ³ But see Austin, Vol. II. p. 266 (p. 583, third edition), on the question of slavery being according to natural law or not. ⁴ 11, 86...Observe that the reading is *adquiritur*, not *adquiri*; so that Gaius only asserts that the *vita necisque potestas* is a creature of the *Jus Gentium*: and makes no statement as to why the master had the slave's acquisitions. Savigny says that slaves were by some nations allowed to have property, e.g. by the Germans, and that therefore Gaius has intentionally used the indicative mood to draw our attention to the fact that the second incident springs from the Civil Law. "Savigny on Possess. translated by Perry," p. 73, note.
suos saevire. Nam ex constitutione *sacratissimi* Imperatoris Antonini qui sine causa servum suum occident, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eundem Principis constitutionem coercetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad fana deorum vel ad status Principum confugunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. Et utrumque recte fit; male enim nostro iure uti non debemus: qua ratione et prodigis interdicitur bonorum suorum administratio.

54. Ceterum cum apud cives Romanos duplex sit dominium, (nam vel in bonis vel ex iure Quintium vel ex utroque iure cuiusque servus esse intelligatur), ut demum servum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quintium eiusdem non sit. nam qui nudum nus
to practise excessive and wanton severity upon their slaves. For by a decree of the emperor Antoninus of most holy memory, he who kills his own slave without cause is ordered to be no less amenable than he who kills the slave of another. Further, the extravagant cruelty of masters is restrained by a constitution of the same emperor; for when consulted by certain governors of provinces with regard to those slaves who flee for refuge to the temples of the gods or the statues of the emperors, he ordered, that if the cruelty of the masters appear beyond endurance, they shall be compelled to sell their slaves. And both these rules are just: for we ought not to make a bad use of our right, and on this principle too the management of their own property is forbidden to prodigals.

54. But since among Roman citizens ownership is of two kinds (for a slave is understood to belong to a man either by Bonitary title, by Quiritary title, or by both titles), we shall hold that a slave is in his master's *potestas* only in case he be his by Bonitary title, this being so even though he be not the

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1 Amenable, that is, to the penalties of the Lex Cornelia de Sicius: for we read in D 48. 8. 1. 2; "Ut qui hominem occidit panitur non habita differentia cuus conditionis hominem interdicit." The penalties are stated in D. 48. 8. 3. 5.

2 If 40, 41.
Quiritium in servo habet, is potestatem habere non intelligatur.

55. Item in potestate nostra sunt liberi nostri quos iustis nuptis procreavimus, quod ius proprium civium Romanorum est. fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. idque divus Hadrianus edicto quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. nec me praeter Galatarum gentem credere, in potestatem parentum liberos esse.

56. Homines autem in potestate liberos cives Romanos, si cives Romanas uxores duxerint, vel etiam Latinas peregrinasve cum quibus conubium habeant, cum enim conubium id efficiat, ut same man's in Quiritary title also. For he who has the bare Quintary title to a slave is not understood to have potestas.

55. Our children, likewise, whom we have begotten in lawful marriage, are in our potestas, and this right is one peculiar to Roman citizens. For there are scarcely any other men who have over their children a potestas such as we have. And thus the late emperor Hadrian remarked in an edict which he published with regard to those who asked him for Roman citizenship for themselves and their children. I am not, however, unaware of the fact, that the race of the Galatians think that children are in the potestas of their ascendants.

56. Roman citizens then have their children in their potestas, if they have married Roman citizens or even Latin or foreign women with whom they have conubium. For since conubium

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1 By justae or legumine nuptiae is meant a marriage contracted and established by the special forms prescribed by the jus civile, by non justae nuptiae, on the other hand, is not necessarily meant an illegal marriage, for this phrase generally denotes the contract which, though not completed according to all the prescribed forms of the jus civile, is valid according to the jus gentium. This was an important distinction in reference to the conubia probata.

* When two persons have conubium one with another they can contract justae nuptiae, or a marriage followed by the effects of the jus civile, especially patres potestas over the offspring and the tie of agnatio among them. For "Conubium est uxoris ducentae facultas. Conubium habent cives Romanus cum civibus Romanis; cum Latins autem et peregrins sit si concessum sit: cum servis nullum est conubium." Ulpian, v. 3—5. The double aspect of conubium, viz. as it affected status, and as it related to degrees of...
liberi patris conditionem sequantur, eventit ut non

solum cives

Romani sint, set et in potestate patris sint. (57.) Unde et

veterans quibusdam concedi solet principalibus constitutio-

nibus conubium cum his Latinis peregrinisse quas primas post

missionem uxorés duxerint. et qui ex eo matrimonio nascuntur,

et cives Romani et in potestatem parentum sunt.

58. Saeclum autem est non omnes nobis uxorés ducere licere:

nam a quarundam nuptiis abstinere debemus.

59. Inter eas enim personas quae parentum liberorumve

locum inter se opulent nuptiae contrahi non possunt, nec inter

eas conubium est, velut inter patrem et filiam, vel matrem et

filium, vel avum et neptem: et si tales personae inter se coie-

has the effect of making children follow the condition of their

father, the result is that they are not only Roman citizens by

birth, but are also under their father's potestas. 57. Hence

by Imperial constitutions there is often granted to certain

classes of veterans conubium with such Latin or foreign women

as they take for their first wives after their dismissal from

service; and the children of such a marriage are both Roman

citizens and in the potestas of their ascendants.

58. Now we must bear in mind that we may not marry any

woman we please, for there are some from marriage with

whom we must refrain.

59. Thus between persons who stand to one another in the

relation of ascendants and descendants, marriage cannot be

contracted, nor is there conubium between them, for instance,
between father and daughter, or mother and son, or grand-

1 Gaius does not here tell us what

were the rights of a father having

patris potestas. Originally no doubt

the potestas over children was the

same as over slaves, including the

power of life and death, and the

right to all property which the child

acquired. The former power gradual-

ly fell into abeyance, and the latter

in the case of sons was infringed upon by the rules which sprang up

regarding peculium castrense and

guan-castrense, for which see D. 14-


239. Read also Maine's Ancient

Law, pp. 135—146.

2 Nuptae and matrimonium seem

to be used indiscriminately by Gaius.

Nuptae properly would be the ce-

ronomies of marriage, matrimonium

the marriage itself.
Prohibited Degrees.

1.60, 61. father and granddaughter; and if such persons cohabit, they are said to have contracted an unholy and incestuous marriage. And these rules hold so universally, that although they enter into the relation of ascendants and descendants by adoption, they cannot be united in marriage; so that even if the adoption have been dissolved the same rule stands: and therefore we cannot marry a woman who has come to be our daughter or granddaughter by adoption, even though we have emancipated her.

60. Between persons also who are related collaterally there is a rule of like character, but not so stringent. 61. Marriage is undoubtedly forbidden between a brother and a sister, whether they be born from the same father and the same mother, or from one or other of them. But if a woman become my sister by adoption, so long as the adoption stands, marriage certainly cannot subsist between us; but when the adoption has been dissolved by emancipation, I can marry her: and moreover if I have been emancipated there will be no bar to the marriage.

1 Ulpius, v. 6. 2 Ibid. 3 c Whether they be of the whole or half blood. 4 I 132.
62. Fratris filiam uxorem ducere licet: idque primum in usum venit, cum divus Claudius Agrippinam, fratis sui filiam, uxorem duxisset. sororis vero filiam uxorem ducere non licet. et haec ita principalibus constitutionibus significatur. Item amitam et materteram uxorem ducere non licet.

63. Item eam quae nobis quondam socrus aut nurus aut privagna aut noverca fuit. ideo utem diximus quondam, quia si adhuc constat eae nuptiae per quas talis affinitas quaesita est, alia ratione inter nos nuptiae esse non possunt, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.

64. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur, neque liberos. hi enim qui ex eo coitu nascentur, matrem quidem habere videntur, patrem vero non utique: nec ob id in potestate eius sunt, sed quales sunt ii quos mater vulgo concepit. nam nec hi patrem habere om-ino intelleguntur, cum his etam incertus sit; unde solent

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1 This connection was again prohibited by Constantine, see Inst 1. 10, § 3.
spurii filii appellari, vel a Graeca voce quasi σποράδην concepti, vel quasi sine patre filii.

65. Aliquando autem event, ut liberi qui statim ut nati sunt parentum in potestate non sint, ii postea tamen redigantur in potestatem. (66.) Itaque si Latinus ex lege Aelia Sentia uxore ducta filium procreaverit, aut Latinum ex Latina, aut civem Romanum ex cive Romana, non habebit eum in potestate at causa probata civitatem Romanam consequitur cum filio: simul ergo eum in potestate sua habere incipit.

67. Item si civis Romanus Latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam civem Romanam esse crederet, et filium procreaverit, hic non est in potestate, quia ne quidem civis Romanus est, sed aut Latinus aut peregrinus, id est eius condicionis cuius et mater fuerit, quia non alter quisquam ad patris condicionem accedit, quam si inter patrem et

uncertain: and therefore they are called spurious children, either from a Greek word, being as it were conceived σποράδην (at random), or as children without a father.

65. Sometimes, however, it happens that descendants, who at the moment of their birth are not in the potestas of their ascendants, are subsequently brought into their potestas. 66. For instance, if a Latin, having married a wife in accordance with the Lex Aelia Sentia, have begotten a son, whether a Latin son by a Latin wife or a Roman citizen by a Roman wife, he will not have him in his potestas, but when his case has been proved, he and his son together attain to Roman citizenship: and therefore at the same instant he will begin to have him in his potestas.

67. Likewise if a Roman citizen through ignorance have married a Latin or a foreign woman, believing her to be a Roman citizen, and have begotten a son, this son is not in his potestas, because he is not even a Roman citizen, but either a Latin or a foreigner, that is, of the condition of which his mother is, since a man does not follow his father's condition unless there be conubium between his father and mother: yet

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1 Ulpian, iv. 2. Singpatris according to the second derivation is contracted down into spurii.

2 i. 29. Ulp. vii. 4.
by a senatusconsultum he is allowed to prove a case of error, and so both the wife and son attain to Roman citizenship, and from that time the son begins to be in the potestas of his father. The rule is the same if through ignorance he marry a woman who is in the category of the deditus, except that the wife does not become a Roman citizen. \(68.\) Likewise if a Roman woman by mistake be married to a foreigner thinking him to be a Roman citizen, she is allowed to prove a case of error, and thus both the son and the husband attain to Roman citizenship, and at the same time the son begins to be in his father's potestas. The rule is the same, if she be married in accordance with the Lex Aelia Sentia to a foreigner, under the impression that he is a Latin, for as to this special provision is made by the senatusconsultum. The rule is the same to some extent, if she be married in accordance with the Lex Aelia Sentia to one who is in the category of the deditus, under the impression that he is a Roman citizen or a Latin, except, that is to say, that he who is in the category of the deditus remains in his condition, and therefore the son, although he becomes a

1 Temp Vespasiani, according to Gans.
2 Ulp. VII. 4.
3 See note on I. 78. At first sight it would seem that the son was already a Roman citizen, there being no conubium between the parents; but the Lex Mensia had ruled otherwise.
4 1. 67.
fiant civis Romanus, in potestatem patris non redigitur. (69.)
Item si Latina peregrino, quem Latinum esse crederet, nupserit, potest ex senatusconsulto filio nato causam erroris probare, et ita omnes fiunt cives Romani, et filius in potestate patris esse incipit. (70.) Idem iuris omnino est, si Latinum per errorem peregrinam quasi Latinam aut civem Romanam e lege Aelia Sentia uxorem duxerit. (71.) Praeterea si civis Romanus, qui se credidisset Latinum, duxisset Latinam, permittitur ei filio nato erroris causam probare, tamquam si ex lege Aelia Sentia uxorem duxisset. Item his qui licet cives Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex senatusconsulto filio nato erroris causam probare:
quod factum peregrina uxor civis Romana fit et filius quoque ei non solum ad civitatem Romanam pervenit, sed etiam in potestate patris redigitur. (72.) Quaecumque de filio esse diximus, eadem et de filia dicta intellegemus. (73.) Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius sive filia sit — — — — — — — — — — Latinus — — — — qui — — — — — nisi minor anniculo sit filius filiave,

Roman citizen, is not brought under his father's potestas. 69. Likewise if a Latin woman be married to a foreigner, thinking him to be a Latin, she can, by virtue of the senatusconsultum, after a son is born, prove a case of error, and so they all become Roman citizens, and the son is thenceforward in his father's potestas. 70. The same rule holds in every respect if a Latin by mistake marry a foreign woman in accordance with the Lex Aelia Sentia, under the impression that she is a Latin or a Roman citizen. 71. Further, if a Roman citizen, who believed himself to be a Latin, have married a Latin woman, he is permitted, after the birth of a son, to prove a case of error, just as though he had married in accordance with the Lex Aelia Sentia. Likewise men, who, although they were Roman citizens, believed themselves to be foreigners and married foreign wives, are allowed by the senatusconsultum, after the birth of a son, to prove a case of error: and on this being done the foreign wife becomes a Roman citizen, and the son also in this way not only attains to Roman citizenship, but is brought under the potestas of his father. 72. Whatever we have said of a son, we shall consider to be also said of a daughter. 73. And so far as regards the proving of a case
causa probari non potest. nec me praeterit in aliquo rescripto divi Hadriani ita esse constitutum, tamquam quod ad erroris quoque causam probandum [desunt 2. lin.] Imperator — — tuendum dedit. (74.) Item peregrino [3 1/2 lin.] uxorem duxisset et filio nato aitam civitatam Romanam consecutus esset, deinde cum quaestetetur an causam probare posset, rescriptis Imperator Antoninus perinde posse eum causam probare, atque si peregrinus manisset. ex quo colligimus etiam peregrinum causam probare posse. (75.) Ex suis quae diximus appare — errore— — — peregrinus [1 1/2 lin.] quidem — errorem — — matrimonium — — — — ea quae superius — — nulius error intervenit — — — — — — — — nullo casu — — — — — — — — — 76. [2 lin.] uxorem duxerit, sicut supra quoque diximus, iustum matrimonium contrahi et tunc ex iis qui nascitur, civis Romanus est et in potestate patris erit. (77.) Itaque si civis Romana peregrino nupserit, is qui nascitur, licet omni modo peregrinus sit, tamen interveniente conubio iustus filius est, tam-

of error, it matters not of what age the son or daughter be1…… 74. Likewise in the case of a foreigner…(who) had married, and after the birth of his son had obtained Roman citizenship in some other way, when afterwards the question was raised whether he could prove a case of error, the emperor Antoninus declared in a rescript that he could as well prove a case as if he had remained a foreigner. Whence we gather that a foreigner too can prove a case of error. 75. ……… 76. ……. has married,…. as we also said above, a lawful marriage is contracted, and then the child of such parents is a Roman citizen and in the potestas of his father. 77. Likewise if a Roman woman be married to a foreigner, although

1 The rest of this paragraph is corrupt, but it seems plain that Gaius goes on to say, that although in proving a case of error the age of the child is immaterial; yet it is not so when a Junian Latini applies to the Praetor in virtue of the Lex Acha Sentia, for his claim is not entertained unless the child is above one year of age. 2 § 75 is so corrupt that any translation of it must be mere guess-work. The commencement of § 76 is also mutilated, but obviously Gaius is speaking of the case of a Roman marrying a woman of a nation with which there is conubium. See 1. 56.
I. 78—80. ]

Conubium.

quam si ex peregrina eum procreasset. hoc tamen tempore e senatusconsulto quod auctore divo Hadriano factum est, etsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est. (78.) Quod autem diximus inter civem Romanam peregrinumque matrimonio contracto eum qui nascitur, peregrinum [desunt 11 lin.]. (79.) Adeo autem hoc ita est, ut [desunt 3 lin.] sed etiam, qui Latini nominantur: sed ad alios Latinos pertinet, qui proprios populos propriaque civitates habebant et erant peregrinorum numero. (80.) Eadem ratione ex contrario ex Latino et cive Romana qui nascitur,

the child is in every case a foreigner, yet if conubium exist between his parents, he is a lawful son, as much as if the foreigner had begotten him upon a foreign woman. At the present time, however, by a senatusconsultum which was enacted at the instance of the late emperor Hadrian, even if conubium do not exist between the Roman woman and the foreigner, the child is the lawful son of his father. 78. But when we said that on a marriage taking place between a Roman woman and a foreigner, the child is a foreigner. 79. 

So. On the same principle, in the converse case, the child of a

1 The rule that the child in this case should follow the condition of the father rather than that of the mother is anomalous; and Goschen conjecturally fills up the lacuna in § 78, with an explanation that a special lex (Mensia) had settled that the rule of the child's condition being that of the mother when no conubium subsisted, should in this particular instance be set aside. See Ulpian, v. 8, and D. i. 5. 24.

6 This paragraph again is altogether in confusion. It is difficult to guess at the purport of the missing part of it, and the suggestions of Goschen and Huschke (which are given below) seem hardly to fit in with what is said in § 80. The whole difficulty really turns on the words sed etiam preceding quem Latini nominantur; if instead of these we could suppose some negative phrase, a meaning could be got out of the passage both agreeable to what is said by Ulpian (v. 8): "Lex Mensia ex alterutro peregrino nato parentis conditionem sequitur," and harmonising with § 80; something to this effect; that the Lex Mensia only affected the children of a marriage where one party was a Roman citizen and the other a foreigner; therefore in marriages between Roman citizens and Julian Latins, (since the latter are after all not foreigners, but citizens of an inferior grade, and Latins in name only and not in reality,) the ordinary rule would apply that the mother's status regulated that of the child in cases where there was no conubium between the parents; but, on the other hand, Latins by birth, who had a nationality of their own, were foreigners in reality, and so the Lex Mensia applied to marriages between them and Roman citizens.
civis Romanus nascitur. fuerunt tamen qui putaverunt ex lege Aelia Sentia contracto matrimonio Latinum nasci, quia videtur eo casu per legem Aeliam Sentiam et Iuniam conubium inter eos dari, et semper conubium efficit, ut qui nascitur patris condicioni accedat: aliter vero contracto matrimonio eum qui nascitur iure gentium matris condicionem sequi. at vero hodie civis Romanus est; scilicet hoc iure utimur ex senatusconsulto, quo auctore divo Hadriano significatur, ut omni modo ex Latino et cive Romana natus civis Romanus nascatur. (81.) His convenienter etiam illud senatusconsulto divo Hadriano auctore significatur, ut ex Latino et peregrina, item contra ex peregrino et Latina qui nascatur, matris condicionem sequatur. (82.)

Latin man and a Roman woman is a Roman citizen by birth. Some, however, have thought that when a marriage is contracted in accordance with the Lex Aelia Sentia, the child is a Latin, because it is considered that conubium is granted between them in that case by the Leges Aelia Sentia and Junia, and conubium always has the effect that the child follows the condition of the father\(^1\): but that when the marriage is contracted in any other way the child by the jus gentium follows the condition of the mother. Now-a-days, however, he is a Roman: inasmuch as we adopt this rule by reason of a senatusconsultum, in which at the instance of the late emperor Hadrian it is laid down that the child of a Latin man and Roman woman is in every case a Roman citizen by birth. 81. Agreeably to these principles this rule is also stated in the senatusconsultum passed at the instance of the late emperor Hadrian\(^2\), that the child of a Latin man and a foreign woman, and conversely of a foreign man and a Latin woman, follows the condition of his mother. 82. With these principles too agrees

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The emendations of the German editors are as follows:

Goschen: Adae autem hoc ita est ut non interveniente conubio matrem in quoque sequatur, qui ex evo Romano et Latina colonarum vel Iuniana nascitur, quamquam hoc casu cessat Lex Mensia (?), quae sane non est tantum spectat quae peregrini, sed etiam qui Latini nominantur.

Huschke: Adeo autem hoc ita est, ut ex Latina et evo Romano qui nascitur ex solo jure gentium matris conditionis accedat; quamquam igitur Mensia non solum cæteri peregrini comprehenduntur, sed etiam qui Latini nominantur.

\(^1\) L. 30, 56, 67, Ulpian, v. 8.
\(^2\) L. 66.
Illud quoque his conveniens est, quod ex ancilla et libero iure gentium servus nascitur, et ex libera et servo liber nascitur. (83.) Animadvertere tamen debemus, ne iuris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliqua casu commutaverit. (84.) Ecce enim ex senatusconsulto Claudiano poterat civis Romana quae alieno servo volente domino eius coit, ipsa ex pactione libera permanere, sed servum procreare: nam quod inter eam et dominum istius servi convenerit, ex senatusconsulto ratum esse iubetur.

sed postea divus Hadrianus iniquitate rei et inelegantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat. (85.) Ex lege......ex ancilla et libero poterant liberi nasci: nam ea lege cavetur, ut si quis cum alena ancilla quam credebant liberam esse coerit; si quidem masculi nascantur,

the rule, that the child of a slave woman and a free man is a slave by birth by the jus gentium, and that the child of a free woman and a slave man is a free man by birth1. 83. We ought, however, to be on our guard lest any lex, or anything equivalent to a lex, may have changed in any instance the rule of the jus gentium. 84. Thus, for example, by a senatusconsultum of Claudius, a Roman woman who cohabited with another person's slave with the master's consent, might herself by special agreement remain free, and yet bear a slave2; for whatever was agreed upon between her and the master of that slave, was by the senatusconsultum ordered to be binding. But afterwards, the late emperor Hadrian, moved by the want of equity in the matter and the anomalous character of the rule3, restored the regulation of the jus gentium that when the woman herself remains free, the child she bears shall also be free. 85. By the Lex4......the children of a slave woman and a free man might be born free: for it is provided by that lex that if a man cohabited with

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1 Ulp. v. 9.
3 See, as to this word inelegantia, Austen, Lect. xxx. p. 231 (p. 553, third edition).
4 Whether the Lex here referred to is the Lex Aelia Sentia or some later Lex, or whether it is the Senatus-consultum above specified, is a moot point among commentators, but not of sufficient importance to be examined at length. It is certainly improbable that so accurate a writer as Gaius should have used Lex and Senatusconsultum as convertible terms.
liberi sint, si vero feminae, ad eum pertineant cuius mater ancilla fuerit. sed et in hac specie divus Vespasianus indegantia iuris motus restituit iuris gentium regulam, ut omni modo, etiam si masculi nascantur, servi sint eius cuius et mater fuerit. (86.) Sed illa pars eiusdem legis salva est, ut ex libera et servo alieno, quem sciebat servum esse, servi nascantur. itaque apud quos talis lex non est, qui nascitur iure gentium matris condicionem sequitur et ob id liber est.

87. Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, usdem casibus in potestate eum patris, etiamsi is civis Romanus sit, non esse plus quam manifestum est et ideo superius rettulimus, quibusdam casibus per errorem non iusto contracto matrimonio senatum intervenire et another person's slave, whom he imagined to be free, the children, if males, should be free; if females, should belong to him whose slave the mother was. But in this instance, too, the late emperor Vespasian, moved by the anomalous character of the rule, restored the regulation of the juss gentium, that in all cases, even if males were born, they should be the slaves of him to whom the mother belonged. 86. But the other part of the same law remains in force, that from a free woman and another person's slave whom she knew to be a slave, slaves are born. Amongst nations, therefore, who have no such law, the child by the juss gentium follows the mother's condition, and therefore is free.

87. Now in all cases where the child follows the condition of the mother and not of the father, it is more than plain that he is not in the potestas of his father, even though he be a Roman citizen: and therefore we have stated above that in certain cases, when by mistake an unlawful marriage has been contracted, the senate interferes and makes good the flaw in

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1 The case treated of in § 84 is that of a woman cohabiting with a slave with his master's consent; the case in § 91, that of her cohabiting with the slave against the master's warning. The present case is that of there being neither warning nor express consent.

2 i. 67—73.

3 Senatus here meaning the Legislature by a senatusconsultum. The senate never interfered in cases of this sort (erroris propterea) directly and as a court or body. Indirectly no doubt it did, i.e. by the publication of an enactment on the particular subject.
emendare vitium matrimonii, eoque modo plerumque efficere, ut in potestatem patris filius redigatur. (88.) Sed si ancilla ex cive Romano conceperit, deinde manumissa civis Romana facta sit, et tunc pariat, licet civis Romanus sit qui nascitur, sicut pater eius, non tamen in potestatem patris est, quia neque ex iusto coitu conceptus est, neque ex ullo senatusconsulto talis coitus quasi iustus constituitur.

89. Quod autem placuit, si ancilla ex cive Romano conceperit, deinde manumissa sit, et tunc pariat, qui nascitur, naturali ratione fit. nam hi qui illegituiie concepuntur, statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberi sunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. at hi qui legitimae concepuntur, ex conceptionis tempore statum sumunt. (90.) Itaque si cui mulieri civi Romanae praecipit aqua et igni interdictum fuent, eoque

the marriage, and thus generally causes the son to be brought under his father’s potestas. 88. But if a female slave conceive by a Roman citizen, be then manumitted and made a Roman citizen, and then bear her child, although the child is a Roman citizen, just as much as his father is, yet he is not in his father’s potestas, because he is neither born from a lawful cohabitation, nor is such a cohabitation put on the footing of a lawful one by any senatusconsultum.

89. The rule, however, that if a slave woman conceive by a Roman citizen and be then manumitted and bear a child, such child is free born, is based on natural reason. For those who are conceived illegitimately take their status from the moment of birth; therefore if born from a free woman they are free, nor is it material by what man the mother conceived them when she was a slave. But those who are conceived legitimately take their status from the time of conception. 90. Therefore if a Roman woman, whilst pregnant, be interdicted from fire and water, and so become a foreigner, and then bear her

1 Ulpius, v. 10.
2 It was a rule of Roman law that no one could lose his citizenship without his own consent. The interdict from fire and water brought about the result which justice required but the law could not effect. The culprit by being debarred from the necessities of life was driven to inflict on himself banishment, and with it loss of citizenship. “Id autem ut esset facendum, non ademptione civitatis, sed tecti et aquae et ignis interdictione faciebant.” Cic. pro Dom. 30.
modo peregrina fiat, et tunc pariat, conplures distinguunt et putant, si quidem ex iustis nuptis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, peregrinum ex ea nasci. (91.) Item si qua mulier cives Romana praegnans ex senatus-consulto Claudiano ancilla facta sit ob id, quod alieno servo currit denuntiante domino eius, conplures distinguunt et existimant, si quidem ex iustis nuptiis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, servum nasci euis cuius mater facta est ancilla. (92.) Item peregrina quoque si volgo conceperit, deinde cives Romana facta sit, et pariat, civem Romanum parit; si vero ex peregrino, eum secundum leges moresque peregrinorum coniuncta est, videtur ex senatus-consulto quod auctore divo Hadiano factum est peregrinus nasci, nisi patru eius civitas Romana quatesita sit.

93. Si peregrinus cum liberis civitate Romana donatus fuerit, non aliter filii in potestate eius fiunt, quam si Imperator eos in child, many authors draw a distinction, and think that if she conceived in lawful marriage, the child born from her is a Roman citizen, whilst if she conceived out of wedlock, the child born from her is a foreigner. 91. Likewise, if a Roman woman, whilst pregnant, be reduced to slavery in accordance with the senatusconsultum of Claudius, because she has cohabited with another man's slave in spite of the warning of his master1, many authors draw a distinction and hold that if she conceived in lawful marriage, the child born from her is a Roman citizen, but if she conceived out of wedlock, he is a slave of the man to whom the mother has been made a slave.

92. Likewise if a foreign woman have conceived out of wedlock, and then be made a Roman citizen and bear her child, the child she bears is a Roman citizen: but if, on the contrary, she conceived him by a foreigner to whom she was united according to the laws and customs of foreigners, he is considered, in accordance with a senatusconsultum which was made at the instance of the late emperor Hadrian, to be born a foreigner, unless Roman citizenship has been obtained by his father.

93. If a foreigner and his children with him, be presented with Roman citizenship, the children are not in his potestas, unless the emperor has subjected them to his potestas2. Which

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1 I. 84, 160.
2 III. 70. Pliny, Paneg. c. 37.
poteestatem redegerit. quod ita demum est facit, si causa cognita adestimaverit hoc filiis expedire: diligentius atque exactius enim causas cognoscit de impuberibus absentibusque. et haec ita edicto divi Hadriani significatur. (94.) Item si quis cum uxore praegnante civitate Romana donatus sit, quamvis is qui nascitur, ut supra diximus, avus Romanus sit, tamen in potestate patris non fit: idque subscriptione divi Hadriani significatur. qua de causa qui intellegit uxorem suam esse praegnantem, dum civitatem sibi et uxori ab Imperatore petit, simul ab eadem petere debet, ut eum qui natus erit in potestate sua habeat. (95.) Alia causa est eorum qui Latini sunt cum libris suis ad civitatem Romanam perveniunt: nam horum in po. estate

he only does if, on investigation of the circumstances, he judges this expedient for the children: for he examines a case with more than ordinary care and exactness when it relates to persons under the age of puberty and to absentees. And these matters are so laid down in an edict of the late emperor Hadrian. 94. Likewise if any man, and his pregnant wife with him, be presented with Roman citizenship, although their child is, as we have said above, a Roman citizen, yet he is not in the potestas of his father: and this is laid down by a (special) rescript of the late emperor Hadrian. Wherefore a man who knows his wife to be pregnant, when asking for citizenship for himself and his wife from the Emperor, ought at the same time to ask him that he may have the child who shall be born in his potestas. 95. The case is different with those who are Latins and with their children attain to Roman citizenship, for their children come under their potestas. Which

1 i. 92.
2 Subscriptio was the emperor's reply to a case laid before him, such reply having authority upon that particular point only. It was almost equal to a Rescript or Epistola. See note on i. 5, and Dirksen, Manuale Latinitatis, sub verbo, § 7.
3 As stated in the note on § 22, Niebuhr held that the magus Latium was the franchise of the old Latin towns: whilst the minus Latium was the franchise of the colonists north of the Po. The Julian law gave civitas to all the old Latin towns, and therefore according to Niebuhr's notion, the magus Latium long before Gaus' time had become obsolete; the only Latin franchise remaining being the minus. Mommsen, however, propounds another theory, into the proof of which our limits preclude our entering, but we may state that the conclusion he arrives at is that the two franchises were both existent in Gaus' time, that neither had any-
fiunt liberi. quod ius quibusdam pergruus [desunt lin. 4].
(96.) magistratum gerunt, civitatem Romanam consequuntur;
minus Latium est, cum hi tantum qui vel magistratum vel
honorem gerunt ad civitatem Romanam pervenunt. idque
compluribus epistulis Principium significatur [t lin.].
97. Non solum tamen naturales liberis, secundum ea quaæ dix-
imus, in potestate nostra sunt, verum et hi quos adoptamus.
98. Adoptr autem duobus modis fit, aut popul.is auctortate,
augurw magistratus, velut Praetoris. (99) Populi aucto-
rate adoptamus eos qui sui iuris sunt: quae specie adoptionis

right (has been extended) to certain foreigners... ...
96. (The
franchise is the magus Latium when the wives and children of
the magistrates of the town as well as the persons themselves
who) discharge the office obtain Roman citizenship: but is the
minus Latium, when those only who hold the magistracy or office
of honour attain to Roman citizenship. And thus is stated in
many epistles of the Emperors.
97. Not only our actual children are in our potestas, accord-
ing to what we have already said, but those also whom we
adopt.
98. Now adoption takes place in two ways, either by author-
ty of the populus¹, or under the jurisdiction of a magistrat,
for instance the Praetor². 99. By authority of the populus we
adopt those who are sui jurs: which species adoption is

thing to do with the old Latins, and
that the difference between the two
was that in the case of the magus
Latium the full curitas was conferred
on those who held office in the co-
llany, and on their wives, parents,
and children, whilst in the case of
the minus Latium, the full curitas
was conferred on the magistrate alone
and not on his relations. See Mommsen,
Die Stadtrechte der Lat. Ga." Salpens,
and Gaus, i. 79, 131, 111. 56.
With Mommsen's view of the sub-
ject agrees the account given by
Appian (de Lillo Livio, ii. 26) of
the settlement of the city of Novo
Como by Caesar. Appian tells us
the inhabitants received the jus Lat-
itu, and that the consequence of this
was that any of the citizens who
held a superior magistracy for a year
obtained the Roman curitas. So also
Asconius has a passage (in Prin.,
p. 3, edit. Orell) which may be trans-
lated: "Pompey gave to the original
inhabitants the jus Latin, so that
they might have the same privilege
as the other Latin colonies, viz. that
then members by holding a magis-
tracy should attain to the Roman
citizenship." The passage in Livy
xii. 8 refers to the old jus Latin,
which was turned into full curitas by
the Lex Julia, but it is well worth
reading.

¹ 1 3
² Ulpian, viii. 1-3.
Adoption and Arrogation.

dicitur adrogatio, quia et qui adoptat rogatur, id est interro-
gatur an velit eum quem adoptaturus sit iustum sibi filium esse; et qui adoptatur rogatur an id fieri patiatur; et populus roga-
tur an id fieri uibeat. Imperio magistratus adoptamus eos qui
in potestate parentium sunt, sive primum gradum liberorum
optimeant, quales est filius et filia, sive infernorem, quales est
nepos, nepalis, pronepos, pronepalis. (100.) Et quidem illa
adoptio quae per populum fit nusquam nisi Romae fit: at haec
tiam in provincias apud Praesides earum fieri solet. (101.)
Item per populum femnae non adoptantur; nam id magis
placuit. Aput Praetorem vero vel in provincis apud Proconsu-
sulem Legatumve etiam femnae solet adoptari.

102. Item inpuberem aput populum adoptari aliquando pro-
hibitum est, aliquando permittum est: nunc ex epistula optimi
Imperatoris Antonini quam scripsit Pontificibus, si iusta
causa adoptionis esse videbitur, cum quibusdam condicionibus per-

styled arrogatio, for he who adopts is rogated, i.e. is interro-
gated whether he wishes the man whom he is about to adopt
to become his lawful son; and he who is adopted is rogated
whether he submits to that being done: and the populus are
rogated whether they order it to be done. Under the juris-
diction of a magistrate we adopt those who are in the potestas
of their ascendants, whether they stand in the first degree of
descendants, as son or daughter, or in a lower one, as grand-
son, granddaughter, great-grandson, great-granddaughter. (100.
That adoption which is performed by authority of the populus
takes place nowhere but at Rome; but the other is frequently
performed in the provinces also in the presence of their govern-
ors. (100. Women, likewise, are not adopted by authority of
the populus: for so it has been generally ruled. But before
the Praetor, or in the provinces before the Proconsul or Legate,
women as well as men may be adopted. (102. Further, there
have been times when it has been forbidden to adopt by
authority of the populus one under the age of puberty, there
have been times when it has been allowed. At the present time,
according to an epistle of the excellent emperor Antoninus
which he wrote to the Pontifices, if the cause of adoption appear

1 See Appendix (C). 
2 Ulpian, viii 4, 5. 
3 1, 6, n. 
4—2
Adoption and Arrogation. [I. 103—107.

missum est. aput Praetorem vero, et in provinciis aput Prae-
consulem Legatumve, cuiscumque aetatis adoptare possumus.

103. Illud vero utriusque adoptionis commune est, quia et
hi qui generare non possunt, quales sunt spadones, adoptare
possunt. (104.) Feminae vero nullo modo adoptare possunt,
quia ne quidem naturales liberos in potestate habent. (105.)
Item si quis per populum sive aput Praetorem vel aput Prae-
sidem provinciae adoptaverit, potest eundem alii in adoptionem
dare. (106.) Set illa quaestio est, an minor natu maiorem natu
adoptare possit: sed utriusque adoptionis commune est.

107. Illud proprum est eius adoptionis quae per populum
fit, quod is qui liberos in potestate habet, si se adrogandum
dederit, non solum ipse potestatis adrogatoris subicitur, set
etiam liberi eius in eiusdem fiunt potestate tanquam nepotes.

lawful, it is allowed under certain conditions. Before the
Praetor, however, or in the provinces before the Proconsul or
Legate, we can adopt people of any age whatever 1.

103. It is a rule common to both kinds of adoption, that
those who cannot procreate, as eunuchs-born, can adopt 2.
104. But women cannot adopt in any way, inasmuch as they
have not even their actual children in their potestas. 3 105. Like-
wise, if a man adopt by authority of the populus, or before the
Praetor or governor of a province, he can give the same person
in adoption to another. 106. But it is a moot point whether
a younger man can adopt an elder, and the doubt is common
to both kinds of adoption 4.

107. There is this peculiarity attaching to the kind of
adoption effected by authority of the populus, that if one who
has children in his potestas give himself to be arrogated, not
only is he himself subjected to the potestas of the arrogator,
but his children also come into the potestas of the same man
in the capacity of grandchildren 5.

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1 But it was generally required
that the adoptor should be more
than sixty years of age, D. i. 7. 15. 2,
and should be at least eighteen years
older than the person adopted. Inst.
i. 11. 4, D. i. 7. 40. i.
2 Ulpian, VIII. 6.
3 Ibid. 8 a.
4 Justinian settled that the adoptor
must be older than the adopted by 18
years ("plena pupertate") Inst. i. 11. 4.
5 Ulpian, VIII. 8. The emperor
Justinian remodelled the whole law
of adoption, enacting that the ac-
tual father should lose none of his
rights, and be exempted from none

108. *Nunc de his personis videamus quae in manu nostra sunt,* quod et ipsum ius proprium civium Romanorum est. (109.) Sed in potestate quidem et masculi et feminae esse solent: in manum autem feminae tantum conveniunt. (110.) Olim itaque tribus modis in manum conveniebant, usu, farreo, coemptione. (111.) Usu in manum convenebat quae anno continuo nupta perseverabat; *quaet enim velut annua possessione usucapiebatur,* in familiam viri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum est, si qua nollet eo modo in manum mariti convenire, ut quotannis trinactio absset atque *ita usum cuiusque anni interrumperet.* set hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitaturum est. (112.) Farreo in manum conveniunt *per quoddam genus sacrificii*...... *in quo farreus panis adhibetur.*

108. Now let us consider about those persons who are in our *manus.* This also is a right peculiar to Roman citizens. 109. But whereas both males and females may be in our *potestas,* females alone come into *manus.* 110. Formerly they came into *manus* in three ways, by *usu,* *farreum* or *coemption.* 111. A woman who remained married for an unbroken year came into *manus* by *usu* (usage): for she was in a manner acquired by usucapion through the possession of a year, and so passed into the family of her husband, and gained the position of a daughter. Therefore it was provided by a law of the Twelve Tables, that if any woman was unwilling to come under her husband’s *manus* in this way, she should year by year absent herself for the space of three (successive) nights, and so break the usage of each year. But all these regulations have been in part removed by enactments, in part abolished by mere disuse. 112. Women come into *manus* by *farreum* through a particular kind of sacrifice...... *in which a cake of fine flour* (far) is of his duties in respect of the child given in adoption. The only exception was in the case when the adoptor was an ascendant of the adopted. In the latter case, styled *adopio pleno,* the old law remained in force. In the other kind (*minus pleno*) the adopted child had no claims on the adoptor, except that of succeeding to him in case of his intestacy, and the adoptor had no claims whatever on the adopted. 1 For an explanation of *usucapio,* see II. 42 et seqq. 2 Tab. vi. l. 4. 3 Ulpian, IX. Servius thus describes a part of the ceremony used in the marriage of a Flamen and Flaminica. “Two seats were joined together and covered with the skin of
Manus by Coemption.

unde etiam confarreatio dicitur. sed conplura praeterea huius iuris ordinandi gratia cum certis et sollemnisibus verbis, praeentibus decem testibus aguntur et sunt. quod 1us etiam nostris temporibus in usu est: nam flamines maiores, id est Diales, Martiales, Quirinales, scul Reges Sacrorum, nisi sunt confarreatis nuptius nati, inagurari non videmus — confarreatio — — — — — (113.) Coemptione in manum conveniunt per mancipationem, id est per quandam imaginiam venditionem, adhibitis non minus quam v testibus, civibus Romanis puberibus, item libripende, asse is sibU emus mulierem, cuius in manum convenit. (114.) Potest autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo: unde aut matrimonii causa facta coemption dicitur, aut fiducciae causa. quae enim cum marito suo facta coemptionem, ut aput eum filiae loco sit, dicitur matrimonii causa fecisse coemp-

employed: whence also the proceeding is called "confarreation": but besides this there are many other ceremonies performed and done for the purpose of ratifying the ordinance, with certain solemn words used, and with ten witnesses present. This rite is in use even in our times, for we see that the superior flamens, i.e. the Diales, Martiales and Quirinales, as well as the Reges Sacrorum, are not admitted to office, unless they are born from a marriage by confarreation1......113. Women come into manus by coemption by means of a mancipation2, i.e. by a kind of imaginary sale, in the presence of not less than five witnesses, Roman citizens of the age of puberty, as well as a libripens4, (wherein) he into whose manus the woman is coming buys her for himself with an as. 114. Now a woman can make a coemption not only with her husband, but also with a stranger: whence a coemption is said to be made either with intent of matrimony or with fiduciary intent. For she who makes a coemption with her husband, to be to him in the place of a daughter, is said to make coemption with the intent of matrimony: but she who

a sheep that had been sacrificed; then the couple were introduced enveloped in a veil, and made to take their seats there, and the woman, to use Drilo's words, was said to be livata to her husband." See Severus on Ann. IV. 104, 357.

1 Tact Ann. IV. 16.
2 i. 119.
3 i. 119. Some further information on the subject of coemption will be found in Boethius ad Cic. Top. 3. 14.
makes a coemption with her husband or a stranger for any other purpose, for instance to get rid of her guardian, is said to have made coemption with fiduciary intent¹. 115. This is effected as follows: if a woman wish to get rid of the guardians she has, in order to obtain another, she makes a coemption with their authorization: then being retransferred in mancipation by the coemptionator to such person as she pleases, and by him manumitted by vindicta, she henceforth has for guardian him by whom she was manumitted; and he is called a fiduciary tutor, as will appear below. 115 a. In ancient times a fiduciary coemption took place also for the purpose of making a testament². For then women had no right of making a testament (certain persons excepted), unless they had made a coemption,

¹ Tutela is treated of in i. 142—200 which passage should be read in order fully to understand this paragraph. The law, as we know, allowed the woman to do no act without the sanction of her guardians, so that even her reputation of them required authorization on their part; although if they were unfit for their office, and yet vexatiously refused to allow a transfer, the Praetor would, as in other cases where they refused to carry out the woman’s wishes, interfere and compel them (i. 190). The guardian, then, sells the woman to the coemptionator by mancipatio. The coemptionator has her in his manus, and by a second mancipatio he transfers her into the mancipium of the person she desires to have as guardian (i. 123). From the mancipium she is freed by emancipation, and so, by mere operation of law (i. 166), at once has the manumittor as her “tutor fiduciarius.”

² i. 195.

³ In ancient times the agnati were heirs-at-law to a woman, and their succession could not be directly set aside. The method adopted was to break the agnatic bond by removing the woman from her family by the process described in the text.
coemptionis faciendae ex auctoritate divi Hadriani senatus remisit. ———— ———— femina ———— ———— (115 b.) Licet autem mulier fiduciae causa cum viro suo fecisset coemptionem, nihilominus filiae loco incipit esse: nam si omnino quaecumque causa uxor in manu viri sit, placuit eam iura filiae nancisci.

116. Superest ut exponamus quae personae in mancipio sint (II7.) Omnes igitur liberorum personae, sive masculini sive feminam sexus, quae in potestate parentis sunt, mancipari ab hoc codem modo possunt, quo etiam servi mancipari possunt. (118.) Idem iuvs est in eorum personis quae in manu sunt. nam feminae a coemptionatoribus eodem modo possunt mancipari quo liberi a parente mancipantur; adeo quidem, ut quamvis ea sola aput coemptionatorem filiae loco sit quae ei nupta sit, been retransferred by mancipation, and manumitted. But the senate, at the instance of the late emperor Hadrian, abolished this necessity of making a coemption...... 115 b. But even if it be for fiduciary purpose that a woman has made a coemption with her husband, she is nevertheless at once in the place of a daughter to him: for if in any case and for any reason a woman be in the manus of her husband, it is held that she obtains the rights of a daughter.

116. It now remains for us to explain what persons are in mancipium. 117. All descendants, then, whether male or female, who are in the potestas of an ascendant, may be mancipated by him in the same manner in which slaves also can be mancipated. 118. The same rule applies to persons who are in manus. For women may be mancipated by their coemptionators in the same manner in which descendants are mancipated by an ascendant: and so universally does this hold, that although that woman alone who is married to her coemptionator stands in the place of a daughter to him, yet one also who is not married to him and so does not stand in the

She then stood alone in the world: "caput et fines familiae," and having no agnata to prefer a claim against her, could freely dispose of her property. III. 9—14. Cic. pro Mur. c. 12. 1 Remanicipata is the technical word for a woman mancipated out of manus. "Remanicipatam Gallus Aelius ait quae remanicipata sit ab eo cui in manum conveniet." Festus sub verb.

* On this subject generally see Mommsen's History of Rome (Dickson's translation), Vol. 1, p. 60.
Mancipation.

tamen nihil minus etiam quae ei nuptra non sit, nec ob id filiae loco sit, ab eo mancipari possit. (118a.) Plerumque solum et a parentibus et a coemptionatoribus mancipantur, cum velint parentes coemptionatoresque e suo iure eas personas dimittere, sicut inferius evidentius apparebit. (119.) Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: quod et ipsum ius proprium civium Romanorum est. eaque res ita agitur. adhibitis non minus quam quinque testibus civibus Romanis puberibus, et praeterea alio eiusdem conditionis qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit rem, aes tenens ita dicit: Hunc ego hominem ex iure Quiritium meum esse aio, isque mihi emptus est hoc aere aeneaque libra: deinde aere percutit libram, idque aes dat ei a quo mancipio accipit, quasi pretii loco. (120.) Eo modo et serviles et libertae personae mancipantur. animalia quoque quae mancipi sunt quo in numero habentur boves, equi, muli, asini; item

place of a daughter to him, can nevertheless be mancipated by him. 118a. But generally persons are mancipated, whether by ascendants or coemptionators, only when the ascendants or coemptionators wish to set them free from their control, as will be seen more clearly below1. 119. Now mancipation, as we have said above2, is a kind of imaginary sale: and this legal form too is one peculiar to Roman citizens. It is conducted thus: not less than five witnesses being present, Roman citizens of the age of puberty, and another man besides of like condition who holds a copper balance, and is called a libripens, he who receives the thing in mancipium takes a coin in his hand and says as follows: “I assert this man to be mine in Quiritary right; and he has been bought by me by means of this coin and copper balance:” then he strikes the balance with the coin, and gives the coin, as though by way of price, to him from whom he receives the thing in mancipium. 120. In this manner persons, both slaves and free, are mancipated. So also are those animals which are things mancipable3, in which category are reckoned oxen, horses, mules, asses; likewise such

1 I. 132. 2 II. 40, 41. 3 I. 113. 4 II. 15.
praedia tam urbana quam rustica quae et ipsa mancipi sunt, quaela sunt Italica, eodem modo solent mancipari. (121.)
In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia quae mancipi sunt, nisi in praesentia sint, mancipari non possunt: adeo quidem, ut eum qui mancipio accipit adprehendere id ipsum quod ei mancipio datur necesse sit: unde etiam mancipatio dicitur, quia manu res capitur. praedia vero absentia solent mancipari. (122.) Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur; et erant asses, dupondii, semisses et quadrantes, nec ullus aureus vel argenteus nummus in usu erat, sicut ex lege xii tabularum intellegere possimus; eorumque nummorum vis et potestas non in numero erat, sed in pondere nummorum. veluti asses librales

landed properties, with or without houses on them¹, as are things mancipable, of which kind are Italic properties², are mancipated in the same manner. 121. In this respect only does the mancipation of estates differ from that of other things, that persons, slave and free, and likewise animals which are things mancipable, cannot be mancipated unless they are present; and so strictly indeed is this the case, that it is necessary for him who takes the thing in mancipium to grasp that which is given to him in mancipium whence the term mancipation is derived, because the thing is taken with the hand: but estates can be mancipated when at a distance⁴. 122. The reason for employing the coin and balance is that in olden times men used a copper coinage only, and there were asses, dupondii, semisses, and quadrantes, nor was any coinage of gold or silver in use, as we may see from a law of the Twelve Tables⁵: and the force and effect of this coinage was not in its number but its weight. For instance the asses weighed a pound each, and the dupondii two;

¹ Ulpian, xix. 1.
² Italic soil was not necessarily in Italy. The name signified that portion of the Roman empire in which certain privileges and immunities were granted to the inhabitants. These were chiefly, exemption from the sextiga or land-tax paid by the possessors of provincial soil, the right of self-government by elective magistrates, and the presence of the Roman rules of immovable property, with their peculiarities of mancipatio, caso in jure, nummum, etc. A list of colonies possessing the Jus Italianum is given in D. 50. 15. 1, 6, 7 and 8.
⁴ But a sod, a brick or a tile must be brought to be handled.
⁵ Probably Tab. ii. I. 1.
erant, et dipondius tum erant bilibres; unde etiam dipondius dictus est quasi duo pondo: quod nomen adhuc in usu retinetur. semisser quoque et quadrantes pro rata scilicet librae acers habeant certum pondus. Item qui dabant oleum peccuniam non adnumerabant eam, sed appendebant. unde servi quibus permittitur administratio peccuniae dispensatores appellati sunt et adhuc appellantur. (123.) Si tamen quaerat aliquis, quae re vixo coemtione enta mancipatis distet: ea quidem quae coemptionem facit, non deducitur in servilem conditionem, a parentibus vero et a coemtionatoribus mancipati mancipataeve servorum loco constituuntur, adeo quidem, ut ab eo cuius in mancipio sunt neque hereditatem neque legata aliter capere possint, quam si simul eodem testamento liberi esse iubeantur

whence the name dipondius, as being duo pondo; a name which is still employed. The semisses (half-asses) and quadrantes (quarter-asses) had also a definite weight, according to their fractional part of the pound of copper. Those, likewise, who gave money in the olden times did not count it out, but weighed it; and thus slaves who have the management of money entrusted to them were called dispensatores (weighers out), and are still so called. 123. But if any one should inquire in what respect a woman purchased in coemption by a husband differs from those who are mancipated: (it is that) a woman who makes a coemption is not reduced to the condition of a slave, whilst those mancipated by parents and coemptionators are brought into that condition, so that they can neither take an inheritance nor legacies from him in whose mancipium they are, unless they be

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1 Isidor. Orig. xvi. c. 24.  
2 When a free person is transferred from potestas, or as in the present case from manus, by mancipium, the authority appertaining to the purchaser is neither potestas nor manus, but mancipium. The person has been sold as though he were a slave, and after the sale is "in servio loco," and although the slavery is fictitious and free from most of the incidents of real slavery, yet that mentioned in the text with regard to his appointment as heir remains. The full signification of his "being ordered to be free," will be better understood after reading II. 186, 187, &c.  
Read notes on I. 132, 134, and see I. 135.  
The reading proposed by Huschke is adopted: "Quae re vixo coemptione enta mancipatis distet," instead of Gneist's: "Quare citra coemptionem feminae etiam mancipantur." Huschke says with truth that no satisfactory meaning can be got out of the latter.
sicut iuris est in persona servorum. sed differentiae ratio manifesta est, cum a parentibus et a coemptionatoribus isdem verbis mancipio accipiuntur quibus servi; quod non similiter fit in coemptione.

124. Videamus nunc, quibus modis ii qui alieno iuri subjicii sunt eo iure liberentur. (125.) Ac prius de his dispiciamus qui in potestate sunt. (126.) Et quidem servi quemadmodum potestas liberentur, ex his intelligere possimus quae de servis manumittendis superius exposuimus.

127. Hi vero qui in potestate parentis sunt mortuo eo sui iuris sunt. Sed hoc distinctionem recipit. nam mortuo patre sane omnimodo filii filaeve sui iuris efficuntur. mortuo vero avo non omnimodo nepotes neposque sui iuris sunt, sed ita, si post mortem avo in patris sui potestatem recasuri non sunt. subque si mortiente avo pater corum et vivat et in potestate patris fuerit, tunc post obitum avo in potestate patris sui sunt: si vero is,

also ordered in the testament to be free, as is the case with slaves. But the reason of the difference is plain, inasmuch as they are received in mancipium from the parents and coemptionators with the same form of words as slaves are: which is not the case in a coemption1.

124. Now let us see by what means those who are subject to the authority of another are set free from that authority. 125. And first let us discuss the case of those who are under potestas. 126. How slaves are freed from potestas we may learn from the explanation of the manumission of slaves which we gave above2.

127. But those who are in the potestas of an ascendant become sui iuris on his death. This, however, admits of a qualification3. For, undoubtedly, on the death of a father sons and daughters in all cases become sui iuris: but on the death of a grandfather grandsons and granddaughters do not become sui iuris in all cases, but only if after the death of the grandfather they will not relapse into the potestas of their father. There-

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1 We do not know what the words used in a coemptio were, but Boethius in the passage already referred to (see note on 1. 113) states that the proceedings were more in the nature of a bilateral contract than a mere unilateral one, and possibly this may be the reason of the difference in the position of the wife and the emancipated person.
2 1. 13, &c.
3 Ulpian, X. 2.
I. 128, 129.

Liberation from Potestas.

quo tempore avus moritūr, aut iam mortuus est, aut exit de potestate patris, tunc hi, quia in potestatem eius cadere non possunt, sui iuris fiant. (128.) Cum autem is cui ob aliquod maleficium ex lege poenali aqua et igni interdicitur civitatem Romanam amittat, sequitur, ut qui eo modo ex numero civium Romanorūm tollitur, proinde ac mortuo eo desinant liberi in potestate eius esse: nec enim ratio patitur, ut peregrinae conditionis homo civem Romanum in potestate habeat. Parī racione et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia acque ratio non patitur, ut peregrinae conditionis homo in potestate sit civis Romani parentis.

129. Quod si ab hostibus captus fuerit parens, quamvis ser-

fore, if at the grandfather's death their father be alive and in the potestas of his father, then after the death of the grandfather they come under the potestas of their father; but if at the time of the grandfather's death the father either be dead or have passed from the potestas of his father, then the grandchildren, inasmuch as they cannot fall under his potestas, become sui juris. 128. Again, since he who is interdicted from fire and water for some crime under a penal law loses his Roman citizenship, it follows that the descendants of a man thus removed from the category of Roman citizens cease to be in his potestas, just as though he were dead: for it is contrary to reason that a man of foreign status should have a Roman citizen in his potestas. On like principle, also, if one in the potestas of an ascendant be interdicted from fire and water, he ceases to be in the potestas of his ascendant; for it is equally contrary to reason that a man of foreign status should be in the potestas of an ascendant who is a Roman citizen.

129. If, however, an ascendant be taken by the enemy, although for the while he becomes a slave of the enemy, yet by

1 I. 90. Ulpian, x. 3.
2 Ulpian, x. 4. The nature of the jux postillum is partly explained in the text. Its effect was that all things and persons taken by the enemy were, on recapture, replaced in their original condition. Property retaken was returned to the original owners, and not left in the hands of the recaptor; liberated captives were regarded as having never been absent. See D. 49. 15, especially 11. 4 and 12, where the technicalities of the subject are discussed and examined.
Jus Postlimini.

46

vus interim hostium fiat, pendet ius liberorum propter ius postlimini, quia hi qui ab hostibus capti sunt, si reversi fuerint, omnia pristina iura recipiunt. itaque reversus habebit liberos in potestate. si vero illic mortuus sit, erunt quidem liberi sui iuris; sed utrum ex hoc tempore quo mortuus est apud hostes parens, an ex illo quo ab hostibus captus est, dubitari potest.

Ipsi quoque filius neposve si ab hostibus captus fuerit, similiter dicemus propter ius postlimini potestatem quoque parentis in suspensu esse. (130.) Praeterea exeunt liberi virilis sexus de patris potestate si flamines Diales inaugurentur, et feminini sexus si virgines Vestales capiantur. (131.) Olim quoque, quo tempore populus Romanus in Latinas regiones colonias deducebat, quis esset parentis profectus erat in Latinam coloniam, e patria potestate exire videbatur, cum quis esset civitatis Romana cessaret accipientur alterus civitatis cives.

vii virtue of the rule of postliminy his authority over his descendants is merely suspended; for those taken by the enemy, if they return, recover all their original rights. Therefore, if he return, he will have his descendants in his potestas, but if he die there, his descendants will be sui juris, but whether from the time when the ascendant died amongst the enemy, or from the time when he was taken by the enemy, may be disputed. If too the son or grandson himself be taken by the enemy, we shall say in like manner that by virtue of the rule of postliminy the potestas of the ascendant is merely suspended. 130. Further, male descendants escape from their father's potestas if they be admitted flamens of Jupiter, and female descendants if elected vestal virgins. 131. Formerly also, at the time when the Roman people used to send out colonies into the Latin districts, a man who by command of his ascendant set out for a Latin colony was regarded as exempt from patria potestas, since those who thus abandoned Roman citizenship were received as citizens of another state.

1 Justian decided they should be sui juris from the time of the capture. Inst. 1. 12. 5. Ulpian, x. 5. Tacit. Ann. iv. 16.
2 Notes on 1. 12. 1. 93. See C. c. 30, pro Balbo, c. 11—13. In fact the direct object of the practice was to enable the new colonists to take up the civitas of the place they were going to colonize, and so by renouncing the civitas or domicile of origin, escape from the patria potestas. It
132. Emancipatio rode desinunt libeni potestatem parentum esse. sed filius quidem testa demum mancipatone ceteri vero liber, sive masculini sexus sive feminini, una mancipatone exuncte de parentum potestate: lex enim XII tantum in persona filii de tribus mancipationibus loquitur, his verbis: SI PATER FILIUM TER VENUMDABIT, FILIUS A PATRE LIBER ESTO. caque res ita agitur. mancipat pater filium alci: is eum vindicta manumittit: eo facto revertitur in potestatem patris. is eum iterum mancipat vel eidem vel ali: set in usu est oedem mancipan: isque eum postea simuliter vindicta manumittit: quo facto rursus in potestatem patris sui revertitur. tunc tertio pater eum mancipat vel eidem vel ali; set hoc in usu est, ut eidem mancipetur: caque mancipacione desinuit in potestate patris esse, etiamsi nondum manumissus sit, set adhuc in causa mancipi [lin. 24].

132. Descendants also cease to be in the potestas of ascend­ants by emancipation. And a son ceases to be in his ascen­dant’s potestas after three mancipations, other descendants, male or female, after one: for the Law of the Twelve Tables only requires three mancipations in the case of a son, in the words: “If a father sell his son three times, let the son be free from the father.” Which transaction is thus effected: the father mancipates the son to some one or other, who manumits him by vindicta. this being done, he returns into his father’s potestas: he mancipates him a second time, either to the same man or to another, but it is usual to mancipate him to the same: and this person afterwards manumits him by vindicta in the same manner, which being done he returns again into his father’s potestas. then the father a third time mancipates him either to the same man or to another, but it is usual to mancipate him to the same: and by this mancipation he ceases to be in his father’s potestas, although he is not yet manumitted, but is in the condition called mancipium.

It is important to notice that this was done, and it may be presumed could only be done, by permission and authority of the ascendants. By his own act and will therefore “nemo patrium suum exuor potest.”

1 Ulpian, N. 1.
2 Tab. IV. l. 3.
3 L. 17.
4 He was not generally manumitted out of mancipium, for then, as a person in mancipium is in a servile position, the manumitor would have been his patronus and so have had extensive claims on his inheritance (l. 165, 111. 39, &c.), but by the pro-
Emancipation of descendants.  

133. Liberum autem arbitrium est ei qui filium et ex eo nepotem in potestate habebit, filium quidem de potestate dimittere, nepotem vero in potestate retnere; vel ex diverso filium quidem in potestate retnere, nepotem vero manumitttere; vel omnes sui iuris efficere. eadem et de pronepote dicta esse intellegemus.

134. Praeterea parentes liberes in adoptionem datis in potestate eos habere desinunt; et in filio quidem, si in adoptionem datur, tres mancipationes et duas intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit, ut sui iuris efficiatur. deinde aut patri remancipatur, et ab eo is qui adoptat vindicat aput Praetorem filium suum esse, et illo

133. He who has in his potestas a son and a grandson by that son, has unrestricted power to dismiss the son from his potestas and retain the grandson in it; or conversely, to retain the son in his potestas, but manumit the grandson; or to make both sui iuris. And we must bear in mind that the same principles apply to the case of a great-grandson.

134. Further, ascendants cease to have their descendants in their potestas when they are given in adoption: and in the case of a son, if he be given in adoption, three mancipations and two intervening manumissions take place in like manner as they take place when the father dismisses him from his potestas that he may become sui iuris. Then he is either remancipated to his father, and from the father the adoptor claims him before the Praetor as being his son¹; and the father putting in no

cess called "Cessio in jure" (II. 24), he was reclaims into the potestas of a friendly plaintiff from the middle man's mancipium, and then emancipated. We have a right to say that he was ultimately brought under a potestas and not left in a mancipium, on account of the express statement of 1 97, that adopted children are in potestas, and because by contrasting §§ 132, 134, we see that the proceedings for emancipation and adoption were identical up to the final act of manumission. The person who manumitted him out of potestas had, however, claims on his inheritance, but claims not so extensive as those over that of an emancipated slave. The friendly plaintiff spoken of above would in most cases be the actual father, in order to keep the property in the family.

¹ This is the "cessio in jure," mentioned above: the father has the son in mancipium, but the claimant demands potestas over him. The father collusively allows judgment to go against himself, and thus the claimant obtains a more extensive power than the father possesses at the time the cessio is made. Hence the process resembles a Recovery in old English Law, where although the tenant had only a limited interest,
contra non vindicante a Praetore vindicanti filius addictur, aut non remancipatur patri sed ei qui adoptat vindicanti in iure ceditur ab eo apud quem in tertia mancipatione est: set sane commodius est patri remancipari. in ceteris vero liberorum personis, seu masculini seu feminini sexus, una scilicet mancipatio sufficit, et aut remancipantur parenti aut non remancipantur. Eadem et in provincis apud Praesidem provinciae solent fieri. (135.) Qui ex filio semel iterumve mancipato conceptus est, licet post tertiam mancipationem patris suffect, in avi potestate est, et ideo ab eo et emancipari et in adoptionem dari potest. At is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in avi potestate. set eum Labeo quidem existimat in eiusdem mancipio esse cuius et pater sit. utimur autem hoc iure, ut quamdui pater eius in mancipio sit, pendeat ius eius: et si quidem pater eius ex mancipatione manumissus erit, cadit.

counter-claim, the son is assigned by the Praetor to the claimant, or he is not remancipated to his natural father, but the person with whom he is left after the third mancipation transfers him by cession in court to the adopting father on his putting in a claim to him. But the more convenient plan is for him to be remancipated to his father. In the case of other classes of descendants, whether male or female, one mancipation alone is sufficient, and they are either remancipated to their ascendant, or not remancipated. In the provinces the same process is gone through before the governor thereof.

135. A child conceived from a son once or twice mancipated, although born after the third mancipation of his father, is nevertheless in the potestas of his grandfather, and therefore can be either emancipated or given in adoption by him. But a child conceived from a son who has gone through the third mancipation, is not born in the potestas of his grandfather. Labeo thinks that he is in the mancipium of the same man as his father is: whilst we adopt the rule, that so long as his father is in mancipium, the child's rights are in suspense, and if indeed the father be manumitted after the mancipation,
in erus potestatem; si vero is, dum in mancipio sit, decesserit, sui iurs fit. (135 a.) Et de — — — — — — licet — — — [1 lin.] ut supra diximus, quod in filio faciunt tres mancipationes, hoc facit una mancipatio in nepote.

136. Mulieres, quamvis in manu sint, nisi coemptionem fecerunt, potestate parentis non liberantur. hoc in Flaminca Dialis senatusconsulto confirmatur, quo ex auctoritate consulum Maximus et Tuberonis cavetur, ut haec quod ad sacra tantum videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenisset. Sed mulieres quae coemptionem fecerunt per mancipationem potestate parentis liberantur: nec interest, an in viri sui manu sint, an extrane; quamvis haec sola loco filiarum habeantur quae in viri manu sunt.

137. [3 lin.] remanicipatione desinunt in manu esse, et cum ex remanicipatione manumissae fuerint, sui iurs esfaciuntur [3 lin.] nihil magis potest cogere, quam filia patrem. set filia quidem

he falls into his potestas, whilst if the father die in mancipium he becomes sui juris. 135 a. ...... as we have said above⁴, what three mancipation effects in the case of a son, one mancipation effects in the case of a grandson.

136. Women are not freed from the potestas of their ascendants, although they be in manus, unless they have made a coemption. This rule is confirmed in the case of the wife of a Flamen Dialis⁵ by a senatusconsultum, wherein it is provided, at the instance of the consuls Maximus and Tubero, that such an one is to be regarded as in manus only so far as relates to sacred matters, but in respect of other things to be as though she had not come under manus. But women who have made a coemption are freed from the potestas of their ascendany by the mancipation: nor is it material whether they be in the manus of their husband or of a stranger; although those women only are accounted in the place of daughters who are in the manus of a husband.

137. .......... cease by the remanicipation to be in manus, and when after the remanicipation they are manumitted, they become sui juris⁶. .......... can no more compel him, than a daughter can her father. But a daughter, even though

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¹ I. 139, 134.
² The marriage of a Flamen and Flaminica was not by coemptus, but
³ I. 115, 115 a.
⁴ by consensus
⁵ Flaminica was not by clarius, but
nullo modo patrem poest cogere, etiamsi adoptiva sit: haec autem virum repudio missa proinde compellere potest, atque si ei numquam nupta fuisse.

138. Ii qui in causa mancipii sunt, quia servorum loco habentur, vindicta, censu, testamento manumissi sui iuris iussit. (139.) Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requirimus, cuius aetatis sit qui manumittit, et qui manumittitur: ac ne illud quidem, an patronum creditoeremve manumissor habeat. Ac ne numerus quidem legis Furiae Caniniaae finitus in his personis locum habet. (140.) Quin etiam invito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea legem mancipio dedit, ut sibi remancipetur: nam quodammodo adopted, can in no case compel her father; but the other (the wife) when she has had a letter of divorce sent to her can compel her husband as though she had never been married to him.

138. Those who are in the condition called mancipium, since they are regarded as being in the position of slaves, become sui juris when manumitted by vindicta, censu or testament. 139. And in such a case the Lex Aelia Sentia does not apply. Therefore we make no enquiry as to the age of him who manumits, or of him who is manumitted, nor even whether the manumittor have a patron or creditor. Nay, further, the number laid down by the Lex Furia Caninia has no application to such persons. 140. Moreover they can obtain their liberty by censu even against the will of him in whose mancipium they are, except when a man is given in mancipium by his father with the understanding that he is to be remancipated to him: for then the father is regarded as

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1 "Repudio misso" A messenger or letter is sent to the other party to the marriage, seven witnesses of the age of puberty being called together to hear the instructions given to the messenger, or the contents of the letter. Warnkoenig, III. p 52.
2 "Can compel her husband to release her from manum, although a daughter cannot compel her father to release her from potestas," the reason being that the husband by the "repudium," has failed to fulfil his share of the compact.

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4—2
tunc pater potestatem propriam reservare sibi videtur eo ipso, quod mancipio recipit. Ac ne is quidem dicitur invito eo cuius in mancipio est censu libertatem consequi, quem pater ex noxali causa mancipio dedit, velut qui furti eius nomine damnatus est, et eum mancipio actori dedit: nam hunc actor pro pecunia habet. (141.) In summa admonendi sumus, adversus eos quos in mancipio habemus nihil nobis contumeliose facere licere: adiquin majorum actione tenendum. Ac ne du quidem in eo iure detentur homines, set plerumque hoc fit dicis gratia uno momento; nisi scilicet ex noxali causa manciparentur.

142. Transeamus nunc ad aliam divisionem. nam ex his personis, quae neque in potestate neque in manu neque in mancipio sunt, quaedam vel in tutela sunt vel in curatione, quaedam neutro iure tenentur. videamus igitur quae in tutela vel in curatione sint: ita enim intelligimus ceteras personas quae neutro iure tenentur.

reserving to himself in some measure his own potestas, from the very fact that he is to take him back from mancipium. And it is held also that a man cannot by cessus obtain his liberty against the will of the person in whose mancipium he is, when his father has given him in mancipium for a noxal cause, for instance, when the father is mulcted on his account for theft, and gives him up to the plaintiff in mancipium: for the plaintiff has him instead of money. 141. Finally, we must observe that we are not allowed to inflict any indignity on those whom we have in mancipium, otherwise we shall be liable to an action for injury. And men are not detained in this condition long, but in general it exists, as a mere formality, for a single instant; that is to say, unless they are mancipated for a noxal cause.

142. Now let us pass on to another division: for of those persons who are neither in potestas, manus or mancipium, some are in tutela or curatio, some are under neither of these powers. Let us, therefore, consider who are in tutela or curatio: for thus we shall perceive who the other persons are, who are under neither power.

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1 He intends, it is true, to give up his potestas as actual father, but he also intends to resume potestas as an adopting father. See note on L 132. 2 IV. 75, 79. 3 III. 223, 224.
143. Ac prius dispiciamus de his quae in tutela sunt.

144. Permissum est itaque parentibus liberis quos in potestate sua habent testamento tutores dare: masculini quidem sexus inpuberibus dumtaxat, feminini autem tam inpuberibus quam nubilibus. veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse. (145.) Itaque si quis filio filiaeque testamento tutorum dederit, et ambos ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet: tantum enim ex lege Iulia et Papia Poppaea iure liberorum a tutela liberantur. Ioquimur autem exceptis Virginibus Vestalibus quas etiam veteres in honorem sacerdotii liberas esse voluerunt: itaque etiam lege xii tabularum cautum est. (146.) Nepotibus autem nepotibusque ita demum possumus tecum tutores dare, si post mortem nostram in patris sui potestatem recasuri non sint. itaque si filius meus mortis...
meae tempore in potestate mea sit, nepotes quos ex eo habeo non poterint ex testamento meo habere tutorem, quamvis in potestate mea fuerint: scilicet quia mortuo me in patris sui potestate futuri sunt. (147.) Cum tamen in compluribus alis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis, quam iam natis testamento tutores dari posse: si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra fiant. hos etiam heredes instituere possimus, cum extraneos postumos heredes instituere permissum non sit. (148.) Uxor quae in manu est proinde acsi filiae, item nurui quae in fili manu est proinde ac nepti tutor dari potest. (149.) Rectissime autem tutor sic dari potest: LUCIUM TITIUM LIBERIS MEIS TUTOREM DO. sed et si ita scriptum sit: LIBERIS MEIS VEL UXORI MEAE TITIUS TUTOR ESTO, recte datus intellegitur. (150.) In persona tamen uxoris quae in

in my potestas, the grandsons whom I have by him cannot have a tutor given them by my testament, although they are in my potestas: the reason of course being that after my death they will be in the potestas of their father. 147. But whereas in many other cases after-born children are esteemed as already born, therefore in this case too it has been held that tutors can be given by testament to after-born as well as to existing children; provided only the children are of such a character that if born in our lifetime, they will be in our potestas. We may also appoint them our heirs, although we are not allowed to appoint the after-born children of strangers our heirs¹. 148. A tutor can be given to a wife in manus exactly as to a daughter², and to a daughter-in-law, who is in the manus of our son, exactly as to a granddaughter. 149. The most regular form of appointing a tutor is: "I give Lucius Titus as tutor to my descendants³," but even if the wording be: "Titus, be tutor to my descendants or to my wife," he is considered lawfully appointed. 150. In the case, however,

¹ A postumus is one born after the making of the testament, whether in the testator's lifetime or not. (D. 28 3 1.) If such an one be born the testament is void, even though he die before the testator; but the provisions of the testament are carried into effect by virtue of the praetor's grant of honorum possessionis tabularis. II. 119; D. 28 3 12. pr. ² 1 114. ³ II. 259.
manu est recepta est etiam tutoris optio, id est, ut liceat ei permittere quem velit ipsa tutorem sibi optare, hoc modo: titiae uxori meae tutoris optionem do. quo casu licet uxori eligere tutorum vel in omnes res vel in unam forte aut duas. (151.) Ceterum aut plena optio datur aut angusta. (152.) Plena ita dari solet, ut proxume supra diximus. angusta ita dari solet: titiae uxori meae dumtaxat tutoris optionem semel do, aut dumtaxat bis do. (153.) Quae optiones plurimum inter se differunt. nam quae plenam optionem habet potest semel et bis et ter et saepius tutorem optare. quae vero angustam habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest: si tantum bis, amplius quam bis optandi facultatem non habet. (154.) Vocantur autem hi qui nominatim testamento tutores dantur, dativi; qui ex optione sumuntur, optivi. 155. Quibus testamento quidem tutor datus non sit, iis ex lege xii agnati sunt tutores, qui vocantur legitimi. (156.)

of a wife who is in manus, the selection of a tutor is also allowed, i.e. she may be suffered to select such person as she chooses for her tutor, in this form: “I give to Titia my wife the option of a tutor.” In which case the wife has power to select a tutor either for all her affairs or, it may be, for one or two matters only¹. 151. Moreover, the selection is allowed either without restraint or with restraint. 152. That without restraint is given in the form we have stated just above. That with restraint is usually given thus: “I give to my wife Titia the selection of a tutor once only,” or “I give it twice only.” 153. Which selections differ very considerably from one another. For a woman who has selection without restraint can choose her tutor once, or twice, or thrice, or more times: but she who has selection with restraint, if it be given her once only, cannot choose more than once; if twice only, has not the power of choosing more than twice. 154. Tutors who are given by name in a testament are called dativi, those who are taken by virtue of selection, optivi.

155. To those who have no tutor given them by testament, theagnates are tutors by a law of the Twelve Tables, and

they are called statutable tutors. 156. Now the agnates a are those united in relationship through persons of the male sex, relations, that is to say, through the father: for instance a brother born from the same father, the son of that brother, and the grandson by that son; an uncle on the father's side, that uncle's son, and his grandson by that son. But those who are joined in relationship through persons of the female sex are not agnates, but merely cognates by natural right. Therefore there is no agnation between a mother's brother and a sister's son, but only cognition. Likewise the son of my father's sister or of my mother's sister is not my agnate, but my cognate, and conversely of course I am joined to him by the same tie: because children follow the family of their father, not of their mother. 157. In olden times, indeed, under the provision of the law of the Twelve Tables, women too had agnates for tutors, but afterwards the Lex Claudia was passed, which abolished these tutelages so far as they related to women. A male, therefore, under the age of puberty will have as tutor his brother over the age of puberty or his father's brother; but women have not a tutor of that kind. 158. By capitis diminutio the right of agnation is destroyed, but that of cognition is not changed: because a civil law doctrine
Capitis diminutio.

159. Est autem capitis diminutio prioris capitis permixtio. Quae tribus modis accidit: nam aut maxima est capitis diminutio, aut minor quam quidam medium vocant, aut minima.

160. Maxima est capitis diminutio, cum aliquis simul et civilitatem et libertatem amittit; quae — — — — qui ex patria. Item feminae liberae ex senatusconsulito Claudiano ancillae sunt eorum dominorunt, quibus invitit et denuntiantibus nihil minus cum servis eorum coeirunt.

161. Minor capitis diminutio est, cum civilitas quidem "amit... may destroy civil law rights, but it cannot destroy those of natural law.

159. Capitis diminutio\(^1\) is the change of the original caput, and occurs in three ways; for it is either the capitis diminutio maxima; or the minor, which some call media; or the minima.

160. The maxima capitis diminutio is when a man loses at once both citizenship and liberty, which (happens to those) who (are expelled) from their country\(^2\): likewise free women by virtue of a senatusconsultum of Claudius become slaves of those masters with whose slaves, in spite of their wish and warning, they have cohabited\(^3\).

161. The minor capitis diminutio is when citizenship indeed

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\(^1\) Ulpian, XI. 9—14. Status and caput are not identical in Roman law; a slave is often said to have status, but it is also affirmed of him that he has "nullum caput." Austin is of opinion that "status and caput are not synonymous expressions, but that the term caput signifies certain conditions which are capital or principal: which cannot be acquired or lost without a mighty change in the legal position of the party." Caput necessarily implies the possession of rights: status generally implies the possession of rights, but may imply mere obnoxiousness to duties, e.g. the status of a slave. See Austin, Lecture XII. Caput includes (1) Liberty, (2) Citizenship, (3) Family. (1) includes (2) and (3); (2) includes (3), therefore by the maxima capitis diminutio, all these elements are lost, by the media all but liberty, by the minima family alone.

\(^2\) This is Huschke's emendation, his complete filling up of the passage being: "qui ex patria jure gentium violato peregrinis populis per patrem patrautum deduntur." For information as to the pater patrum, consult a classical dictionary, or read pp. 16—18 of Kent's International Law (Abdy's edition); Cic. pro Cael. 34; Livy, I. 24, 32.

\(^3\) 1. 84, 91; Ulpian XI. 11.
titur, libertas vero retinetur. quod accidit ei cui aqua et igni
interdictum fuerit.

162. Minima capitis diminutio est, cum et civitas et liber-
tas retinetur, sed status hominis commutatur. quod accidit in his
qui adoptantur, item in his qui coemptionem faciunt, et in his
qui mancipio dantur, quique ex mancipatione manumittantur;
adeo quidem, ut quotiens quisque mancipetur, aut remancipe-
tur, totiens capite diminuatur. (163) Nec solum maioribus
diminutionibus ius adgnationis corrumpitur, sed etam minima.
et ideo si ex duobus liberis alterum pater emancipavert, post
obitum eius neuter alteri adgnationis iure tutor esse potent.

164. Cum autem ad agnatos tutela pertinet, non simul ad
omnes pertinet, sed ad eos tantum qui proximo gradu sunt.
[desunt lin. 24]

165. Ex eadem legem duodecim tabularum libertorum et liber-
tarum tutela ad patronos liberosque eorum pertinet, quae et ipsa
leges adhaeret: non quia nominativa e lege de hac tutela

is lost, but liberty retained, which happens to a man inter-
ducted from fire and water 1.

162. The minima capitis diminutio is when citizenship and
liberty are retained, but the status of a man is changed; which
is the case with persons adopted, likewise with those who
make a coemption, with those who are given in mancipium,
and with those who are manumitted after mancipation 2: so
that indeed as often as a man is mancipated or remanicipated,
so often does he suffer capitis diminutio. 163. Not only by
the greater diminutiones is the right of agnation destroyed, but
even by the least; and therefore if a father have emancipated
one of two sons, neither can after his death be tutor to the
other by right of agnation.

164. In cases, however, when the tutelage devolves on the
agnates, it does not appertain to all simultaneously but only to
those who are in the nearest degree.

165. By virtue of the same law of the Twelve Tables the
tutelage of freedmen and freedwomen devolves on the patrons
and their children, (and this too is styled a statutable tutel-
age): not because express provision is made in that law with

1 I. 90, 118.
2 I. 110, 116, 132.
cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. eo enim ipso, quod hereditates libertorum libertarumque, ss intestati decessissent, iussisset lex ad patronos liberose eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocavit, eosdem et tutores esse iussisset.

166. Exemplo patronorum etiam fiduciariae tutelae receptae sunt. eae enim tutelae scilicet fiduciariae vocantur proprie, quae ideo nobis competunt, quia liberum caput mancipatum nobis vel a parente vel a coemptionatore manumiserimus. (167.) Set Latinarum et Latinorum inpuberum tutela non omni modo ad manumissores, sicut bona eorum, pertinet, sed ad eos quorum ante manumissionem ex iure Quiritium fuerunt: unde si ancilla respect to this tutelage, but because it is gathered by construction as surely as if it had been set down in the words of the law. For from the very fact that the law ordered the inheritances of freedmen and freedwomen, in case of their dying intestate, to belong to the patrons or their children, the ancients concluded that the law intended their tutelages also to devolve on them, since it ordered that the agnates too, whom it called to the inheritance, should be tutors as well.

166. Fiduciary tutelages have been admitted into use upon the precedent of patronal tutelages. For those are properly called fiduciary tutelages which devolve upon us because we have manumitted a free person who has been mancipated to us either by a parent or a coemptionator. 167. But the tutelage of Latin women or Latin men under puberty does not in all cases appertain to their manumittors, as their goods do, but devolves on those whose property they were by Quintary title before manumission: therefore if a female slave be yours by

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1 The argument is:
(1) The agnates who have the inheritance, also have the tutelage.
(2) Therefore the inheritance and the tutelage, the benefit and the burden, devolve on the same persons.
(3) Now the patrons have the inheritance by the express words of the law.
(4) Therefore they also have the tutelage.

3 The manumittor might be owner both "in bonis," and "ex iure Quiritium," or he might only have the title "in bonis." (See II 40.) For by reading 1. 54, we see that if the legal ownership was separated from the beneficial, the beneficial owner, i.e. the owner "in bonis," having the potestas, had the power of manumission. The general rule in the case
Tutela cessicia.

*ex iure Quiritium tua sit, in bonis mea, a me quidem solo, non etiam a te manumississa, Latina fieri potest, et bona eius ad me pertinens, sed eius tutela tibi competit: nam ita lege Iunia cavetur. itaque si ab eo cuius et in bonis et ex iure Quiritium ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertinet.*

168. *Agnatis, qui legitiimi tutores sunt, item manumissoribus permissum est feminarum tutelam alii in iure cedere: pupillo-rum autem tutelam non est permissum cedere, quia non vide-tur onerosa, cum tempore pubertatis finatur. (169) Is autem cui ceditur tutela cessicius tutor vocatur. (170) Quo mortuo aut capite diminuto revertitur ad eum tutorem tutela qui cessit. ipse quoque qui cessit, si mortuus aut capite diminutus sit, a cessario tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habuerit. (171) Set quantum ad agnatos pertinet, nihil hoc tempore de cessicia Quiritary, mine by Bonitary title, when manumitted by me alone and not by you also, she can be made a Latin, and her goods belong to me, but her tutelage devolves on you: for it is so provided by the Lex Junia. Therefore if she be made a Latin by one to whom she belonged both by Bonitary and Quiritary title, the goods and the tutelage both go to the same man.

168. Agnates, who are statutable tutors, and manumittors also, are allowed to transfer to others by cession in court the tutelage of women; but not that of pupils, because this tutelage is not looked upon as onerous, inasmuch as it must terminate at the time of puberty. 169. He to whom a tutelage is thus ceded is called a cessician tutor: 170. and on his death or *capitis diminutus* the tutelage returns to him who ceded it. So too, if the man himself who ceded it die or suffer *capitis diminutus*, the tutelage shifts from the cessician tutor and reverts to him who had the claim to the tutelage next in succession to the cesser. 171. But so far as relates to agnates, no questions now arise about cessician tutelage, inasmuch as the tutelages of

of tutelages which were for the profit of the tutor as well as the pupil, was that the benefit (the right of inheritance) should go with the burden (the tutelage proper), but in this paragraph Gaius is pointing out an exception. Ulpian, xi. 19.

I. 172—175. Tutela prætoria.

Tutela quaeritur, cum agnatorum tutelae in feminis lege Claudia sublatae sint. (172.) Sed fiduciarios quoque quidam putaverunt cedendae tutelae us non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen qui filiam neptemve aut proneptem alteri ea lege mancipio dedit, ut sibi remanciparetur, remancipatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur; et non minus huic quam patronis honor praestandus est.

173. Praeterea senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere: quo petito desinit, nec interest quam longe aberit is tutor. (174.) Set excipitur, ne in absentis patroni locum liceat libertae tutorem petere. (175.) Patroni autem loco habemus etiam parentem qui in e mancipio sibi remancipatam filiam neptemve aut proneptem manumissione legitimam tutelam nactus est. huius quidem liberi fiduciarii tutoris loco numerantur: patroni autem

agnates over women were abolished by the Lex Claudia¹. 172. Some, however, have held that fiduciary tutors also have not power to cede a tutelage, since they have voluntarily undertaken the burden. But although this be the rule, yet the same must not be laid down in respect of an ascendant who has given a daughter, granddaughter, or great-granddaughter in mancipium to another on condition that she be remancipated to him, and has manumitted her after the remancipation: since such an one is also reckoned a statutable tutor, and in no less degree must respect be paid to him than to a patron.

173. Further by a senatusconsultum women are allowed to apply for a tutor in the place of one who is absent, and on his appointment the original tutor ceases to act: nor does it matter how far the original tutor has gone away. 174. But there is an exception to this, that a freedwoman may not apply for a tutor in the place of an absent patron. 175. We also regard as equivalent to a patron an ascendant who has acquired by manumission statutable tutelage over a daughter, granddaughter or great-granddaughter remancipated to him out of mancipium. The children, however, of such an one are

¹ I. 157.
² "Also," i.e. in addition to the two classes of legitimi already named in §§ 155, 165. Conf. I. 175.
³ Ulpian, XI. 22.
⁴ I. 172.
liberi eandem tutelam adipiscuntur, quam et pater eorum habuit. (176.) Sed ad certam quidem causam etiam in patroni absentis locum permisit senatus tutorem petere, veluti ad hereditatem adeundam. (177.) Idem senatus censuit et in persona pupillii patroni filii. (178.) Itemque lege Iulia de maritandis ordinibus ei quae in legitima tutela pupillii sit permittitur dotis constituendae gratia a Praetore urbano tutorem petere. (179.) Sane patroni filius etiam in locum permissam senatus petere, veluti ad hereditatem adeundam. (180.) Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere. (181.) Quibus casibus salvam regarded as fiduciary tutors\(^1\), whereas the children of a patron acquire the same kind of tutelage as their father also had. 176. But the senate has allowed a woman to apply for a tutor for a definite purpose even in the place of an absent patron, for instance, to enter upon an inheritance\(^2\). 177. The senate has adopted the same rule in the case of the son of a patron being a pupil\(^3\). 178. So also by the Lex Julia de maritandis ordinibus a woman who is in the statutable tutelage of a pupil is allowed to apply for a tutor from the Praetor Urbanus for the purpose of arranging her dos\(^4\). 179. For the son of a patron undoubtedly becomes the tutor of a freedwoman, even though he be under puberty, and yet he can in no instance authorize\(^5\) her acts, since he is not allowed to do anything for himself without the authorization of his tutor. 180. Likewise, if a woman be in the statutable tutelage of a mad or dumb person, she is by the senatusconsultum\(^6\) allowed to apply for a tutor for the purpose of arranging her dos. 181. In these cases it is plain that the tutelage remains intact for the patron

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\(^1\) D. 26. 4. 4.
\(^2\) Ulpian, xi. 22.
\(^3\) Ibid. 22.
\(^4\) Ibid. 20. For an account of dos, see Lord Mackenzie's Rom. Law, p. 103; Sandars, p. 112 and p. 234; and Ulp. vi.
\(^5\) The auctoritas of the tutor is the tutor's presence and assent to the deed of the pupil. The pupil himself performs the symbolical act or utters the words necessary to effect the transaction in hand, but his will is considered to be defective on account of his youth (or in the case of a woman, her sex); and the tutor's presence and approval add a sound will to a duly performed act, the two requisites insisted on by the law. Auctoritas is derived from augeo, and signifies the complement or supplyng of a defect.

\(^6\) Probably that referred to in 1. 173, and in Ulp. xi. 21.
manere tutelam patrono patronique filio manifestum est. (182.) Praeterea senatus censuit, ut si tutor pupilli pupillæve sus­pectus a tutela remotus sit, siue ex iusta causa fuerit excusatus, in locum eius alius tutor detur, quo dato prior tutor amitter tutelam. (183.) Hanc omnia simuliter et Romae et in pro­vinciis solent observari — — si vero — — — — — — — — — (184.) Olim cum legis actiones in usu erant, etiam ex illa causa tutor dabatur, si inter tutorem et mulierem pupillumve legis actione agendum erat: nam qua ipse quidem tutor in re sua auctor esse non poterat, alius dabatur, quo auctore illa legis actio peragertur: qui dicebatur praetorius tutor, quia a Prae­tores urbano dabatur. post sublatas legis actiones quidam putant hanc speciem dandi tutoris non esse necessarium, sed adhuc datur in usu est, si legitimo iudicio agatur.

185. Si cui nullus omnino tutor sit, ei datur in urbe Roma

and the son of the patron. 182. Further the senate has ruled that if a tutor of a pupil, male or female, be removed from his tutorship as untrustworthy¹, or be excused on some lawful ground², another tutor may be given in his place, and on such appointment the original tutor loses his tutorship. 183. All these rules are observed in like manner at Rome and in the provinces: ..... 184. Formerly when the legis actiones⁴ were in use, a tutor used also to be given in case proceedings by legis actio had to be taken between a tutor and a woman or pupil. for inasmuch as the tutor could not authorize in any matter that concerned himself, another used to be appointed under whose authorization the legis actio was conducted: and he was called a Praetorian tutor, because he was appointed by the Praetor Urbanus. Now that legis actiones have been abolished, some authorities hold that this kind of tutor by appointment has become unnecessary, but it is still usual for such an one to be appointed, where proceedings have to be taken by statutable action⁵.

185. Supposing a person to have no tutor at all, one is given

¹ Just. 1 26.
² Just. 1 25. Ulpian. xi. 23.
³ Ulp. xi 30.
⁴ iv ii 49. Ulpian. xi 24.
⁵ Statutable as opposed to "Imperio—continent," for which distinction see iv. 103.
ex lege Atilia a Praetore urbano et maiore parte Tribunorum plebis, qui Atilianus tutor vocatur; in provincis vero a Praesidibus provniarum ex lege Iulia et Titia. (186.) Et ideo si cui testamento tutor sub conditione aut ex die certo datus sit, quamdiu condicin aut dies pendet, tutor dari potest; item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex iiis legibus tutor petendus est: qui desinit tutor esse postea quam quis ex testamento tutor esse coeperit. (187.) Ab hostibus quoque tutore capto ex his legibus tutor datur, qui desinit tutor esse, si quis qui captus est in civitatem reversus fuerit: nam reversus recipit tutelam iure postliminii. 

183. Ex his apparat quot sint species tutelarum. si vero quae mens, in quot-genera hae species deducantur, longa est disputatio: nam de ea re valde veteres dubitaverunt, nosque diligentius hunc tractatum executi sumus et in edict interpretato.

186. And therefore if a tutor be appointed to any one by testament under a condition or to act after a certam day, so long as the condition is unfulfilled or the day not arrived, another tutor may be appointed: likewise if the tutor be appointed without condition, still for such time as no heir exists another tutor must be applied for under these laws, who ceases to be tutor as soon as any one begins to act as tutor under the testament. 187. Also when a tutor is taken by the enemy, another tutor is appointed under these laws, who ceases to be tutor if the captive return into the state; for having returned he recovers his tutelage by the rule of postliminy.

188. From the foregoing it appears how many species of tutelage there are. But if we enquire into how many classes these species may be collected, the discussion will be tedious: for the ancients held most opposite opinions on this point, and we have carefully investigated this question both in our ex-

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1 Enacted about 250 B.C. Ulpian, xi. 18. The law is mentioned by Livy, xxxix. 9.
2 Enacted 30 B.C.
3 The institution of the heir is the main point of a Roman testament, and until he accepts the inheritance, no provision of the testament can be carried out.
4 I. 129.
Necessity of tutelage.

In his libris quos ex Quinto Mucio fecimus. hoc solem tantusper sufficit admonuisset, quod quidam quinque genera esse dixerunt, ut Quintus Mucius; alii tria, ut Servius Sulpicius; alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.

189. Sed inpuberes quidem in tutela esse omnium civitatum iure contingit; quia id naturali ratione conveniens est, ut is qui perfectae aetatis non sit alterius tutela regatur. nec fere ulla cintas est, in qua non licet parentibus liberis suis inpuberibus testamento tutorem dare: quamvis, ut supra diximus, soli cives Romani videantur tantum liberis in potestate habere.

190. Feminas vero perfectae aetatis in tutela esse fere nulla planation of the Edict and in those commentaries which we have based on the works of Quintus Mucius. Meanwhile it is sufficient to make this remark only, that some have held that there are five classes, as Quintus Mucius; others three, as Servius Sulpicius; others two, as Labeo; whilst others have thought that there are as many classes as species.

189. Now for those under puberty to be in tutelage is a rule established by the law of all communities; because it is agreeable to natural reason that he who is not of full age should be guided by the tutelage of another: and there is scarcely any community where ascendants are not allowed to give by testament a tutor to their descendants under puberty; although, as we have said above, Roman citizens alone seem to have their children in potestas. 190. But there is scarcely any reason of weight to account for women of full age being under tutelage.

1 This Q. M. Scaevola (son of Pub. M. Scaevola) is the man of whom Pomponius speaks as the earliest systematic writer on the Civil Law, and whom Cicero styles the most erudite, acute, and skilful lawyer of his day, "iuris pontiorum eloquentissimus, eloquentium juris pertinuissimus." See D. i. 2. 41. Cic de Orat. i. 39. For a memoir of Servius Sulpicius Rufus see Cicero, Brutus, c. 43, and for an account of Antistius Labeo, D. i. 2. 47.

2 For an account of the various kinds of tutelae see Appendix (D). The five classes of Q. Mucius were probably the same as in our tabulation; S. Sulpius may have followed the classification of Ulpian (XI. 3); "Tutores aut legitiimi sunt, aut senatus consultis constituti, aut moribus introducti:" Labeo's division may have been into testamentary and non-testamentary, or he may have combined the two first-named classes of Sulpius, and opposed them to the third "moribus introducti."

3 1. 55. 4 1. 144.
prætiosa ratio suasisse videtur. nam quae vulgo creditur, quæ levitate animi plerumque decipiuntur, et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera. multa enim quae perfectae aetatis sunt ipsae sibi negotia tractant, et in quibusdam causis dicus gratia tutori interponit auctoritatem suam; saepe etiam invitus auctor fieri a Praetore cogitur. (191.) Unde cum tutore nullum ex tutela iudicium mulieri datur: at ubi pupillorum pupillarumve negotia tutores tractant, eos post pubertatem tutelae iudicio rationem reddunt. (192.) Sane patronorum et parentum legitimae tutelae vim aliquam habere intellegunt eo, quod neque ad testamentum faciendum, neque ad res mancipi alienandas, neque ad obligationes suscipientes auctores fieri coguntur, praeterquam si magna causa alienandarum rerum mancipi obligationisque suscipientiae interveniat. eaque omnia ipsorum causa constituta sunt, ut quia ad eos intestatarum mortuarum hereditates pertinent,

For the one generally received¹, that owing to their feebleness of intellect, they are so often deceived, and that it is right they should be guided by the authority of tutors, appears more specious than true. For women who are of full age manage their affairs for themselves, and the tutor affords his authorization as a mere formality in certain matters; and is besides often compelled by the Praetor to authorize against his will¹. 191. Therefore a woman is allowed no action against her tutor on account of his tutelage; but when tutors manage the business of pupils, male or female, they are accountable to them in an action of tutelage², after they have reached the age of puberty. 192. The statutable tutelages of patrons and ascendants may on the other hand be seen to have some binding force, from the fact that these tutors are not compelled to authorize either the making of a testament, the alienation of things mancipable, or the contracting of obligations, unless some urgent cause arise for the alienation of the things mancipable or the contracting of the obligation. And all these regulations are made for the advantage of the tutors themselves, that, since the inheritances of the women, if

¹ See Livy, xxxiv. 2; Cic. pro Murœna, c. 12; and Ulp. xi. 1. ² It should be noticed that Gaius uses iudicium and actio as interchangeable terms.
1. neque per testamentum excludantur ab hereditate, neque alienatis pretiosionibus rebus susceptoque aere alieno minus locuples ad eos hereditas perveniat. (193.) Aput peregrinos non similiter, ut aput nos, in tutela sunt feminae; set tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem.

194. Tutela autem liberantur ingenuae quidem trium liberorum iure, libertinae vero quattuor, si in patroni liberorumve eius legitima tutela sint. nam et ceterae quae alterius generis tutores habent, velut Atilianos aut fiduciarios, trium liberorum iure liberantur. (195.) Potest autem pluribus modis libertinam alterius generis habere, veluti si a femina manumissa sit: tunc enim e lege Atilha petere debet tutorem, vel in provincia e lege Julia et Titia: nam patronae tutelam liberorum suorum libertarumve gerere non possunt. Sed et si sit a masculo manumissa,

they die intestate, belong to them, they may neither be excluded by a testament from the inheritance, nor may the inheritance come to them depreciated in value through the more precious articles being alienated and debt incurred. 193. Amongst foreign nations women are not in tutelage as they are with us: but yet they are generally in a position analogous to tutelage; for instance, a law of the Bithynians orders that if a woman make any contract, her husband or son over the age of puberty shall authorize it.

194. Freeborn women are freed from tutelage by prerogative of three children; freedwomen by that of four, if they be in the statutable tutelage of a patron or his children. For the other freedwomen who have tutors of another kind, as Atilian or fiduciary, are also freed by the prerogative of three children. 195. Now a freedwoman may in various ways have tutors of a different kind (from statutable), for instance if she have been manumitted by a woman; for then she must apply for a tutor in accordance with the Lex Atilia, or in the provinces in accordance with the Lex Julia et Titia: for patronesses cannot hold the tutelage of their freedmen or freedwomen. Besides, if she have been manumitted by a man, and with his authori-

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1 This privilege was conferred by the Lex Poppaea, A.D. 10. Ulpian, xix. 3.
et auctore eo coemptionem fecerit, deinde remancipata et manumissa sit, patronum quidem habere tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius dicitur. Item si patronus sive filius eius in adoptionem se dedit, debet sibi e lege Atia vel Tuia tutorem petere. Similiter ex isdem legibus petere debet tutor, si patronus decedit nec ullam virilis sexus liberorum in familia relinquat.

196. Masculi quando puberes esse coeperint, tutela liberatur. Puberem autem Sabinus quidem et Cassius et alii nostri praecipitores eum esse putant qui habitu corporis pubertatem ostendit, hoc est qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam,

196. Males are freed from tutelage when they have attained the age of puberty. Now Sabinus and Cassius and the rest of our authorities think that a person is of the age of puberty who shows puberty by the development of his body, that is, who can procreate: but that with regard to those who cannot attain to puberty, such as eunuchs-born, the age is to be regarded at which persons (generally) attain to puberty. But
1. 197-200] 

Sureties provided by tutors and curators. 69

cuius aetatis puberes funt. sed diversae scholae auctores annis putant pubertatem aessimandam, id est eum puberem esse existimandum, qui XlIII annos explevit—[24 lineae.]

197. ———— aetatem pervenerit in qua res suas tueri possit. *idem* aput peregrinas gentes custodiri superius indicavimus. (198) Ex iisdem causis et in provincis a Praesidisibus earum curatores dari voluit.

199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut diminuantur, curat Praetor, ut et tutores et *curatores* eo nomine satisdent. (200) Set hoc non est perpetuum. nam et tutores testamento dati satisdare non coguntur, quia fides eorum et

the authors of the opposite school think that puberty should be reckoned by age, i.e. that a person is to be regarded as having attained to puberty who has completed his fourteenth year

197. ... ..... *shall have arrived at the age at which he can take care of his own affairs. That the same rule is observed among foreign nations we have stated above*. 198. Under the same circumstances he ordained that curators should be given in the provinces also by the governors thereof.

199. To prevent, however, the property of pupils and of those who are under curation from being wasted or diminished by their tutors and curators, the Praetor provides that both tutors and curators shall furnish sureties as to this matter. 200. But this rule is not of universal application. For, firstly, tutors given by testament are not compelled to furnish sureties, be-

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1 Fourteenth year if a male, twelfth if a female Just. 1. 22.

2 In the missing 24 lines we may conjecture that there was an explanation of the other causes which terminated tutelage, and that then began the exposition of curatorship. As the laws relating to curators are to be found in Just. *Just* 1. 23 and Ulpian, *ulplan*, xi, it is sufficient to observe that a tutor has authority over the person as well as the property of his ward, whilst the curator is only concerned with the property; and that the office of the latter begins when the ward attains the age of 14 (when the tutor ceases to act), and continues till the ward is 25.

3 1. 189.

4 *Satisdare* = to find sureties (third parties, and not to enter into a personal bond. The law as to sureties (spouores, fidemensores and fid jurisven) will be found in *Iulius 115*—127, and IV. 88—102.
diligentia ab ipso testatore probata est; et curatores ad quos non e lege curatio pertinet, set qui vel a Consule vel a Praetore vel a Praeside provinciae dantur, plerumque non coguntur satis dare, scilicet quia satis idonei electi sunt.

cause their integrity and carefulness are borne witness to by the testator himself: and, secondly, curators to whom the curation does not come by virtue of a lex, but who are appointed either by a Consul, or a Praetor, or a governor of a province, are in most cases not compelled to furnish sureties, for the reason, obviously, that men suitable for the office are selected.
BOOK II.

1. *Superiore commentario de iure personarum exposuimus; modo videamus de rebus: quae vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur.*

2. *Summa itaque rerum divisio in duos articulos deducitur: nam aliae sunt divini iuris, aliae humani.*

3. *Divini iuris sunt veluti res sacrae et religiosae.* (4.) *Sacrae sunt quae Dii superis consecratae sunt; religiosae, quae Dii manibus relictae sunt.* (5.) *Sed sacrum quidem*

1. In the preceding commentary we have treated of the law of persons: now let us consider as to things: which are either within our patrimony or without it.

2. The chief division of things, then, is reduced to two heads: for some things are *divini juris,* others *humani juris.*

3. Of the class *divini juris* are things sacred or religious.

4. Things sacred* are those which are consecrated to the Gods above: things religious those which are given up to the Gods below.* 5. But land is considered sacred only when made so

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1 It will be observed that the divisions of things given in §§ 1, 2 are not coincident but disparate divisions.

A. *In patrimonio—Res singulorum.*

B. *Extra patrimonium—(1) Res communes.* Of which the use is common to all the world; the *proprietas* belongs to none.

   (a) *Res publicae:* of which the use is common to all the members of a state, the *proprietas* is in the state.

   (3) *Res universitatis:* belonging to a corporation.

(4) Things consecrated:

   (a) *Res sanctae.*

(8) *Res religiosae.*

(7) *Res sacrae.*

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2 See Festus sub verb. *sacer.*

solum existumatur auctoritate populi Romani fieri; consecratur enim lege de ea re lata aut senatusconsulto facto.

6. Religiosum vero nostra voluntate facimus mortuum inherentes in locum nostrum, si modo eius mortui funus ad nos pertineat. (7.) Set in provinciis solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Caesaris, nos autem possessionem tantum et usumfructum habere videmur. utique tamen eusmodi locus, licet non sit religiosus, pro religioso habeatur, quia etiam quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

8. Sanctae quoque res, velut mun et portae, quodammodo divini iuris sunt.

9. Quod autem divini iuris est, id nullius in bonis est: id vero quod humani iuris est plerumque aliquus in bonis est: potest autem et nullius in bonis esse. nam res hereditariae, antequam

by authority of the Roman people: for it is consecrated by the passing of a lex or the making of a senatusconsultum in respect of it.

6. On the other hand, we can of our own free will make land religious by conveying a corpse into a place which is our own property, provided only that the burial of the corpse devolves on us. 7. But it has been generally held that on provincial soil land cannot be made religious, because in such land the ownership belongs to the Roman people or to Caesar, and we are considered to have only the possession and usufruct. Still, however, such a place, although it be not religious, is considered as religious, because that also which is consecrated in the provinces, not by authority of the Roman people, is strictly speaking not sacred, and yet is regarded as sacred.

8. Hallowed things also, for instance walls and gates, are in some degree divini juris.

9. Now that which is divini juris is the property of no one; whilst that which is humani juris is generally the property of some one, although it may be the property of no one. For the items of an inheritance, before some one becomes heir,

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1 See note on 1. 6.
2 See Long's Introduction to Cicero's Orationes d. leg. App. (ed. Pryce) ; Savigny, On Possession, translated by Perry, § 13. The heir instituted in the testament becomes hen only by entering upon the office and duties, therefore
II. 10—14.] Res corporales et incorporales.

10. Aliquis heres existat, nullius in bonis sunt. (10.) Hae autem res quae humani iuris sunt, aut publicae sunt aut privatae. (11.) quae publicae sunt, nullius in bonis esse creduntur; ipsius enim universitas esse creduntur. privatae autem sunt, quae singularorum sunt.

11. Quaedam praetera res corporales sunt, quaedam incorporales. (13.) Corporales hae sunt quae tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerables. (14.) Incorporales sunt quae tangi non possunt: qualia sunt ea quae in use consistunt, sicut hereditas, usufructus, obligationes quoquo modo contractae. nec ad rem pertinent, quod in hereditate res corporales continentur; nam et fructus qui ex

are no one's property. 10. Those things again which are humani juris are either public or private. 11. Those which are public are considered to be no one's property: for they are regarded as belonging to the community; whilst private things are those which belong to individuals.

12. Further some things are corporeal, some incorporeal. 13. Corporeal things are those which can be touched, as a field, a man, a garment, gold, silver and, in a word, other things innumerable. 14. Incorporeal things are such as cannot be touched: of this kind are those which consist in a right, as an inheritance, an usufruct, or obligations in any way contracted. Nor is it material that in an inheritance there are comprised corporeal things: for the fruits also which are gathered in (by the usufructuary) from land are corporeal, and

in the interval between the death of the testator and the acceptance of the inheritance there is a vacancy and the Res are nullius.

1 We see therefore that incorporeal things are not, strictly speaking, things at all, but only the rights to things. We may also remark that "tangible" signifies in Roman law that which is perceptible by any sense, according to the Stoic notion that all senses are modifications of that of touch. Hence "acts" are corporeal things according to this classification. Austin, Lecture XIII. See Cicero, Topica, cap. v.

2 Without entering into the discussion of a subject which has engaged the attention and divided the judgment of many old authorities, and which occupied a leading position in the Roman law of Possession, it is sufficient to say that it was by the perception, i.e. the reduction into possession, that the tenant, usufructuary, and generally every one who derived his rights to the profits from the owner, acquired the ownership of those profits. Savigny, On Possession, translated by Perry, Bl. II. § 24, pp. 200—204. See D. 41. 1. 48. pr., D. 7. 4. 13, D. 22. 1. 25. 1.
fundo percepientur corporales sunt, et id quod ex aliqua obligatione
nobis debitur plerumque corporale est, velut fundus, homo, pecunia: nam ipsum ius successions, et ipsum ius utendi fruendi,
et ipsum ius obligations incorporale est. eodem numero sunt et
cura praediorum urbanorum et rusticiorum, quae eam servitutes
vocantur.—[13. fere lineae desunt.]

15. Item [2 lin.] Ea autem animalia nostri quidem pra-
that which is due to us by virtue of an obligation is generally
corporeal, as a field, a slave or money; whilst the right itself
of succession, and the right itself of the usufruct, and the right
itself of the obligation, are incorporeal. In the same category
are rights over estates urban or rustic, which are also called
servitudes¹... ....

15. [All* things are either mancipable or non-mancipable*.}

¹ Urban and rustic estates mean
respectively lands with or without
buildings on them: the situation of
either, whether in town or country,
is immaterial cf. D. 8. 4. 1. From
the Epitome of Gaius (11. 1, § 3) we
get the substance of the missing thir-
teen lines. "The rights over estates
urban or rustic are also incorporeal.
The rights over urban estates are
those of stillicidium (turning the
droppings from your roof into your
neighbor's premises), of windows,
drain, raising your house higher, or
restraining another man from raising
his, and of lights, (i.e.) that a man is
so to build that he do not block out
the light from a neighbouring house.
The rights over rustic estates are
those of way, or of road whereby
animals may pass or be led to water,
and of channel for water; and these
also are incorporeal. These rights
whether over rustic or urban estates
are called servitudes."²

² The first six lines are supplied
from Ulpian, xix. 1.
³ Res mancipi, it is clear, were such
things as were objects of interest and
value in the eyes of the early posses-
sores of Roman citizen-rights, or pro-
ably of those who laid the founda-
tions of ancient Rome. Hence we
see, firstly, how small in number were
these objects; secondly, that they were
such only as had a value to an agri-
cultural people, and, thirdly, that the
few rights (as distinguished from ma-
terial objects) which appeared among
them were rights or easements that
almost necessarily formed parts of
some of these material objects. Why
they were called Res mancipi has
puzzled a host of commentators, no
less than when and how they grew
into being, but neither question is
insoluble. They were, in fact, such
things as the old settlers cared to
possess and as could be transferred
by the hand and into the hand, ma-
nius, as we have said before, being the
symbol of property; and since for a
long time they were the only things
worthy of consideration as property,
they got a name in time, more for the
purpose of classification and distinc-
tion than for any other. When is
not of much consequence, but pro-
bably not till it was necessary to dis-
tinguish them from many other things
that had become known to use and
practice, and which by way of oppo-
sition were called nec mancipi. See
as to this subject Maine's Ancient
Law, chapter viii. p. 177.

Things mancipable are property on Italic soil, whether rural, as a field, or urban, as a house: likewise rights over rural property, as via, iter, actus, aquae ductus: likewise slaves, and quadrupeds which are tamed by saddle and yoke (lit. by back and neck), as oxen, mules, horses, asses.] These animals our authorities hold to be mancipable the moment they are born: but Nerva and Proculus and other authors of the opposite school consider that they are not mancipable unless they be broken in: and if through their excessive fierceness they cannot be broken in, then they are regarded as being mancipable on arriving at the age at which animals are usually broken in. 16. Wild-beasts on the other hand, such as bears and lions, are non-mancipable: so are those animals which are usually in the category of wild-beasts, as elephants and camels, and therefore it is not material that such animals are (sometimes) tamed by yoke and saddle...... 17. Likewise, almost all things which are incorporeal are non-mancipable, with the exception of servitudes over rural property on Italic soil; which are mancipable, although they are in the category of incorporeal things.

18. Now there is a great difference between things manci-
pable and things non-mancipable. 19. For things non-mancipable can be alienated by mere delivery, provided only they be corporeal, and so admit of delivery. 20. Therefore if I deliver to you a garment, or gold, or silver, whether on the ground of sale, or donation, or on any other ground, the thing becomes yours without any legal formality. 21. Provincial lands, some of which we call stipendiary, some tributary, pass in like manner. Stipendiary are those which are situated in the provinces regarded as specially belonging to the Roman people: tributary are those which are in the provinces considered as specially belonging to Caesar. 22. Things mancipable on the contrary are transferred to another by mancipation: whence no doubt they got their appellation. But whatever effect a mancipation has, the same has also a cession in court. 23. How a mancipation is effected we have explained in the preceding Commentary. 24. A cession in court is managed as follows: He to whom the thing is being passed by cession, taking hold of it in the presence of a magistrate of the Roman people, for instance, a Praetor, or the Governor of a province, speaks thus: "I assert this man to be mine by Quiritary right." Then, after he has made his claim, the

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1 I. 6, II. 7.  
2 I. 119.  
3 Ulpian, xix. 9.
MEUM ESSE AIO. demde postquam hic vindicaverit, Praetor
interrogat eum qui cedit, an contra vindicet. quo negante aut
tacente, tunc ei qui vindicaverit eam rem addicet. idque legis
actio vocatur, quae fieri potest eitiam in provinciis apud Prae-
sides estum. (25.) Plurumque tamen et fere semper mancipa-
tionibus utetur. quod enim ipsi per nos praesentibus amicis
agere possimus, hoc non est necesse cum maiore difficultate
apud Praetorem aut apud Praesidem provinciae quaerere. (26.)
At si neque mancipata, neque in iure cessa sit res mancipi
[desunt 31 lin.] (27.) In summa admonendi sumus nexum
Italics soli proprium esse, provincialis soli nexum non esse:
recept enim nexus significationem solum non alter, quam si
mancipi est, provinciale vero nec mancipi est.—enim vero pro-
vincia — — — — — — — de mancipa—.

Praetor questions the man who is making the cession, whe-
ther he puts in a counter-claim: and on his saying no or
holding his peace, the Praetor assigns the thing to him who
has claimed it. And this is called a legis actio, and can
be transacted in the provinces also before the governors
thereof. 25. Generally, however, and indeed almost always,
we employ mancipationes. For when we can do the business
by ourselves in the presence of our friends, there is no need to
seek its accomplishment in a more troublesome manner before
the Praetor or the governor of a province. 26. But if a thing
mancipable have been passed neither by mancipation nor cession
in court...... 27. Finally, we must take notice that nexum is
peculiar to Italic soil: there is no nexum of provincial soil:
for soil admits of the application of nexum only when it is
mancipable, and provincial soil is non-mancipable. 2

1 IV. 11 et seq.
2 Most probably Gauus went on
to say that when a res mancipi was
merely delivered, the man who re-
ceived it had it in bonis only, and
not ex jure Quiritum. See 11. 41.
3 Nexum is Goschen's conjectural
reading, of which the more correct
version would possibly have been
nexit Nexum and nexus are both
substantives, the former an old word
found in the Twelve Tables as anti-
theetical to mancipium (see Tab. vi.
l. 1), the latter a more modern ex-
pression, used to signify obligation
generally, see D. 10. 2. 31. 33 and
D. 12. 6. 26. 7.
The meaning of nexum is given by
Varro (de L. Lat. v11. 109): "Nex-
um Mamilius scribit, omne quod per
libram et aes genitur, in quo sunt
mancipia. Mutius, quae per aes et
libram sunt ut obligentui, praetor
quae mancipio dentur. Hoc venus
28. Incorporales res traditionem non recipere manifestum est. (29.) Sed iura praediorum urbanorum in iure tantum edi possunt; rusticorum vero etiam mancipari possunt. (30.) Ususfructus in iure cessionem tantum recipit. Nam dominus proprietatis ali usumfructum in iure cedere potest, ut ille usumfructum habeat, et ipse nudam proprietatem reiunct. Ipse ususfructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se descedat et convertatur in proprietatem. alu vero in iure cedendo nihilominus ius suum retinet; creditur enim ea cessione nihil agi. (31) Sed haec scilicet in Italici praedibus sunt, quia et ipsa praeda mancipationem et in iure cessionem recipit. alioquin in provincialibus praedibus sive quos usumfructum sive ius eundi, agendi, aquamve ducendi, vel altius tollendi aedes, aut non tollendi, ne lumini-

28. That incorporeal things do not admit of delivery is obvious. 29. But rights over urban property can only be conveyed by cession in court; whilst those over rural property can be conveyed by mancipation also. 30. Usufruct susceptus of cession in court only. For the owner of the property can make cession in court of the usufruct to another, so that the latter may have the usufruct, and he himself retain the bare ownership. The usufructuary again, by making cession of the usufruct to the owner of the property causes it to depart from him and be absorbed in the ownership. But if he make cession of it to another he still retains his right, for it is considered that nothing is done by such a cession. 31. But these rules only apply to Italic property, because the property itself also admits of mancipation and cession in court. In provincial property on the contrary, if a man desire to establish a usufruct, or right of path, road, watercourse, raising buildings higher, or preventing buildings being raised higher lest a
bus vicini officiatur ceteraque similia iura constituere velit, pactiombus et stipulationibus id efficere potest; quia ne ipsa quidem praedia mancipationem aut in iure cessionem recipiunt. (32.) Et cum ususfructus et hominum et ceterorum animalium constituiri possit, intellegere debemus horum ususfructum etiam in provincis per in iure cessionem constitui posse. (33.) Quod autem diximus ususfructum in iure cessionem tantum recipere, non est temere dictum, quamvis etiam per mancipationem constituiri possit eo quod in mancipanda proprietate detrahi potest: non enim ipse ususfructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut apud alium ususfructus, apud alium proprietas sit. (34.) Hereditas quoque in iure cessionem tantum recipit. (35.) Nam si ad quem ab intestato legitimo iure pertinet hereditas in iure eam ali in ante

neighbour's lights be interfered with, and other similar rights, he can only do it by pacta et stipulations, because even the property itself does not admit of mancipation or cession in court. 32. Also, since it is possible for an usufruct to be established over slaves and other animals, we must understand that usufruct over them can be established by cession in court even in the provinces. 33. Now when we said that usufruct admitted of cession in court only, we were not speaking at random, although it may be established by mancipation also, inasmuch as it may be withheld in a mancipation of the property: for in such a case the usufruct itself is not mancipated, although the result of its being withheld in mancipating the property is that the usufruct is left with one person and the property with another. 34. An inheritance also is a thing which admits of cession in court only. 35. For if to whom an inheritance on an intestacy belongs by statute law make cession of it before

1 III 92 et seqq. 2 Slaves and animals are res mancipi: therefore by the principle implied in § 31, the usufruct of them can be conveyed by cessio in jure. Further, the cessio in jure may take place even in the provinces; for moveable res mancipi are res mancipi all over the world, lands alone are res mancipi on Italic soil only. 3 Yet we see from III. 102 that a testament could be made by mancipation. There is however no contradiction: what was mancipated was a familia or estate, which did not become an inheritance till the death of the testator. Here we are treating of the transfer of an inheritance by the heir, not its creation by the testator. 4 Legitima jure = by virtue of a rule of the Twelve Tables or some lex: as opposed to a rule of the Praetor's edict.
aditionem cedat, id est ante quam heres extiterit, perinde fit heres is cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis perinde transeunt ad eum cui cessa est hereditas, ac si ea singula in iure cessa fussent. (36.) Testamento autem scriptus heres ante adltam quidem hereditatem in iure cedendo eam aliui nihil agit; postea vero quam adiert si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem in iure cedat. (37.) Idem et de necessarisis hereditibus diversae scholae auctores existimant, quod nihil videtur interesse utrum a/lfuis adeundo hereditatem fiat heres, an Invitus existat: quod quale sit, suo loco apparebit. sed entry, i.e. before he has become heir, the other to whom he has ceded it becomes heir, just as if he had himself been called by law to the inheritance: if, however, he make cession after (accepting) the obligation, he still remains heir himself, and will therefore be liable to the creditors, but the debts (due to the inheritance) perish, and so the debtors to the inheritance are benefited\(^1\): the corporeal items, however, of the inheritance pass to him to whom the inheritance is ceded, just as if they had been ceded singly\(^2\). 36. But an heir appointed by testament, if he make cession before entry on the inheritance, does a void act: whilst if he cede after entry, the results are the same as those we have just named in the case of one to whom an inheritance on an intestacy devolves by statute law, if he make cession after (accepting) the obligation. 37. The authorities of the school opposed to us hold the same in regard to heredes necessariss, because it seems to them immaterial whether a man becomes heir by entering on an inheritance, or becomes heir against his will. What the meaning of this is will be seen in its proper place. But our authorities

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\(^1\) He is liable to the creditors because he has done an act which identifies him juridically with the deceased. The debtors are not liable to him because he has freely given up the juridical identity he had established; nor are they liable to the cessionary because they are not bound to recognize him as a successor to their creditor, the deceased.

\(^2\) Ulpian, xix. 12—15.
II. 38-40. Ownership ex jure Quiritium and in bonis.

nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem. (38.) Obligationes quoquo modo contractae nihil eorum recipunt. nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum; sed opus est, ut iubente me tu ab eo stipulans: quae res efficit, ut a me liberetur et incipiat tibi tenere: quae dicitur novatio obligationis. (39.) sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

40. Sequitur ut admoneamus apud peregrinos quidem unum esse dominium: ita aut dominus quisque est, aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebatur: aut enim ex iure Quintium unusquisque dominus erat, aut non intellegebatur dominus. set postea divisionem accepit domi-

think that the heres necessarius does a void act when he makes cession of the inheritance. 38. Obligations, in whatever way they be contracted, admit of none of these (forms of transfer). For if I desire that a thing which is owed to me by a certain person should be owed to you, I cannot bring this about by any of those methods whereby corporeal things are transferred to another: but it is necessary that you should by my order stipulate (for the thing) from him, and the result produced by this is that he is set free from me and begins to be bound to you: and this is called a novation of the obligation.

39. But without such novation you cannot bring a suit in your own name, but must sue in my name as my cognitor or procurator.

40. The next point for us to state is that amongst foreigners there is but one kind of ownership: thus a man is either owner (absolutely) or is not regarded as owner (at all). And this rule the Roman people followed of old, for a man was either owner in Quiritary right, or he was not regarded as owner. But afterwards ownership became capable of division, so that one

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1 II. 153; III. 87.
2 III. 176.
3 A cognitor is an agent appointed in court and in the presence of the other party to the suit: a procurator is appointed by mandate, and the opposing party has not necessarily any knowledge of his appointment till the time comes for him to act.

IV. 83, 84.
nium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. (41.) nam si tibi rei mancipi neque mancipane vero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficiatur, ex iure Quintium vero mea permanebit, donec tu eam possidiendo usucapias: semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse, ac si ea mancipata vel in iure cessa esset. (42.) Usucapio autem mobilium quidem rerum anno completur, fundi vero et aedum biennio; et ita lege xii tabularum cautum est.

43. Ceterum etiam earum rerum usucapio nobis competit quae non a domino nobis traditae fuerint, sive mancipi sint eae res sive nec mancipi, si modo ea bona fide acceperimus, cum crederemus eum qui tradiderit dominum esse. (44.) Quod ideo receptum videtur, ne rerum dominia diutius incerto essent: cum sufficeret domino ad inquirendum rem suam anni

man might be owner in Quiritary, another in Bonitary right.

41. For if I neither mancipate nor pass by cession in court, but merely deliver to you, a thing mancipated, the thing becomes yours in Bonitary but remains mine in Quiritary right, until through possessing it you acquire it by usucapion: for as soon as usucapion is completed the thing is at once yours in full title, i.e. both Bonitary and Quiritary, just as though it had been mancipated or passed by cession. 42. Now the usucapion of moveable things is completed in a year, that of land and buildings in two years: and it is so laid down in a law of the Twelve Tables.

43. Moreover usucapion runs for us even in respect of those things which have been delivered to us by one not the owner, whether they be things mancipated or things non-mancipated, provided only we have received them in good faith, believing that he who delivered them was the owner. 44. This seems to have become a custom in order to prevent the ownership of things being too long in doubt: inasmuch as the space of one or two years would be enough for the owner to make inquiries after his property, and that is the

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1 "Usus-auctoritas fundi biennium, oeterarum rerum annus esto." Tab. vi. I. 3. Quoted by Cic. Tlp. iv. 23. See also Cic. pro Caecina, § 54; Ulp. xix. 8 For the alteration of the times of usucapion see Just. Inst. ii 6.
II. 45—49.  Usucapion.

aut biennii spatium, quod tempus ad usucapionem possessori tributum est.

45. Set aliquando etiamsi maxime quis bona fide alienam rem possideat, numquam tamen illi usucapio procedit, velut si qui rem furtivam aut vi possessam possideat; nam furtivam lex xii tabularum usucapi prohibet, vi possessam lex Julia et Plautia.  (46.) Item provincialia praedia usucapionem non recipiunt.  (47.) Item olim mulieris quae in agnatorum tutela erat res mancipi usucapi non poterant, praeterquam si ab ipsa tutore actore traditae essent: idque in lege xii tabularum cautum erat.  (48.) Item liberos homines et res sacras et religiosas usucapi non posse manifestum est.

49. Quod ergo vulgo dicitur furtivarum rerum et vi pos-
time allowed to the possessor for gaining the property by usucapion 1.

45. But sometimes, although a man possess a thing most thoroughly in good faith, yet usucapion will never run in his favour, for instance if a man possess a thing stolen or taken possession of by violence: for a law of the Twelve Tables 2 forbids a stolen thing to be gotten by usucapion, and the Lex Julia et Plautia 3 does the same for a thing taken possession of by violence.  46. Provincial property also does not admit of usucapion 4.  47. Likewise, in olden times the mancible property of a woman who was in the tutelage of her agnates could not be gotten by usucapion, except it had been delivered by the woman herself with the authorization of her tutor 5: and this was so provided by a law of the Twelve Tables 6.  48. It is also clear that free men and sacred and religious things cannot be gotten by usucapion.

49. The common saying, that usucapion of things stolen

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1 II. 54. 29a.
2 Tab. VIII l. 17.
3 Lex Plautia, ii c 59; Lex Julia de vi temp. Augusti.
4 The two chief requisites of a possession which will enable usucapion, are bona fides and jusia causa. The latter is deficient in the present example, for although the goods are in the possession of an innocent alienee, yet they came to him from one wrongly possessed. See § 49 below.
5 In the case of provincial lands the dominium was reserved to the Roman people, therefore obviously no private holder could avail himself of usucapion to acquire dominium.
6 Cic. pro Flacco, c. 84. Cic. ad Att. l. 5.
7 Tab. v. l. 2.
sessorum usucapionem per legem xii tabularum prohibitam esse, non eo pertinet, ut ne ipsa fur quae per vim possidet, usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet); sed nec ulius alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat. (50.) Unde in rebus mobilibus non facile procedit, ut bonae fidei possessori usucapio competat, quia qui alienam rem vendidit et tradidit furtum committit; idemque accidit, etiam si ex alia causa tradatur. Set tamen hoc aliquando aliter se habet. Nam si heres rem defuncto commodatam aut locatam vel apud eum depositam, existimans eam esse hereditarium, vendiderit aut donaverit, furtum non committit. Item si is ad quem ancillae usufructus pertinet, partum etiam suum esse credens vendiderit aut donaverit, furtum non committit; furtum enim sine affectu

or taken possession of by violence is prohibited by a law of the Twelve Tables, does not mean that the thief himself or possessor by violence cannot get by usucapion, for usucapion does not run for him on another account, namely that he possesses in bad faith;) but that no one else has the right of usucapion, even though he buy from him in good faith. 50. Whence, in respect of moveables it is difficult for usucapion to be available for a possessor in good faith, because he who has sold and delivered a thing belonging to another commits a theft: and the same rule holds also if it be delivered on any other ground 1. Sometimes, however, it is otherwise; for if an heir thinking that a thing lent or let to the deceased or deposited with him is a part of the inheritance, has sold or given it away, he commits no theft 2. Likewise, if he to whom the usufruct of a female slave belongs, thinking that her offspring is also his, sells it or gives it away, he commits no theft 3, for theft is not committed without the intent of thieving. It may happen in other ways also that a man may without the

1 Any other ground than sale, sc. D. 41. 3. 36. 1. 2 D. 41. 3. 36. 3. 311. 197. We see from this that the Roman lawyers excused mistakes of law as well as of fact. The reason why this particular mistake was excused is shown in D. 41. 3. 36. 1. The usufructuary supposes he has a right to the child of the ancilla, because the usufructuary of a flock of sheep has a right to the young of that flock.
II. 51, 52. *Bonâ fide possessio.*

furandi non committitur. aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessorre usucapiatur. (51.) Fundi quoque alieni potest aliquis sine vex possessionem nancisci, quae vel ex negligentia domini vacet, vel quis dominus sine successore decesserit vel longo tempore auferit. nam si ad alium bona fide accipientem transulerit, poterit usucapere possessor; et quamvis ipse qui vacantem possessionem nactus est, intellegat alienum esse fundum, tamen nihil hoc bonae fidei possessori ad usucapionem nocet, cum improbata sit eorum sententia qui putaverint furtivum fundum fieri posse.

52. Rursus ex contrario accidit, ut qui sciat alienam rem se possidere usucapiat: velut si rem hereditarium cuius possessionem heres nondum nactus est, aliquis possederit; nam ei taint of theft deliver a thing belonging to another to a third person, and cause it to be gained through usucapion by the possessor. 51. A man may also take possession without violence of the land of another, which is vacant either through the carelessness of the owner, or because the owner has died without a successor, or has been absent for a long time. If then he transfer it to another, who receives it in good faith, this second possessor can get it by usucapion: for although the man himself who has taken the vacant possession may be aware that the land belongs to another, yet this is no hindrance to the possessor in good faith gaining it by usucapion, inasmuch as the opinion of those lawyers has been set aside who thought that land could be the subject of a theft.

52. Again, in the converse case, it sometimes happens that he who knows that he is in possession of a thing belonging to another may yet acquire an usucaptive title to it. For instance, if any one take possession of an item of an inheritance of which

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1 This paragraph is cited almost as it stands in D 41. 3 37, being there stated as taken from Gian Lib. II. *Institut.* Laws 36 and 38 of the same title, which are also very similar to §§ 50 and 52 of the present book, are noted as taken from Gian Lib. II. *Rerum quotidianarum sive Aurorum.*

2 The first taker is deficient in bona fides, but not so the second. On the principle laid down in II. 44 the possession of the first is sufficient to establish justa causa when the transfer is made to the second. Hence the second has both the main requisites of *cedens possessor* (possession, that is to say, which will enable usucapion), viz. justa causa and bona fides.
concessum est usuccapere, si modo ea res est quae recipit usuccapionem. quae species possessionis et usuccapionis pro herede vocatur. (53.) Et in tantum haec usuccapo concessa est, ut et res quae solo continentur anno usuccapiantur. (54.) Quare autem etiam hoc casu soli rerum annua constituta sit usuccapio, illa ratio est, quod olim rerum hereditiarum possessione reful ipse hereditates usuccapi credabantur, scilicet anno. lex enim xii tabularum soli quidem res biennio usuccapi iussit, ceteras vero anno. ergo hereditas in ceteris rebus videbatur esse, quia soli non est, quia neque corporels est: et quamvis postea creditum sit ipsae hereditates usuccapi non posse, tamen in omnibus rebus hereditaris, etiam quae solo tenentur, annua usuccapio remansit. (55.) Quare the heir has not yet obtained possession:\(^1\): for he is allowed to get it by usuccapion. provided only it be a thing which admits of usuccapion. This species of possession and usuccapion is called *pro herede*. 53. And this usuccapion has been allowed to such an extent that even things appertaining to the soil are acquired by usuccapion in one year. 54. The reason why in this case the usuccapion of things connected with the soil is allowed to operate in one year is this; that in former times by possession of the items of an inheritance the inheritances themselves were, in a manner, considered to be gained by usuccapion, and that too of one year. For a law of the Twelve Tables\(^2\) ordered that things appertaining to the soil should be acquired by usuccapion in two years, but all other things in one. An inheritance therefore was considered to be one of the "other things," because it is not connected with the soil, since it is not even corporeal: and although at a later period it was held that inheritances themselves could not be acquired by usuccapion, yet the usuccapion of one year remained established in respect of all the items of inheritances, even those connected with the soil. 55. And the reason why

\(^1\) In the case of a vacant inheritance, that is, one of which the heir had not yet taken possession, the Roman law permitted any one to enter and in time to acquire an usuccaptive title, which was technically called *pro herede*. In this case, as neither *bona fides* nor good title at

\(^2\) See D. 41. 5.
autem omnino tam improba possessio et usucapio concessa sit, illa ratio est, quod voluerunt veteres maturius hereditates adiri, ut essent qui sacra facerent: quorum illis temporibus summa observatio fuit, et ut creditores haberent a quo suum consequerentur. (56.) Haec autem species possessionis et usucapionis etiam lucrativa vocatur: nam sciens quisque rem alienam lucrificat. (57.) Sed hoc tempore etiam non est lucrativa. nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones revocarentur; et ideo potest heres ab eo qui rem usucipit, hereditatem petendo perinde eam rem consequi, atque si usucapta non esset (58.) et necessario tamen herede extante ipso iure pro herede usucapi potest.

59. Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. nam qui rem alciui fiduciae causa mancipio dederit vel in iure cesserit, si eandem ipse possederit, potest usucapere, so unfair a possession and usucapion have been allowed at all is this: that the ancients wished inheritances to be entered upon speedily, that there might be persons to perform the sacred rites (of the family), to which the greatest attention was paid in those times, and that the creditors might have some one from whom to obtain their own. 56. This species, then, of possession and usucapion was also called lucrativa (profitable): for a man with full knowledge makes profit out of that which belongs to another. 57. At the present day, however, it is not profitable; for at the instance of the late emperor Hadrian a senatusconsultum was passed, that such usucapions should be set aside: and therefore the heir by suing for the inheritance may recover the thing from him who has acquired it by usucapion, just as though it had not been acquired by usucapion. 58. But if the heir be of the kind called necessarius, usucapion pro herede can still by force of law take place.

59. There are other cases besides in which a man with full knowledge that the property is another's can get it by usucapion. For he who has transferred a thing to any one by mancipation or by cession in court under a fiduciary agreement, provided he get the possession of the same, can

1 II. 154. III. 201.
2 Fiducia was a pact, attached to a conveyance by mancipatio or in jure cesso, whereby the recipient of
Usureptio.

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anno scilicet, etiam soli si sit. quae species usucapionis dicitur usureptio, quia id quod aliquando habuimus recuperamus per usucapionem. (60.) Sed cum fiducia contrahitur aut cum creditoire pignoris iure, aut cum amico, quod tutus nostrae res aput eum essent, si quidem cum amico contracta sit fiducia, sane omni modo competit usus receptio; si vero cum creditoire, soluta quidem pecunia omni modo competit, non minus vero soluta ita demum competit, si neque conduxerit eam rem a creditor debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usucapio competit. (61.) Item si rem obligatam sibi populus vendiderit, eamque dominus posse-

acquire it by usucapion, and that too in one year\(^1\), even though it appertain to the soil. This species of usucapion is called usureception, because we take back by usucapion what we have had once before. 60. But since this fiduciary compact is entered into either with a creditor in reference to a pledge, or with a friend for the purpose of more completely securing such property of ours as he has in his hands; if the assurance be made with a friend, usureception is in all cases allowable: but if with a creditor, then after payment of the money it is universally allowable, but before payment “profitable usucapion”\(^2\) is only allowed in case the debtor has neither hired the thing from the creditor\(^3\), nor asked for its possession upon sufferance. 61. Likewise, if the populus have sold a thing pledged to them, and

the thing or person transferred bound himself to restore it on request. See Dirksen, sub verbo, § 2. Savigny, On Possession, p. 216. Cic. pro Flacc. c. 21.

\(^1\) The principle is the same as in § 54: the term of usucapion is one year, because the thing is a pledge, therefore one of the “caeterae res,” and no account is taken of its being a pledge of land.

\(^2\) Savigny (Treatise on Possession, p. 51) takes this as an example of the rule “Nemo sibi causam possessionis mutare potest.” The whole of the passage of Savigny pp. 49—52 is worth reading.

\(^3\) A hirer has no juridical possession, but is regarded as agent for the lessor: having then no possession, he can have no usucapion. D. 13. 6. 8; D. 41. 2. 3. 20. See Savigny, On Possession, translated by Ferry, p. 206.

\(^4\) With reference to the matter here stated Savigny says, “Whoever simply permits another to enjoy property or an easement retains to himself the right of revocation at will, and the juridical relation hence arising is called precarium.” See Savigny, On Possession, p. 355, where the learning on the subject of precarium and the interdict connected with it is set out at length.
derit, concessa est usureceptio: sed hoc casu praedium bien-
nio usurecipitur. et hoc est quod volgo dicitur ex praeidia-
tura possessionem usurecipi. nam qui mercatur a populo praec-
diatur appellatur.

62. Accidit aliquando, ut qui dominus sit alienandae rei
potestatem non habeat, et qui dominus non sit alienare possit.
(63.) Nam dotale praedium maritus invita muliere per legem
Iuliam prohibetur alienare, quamvis ipsus sit vel mancipatum
ei dotis causa vel in iure cessum vel usucaptum. quod quidem
ius utrum ad Italica tantum praedia, an etiam ad provincialia
pertineat, dubitatur.

64. Ex diverso agnatus furiosi curator rem furiosi alienare
potest ex lege xii tabularum; item procurator, id est cui libera

the original owner get possession, usureception is allowed: but
in this case if the subject of the pledge be land, it is usurecept-
ed in two years. And hence comes the common saying that
possession may be usurecepted from a praedaatura. For he
who buys from the people is called a prædiator.

62. It sometimes happens that he who is owner has not
the power of alienating a thing, and that he who is not owner
can alienate. 63. For by the Lex Julia a husband is pre-
vented from alienating lands forming part of the dos against
the will of his wife: although the lands are his own through
having been mancipated to him for the purpose of dos, or
passed by cession in court, or acquired by usucaption. Whether
this rule is confined to Italic lands or extends also to those in
the provinces is a doubtful point.

64. On the other hand, the agnate curator of a madman
can by a law of the Twelve Tables alienate the property of

1 Prædium is anything attached
to or connected with the land; some-
times the word is used antithetically
to persona. See D. 43. 20. 1. 43; and
as to Praediator in the sense
used in this paragraph see Cic. pro
Balbo, c. 20, and In Verrem, II. I.
54. Varro says that prædium pro-
per signifies land pledged: de
L. L. v. 40. So also does Pseudo-
Asconius in his commentary on the
passage from the Verrine orations

2 Lex Julia de adulterus, temp.
Augusti: Paul. S. R 11 21 b. This
law which originally applied only to
lands in Italy was extended by just-
tian to the provinces also; see Just.
Inst. 2. 8. pr.

3 For the law of dos see Ulpian,
vI.

4 The fragment of the law bearing
on the topic (viz. Tab. v. I. 7) does
not state this doctrine in so many

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administratio permissa est; item creditor pignus ex pactione, quamvis eius ea res non sit. sed hoc forsitam ideo videatur fieri, quod voluntate debitoris intellegitur pignus alienari, qui olim pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur.

65. Ergo ex his quae diximus adparet quaedam naturali iure alienari, qualla sunt ea quae traditio alienantur; quaedam civilis, nam mancipationis et in iure cessionis et usucapionis ius proprium est civium Romanorum.

66. Nec tamen ea tantum quae traditione nostra sunt naturali nobis ratione adquiruntur, sed etiam quae occupando ideo adquisitorum, quia antea nullius essent: qualia sunt omnia quae terrae, maris, coelo capiuntur. (67.) Itaque si feram bestiam ali illa captum

the madman: a procurator likewise (can alienate what belongs to another), i.e. a person to whom absolute management is intrusted: a creditor also by special agreement may alienate a pledge, although the thing is not his own. But perhaps the last-named alienation may be considered as taking place through the pledge being regarded as alienated by consent of the debtor, who originally agreed that the creditor should have power to sell the pledge, if the money were not paid.

65. From what we have said then it appears that some things are alienated according to natural law, such as those alienated by ordinary delivery: some things according to the civil law; for the right originating from mancipation, or cession in court, or usucaption, is one peculiar to Roman citizens.

66. But not only those things which become ours by delivery are acquired by us on natural principle, but also those which we acquire by occupation, on the ground that they previously belonged to no one: of which class are all things caught on land, in the sea, or in the air. 67. If therefore we have caught a wild beast, or a bird, or a fish, anything we

words, but doubtless the rule given by Gaius was a direct consequence of the fact that this law gave the testamentorum to their agnates. Cf. Cic. de Invent. Rhet. Lib. ii. c. 50.

\footnote{1 \[IV. 84.\] \footnote{3 On which view it is no example of one man alienating what belongs to another.} \footnote{2 See Appendix (E).}
11.68-70. Title by alluvion.

fuert, id statim nostrum fit, et eo usque nostrum esse intellegitur, donec nostra custodia coercetur. cum vero custodiam nostram evaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia nostrum esse desinit. naturalem autem libertatem recipere videtur, cum aut oculos nostros evaserit, aut licet in conspectu sit nostro, difficilis tamen eius rei persecutio sit.

68. In iis autem animalibus quae ex consuetudine abire et redire solent, veluti columbis et apiibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant et siant occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

69. Ea quoque quae ex hostibus capiuntur naturali ratione nostra sunt.

70. Sed et id quod per adluvionem nobis adicitur eodem iure nostrum fit. per adluvionem autem id'videtur adici quod have so caught at once becomes ours, and is regarded as being ours so long as it is kept in our custody. But when it has escaped from our custody and returned into its natural liberty, it again becomes the property of the first taker, because it ceases to be ours. And it is considered to recover its natural liberty when it has either gone out of our sight, or, although it be still in our sight, yet its pursuit is difficult.

68. With regard to those animals which are accustomed to go and return habitually, as doves, and bees, and deer, which are in the habit of going into the woods and coming back again, we have this rule handed down; that if they cease to have the intent of returning, they also cease to be ours and become the property of the first taker; and they are considered to cease to have the intent of returning when they have abandoned the habit of returning.

69. Those things also which are taken from the enemy become ours on natural principle.

70. That also which is added to us by alluvion becomes ours on the same principle. Now that is considered to be.

1 See Savigny, On Possession, p. 256, and also D. 41. 1. 3. 2 and 41. 1. 5. pr.
ita paulatim flumen agro nostro adicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur. hoc est quod volgo dicitur, per adluvionem id adici videri quod ita paulatim adicitur, ut oculos nostros fallat. (71.) Quod si flumen partem aliquam ex tuo praedio detraxit et ad meum praedium attulerit, haec pars tua manet.

72. At si in medio flumine insula nata sit, haec eorum omnium communis est qui ab utraque parte fluminis prope ripam praedia possident. si vero non sit in medio flumine, ad eos pertinet qui ab ea parte quae proxuma est iuxta ripam praedia habent.

73. Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit.

added by alluvion which the river adds so gradually to our land, that we cannot calculate how much is added at each instant: and hence the common saying, that that is regarded as added by alluvion which is added so gradually that it cheats our eyes. 71. But if the river rend away a portion of your field and conjoin it to mine, that portion remains yours.

72. If an island be formed in the middle of a river, it is the common property of all who have lands adjacent to the bank on either side of the river. But if it be not in the middle of the river, it belongs to those who have lands along the bank on that side which is the nearest.

73. Moreover that which is built on our ground by any one, even though he have built it in his own name (i.e. for himself), is ours by natural law, because the superstructure goes with the soil

1 But if the builder had acted in bona fides and had at the time the possession of the land, he could resist the action of the owner who refused to indemnify him, by an exceptio doli mali. He could, however, in no case bring an actio ad eisdemdam to get back the actual building materials. But if the house were pulled down, then he was allowed to vindicate them even if the period of usucapion for the house were completed, because “he who possesses an entirety, possesses the entirety only and not each individual part by itself” (Sav. On Poss. p. 193): so that the good title to the land would not have cured the bad title to the materials. If he had not possession, and if the house were not demolished, there is great doubt whether he had any remedy at all. D. 41. 1. 7. 11; D. 5. 3. 38.
74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram complexa fuerit.

75. Idem contingit et in frumento quod in solo nostro ab aliquo satum fuerit. (76.) Sed si ab eo petamus fundum vel aedificium, et inpressas in aedificium vel in seminaria vel in sementem factas ei solvere nolimus, poterit nos per exceptionem doli repellere; utique si bona fidei possessor fuerit.

77. Eadem ratione probatum est, quod in chartulis sive membranis meis alquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt. itaque si ego eos libros easque membranas petam, nec in pensas scripturae solvam, per exceptionem doli mali summoveri potero.

74. Much more is this the case with a plant which a man has placed in our land, provided only it have laid hold of the earth with its roots.

75. The same is the case also with corn which has been sown on our land by any one. 76. But if we claim the land or building, and will not pay the expenses incurred upon the building, or seed, or plant, he can resist us by an exception of fraud: at any rate if he be a possessor in good faith.

77. On the same principle the rule has been established that whatever any one has written on my paper or parchment, though it be in golden letters, is mine, because the letters are an accession to the paper or parchment. So too, if I claim those books and those parchments, and yet will not pay the expense of the writing, I can be resisted by an exception of

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1 IV. 115 et seqq. For "fructum," the reading of the MS., Huschke suggests "fundum." This appears a better reading, for it is plain from the ending of the paragraph that Gaius is not referring to mala fide possession. We know that a bond fide possessor had a right to the fruits (see Savigny, On Possession, p. 201), therefore it would be useless to talk of an action for them. Such an action would simply be refused by the Praetor, not granted and then overthrown in judicio by the exception of fraud. But as the bond fide possessor was treated equitably in this matter of fruits, it is only consistent that he should be treated equitably in the matter of expenses too; and so although a vindicatio would lie for the dominus, yet it could be successfully opposed if he refused to make good the money laid out by the defendant during the bond fide possession of the land in dispute.
(78.) Sed si in tabula mea aliquis pinxerit velut imaginem, contra probatur: magis enim dicitur tabulum picturae cedere. cuius diversitatis vix idonea ratio redditur. certe secundum hanc regulam si a me possidente petas imaginem tuam esse, nec solvas pretium tabulae. poteris per exceptionem doli mali summoveri. at si tu possideas, consequens est, ut utilis mihi actio adversum te dari debet: quo casu nisi solvam impensam picturae, poteris me per exceptionem doli mali repellere, utique si bona fide possessor fueris. illud palam est, quod sive tu subnpuisses tabulam sive alius, competit mihi furti actio.

79. In aliis quoque speciebus naturalis ratio requiritur:

fraud. 78. But if any one have painted anything on my tablet, a likeness for instance, an opposite decision is given: for the more correct doctrine is that the tablet is an accession to the picture. For which difference scarcely any satisfactory reason is given. No doubt, according to this rule, if you claim as your own the picture of which I am in possession, and yet will not pay the price of the tablet, you can be resisted by an exception of fraud. But if you be in possession, it follows that an actio utilis ought to be allowed me against you: in which case if I do not pay the price of the picture, you can resist me by an exception of fraud, at any rate if you be a possessor in good faith. It is clear that if you or any one else have stolen the tablet, an action of theft lies for me.

79. In specifications also natural principles are resorted to.

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1 In assigning new actions the Praetor was careful to frame them, as far as possible, on the precedent of actions already existing under the civil or praetorean law. It might be that the precise phraseology of some enactment was not applicable to the case in question, although its principle could be turned to use; the Praetor therefore, although unable to grant an actio directa, could and did grant an actio utilis, i.e. an "analogous" action: the epithet utilis being derived not from utilis the verb, but uitis the adverb.

The special circumstances of the present case are: (a) that it is a general rule that a vindicatio can only be brought by the dominus, the owner of the thing, when he is kept out of possession: (b) that snoopure there is no separate property in an accession, so that one who claims the accession not through the principal thing is not a dominus, and hence has no action: therefore the dominus being in possession of the picture, the owner of the tablet has by the civil law no action for his tablet. Here then is an opportunity for the Praetor to meet the spirit, and contravene the letter of the law, by granting to the latter an actio utilis. See Austin, II. 323. (II. 621, third edition.)
proinde si ex uvis aut olivis aut spicis meis vinum aut oleum aut frumentum feceris, quae rerum utrum meum sit id vinum aut oleum aut frumentum, an tuum. item si ex auro aut argento meo vas aliud feceris, aut ex meis tabulis navem aut armarium aut subcellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum aut collyrium feceris: quae rerum utrum tuum sit id quod ex meo effeceris, an meum. quidam materiam et substantiam spectandum esse putant, id est, ut cuius materia sit, illius et res quae facta sit videatur esse; idque maxime placuit Sabino et Cassio. alii vero etius rem esse putant qui fecerit; idque maxime diversae scholae auctoribus visum est: sed eum quoque cuius materia est qui subripuerit habere actionem; nec minus adversus eundem conditionem ei competere, quia extinta e.

For instance, if you have made wine, or oil, or corn, out of my grapes, olives, or ears, the question arises whether that wine, oil, or corn is mine or yours. Likewise, if you have made any vessel out of my gold or silver, or made a ship, or chest, or seat out of my planks: likewise, if you have made a garment out of my wool, or made mead out of my wine and honey, or a plaster or eye-salve out of my drugs, the question arises whether that which you have so made out of mine is yours or mine. Some think the material and substance are what ought to be regarded, i.e. that the thing made should be considered to belong to him to whom the materials belong: and this opinion found favour with Cassius and Sabinus. But others think that the thing belongs to him who made it. (and this view rather is upheld by the authorities of the school opposed to us,) but that he to whom the material and substance belonged has an action of theft against him who took them away: and that he has in addition a condition against the same person, because things which have been destroyed, although they cannot be recovered by vindication, yet may

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1 The principles here stated are fully set out and in very similar language in D. 41. 1 7. 7, which passage forms part of a long citation from another treatise of Gaius, viz. the Liber Rerum quotidinarum sive Aurorum.

2 To which school Gaius himself belonged.

3 IV. 2—5.
res, licet vindicari non possint, condici tamen furibus et quibus-dam aliis possessoribus possunt.

DE PUPILLIS AN ALIQUID A SE ALIENARE POSSUNT.

80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem mancipi alienare posse; nec mancipi vero feminam quidem posse, pupillum non posse. (81.) Ideoque si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet ea pecunia res nec mancipi sit, contrahit obligationem. (82.) At si pupillus idem fecerit, quia eam pecuniam non facit accipientis, nullam contrahit obligationem. unde pupillus vindicare quidem nummos suos potest, scubì extent, id est intendere suos ex iure Quintium esse; mala fide consumtos vero ab eodem repetere potest quasi possideret. unde de pupillo quidem quaeritur, an nummos quoque quos mutuos dedit, ab eo qui accepit bona fide alienatos be sued for by condiction as against thieves and certain other possessors.

80. We must now be informed that neither a woman nor a pupil can without the authority of the tutor alienate a thing mancipable: a thing non-mancipable a woman can alienate, and a pupil cannot. 81. Therefore in all cases where a woman lends money to any one without the authorization of her tutor, she contracts an obligation, for she makes the money the property of the recipient, inasmuch as money is a thing non-mancipable. 82. But if a pupil have done the same, since he does not make the money the property of the recipient, he contracts no obligation. Therefore, the pupil can recover his money by vindication, as long as it is unconsumed, i.e. claim it to be his own in Quinarius right: and further, if it have been fraudulently consumed he can reclaim it from the recipient, just as though he were still in possession of it. Whence arises this question with regard to a pupil, viz. whether he can reclaim money he has lent from him who has received it, after

1 Ulp. xi. 27.
2 Mutuum is a contract perfected by delivery in cases where delivery passes the property: hence in this instance the mutuum is binding, money being a res nec mancipi, and therefore capable of transfer by mere delivery. See III. 90.
peter possit, quoniam is scilicet accipientis eos nummos facere videtur. (83.) At ex contrario res tam mancipi quam nec mancipi mulieribus et pupillis sine tutoris auctoritate solvi possunt, quoniam meliorem conditionem suam facere iis etiam sine tutoris auctoritate concessum est. (84.) Itaque si debitor pecuniam pupillo solvat, facit quidem pecuniam pupilli, sed ipse non liberatur; quia nulam obligationem pupillus sine tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. set tamen si ex ea pecunia locupletior factus sit, et aedium petat, per exceptionem doli mali summoveri potest. (85.) Mulieri vero etiam sine tutoris auctoritate recte solvi potest: nam qui solvit, liberatur obligatione, quia res nec mancipi, ut proxyme diximus, a se

the latter has in good faith transferred it to a third party; since he undoubtedly makes the money the property of the receiver. 83. But, on the other hand, both things mancipable and things non-mancipable can be paid to women and pupils without the authorization of the tutor, because they are allowed to make their condition better even without their tutor's authorization. 84. Therefore, if a debtor pay money to a pupil, he makes the money the property of the pupil, but is not himself freed from obligation, because the pupil can dissolve no obligation without the authorization of the tutor, since without his tutor's authorization he is not allowed to alienate anything. But nevertheless if he have benefited by this money, and yet sue for it again, he can be resisted by an exception of fraud. 85. Payment, however, can be legally made to a woman even without the authorization of her tutor: for he who pays is freed from obligation, since, as we have said above, a woman can part with things non-mancipable

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1 The case is one of bona fide alienation, and it is only malum fide alienation or consumption which draws with it the necessity of making compensation.

2 Sulpere means to discharge an obligation. It is difficult to hit upon a precise equivalent in English, because the solutio spoken of in this paragraph may be either dare facere, or praetare.

3 This does not mean that the debtor would have to pay over again in all cases, as we see from the concluding paragraph of the section. The debtor having paid a person not fit to be entrusted with money, was liable in case any loss took place, or if the pupil wastefully expended what he had received. Just. Inst. 11. 8 2.
dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accipiat pecuniam; at si non accipiat, sed habere se dicat, et per acceptationem velit debitorem sine tutoris auctoritate liberare, non potest.

86. Adquintur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipiove habemus; item per eos servos in quibus usumfructum habemus; item per homines liberos et servos alienos quos bona fide possidemus. de quibus singulis diligentem displiciamus.

87. Igitur quod liberi nostri quos in potestate habemus, item quod servi nostri mancipio accipunt, vel ex traditione mancipiove accipunt, sive quid stipulentur, vel ex alqualibet causa acquirunt, id nobis acquirunt: ipse enim qui in potestate nostra est nihil suum habere potest, et ideo si heres institutus sit, nisi nostro iussu, hereditatem adire non potest; et si iubentibus nobis adient, hereditatem nobis acquirit, proinde atque si nos ipsi heredes instituti essemus. et convenienter scilicet legatum even without her tutor’s authorization: although this is the case only if she receive the money; but if she do not receive it, but merely say she has it, and desire to free the debtor by acceptation except without the authorization of her tutor, she cannot do so.

86. Property is acquired for us not only by our own means but also by means of those whom we have under our potestas, manus or mancipium: likewise, by means of those slaves in whom we have an usufruct: likewise, by means of free men and slaves of others whom we possess in good faith. These cases let us consider carefully one by one.

87. Whatever, therefore, our children, whom we have under our potestas, and likewise whatever our slaves receive by mancipation, or obtin by delivery, or stipulate for, or acquire in any way at all, is acquired for us: for he who is under our potestas can have nothing of his own; and therefore if he be instituted heir, he cannot enter on the inheritance except by our command; and if he enter at our command, he acquires the inheritance for us just as though we had ourselves been instituted heirs. And in like manner of course a legacy

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1 III. 169.  
2 Ulpian, xix. 18.  
3 III. 114.  
4 Ulpian, xix. 19.
Possessio per alium.

per eos nosis adquiritur. (88.) dum tamen sciamus, si alterius in bonis sit servus, alterius ex iure Quiritium, ex omnibus causis ei soli per eum adquiri cuius in bonis est. (89.) Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis, sed etiam possessio: cuius enim rei possessionem adepti fuerint, id nos possidere videmur. unde etiam per eos usucapio procedit.

90. Per eas vero personas quas in manu mancipiove habe­mus, proprietas quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt: an autem possessio adquiratur, quaeri solet, qua ipsas non possidemus. (91.) De his autem servis in quibus tantum usumfructum habemus ita placuit, ut quidquid ex re nostra vel ex operis suis adquirunt, id

is acquired for us by their means. 88. Let us, however, take notice that if a slave belong to one man by Bonitary and to another by Quintary title, acquisition is in all cases made by his means for that one only whose Bonitarn property he is'. 89. And not only is ownership acquired for us by means of those whom we have under our potestas, but possession also: for of whatever thing they have obtained possession, that thing we are considered to possess. Hence also usu­capion takes effect through their means'.

90. Next, by means of those persons whom we have under manus or mancipium ownership, no doubt, can be acquired for us in all cases, just as it can by those who are under our potestas: but whether possession can be acquired is often questioned, because we do not possess the persons themselves'. 91. With regard to slaves in whom we have merely an usufruct, the rule is that whatever they acquire by means of our substance

1 II. 40. Ulp. XIX. 70. The owner in bonis has the potestas. 1. §4.
2 Possession, however, is not acquired for another without that other's knowledge and consent, although property may be for the animus domini must exist not only in personal but also in derivative possession, such as that of a slave for his master. See Savigny, On Poss. § 28.
3 Savigny points out (Treatise on Possession, p. 230) that if we could only acquire derivative possession through persons of whom we ourselves have possession, the father could not acquire through the son, nor the usufructuary through the slave in whom he had the usufruct (§ 91) Gaius, consistently with himself, raises a doubt as to the last-named case in § 94.
Possessio per alium.

nobis adquiratur; quod vero extra eas causas, id ad dominum proprietatis pertineat. itaque si iste servus heres institutus sit legatumve quod ei datum fuerit, non mih, sed domino proprietatis adquiritur. (92.) Idem placet de eo qui a nobis bona fide possidetur, sive liber sit sive alienus servus. quod enim placuit de usufructuario, idem probatur etiam de bona fide possessor. itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus sit. (93.) Sed si bonae fidei possessor usucaptus servum, quia eo modo dominus fit, quod quidem illi causa per eum sibi adquirere potest: usufructuarus vero usucapere non potest, primum quia non possidet, sed habet ius utendi et fruendi; deinde quia scit alienum servum esse. (94.) De illo quaeritur, an per eum servum in quo usufructum habemus possidere aliquam rem et usucapere possimus, quia ipsum non possidemus. Per eum vero quem bona

or their own labour is acquired for us1: but whatever from other sources than these, belongs to their proprietor. Therefore, if such a slave be instituted heir or any legacy be left to him, it is acquired not for me but for his proprietor. 92. The law is the same as to one who is possessed by us in good faith, whether he be free or the slave of another. For whatever holds good as to an usufructuary also holds good as to a possessor in good faith1. Therefore, whatever is acquired from causes other than these two either belongs to the man himself, if he be free, or to his master, if he be a slave. 93. But if a possessor in good faith have got the slave by usucapio, since he thus becomes his master, he can acquire by his means in every case: but an usufructuary cannot get by usucapion; firstly, because he does not possess, but has the right of usufruct; and secondly, because he knows the slave to be another's. 94. Whether we can possess and get an usucaptive title to anything by means of a slave in whom we have the usufruct is a moot point2, since we do not possess the slave himself. There is, however, no doubt that we can

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1 Ulpian, xix. 21.
2 Ibid.
3 According to D 41. 2. 8 and D. 41. 2. 49. pr. it is quite clear that the usufructuary could acquire through the slave in whom he had the usufruct. It may be that the law as laid down in those passages by Paulus and Papirius was not so laid down until after Gaius's time, when, as we see, the question was a doubtful one.
II. 95, 96.]

Bonâ fide possessio.

fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utnusque persona secundum distinctionem quam proxime exposuimus, id est si quid ex re nostra vel ex operis sui adquirant, id nobis adquintur. (95.) Ex his apparet per liberos homines, quos neque iuri nostro subjectos habemus neque bona fide possidemus, item per alienos servos, in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse, et hoc est quod dicitur per extraneam personam nihil adquiri posse, excepta possessione; de ea enim quaeritur, anne per liberam personam nobis adquiratur.

96. In summa sciendum est it in potestate manu mancipiove sunt nihil in iure cedi posse. cum enim istarum personarum nihil suum esse possit, conveniens est scilicet, ut nihil suum esse per se in iure vindicare possint.

both possess and get by usucapion by means of a man whom we possess in good faith. But in both instances we are speaking with a reference to the qualification which we laid down just above, viz. that it is only what they acquire by our substance or their own work which is acquired for us. 95. Hence it appears that in no case can anything be acquired for us by means of free men whom we neither have subject to our authority nor possess in good faith, nor by the slaves of other men of whom we have neither the usufruct nor the lawful possession. And hence comes the saying that nothing can be acquired for us through a stranger, except possession; for it is questionable whether acquisition of this cannot be made for us by a free person.²

96. Finally, we must take note that nothing can be passed by cession in court to those who are under poletas, manus or mancipium. For since these persons can have nothing of their own, it clearly follows that they cannot claim anything in court to be their own on an independent title (per se).

¹ This passage in the text, it will be observed, is partly filled in conjecturally. To this circumstance alone can we attribute the undecided manner in which the possibility of acquiring possession by a free agent is asserted; for the fact of such acquisition being allowable is certain. The principal acquires possession through the agent at once and before he receives information of the transaction of the business, if he gave a precedent mandatum (commission), but only after knowledge of the taking of possession and approval of the same (ratibatuto) when the agent is self-appointed (negotiorum gestor). See Sav. On Poss. pp. 230—236, Paulus, S. R. 5. 2. 2.

99. Ac prius de hereditatibus dispiciamus, quarum duplex condicio est: nam vel ex testamento, vel ab intestato ad nos pertinent.

100. Et prius est, ut de his dispiciamus quae nobis ex testamento obveniant.

101. Testamentorum autem genera initio duo fuerunt. Nam aut calatis comitibus faciebant, quae comitia bis in anno testa-

97. This much it is sufficient to have laid down at present as to the methods whereby particular things are acquired by us. For the law of legacies, whereby also we acquire particular things, we shall state more conveniently in another place. Let us therefore now consider how things are acquired by us in the aggregate. 98. If then we have been made heirs to any man, or if we seek the possession of any man's goods; or buy any bankrupt's goods, or arrogate any man, or receive any woman into manus as a wife, the property of such person passes to us.

99. And first let us consider the subject of inheritances, of which there are two descriptions, for they devolve upon us either by testament or intestacy.

100. The first thing is to consider about those things which come to us by testament.

101. Originally then there were two kinds of testaments: for men either made them at the specially-summoned *comitia*,

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1 II. 191 et seqq.
2 III. 32.
3 III. 77.
4 Testamentum est mentis nostrae contestatio, in id sollemnis facta ut post mortem nostram valeat." Ulp. XX. 1.
5 The *comitia* of which two meetings were set apart would, it is almost needless to say, be the *curitias*; as the plebeians had not in those early times risen into importance. The rule was that inheritances should descend according to law, and a Roman could only have this rule relaxed in his own case by obtaining a special enactment, (what would have been called at a later period a *privilegium*,) at the assembly of the nation, either
II. 102, 103. Testaments.

which comitia were appointed twice in the year for the purpose of testaments being made; or in procinctu, i.e. when on account of war they were going out to fight; for procinctus means an army prepared and armed. The one kind, therefore, they made in peace and tranquility, the other when going out to battle. 102. Afterwards there was added a third kind of testament, which is solemnized by means of the coin and scale. For a man who had made his testament neither at the comitia calata nor in procinctu, if threatened with sudden death, used to give his familia (i.e. his patrimony) by mancipation to some friend, and injoin on him what he wished to be given to each person after his death. Which testament is called "by coin and balance," clearly because it is solemnized by mancipation. 103. But the two kinds of testament first-mentioned have fallen into disuse: and that alone is retained in use which is solemnized by coin and balance. It is, however, now made in another way from that in which it used to be made. For formerly the familiae emptor, i.e. he who received the estate by mancipation from the testator, held the place of heir, and therefore the testator charged him with what he wished to be given to each

the whole of it, the comitia, or in cases of emergency such portion as could readily be collected, the pro-
cinctus. See Festus sub verb. procinctus.

Ulpian, xx. 2.
testator, quid cuique post mortem suam dari velit. nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia propter veteris iuris imitacionem familiae emptor adhibetur. (104.) Eaque res ita agitur. Qui facit testamentum, adhibitus, sicut in ceteris mancipationibus, v testibus civibus Romanis libripens et libripende, postquam tabulas testamenti scriptae, mancipat alci dicis gratia familiae suam; in qua re his verbis familiae emptor utitur:

FAMILIAM PECUNIAMQUE TUAM ENDO MANDATELA TUTELA CUSTODELAQUE MEA ESSE AIO, EAQUE, QUO TU IURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE, et ut quidam adiciunt AENEAE LIBRA, ESTO MIHI EMPTA. deinde aere percuit libram, idque aes dat testator velut pretii loco. deinde testator tabulas testamenti tenens ita dicit: HAEC ITA UT IN HIS TABULIS CERIQUIE SCRIPTA SUNT ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. et hoc dicitur nuncupatio. nuncupare est enim

person after his death. But now one person is appointed heir in the testament, and on him the legacies are charged, and another, as a mere form and in imitation of the ancient law, is employed as familiae emptor. 104. The business is effected thus. The man who is making the testament, having called together, as in all other mancipations, five witnesses, Roman citizens of puberty, and a balance-holder (libripens)¹, after writing the tablets of his testament mancipates his estate for form’s sake to some one: at which point the familiae emptor makes use of these words: “I declare your patrimony and money to be in my charge, guardianship and custody: and in order that you may be able to make a testament duly according to public law, be they bought by me with this coin, and,” as some add, “with this copper balance.” Then he strikes the balance with the coin, and gives that coin to the testator, as it were by way of price. The testator thereupon, holding the tablets of the testament, speaks thus: “These things, just as they are written in these tablets of wax, I so give, I so bequeath, and I so claim your evidence, and do you, Quintes, so afford it me.” And this is called the nuncupation: for to nuncupate is

¹ Ulpian, xx. 2. ² Ulpian, xx. 9.
II. 105, 106.] Nuncupatio. Familiae emptor. 105

palam nominare; et sane quae testator specialiter in tabulis testamenti scripsisset, ea videtur generali sermone nominare atque confirmare.

105. In testibus autem non debet esse qui in potestate est aut familiae emptoris aut ipsius testatoris, quia propter veteris iuris imitationem totum hoc negotium quod agitur testamenti ordinationi gratia creditur inter familias emptorem agi et testatorem: quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat, heredes loco erat. itaque reprobatum est in ea re domesticum testimonium. (106.) Unde et si is qui in potestate patris est familiae emptor adhibitus sit, pater eius testis esse non potest; at ne is quidem qui in eadem potestate est, velut frater eius. Sed si filiusfamilias ex castrensi peculio post missionem facit testamentum, nec pater eius recte
to declare openly\(^1\): and whatever the testator has written in detail on the tablets of his testament, he is regarded as declaring and confirming by this general statement.

105. Amongst the witnesses there ought not to be any one who is under the potestas either of the familiae emptor or of the testator himself, since in imitation of the old law all this business which is done for the purpose of making the testament is regarded as taking place between the familiae emptor and the testator: because in olden times, as we have just stated, he who received the estate of the testator by mancipation was in the place of heir. Therefore the evidence of members of the same household was refused in the matter\(^2\).

106. Hence also, if he who is under the potestas of his father be employed as familiae emptor, his father cannot be a witness\(^3\): neither can one who is under the same potestas, his brother for instance. And if a filius families make a testament regarding his castrense peculium\(^4\) after his discharge from service, his father

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\(^1\) "Nuncupare nominare valere apparat in legisbus." Varro, de L. L. vi. 60.

\(^2\) Ulpian, xx. 3.

\(^3\) Ibid. 4. 5.

\(^4\) Ulpian, xx. 10. Peculium originally meant property of the paterfamilias held on his sufferance by the son or slave, and which he could take from them at his pleasure. Peculium castrense dates from the time of Augustus: soldiers in potestate parentis were by enactment of that emperor allowed to have an independent property in their acquisitions made on service, and the rule that the property of a son was the property of the father (II. 87) was set aside in this case. If the testament were made during service, no
testis adhibetur, nec is qui in potestate patris sit. (107.) De
libripendae eadem quae et de testibus dicta esse intellegemus;
nam et is testium numero est. (108.) Is vero qui in potestate
heredis aut legatarum est, cuiusve heres ipse aut legatarius in
potestate est, quiue in eiusdem potestate est, adeo testis et
libripens adhiberi potest, ut ipse quoque heres aut legatarius
iure adhibeatur. sed tamen quod ad heredem pertinet quique
in eius potestate est, cuiusve is in potestate crit, minime hoc
iure uti debemus.

DE TESTAMENTIS MILITUM.

109. Sed haec diligens observatio in ordinandis testamentis
militibus propter nimiam
imperitiam constitutionibus Principum
remissa est. nam quamvis neque legitimum numerum testium
cannot properly be employed as a witness ¹, nor one who is
under the potestas of his father. 107. We shall consider that
what has been said about the witnesses is also said about the
balance-holder: for he too is in the number of the witnesses.
108. But a man who is under the potestas of the heir or a
legatee, or under whose potestas the heir or a legatee himself is,
or who is under the same potestas (with either of them), may
so undoubtedly be employed as a witness or balance-holder,
that even the heir or legatee himself may be lawfully so em­
ployed. Yet so far as concerns the heir, or one who is under
his potestas, or one under whose potestas he is, we ought to
make use of this right very sparingly².

109. But these strict regulations as to the making of testa­
ments have been relaxed by constitutions of the Emperors in
the case of soldiers, on account of their great want of legal
knowledge. For their testaments are valid, though they have

formalities were needed (11. 109); hence the words "post missionem"
are inserted in the text.

¹ Marcellus, with whom Ulpian
apparently agrees, held that a father
could be made witness to a testament
of a plus familiaris respecting his castrense peculium. See D 28 1. 20. 2.
² The transaction, as Gaius tells
us (11 105), was still regarded as one
between the testator and the familiae
empтор, and yet people were gradual­
ly beginning to see that this was
but a fiction, and that the real parties
were the testator and the heir; hence
the caution at the end of 11. 108,
which Justinian subsequently trans­
formed into a law. Inst. 11. 10. 10.
II. 110—112.  

Military testaments.

adhibuerint, neque vendiderint familiam, neque nuncupaverint testamentum, recte nihilominus testantur. (110.) Praeterea permissum est is et peregrinos et Latinos instituere heredes vel iis legare; cum alioquin peregrini quidem ratione civilis prohibeantur capere hereditatem legataque, Latini vero per legem Iuniam. (111.) Caelibes quoque qui legi Iulia hereditatem legataque capere vetantur, item orbi, id est qui liberos non habent, quos lex Papia plus quam semissem capere prohibet [23 lin.].

112. Sed senatus divo Hadriano auctore, ut supra quoque signifcavimus, mulieribus etiam coemptione non facta testamentum facere permittit, si modo maiores facerent annorum XII tutore auctore; scilicet ut quae tutela liberatae non essent ita testari

neither employed the lawful number of witnesses, nor sold (mancipated) their estate, nor nuncupated their testament. 110. Moreover, they are allowed to institute foreigners or Latins as their heirs, or to leave legacies to them: although in other cases foreigners are prohibited by the civil law from taking inheritances, and Latins by the Lex Jutia. 111. Unmarried persons also, who by the Lex Julia are forbidden to take an inheritance or legacies, also orbi, i.e. those who have no children, whom the Lex Papia prevents from taking more than half the inheritance, (can be appointed heirs by soldiers). . . ..

112. But the senate, at the instance of the late emperor Hadrian (as we stated above), allowed women to make a testament, even though they had not entered into a coemption; provided only they were above twelve years of age and made it with the authorization of their tutor; that is, (the senate ruled) that women not freed from tutelage should so make their testa-

1 The testaments of soldiers made irregularly were only valid for one year after their leaving the service. Ulpian, xxii. 10.

2 1. 23. The prohibition of Latins was not absolute. See Ulpian, xxii. 3.

3 The Lex Julia de maritandis ordinibus (temp. Augusti) is meant. Caelibes could by that law take what was bequeathed to them only in case they married within 100 days from the time when they became entitled.

Ulpian, xvii. 1. The Lex Julia was enacted A.D. 4, but it did not come into operation till A.D. 10, in which year the Lex Papia Poppaea was also passed. The two laws being thus connected both in their object and their date, are generally spoken of together, and sometimes, though not quite correctly, as if they were one law, Lex Julia et Papia. See Appendix (G).

4 1. 115 a.
deberent. (113.) Videntur ergo melioris condicionis esse feminae quam masculi: nam masculus minor annorum XlIII testamentum facere non potest, etiamsi tutore auctore testamentum facere velit; femina vero post XII annum testamenti faciendi ius nanciscitur.

114. Igitur si quaeramus an valeat testamentum, imprimis advertere debemus an is qui id fecerit habuerit testamenti cognitionem: deinde si habuerit, requiremus an secundum iuris civilis regulam testatus sit; exceptis militibus, quibus propter nimiam inperitiam, ut diximus, quomodo velint vel quomodo possint, permittitur testamentum facere.

taments¹. 113. Women, therefore, seem to be in a better position than men: for a male under fourteen years of age cannot make a testament, even though he desire to make it with the authorization of his tutor: but a woman obtains the right of making a testament after her twelfth year².

114. If then we are considering whether a testament be valid, we first ought to consider whether he who made it had testamenti facto²: then, if he had it, we shall enquire whether he made the testament according to the rules of the civil law: except in the case of soldiers, who, as we have stated, on account of their great want of legal knowledge are allowed to make a testament as they will and as they can.

¹ For the circumstances under which women are freed from tutela see I. 104.
² Ulpian, xx. 12, 15.
³ Testamenti factio is used in three senses:
(1) The legal capacity of making a testament:
(2) The legal capacity of taking under a testament:
(3) The legal capacity of being a witness to a testament.

The phrase is here used in the first sense. All persons sui jurs, except delitii i (1. 25, iii. 75), had this testamenti facto. Persons not sui jurs might have it in the other two senses.

After the Lex Papia Poppaea was passed, the man who had testamenti facto in the second sense did not of necessity receive his inheritance or legacy: he had the power of doing so still, yet that power was not absolute, but conditional on his ceasing to be coelebs or orbis within one hundred days after the testament came into operation. Therefore although he had the testamenti facto, circumstances might still rob him of the jus capendi ex testamento.

In the third sense testamenti facto was not an absolute but a relative right. There were persons who did not possess it at all, and those who were not so disqualified still could not be witnesses to every testament, but were without testamentis facto when the testator of familiae emptor was linked to them by patres testamentas, as we see from II. 105—108. From this relative character of the privilege we see how opposite is Ulpian's phraseology in xx. 2: "cum quibus testamenti facto est."
II. 115—119. ] Institution of heir. Bonorum possessio. 109

115. Non tamen, ut iure civili valeat testamentum, sufficit ea observatio quam supra exposuimus de familiae venditione et de testibus et de nuncupationibus. (116.) Ante omnia requiendum est an institutio heredis sollemni more facta sit: nam aliter facta institutione nihil proficit familiam testatoris ita venire, testesve ita adhibere, aut nuncupare testamentum, ut supra diximus. (117.) Sollemnis autem institutio haec est: TITIUS HERES ESTO. sed et illa iam conprobata videtur: TITIUM HEREDEM ESSE IUBEO. at illa non est conprobata: TITIUM HEREDEM ESSE VOLO. set et illae a plerisque improbatae sunt: HEREDEM INSTITUO, item HEREDEM FACIO.

118. Observandum praeterea est, ut si mulier quae in tutela sit faciat testamentum, tutoris auctoritate facere debeat: alioquin inutiliter iure civili testabitur. (119.) Praetor tamen, si septem signis testium signatum sit testamentum, scriptis hisibus secundum tabulas testamenti bonorum possessionem pollicetur: et si nemo sit ad quem ab intestato iure legitimo perti-

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1 The form to be solemn must be imperative, not preceptive or a mere statement. Ulpian, xxl. 4 ii. 113.
neat hereditas, velut frater eodem patre natus aut patruus aut fratis filius, ita poterunt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex causa testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit. (120.) Sed videamus an non, etiamsi frater aut patruus extent, potiores scripti heredibus habeantur. rescripto enim Imperatoris Antonini significatur, eos qui secundum tabulas testamenti non iure factas bonorum possessioem petierint, posse adversus eos qui ab intestato vindicant hereditatem defendere se per exceptionem doli mali. (121.)
II. 122, 123.] Prædictiōn of a suus heres.

quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quae ideo non utiliter testatae sunt, quod verbi gratia familiam non vendiderint aut nuncupationis verba locutae non sint: an autem et ad ea testamenta feminarum quae sine tutoris auctoritate fecerint haec constitutio pertineat, videbimus. (122.) Loquimur autem de his scilicet feminis quae non in legitima parentum aut patronorum tutela sunt, sed de his quae alterius generis tutores habent, qui etiam inviti coguntur auctores fieri: alioquin parentem et patronum sine auctoritate eius facto testamento non summoveri palam est.

123. Item qui filium in potestate habet curare debet, ut eum vel heredem instituat vel nominatim exheredet; alioquin si eum silentio praetererit, inutiliter testabitur; adeo quidem, ut nostri praeceptores existimant, etiamsi vivo patre filius de-

applies to testaments of men is certain: also to those of women who have made an invalid testament because, for instance, they have not sold their estate, or have not spoken the words of nuncupation: but whether the constitution also applies to those testaments of women which they have made without authorization of the tutor is a matter for us to consider. 122. But of course, we are speaking about those women who are not in the statutable tutelage of parents or patrons, but who have tutors of another kind, who are compelled to authorize even against their will: on the other hand, it is plain that a parent or a patron cannot be set aside by a testament made without his authorization. 1

123. Likewise, he who has a son under his potestas must take care either to appoint him heir or to disinherit him by name: otherwise, if he pass him over in silence, the testament will be void: so that, according to the opinion of our authorities,

but descendants, so that the appointed heirs are preferred to a brother or father's brother. Under Justinian's legislation, however, the brother sometimes could wrest the possession from them. Just Inst. 11 18 1

1 This paragraph is an answer to the question implied in "videbimus" at the end of § 121. The testaments of women under fiduciary tutors will be supported by the prætor's grant of honorum possesso secundum tabulas, but not those of women in tutela legitima. See 1. 192. The incompleteness of the paragraph is easily accounted for, if our hypothesis be accepted, that the work of Gaius was merely a republication of his notes for lecture. The doubt which he starts would be explained by him orally.

2 Ulpian, xxii. 14—23, and Cic. de Oratore, 1. 38 apud finem.
functus sit, neminem heredem ex eo testamento existere posse, scilicet quia statim ab initio non constiterit institutio. sed diversae scholae auctores, siquidem filius mortis patris tempore vivat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur: si vero ante mortem patris interceptus sit, posse ex testamento hereditatem adiri putant, nullo iam filio impedimento; quia scilicet existimant non statim ab initio inutiliter fieri testamentum filio praeterito. (124.) Ceteras vero liberorum personas si praeterierit testator, valet testamentum. praeteritae istae personae scriptis heredibus in partem ad crescunt: si sui instituti sint in virilem; si extranei, in dimidiam. id est si quis tres verbi gratia filios heredes instituerit et filiam praeterierit, filia ad crescendo pro quarta parte fit heres; placuit enim eam tuendum esse pro ea parte, quia etiam ab intestato eam partem habitura esset. at si extraneos ille heredes instituerit et filiam praeterierit, filia ad crescendo ex
even if the son die in the lifetime of the father, no heir can exist under that testament, because the institution was invalid from the very beginning. But the authors of the school opposed to us admit that if the son be alive at the time of the father's death, he undoubtedly stands in the way of the appointed heirs, and becomes heir by intestacy: but they think that if he die before the death of his father, the inheritance can be entered upon in accordance with the testament, the son being now no hindrance: holding that when a son is passed over, the testament is not invalid from the very beginning. 124. But if the testator pass over other classes of descend-ants, the testament stands good. These persons so passed over attach themselves upon the appointed heirs for a portion; for a proportionate share, if sui heredes have been appointed heirs¹: for a half, if strangers have been appointed. That is, if a man have, for example, instituted three sons as heirs and passed over a daughter, the daughter by attachment becomes heir to one-fourth: for it has been settled that she is to be protected to this extent, because she would also have had that amount on intestacy. But if the man have instituted strangers as heirs and passed over a daughter, the daughter

¹ II. 156. Ulp. xxii. 17.
Possession granted to women.

dimidia parte fit heres. Quae de filia diximus, eadem et de nepote deque omnibus liberorum personis, sive masculini sive feminini sexus, dicta intellegemus. (125.) Quid ergo est? licet feminae secundum ea quae diximus scriptis heredibus dimidiam partem tantum detrahant, tamen Praetor eis contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repelluntur: et efficerecur sane liberorum possessionem, III non inter feminas et masculos interesset: (126.) sed nuper Imperator Antoninus significavit rescripto suas non plus nancisci feminas per bonorum possessionem, quam quod iure ad crescendi consequerentur, quod in emancipatis feminis similiter obtinet, scilicet ut quod ad crescendi iure habiturae essent, si sua fuissent, id ipsum etiam per bonorum possessionem habeant. (127.) Sed si quidem filius a patre exheredetur, nominatim exheredari ante — — — — — potest by attachment becomes heir to one-half. All that we have said as to a daughter we shall consider to be said also of a grandson and all classes of descendants, whether of the male or female sex. 125. But what matters it? Although women, according to what we have said, take away only one half from the appointed heirs, yet the Praetor promises them possession of all the goods in spite of the testament, by which means the stranger heirs are debarred from the entire inheritance: and through this possession of goods, the effect would be that no difference would exist between men and women. 126. But the Emperor Antoninus has lately decided by a rescript that women who are suae heredes are to obtain no more by possession of goods than they would obtain by right of attachment1. A rule which applies to emancipated women as well, so that they are to have by possession of goods exactly what they would have had by right of attachment, if they had been suae heredes. 127. But if a son be disinherited by a father, he must be disinherited by name2. A man is considered to be disinherited by name,

1 "That they are to have no more by the aid of the praetor than is given to them by the jus civile." Cf. Theophillus, ii. 13. 3. Ulpian xxii. 23. These points and the amending rescript of Antoninus are noticed at considerable length in the Code 6. 28. 4, and we perceive that the matter still gave rise to controversy even in Justinian's time. That emperor effected a final settlement of the dispute by a rescript of the date 531 A.D.

2 Bocking proposes to continue the
exheredari. nominatim autem exheredari videtur sive ita exheredetur: *TITIUS FILIUS MEUS EXHERES ESTO sive ita: FILIUS MEUS EXHERES ESTO, non adiecto proprio nomine. (128.)

*Masculorum ceterorum personae vel feminini sexus aut nominatim exheredari possunt aut inter ceteros, velut hoc modo: CETERI EXHEREDES SUNTO quae verba post institutionem heredum adici solent. sed haec ita sunt sure cussi. (129.)

Nam Praetor omnes virilis sexus, tam filios quam ceteros, id est nepotes quoque et pronepotes nominatim exheredari iubet, feminini vero inter ceteros: qui nisi fuerint ita exheredati, promittit eis contra tabulas bonorum possessionem. (130.)

Postumi quoque liberi vel heredes institui debent vel exheredari. (131.)

Et in eo par omnium condicio est, quod et in filio postumo et in quo-

if he be either disinherited in the words: "Be my son, Titius, disinherited;" or in these: "Be my son disinherited," without the addition of his proper name. 128. Other males or any females may be disinherited either by name or in a general clause, for instance thus: "Be all others disinherited:" words which are usually added after the institution of the heirs. But these rules are so by the civil law only. 129. For the Praetor orders all of the male sex, both sons and others, i.e. grandsons also and great-grandsons, to be disinherited by name, but women by a general clause: and if they be not thus disinherited, he promises them possession of the goods as against the testament. 130. After-born descendants also must either be appointed heirs or disinherited. 131. And in this respect the condition of all of them is the same, that

passage "before the appointment of the heir (i.e. in a part of the testament preceding the appointment of heir), or in the midst of the appointments of the heirs (if there be several), but he cannot in any case be disinherited by a general clause (inter caderai)." The meaning of the last sentence is that he must be named; no general proviso, such as "caeteri exheredes sunto," will suffice to bar him.

We may here remark that the disinheriting of sons or descendants was not allowed to a testator unless he had good cause for setting them aside. In many cases (see Just. Instit. II. 18) children so disinherited could bring the querela insufficient testaments, "complaint of the testament not being in accordance with natural affection," and have it annulled.

1 A considerable portion of the MS. is lost at this point, and §§ 131—134 are supplied from Justinian's Institutes. See Ulpian, XXII. 21, 22. The meaning of the word *postumus* is discussed in the note on 1. 148.
II. 132, 133.] Disherson of postumi.

1. And whoex ceteris liberis, suce femminini sexus suve masculini, praeterito, valet quidem testamentum, sed postea adgnatton postumi sive postumae rumpatur, et ea ratione tohum sinfirmatur: sdeoque si multier ex qua postumus aut postuma sperabatur abortum fecerit, nihil impedimento est scriptis hereditibus ad hereditatem adeundum. (132.) Sed feminins quidem sexus postumae vel nominatim vel inter ceteros exheredari solent. dum tamen si inter ceteros exhereduntur, aliquum es legetur, ne videantur per oblivionem praeteritae esse: masculos vero postumos, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo: QUICUMQUE MIHI FILIUS GENITUS FUERIT EXHERES ESTO (133.) Postumorum loco sunt et hi qui in sui heredis locum succedendo quasi adgnascendo fiant parentibus sui heredes. ut esse si filium et ex eo nepotem neptemve in potestate habecom, quia filius gradu praeceedit, is solus sura sui heredis habet, quamvis nepos

when an after-born son or any other descendant, whether male or female, is passed over, the testament is still valid, but is broken by the subsequent 

agnation of the after-born descendant, male or female, and thus becomes utterly inoperative.

And therefore, if a woman, from whom an after-born son or daughter is expected, miscarry, there is nothing to prevent the appointed heirs from entering on the inheritance. 132. After-born females may be disinheritcd either by name or in a general clause; provided only that if they be disinherited by a general clause, something be left them as a legacy, that they may not seem passed over through forgetfulness. But it has been ruled that after-born males, i.e. a son, &c., cannot be duly disinherited except they be disinherited by name, that is, in this manner, "Whatever son shall be born to me, let him be disinherited." 133. Those are classed as after-born children, who, by succeeding into the place of a suus heres, become heirs to their ascendants by quasi-agnation. For instance, if any man have under his potestas a son and a grandson or granddaughter by him, the son alone has the rights of suus

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1 By agnatio is merely meant the fact of becoming an agnatus, which might be either by birth or adoption, or, as in the present case, by conception, for when there is conuuum the child follows his father's condition, and his rights vest at the time of conception (1. 89). Therefore the testator passes over a suus heres, as the child's rights extend back into the testator's lifetime.

2 See Ulp. XXIII. 3; Cic. De Oratore, 1. 57, and Pro Caelio. 25.
Disherson of quasi-agnates. [II. 134, 135.]

quoque et neptis ex eo in eadem potestate sint; sed si filius meus me vivó moriatur, aut qualibet ratione exact de potestate mea, incipit nepos neptisve in eius locum succedere, et eo modo iura suorum heredum quasi adgnatione nasci. (134.) Ne ergo eo modo rumpat mihi testamentum, scit ipsum filium vel heredem instituere vel exheredare nominatim debo, ne non iure faciam testamentum, ita et nepotem neptemve ex eo sucesse est mihi vel heredem instituere vel exheredare, ne forte, me vivo filio mortuo, succedendo in locum eius nepos neptisve quasi adgnatione rumpat testamentum: idque leges Junia Velleia provisum est: qua simul cavitur, ut illi tamquam postumi, id est virillis sexus nominatim, femininis vel nominatim vel inter ceteros exheredentur, dum tamem us qui inter ceteros exheredantur aliquid legat.

135. Emancipatos liberos iure civili neque heredes instituere neque exheredare nescisse est, quod non sunt sui heredes. sed Praetor omnes, tam femininis quam masculinis sexus, si heredes

heres, because he is prior in degree, although the grandson also and the granddaughter by him are under the same potestas: but if my son die in my lifetime or depart from my potestas by any means, the grandson or granddaughter at once succeeds into his place, and so obtains the rights of a suus heres by quasi-agnation. 134. Therefore, to prevent him or her from thus breaking my testament, it is necessary for me to appoint as heir or disinherit the grandson or granddaughter by my son, just as I ought to appoint as heir or disinherit by name the son himself to prevent me from making an informal testament: lest, perchance, if my son die in my lifetime, the grandson or granddaughter by succeeding into his place should break my testament by the quasi-agnation: and this is provided by the Lex Junia Velleia¹: wherein there is also a direction that these persons are to be disinherited in the same way as after-born descendants, i.e. males by name, females either by name or in a general clause, provided only that some legacy be left to those disinherited in a general clause.

135. According to the civil law it is not necessary either to appoint as heirs or to disinherit emancipated children, because they are not suus heredes. But the Praetor orders all, both males

¹ Passed A.D. 10.
II. 135a—137. Relation of adopted children to parents.

non instituantur, exheredari iubet, virilis sexus filios et ulterioris gradus nominatim, feminini vero inter ceteros. quodsi neque heredes instituti fuerint, neque ita, ut supra diximus, exheredati, Praetor promittit eis contra tabulas bonorum possessionem. (135a.) In potestate patre constituto, qui inde nati sunt, nec in accipienda bonorum possessione, patri concurrunt qui possit eos in potestate habere; aut si petitur, non impetrabitur. namque per ipsum patrem suum prohibetur. nec differunt emancipati et sui.

136. Adoptivi, quamdiu tenentur in adoptionem, naturalium loco sunt: emancipati vero a patre adoptivo neque iure civil, neque quod ad editum Praetoris pertinet, inter liberos numerantur. (137.) qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quam id quidem sint in adoptiva familia, extraneorum numero habeantur. cum vero emancipati and females, to be disinherited, if they be not instituted heirs; sons and more remote descendants of the male sex by name, descendants of the female sex in a general clause 1. But if they be neither instituted heirs, nor disinherited in the manner we have stated above, the Praetor promises them possession of the goods as against the testament. 135 a. Where a father is under potestas his children cannot be joined with their father even in receiving a possession of goods, because of the possibility of his having them under his potestas: and their claim, if they make one, will be fruitless; for it is barred by the existence of their father. And those emancipated and sui juris are on the same footing 2.

136. Adopted children, so long as they are held in adoption, are in the place of actual children: but when emancipated by their adoptive father, they are not accounted as his children either by the civil law or by the provisions of the Praetor’s edict. 137. From which principle it follows, on the other hand, that in respect of their actual father they are considered to be strangers so long as they are in the adoptive family. But when they have been emancipated by the adoptive father, they begin to be in the position in which

1 Ulpian, xxxi. 23.

2 We have translated this paragraph as it stands in Gnest, but it should be noticed that Huschke is strongly inclined to leave it out as a corrupt interpolation.
118  
Invalidation of testaments.  [II. 138—141.

they would have been, if emancipated by the actual father himself 1.

138. If any man, after making a testament, adopt a son, either one who is suo iuris by authority of the populus, or one who is under the potestas of an ascendant by authority of the Praetor 2, his testament is in all cases broken by this quasi-agnation of a suus heres. 139. The rule is the same if a man take a wife into manus after making a testament, or if a woman already in his manus be married to him: for owing to this she is henceforth in the place of a daughter 3, and is a quasi suus heres. 140. Nor does it matter if such a woman, or a man who is adopted, have been instituted heir in that testament. For as to disinheriting, it is superfluous to make inquiry, since at the time the testament was made they were not of the class of suus heredes 4. 141. A son also who is manumitted

1  Therefore the praetor will grant them possessio bonorum of the goods of the actual father. The whole of the regulations as to the claims of adopted children on their actual and adoptive parents were changed by Justianus, whose new system will be found in Inst. ii. 13. 5; i. 11. 2.
2  1. 98, 99.
3  1. 115 b.
4  If they be already instituted in the testament it must be as extranei and not as suus heredes. Therefore there is a quasi-agnation all the same, there having been no recognition of them in their present character, such recognition in fact having been impossible. “As to disinheriting,” Gaius says, “there is no need to make inquiry,” for as they were not suus heredes when the testament was made there was no need to mention them at all at that time. It is the subsequent quasi agnatin which invalidates the testament, not the fact of their being named or not named in it; for if named, they
II. 142, 143. Invalidation of testaments.

manumittitur, quia revertitur in potestatem patriam, rumpit ante factum testamentum. nec prodest si in eo testamento heres institutus vel exheredatus fuerit. (142.) Simile ius olim fuit in eius persona cuius nomine ex senatusconsulto erroris causa probatur, quia forte ex peregrina vel Latina, quae per errorem quasi civis Romana uxor ducta esset, natus esset. nam sive heres institutus esset a parente sive exheredatus, sive vivo patre causa probata sive post mortem eius, omnimodo quasi adgnatione rumpbat testamentum. (143.) Nunc vero ex novo senatusconsulto quod auctore divo Hadriano factum est, sì quidem vivo patre causa probatur, aequum olim omnimodo rumpit testamentum: si vero post mortem patris, praeiteritis quidem rumpit testamentum, si vero heres in eo scriptus est vel exheredatus, non rumpit testamentum; ne scilicet diligenter facta testamenta rescinderentur eo tempore quo renovari non possent.

after a first or second mancipation, breaks a testament previously made, since he returns into his father's potestas. Nor does it matter if he have been instituted heir or disinherit in that testament. 142. Formerly there was a similar rule as to a person with regard to whom a cause of error was proved in accordance with the senatusconsultum, because, for instance, he had been born from a foreign or Latin woman, who had been married by mistake, under the impression that she was a Roman citizen. For whether he had been instituted heir by his ascendant or disinherit, and whether cause had been proved during the lifetime of his father or after his death, in all cases he broke the testament by his quasi-agnation. 143. But now, according to a new senatusconsultum which was made at the instance of the late Emperor Hadrian, if cause be proved in the lifetime of the father, he (the son) altogether breaks the testament just as formerly: but if it be proved after the death of the father, he breaks the testament in case he has been passed over, but does not break it in case he has been appointed heir or disinherit therein: this obviously being intended to prevent testaments carefully made from being set aside at a time when they cannot be re-executed.

must have been named in another character.

1 l. 133—135.
3 l. 67.
144. Posteriore quoque testamento quod iure factum fuerit superius rumpitur. nec interest an extiterit aliquis ex eo heres, an non extiterit: hoc enim solum spectatur, an existere potu­erit. ideoque si quis ex posteriore testamento quod iure factum est, aut noluerit heres esse, aut vivo testatore, aut post mortem eius antequam hereditatem adiret decessent, aut per cretionem exclusus fuerit, aut condicione sub qua heres institutus est defectus sit, aut propter saelibatum ex lege Iulia summotos fuerit ab hereditate: quibus casibus paterfamilias intestatus moritur: nam et prius testamentum non valet, ruptum a posterio­re, et posterius aeque nullas vires habet, cum ex eo nemo heres extiterit.

145. Alio quoque modo testamenta iure facta infirmantur, velut cum is qui fece­rit testamentum capite diminutus sit. quod quibus modis accidat, primo commentario relatum est. (146.) Hoc autem casu inrita fieri testamenta dicemus, cum alioquin et quae rumpuntur inrita fiant; et quae statm ab iniito non iure

144. A testament of earlier date is also broken by one duly made at a later period. And it matters not whether any one become heir under the second testament or not: for the only point regarded is whether any one could have become heir. Therefore if any one appointed under the later and duly made testament, either refuse to be heir, or die in the lifetime of the testator or after his death but before entry on the inheritance, or be excluded by creation, or fail to fulfil some condition under which he was instituted heir, or be debarred from the inheritance by the Lex Julia by reason of celibacy: in all these cases the paterfamilias dies intestate, for the earlier testament is void, being broken by the later one: and the later one is equally without force, since no one becomes heir under it. 145. Testaments duly made are invalidated in another way, for instance, if the maker of the testament suffer capitis diminutio. In what ways this comes to pass has been explained in the first Commentary. 146. But in this case we shall say that the testaments become ineffectual; although, on the other hand, those are also ineffectual which are broken.
and those are ineffectual which are made informally from the very beginning; and those too which have been duly made, and afterwards become ineffectual through *capitis diminutionem* inrita sunt, might just as well be called broken. But as it is plainly more convenient to distinguish particular cases by particular names, therefore some are said to be made informally, others to be broken after being formally made, or to become ineffectual.

147. Those testaments, however, are not altogether valueless which either have been made informally at the outset, or though made formally have afterwards become ineffectual or been broken. For if testaments be sealed with the seals of seven witnesses, the appointed heir can claim possession of the goods in accordance with the testament, provided only the deceased testator was a Roman citizen and *sui juris* at the time of his death: for if the testament be ineffectual because the testator subsequently lost citizenship, or liberty as well, or because he gave himself in adoption and at the time of his death was under the *potestas* of the adoptive father, then the appointed heir cannot claim possession of the goods in accordance with the testament. 148. Now those who receive possession of the goods in accordance with a testament, which

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1 See Appendix (E).
initio non iure factae sint, aut iure factae postea ruptae vel inritae erunt, bonorum possessionem accipunt, si modo possunt hereditatem optimere, habebunt bonorum possessionem cum re: si vero ab his avocari hereditas potest, habebunt bonorum possessionem sine re. (149) Nam si quis heres iure civili institutus sit vel ex primo vel ex posteriori testamento, vel ab intestato iure legitimo heres sit, is potest ab his hereditatem avocare. si vero nemo sit alius iure civili heres, ipsi retinere hereditatem pos-

either was made informally from the very beginning, or though made formally was afterwards broken or became ineffectual, if only they can obtain the inheritance, will have the possession of the goods with benefit (cum re): but if the inheritance can be wrested from them, they will have the possession of the goods without benefit (sine re). 149. For if any one have been instituted heir according to the civil law either in a former or a later testament, or be heir on intestacy by statutable right, he can wrest the inheritance from them. But if there

1 It may very well happen that one man is heres according to the civil law, and another bonorum possessor according to the Praetor's edict. For example, suppose a man to have only one son, whom he has emancipated: and also suppose a brother to be his nearest agnate, or suppose him to appoint a testamentary heir: the brother or the instituted heir is heres, but the Praetor will grant bonorum possession to the son hence the hereditas is sine re, the bonorum possession is cum re (See § 135.) Again, the Praetor allowed only a limited time for heirs, whether scripta or ab intestato, to apply to him for bonorum possession (which it was an advantage to have in addition to hereditas, because the Interdict "Quorum Bonorum," described in IV. 144, was attached to it), and if they failed to apply within the time, the bonorum possession would be granted to applicants of the class which came next in order of succession, if it were a case of intestacy, or to the heirs ab intestato in the case of neglect of application on the part of an instituted heir: but still in such a case the heir having merely omitted to secure an additional advantage, and not having forfeited his claim under the civil law, could hold the inheritance against the bonorum possessor, and so in this case the hereditas was cum re and the bonorum possession was sine re. See III. 36; Ulpian, xxviii. 13.

2 In §§ 148, 149 the two separate cases of a first testament or a second testament being void at civil law, and bonorum possession nevertheless granted under it, are taken together, and hence a slight confusion. In § 149 the solution of the legal difficulty is given: viz. that if the void testament be a second one, the heir under a valid first testament has hereditas cum re: if the invalid testament be the first, it is through the fact of there being a second that it is void, therefore the heir under the second has the hereditas cum re, if there be but one testament and that void, the hereditas cum re goes to the heir on an intestacy.

be no other person heir by the civil law, they may retain the inheritance themselves if they be in possession of it, or they have an interdict for the purpose of acquiring the possession of the goods against those who possess them. Sometimes, however, although there be an heir instituted in (another) testament according to the civil law, or a statutable heir, yet the appointed heirs are allowed to prevail, for instance, if the point wherein the testament is unduly made be that the estate has not been sold, or that the testator has not spoken the words of nuncupation. 150. The case is different with those who obtain possession of the goods when no one becomes heir, and yet have not received from the Praetor a grant of the possession: yet even these possessors in olden times, before the Lex Julia, used to obtain the property; but by that law such goods become caduca (lapses) and are ordered to be made over to the populus, if no one become successor to the dead man. 151. .............................................................

1 That is, an heir ab intestato, pointed out by the jus civile. The term technically means an heir who is not a solum, but an agnatus. But probably there is here no reference to this distinction. Ulp. xxviii. 7. 3 II. 52-58. 6 See Ulpian, xvii. 1.2; xxviii.7.
152. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

153. Necessarius heres est servus cum libertate heres institutus; ideo sic appellatus, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et heres est. (154) Unde qui faculatès suas suspectas habet, solet servum primo aut secundo vel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona veneant, id est ut ignominia quae accidit ex venditione bonorum hunc potius heredem quam ipsum testatorem contingat; quamquam apud Fusidium Sabino placeat eximendum eum esse ignominia, quia non suo vitio, sed necessitate iuris bonorum venditionem pateretur: sed alio iure utimur. (155) Pro hoc tamen in commodo illud ei commodum praestatur, ut ea quae post mortem patroni sibi ad-

152. Heirs are called either necessarii, or sui et necessarii, or extranei.

153. A necessary heir is a slave instituted with a grant of liberty: so called from the fact that whether he desire it or not, he is in all cases free and heir at once on the death of the testator. 154. Therefore a man who suspects himself to be insolvent generally appoints a slave free and heir in the first, second, or even some more remote place, so that if the creditors cannot be paid in full, the goods may be sold as those of this heir rather than of himself: that is to say, that the disgrace arising from the sale of the goods may fall upon this heir rather than the testator himself: although Sabinus, according to Fusidius, thinks the slave should be exempted from disgrace, because he suffers the sale not from fault of his own, but from requirement of the law: but we hold to the contrary rule. 155. In return, however, for this disadvantage, there is allowed to him the advantage that what-

1 II. 174.
2 The phrase "Sabino aput Fusidium" is an ambiguous one. As Fusidius probably lived about A.D. 166, and Sabinus we know was consul in A.D. 69, the translation in our text is justifiable; but there have been commentators who render it "Sabinus in a commentary on Fusidius," thus making Fusidius the earlier writer of the two. Passages where apud is used in each of these senses are collected in Smith's Dict. of Roman and Greek Biography and Mythology, in the article on Ferox, Urseius, &c.
quisierit, sive ante bonorum venditionem sive postea, ipsi reserventur. et quamvis pro portione bona venierint, iterum ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit adquisitum, velut si Latini bonis quae adquirisierit, locupletior factus sit; cum ceterorum hominum quorum bona venierint pro portione, si quid postea adquirant, etiam saepius eorum bona veniri solent.

156. Sui autem et necessarii heredes sunt velut filius filiave, nepos neptisve ex filio, denceps ceteri, qui modo in potestate mortientis fuerunt. sed uti nepos neptisve suus heres sit, non sufficit eum in potestate avi mortis temporeuisse, sed opus est, ut pater quoque eius vivo patre suo desierit suus heres esse aut morte interceptus aut qualibet ratione liberatus potestate:

ever he acquires for himself after the death of his patron, whether before the sale of the goods or after, is reserved for himself. And although the goods when sold only pay a part of the debts (pro portione venierint), yet his goods will not be sold a second time on account of the inheritance, unless he has acquired something in connection with the inheritance; for instance, if he be enriched by the goods of a Latin which have accrued to him: although when the goods of other men will only pay in part, if they acquire anything afterwards, their goods are sold over and over again.

156. Heirs sui et necessarii are such as a son or daughter, a grandson or granddaughter by a son, and others in direct descent, provided only they were under the potestas of the dying man. But in order that a grandson or granddaughter may be suus heres, it is not enough for them to have been under the potestas of the grandfather at the time of his death, but it is needful that their father should also have ceased to be suus heres in the lifetime of his father, having been either cut off

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1 This is called the beneficium separations by later writers.
2 The reading we have adopted is that of Huschke, and the Latin mentioned will of course be a Latin manumitted by the testator, to whose inheritance therefore the testator’s heir succeeds: see III. 56. If we take the old reading “velut si Latinus acquirisierit,” a second if must be understood: “velut si, si Latinus adquisierit, locupletior factus sit.” But the explanation of the sentence would be difficult, for although the goods of a deceased Latin belong to his manumittor, that manumittor had no claim on the goods of a living one, and we know of no law putting the manumittor’s creditors in a better position than himself.
3 III. 56.
tum enim nepos neptisve in locum sui patris succedunt. (157.) Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente quodam modo domini existimantur. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii vero ideo dicuntur, quia omnino, *sive velint sive nolint, tam ab intestato quam ex testamento heredes sunt.* (158.) sed his Praetor permittit abstinere se ab heredilale, ut potius parentis bona veneant. (159.) Idem iuris est et *in uxoris persona quae in manu est,* quia filiae loco est, et in nurus quae in manu filii est, quia neptis loco est. (160.) Quin etiam similiter abstinendi postratem facit Praetor etam [mancipato, id est] ei qui in causa mancipiat est, cum liber et heres institutus sit; cum necessarius, non etiam suus heres sit, tamquam servus.

by death or freed from *potestas* in some way or other: for then the grandson or granddaughter succeeds into the place of the father. 157. They are called *sui heredes* because they are heirs of the house, and even in the lifetime of their ascendant are regarded as owners (of the property) to a certain extent¹. Wherefore, if any one die intestate, the first place in the succession belongs to his descendants. But they are called *necessarii,* because in every case, whether they wish or not, and whether on intestacy or under a testament, they become heirs. 158. But the Praetor permits them to abstain from the inheritance, in order that the goods sold may be their ascendant’s (rather than their own²). 159. The rule is the same as to a wife who is under *manus,* because she is in the place of a daughter, and as to a daughter-in-law who is under the *manus* of a son, because she is in the place of a granddaughter. 160. Besides, the Praetor grants in like manner a power of abstaining to (a mancipated person, that is to) one who is in the condition called *mancipium,* when he is instituted free and

1 Papinian, D. 38. 6. 7, gives another derivation: “*suus heres est cum et ipse fuerit in potestate*;” i.e. the ascendant had him in his *potestas* and so he was *suus* “belonging to him;” just as land or a chattel was also *suum,* because he had *dominium* over it.

2 They could not get rid of the appellation of heirs, but they could get rid of all the practical consequences of heirship by this *beneficium abstinendi;* and so the disgrace of the sale (§ 154) fell on the memory of the deceased and not on themselves.
II. 161—163.] Heredes extranei. Potestas deliberandi. 127

161. Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantur. itaque liberi quoque nostri qui in potestate nostra non sunt, heredes a nobis instituti sicut extranei videntur. qua de causa et quia a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent. servi quoque qui cum libertate heredes instituti sunt et postea a domino manumissi, eodem numero habentur.

162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda. (163.) Sed sive is cui abstinendi potestas est inmiscuerit se bona hereditaria, sive is cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum xxy nam huius aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosam hereditatem susceperit, Praetor succurrit. scio quidem divum

heir: since like a slave he is a heres necessarius, although not suus also.

161. All others who are not subject to a testator's authority are called extraneous heirs. Thus, our descendants not under our potestas, when appointed heirs by us, are regarded as extraneous. Wherefore those who are appointed by a mother are in the same class, because women have not their children under their potestas. Slaves also who have been instituted heirs with a grant of liberty, if afterwards manumitted by their master, are in the same class.

162. To extraneous heirs is allowed a power of deliberating as to entering on the inheritance or not. 163. But if one who has the power of abstaining meddle with the goods of the inheritance, or if one who is allowed to deliberate as to entering on the inheritance enter, he has not afterwards the power of abandoning the inheritance, unless he be under twenty-five years of age. For, as the Praetor gives assistance in all other cases to men of this age who have been deceived, so he does also if they have thoughtlessly taken upon them-

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1 I. 138. "Suus also," i.e. necessarius et suus.

This clause explains why a mancipated person should be appointed free and heir. A person in causa mancipii is technically a slave.

2 I. 188.

3 Sc. a heres suus et necessarius.

4 Sc. a heres extraneus. I. 163.
Hadrianum etiam maiori xxv. annorum veniam dedisse, cum post aditam hereditatem grande aed alienum quod aditae hereditatis tempore latebat apparuisset.

164. Extraneis heredibus solet cretion dari, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, tempore fine summoveantur. Ideo autem cretion appellata est, quia cernere est quasi decernere et constitutere.

(165.) Cum ergo ita scriptum sit: HERES TITIUS ESTO: adicere debeamus; CERNITOQUE IN CENTUM DIESBUS PROXUMOS QUIBUS SCIES POTERISQUE. QUOD NI ITA CREVERIS, EXHERES ESTO.

(166.) Et qui ita heres institutus est si velit heres esse, debebit intra diem cretionis cernere, id est haec verba dicere: QUOD ME PUBLIUS MAEVIUS TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE. Quodsi ita non creverit, finito tempore cretionis excluditur: nec quicquam proficit, si pro herede gerat, id est si rebus hereditariis tamquam heres

selves a ruinous inheritance. I am aware, however, that the late emperor Hadrian granted this favour also to one above twenty-five years of age, when after entry on the inheritance a great debt was discovered which was unknown at the time of entry.

164. To extraneous heirs “cretion” is usually given, that is, a period in which to deliberate; so that within some specified time they are either to enter on the inheritance, or if they do not enter, are to be set aside at the expiration of the time. It is called cretion because the verb *cernere* means to deliberate and decide. 165. When, therefore, the clause has been written, “Titius be heir,” we ought to add, “and make thy cretion within the next hundred days after thou hast knowledge and ability. But if thou fail so to make thy cretion be disinherited.” 166. And if the heir thus instituted desire to be heir, he ought to make cretion within the time allowed for cretion, *i.e.* speak the words, “Inasmuch as Publius Maevius has instituted me heir in his testament, I enter on that inheritance and make cretion for it.” But if he do not so make cretion, he is debarred at the expiration of the time limited for cretion. Nor is it of any avail for him to

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1 Ulpian, xxii. 25—34. “Crevi valet constituui: itaque heres quum constituit se heredem esse, dicitur cernere, et quum id factit, crevisse.” Varro, de L. L. vii. 98. See also Festus, sub verbo.
At is qui sine cretione heres institutus sit, aut qui ab intestato legitimo iure ad hereditatem vocatur, potest aut cernendo aut pro herede gerendo vel etiam nuda voluntate susciendae hereditatis heres fieri: eique liberum est, quoque tempore voluerit, adire hereditatem. sed solet Praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si velit adeat hereditatem: si minus, ut liceat creditoribus bona defuncti vendere. (168.) Sic autem cum cretione heres institutus, nisi creverit hereditatem, non fit heres, ita non aliter excluditur, quam si non creverit intra id tempus quo cretion finita sit. itaque licet ante diem cretionis constituere hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse potest. (169.) At hoc qui sine cretione heres institutus est, quique ab intestato per

act as heir, i.e. to use the items of the inheritance as though he were heir. 167. But an heir appointed without cretion, or one called to the inheritance by statute law on an intestacy, can become heir either by exercising cretion, or by acting as heir, or even by the bare wish to take up the inheritance: and it is in his power to enter on the inheritance whenever he pleases. But the Praetor usually fixes a time, on the demand of the creditors of the inheritance, within which he may enter on the inheritance if he please, but if he do not enter, then the creditors are allowed to sell the goods of the deceased. 168. In like manner as any one instituted heir with cretion does not become heir unless he make cretion for the inheritance, so he is not debarred in any other manner than if he fail to make cretion within the time at which the cretion is limited. Therefore, although before the day limiting the cretion he may have decided not to enter on the inheritance, yet on repenting of his act he may become heir by using his cretion, if a portion of the time of cretion still remain. 169. But one who is instituted heir without cretion, or who is called in by law on an intestacy, as on the one hand he

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Cretio continua et vulgaris. [II. 170—172.]

legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statum ab hereditate repellitur. (170.) Omnis autem cretio certo tempore constringitur, in quam rem tolerabile tempus visum est centum dierum: potest tamen nihilominus iure civili aut longius aut brevius tempus dari: longius tamen interdum Praetor coartat. (171.) Et quamvis omnis cretio certis diebus constringatur, tamen alia cretio vulgaris vocatur, alia certorum dierum: vulgaris illa, quam supra exponimus, id est in qua adiciuntur haec verba: QUIBUS SCIT POTERITQUE; certorum dierum, in qua detractis his verbis cetera scribuntur. (172.) Quarum cretionum magna differentia est: nam vulgari cretione data nulli dies computatun, nisi quibus scierit quosque se heredem esse institutum et possit cernere. certorum vero dierum cretione data etiam nescienti se heredem institutum esse numerantur dies continuai; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius becomes heir by bare wish, so on the other, by an opposite determination he is at once excluded from the inheritance. 170. Now every cretion is tied down to some fixed time. For which object a hundred days seems a fair allowance: but nevertheless, at civil law, either a longer or a shorter time can be given, though the Praetor sometimes abridges a longer time. 171. And although every cretion is tied down to some fixed number of days, yet one kind of cretion is called common (vulgaris), the other cretion of fixed days (certorum dierum): the common is that which we have explained above1, i.e. that in which are added the words, “after he has knowledge and ability”; that of fixed days is the cretion in which the rest of the form is written, and these words omitted. 172. Between these cretionis there is a great difference: for when common cretion is appointed, no days are taken into account except those whereon the man knows that he is instituted heir, and is able to make his cretion. But when cretion of fixed days is appointed, the days are reckoned continuously, even against one who does not know that he has been instituted heir; likewise the time is counted against one who is prevented by any reason from making his cretion, and further than this,

1 II. 165.
De substitutionibus.

(174.) Interdum duos pluresve gradus heredum facimus, hoc modo: LUCIUS TITIUS HERES ESTO CERNITQUE IN DIEBUS CENTUM PROXIMIS QUIBUS SCIENS POTERISQUE. QUOD SI ITA CREVERIS, EXHERES ESTO. TUM MAEVIVS HERES ESTO CERNITQUE IN DIEBUS CENTUM ET RELIGA; ET DEINCEPS IN QUANTUM VELIMUS SUBSTITUERE POSSUMUS. (175.) Et licet novis vel unum in unius locum substituere pluresve, et contra in plurium locum vel unum vel plures substituere. (176.) Primo itaque gradus scriptus heres hereditatem cernendo fit heres et substitutus excluditur; non cernendo simulatur, etiam si pro herede gerat, et in locum eius substitutus succedit. et deinceps si plures gradus sint, in singulis simili ratione

against one who is instituted heir under a condition. Therefore it is better and more convenient to employ common cretion. 173. This cretion is called "continuous," because the days are reckoned continuously. But since this cretion is too strict, the other is generally employed, and therefore is called "common."

174. Sometimes we make two or more degrees of heirs, in this manner: "Lucius Titius be heir, and make thy cretion within the next hundred days after thou hast knowledge and ability. But if thou fail so to make cretion, be disinherited. Then Maevius be heir, and make thy cretion within a hundred days," &c. And so we can substitute successively as far as we wish. 175. And it is in our power to substitute either one person or several in the place of one; and on the other hand, either one or several in the place of several. 176. The heir, then, who has been instituted in the first degree, becomes heir by making cretion for the inheritance, and the substitute is excluded: but by not making cretion he is excluded, even though he act as heir, and the substitute succeeds into his place. And so, if there be several degrees, the same thing
idem contingit. (177.) Sed si cretio sine exheredatione sit data, id est in haec verba: SI NON CREVERIS TUM PUBLIUS MAEVIUS HERES ESTO, illud diversum invenitur, quia si prior omissa cretione pro herede gerat, substitutus in partem admittitur, et sunt ambo aequis partibus heredes. quod si neque cernat neque pro herede gerat, sane in universum sum-movetur, et substitutus in totam hereditatem succedit. (178.) Sed dum quidem placuit, quamdui cernere et eo modo heres fieri possit prior, etiam si pro herede gesserit, non tamen admissi substitutum: cum vero cretio finita sit, tum pro herede gerentem admittere substitutum: olim vero placuit, etiam super-ante cretione posse eum pro herede gerendo in partem substitutum admittere et amplius ad cretionem reverti non posse.

179. Liberis nostris inpuberibus quos in potestate habemus happens to each successively in like manner. 177. But if cretion be given without disinherintance, i.e. in the words, "If thou fail to make cretion, then let Publius Maevius be heir;" this difference is discovered, that if the heir first named, neglecting his cretion, act as heir, the substitute is admitted to a portion, and both become heirs to equal shares. But if he neither make cretion nor act as heir, he is undoubtedly debarred altogether, and the substitute succeeds to the entire inheritance. 178. But it has now for some time been the rule, that so long as the first-named heir can exercise cretion and so become heir, by his merely acting as heir the substitute is not admitted: but that, when the time for cretion has elapsed, then by acting as heir he lets in the substitute: whilst in olden times it was the rule, that even if the time for cretion were unexpired, yet by acting as heir he let in the substitute to a portion, and could not afterwards fall back upon his cretion.

179. We can substitute to our descendants under the age

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1 Ulpian (XXII. 34) calls this imperfetta cretio. He also mentions a constitution of Marcus Aurelius by which gestio pro herede was made equivalent to cretio, and gave the whole inheritance to the heir first named. So that either Gaius has here made a slip, or the decree came out after this portion of the commentary was written. The comparison of § 178 with this paragraph would point to the latter conclusion.
non solum ita, ut supra diximus, substituere possimus, id est
ut si heredes non extiterint, alius nobis heres sit; sed eo amplius, ut etiam si heredes nobis extiterint et adhuc inpuberes mortui fuerint, sit iis aliquis heres, velut hoc modo: TITIUS
FILIUS MEUS MIHI HERES ESTO. SI FILIUS MEUS MIHI HERES
NON ERIT SIVE HERES ERIT ET PRIUS MORIATUR QUAM IN SUAM
TUTELAM VENERIT, SEIUS HERES ESTO. (180.) QUO CASI SI QUI-
DEM non extiterit heres filius, substitutus patri fit heres: SI VERO
heres extiterit filius et ante pubertatem decesserit, ipsi filio fit
heres substitutus. quamobrem duo quodammodo sunt testa-
menta: alius patris, alius filii, tamquam si ipse filius sibi heredem
instituisset: aut certe unum est testamentum duarum hereditaturn.

181. Ceterum ne post obitum parentis periculo insidiarum
subjectus videatur pupillus, in usu est vulgarem quidem sub-
stitutionem palam facere, id est eo loco quo pupillum heredem
instituimus: nam vulgaris substitutio ita vocat ad hereditatem
of puberty whom we have in our potestas, not only in the way
we have described above, i.e. that if they do not become our
heirs, some one else may be our heir: but further than this,
sO that even if they do become our heirs, and die whilst still
under puberty, some one else shall be their heir; for example,
thus: "Titius, my son, be my heir. If my son shall not be-
come my heir, or if he become my heir and die before he
comes into his own governance, Seius be heir." 180. In
which case, if the son do not become heir, the substitute be-
comes heir to the father: but if the son become heir and die
before puberty, the substitute becomes heir to the son him-
self. Wherefore there are, in a manner, two testaments: one
of the father, another of the son, as though the son had
instituted an heir for himself: or at any rate there is one
testament regarding two inheritances.

181. But lest there be a likelihood of the pupil being
exposed to foul play after the death of his ascendant, it is
usual to make the vulgar substitution openly, i.e. in the clause

1 Ulpian, XXIII. 7-9. In the last of these paragraphs it is laid down
much more plainly than by Gaius (though he too implies the fact
throughout) that the testament for
the pupil must be an appendage to
a testament of the ascendant, and
cannot exist otherwise.
substitutum, si omnino pupillus heres non extiterit; quod accidit cum vivo parente moritur, quo casu nullum substitutum maleficium suspicari possimus, cum scilicet vivo testatore omnia quae in testamento scripta sint ignorentur. illam autem substitutionem per quam, etiamsi heres extiterit pupillus et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, easque tabulas proprio lino propriaque cera consignamus; et in prioribus tabulis cavermus, ne inferiores tabulae vivo filio et adhuc inpubere aperiantur. Sed longe tutius est utrumque genus substitutionis separatim in inferioribus tabulis consignari, quod si ita consignatae vel separatae fuerint substitutiones, ut diximus, ex priori potest intelligi in altera [alter] quoque idem esse substitutum.

182. Non solum autem heredibus institutis inpuberibus liberis ita substituere possimus, ut si ante pubertatem mortui fuerint, sit is heres quem nos voluerimus, sed etiam exheredatis. itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum adquisitum fuerit, id omne ad

where we institute the pupil heir: for the vulgar substitution calls the substitute to the inheritance in case the pupil do not become heir at all: which occurs when he dies in his ascendant's lifetime, a case wherein we can suspect no evil act on the part of the substitute, since plainly whilst the testator lives, all that is written in his testament is unknown: but the substitution whereby we call in the substitute if the pupil become heir and die under the age of puberty, we write separately in the concluding tablets, and seal up these tablets with a string and seal of their own: and we insert a proviso in the earlier tablets, that the concluding tablets are not to be opened whilst the son is alive and under puberty. But it is by far the safer method to seal up both kinds of substitution in the concluding tablets, because if the substitutions have been sealed up or separated in the manner we have (above) described, it can easily be guessed from the first that the substitute is the same in the second.

182. We can not only substitute to descendants under puberty who are instituted heirs, in such manner that if they die under puberty he whom we choose shall be heir, but we can also substitute to disinherited children. In that case, therefore, if anything be acquired by the pupil from inherit-
II. 183—187.] Appointment of slaves as heirs.

substitutum pertinet. (183.) Quaecumque diximus de substitutione inpuberum liberorum, vel heredum institutorum vel exheredatorum, eadem etiam de postumis intellegemus.

184. Extraneo vero heredi instituto ita substituere non possumus, ut si heres extiterit et intra aliquod tempus descesserit, alius ei heres sit: sed hoc solum nobis permittum est, ut eum per fideicommissum obligemus, ut hereditatem nostram vel totam vel pro parte restituat; quod ius quale sit, suo loco trademus.

185. Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt. (186.) Sed noster servus simul et liber et heres esse iuberi debet, id est hoc modo: STICHUS SERVUS MEUS LIBER HERESQUE ESTO, vel HERES LIBERQUE ESTO. (187.) Nam si sine libertate heres institutus sit, etiam si postea manumissus fuerit a domino, heres esse non ances, legacies or gifts of relations, the whole of it belongs to the substitute. 183. All that we have said as to the substitution of descendants under puberty, whether instituted heirs or disinherited, we shall also understand to apply to after-born children.

184. But if a stranger be instituted heir, we cannot substitute to him in such manner, that if he become our heir and die within some specified time, some other person is to be his heir: but this alone is permitted us, that we may bind him by fideicommissum to deliver over our inheritance either wholly or in part: the nature of which rule we will explain in its proper place.

185. Slaves, whether our own or belonging to other people, can be appointed heirs, just as well as free men. 186. But it is necessary to appoint our own slave simultaneously free and heir, i.e. in this manner: “Let Stichus, my slave, be free and heir,” or “be heir and free.” 187. For if he be instituted heir without a gift of liberty, although he afterwards be manumitted by his master, he cannot be heir, because the institution was invalid in his then status; and therefore, even if he be

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1 I. 147. n.
2 II. 246 et seqq.; II. 277.
3 Ulpian, xxii. 7—13.
4 Justinian altered the law on this point, so that thenceforward the appointment of a slave as heir gave him liberty by implication. Inst. ii. 14. pr.
potest, quia institutio in persona eius non constitit; ideoque licet alienatus sit, non potest iussu domini cernere hereditatem. 188. Cum libertate vero heres institutus, si quidem in eadem causa manserit, fit ex testamento liber idemque necessarius heres. si vero ab ipso testatore manumissus suert, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu novi domini adire hereditatem debet, et ea ratione per eum dominus fit heres: nam ipse alienatus neque heres neque liber esse potest. (189.) Alienus quoque servus heres institutus, si in eadem causa duraverit, iussu domini hereditatem adire debet; si vero alienatus fuerit ab eo, aut vivo testatore aut post mortem eius antequam adeat, debet iussu novi domini cernere. si manumissus est antequam adeat, suo arbitrio adire hereditatem potest. (190.) Si autem servus alienus heres institutus est vulgari cretione data, alienated, he cannot make cretion for the inheritance at the order of his new master.

188. When, however, he is instituted with a gift of freedom, if he remain in the same condition, he becomes by virtue of the testament free, and at the same time necessary heir. But if he be manumitted by the testator, he can enter on the inheritance at his own pleasure. If again he have been alienated, he must enter on the inheritance at the command of his new master, and so by his means the master becomes heir: for when alienated he cannot himself become either heir or free. 189. When another man's slave is instituted heir, if he remain in the same condition, he must enter on the inheritance by command of his master: but if he be alienated by him, either in the testator's lifetime or after his death, and before he has entered, he must make cretion by order of his new master. If he be manumitted before he enters, he can enter on the inheritance at his own pleasure.

190. Further, if another man's slave be instituted heir, and common cretion appointed, the time of cretion only begins

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1 II. 164.
2 II. 153.
3 The due appointment of an heir is the foundation of the whole testament (II. 116): if the appointment be invalid the testament fails utterly; but if a legacy fail the residue of the testament stands good. The appointment of the slave as heir, in the present case, is valid, but for juridical reasons he inherits for the benefit of another: the gift of liberty is regarded as a legacy, and therefore the impossibility of its being received, is, by the above principle, a matter of minor importance, not at any rate causing the inheritance to fail.
4 II. 173.

Ita intellegitur dies cretionis cedere, si ipse servus scierit se heredem institutum esse, nec ulla impedimentum sit, quem minus certiore dominum faceret, ut illius iussu cernere possit.

191. Post haec videamus de legatis. Quae pars iuris extra propositam quidem materiam videtur; nam loquimur de his iuris figuris quibus per universitatem res nobis adquiruntur. sed cum omnimodo de testamentis deque hereditibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco poterat haec iuris materia tractari.

192. Legatorum utique genera sunt quattuor: aut enim per vindicationem legamus, aut per damnationem, aut sinendi modo, aut per praecpectionem.

193. Per vindicationem hoc modo legamus: LUCIO TITIO verbi gratia HOMINEM STICHUM DO LEGO. sed et si alterum verbum positum sit, velut: hominem stichum do, per vindicationem legatum est. si vero etiam alius verbi velut: ita legatum fuerit:

To run, when the slave knows that he is instituted heir, and there is no hindrance to his informing his master, so that he may make creation at his command.

191. Next, let us consider legacies. Which portion of law seems indeed beyond the subject we proposed to ourselves: for we are speaking of those legal methods whereby things are acquired for us in the aggregate: but as we have discussed all points relating to testaments and heirs who are appointed in testaments, this matter of law may with good reason be discussed in the next place.

192. There are then four kinds of legacies: for we either give them by vindication, by damnation, sinendi modo, or by praecpection.

193. We give a legacy by vindication in the following manner: "I give and bequeath the man Stichus," for example, "to Lucius Titius." Also if only one of the two words be used, for instance, "I give the man Stichus," still it is a legacy by vindication. And even if the legacy be given in other

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1 "Legatum est quod legis modo, id est imperative, testamento relinquitur. Nam et quae preeactivo modo relinquuntur fidicommisae vocantur." Ulpian, xxiv. 1.

2 "Legatum est donato quaedam a defuncto relieta [ab herede praestanda]." Inst. ii. 30. 1.

3 Ulpian, xxiv. 3—14.
sumito, vel ita: sibi habeat, vel ita: CAPITO, aeque per vindicationem legatum est. (194) Ideo autem per vindicationem legatum appellatur, quia post aditam hereditatem statim ex iure Quiritium res legatarum fit; et si eam rem legatarus vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere eam rem suam ex iure Quiritium esse. (195.) In eo vero dissentiant prudentes, quod Sabinius quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarum, etiamsi ignorant sibi legatum esse dimissum, et postea quam scient et repudaverit, tum peninde esse atque sibi legatum non esset: Nerva vero et Proculus ceterisque illius scholae auctores non aliter putant rem legatarum fieri, quam si voluerit eam ad se pertinere. Sed hodie ex divi Pri Antonini constitutione hoc magis iure uti videmur quod Proculo placuit. nam cum legatus fuisse Latinus per vindicationem coloniae: deliberent, inquis, decuriones an words, for instance thus, "let him take," or thus, "let him have for himself," or thus, "let him acquire," it is still a legacy by vindication. 194. The legacy "by vindication" is so called because after the inheritance is entered upon the thing at once becomes the property of the legatee by Quirity title; and if the legatee demand the thing either from the heir or from any other person who is in possession of it, he must proceed by vindication, i.e. plead that the thing is his by Quirity title. 195. On the following point, however, lawyers differ, for Sabinus and Cassius and the rest of our authorities hold that what is left as a legacy in this way becomes the property of the legatee at the moment when the inheritance is entered on, even if the legatee be ignorant that the legacy has been left to him, and that only after he has become aware of it and refused it, is it as though it had not been bequeathed: whilst Nerva and Proculus and the other authorities of that school hold that the thing does not become the legatee's, unless he have the intent that it shall belong to him. But at the present day, judging from a constitution of the late emperor Pius Antoninus, we seem rather to follow the rule of Proculus: for when a Latin had been left as a legacy by vindication to a colony: "let the decuriones," he said, "consider whether they

1 IV. 1—5. 
2 See Appendix (H).
ad se velint pertinere, prionde ac si uni legatus esset. (196.) Eae autem solae res per vindicationem legantur recte quae ex iure Quintium ipsius testatoris sunt. sed eas quidem res quae pondere, numero, mensura constant, placuit sufficere si mortus tempore sint ex iure Quritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. ceteras res vero placuit utroque tempore testatoris ex iure Quritium esse debere, id est et quo faceret testamentum et quo moreretur: aliquoquin inutile est legatum. (197.) Sed sane hoc ita est iure civili. Postea vero auctore Nerone Caesare senatusconsultum factum est, quo cautum est, ut si eam rem quisque legaverit quae eius numquam fuerit, perinde utile sit legatum, atque si optimo iure relictum esset. optumum autem ius est per damnationem legatum; quo genere etiam aliena res legari potest, sicut inferiorus apparebit. (198.) Sed si quis rem suam legaverit, deinde post

wish him to belong to them, in the same manner as if he had been bequeathed to an individual." 196. Those things alone can be bequeathed effectually by vindication which belong to the testator himself by Quiritary title. But as to those things which depend on weight, number, or measure, it has been ruled that it is sufficient if they be the testator's by Quiritary title at the time of his death; for instance, wine, oil, corn, coin. Whilst it has been ruled that other things ought to be the testator's by Quiritary title at both times, that is to say, both at the time he made the testament and at the time he died; otherwise the legacy is invalid. 197. This is so undoubtedlly by the civil law. But, afterwards, at the instance of Nero Caesar, a senatusconsultum was enacted, wherein it was provided that if a man bequeathed a thing which had never been his, the legacy should be as valid as if it had been bequeathed in the most advantageous form 1. Now the most advantageous form is a legacy by damnation: by which kind even the property of another can be bequeathed, as will appear below 2. 198. But if a man bequeath a thing of his own,

1 Nero's S C. enacted that when a legacy was invalid on account of improper words being used, and there was no other objection to be taken to it, the legacy should be upheld: "ut quod minus pacis (aptis?) verbi legatum est, perinde sit ac si optimo iure legatum esset." Ulpian, xxiv. 11 a.

2 II. 202.
testamentum factum eam alienaverit, plerique putant non solum iure civili inutile esse legatum, sed nec ex senatusconsulto confirmari. quod ideo dictum est, quia etsi per damnationem aliquis rem suam legaverit eamque postea alienaverit, plerique putant, licet ipso iure debeatur legatum, tamen legatarium petentem per exceptionem doli mali repeli quasi contra voluntatem defuncti petat. (199) Illud constat, si duobus pluribusve per vindicationem eadem res legata sit, sive coniunctim sive disjunctim, si omnes veniant ad legatum, partes ad singulos pertinere, et deficientis portionem collegatario ad crescere. coniunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DO LEGO; disjunctim ita: LUCIO TITIO HOMINEM STICHUM DO LEGO. SEIO EUNDEM HOMINEM DO LEGO. (200.) Illud quaeritur, quod sub condicione per vindicationem legatum est, pendente condicione cuius esset. Nostri praeceptores heredis esse putant exemplo statulibem, id est eius servi qui testamento sub

and then after the making of his testament alienate it, it is the general opinion that the legacy is not only invalid at the civil law, but that it is not even upheld by the *senatusconsultum*. The reason of this being so laid down is that it is generally held that even if a man’s bequest of his property be by damnation and he afterwards alienate it, although by the letter of the law the legacy is due, yet the legatee on demanding it will be defeated by an exception of fraud, because he makes demand contrary to the intent of the deceased. 199. It is an acknowledged rule that if the same thing be left to two or more persons by vindication, whether conjointly or disjointly, and if all accept the legacy, equal portions go to each, and the portion of one not taking accrues to his co-legatee. Now a legacy is left conjointly thus: “I give and bequeath the man Stichus to Titius and Seius;” disjointly, thus: “I give and bequeath to Lucius Titius the man Stichus. I give and bequeath to Seius the same man.” 200. This question arises, whose is a legacy left by vindication under a condition, whilst the condition is unfulfilled? Our authorities think it belongs to the heir, after the precedent of the *statuliber*, *i.e.* the slave who is ordered in a testament to become free under some condition, and

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1 IV. 115 et seq.

2 Ulpian, II. 1, 2.
II. 201—204.]  

Per damnationem.  

alia condicione liber esse iussus est, quem constat interea heredis servum esse. sed diversae scholae auctores putant nullius internam eam rem esse; quod multo magis dicunt de eo quod sine condicione pure legatum est, antequam legatarius athittat legatum.

201. Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO. sed et si DATO scriptum sit, per damnationem legatum est. (202.) Quo genere legati etiam aliena res legari potest, ita ut heres redimere et praestare aut aestionem eius dare debet. (203.) Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit. (204.) Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario acquiritur, sed nihilominus heredis est. ideo legatarius in personam agere debet, id est intendere heredem sibi dare opor-

who, it is admitted, is the slave of the heir for the meantime. But the authorities of the opposite school think that the thing belongs to no one in the interim: and they assert this still more strongly of a thing left simply without condition, before the legatee accepts the legacy.

201. We bequeath by damnation in the following manner: “Let my heir be bound to give my slave Stichus:” and it is also a legacy by damnation if the wording be “let him give.” 202. By which kind of legacy even a thing belonging to another may be bequeathed, so that the heir has to purchase and deliver it or give its value. 203. By damnation also can be bequeathed a thing which is not in existence, if only it will come into existence, as for instance, the fruits which shall spring up in a certain field, or the offspring which shall be born from a certain female slave. 204. A thing thus bequeathed does not at once vest in the legatee after the inheritance is entered upon, like a legacy by vindication, even though it be bequeathed unconditionally, but still belongs to the heir. Therefore the legatee must bring a personal action, i.e. plead that the heir is bound to give him the thing: and
tere: et tum heres *rem*, si mancipi sit, mancipio dare aut in iure cedere possessionemque tradere debet; si nec mancipi sit, sufficit si tradiderit. nam si mancipi rem tantum tradierit, nec mancipaverit, usucapione *dumtaxat* pleno iure fit legatarii: *finitur* autem *usucapio*, *ut supra quoque diximus*, mobilium quidem rerum anno, earum vero quae solo tenentur, iennio. (205.) Est et *alia differentia* inter legatum *per vindicationem* et *per damnationem*: *si eadem res* duobus pluribusque per damnationem legata sit, si quidem conunctim, plane singulis partibus debentur *sicut in per vindicationem legato*. si vero disjunctim, singulis solidis res debetur, ut scilicet heres alteri rem, alteri aequosionem eius praestare debeat. et in coniunctis deficientis portionem *non ad collegatarium* pertinet, sed in hereditate remanet. 206. Quod autem diximus deficientis portionem *in* per damnationem quidem legato in hereditate retinet, in per vindicationem vero collegatario accrescere, admonendi sumus ante

then, if it be a thing mancipable, the heir must give it by mancipation¹ or by cession in court², and deliver up the possession: if it be a thing non-mancipable, it is enough that he deliver it. For if he merely deliver a thing mancipable without mancipating it, it only becomes the legatee's in full title by usucapion: and usucapion, as we have also said above³, is completed in the case of moveable things in one year, but in the case of those connected with the soil in two. 205. There is also another difference between a legacy by vindication and one by damnation: for supposing the same thing be bequeathed to two or more persons by damnation, if it be conjointly, clearly equal portions are due to each as in a legacy by vindication: but if disjointly, the whole thing is due to each, so that in fact the heir must give up the thing to one and its value to the other. Also, in conjoint legacies, the portion of one who fails to take does not belong to his co-legatee, but remains in the inheritance. 206. But as to our statement that the portion of one failing to take is retained in the inheritance in the case of a legacy by damnation, but accrues to the co-legatee in the case of one by vindication: we must be reminded that it was so by the civil law

¹ I. 119. ² II. 24. ³ II. 41.
II. 207—210. | Sinendi modo.

legem Papiam iure civili ita suisse: post legem vero Papiam
deficientis portio caduca sit et ad eos pertinet qui in eo testa-
mento liberos habent. (207.) Et quamvis prima causa sit in
caducis vindicandis heredum liberos habentum, unde, si
heredes liberos non habeant, legatariorum liberos habentum,
tamen ipsa lege Papia significatur, ut collegatarius coniunctus,
si liberos habeat, potior sit heredibus, etiamsi liberos
habebunt. (208.) sed plerisque placuit, quantum ad hoc ius
quod lege Papia coniunctis constituatur, nihil interesse utrum
per vindicationem an per damnationem legatum sit.

207. Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO
SINERE LUCIUM TITIUM HOMINEM STICHUM SUMERE SIBIQUE
HABERE. (210.) Quod genus legati plus quidem habet quam
per vindicationem legatum, minus autem quam per damnationem.
nam eo modo non solum suam rem testator utile
legare potest, sed etiam heredis sui: cum alioquin per vindica-
tionem nisi suam rem legare non potest; per damnationem

before the Lex Papia: but that now since the passing of the
Lex Papia, the portion of one failing to take becomes a lapse,
and belongs to those persons named in the testament who
have children. 207. And although in claiming lapses, the
first right belongs to the heirs who have children, and then, if
the heirs have no children, the right belongs to the legatees
who have children, yet it is laid down in the Lex Papia itself,
that a co-legatee conjoined (with the person who fails to take),
if he have children, is to have a claim prior to that of the
heirs, even though they have children. 208. But so far as
corns this right established by the Lex Papia for conjoint
legatees, it is generally held that it is immaterial whether the
legacy be by vindication or by damnation.

209. We bequeath sinendi modo thus: "Let my heir be
bound to allow Lucius Titus to take the slave Stichus and
have him for himself." 210. Which kind of legacy is more
extensive than one by vindication, but less extensive than one
by damnation. For in this way a testator can validly be-
queath not only his own property, but also that of his heir.
Whereas, on the other hand, by vindication he cannot be-
queath anything but his own property: whilst by damnation

1 A.D. 10. See note (G) in Appendix.
autem cuiuslibet extranei rem legare potest. (211.) Sed si quidem mortis testatoris tempore res ipsius testatoris sit vel heredis, plane utile legatum est, etiamsi testamenti faciundi tempore neutrius fuerit. (212.) Quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse: quid ergo est? licet aliquis eam rem legaverit quae neque eius unquam fuerit, neque postea heredis eius unquam esse coeperit, ex senatusconsulto Nero-niano proinde videtur ac si per damnationem relict a esset. (213.) Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is heres tradendo vel mancipando vel in iure cedendo legatarii eam fecerit; ita et in sinendi modo legato iuris est: et ideo huius quoque legati nomine in personam actio est quidquid heredem ex testamento dare faciendum oporet. (214.) Sunt tamen qui putant ex hoc le-

he can bequeath the property of any stranger. 211. Now if the thing at the time of the testator's death belong either to him or to the heir, the legacy is undoubtedly valid, even though it belonged to neither at the time the testament was made. 212. But if the thing commenced to be the property of the heir after the death of the testator, it is a disputed point whether the legacy is valid: and the general opinion is that it is void. What follows then? Although a man have bequeathed a thing which was neither his at any time nor ever subsequently began to be the property of his heir, yet by the senatusconsultum of Nero, it is regarded as if left by damnation1. 213. In like manner as a thing bequeathed by damnation does not become the property of the legatee immediately the inheritance is entered on, but remains the heir's, until the heir makes it the legatee's by delivery, or mancipation, or cession in court: so also is the law regarding a legacy sinendi modo: and therefore in respect of this legacy also the action is personal, running thus: "whatsoever the heir ought to give or do according to the testament2." 214. There

1 Ulp. xxiv. 11 a. Gaius probably intends the latter half of this paragraph to be a denial of the doctrine of the "plerique" of the first half: but if so, he words his sentence so badly that he omits the very case under discussion, and that only.

2 IV. 2.
II. 215—217.] *Per praecptionem.*

gato non videri obligatum heredem, ut manus pet aut in iure cedat aut tradat, sed sufficere, ut legatarium rem sumere patiatur; quia nihil ultra ei testator imperavit, quam ut sitat, id est patiatur legatarium rem sibi habere. (215.) Maior illa dissensio in hoc legato intervenit, si eandem rem duobus pluri-busve disiunctim legasti: quodam putant utrisque solidum deberi, sicut per damnationem: nonnulli occupantis esse melior condicionem aestimant, quia cum in eo genere legati damnetur heres patientiam praestare, ut legatarius rem habeat, sequitur, ut si priori patientiam praestiterit, et is rem sumpsent, secutus sit adversus eum qui postea legatum petierit, quia neque habeat rem, ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

216. *Per praecptionem hoc modo legamus:* LUCIUS TITIUS HOMINEM STICUM PRECEPITO. (217.) Sed nostri quidem praecptores nulli ali ei modo legari posse putant, nisi ei qui alqua ex parte heres scriptus esse: praecipere enim esse praecipuum sumere; quod tantum in eius personam procedit qu:

are, however, people who think that in this kind of legacy the heir is not to be considered bound to mancipate, make cession in court, or deliver, but that it is enough for him to allow the legatee to take the thing: because the testator laid no charge on him except that he should allow, i.e. suffer the legatee to have the thing for himself. 215. The following more important dispute arises with regard to this kind of legacy, if you have bequeathed the same thing to two or more disjointly: some think the whole is due to each, as in a legacy by damnation: some consider that the condition of the one who first gets possession is the better, because, since in this description of legacy the heir is to suffer the legatee to have the thing, it follows that if he suffer the first legatee and he take the thing, he is secure against the other who subsequently demands the legacy, because he neither has the thing, so as to allow it to be taken from him; nor has he fraudulently caused himself not to have it.

216. By preception we bequeath in this manner: “Let Lucius Titius first take the man Suchus.” 217. But our authorities think that a bequest cannot be made in this form to any one who is not appointed heir in part: for praecipere means to take in advance: which only is possible in the case

6. 10
aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit. (218.) Ideoque si extraneo legatum fuent, inutile est legatum, adeo ut Sabinus exstitimaverit ne quidem ex senatusconsulto Neroniano posse convalescere: nam eo, inquit, senatusconsulto ea tantum confirmantur quae verborum vito iure civili non valent, non quae propter ipsam personam legatari non debentur. sed Iuliano ex Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum: nam ex verbis etiam hoc casu accidere, ut iure civili inutile sit legatum, unde manifestum esse, quod eodem aliis verbis recte legatur, velut [per vindicationem et per damnationem et] sinendi modo: tunc autem vitio personae legatum non valere, cum ei legatum sit cui nullo modo legari possit, velut peregrino cum quo testamenti factio non sit; quo plane casu senatusconsulto locus non est. (219.) Item nostri praec.

of one who is appointed heir to some part, since he can have the legacy in advance and clear of other benefit. Therefore, if the legacy have been left to a stranger, the legacy is void, so that Sabinus thought it could not even stand by virtue of Nero's senatusconsultum: for he says, by that senatusconsultum those bequests alone are upheld which are invalid at the civil law through an error of wording, not those which are not due on account of the very character of the legatee. But Julianus, according to Sextus, thought that the legacy was in this case upheld by the senatusconsultum: because from the following consideration it was plain that in this case too the wording caused the invalidity of the bequest at the civil law, viz. that the legacy could be validly left in other words, as for instance, (by vindication or damnation or) sinendi modo: and (he said) that a legacy was invalid from defect of the person only when the legacy was to one to whom a legacy could by no means be given, for instance, to a foreigner with whom there is no testamenti factio: in which case undoubtedly the senatusconsultum is inapplicable. 219. Likewise, our autho-

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1 He is ordered to take "in advance." "In advance" must mean before he takes some other benefit: now an ordinary legatee takes nothing but his legacy, and therefore praecipito must refer to an heir, the only legatee whom we can conceive as taking beforehand another benefit in addition to his legacy.

2 See note on II 114.
ceptores quod ita legatum est nulla ratione putant posse consequi eum cui ita fuerit legatum praeter quam iudicio familiae erciscundae quod inter heredes de hereditate ercisunda, id est dividunda accipi solet: officio enim iudicis id contineri, ut et quod per praecptionem legatum est adjudicetur. (220.) Unde intellegimus nihil aliud secundum nostrorum praecceptorum opinionem per praecptionem legari posse, nisi quod testatoris sit: nulla enim alia res quam hereditaria deductur in hoc iudicium. Itaque si non suam rem eo modo testator legaverit, iure quidem civili inutile ent legatum; sed ex senatusconsulto confirmabitur. aliquo tamen casu etiam alienam rem per praecptionem legari posse tentur: veluti si quis eam rem legaverit quam creditor fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia solvere eam rem, ut possit

1 4v. 42.
2 Dirksen, sub verbo, § 2 A. Officium = munera partes, executum.
3 "Also," i.e. in addition to his proper function of dividing the inheritance.
4 Sc. of Nero, T. 197.
5 "Originally it was customary to transfer to the creditor the property in a subject by mancipation, with a promise, however, by the creditor, at the moment of mancipation, to deliver the property back (pactum de emancipando, fiducia)." Savigny, On Possession, translated by Ferry, p. 316.
praepicere is cui ita legatum sit. (221.) Sed diversae scholae auctores putant etiam extraneo per praecpectionem legari posse proinde ac si ita scribatur: Titius hominem stichum capito, supervacuo adiecta praeba syllaba; ideoque per vindicationem eam rem legatam videri. quae sententia dicitur divi Hadriani constitutione confirmata esse. (222) Secundum hanc igitur opinionem, si ea re eius numiitum defuncti fuerit, potest a legatario vindicari, sive is unus ex heredibus sit sive extraneus: et si in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi vero familiae hereriscundae iudicis officio praestabtur. quod si nullo iure fuerit testatoris, tam heredi quam extraneo ex senatusconsulto utile est. (223) Sive tamen heredibus, secundum nostrorum opinionem, sive

221. But the authorities of the other school think that a legacy can be left by precept even to a stranger, just as if the wording were thus: "Let Titius take the slave Stichus," the syllable pre being added superfluously: and therefore that such a legacy appears to be one by vindication, an opinion which is said to be confirmed by a constitution of the late emperor Hadrian. 222. According to this opinion, therefore, if the thing belonged to the deceased by Quintary title, it can be "vindicated" by the legatee, whether he be one of the heirs or a stranger: and if it only belonged to the testator by Bynary title, the legacy, if left to a stranger, will be valid by the senatusconsultum, but, if to the heir, will be paid over to him by the executive authority of the judex in the actio familiae eriscundae: whilst if it belonged to the testator by no title at all, it will be valid, whether to an heir or a stranger, by reason of the senatusconsultum. 223. If the same thing have been

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1 II. 194. 2 II. 40, 41. The derivation of the word eriscundae is given by Festus thus: "Erectum citumque sit inter consortes, ut in ibris legam Romanum legitur. Erectum a coercendo dictum, unde et eriscundae et eriscant. Citum autem vocatum est a ciendo." The sense of this may be thus given: "Between co-heirs, as we read in the Roman law-books, property is to be erectum citumque. Erectum is a word connected with coercere, to gather together, citum from cito, to portion out." Hence the notion of Festus is that erectus implies "to gather together and then apportion." A joint inheritance is erectum citumque, an inheritance to a single heir erectum nec citum. See Ovietus' note on Cic. de Orat. i. 56. 4 Sc. of Nero; ii. 197
etiam extraneis, secundum illorum opinionem, duobus pluribusve eadem res coniunctim aut disiunctim legata fuerit, singulis partes habere debent.

AD LEGEM FALCIDIAM.

224. Sed olim quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quocquam heredi relinquere praeterquam inane nomen heredis: ideoque lex XII tabularum permittere videbatur, qua cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: uti legassit, utae rei, ita ius est. quare qui scripti heredes erant, ab hereditate se abstinent ab et idcirco plerique intestati moriabant. (225.) Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille assebus legatorum nomine mortisve causa capere permissum non est. sed et haec lex non perfect quod voluit. qui enim verbi gratia quinque millia aeris patrimonium habebat, poterat quinque hominibus
dead to two or more conjointly or disjointly, whether it be to heirs, according to our opinion, or even to strangers, according to theirs, all must take equal shares 1.

224. In olden times it was lawful to expend the whole of a patrimony in legacies and gifts of freedom, and leave nothing to the heir, except the bare title of heir: and this law of the Twelve Tables seemed to permit, wherein it is provided, that any disposition which a man made of his property should be valid, in the words, “In accordance with the bequests of his property which a man has made, so let the right be.” Wherefore those who were instituted heirs often abstained from the inheritance: and on that account many persons died intestate. 225. For this reason the Lex Furia 2 was passed, whereby it was forbidden for any person, certain exceptions however being made, to take more than a thousand asses by way of legacy or donation in contemplation of death 3. But this law did not accomplish what it intended. For a man who had, for instance, a patrimony of five thousand asses, could expend his whole patrimony by bequeathing a thousand asses

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1 See Appendix. (I).

2 Tab. v. 1. 3.

3 B. C. 182. A different law from

4 Just. Inst. II. 7. 1.

the Lex Furia Canmina named in I.
singulis millenos asses legando totum patrimonium erogare. (226.) Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortisve causa capere ciperet quam heredes caperent. ex qua lege plane quidem aliquid utique heredes habere videbantur; sed tamen fere vitum simile nascebat: nam in multas legatariorum personas distributo patrimonio poterat adeo heredi minimum relinquere, ut non expediret heredi huius lucris gratia totus hereditatis onera sustiner.

(227.) Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem. itaque necesse est, ut heres quartam partem hereditatis habeat et hoc nullc iure utmur.

(228.) In libertatibus quoque dandis nimiam licentiam conspecuit lex Furia Caninia, sicut in primo commentario rettulimus.

DE INUTILITER RELICTIS LEGATIS.

229. Ante heredis institutionem inutiliter legatur, scilicet quia testamenta vim ex institutione heredis accipiunt, et ob id to each of five men. 226. Therefore, afterwards, the Lex Voconia was passed, whereby it was provided, that no one should be allowed to take more by way of legacy or donation in contemplation of death than the heirs took. Through this law the heirs seemed certain to have something at any rate: but yet a mischief almost similar to the other arose: for by the patrimony being distributed amongst a large number of legatees, testators could leave so very little to the heir, that it was not worth his while for the sake of this profit to sustain the burdens of the entire inheritance. 227. Therefore, the Lex Falcidia was passed, by which it was provided that the testator should not be allowed to dispose of more than three-fourths in legacies. And thus the heir must necessarily have a fourth of the inheritance. And this is the law we now observe. 228. The Lex Furia Caninia, as we have stated in the first commentary, has also checked extravagance in the bestowal of gifts of freedom.

229. A legacy is invalid if set down before the institution of the heir, plainly because testaments derive their efficacy

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1 U. c. 168.  
2 B. c. 39.  
3 B. c. 39.  
4 Ulpian, xxiv 32.  
5 I. 42.
velut caput et fundamentum intellegitur totius testamenti heredis institutio. (230.) Pariter nec libertas ante heredis institutionem dari potest. (231.) Nostri praecptores nec tutorem eo loco dari posse existimant: sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.

232. Post mortem quoque heredis inutiliter legatur; id est hoc modo: CUM HERES MEUS MORTUUS ERIT, DO LEго, aut DATO. Ita autem recte legatur: CUM HERES MORIETUR: quia non post mortem heredes relinquitur, sed ultimo vitae eius tempore. Rursum ita non potest legari: PRIDIE QUAM HERES MEUS MORIETUR: quod non pretiosa ratione receptum videtur. (233.) Eadem et de libertatis dicta intellegemus. (234.) Tutor vero an post mortem heredis dari potest quaerentibus eadem forsitatis potest esse quaestio, quae de eo agitur qui ante heredum institutionem datur.

from the institution of the heir, and therefore that institution is regarded as the head and foundation of the entire testament.

230. For the same reason, a gift of freedom too cannot be given before the institution of the heir. 231. Our authorities think that a tutor also cannot be given in that place: but Labeo and Proculus think a tutor can be given, because no charge is laid upon the inheritance by the giving of a tutor.

232. A bequest (to take effect) after the death of the heir is also invalid: that is, one in the form: "When my heir shall be dead, I give and bequeath," or "let him give." But it is valid if worded thus: "When my heir shall be dying:" because it is not left after the decease of the heir, but at the last moment of his life. Again, a legacy cannot be left thus: "The day before my heir shall die." Which rule seems adopted for no good reason. 233. The same remarks we understand to be made with regard to gifts of freedom. 234. But if it be asked whether a tutor can be given after the death of the heir, perhaps the question will be the same as that discussed regarding him who is given before the institution of the heirs.

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1 Ulpian, XXIV. 15.  
2 Ibid. i. 30.  
3 Ulpian, XXIV. 16.  
4 i. 231.
DE POENAE CAUSA RELICTIS LEGATIS.

235. A legacy by way of penalty is also invalid. Now a legacy is considered to be by way of penalty, which is left for the purpose of constraining the heir to do or not to do something: for instance, a legacy in these terms: "If my heir shall bestow his daughter in marriage on Titus, let him give ten thousand sesterces to Seius;" or thus: "If you do not bestow your daughter in marriage on Titus, give ten thousand to Titius." And also, if he shall have ordered ten thousand to be given to Titus, "If the heir do not," for example, "set up a monument to him within two years," the legacy is by way of penalty. And in fact, from the mere definition we can invent many specific instances of like character. 236. Not even freedom can be given by way of penalty, although this point has been questioned. 237. But as to a tutor we can raise no question, because the heir cannot be compelled by the giving of a tutor to do or not to do anything; and therefore a tutor is not given by way of penalty: and if one be given, he is considered to be given under a condition rather than by way of penalty.

1 Ulpian, xxiv. 17. This rule was abolished by Justinian, as were those in §§ 219, 232. See Inst. xx. 34--36. 2 The si must be repeated: "Sed et si, si heres, etc." Conf. ii. 155. n.
238. Incertae personae legatum inutiliter relictur. incerta autem videtur persona quam per incertam opinionem animo suo testator subicit, velut si ita legatum sit: QUI PRIMUS AD FUNUS MEUM VENERIT, EI HERES MEUS X MILIA DATO.

239. Libertas quoque non videtur incertae personae dari posse, quia lex Funa Caninia iubet nominatim servos liberan. (239.) Tutor quoque certus dari debet.

240. A legacy to an uncertain person is invalid. Now an uncertain person seems to be one whom the testator brings before his mind without any clear notion of his individuality, for instance, if a legacy be given in these terms: “Let my heir give ten thousand sesterces to him who first comes to my funeral.” The law is the same if he have made a general bequest to all: “Whosoever shall come to my funeral.” Of the same character is a bequest thus made: “Let my heir give ten thousand to whatever man bestows his daughter in marriage on my son.” And of the same character too is a bequest made thus: “Whoever shall be consuls designate after my testament (comes into operation);” for it is in like manner regarded as a legacy to uncertain persons. And there are in fine many other instances of this kind. But a legacy is validly left to an uncertain person under a definite description, for instance, “Let my heir give ten thousand to that one of my relations now alive who first comes to my funeral.” It is also considered not allowable for liberty to be given to an uncertain person, because the Lex Funa Caninia orders slaves to be liberated by name. A person given as a tutor ought also to be definite.

1 Ulpian, XXIV. 18. 2 Ulpian, I. 25. See note on I. 45.
A legacy left to an afterborn stranger is also invalid. Now an afterborn stranger is a person who, if born, would not be a suus heres of the testator. Therefore even a grandchild conceived from an emancipated son is an afterborn stranger in regard to his grandfather; likewise the child conceived by a wife who was married without conubium is an afterborn stranger in regard to his father.

An afterborn stranger cannot even be appointed heir: for he is an uncertain person. But all the other points which we have mentioned above apply to legacies solely: although some hold, not without reason, that an heir cannot be instituted by way of penalty: for it will make no difference whether the heir be directed to give a legacy in case he do or fail to do something, or whether a co-heir be joined on to him: because as well by the addition of a co-heir, as by the giving of a legacy, he is compelled to do something against his wish.

It is a disputed point whether we can validly give a legacy to one who is under the potestas of him whom we institute heir. Servius maintains that the legacy is valid, but becomes void if
Legatee under the potestas of the heir.

155

II. 245. evanescere legatum, si quo tempore dies legatorum cedere so-
let, adhuc in potestate sit; ideoque sive pure legatum sit et
vivo testatore in potestate heredis esse desierit, sive sub con-
dicione et ante condicacionem id acciderit, debere legatum. Sa-
binus et Cassius sub condicione recte legari, pure non recte,
putant: licet enim vivo testatore possit desinere in potestate
heredis esse, ideo tamen inutile legatum intellegi oportere,
quia quod nullas vires habiturum foret, si statim post testamen-
tum factum deceessisset testator, hoc ideo valere quia vitam
longius traxerit, absurdum esset. diversae scholae auctores
nec sub condicione recte legari putant, quia nos in potestate
habemus, eis non magis sub condicione quam pure debere
possimus. (245.) Ex diverso constat ab eo qui in potestate
lusa est, herede instituto, recte tibi legari: sed si tu per eum
heres extriteris, evanescere legatum, quia ipse tibi legatum

the legatee be still under potestas at the usual time for the vesting
of a legacy; and therefore, if either the legacy be left un-
conditionally, and during the testator's lifetime he cease to be
under the potestas of the heir; or under condition, and the same
occur before fulfilment of the condition, the legacy is due.
Sabinus and Cassius think that a legacy if left under condi-
tion is good, if left unconditionally is bad: for that although
the legatee may happen to cease to be under the potestas of the
heir during the testator's lifetime, yet the legacy ought to be
considered invalid for this reason, that it is absurd that what
would have been invalid, if the testator had died immediately
after making the testament, should be valid because he has
lived longer. The authorities of the other school think that
the legacy cannot be left validly even under a condition, be-
cause we cannot be indebted to those who are under our potestas
any more under a condition than unconditionally. 245. On
the contrary, it is allowed that a legacy can validly be given to
you, payable by one under your potestas who is instituted heir:
yet if you become heir through him, the legacy is inoperative,

1 "Cedere diem significat incri-
pere debem pecuniam: venire diem,
significat eum diem venisse, quo pe-
cunia peti potest." Ulpian. See D.
50. 16. 213. pr.
2 This is Cato's rule: "Quod, si

1 testamenti facti tempore deceessisset
2 Ulpian, XXIV. 34.
testator, inutile foret, id legatum,
quandocunque deceessent, non va-
ler " D. 34. 7. 1. pr.
debere non possis; si vero filius emancipatus aut servus manumissus erit vel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

246. Hinc transeamus ad fideicommissa.

247. Et prae de hereditatibus videamus.


because you cannot owe a legacy to yourself: but if the son be emancipated, or the slave manumitted or transferred to another, and become heir himself or make another heir, the legacy is due.

246. Now let us pass on to fideicommissa.

247. And let us begin with the subject of inheritances.

248. First, then, we must know that some heir must be instituted in due form, and that it must be intrusted to his good faith that he deliver over the inheritance to another: for if this be not done, the testament is invalid for want of an heir instituted in due form. 249. The proper phraseology for fideicommissa generally employed is this: "I beg, I ask, I wish, I commit to your good faith:" and these words are equally binding when employed singly, as though they were all united into one. 250. When, therefore, we have written: "Let Lucius Titius be heir;" we may add: "I ask you, Lucius Titus, and beg of you, that as soon as you can enter on my inheritance, you will render and deliver it over to Gaius Seius."

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1 *Fideicommissum* was a bequest given by way of request, not by way of order; and was held to be due on the equitable ground of respecting the testator's desires; "Fideicommissum est quod non civilibus verbis, sed precativa relinquitur, nec exurgore juris civilis profiscitur, sed ex voluntate datur relinquuntis." Ulpian, XXV. 1.
We may also ask him to deliver over a part: and it is in our power to leave fiduciammissa either under condition, or unconditionally, or from a specified day. 251. Now when the inheritance is delivered over, he who has delivered it still remains heir: but he who receives the inheritance is sometimes in the place of heir, sometimes of legatee. 252. But formerly he used to be neither in the place of heir nor of legatee, but rather of purchaser. For it was then usual for the inheritance to be sold for a single coin and as a mere formality to him to whom it was delivered over: and the same stipulations which are usually entered into between the vendor and the purchaser of an inheritance were entered into between the heir and the person to whom the inheritance was delivered over, i.e. in the following manner: the heir on his part stipulated with him to whom the inheritance was delivered over, that he should be indemnified for any amount in which he might be mulcted in connexion with the inheritance, or for anything which he might give bona fide to another, and generally, that if any one brought an action against him in connexion with the inheritance he should be duly defended: whilst the receiver of the inheritance stipulated in his turn, that whatever should come to the heir from the inheritance should be delivered over to him: and that he should also allow him to bring actions con-
restitueretur; ut etiam pateretur eum hereditarias actiones procurationio aut cognitorio nomine exequi.

253. Sed posterioribus temporibus Trebellio Maximo et Annaeo Seneca Consulibus senatusconsultum factum est, quo cautum est, ut si cui hereditas ex fideicommissa causa restituta sit, actiones quae iure civili heredi et in heredem competenter et in eum darentur cui ex fideicommissso restituta esset hereditas. post quod senatusconsultum desierunt illae cautiones in usu haber. Praetor enim utiles actiones et in eum qui recepit hereditatem, quasi heredi et in heredem dare coepit, eaeque in edicto proponuntur. (254.) Sed rursus quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob ut exstinguebantur fideicommissa, Pegaso et Pusione Consulibus senatus censuit, ut ei qui rogatus esset hereditatem restituerere perinde licet quartam partem cerning the inheritance, in the capacity of procurator or cognitor.

253. But at a later period, when Trebellius Maximus and Annaeus Seneca were consuls, a senatusconsultum was enacted, whereby it was provided that if an inheritance were delivered over to any one on the ground of fideicommissum, the actions which by the civil law would lie for and against the heir, should be granted for and against him to whom the inheritance was delivered over in accordance with the fideicommissum. And after the passing of this senatusconsultum, these securities (the stipulations) ceased to be used. For the Praetor began to grant utiles actiones* for and against the receiver of the inheritance, as if they were for and against the heir, and these are set forth in the edict. 254. But again, since the appointed heirs, being generally asked to deliver over the whole or nearly the whole of an inheritance, refused to enter on the inheritance for little or no gain, and thus fideicommissa fell to the ground, therefore in the consulship of Pegasus and Pusio the senate decreed, that he who was asked to deliver over the inheritance should be allowed to retain a fourth part, just as

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1 IV. 83, 84.
2 The wording of the S. C. will be found in D. 36. 1. 1. 2.
3 See note on II. 78.
II. 255.]  

Senatusconsultum Pegasianum.

retinere, atque e lege Falcidiana in legatis retinendi ius conceditur. ex singulis quoque rebus quae per fideicommissum relinquuntur eadem retentio permissa est. per quod senatusconsultum ipse onera hereditaria sustinet; ille autem qui ex fideicommissio relictam partem hereditatis recipit, legatarii partiarum loco est, id est eum legatarii cui pars honorum legatur. quae species legati partitio vocatur, quae cum herede legatarius partitur hereditatem. unde effectum est, ut quae solent stipulationes inter heredem et partiarum legatarum interponuntur eadem interponantur inter eum qui ex fideicommissa causa recipit hereditatem et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit. (255.) Ergo si quidem non plus quam deditam hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restitur hereditas, et in utrumque actiones hereditariae pro rata parte dantur: in heredem quidem iure civili, in eum vero

this right of retention is permitted by the Falcidian law in respect of legacies. The same retention is also allowed in the case of individual things left by fideicommissum. By this senatusconsultum the heir himself sustains the burdens of the inheritance, whilst he who receives the rest of the inheritance by virtue of the fideicommissum, is in the position of a partitary legatee, i.e. of a legatee to whom a portion of the goods is left. Which species of legacy is called partitur', because the legatee shares (partitur) the inheritance with the heir. The result of this is that the same stipulations which are usually entered into between the heir and the partitary legatee, are also entered into between him who receives the inheritance by way of fideicommissum and the heir, i.e. that the gain and loss of the inheritance shall be shared between them in proportion to their interests. 255. If then the appointed heir be asked to deliver over not more than three-fourths of the inheritance, the inheritance is thereupon delivered over in accordance with the senatusconsultum Trebellianum, and actions in connexion with the inheritance are allowed against both parties according to the extent of their interests': against the heir by the civil law, and against him who receives the inheritance by the

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1 Ulpian, xxiv. 25. Cic. de Legg. ii. 20.  
2 Ulpian, xxv. 14.
qui recipit hereditatem ex senatusconsulto Trebelliano. quam quam heres etiam pro ea parte quam resituit heres permanet, eique et in eum solidae actiones competunt: sed non uterius oneratur, nec ulterior illi dantur actiones, quam apud eum commodum hereditatis remanet. (256.) At si quis plus quam dextranem vel etiam totam hereditatem resituetur rogatus sit, locus est Pegasiano senatusconsulto. (257.) Sed is qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinet: sed quarta quidem retenta quasi partis et pro parte stipulationes interponi debent tamquam inter partiarum legatarum et heredem; si vero totam hereditatem resituetur, ad exemplum emptae et venditae hereditatis stipulationes interponendae sunt. (258.) Sed si recuset scriptus heres adire hereditatem, ob id quod dictat eam sibi suspectam esse quasi damnosam, caveretur Pegasiano senatusconsulto, ut desiderante eo cui resituetur rogatus est, iussu Praetoris adeat et restituat, perindeque ei et in eum qui receperit actiones dentur.

senatusconsultum Trebellianum. Although the heir remains heir even for the part he has delivered over, and actions as to the whole lie for and against him: yet he is not burdened, nor are actions granted to him (for his own benefit) beyond the interest in the inheritance which belongs to him. 256. But if he be asked to deliver over more than three-fourths, or even the whole inheritance, the senatusconsultum Pegasianum applies. 257. But he who has once entered on the inheritance, provided only he have done it of his own free will, whether he retain or do not wish to retain the fourth part, sustains all the burdens of the inheritance himself; but when the fourth is retained, stipulations resembling those called partis et pro parte ought to be employed, as between a partarius legatee and an heir: whilst if he have delivered over the whole inheritance, stipulations resembling those of a bought and sold inheritance must be employed. 258. But if the appointed heir refuse to enter upon the inheritance, because he says that it is suspected by him of being rumens, it is provided by the senatusconsultum Pegasianum that at the request of him to whom he is asked to deliver it over he shall enter by order of the Praetor and deliver it over, and that actions are to be allowed for and against him who has received it, as in the rule under
II. 259—261. Fideicommissa of individual things.

ac iuris est ex senatusconsulto Trebelliano. quo casu nullis stipulationibus opus est, quia simul et hic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui receperit hereditatem.

259. Nihil autem interest utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur: nam et hoc casu de quarta parte eius partis ratio ex Pegasiano senatusconsulto haberi solet.

260. Potest autem quisque etiam res singulas per fideicommissum relinquere, velut fundum, hominem, vestem, argentum, pecuniam; et vel ipsum heredem rogare, vel atlicui restituat, vel legatarium, quamvis a legatario legari non possit. (261.) Item potest non solum propria testatoris res per fideicommissum relinquui, sed etiam heredis aut legatarii aut cuirhes et alius alterius. itaque et legatum non solum de ea re rogari potest, ut eam aliqui restituat, quae ei legati sit, sed etiam de alia, sive ipsius

the senatusconsultum Trebellianum. In which case no stipulations are needed, because at the same time security is afforded to him who has delivered over the inheritance, and the actions attaching to it are transferred to and against him who has received it.

259. It makes no matter whether a man instituted heir to the whole inheritance be requested to deliver over the inheritance wholly or partly, or whether the heir instituted to a part be requested to deliver over the part or part of the part: for in the latter case too it is usual for a calculation to be made of the fourth of that part according to the senatusconsultum Pegasianum.

260. A man can also leave individual things by fideicommissum, as a field, a slave, a garment, plate, money: and he can ask either the heir or a legatee to deliver it over to some one, although a legacy cannot be charged upon a legatee1. 261. Likewise, not only can the testator’s own property be left by fideicommissum, but that of the heir also, or of a legatee, or of any one else2. Therefore, not only can a request for re-delivery to another be addressed to the legatee with respect to

1 Ulpius, xxiv. 20. 2 Ibid. xxv. 5.
Fideicommissary gifts of freedom. [II. 262—266.]

... legatarii sive aliena sit. sed hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento cepisset: nam quod amplius est inutiliter relictur. (262.) Cum autem aliena res per fideicommissum relictur, necesse est ei qui rogatus est, aut ipsam redimere et praestare, aut aestimationem aus solvere. scut iuris est, si per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum relictam dominus non vendat, extingui fideicommissum; sed aliam esse causam per damnationem legati.

263. Libertas quoque servo per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legatarius. (264) Nec interesse utrum de suo proprio servo testator roget, an de eo qui ipsius heridis aut legatarii vel etiam extranei sit. (265) Itaque et alienus servus redimi et manumitt debet. quod si dominus cum non vendat, sancta extinguitur libertas, quia pro libertate pretii computato nulla intervenit. (266) Qui autem ex fideicommissum the very thing left to him, but also with respect to a different thing, whether it belong to the legatee himself or to a stranger. But this only is to be observed, that no one may be asked to deliver over to another more than he himself has taken under the testament for the bequest of the excess is inoperative. 262. Also, when another man's property is left by fideicommissum, it is incumbent on the person requested to deliver it either to purchase the very thing and hand it over, or to pay its value. Exactly as the rule is when another man's property is legated by damnation. 'There are, however, those who think that if the owner will not sell a thing left by fideicommissum the fideicommissum is extinguished: but that the case is different with a legacy by damnation.

263. A gift of liberty can also be made to a slave by fideicommissum, in such manner that either the heir or a legatee may be asked to manumit him. 264. Nor does it matter whether the testator make request as to his own slave, or as to one belonging to the heir himself, or to a legatee, or even to a stranger. 265. And therefore, even a stranger's slave must be bought and manumitted. But if the owner will not sell him, clearly the gift of liberty is extinguished, because no com-

\footnotesize{1} Just. Inst. II. 24. 2.  
\footnotesize{2} Ulpian, II. 10.  
\footnotesize{3} Ulpian, II. 11. Lit. “no calculation of price instead of liberty” For the alteration of this rule see Just. Inst. II. 24. 2.
II. 261—270 a. **Fideicommissa and legacies contrasted.**

misso manumittitur, non testatoris fit libertus etiamsi testatoris servus sit, sed eius qui manumittit. (267.) At qui directo, testamento, liber esse iubetur, velut hoc modo: STICUS SERVUS MEUS LIBER ESTO, vel STICUM SERVUM MEUM LIBERUM ESSE IUBEO, ut ipsius testatoris fit libertus. Nec alius ullus directo, ex testamento, libertatem habere potest, quam qui utroque tempore testatoris ex iure Quiritium fuerit, et quo feceret testamentum et quo moreretur.

268. Multum autem different quae per fideicommissum relinquuntur ab his quae directo iure legantur. (269.) Nam ecce per fideicommissum etiam mutu hereditas relinquu potest: cum aliquoquin legatum nisi testamento facto inutili sit. (270.) Item intestatus moriturus potest ab eo ad quem bona eius pertinent fideicommissum allicui relinquere: cum aliquoquin ab eo legari non possit. (270 a.) Item legatum codicilli reliquiun non alter valet, pensation in lieu of liberty is possible. 266. Now he who is manumitted in accordance with a fideicommissum, does not become the freedman of the testator, even though he be the testator’s slave, but the freedman of the person who manumits him. 267. But he who is ordered to be free by direct bequest in a testament, for instance, in the following words: "Let my slave Stichus be free," or, "I order my slave Stichus to be free," becomes a freedman of the testator himself: no one, however, can have liberty directly by virtue of a testament, except one who belonged to the testator by Quintary title at both times, viz. that at which he made the testament, and that at which he died.

268. Things left by fideicommissum differ much from legacies left directly. 269. Thus, for instance, an inheritance can be left by fideicommissum even with a nod: whilst, on the contrary, a legacy, unless a testament be made, is invalid. 270. Also a man about to die intestate can leave a fideicommissum chargeable on him upon whom his goods devolve: although, on the contrary, a legacy cannot be charged upon such an one.

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1 This is a point of importance, because, as stated in note on 1. 37, the libertus owes to his patronus certain duties.
2 Such a freedman is called libertus oecumae. Ulpian, ii. 7, 8.
3 Ulpian, i. 23.
4 Justinian assimilated legacies and fideicommissa in all respects. See Inst. ii. 20. 3
5 Ulpian, xxv. 3. D. 32. 1. 21. pr.
quam si a testatore confirmati fuerint, id est nisi in testamento caverit testator, ut quidquid in codicillis scripserit id ratum sit: fideicommissum vero etiam non confirmatis codicillis relinquique potest. (271.) Item a legatario legari non potest: sed fideicommissum relinquique potest. quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possimus. (272.) Item servo alieno directo libertas dari non potest: sed per fideicommissum potest. (273.) Item codicillis nemo heres institui potest neque exheredari, quamvis testamento confirmati sint. at hic qui testamento heres institutus est potest codicillis rogari, ut eam hereditatem alii totam vel ex parte restituat, quamvis testamento codicilli confirmati non sint. (274.) Item mulier quae ab eo qui centum milia aeras census est per legem Voconioam heres institui non potest, tamen fideicommissio relictam sibi hereditatem capere potest. (275.) Latini quoque qui hereditates legatarum directo iure lege

270a. Likewise, a legacy left in codicils is not valid, unless the codicils be confirmed by the testator, i.e., unless the testator insert a proviso in his testament that what he has written in the codicils shall stand good; but a fideicommissum can be left even in unconfirmed codicils. 271. Likewise, a legacy cannot be charged upon a legatee, but a fideicommissum can be so charged. Moreover we can leave to a second person a further fideicommissum chargeable on a man to whom we already have left a fideicommissum. 272. Likewise, liberty cannot be given directly to another man’s slave, but it can be given by fideicommissum. 273. Likewise, no one can be instituted heir or disinherited by codicils, even though they be confirmed by testament. But the heir instituted by testament may be asked in codicils to deliver over the inheritance, wholly or in part, to another, even though the codicils be not confirmed by testament. 274. Likewise, a woman, who by the Lex Voconia could not be instituted heir by any one registered as having more than 100,000 ases, may still take an inheritance left her

1 The law regarding codicils is to be found in Just. Inst. ii. 25. A codicil confirmed would become part of the testament, and the legacy thus become binding.
2 ii. 260, 261.
3 ii. 264, 267.
4 Ulpian, xxv. 11.
5 Sc by the censors. The law is referred to by Cicero, in Verrem, ii. 1. c. 42, Pro Balbo c. 8, and
6 De Repub. iii. c. 10. Another pro-
II. 276, 277. 

Fideicommissa and legacies contrasted.

Iunia capere prohibentur, ex fideicommissio capere possunt. (276.) Item cum senatusconsulto prohibitum sit proprium servum minorem annis xxx liberum et heredem instituere, plerisque placet posse nos iubere liberum esse, cum annorum xxx erit, et rogare, ut tunc illi restitutur hereditas. (277.) Item quamvis non possimus post mortem eius qui nobis heres extinctit, alium in locum eius heredem instituere, tamen possimus cum rogare, ut cum morietur, alii eam hereditatem totam vel ex parte restituat. et quia post mortem quoque fideicommissum dari potest, idem eflicere possimus et si ita scripsimus: CUM TITIUS HERES MEUS MORTUUS ERIT, VOLO HEREDITATEM MEAM AD PUBLIUM MAEVIIUM PERTINERE. utroque autem by fideicommissum. 275. Latins also, who are prevented by the Lex Junia from taking inheritances or legacies bestowed directly, can take by fideicommissum. 276. Likewise, although we are forbidden by a senatusconsultum to appoint free and heir our own slave who is under thirty years of age, yet it is generally held that we may order him to be free when he shall arrive at the age of thirty, and ask that the inheritance be then delivered over to him. 277. Likewise, although when a man has become our heir we cannot appoint another to take his place after his death; yet we can ask him to deliver over the inheritance to another, wholly or in part, when he shall be dying. And since a fideicommissum can be given even after the death of the heir, we can also produce the same effect if we word our bequest thus: "When Titius, my heir, shall be dead, I wish my inheritance to belong to Publius Maevius." By each of these

vision of the law is mentioned in II. 226.

1 I. 23, 24.

2 I. 18. It was not by a senatusconsultum but by a Lex (Aedus Sentia) that men were forbidden to manumit a slave under thirty: still there need be no contradiction between this passage and I. 18. Testators, to avoid the operation of the Lex Aedus Sentia, had probably appointed slaves under thirty, not as heirs immediately, but to be heirs when they reached the age of thirty, and this was rendered invalid by the S.C. The S.C. therefore merely applied to a particular case the well-known maxim: "Nemo partim testatus, partum intestatus decedere potest:" for there would be an intestacy from the time of the testator's death to that when the heir became thirty years old: or, if we imagine that the heir ab intestato might occupy during the interval, then we are confuted by the equally trite maxim: "Semel heres, semper heres."

3 II. 184.

4 But not a legacy: see II. 232.
modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de fideicommisso restituento. (278.) Praeterea legata per formulam petimus: fideicommissa vero Romae quidem aput Consulem vel aput eum Praetorem qui praecipue de fideicommissis ius dicit persequimur; in provinciis vero aput Praesidem provinciae. (279.) Item de fideicommissis semper in urbe ius dicitur: de legatis vero, cum res aguntur. (280.) Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit: legatorum vero usurae non debentur; idque rescripto divi Hadiani significetur.

Methods, both the first and the second, Titus leaves his heir bound to deliver over a fideicommissum. 278. Moreover, we sue for legacies by means of a formula: but we proceed for fideicommissa at Rome before the Consul or the Praetor who has special jurisdiction over fideicommissa, in the provinces before the governor. 279. Likewise, judgment regarding fideicommissa is given at any time in the city: but regarding legacies only on the days devoted to litigation. 280. The interest and profits of fideicommissa are due, in case he who has
to pay a fideicommissum makes delay of payment: but the interest of legacies is not due: and this is stated in a rescript of the late emperor Hadrian. I know, however, that Julianus thought the rule was the same in a legacy left sinendi modo as in fideicommissa, and I see that this opinion prevails at the present time too. 281. Likewise, legacies written in Greek are invalid, but fideicommissa are valid. 282. Likewise, if the heir deny that a legacy has been left by damnation, the action is brought against him for double. but the suit for fideicommissa is always for the value only. 283 Likewise, a man can reclaim what he has paid by mistake beyond what was due under a fideicommissum: whilst that which has for an erroneous reason been paid beyond what was due under a legacy by damnation cannot be recovered. The same undoubtedly is the law as to a legacy which, though not due, has for some cause or other been paid by mistake.

284. There used to be other differences; but these do not now exist. 285. For instance, foreigners could take fideicommissa: and this was almost the first instance of fideicommissa due, but there is a payment in excess: in the second case no legacy is due at all.

1 Val. Max. Lib. IV. c. 7.
et nunc ex oratione divi Hadriani senatusconsultum factum est, ut ea fideicommissa fisco vindicarentur. (286.) Caelibes quoque qui per legem Iuliam hereditates legataque capere prohibentur, olim fideicommissa videbantur capere posse. Item orbi qui per legem Papiam, ob id quod liberos non habent, dimidas partes hereditatun legatorumque perdunt, olim solo'da fideicommissa videbantur capere posse. sed postea senatusconsulto Pegasiano perinde fideicommissa quoque, ac legata hereditatesque capere posse prohibiti sunt. eaque translata sunt ad eos qui testamento liberos habent, aut si nullus liberos habebit, ad populum, sicuti iuris est in legatis et in hereditatibus. (287.) Eadem aut similis ex causa autem olim incertae personae vel postumo alieno per fideicommissum relinequi poterat, quamvis neque heres institui neque legari ei possit. sed senatusconsulto quod auctore divo Hadriano factum est idem in fideicommissis quod in legatis hereditatisbusque constitutum est.

missa. But afterwards this was forbidden: and now a senatusconsultum has been enacted, at the instance of the late emperor Hadrian, that such fideicommissa are to be claimed for the fiscus. 286. Unmarried persons also, who by the Lex Julia are debarred from taking inheritances and legacies, were in olden times considered capable of taking fideicommissa'. Likewise, childless persons, who by the Lex Papia lose half their inheritances and legacies because they have no children, were in olden times considered capable of taking fideicommissa in full. But afterwards by the senatusconsultum Pegasianum they were forbidden to take fideicommissa as well as inheritances or legacies. And these were transferred to those persons named in the testament who have children, or, if none of them have children, to the populus, just as the rule is regarding legacies and inheritances'. 287. For the same or a similar reason, too, a fideicommissum could formerly be left to an uncertain person or after-born stranger, although such an one could not be appointed either heir or legatee*. But by a senatusconsultum which was made at the instance of the late emperor Hadrian the same rule was established with regard to fideicommissa as with regard to lega-
Fideicommissa and legacies contrasted.

Item poenae nomine iam non dubitatur nec per fideicommissum quidem relinquiqi posse. Sed quamvis in multis iuris partibus longe latior causa sit fideicommissorum, quam eorum quae directo relinquuntur, in quibusdam tantumdem valeant: tamen tutor non aliter testamento dari potest quam directo, veluti hoc modo: LIBERIS MEIS TITIUS TUTOR ESTO, vel ita: LIBERIS MEIS TITIUM TUTOREM DO: per fideicommissum vero dari non potest.

Likewise, there is now no doubt that a bequest by way of penalty cannot be made even by fideicommissum. But although in many legal incidents the scope of fideicommissa is far more comprehensive than that of direct bequests, and in others the two are of equal effect, yet a tutor cannot be given in a testament in any manner except directly, for instance thus: "Titus be tutor to my children:" or thus, "I give Titus as tutor to my children:" and one cannot be given by fideicommissum.
BOOK III.

1. Intestatorum hereditates leges XII tabularum primum ad suos heredes pertinent. (2.) Sui autem heredes existimantur liberi qui in potestate morientis fuerunt, veluti filius fiiavit, nepos nepotis ex filio, pronepos pronepotis ex nepote filio nato prognatus prognatae. nec interest utrum naturales sint liberi, an adoptivi.

II. dum tamen nepos neptisve et pronepos pronepotis suorum heredum numero sunt, si praecedens persona desersit in potestate parentis esse, suve morte id acciderit suae alia ratione, veluti emancipatione: nam si per id tempus quo quis moritur filius in potestate eus sit, nepos ex eo suus heres esse non potest. idem et in eetris

1. THE inheritances\textsuperscript{1} of intestates by a law of the Twelve Tables belong in the first place to their \textit{sui heredes}\textsuperscript{2}. and those descendants are accounted \textit{sui heredes} who were under the \textit{potestas} of the dying man, as a son or daughter, grandson or granddaughter by a son, great-grandson or great-granddaughter sprung from a grandson born from a son. Nor does it matter whether they be actual or adopted descendants.

But a grandson or granddaughter, and a great grandson or great-granddaughter, are in the category of \textit{sui heredes} only when the person prior to them in degree has ceased to be under the \textit{potestas} of his ascendant, whether that has happened by death or by some other means, emancipation for instance: for if at the time when a man dies his son be under his \textit{potestas}, the grandson by him cannot be a \textit{sui heres}\textsuperscript{3}. And the same we under-

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\textsuperscript{1} The first four paragraphs of this book and a portion of the fifth are filled in conjecturally by the German editors of the text, as a leaf is wanting from the MS. at this point.

\textsuperscript{2} II. 156. Ulpian, XXII. 14, XXVI. 1.

\textsuperscript{3} I. 127.
deinceps liberorum personis dictum intellegemus. (3.) Uxor quoque quae in manu est sua heres est, quia filiae loco est; item nurus quae in filii manu est, nam et haec nepitis loco est. sed ita demum erit sua heres, si filius causae in manu erit, cum pater moritur, in potestate eius non sit. idemque dicemus et de ea quae in nepoti

manu matrimoni causa sit, quia pro neutris loco est. (4.) Postumi quoque, quique si vivo parente nati essent, in potestate eius futuri forent, sui heredes sunt. (5.) Idem iuris est de his quorum nomine ex lege Aelia Sentia vel ex senatusconsulto post mortem patris causa probatur: nam et hi vivo patre causa probata in potestate eius futuri essent. (6.) Quod etiam de eo filio, qui ex prima secundave mancipatione post mortem patris manumitterit, intellegemus.

7. Igitur cum filius filiave, et ex altero filio nepotes nepote extant, pariter ad hereditatem vocantur; nec qui gradu stand to be laid down with regard to other classes of descend-

ants. 3. A wife also who is under manus is a sua heres, because she is in the place of a daughter: likewise a daughter-in-law who is under the manus of a son, because she again is in the place of a granddaughter1. But she will only be a sua heres in case the son, under whose manus she is, be not under his father's potestas when his father dies. And the same we shall also lay down with regard to a woman who is under the manus of a grandson with matrimonial intent8, because she is in the place of a great-granddaughter. 4. After-born descendants9 also, who, if they had been born in the lifetime of the ascendant, would have been under his potestas, are sua heredes. 5. The law is the same regarding those in reference to whom a case is proved after the death of their father by virtue of the Lex Aelia Sentia or the senatusconsultum: for these too, if the case had been proved in the lifetime of the father, would have been under his potestas10. 6. Which rule we also apply to a son who is manu-

mitted from a first or second mancipation after the death of his father11.

7. When therefore a son or daughter is alive, and also

grandsons or granddaughters by another son, they are called

1 11. 150.
2 1. 114.
3 1. 147. n.
4 1. 29 et seqq.; 1. 67 et seqq.
5 11. 141—143; 1. 139, 135.
proximior est ulteriorum excludit: aequum enim videbatur nepotes neptesve in patris sui locum portionemque succedere. pari ratione et si nepos neptisve sit ex filio et ex nepote pronepos proneptisve, simul omnes vocantur ad hereditatem. (8.) Et quia placebat nepotes neptesve, item pronepes proneptesve in parentis sui locum succedere: conventiens esse visum est non in capita, sed in stirpes hereditates dividit, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo plurisve nepotes alteram dimidiam; item si ex duobus filiis nepotes extent, et ex altero filio unus forte vel duo, ex altero tres aut quattuor, ad unum aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

9. Si nullus sit suorum heredum, tunc hereditas pertinet ex eadem lege xii tabularum ad adgnatos. (10.) Vocantur autem adgnati qui legitima cognatione iuncti sunt: legitima autem cognatio est ea quae per viriles sexus personas conuungitur. ita-

simultaneously to the inheritance: nor does the nearer in degree exclude the more remote: for it seemed fair for the grandsons or granddaughters to succeed to the place and portion of their father. On a like principle also, if there be a grandson or granddaughter by a son and a great-grandson or great-granddaughter by a grandson, they are all called simultaneously to the inheritance. 8. And since it seemed right that grandsons and granddaughters, as also great-grandsons and great-granddaughters, should succeed into the place of their ascendant: therefore it appeared consistent that the inheritance should be divided not per capita but per stirpes, so that a son should receive one-half of the inheritance, and two or more grandsons by another son the other half: also that if there were grandsons by two sons, and from one son one or two perhaps, from the other three or four, one-half should belong to the one or two and the other half to the three or four.

9. If there be no suus heres, then the inheritance by the same law of the Twelve Tables belongs to the agnates. 10. Now those are called agnates who are united by a relationship recognized by statute law; and a relationship recognized by statute law is one traced through persons of the male sex.

1 I. 156. Tabula v. l. 4: "Si ab intestato moritur cui suus heres nec est, adgnatus proximus familiam habet."
que eodem patre nat. fratres agnati sibi sunt, qui etiam consanguinei vocantur, nec requiritur an etiam matrem eandem habuerint. item patruus fratris filio et invicem is illi agnatus est. eodem numero sunt fratres patruales inter se, id est qui ex duobus fratribus progeninati sunt, quos plerique etiam consobrinos vocant. qua ratione scilicet etiam ad plures gradus agnationis pervenire poterimus. (11.) Non tamen omnibus simul agnatis dat lex xii tabularum hereditatem, sed his qui tunc, cum certum est aliquem intestato decessisse, proximo gradu sunt. (12.) Nec in eo iure successio est: ideoque si agnatus proximus hereditatem omiserit, vel antequam adserit, decesserit, sequentibus nihil iuris ex iure competit. (13.) Ideo autem non mortis tempore quis proximus sit reperimus, sed eo tempore quo certum fuerit aliquem intestatum decessisse quia si quis testamento facto decesserit, melius esse visum est tunc ex iis requiri proximum, cum certum esse coeperit neminem ex eo testamento fori heredem.

Brothers therefore born from the same father are agnates one to another (and are also called consanguines); nor is it a matter of inquiry whether they have the same mother as well. Likewise, a father's brother is agnate to his brother's son, and conversely the latter to the former. In the same category, one relatively to the other, are fratri patruales, i.e. the sons of two brothers, who are usually called consobrini. And on this principle evidently we may trace out further degrees of agnation. 11. But the law of the Twelve Tables does not give the inheritance to all the agnates simultaneously, but to those who are in the nearest degree at the time when it is ascertained that a man has died intestate. 12. Under this title too there is no representation; and therefore, if the agnate of nearest degree decline the inheritance or die before he has entered, no right accrues under the law to those of the next degree. 13. And the reason why we inquire who is nearest in degree not at the time of death but at the time when it was ascertained that a man had died intestate, is that if the man died after making a testament, it seemed the better plan for the nearest agnate to be sought for when it became certain that no one would be heir under that testament.

1 III. 22. Ulpian, xxvi. 5.
14. Quod ad feminas tamen attinet, in hoc iure aliud ipsarum hereditatibus capiendis placuit, aliud in ceterorum bonis ab his capiendis. nam feminarum hereditates perinde ad nos agnationis iure redeunt atque masculorum: nostrae vero hereditates ad feminas ultra consanguineorum gradum non pertinunt. itaque soror fratris sororve legitima heres est; amita vero et fratris filia legitima heres esse non potest. sororis antem nobis loco est etiam mater aut noverca quae per in manum conventionem aput patrem nostrum iura filiae consecuta est.

15. Si ei qui defunctus erit sui frater et alterius fratris filius, sicut ex superioribus intellegitur, frater prior est, quia gradu praecedit. sed alia facta est iuris interpretatio inter suos heredes. (16.) Quodsi defuncti nullus frater extet, sed sint liberi fratrum, ad omnes quidem hereditas pertinet: sed quaestum est, si dispari forte numero sint nati, ut ex uno unus vel duo, ex altero tres vel quattuor, utrum in stirpes dividenda sit hereditas, sicut

14. With reference to women, however, one rule has been established in this matter of law as to the taking of their inheritances, another as to the taking of goods of others by them. For the inheritances of women devolve on us by right of agnation, equally with those of males: but our inheritances do not belong to women who are beyond the degree of consanguineae. A sister therefore is statutable heir to a brother or a sister: but a father's sister and a brother's daughter cannot be statutable heirs. A mother, however, or a stepmother, who by conventio in manum has gained the rights of daughter in regard to our father, stands in the place of sister to us.

15. If the deceased have a brother and a son of another brother, the brother has the prior claim, as is obvious from what we have said above, because he is nearer in degree. But a different interpretation of the law is made in the case of sui heredes. 16. Next, if there be no brother of the deceased, but there be children of brothers, the inheritance belongs to all of them: but it was doubted formerly, supposing the children were unequal in number, so that there were one or two, perhaps, from one brother, and three or four from the other, whether the

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1 III. 10.
2 III. 11.
3 III. 11.
4 III. 7.
inter suos heredes iuris est an potius in capita. iamdum tamen placuit in capita dividendum esse hereditatem. itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas dividetur, ita ut singuli singulas portiones ferant.

17. Si nullus agnatus sit, eadem lex xii tabularum gentiles ad hereditatem vocat: qui sint autem gentiles, primo commentario retulimus et cum illic admonuimus totum gentilicum ius in desuetudinem abisse, supervacuum est hoc quoque loco de ea re curiosius tractare.

18. Hactenus lege xii tabularum finitae sunt intestatorum hereditates: quod ius quemadmodum strictum fuerit, palam est intellegere. (19) Statim enim emancipati liberi nullum ius in hereditatem parentis ex ea lege habent, cum desierint sui inheritance should be divided per stirpes, as is the rule amongst sui heredes', or rather per capita. It has, however, for some time been decided that the inheritance must be divided per capita. Therefore, whatever be the number of persons in the two branches together, the inheritance is divided into that number of portions, so that each one takes a single share.

17. If there be no agnate, the same law of the Twelve Tables calls to the inheritance the gentiles: and who the gentiles are we have informed you in the first Commentary. And since we told you there that the whole of the laws relating to gentiles had gone into disuse, it is superfluous to treat in detail of the matter here.

18. Thus far the inheritances of intestates are limited by the law of the Twelve Tables: and how strict these regulations were is clearly to be seen. 19. For in the first place, emancipated descendants have, according to this law, no right to the inheritance of their ascendant, since they have ceased to be sui

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3 111. 8.  
8 Tab v. 1. 5, "Si adgatus nec escit, gentilis familiae nuncitor." The explanation referred to is not now extant; it was probably contained on the page of the MS. missing between §§ 164 and 165 of the first commentary. As the subject is merely one of antiquarian interest, it will perhaps be sufficient to quote the following passage from Cicero, Topic. 6: "Gentiles sunt, qui inter se eodem nomine sunt, Non est satis: Quis ab ingenuo orundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc: Quis capite non sunt demini, Hoc fortasse satis est." Festus also says: "Gentilis dictur et ex eodem genere ortus, et is qui similis nomine appellatur, ut si Cineus: Gentiles mihl sunt qui meo nomine appellantur."
heredes esse. (20.) Idem iuris est, si ideo liberi non sint in potestate patris, quia sint cum eo civitate Romana donati, nec ab Imperatore in potestatem redacti fuerint. (21.) Item agnati capite deminiuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione permittatur. (22.) Item proximo agnato non adeunte hereditatem, nihil magis sequens iure legitimo admittitur. (23.) Item feminae agnatae quaecumque consanguineorum gradum excedunt, nihil iuris ex lege habent. (24.) Similiter non admittuntur cognati qui per feminam sexus personas necessitudo iunguntur; adeo quidem, ut nec inter matrem et filium et filiamve ultro citroque hereditatis capiendae ius competat, praeter quam si per in manum conventionem consanguinitatis iura inter eos constiterint.

25. Sed haec iuris iniquitates edicto Praetoris emendatae sunt. (26.) Nam liberos omnes qui legitimo iure deficiuntur vocat ad hereditatem proinde ac si in potestate parentum mortis tempore habeant.

176 Strictness of the civil rules as to inheritance. [III. 20—26.]

The rule is the same if children be not under the potestas of their father, because they have been presented with Roman citizenship at the same time with him, and have not been placed under his potestas by the emperor. 21. Likewise, agnates who have suffered capitis diminutio are not admitted to the inheritance under this law, because the (very) name of agnation is destroyed by capitis diminutio. 22. Likewise, when the nearest agnate does not enter on the inheritance, the next in degree is not on that account admitted, according to statute law. 23. Likewise, female agnates who are beyond the degree of consanguineae have no title under this law. 24. So also cognates, who are joined in relationship through persons of the female sex, are not admitted: so that not even between a mother and her son or daughter is there any right of taking an inheritance devolving either the one way or the other, unless by means of a conventio in manum the rights of consanguinity have been established between them.

25. But by the Praetor’s edict these defects from equity in the rule have been corrected. 26. For he calls to the inheritance all descendants who are deficient in statutable title, just

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1 i. 94.  8 i. 158. inheritance be taken by the son (or daughter), nor the son’s (or daughter’s) by the mother.
2 iii. 12.  9 Viz. neither can the mother’s
4 iii. 14.  6 iii. 14.
III. 27—29. Praetorian emendations of this strictness.

fuissent, sive soli sint sive etiam sui heredes, id est qui in potestate patris fuerunt, concurrant. (27.) Adgnatos autem capite deminutos non secundo gradu post suos heredes vocat, id est non eo gradu vocat quo per legem vocarentur, si capite minuti non essent; sed terto, proximitatis nomine: licet enim capitis diminutione ius legitimum perdiderint, certe cognationis iura retinent. itaque si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiam si longiore gradu fuerit. (28.) Idem iuris est, ut quidam putant, in eius agnati persona, qui proximo stant, omnino omittente hereditatem, nihilo magis iure legitimo admittitur. sed sunt qui putant hunc eodem gradu a Praetore vocari, quo etiam per legem agnatis hereditas datur. (29.) Feminae

as though they had been under the potestas of their ascendants at the time of their death, whether they be the sole claimants, or whether sui heredes also, i.e. those who were under the potestas of their father, claim with them. 27. Agnates, however, who have suffered capitis diminutio he does not call in the next degree after the sui heredes, i.e. he does not call them in that degree in which they would have been called by statute law if they had not suffered capitis diminutio; but in a third degree, on the ground of nearness of blood: for although by the capitis diminutio they have lost their statutable right, they surely retain the rights of cognition. If, therefore, there be another person who has the right of agnation unimpaired, he will have a prior claim, even though he be in a more remote degree. 28. The rule is the same, as some think, in the case of an agnate, who, when the nearest agnate declines the inheritance, is not on that account admitted by statute law. But there are some who think that such a man is called by the Praetor in the same degree as that in which the inheritance is given by statute law to the agnates. 29. Female agnates

1 "Quia civilis ratio civilia quiadem iura corrumpere potest, naturallia vero non potest." 1. 158.

2 That is, such a person is called in the third, not the second degree. The question here discussed is a very important one. If the agnate referred to took as one of the third class, he would take concurrently with cognates; whereas if he took in the second class he would have the whole inheritance to the exclusion of the cognates. Further, if the agnate were thrown, in the case supposed, into the third class, he might after all get nothing from the inheritance; for instance he might be related to the deceased in the third degree of blood, and so be excluded by cognates who were of the first or second.

2 Sc. Tab. v. l. 4.
certe agnatae quae consanguineorum gradum excedunt tertio gradu vocantur, id est si neque suus heres neque agnatus ullus crit. (30.) Eodem gradu vocantur etiam eae personae quae per feminini sexus personas copulatae sunt. (31.) Liberi quoque qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur.

32. Quos autem Praetor vocat ad hereditatem, hi heredes ipso quidem iure non fiunt. nam Praetor heredes facere non potest: per legem enim tantum vel similem iuris constitutionem heredes fiunt, veluti per senatusconsultum et constitutionem principalem: sed eis si quidem Praetor det bonorum possessionem, loco heredum constituuntur.

33. Adhuc autem alios etiam complures gradus Praetor facit in bonorum possessione danila, dum id agit, ne quis sine successore moriatur. de quibus in his commentariis copiose non agimus ideo, quia hoc ius totum propriis commentariis quoque alias explicavimus. Hoc solum admonuisse sufficit [desunt lin. 36]. (34.)

who are beyond the degree of consanguineae are undoubtedly called in the third degree, i.e. in the event of there being no suus heres or agnate. 30. In the same class moreover are called those persons who are joined in relationship through persons of the female sex. 31. Descendants also who are in an adoptive family are called in the same degree to the inheritances of their actual ascendants.

32. Now those whom the Praetor calls to the inheritance do not become heirs in strictness of law: for the Praetor cannot make heirs, as heirs exist only by a lex or some analogous constitution of law, for instance by a senatusconsultum or constitution of the emperor: but if the Praetor grant to them possession of the goods, they are put into the position of heirs.

33. The Praetor further makes many other degrees in the giving of possession of the goods, whilst providing that no one shall die without a successor. Concerning which degrees we do not treat at length in this work, because we have explained all this branch of law elsewhere in a work devoted to the subject1. It is sufficient to make this statement only2

1 Probably the treatise Ad Edictum Urbinum is meant.
2 At this point several lines of the MS. are illegible; but the substance of the missing portion can be gathered from Ulpian, Title xxviii.
III. 35. 36. [Interdict Quorum Bonorum]

— item ab intestato heredes suos et agnatos ad bonorum possessionem vocat. quibus casibus beneficium eius in eo solo videtur aliquam utilitatem habere, quod is qui ita bonorum possessionem petit, interdicto cuius principium est QUORUM BONORUM uti posit. cuius interdicti quae sit utilitas, suo loco proponemus. aliquoquin remota quoque bonorum possessione ad eos hereditas pertinet iure civili.

35. Ceterum saepe quibusdam ita datur bonorum possessio, ut is cui data sit, non optineat hereditatem: quae bonorum possessio dicitur sine re. (36.) nam si verbi gratia iure facto testamento heres institutus creverit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo, quod iure civili heres sit, nihil minus ii qui nullo facto testamento ad intestati bona vocantur possunt petere bonorum possessionem: sed sine re ad eos hereditas pertinet,

34. ... likewise he calls the sui heredes and agnati, who are heirs on an intestacy, to the possession of the goods. In which cases his grant appears to bestow an advantage only in this respect, that a man who thus sues for possession of the goods can make use of the interdict commencing with the words: Quorum Bonorum. What is the advantage of this interdict we shall explain in its proper place. As to all other incidents, even if the grant of possession of the goods were left out of question, the inheritance belongs to them by the civil law.

35. But frequently the possession of the goods is granted to people in such a manner, that he to whom it is given does not obtain the inheritance; which possession of the goods is said to be sine re (without benefit). 36. For, to take an example, if the heir instituted in a testament formally executed have made cretion for the inheritance, but have not cared to sue for possession of the goods “in accordance with the tablets,” content with the fact that he is heir by the civil law, those who are called to the goods of the intestate in the case of no testament being made can nevertheless sue for the possession of the goods: but the inheritance belongs to them sine re, since

For the subject of Bonorum Possessio, see App. (K). 2 II. 148. Ulpian, xxviii. 13; xxii. 6. 1 IV. 144. 3 II. 164.
cum testamento scriptus heres evincere hereditatem possit. (37.) Idem iuris est, si intestato aliquo mortuo suus heres noluerit petere bonorum possessionem, contentus legitimo iure. nam et agnato competet quidem bonorum possessio, sed sine re, cum evinci hereditas ab suo herede potest. et illud conveniunt, si ad agnatum iure civili pertinet hereditas et hic adierit hereditatem, sed bonorum possessionem petere noluerit, et si quis ex proximis cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem. (38.) Sunt et alii quidam similes casus, quorum aliquos superiore commentario tradidimus.

39. Nunc de libertorum bonis videamus. (40.) Olim itaque licebat liberto patronum suum in testamento praeterire: nam ita demum lex XII tabularum ad hereditatem liberti vocabant patronum, si intestatus mortuus esset libertus nullo suo herede relictus. itaque intestato quoque mortuo liberto, si is

the appointed heir can wrest the inheritance from them. The law is the same, if, when a person has died intestate, his suus heres do not care to sue for the possession of the goods, being content with his statutory right. For then the possession of the goods belongs to the agnate, but sine re, since the inheritance can be wrested away from him by the suus heres. And in like manner, if the inheritance belong to the agnate by the civil law, and he enter upon it, but do not care to sue for possession of the goods, and if one of the cognates of nearest degree sue for it, he will for the same reason have possession of the goods sine re. 38. There are certain other similar cases, some of which we have treated of in the preceding Commentary.

39. Now let us consider about the goods of freedmen. 40. Formerly then a freedman might pass over his patron in his testament: for a law of the Twelve Tables called the patron to the inheritance of a freedman, only if the freedman had died intestate and leaving no suus heres. Therefore, even when a freedman died intestate, if he left a suus heres, his

1 More correctly the bonorum possessiones belongs to them, but is sine re, and the hereditas remains with the written heir, cum re. But Gaius is here using hereditas to signify "the hereditaments," rather than "the inheritance," as he does in II. 119.

2 II. 119, 148, 149.
3 Ulpian, XXVI. XXIX.
4 Tab. v. l. 8.
suum heredem reliquerat, nihil in bonis eius patrono iuris erat. 
et si quidem ex naturalibus liberis aliquem suum heredem reli-
quisset, nulla videbatur esse querela; si vero vel adoptivus 
filius filiave, vel uxor quae in manu esset sua heres esse, aperte 
iniquum erat nihil iuris patrono superesse. (41.) Qua de causa 
postea Praetoris edicto haec iuris iniquitas emendata est. sive 
enim faciat testamentum libertus, iubetur ita testari, ut patrono 
suo partem dimidiam bonorum suorum relinquat; et si aut nihil 
ut minus quam partem dimidiam reliquerit, datur patrono 
contra tabulas testamenti partis dimidiae bonorum possessio. si 
vero intestatus moriatur, suo herede relicto adoptivo filio, vel 
uxore quae in manu ipsius esset, vel nuru quae in manu filii 
eius fuerit, datur aequae patrono adversus hos suos heredes 
partis dimidiae bonorum possessio. prosunt autem liberto ad 
excludendum patronum naturales liberi, non solum quos in 
potestate mortis tempore habet, sed etiam emancipati et in 
adoptionem dati, si modo aliqua ex parte heredes scripti 
sint, aut praeteriti contra tabulas testamenti bonorum possessionem 
ex edicto petierint: nam exheredati nullo modo repellunt pa-
patron had no claim to his goods. And if indeed the suus heres 
he left were one of his actual children, there seemed 
to be no ground for complaint, but if the suus heres were an 
adopted son or daughter, or a wife under manus, it was clearly 
inequitable that no right should survive to the patron. 41. 
Wherefore this defect from equity in the law was afterwards 
corrected by the Praetor's edict. For if a freedman make 
a testament, he is ordered to make it in such manner as to 
leave his patron the half of his goods: and if he have left 
him either nothing or less than the half, possession of one-half 
of the goods is given to the patron "as against the tablets of the 
testament." Further, if he die intestate, leaving as suus heres 
an adopted son, or a wife who was under his own manus, or a 
daughter-in-law who was under the manus of his son, possession 
of half the goods is still given to the patron as against these 
sui heredes. But all actual descendants avail the freedman 
to exclude his patron, not only those whom he has under his 
potestas at the time of his death, but also those emancipated or 
given in adoption, provided only they be appointed heirs to 
some portion, or, being passed over, sue for possession of the 
goods "as against the tablets of the testament" in accordance
tronum. (42.) Postea lege Papia aucta sunt iura patronorum quod ad locupletiores libertos pertinet. Cautum est enim ea lege, ut ex bonis eius qui sestertiorum nummorum centum millium plurisue patrimonium reliquerit, et pauciores quam tres liberos habebit, sive is testamento facto sive intestato mortuus erit, virilis pars patrono debatur. itaque cum unum filium unamve filiam heredem reliquerit libertus, perinde pars dimidia patrono debetur, ac si sine ullo filio filiave moreretur; cum vero duos duasve heredes reliquerit, tertia pars debetur; si tres relinquent, repellitur patronus. [linea vacua.]

43. In bonis libertinarum ullam iniuriam antiquo iure patiebantur patroni. cum enim hae in patronorum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque sive auctor ad testamentum faciendum factus erat, neque tantum, quantum vellet, testamento sibi relictum erat, de se quem debatur, qui id a liberta impetrare potuerat. si vero auctor ei factus non erat, etiam tutius hereditatem morte

with the edict: for when disinherited they in no way bar the patron. 42. Afterwards by the Lex Papia the rights of patrons in regard to wealthy freedmen were increased. For it was provided by that lex that a proportionate share shall be due to the patron out of the goods of a freedman who leaves a patrimony of the value of 100,000 sesterces or more, and has fewer than three children, whether he die with a testament or intestate. When, therefore, the freedman leaves as heir one son or one daughter, a half is due to the patron, just as though he died without any son or daughter: but when he leaves two heirs, male or female, a third part is due: when he leaves three the patron is excluded.

43. As to the goods of freedwomen, the patrons were not injuriously affected under the ancient law. For since these women were under the statutable tutelage of their patrons, they obviously could not make a testament except with the authorization of the patron. Therefore, if he had lent his authorization to the making of a testament, and that amount which he wished for had not been left to him, he had himself to blame, since he could have obtained this from the freedwoman. But if he had not granted her his authority, he took the inheritance
III. 44–46.] Patron’s claims on goods of Freedwoman. 183
eius capiebat; nam neque suum heredem liberta relinquuebat qui
posset patronum a bonis eius vindicandis repellere. (44.) Sed
postea lex Papia cum quattuor liberorum iure libertas tutela
patronorum liberaret, et eo modo inferret, ut iam sine patroni
tutoris auctoritate testari possent, prospexit ut pro numero libe-
rorum quos superstites liberta habuerit virilis pars patrono de-
beatur—ex bonis eius, quae omnia—iuris [2 lin.]
ad patronum pertinet.

45. Quae autem diximus de patrono, eadem intellegemus et
de filio patroni, item de nepote ex filio, et de pronepote ex nepote
filio nato prognato. (46.) Filia vero patroni, item neptis ex
filio, et pronectis ex nepote filio nato prognata, quamvis idem
iuris habant, quod leges xii tabularum patrono datum est, Praetor
tamen vocat tantum masculini sexus patronorum liberos: sed filia,
ut contra tabulas testamenti liberti vel ab intestato contra filium
adoptivum vel uxorem nutumve dimidiat partis bonorum pos-
even more surely on her death: since a freedwoman could not
leave a suus heres to exclude the patron from his claim upon
her goods. 44. But afterwards, when the Lex Papia had
exempted freedwomen from the tutelage of their patrons by
prerogative of four children, and so had empowered them
thenceforth to make a testament without the authorization of
their patron, it provided that a proportionate share should be
due to the patron, determined by the number of children
whom the freedwoman had surviving............... 45. All that we have said regarding a patron we shall
apply also to the son of a patron, to his grandson by a son,
and to his great-grandson sprung from a grandson born from
a son. 46. But although the daughter of a patron, and his
granddaughter by a son, and his great-granddaughter sprung
from a grandson born from a son have the same right which
is given to the patron himself by the law of the Twelve
Tables, yet the Praetor only calls in male descendants of the
patron: but by prerogative of three children the daughter,
according to the Lex Papia, obtains (the privilege) of suing
for possession of half the goods “as against the tablets of the
testament” of a freedman, or on his intestacy in opposition to

1 Ulpian, xxix. 2.
2 1. 194. Ulpian, xxix. 2.
3 Ulpian, xxix. 4.
sessionem petat, trium liberorum iure lege Papia consequitur: aliter hoc ius non habet. (47.) Sed ut ex bonis libertae suae quattuor liberos habentis viriliis pars ei debetur, liberorum quidem iure non est comprehensum, ut quidam putant. sed tamen intestata liberta mortua, verba legis Papiae faciunt, ut ei viriliis pars debeatur. si vero testamento facto mortua sit liberta, tale ius ei datur, quale datum est patronae tribus liberis honoratis, ut proinde bonorum possessionem habeat quam patronus liberique contra tabulas testamenti liberti habent: quamvis parum diligenter ea pars debeatur, ut quidam putant. sed tamen intestata liberta mortua, verba legis Papiae faciunt, ut ei vulgus iure sit. (48.) Ex his apparat extraneos heredes patronorum longe remotum ab omnii eo iure iri, quod vel in intestatorum bonis vel contra tabulas testamenti patrono competit.

49. Patronae olim ante legem Papiam hoc solum ius habebant in bonis libertorum, quod etiam patronis ex lege xii tabulas testamenti habeant: his adopted son or his wife, or his daughter-in-law: in other cases she has not this right. 47. But, as some think, it is not a consequence of this prerogative of children (of the patron's daughter) that a proportionate share should be due to her out of the goods of her freedwoman who has four children. Still, however, if the freedwoman die intestate, the words of the Lex Papia are express that she shall have a proportionate share. But if the freedwoman die leaving a testament, a right is given to the patron's daughter similar to that given to a patroness having the prerogative of three children, viz. that she shall have the possession of the goods, just as the patron and his descendants have, "as against the tablets of the testament:" although this portion of the lex is not very carefully worded. 48. From the foregoing it appears that extraneous heirs of a patron are to be completely debarred from the whole of the right which appertains to the patron himself either in respect of the goods of intestates or "as against the tablets of a testament."

49. Patronesses in olden times, before the Lex Papia was passed, had only that claim upon the goods of freedmen, which was granted to patrons also by the law of the Twelve

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1 Paragraphs 46, 47 are filled in conjecturally by Gneist and others: whether correctly or not seems doubtful: at any rate the style of the Latin is very different from that generally employed by Gains. For the matter contained in these two paragraphs see Ulpian, XXIX. 5.

2 II. 161.
larum datum est. nec enim ut contra tabulas testamenti, in quo praeteritae erant, vel ab intestato contra filium adoptivum vel uxorem nurumve bonorum possessionem partis dimiliae peterent, Praetor similiter ut patrono liberisque eius concessit. (50.) Sed postea lex Papia duobus liberis honoratiae ingenuae patronae, libertinae tribus, eadem fere iura dedit quae ex edicto Praetoris patroni habent, trium vero liberorum iure honoratae ingenuae patronae ea iura dedit quae per eandem legem patrino data sunt: libertinae autem patronae non idem iuris praestitit. (51.) Quod autem ad libertinarum bona pertinet, si quidem intestatae decesserint, nihil novi patronae liberis honoratae lex Papia praestat. itaque si neque ipsa patrona, neque liberta capitum diminita sit, ex lege xii tabularum ad eam henderit pertinet, et excluduntur libertae liberi; quod iuris est etiamsi liberis honoratae non sit patrona: numquam enim, sicut supra diximus, feminae suum heredem habere possunt. si vero vel huius vel illius capitis diminutio interveniat, rursus liberi

Tables. For the Praetor did not grant to them, as he did to a patron and his descendants, the right of suing for possession of half the goods “as against the tablets of a testament” in which they were passed over, or as against an adopted son, or a wife, or a daughter-in-law in a case of intestacy. 50. But afterwards the Lex Papia conferred on a freeborn patroness having two children, or a freedwoman patroness having three, almost the same rights which patrons have by the Praetor’s edict. Whilst to a freeborn patroness having the prerogative of three children it gave the very rights which are given by that same law to a patron, although it did not give the same privilege to a freedwoman patroness. 51. But with respect to the goods of freedwomen, if they die intestate, the Lex Papia gives no new privilege to a patroness having children. If, therefore, neither the patroness herself nor the freedwoman have suffered capitis diminutio, the inheritance belongs to the former by the law of the Twelve Tables, and the children of the freedwoman are excluded: which is the rule even if the patroness have no children: for, as we have said above, women can never have a suus heres. But if a capitis diminutio of either the one or the other have taken place, the children of the freedwoman in their

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1 Ulpian, xxix. 6, 7.  2 III. 42.  3 II. 161.
libertae excludunt patronam. quia legitimo iure capitis diminuti
tione perempto evenit, ut liberi libertae cognationis iure poti-
ores habeantur. (52.) Cum autem testamento facto moritur
liberta, ea quidem patrona quae liberis honorata non est nihil
iuris habet contra libertae testamentum: ei vero quae liberis
honorata sit, hoc ius tribuitur per legem Papiam quod habet ex
edicto patronus contra tabulas liberti.

53. Eadem lex patronae filiae liberis honoratae—patroni iura
dedit; sed in huius persona etiam unius filii filiaeve ius suf-
fit.

54. Hactenus omnia ea iura quasi per indicem tetigisse satis
est: alioquin diligentior interpretatio propriis commentariiis ex-
posita est.

55. Sequitur ut de bonis Latinorum libertinorum dispici-
amus.

56. Quae pars iuris ut manifestior fiat, admonendi sumus,
de quo alio loco diximus, eos qui nunc Latini Iuniani dicuntur

turn exclude the patroness. Because when the statutable
right has been destroyed by a capitis diminutio, the result is
that the children of the freedwoman are considered to have the
stronger claim by right of relationship. 52. But when a freed-
woman dies after making a testament, a patroness who has no
children has no right against her testament: but to one who
has children the same right is granted by the Lex Papia as
that which a patron has by the Praetor's edict against the testa-
ment of a freedman.

53. The same lex grants to the daughter of a patroness
who has children the rights belonging to a patron: but in her
case the prerogative of even one son or daughter is sufficient.

54. It is enough to have touched on all these rights to this
extent, in outline as it were: a more accurate exposition is
elsewhere set forth in a book specially devoted to them1.

55. Our next task is to consider the case of the goods of
freedmen who are Latins.

56. To make this part of the law more intelligible, we must
be reminded of what we said in another place2, that those

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1 Whether he refers to his treatise Ad Edictum Urbanum, or to that
Ad Leges Iuliam et Papiam, or to that De Manumissionibus, is uncer-
tain, as the subject is appropriate to
any of the three.

2 1. 22.
who are now called Junian Latins, were formerly slaves by Quintary title, but through the Praetor's help used to be secured in the semblance of freedom: and so their property used to belong to their patrons by the title of peculium: but that afterwards, in consequence of the Lex Junia, all those whom the Praetor protected as if free, began to be really free, and were called Junian Latins: Latins, for the reason that the lex wished them to be free, just as though they had been free-born Roman citizens, who had been led out from the city of Rome into Latin colonies, and become Latin colonists; Junians, for the reason that they were made free by the Junian Law, though not made Roman citizens. Wherefore, when he who carried the Lex Junia saw that the result of this fiction would be that the goods of deceased Latins would cease to belong to their patrons; because neither would they die as slaves, so that their property could belong to their patrons by the title of peculium, nor could the goods of a Latin freedman belong to the patrons by the title of manumission; he thought it necessary,

1 See App. (A).
2 The legitima hereditas of patrons, being derived from the law of the Twelve Tables, which did not recognize any title but that ex jure Quiritium, could not apply to Latins who were manumitted by owners having only the title in bonis. Neither could it apply to slaves manumitted irregularly and so made Latins, for the Twelve Tables again recognized no manumission but one in due form of law, i.e. by vindicta, census or testament. If the Lex Aelia Sitia had not been passed, there might perhaps have been a legitima hereditas of the goods of freedmen manumitted when under thirty years of age, but as that
timavit, ne beneficium istis datum in iniuriam patronorum converteretur, cavere, ut bona horum libertorum proinde ad manumissores pertinent, ac si lex lata non esset. itaque iure quodammodo peculii bona Latinorum ad manumissores corum pertinent. (57.) Unde eventit, ut multum differat ea iura quae in bonis Latinorum ex lege Junia constituta sunt, ab his quae in hereditate civium Romanorum libertorum observantur. (58.) Nam civis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinent: ad filiam autem patroni nepotesque ex filio et pronepotes ex nepote filio nato prognatos omnimodo pertinent, etiamsi a parente fuerint exheredati: Latinorum autem bona tamquam peculium servorum etiam ad extraneos heredes pertinent, et ad liberos manumissorius exheredatos non pertinent. (59.) Item civis Romani liberti hereditas ad duos pluresve patronos aequaliter pertinent, licet dispar in eo servorum dominium habuerint: bona vero Latinorum pro ea parte perti-

in order to prevent the benefit bestowed on these persons from proving an injury to their patrons, to insert a proviso, that the goods of such freedmen should belong to their manumittors in like manner as if the law had not been passed. Therefore, the goods of Latins belong to their manumittor, by a title something like that of peculium. 57. The result of this is that the rules applied to the goods of Latins by the Lex Junia are very different from those which are observed in reference to the inheritance of freedmen who are Roman citizens. 58. For the inheritance of a freedman who is a Roman citizen in no case belongs to the extraneous heirs of his patron: but belongs in all cases to the son of the patron, to his grandsons by a son, and to his great-grandsons sprung from a grandson born from a son, even though they have been disinherited by their ascendant: whilst the goods of Latins belong, like the peculia of slaves, even to the extraneous heirs, and do not belong to the disinherited descendants of the manumittor. 59. Likewise, the inheritance of a freedman who is a Roman citizen belongs equally to two or more patrons, although they had unequal shares of property in him as a slave: but the goods of Latins belong to them accord-

1 III. 45, 48.
Inheritances of Latin and Citizen Freedmen. 189

In hereditate civis Romani liberti patronus alterius patroni filium exclusit, et filius patroni alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patronum et ad alterius patroni heredem simul pertinent pro qua parte ad ipsum manumissorem pertinerent. (60.) Item si unius patroni tres forte liberi sunt, et alterius unus, hereditas civis Romani liberti in capita dividitur, id est tres fratres tres portiones ferunt et unus quartam: bona vero Latinorum pro ea parte ad successores pertinent pro qua parte ad ipsum manumissorem pertinerent. (61.) Item si alter ex his patronis suam partem in hereditatem civis Romani liberti spernat, vel ante moriatur quam cernat, tota hereditas ad alterum pertinet: bona autem Latini pro parte decedentis patroni caduca fiunt et ad populum pertinent.

63. Postea Lupo et Largo Consulibus senatus censuit, ut

1 Ulpian, xxvii. 2, 3.
2 Ibid. xxvii. 4.
3 II. 164.
4 II. 206.
5 A.D. 41.
bona Latinorum primum ad eum pertinerent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, uti quique proximus esset; tunc antiquo iure ad heredes eorum qui liberassent pertinerent. (64.) Quo senatusconsulto quidam id actum esse putant, ut in bonis Latinorum eodem iure utamur, quo utimur in hereditate civium Romanorum libertinorum; idemque maxime Pegaso placuit. quae sententia aperte falsa est. nam civis Romani liberti hereditas numquam ad extraneos patroni heredes pertinet: bona autem Latinorum etiam ex hoc ipso senatusconsulto non obstantibus liberis manumissoris etiam ad extraneos heredes pertinent. item in hereditate civis Roman liberti liberis manumissoris nulla exheredatio nocet: in bonis Latinorum autem novere nominatim factam exheredationem ipso senatusconsulto significatur. Verius est ergo hoc solum eo senatusconsulto actum esse, ut manumissoris liberi qui nominatim exheredati non sint praferantur extraneis heredibus. (65.) Itaque et emancipatus filius patroni praeteritus, quamvis senate decreed that the goods of Latins should devolve; firstly, on him who freed them; secondly, on the descendants of such persons (manumittors), not being expressly disinherited, according to their proximity: and then, according to the ancient law, should belong to the heirs of those who had freed them. 64. The result of which senatusconsultum some think to be that we apply the same rules to the goods of Latins which we apply to the inheritance of freedmen who are Roman citizens: and this was most strenuously maintained by Pegasus. But his opinion is plainly false. For the inheritance of a freedman who is a Roman citizen never belongs to the extraneous heirs of his patron: whilst the goods of Latins, even by this senatus-consultum, belong to extraneous heirs as well, if no children of the manumittor prove a bar. Likewise, in regard to the inheritance of a freedman who is a Roman citizen no disherison is of prejudice to the children of the manumittor, whilst in regard to the goods of Latins it is stated in the senatusconsultum itself that a disherison expressly made does prejudice. It is more correct, therefore, to say that the only effect of this senatusconsultum is that the children of a manumittor who are not expressly disinherited are preferred to the extraneous heirs. 65. Ac-

1 Sc. scripti heredes.
contras tabulas testamenti parentis sui bonorum possessionem non petierit, tamen extraneis heredibus in bonis Latinorum potior habetur. (66.) Item filia ceterique quos exheredes licet iure civili facere inter ceteros, quamvis id sufficiat, ut ab omni hereditate patris sui summuneantur, tamen in bonis Latinorum, nisi nominatim a parente fuerint exheredati, potiores erunt extraneis heredibus. (67.) Item ad liberos qui ab hereditate parentis se abstinuerunt, bona Latinorum pertinent, quamvis alieni habeantur ab paterna hereditate, quia ab hereditate exhere­dati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt. (68.) Ex his omnibus satis illud appa­ret, si is qui Latinum fecerit,—[desunt 25 lin.] (69.) — — putant ad eos pertinere, quia nullo interveniente extraneo herede senatusconsulto locus non est. (70.) Sed si cum liberis cordingly, even the emancipated son of a patron, when passed over, is considered to have a better claim to the goods of Latins than the extraneous heirs have, notwithstanding that he may not have sued for the possession of the goods of his parent “as against the tablets of the testament.” 66. Likewise, a daughter and all others whom it is allowable by the civil law to disinherit in a general clause, although this proceeding is sufficient to debar them from all the inheritance of their ascen­dant, yet have a claim to the goods of Latins superior to that of extraneous heirs, unless they have been expressly disinherited by their ascendant. 67. Likewise, the goods of Latins belong to descendants who have declined to take up the inheritance of their ascendant, although they are esteemed aliens from the an­cestral inheritance; because they can by no means be said to be disinherited from the inheritance, any more than those can who are passed over in silence in a testament. 68. From all that has been said it is quite clear that if he who has made a man a Latin...... 69. ......they think, belongs to them, because, as no extraneous heir is concerned, the senatusconsultum does not apply¹. 70. But if a patron have left a stranger heir con-

¹ Göschens imagines that if the lacuna were filled up, the sense would be: “The goods of a Latin are di­vided amongst the children of the manumitter in proportion to their shares in the inheritance, provided these children be the sole heirs and no stranger be conjoined with them.” The case of a stranger being con­joined with them is considered in the next paragraph.
suis etiam extraneum heredem reliquerit, Caelius Sabinus ait tota bona pro virilibus partibus ad liberos defuncti pertinere, quia cum extraneus heres intervenit, non habet lex Iunia locum, sed senatusconsul tum. Iavolenus autem ait tantum eam partem ex senatusconsulto liberos patro ni pro virilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas vero partes pro hereditariis partibus ad eos pertinere. (71.) Item quaeritur, an hoc senatusconsultum ad eos patroni liberos pertineat qui ex filia nepet eva procreantur, id est ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. item an ad maternos Latinos hoc senatusconsultum pertineat, quaeritur, id est

jointly with his descendants, Caelius Sabinus says that all the goods (of the Latin) belong to the children in equal shares, because, when an extraneous heir is introduced, the Lex Junia does not apply, but the senatusconsultum does. Javolenus, on the other hand, says that the children of the patron will only take that portion in equal shares according to the senatusconsultum, which the extraneous heirs would have had by the Lex Junia before the senatusconsultum; but that the other parts belong to them in the ratio of their shares in the inheritance. 71. Likewise, it is a disputed point whether this senatusconsultum applies to descendants of a patron through a daughter or granddaughter, i.e. whether my grandson by my daughter has a claim to the goods of my Latin prior to that of my extraneous heir. Likewise, it is disputed whether this senatusconsultum applies to Latins belonging to a mother, i.e. whether the son of a patroness has a claim to the goods of

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1 Sc. the S. C. of Lupus and Largus. As no mention of an equal division being enjoined by the S. C. is to be found in the portion of the text of Gaius preserved to us, it must have occurred in the fragmentary paragraphs 68 and 69. The S. C. took away the goods of the Latin from the extraneous heirs, in favour of children not expressly disinherited. A clause therefore would be needed in the S. C. to say how these should be divided, whether according to the portions in which the children had been appointed heirs, (if they were appointed,) or equally. The text tells us the S. C. declared for equality of division. TheLex Junia, however, having laid down the opposite rule for the division amongst extraneous heirs, the difficulty of § 70 arose with regard to the forfeitures when extraneous heirs and sui heredes were appointed together.
III. 72.] *Descendants of a Patroness have no claim.* 193

ut in bonis Latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. sed huius sententiam plerique inprobant, quia senatus de his liberis patronarum nihil sentiat, qui aliam familiarium sequentur. idque ex eo adparet, quod nominatim exheredatos summovet: nam videtur de his sentire qui exheredari a parente solent, si heredes non instituantur; neque autem matri filium filiamve, neque avo materno nepotem neptemve, si eum eamve heredem non instituat, exheredare necesse est, sive de iure civili quaramus, sive de edicto Praetoris quo praeteritis liberis contra tabulas testamenti bonorum possititum.

72. Aliquando tamen civis Romanus libertus tamquam Latinus moritur, veluti si Latinus salvo iure patroni ab Imperatore ius Quiritium consecutus fuerit: nam ita divus Traianus constituit, si Latinus invito vel ignorantem patrono ius Quiritium ab Imperatore consecutus sit. quibus casibus dum vivit iste liber-

a Latin belonging to his mother superior to that of the extraneous heir of his mother. Cassius thought that the *senatus consultum* was applicable in either case, but his opinion is generally disapproved of, because the senate would not have these descendants of patronesses in their thoughts, inasmuch as they belong to another family. This appears also from the fact, that they debar those disinherited expressly: for they seem to have in view those who are usually disinherited by an ascendant, supposing they be not instituted heirs; whereas there is no necessity either for a mother to disinherit her son or daughter, or for a maternal grandfather to disinherit his grandson or granddaughter, if they do not appoint them heirs; whether we look at the rules of the civil law, or at the edict of the Praetor, in which possession of goods "as against the tablets of the testament" is promised to children who have been passed over.

72. Sometimes, however, a freedman who is a Roman citizen dies as a Latin; for example, if a Latin have obtained from the Emperor the Quiritary franchise with a reservation of the rights of his patron: for the late Emperor Trajan made a constitution to this effect, to meet the case of a Latin obtaining the Quiritary franchise from the Emperor against the will or without the knowledge of his patron. In such instances, the freedman, whilst he lives, is on the same footing with other
Roman citizens, and begets legitimate children, but he dies as a Latin, and his children cannot be heirs to him: and he has the right of making a testament only thus far, that he may institute his patron heir, and substitute another for him in case he decline to be heir. 73. Since then the effect of this constitution seemed to be that such men could never die as Roman citizens, although they had afterwards availed themselves of those means whereby, either according to the Lex Aelia Sentia\(^1\) or the senatusconsultum\(^2\), they could become Roman citizens; the late Emperor Hadrian, moved by the want of equity in the matter, caused a senatusconsultum to be passed, that those who had obtained the Quiritty franchise without the knowledge or against the will of their patron, if they afterwards availed themselves of the means whereby, if they had remained Latins, they would have obtained Roman citizenship according to the Lex Aelia Sentia or the senatusconsultum, should be regarded in the same light as if they had attained to Roman citizenship according to the Lex Aelia Sentia or the senatusconsultum.

74. The goods of those whom the Lex Aelia Sentia puts

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\(^1\) I. 29.

\(^2\) Sc. the S. C. of Lupus and Largus. See §§ 69, 70.
facit, bona modo quasi civium Romanorum libertorum, modo quasi Latinorum ad patronos pertinent. (75.) nam eorum bona qui, si in aliquo vitio non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patronis eadem lege tribuuntur. non tamen hi habent etiam testamenti factionem; nam id plerisque placuit, nec inmerito: nam incredibile videbatur pessimae condicionis hominibus voluisse legis latorem testamenti faciendi ius concedere. (76.) Eorum vero bona qui, si non in aliquo vitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latini decessissent. nec me praeterit non satis in ea re legis latorem voluntatem suam expressisse.

77. Videamus autem et de ea successione quae nobis ex emptione bonorum competit. (78.) Bona autem veneunt aut vivorum aut mortuorum. vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur; item eorum into the category of dediticii\(^1\) belong to their patrons; sometimes like those of freedmen who are Roman citizens, sometimes like those of Latins. 75. For the goods of those who on their manumission would have been Roman citizens, if they had been under no taint, are by this law assigned to the patrons, like those of freedmen who are Roman citizens; but such persons have not at the same time testamenti factione\(^2\): for most lawyers are of this opinion, and rightly: since it seemed incredible that the author of the law should have intended to grant the right of making a testament to men of the lowest status. 76. But the goods of those who on their manumission would have been Latins, if they had been under no taint, are assigned to the patrons, exactly as though the freedmen had died Latins. I am not, however, unaware that on this point the author of the law has not clearly expressed his intention in words.

77. Now let us consider that succession which belongs to us through the purchase of an insolvent's goods (emptio bonorum). 78. The goods which are sold may belong either to living or dead persons: living persons, for instance, when men conceal themselves with a fraudulent intent, or are not defended into its highest sense. See I. 25, and note n. 114.
qui ex lege Iulia bonis cedunt; item iudiciorum post tempus, quod eis partim lege xii tabularum, partim edicto Praetoris ad expediendum pecuniam tribuitur. mortuorum bona veneunt velut eorum, quibus certum est neque heredes neque bonorum possessores neque ullum alium iustum succurrentem existere. (79.) Si quidem vivi bona veneant, iubet in their absence; likewise, when men make a voluntary assignment in accordance with the Lex Julia; likewise, the good, of judgment-debtors, after the expiration of the time which is granted them, in some cases by a law of the Twelve Tables, in others by the Praetor's edict, for the purpose of raising the money. The goods of dead persons are also sold; for example, those of men to whom it is certain that there will be neither heirs, bonorum possessores, nor any other lawful successor. 79.

1 See Mackeldy, p. 456, § 2. Cessio honorum was a voluntary delivery of his goods by an insolvent, which saved him from the personal penalties of the old law. These penalties were as follows: (1) On failure to meet an engagement entered into by nexum (i.e. by provisional mancipation which a man made of himself and his estate as security against non-payment) the creditor claimed the person and property of the debtor, and these were at once assigned (addictebantur) to him: (2) On failure to meet engagements made in any other way, a judgment had first to be obtained and then, if after thirty days' delay payment were not made, the addicte followed, as in the first case. An addictus was at once carried off and imprisoned by his creditor, but a space of 60 days was still allowed during which he might be redeemed by payment of the debt by any friend who chose to come forward; and to afford facilities for such redemption a proclamation of the amount and circumstances of the debt was made three times, on the nundinæ, within the 60 days. If no payment were made within this time, the addicte became final; the debtor's civitas was lost, and the creditors might even kill him or sell him beyond the Tiber. If there were several creditors, the law of the Twelve Tables, quoted by A. Gellius, was applicable; "Tertis nun-dinis partes secanto: si plus minusve seuerunt se (i.e. sine) fraude esto." A. Gell. xx. 1. 49.

Savigny holds that addicte was originally a remedy only applicable when there was a failure to repay money lent (certa pecunia creditis); and that the patricians to increase their power over their debtors invented the transaction called nexum, whereby all obligations could be turned into the form of an acknowledgment of money lent, and whereby also the interest could be made a subject of addicte as well as the principal: for under the old law the remedy against the debtor's person was only in respect of the principal.

Niebuhr is of opinion that addicte of the debtor's person was done away with by the Lex Poetilia A. U. C. 474; see Niebuhr's Hist of Rome, 111. 155, translated by Smith and Schmitt, 1851.

1 IV. 21, see XII. Tab., Tab. III. l. 3. 2 III. 32.
III. 80.]

*Emptio Bonorum.*

ea Praetor per dies continuos xxx possideri et proscribi; si vero mortui, post dies xv postea iubet convenire creditores, et ex eo numero magistriunm creari, id est eum per quem bona veneant. itaque si vivi bona veneant, in diebus pluribus veniri iubet, si mortui, in diebus paucioribus; nam vivi bona xxx, mortui vero xx emptori addici iubet. quare autem tardius viventium bonorum venditio compleri iubetur, illa ratio est, quia de vivis curandum erat, ne facile bonorum venditiones paterentur.

80. Neque autem bonorum possessorum neque bonorum emptorum res pleno iure sunt, sed in bonis efficiuntur; ex iure Quiritium autem ita demum adquiruntur, si usucepturum interdum quidem bonorum emptorum idem plane ius quod est

If then the goods of a living person be sold, the Praetor orders them to be taken possession of (by the creditors) and to be advertised for sale for thirty successive days: but if those of a dead person, he orders that after fifteen days the creditors shall meet, and out of their number a magister be appointed, i.e. one by whom the goods are to be sold. Also, if the goods sold be those of a living person, he orders them to be sold (for delivery) after a longer period, if those of a dead person (for delivery) after a shorter period; for he commands that the goods of a living person shall be assigned over to the purchaser after thirty days, but those of a dead person after twenty.1 And the reason why the sale of the goods of living persons is ordered to become binding after a longer interval is this, that care ought to be taken when living persons are concerned that they have not to submit to sales of their goods without good reason.

80. Now neither bonorum possessores2 nor the purchasers of an insolvent's goods have the property by full title, but hold it by Bonitary title alone; and it is only on completion of usucaption3 that it becomes theirs by Quiritary title: although

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1 The number of the days in this passage is given according to Gneist's text, but it is as well to know that the reading is disputed by Hollweg, Lachmann and Huschke, as Gneist himself states in a note.
2 Bonorum possessores = those whom the Praetor recognizes as successors, although they have not the hereditas by the Civil Law. Conf. IV. 34; III. 31. Gaius at this point digresses for an instant into the law of intestate or testamentary succession.
3 II. 47.
mancipum esse intellegitur, si per eos scilicet bonorum empto-
ribus addicitur qui publice sub hasta vendunt [deest 1 lin.].
(81.) Item quae debita sunt ei cuius fuerunt bona, aut ipse
debuit, neque bonorum possessorès neque bonorum emptores
ipso iure debent aut iipsis debentur: sed de omnibus rebus
utilibus actionibus et conveniuntur et experimentur, quas inferius
proponemus.

82. Sunt autem etiam alterius generis successiones, quae
neque lege xii tabularum neque Praetoris edicto, sed eo
iure quod consensu receptum est introductae sunt. (83.) Ecce
enim cum paterfamilias se in adoptionem dedit, mulierem in
manum convenit, omnes eius res incorporales et corporales
quaque ei debita sunt, patri adoptivo coemptionatorive ad-
sometimes the title of the purchasers of an insolvent's goods is
regarded as being nearly equivalent to that of *mancipes*¹, viz.
in the case where the assignment to the purchasers of the in-
solvent's goods is made by those who sell by auction in the
name of the state². 81. Likewise, debts owing to him to
whom the goods belonged, or debts which he owed, are not
by the letter of the law due either to the *bonorum possessores*
or the purchasers in the case of insolvency, or due from them: but
on all matters such persons are sued and sue by *actiones utiles*³,
of which we shall give an account hereafter.

82. There are besides successions of another kind, which
have been introduced into practice neither by any law of
the Twelve Tables, nor by the Praetor’s edict, but by those
rules which are received by general consent. 83. To take an
instance, when a person *sui juris* has given himself in adop-
tion, or a woman has passed under *manus*⁴, all their pro-
perty, incorporeal and corporeal, and all that is due to them, is
acquired by the adopting father or *coemptionator*, except those

¹ A *mancipes* according to Festus and Asconius Pedianus was the re-
presentative of a body of *publicani* in partnership; and where taxes
were bought or hired by them from the state, this person attended the
auction and made the bargain for the body (*societas*) by holding up his
hand; hence the name. On the cen-
sor at the sale recognizing a particu-
lar *mancipes* as a purchaser, the legal
consequence was that the full *domi-
nium* was transferred to him for the
body, whether the subject of the sale
were a *res mancips* or a *res nec man-
cipi*.
² This refers to the sale of the
confiscated property of a condemned
criminal.
³ IV. 34, 35. See note on 11. 78.
⁴ I. 108 et seqq.
III. 84. [Liability of the adopter for the adopted.]

84. But, on the other hand, a debt owing by a man who has given himself in adoption, or by a woman who has come under manus, attaches to the coemptionator or the adopting father himself, if it be a debt inherited, and he is liable for it by direct process, since such adopting father or coemptionator becomes heir personally (suo nomine); and he who has given himself to be adopted is not directly liable, nor is she who has come under manus, because they cease to be heirs by the civil law. But with regard to a debt which such persons previously owed on their own account, although neither the adopting father nor the coemptionator is liable, nor does the man who gave himself to be adopted nor the woman who came under manus remain bound, being freed by the capitis diminutio, yet an utilis actio is granted against them, the capitis diminutio being treated as non-existent: and if they be not defended against this action, the Praetor permits the creditors to sell all

1 See note on L. 26.
2 III. 181.
iuri non subiecissent, universa vendere creditoribus Praetor
permitit.

85. Item si is ad quem ab intestato legitimo iure pertinent hereditas eam hereditatem, antequam cernat aut pro herede gerat, alli in iure cedat, pleno iure heres fit is cui eam cesserit, perinde ac si ipse per legem ad hereditatem vocaretur. quodsi posteaquam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur: sed res corporales transferit proinde ac si singulas in iure cessisset; debita vero peressunt, eoque modo debitores hereditarii lucrum faciunt. (86.) Idem iuris est, si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem, ante aditam vero hereditatem cedendo nihil agit. (87.) Suus autem et necessarius heres an aliquid agant in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant: diversae scholae auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim inter-

the goods which would have been theirs if they had not rendered themselves subject to another's authority.

85. Likewise, if a man to whom an intestate inheritance belongs by statute law, transfer it by cession in court to another before exercising his creation or acting as heir, he to whom the cession is made becomes heir in full title, just as if he had himself been called to the inheritance by law. But if he make the cession after he has taken up the inheritance, he still remains heir, and will therefore be liable personally to the creditors: but he will convey the corporeal property just as if he had made cession of each article separately: the debts, however, are at an end, and thus the debtors to the inheritance are profited. 86. The rule is the same if the heir appointed in a testament make cession after taking up the inheritance; although by making cession previously to entering on the inheritance he effects nothing. 87. Whether a suus heres and a necessarius heres can effect anything by a cession in court, is disputed. Our authorities think that their act is void: the authorities of the other school think that they effect the same as other heirs who have entered upon an inheritance, for that

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1 IV. 18, 80.
2 II. 24.
3 II. 104.
4 II. 35.
5 II. 36.
6 II. 37.
est, utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur. [lin. vacua.]

88. *Nunc transeamus ad obligationes. quaerum summa divisio in duas species deductur: omnis enim obligatio vel ex contractu nascitur vel ex delicto.*

89. Et prius videamus de his quae ex contractu nascentur. harum quattuor genera sunt: aut enim re contrahit obligatio, aut verbis, aut litteris, aut consensu.

90. Re contrahit obligatio velut mutui datione. *quaes proprie in his fere rebus contingit quae [res] pondere, numero, mensura constant: qualis est pecunia numerata, vinum, oleum, frumentum, aes, argentinum, aurum. quas res aut numerando aut*

It makes no difference whether a man become heir by creation or by acting as heir, or be compelled to (enter upon) the inheritance by necessity of law\(^1\).

88. Now let us pass on to obligations\(^*\); the main division whereof is into two kinds: for every obligation arises either from contract or from delict.

89. First, then, let us consider as to those which arise from contract\(^*\). Of these there are four kinds, for the obligation is contracted either *re*, *verbis*, *litteris*, or *consensu* (by the thing itself, by words, by writing, or by consent).

90. An obligation is contracted *re*, for example, in the case of a loan to be returned in kind. Strictly speaking, this deals chiefly with those things which are matters of weight, number and measure, such as coin, wine, oil, corn, brass, silver, gold. And these we give by counting, measuring or weighing them,

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\(^{1}\) To understand this passage fully we must recollect that a *suus heres*, as well as a *necessarius*, cannot free himself from the inheritance, in name at least. See II. 157.

\(^{2}\) Justinian says: "Obligatio est juris vinculum quo necessitate adstringitur alicujus solvendae rei secundum nostrae civitatis jura." The latter words of the definition indicate that no obligation was recognized by the law unless it could be enforced by action.

\(^{3}\) Gaius does not define a contract in his Commentaries. Three elements go to its constitution, an offer from the one party, an acceptance by the other, an obligation imposed by the law compelling the parties to abide by their offer and acceptance. When the law does not impose such obligation, the agreement is only a *pactum*, and cannot found an action, although it may be used as a defence. The Roman law regarded those agreements as contracts which were solemnized in the four ways named in the text, *re*, *verbis*, *litteris*, or *consensu*. For a list of these contracts see Appendix (1).
with the intent that they shall become the property of the recipients, and that at some future time not the same but others of like nature shall be restored to us: whence also the transaction is called *mutuum*, because what is so given to you by me becomes yours from being mine. \textit{91.} He also who receives a payment not due to him from one who makes the payment by mistake is bound \textit{re}. For the condiction\textsuperscript{1} worded thus: "should it appear that he ought to give" can be brought against him, just as though he had received a loan to be returned in kind\textsuperscript{2}. Wherefore, some hold that a pupil or a woman to whom that which is not due has been given by mistake without the authorization of the tutor is not liable to the condition, any more than he or she would be in the case of a loan to be returned in kind having been given. But this spec-

\textsuperscript{1} IV. 4. 5.

\textsuperscript{2} This is not a case of contract at all, but of what is called quasi-contract. Justinian (III. 13) divides obligations into four classes, the classes additional to those of Gaius being *quasi ex contractu*, *quasi ex delicto*. These quasi-contracts are as Austin clearly explains—"Acts done by one person to his own inconvenience for the advantage of another, but without the authority of the other, and consequently without any promise on the part of the other to indemnify him or reward him for his trouble. An obligation therefore arises such as would have arisen had the one party contracted to do the act and the other to indemnify or reward." A quasi-delict, on the other hand, is "an incident by which damage is done to the obligee (though without the negligence or intention of the obligor), and for which damage the obligor is bound to make satisfaction. It is not a delict, because intention or negligence is of the essence of a delict." The truth is that in both cases an incident begets an obligation, and until the breach of that obligation by refusal to indemnify or make satisfaction there is neither contract nor delict, although after such refusal there is no doubt a delict. So Gaius himself says elsewhere: "Obligations aut ex contractu nascuntur, aut ex maleficio, aut proprion quodam jure ex varis causarum figuris." D. 44. 7. 1. pr.
haec species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere.


11.  Verbi! Obligations or Stipulations.

1  III. 115.
Stipulations.

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[III. 94—96.

civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit; quamvis dicatur a Graeca voce figurata esse. (94.) Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur, quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur. (95.) Illud dubitari potest, si quis [desunt 24 lin.].

96.—obligentur: utique cum quaeritur de iure Romanorum. nam aput peregrinos quid iuris sit, singularum civitatum iura requirentes alid in alia lege reperimus.

given? I do engage: is so peculiar to Roman citizens that it cannot properly be translated into Greek; although it is said to be modelled upon a Greek word. 94. Hence it is said that in one case a foreigner also can be bound by this word, for instance, if our Emperor interrogate the prince of some foreign people regarding peace: Do you engage that there shall be peace? or if he be himself interrogated in like manner. But this is laid down with too much refinement: because if anything be done against the agreement, an action is not brought on the stipulation, but the matter is redressed according to the rules of war. 95. It may be doubted if any one. 96. ........ are bound: at any rate when the question is as to Roman law. For as to the law amongst foreigners, if we inquire into the rules of individual states, we shall find one thing in one system of legislation, another in another.

1 Sc. from παραλή.  
2 Twenty-four lines are lost here; but by comparison with the Epitome we may conjecture what was the substance of the missing portion. First the question was discussed whether the two contracting parties might speak in different languages, which probably was settled in the affirmative. Then two cases were alluded to in which a verbal contract might be unilateral in form, i.e. in which no question need precede the promise. These were (1) dotis dictio or a promise of dower made by the wife, the intended wife, or the father or debtor of the intended wife, to the husband or intended husband, (2) a promise made by a freedman to his patron and confirmed by oath. III. 83. Ulp. vi. 1. 3. We say “unilateral in form”: for it is obvious that stipulations generally were bilateral in form, although they were invariably unilateral in essence, the whole burden lying on one party, the whole benefit accruing to the other.  
3 See III. 130, note.
97. Si id quod dari stipulamur tale sit, ut dari non possit, inutilis est stipulatio: velut si quos hominem liberum quem servum esse credebatur, aut mortuum quem vivum esse credebatur, aut locum sacrum vel religiosum quem putabat esse humani iuris, sibi dari stipuletur. (97 a.) Item si quis rem quae in rerum natura non est aut esse non potest, velut hippocentaurn um stipuletur, aequo inutilis est stipulatio.

98. Item si quis sub ea condicione stipuletur quae existere non potest, veluti si digito coelum tetigerit, inutilis est stipulatio. sed legatum sub impossibili condicione relictum nostri praecptores proinde valere putant, ac si ea condicio adieta non esset: diversae scolae auctores non minus legatum inutille existimant, quam stipulationem, et sane vix idonea diversitatis ratio reddi potest. (99.) Praeterea inutilis est stipulatio, si quis

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1 Gaius uses the verb stipular here for the first time, without having defined it: the stipulator is the interrogator in an obligation verbis: stipulator therefore signifies to ask for something in solemn form.

As to the derivation of the word stipulatio there are many theories: Paulus connects it with stipulus, an old adjective signifying firm (S.R.V. 7. 1): Festus and Varro with stips, a coin (Varro, de Ling. Lat. v. 182): Isidorus with stipula, a straw, because, he says, in olden times the contracting parties used to break a straw in two and each retain a portion, so that by reuniting the broken ends "sponstiones suas agnoscerebant." (Orig. Verb. 26, § 30.)

2 II. 2-4.
invalid stipulations.

ignorans rem suam esse cam sibi dari stipuletur; nam id quod alicuius est, id ei dari non potest.


void, if a man in ignorance that a thing is his own stipulate for it to be given to him: for that which is a man's cannot be given to him.

100. Lastly, a stipulation of the following kind is void: if a man stipulate thus for a thing to be given: Do you engage that it shall be given after my death? or thus: Do you engage that it shall be given after your death? But it is valid if a man thus stipulate for it to be given: Do you engage that it shall be given when I am dying? or thus: Do you engage that it shall be given when you are dying? i.e. that the obligation shall be referred to the last instant of the life of the stipulator or promiser. For it seems anomalous that the obligation should begin in the person of the heir. Again, we cannot stipulate thus: Do you engage that it shall be given the day before I die, or the day before you die? Because which is the day before a person dies cannot be ascertained unless death has ensued: and again, when death has ensued, the stipulation is thrown into the past, and is in a manner of this kind: Do you engage that it shall be given to my heir? which is undoubtedly invalid. 101. Whatever we

1 Justinian abolished all these distinctions, and made valid obligations for performance after the death of either party. Inst. iii. 19. 13.
102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non responderit: velut si sestertia x a te dari stipuler, et tu nummum sestertium v milia promittas; aut si ego purae stipuler, tu sub condicione promittas.

103. Praeterea inutilis est stipulatio, si ei dari stipulatur cuius iuri subiecti non sumus: unde illud quaesitum est, si quis sibi et ei cuius iuri subjectus non est dari stipuletur, in quantum valeat stipulatio. nostri praecipitores putant in universum valere, et proinde ei soli qui stipulatus sit solidum deberi, atque si extranei nomen non adieisset. sed diversae scholae auctores dimidium ei deberi existimant, pro aliena—[desunt 4 lin.].

104. Item inutilis est stipulatio, si ab eo stipuler qui iuri meo subiectus est, vel si is a me stipuletur. sed de servis et de his qui in mancipio sunt illud praeterea ius observatur, ut non solum ipsi cuius in potestate mancipio sunt obligari non possint, sed ne aliqui quidem ulli.

have said about death we shall also understand to be said about capitis diminutio¹.

102. Further, a stipulation is void if a man do not reply to the question he is asked; for instance, if I should stipulate for ten sestertia to be given by you, and you should promise five sestertia: or if I should stipulate unconditionally, and you promise under a condition.

103. Further, a stipulation is void if we stipulate for a thing to be given to a man to whose authority we are not subject: hence this question arises, if a man stipulate for a thing to be given to himself and one to whose authority he is not subject, how far is the stipulation valid? Our authorities think it is valid to the full amount, and that the whole is due to him alone who stipulated, just as though he had not added the name of the stranger. But the authorities of the other school think half is due to him²...............

104. Likewise, a stipulation is void if I stipulate for payment from one who is subject to my authority, or if he stipulate for payment from me. But there is this rule further observed in regard to slaves and those who are under mancipium, that not only can they not enter into an obligation with

¹ I. 159 et seqq.
² Justinian adopted the latter view. Inst. III. 19. 4.
105. Mutum neque stipulari neque promittere posse palam est. Quod et in surdo receptum est: quia et is qui stipulatur verba promittentis, et qui promittit, verba stipulantis exaudire debet. (106.) Furiosus nullum negotium gerere potest, quia non intellegit quid agat. (107.) Pupillus omne negotium recte gerit: ita tamen ut tutor, sicubi tutoris auctoritas necessaria sit, adhibeat, velut si ipse obligetur: nam alium sibi obligare etiam sine tutoris auctoritate potest. (108.) Idem iuris est in feminis quae in tutela sunt. (109.) Sed quod diximus de pupillis, utique de eo verum est qui iam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a furioso differt, quia huius aetatis pupilli null intellectum habent: sed in his pupilis per utilitatem benignior iuris interpretatio facta est.

110. Possimus tamen ad id quod stipulamur alium adhibere etiam sine tutoris auctoritate, provided that his tutor be employed in cases where the tutor's authorization is necessary, for instance, when the pupil binds himself: for he can bind another to himself even without the authorization of the tutor. The law is the same with regard to women who are under tutelage. But what we have said regarding pupils is only true about one who has already some understanding: for an infant and one almost an infant do not differ much from a madman, because pupils of this age have no understanding: but for convenience a somewhat lenient construction of the law has been made in the case of such pupils.

We can, however, make another person a party to...
bere qui idem stipulatur, quem vulgo adstipulatorem vocamus. (III.) Sed huic proinde actio competit, proindeque ei recte solvitur ac nobis. sed quidquid consecutus erit, mandati iudicio nobis restituere cogetur. (II12.) Ceterum potest etiam aliis verbis uti adstipulator, quam quibus nos usi sumus. itaque si verbi gratia ego ita stipulatus sim: DARI SPONES? ille sic adstipulari potest: IDEM FIDE TUA PROMITIS? vel IDEM FIDE ITUBES? vel contra. (II13.) Iem minus adstipulari potest, plus non potest. itaque si ego sestertia x stipulatus sum, ille sestertia v stipulari potest; contra vero plus non potest. item si ego pure stipulatus sim, ille sub condicione stipulari potest; contra vero non potest. non solum autem in quantitate, sed that for which we stipulate, so as to stipulate for the same, and such an one we commonly call an adstipulator. III. An action then will equally lie for him and payment can as properly be made to him as to us, but whatever he has obtained he will be compelled to deliver over to us by an action of mandate1. II12. But the adstipulator may even use other words than those which we use. Therefore if, for example, I have stipulated thus: Do you engage that it shall be given? He may adstipulate thus: Do you become fidepromissor for the same? or: Do you become fidejussor for the same? or vice versâ. II13. Likewise, he can adstipulate for less, but not for more. Therefore if I have stipulated for ten sestertia, he can (ad)stipulate for five: but he cannot do the contrary. Likewise, if I have stipulated unconditionally, he can (ad)stipulate under a condition: but he cannot do the contrary. And the more and the less are considered with reference not

Gneist. In § 103 it is stated that no man can stipulate for the benefit of another, to which statement the doctrine of adstipulators is at first sight opposed.

The subject here discussed, viz. "De adstipulatoribus," is entirely omitted from the Institutes of Justinian; perhaps because the well-established principle of the older law, that a right of action could not originate in the heir of the stipulator (which was one of the chief reasons for adstipulators being employed at all) was destroyed by imperial enactment. See Cod. 4. 11, where the rule, "Ab hereditibus non incipere actiones nec contra heredes," is especially condemned.

1 III. 117, 155 et seqq.

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etiam in tempore minus et plus intellegitur: plus est enim statim aliquid dare, minus est post tempus. (114.) In hoc autem iure quaedam singulare iure observantur. nam adstipulatoris heres non habet actionem. item servus adstipulando nihil agit, qui ex ceteris omnibus causis stipulatione domino adquirit. idem de eo qui in mancipio est magis placit; nam et is servi loco est. is autem qui in potestate patris est, agit aliquid, sed parenti non adquirit; quamvis ex omnibus ceteris causis stipulando ei adquirat. ac ne ipsi quidem aliter actio competit, quam si sine capitibus diminutione exierit de potestate parentis, veluti morte eius, aut quod ipse flamen Dialis inauguratus est. eadem de filia familias, et quae in manu est, dicta intellegemus. (115. Pro eo quoque qui promittit solent alii obligari, quorum alios sponsores, alios fidepromissores, alios fideiussores appellantamus. (116.) Sponsor ita interrogatur: IDEM DARI SPONDES?

only to quantity but also to time: for it is more to give a thing at once, less to give it after a time. 114. As to this matter of law some peculiar rules are observed. For the heir of the adstipulator can bring no action. Likewise, a slave who adstipulates effects nothing, although in all other cases he acquires for his master by stipulation. The same is generally held with regard to one who is under mancipium: for he too is in the position of a slave. But he who is under the potestas of his father does a valid act, but does not acquire for his ascendant: although in all other cases he acquires for him by stipulation. And an action does not even lie for him personally, unless he have passed from his ascendant's potestas without a capitis diminutio, for instance, by that ascendant's death, or because he himself has been instituted Flamen Dialis. The same rule we shall adopt with regard to a woman under potestas or under manus.

115. For the promiser also others are frequently bound, some of whom we call sponsores, some fidepromissores, some fideiussores. 116. A sponsor is interrogated thus: Do you engage that the same thing shall be given? a fidepromissor:

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1 IV. 53.  2 IV. 113.  3 II. 87.

4 I. 123, 138.  5 I. 130.
III.117-119.] Sponsors, Fidepromissors, Fidejussors.

Do you become fidepromissor for the same? a fidejussor: Do you become fidejussor for the same? But by what name those should properly be called who are interrogated thus: Will you give the same? Do you promise the same? Will you do the same? is a matter for our consideration.

117. We are in the frequent habit of taking sponsors, fidepromissors, and fidejussors, to make certain that we are carefully secured. But we scarcely ever employ an adstipulator save when we stipulate that something is to be given us after our death: for since we effect nothing by such a stipulation, an adstipulator is introduced, that he may bring the action after our death: and if he obtain anything, he is liable to our heir for its delivery in an action of mandate.

118. The position of a sponsor and fidepromissor is very much the same, that of a fidejussor very different. 119. For the former cannot be attached to any but verbal obligations: although sometimes the promiser himself is not bound, for instance, if a woman or a pupil have promised anything without authorization of the tutor, or if any person have promised that something shall be given after his death. But if a slave or a

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1 Such an one would be a fidejussor according to Ulpian. See D. 46. 1. 8. pr.

2 III. 100.

3 III. 155.
Sponsors, &c. Lex Furia. [III. 120, 121.]

spoponderit, an pro eo sponsor aut fidepromissor obligetur. fideiussor vero omnibus obligationibus, id est sive re sive verbis sive litteris sive consensu contractae fuerint obligationes, adici potest. at ne illud quidem interest, utrum civilis an naturalis obligatio sit cui adiciatur; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui a servo fideiussumem accipiat, sive dominus in id quod sibi debetur. (120.) Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus, et alio iure civitas eius utatur: fideiussoris autem etiam heres tenetur. (121.) Item sponsor et fidepromissor per legem Furiam biennio liberantur: et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes deducitur inter eos obligatio, et singuli viriles partes dare iubentur.

foreigner have promised by the word spondeo, it is questionable whether the sponsor or fidepromissor is bound for him\(^1\). A fideiussor on the contrary can be attached to any obligation, i.e. whether it be contracted re, verbis, litteris or consensu. And it does not even matter whether it be a civil or a natural obligation to which he is attached, so that he can be bound even for a slave, whether the receiver of the fideiussor from the slave be a stranger, or the master for that which is due to him. 120. Besides, the heir of a sponsor and fidepromissor is not bound, unless we be considering the case of a foreign fidepromissor, and his state adopt a different rule\(^2\): but the heir of a fideiussum is bound as well as himself (etiam). 121. Likewise, a sponsor and a fidepromissor are freed from liability after two years, by the Lex Furia\(^4\): and whatever be their number at the time when the money can be sued for, the obligation is divided amongst them into so many parts, and each of them is ordered to pay one part. But fideiussums are bound for

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\(^1\) The reason for the difference is that the Roman law regarded the promise of the woman or pupil as binding morally, but that of the slave or foreigner as entirely void. Hence the surety's engagement concluded in due form is in the first case an accessory to what the law does more or less recognize, and so stands good; whilst in the other case it is an accessory to a nullity, and therefore a nullity itself.

\(^2\) From this section it would almost appear as if the notion of a comitas gentium existed in Roman Jurisprudence, so as to warrant the belief that there was something like private international law. See III. 96.

\(^4\) Enacted B.C. 95. IV. 22.
fideiussores vero perpetuo tenentur; et quotquot erunt numero, singuli in solidum obligantur. *itaque liberum est creditori a quo velit solidum petere.* *Se desperib* divi Hadriani compellitur creditor a singulis, qui modo solvenndo *sint, partes petere.* eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus solvenndo non sit, *non augetur onus ceterorum*, quotquot erunt. *Cum autem lex Furia tantum in Italia locum habeat, consequens est, ut in provinciis sponsores quoque et fidepromissores proinde ac fideiussores in perpetuo teneantur et singuli in solidum obligentur, nisi ex epistula divi Hadriani hi quoque adiuvandi videantur.* (122.) Praeterea inter sponsores et fidepromissors lex Apuleia quandom societatem introduxit. nam si quis horum plus sua portione solverit, de eo quod amplius dederit *adversus ceteros actionem habet.* *Lex autem Apuleia ante legem Furiam lata est,* quo tempore in solidum obligabantur: unde quae situr, an post legem Furiam adhuc ever, and whatever be their number, each is bound for the whole amount. And so it is allowable for the creditor to demand the whole from whichever of them he may choose. But according to an epistle of the late emperor Hadrian the creditor is compelled to sue for a proportional part from each, and those only (are to be reckoned in the calculation) who are solvent. In this respect therefore this epistle differs from the Lex Furia, viz. that if any of a number of sponsors or fidepromissors be insolvent, the burden of the rest, whatever be their number, is not increased. But inasmuch as the Lex Furia is of force in Italy only, it follows that in the provinces sponsors and fidepromissors also, as well as fideiussors, are bound for ever, and each of them for the full amount, unless they too are to be considered relieved by the epistle of the late emperor Hadrian. 122. Further the Lex Apuleia introduced a kind of partnership amongst sponsors and fidepromissors. For if any one of them have paid more than his share, he has an action against the others for that which he has given in excess. Now the Lex Apuleia was enacted before the Lex Furia, at which time they were liable in full: hence the question arises whether after the passing of the Lex Furia the benefit of the Lex Apuleia still

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1 B.C. 102.
legis Apuleiae beneficium supersit. et utique extra Italiam superest; nam lex quidem Furia tantum in Italia valet, Apuleia vero etiam in aliter praeter Italiam regionibus. Alia sane est fideiussorum condicio; nam ad hos lex Apuleia non pertinet. itaque si creditor ab uno totum consecutus fuerit, huius solius detrimentum sit, scilicet si is pro quo fideiussor solvendo non sit. sed ut ex supradictis appareat, is a quo creditor totum petit, poterit ex epistula divi Hadriani desiderare, ut pro parte in se detur actio. (123.) Praeterea lege Pompeia cautum est, ut is qui sponsores aut fidepromissors accipiat prædicat palam et declarat, et de qua re satis accipiat, et quot sponsores aut fidepromissors in eam obligationem accepturus sit: et nisi prædixerit, permittitur sponsoribus et fidepromissoribus intra diem xxx præjudicium postulare, quo quaeratur, an ex ea lege praedictum sit; et si iudicatum fuerit praedictum non esse,

continues. And undoubtedly it continues in places out of Italy: for the Lex Furia is only applicable in Italy, but the Lex Apuleia in other regions also beyond Italy. The position of fidejussors is different: for the Lex Apuleia does not apply to them. Therefore, if the creditor have obtained the whole from one of them, the loss falls on this one only, supposing, that is, that he for whom he was fidejussor be insolvent. But, as appears from what was said above, he from whom the creditor demands payment in full, can, in accordance with the epistle of the late emperor Hadrian, demand that the action shall be granted against him for his share only. (123.) Further by the Lex Pompeia it is provided that he who accepts sponsors or fidepromissors shall make a public statement beforehand, and declare on what matter he is taking surety, and how many sponsors and fidepromissors he is about to take in respect of the obligation: and unless he thus make declaration beforehand, the sponsors and fidepromissors are allowed at any time within thirty days to demand a preliminary investigation, in which the matter of inquiry is whether prior declaration was made according to the law; and if it be decided that the declaration was not made, they are

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1 This is Huschke's reading. He connects the Lex Pompeia with the Unciaria Lex, spoken of by Festus in a mutilated fragment.

2 IV. 44.
III. 124. | Lex Cornelia.

liberantur. Qua lege fideiussorum mentio nulla fit: sed in usu est, etiam si fideiussores accipiamus, praedicere.

124. Sed beneficium legis Corneliae omnibus commune est. Qua lege idem pro eodem aput eundem eodem anno vetatur in ampliorem summam obligari credita pecuniae quam in xx milia; et quamvis sponsor vel fidepromissor in amplam pecuniam, velut si sestertium c milia se obligaverit, non tamten tenebitur. Pecuniam autem creditam dicimus non solum eam quam credendi causa damus, sed omnem quam tunc, cum contrahitur obligatio, certum est debitum iri, id est quae sine ulla condicione deducitur in obligationem. itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea lege significantur. itaque si vinum vel frumentum, et si fundum vel hominem stipulemur,

freed from liability. In this law no mention is made of fideiussors; but it is usual to make a prior declaration, even if we be accepting fideiussors.

124. The benefit of the Lex Cornelia is common to all sureties. By this lex the same man is forbidden on behalf of the same man, and to the same man, and within the same year to be bound for a greater sum of borrowed money than 20,000 sesterces; and although the sponsor or fidepromissor may have bound himself for more money, for instance for 100,000 sesterces, he will nevertheless not be liable. By "borrowed money" we mean not only that which we give for the purpose of a loan, but all money which at the time when the obligation is contracted it is certain will become due, i.e. which is made a matter of obligation without any condition. Therefore, that money also which we stipulate shall be given on a fixed day is within the category, because it is certain that it will become due, although it can be sued for only after a time. By the appellation "money" every thing is intended in this lex. Therefore the lex is to be observed if we be stipulating for wine, or corn, or a piece of land, or a man.

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1 B.C. 81.  
2 Or if we take Huschke's reading, tamen dumtaxat xx damnatur:  
3 D. 50. 16. 178 and 222.
216  Sponsors, Fidepromissors, Fidejussors. [III. 125—127.

haec lex observanda est. (125.) Ex quibusdam tamen causis
permittit ea lex in infinitum satis accipere, veluti si doxis no-
mine, vel eius quod ex testamento tibi debeatur, aut iussu iudicis
satis accipiatur. et adhuc lege vicesima hereditatium cavetur,
ut ad eas satisfactiones quae ex ea lege proponuntur lex Cornelia
non pertineat.

126. In eo iure quoque iuris par condicio est omnium, spon-
sorum, fidepromissorum, fidejussorum, quod ita obligari non
possunt, ut plus debeat quam debet is pro quo obligantur.
at ex diverso ut minus debeat, obligari possunt, sicut in ad-
stipulatoris persona diximus. nam ut adstipulatoris, ita et horum
obligatio accessio est principalis obligationis, nec plus in acces-
sione esse potest quam in principali re. (127). In eo quoque
par omnium causa es, quod si quis pro reo solverit, eius reci-
perandi causa habet cum eo mandati iudicium. et hoc amplius

125. In some cases, however, the law allows us to take surety
for an unlimited amount, for instance, if surety be taken in
reference to a dos, or for something due to you under a testa-
ment, or by order of a judex. And further, it is provided by the
Lex Vicesima Hereditatium\(^1\) that the Lex Cornelia shall not
apply to certain surety-engagements specified in that law.

126. In the following legal incident the position of all,
sponsors, fidepromissors and fidejussors, is alike, that they
cannot be so bound as to owe more than he for whom they
are bound owes. But on the other hand they may be so bound
as to owe less, as we said in the case of the adstipulator\(^2\).
For their obligation, like that of the adstipulator, is an
accessory to the principal obligation, and there cannot be more
in the accessory than in the principal thing. 127. In this
respect also the position of all of them is the same, that if
any one has paid money for his principal, he has an action
of mandate\(^3\) against him for the purpose of recovering it. And
further than this, sponsors by the Lex Publilia\(^4\) have an action

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\(^1\) The Lex Vicesima Hereditatium was enacted in the reign of Augustus (A.D. 6), and laid a tax of one-
twentieth on all inheritances and legacies, except where the recipients were very near relations.

\(^2\) III. 113.

\(^3\) III. 155 et seqq.

\(^4\) Who Publilius was is not cer-
tainly known. He is supposed to be
named by Cicero in the Orat. pro
Cluent. c. 45.

Sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur depensi.

128. Litteris obligatio fit veluti in nominibus transcripticiis. fit autem nomen transcripticum duplici modo, vel a re in personam, vel a persona in personam. (129.) 

A re in personam transcriptio fit, veluti si id quod tu ex emptionis causa aut conductionis aut societatis mihi debas, id expensum tibi tulero. (130.) A persona in personam transcriptio fit, veluti si id quod mihi Titius debet tibi id expensum tulero, id est si Titius te peculiarem to themselves for double the amount, which is called the *actio depensi*.

128. An obligation *litteris* arises in the instance of “transferred entries." A transferred entry occurs in two ways, either from thing to person, or from person to person. 129. A transfer from thing to person takes place when I set down to your debit what you owe me on account of a sale, a letting, or a partnership. 130. A transfer from person to person takes place when I set down to your debit what Titius owes to me, i.e. when Titius makes you his substitute to me.

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1 The working of this action is more fully explained by Gaius in IV. 9, 22, 25.

2 In order to understand the nature of this obligation it is necessary to remember that among the Romans every master of a house kept regular accounts with great accuracy: and to be negligent in this matter was regarded as disreputable. The entries were first roughly made in day-books, called *Adversaria* or *Calendaria*, and were posted at stated periods in ledgers, called *Codices expensis et accepti*. Nomen was the general name for any entry, whether on the debtor or creditor-side of the account. When any one keeping books entered a sum of money as received from Titius, he was said *ferre vel referre acceptum Titii*, that is, to place it to the credit of Titius: when, on the other hand, he entered a sum as paid to Titius, he was said *ferre vel referre expensum Titii*, that is, to place it to the debit of Titius. If it could be proved that an *expensum* had been set down with the debtor’s consent, the absence of a corresponding *acceptum* in the debtor’s ledger was immaterial, as such absence only argued fraud or negligence on his part. The solemnity therefore which in this case turned a pact into a contract was an *entry with consent*. Heineccius, basing his reasoning on a passage of Theophilus, holds that a contract *litteris* is never an original contract, but always operate; as a *novoatio* of some precedent obligation. See Heineccii *Antiquit.* III. 28. § 4. Cic. de *Off.* III. 14. Cic. *pro Rosc.* Com. 1.

3 The case supposed is that Titius owes me, say, 100 *aures* and you owe Titius the same amount: it simplifies matters therefore if Titius, who has to receive 100 and pay 100, remove himself from the transaction altogether by remitting your debt to him and making you, with my consent, a debtor to me in his own stead.
The case is different with those entries which are called "arcarian." For in these the obligation is one re not litteris: inasmuch as they do not stand good unless the money has been paid over; and the paying over of money constitutes an obligation re not litteris. And therefore we shall be correct if we say that arcarian entries produce no obligation, but afford evidence of an obligation already entered into. 132. Hence it is rightly said that even foreigners are bound by arcarian entries, because they are bound not by the entry itself, but by the paying over of the money, which kind of obligation belongs to the jus gentium.

But whether foreigners are bound by transferred entries is justly disputed, because an obligation of this kind is in a manner a creation of the civil law; and so Nerva thought. But it was the opinion of Sabinus and Cassius, that if the entry were from thing to person, even foreigners were bound: but if from person to person, they were not bound. 134. Further, an obligation litteris is considered to arise from chirographs

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1 Arcarian entries are memoranda of a contract already formed, and not the very documents by which one is originated. By a "transferred entry" an engagement merely equitable was converted into one furnished with an action; whilst the value of an "arcarian entry" was that it could be used for the purpose of proving a transaction which, though good in law so far as the right to sue was concerned, might otherwise have failed for want of evidence to support it.
III. 135—137.]

Consensual Obligations.

135. Consensus frunt obligationes in emptionibus et venditionibus, locationibus conductionibus, societatibus, mandatis. (136.) Ideo autem istis modis consensu dicimus obligationes contrahi, quia neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse. unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per internuntium, cum aliquo verborum obligatio inter absentes fieri non possit. (137.) Item in his

and syngraphs¹, i.e. if a man state in writing that he owes or will give something: provided only there be no stipulation made regarding the matter². This kind of obligation is peculiar to foreigners.

135. Obligations arise from consent in the cases of buying and selling, letting and hiring, partnerships and mandates. 136. And the reason for our saying that in these cases obligations are contracted by consent is that no peculiar form either of words or of writing is required, but it is enough if those who are transacting the business have come to agreement. Therefore, such matters are contracted even between persons at a distance one from the other, for example, by letter or messenger, whilst on the contrary a verbal obligation cannot arise between persons who are apart. 137. Likewise, in

¹ A chirograph is signed by the debtor only, a syngraph by both debtor and creditor. Chirographs and syngraphs were not mere proofs of a contract, but documents on which an action could be brought. A simple memorandum, which was good only as evidence, was termed in Gaius’ day a cautio. In Justinian’s time cautiones and chirographs were regarded as identical; but see his regulations as to the time within which an exceptio non numeratae pecuniae could be brought in Inst. iii. 21. Mühlenbruch for some inexplicable reason considers nomina arcaria to be identical with syn-graphs and chirographs; although the word praterius in § 134 shews pretty plainly that the two are contrasted; and this inference is corroborated by our observing that syngraphs and chirographs are said to be peculiar to foreigners, whilst as to nomina arcaria the remark occurs, etiam peregrinos tis obligari, the etiam plainly implying that these are not peculiar to foreigners and therefore are something different from syngraphs and chirographs.

² If there be, the obligation is verbis, and the document becomes a cautio, not absolutely conclusive, but available as evidence.
these contracts the one is bound to the other for all that the one ought in fairness and equity to afford to the other, whilst, on the contrary, in verbal obligations one stipulates and the other promises, and in litteral obligations one binds by an entry to the debit and the other is bound.  138. But an entry may be made to the debit of an absent person, although a verbal obligation cannot be entered into with an absent person.

139. A contract of buying and selling is entered into as soon as agreement is made about the price, even though the price has not yet been paid, nor even earnest given. For what is given as earnest is only evidence of a contract of buying and selling having been entered into.  140. Further, the price ought to be fixed: if, on the contrary, they agree that the thing shall be bought for such price as Titius shall value it at, Labeo says such a transaction has no validity, and Cassius assents to his opinion: but Ofilius says there is a buying and selling, and Proculus follows his opinion.

1 The old contracts based on the civil law were unilateral, the new contracts by consent, springing from the jus gentium, were bilateral. It will be observed that Gaius says nothing here about real contracts. Possibly this is because their position was anomalous: they had been unilateral, but under the growing influence of the jus gentium were becoming bilateral, as is implied in the concluding words of III. 132 above.  2 That is, is not of the essence of the contract.  3 Justinian settled this dispute.
III. 141. Emptio-Venditio compared with Permutatio.

141. Item pretium in numerata pecunia consistere debet. nam in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei pretium esse possit, valde quaeritur. nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis et venditionis vetustissimam esse; argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ait:

"Ενθεν ἄρ' οὐνίζοντο καρπκομάωντες Ἀχαῖοι,
"Αλλοι μὲν χαλκῷ, ἄλλοι δὲ αἰθωνι σιδήρῳ,
"Αλλοι δὲ μινός, ἄλλοι δὲ αὐτήσι βῶσισι,
"Αλλοι δὲ ἀνδραπόδισιν.

Diversae scholae auctores dissentient, aliquid esse existimant permutationem rerum, alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse; sed rursus utramque videri et venisse et utramque pretii nomine datam esse ab-

141. Likewise the price must consist of coined money. For whether the price can consist of other things, for instance, whether a slave, or a garment, or a piece of land can be the price of another thing, is very doubtful. Our authorities think the price may consist of some other thing; and hence comes the vulgar notion that by the exchange of things a buying and selling is effected, and that this species of buying and selling is the most ancient: and they bring forward as an authority the Greek poet Homer, who in a certain passage says thus: "Thereupon then the long-haired Achæans obtained wine, some for brass, some for glittering steel, some for skins of cattle, some for cattle themselves, some for slaves." The authorities of the other school take a different view, and think that exchange of things is one matter, buying and selling another: otherwise, they say, it could not be made clear when things were exchanged which thing was to be considered sold and which given as a price: but again for both equally to be considered to be sold, and also both given as the price, appears ridiculous.

If the referee fixed the price, the sale was valid; if he could not or would not, the agreement was void. 1 Iliad, V11. 472—475.

142. *Locatio* autem et *conductio* similibus regulis constituuntur: nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi. (143.) unde si alieno arbitrio merces permissa sit, velut quarti Titius aestimaverit, quaeritur an locatio et conductio contrahatur. qua de causa si fulloni polienda curandave, sarcinatori sarcienda vestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos convenerit, quaeritur an locatio et conductio contrahatur; (144.) vel si rem tibi utendam dederim et invicem aliam rem

But Caelius Sabinus says, if when Titius has a thing for sale, for instance a piece of land, I take it, and give a slave, say, for the price; the land is to be regarded as sold, and the slave to be given as the price in order that the land may be received.

142. The contract of letting and hiring is regulated by similar rules: for unless a fixed hire be determined, no letting and hiring is considered to be contracted. 143. Therefore, if the hire be left to the decision of another, such amount, for example, as Titius shall think right, it is disputed whether a letting and hiring is contracted. Wherefore, if I give garments to a fuller to be smoothed and cleaned, or to a tailor to be repaired, no hire being settled at the time, my intention being to give afterwards what shall be agreed upon between us, it is disputed whether a letting and hiring is contracted. 144. Or if I give a thing to you to be used, and in return receive

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1 This is not a mere dispute about words, like so many of the points debated between the Sabinians and Proculians. The old Roman Law regarded exchange as a real contract, therefore a mere agreement to exchange was not binding, and the exchange could only be enforced in case one of the parties had delivered up the thing which he was to part with: but if the Sabinians could have been victorious in their argument, and got the lawyers to admit that an exchange was a sale, exchange would have become a consensual contract, and a mere agreement to exchange have been binding.

2 The contract is not a *locatio conductio* for want of a *merces* specified beforehand; it is not a *mandatum* because it is not gratuitous, there being an implication that a *merces* will eventually be paid: hence the remedy can only be by an *actio in factum praescriptis verbis*, as to which see *App. (Q.)*
III. 145, 146. Emptio contrasted with Locatio.

utendam acceperim, quaeritur an locatio et conductio contrahatur.

145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat utrum emptio et venditio contrahatur, an locatio et conductio. veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum quae ea lege locantur, ut quamdiu id vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur; sed magis placuit locationem conductionemque esse.

146. Item si gladiatores ea lege tibi tradiderim, ut in singulos qui integri exierint pro sudore denarii xx mihi darentur, from you another thing to be used, it is disputed whether a letting and hiring is contracted 1.

145. But buying and selling and letting and hiring have so close a resemblance to one another, that in some cases it is a matter of question whether a buying and selling is contracted or a letting and hiring 2; for instance, if a thing be let for ever, which happens with the lands of corporations which are let out on the condition that so long as so much rent be paid the land shall not be taken away either from the hirer himself or his heir; but it is the general opinion that this is a letting and hiring 3.

146. Likewise, if I have delivered gladiators to you on condition that for each one who escapes unhurt 20 denarii

1 The contract in this case is one of the inominate real contracts — Do ut des, &c. — therefore is only binding when one party has completed his delivery, and not on mere consent. The matter here noticed is very fully discussed in Jones, On Bailments, p. 93.
2 D. 19. 2. 2. 1.
3 This locatio in perpetuum or emphyteusis was by Zeno made a distinct kind of contract, subject to rules of its own. See Inst. III. 24. 3. Also read Savigny, On Possession, pp. 77—79; D. 6. 3.

From these authorities and others we learn that emphyteusis was a comparatively modern contract, a lease of lands by a private individual or corporation to a private individual; whereas the older ager vectigal is was always a lease proceeding from a corporation. The leases of agri vectigales were not always perpetual, but sometimes for a term of years. The emphyteutic leases made by a private individual were always hereditary. Hence they were closely analogous to the feu farms mentioned by Britton (see Nichols' translation of Britton, fol. 164), which were lands held in fee for an annual rent reserved at the time of their grant; being therefore a species of socage. In Cicero's time lands leased by corporations, whether for years or in perpetuity, were called agri fructuarii.
in eos vero singulos qui occisi aut debilitati fuerint, *denarii* mille: quae rerum utrum emptio et venditio, an locatio et conductio contrahatur. et magis placuit eorum qui integri exierint locationem et conductionem contractam videri, at eorum qui occisi aut debilitati sunt emptionem et venditionem esse: idque ex accidentibus apparat, tamquam sub condicione facta cuiusque venditione aut locatione. iam enim non dubitatur, quin sub condicione res veniri aut locari possint. (147.) Item quaeritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet verbi gratia denarios cc, utrum emptio et venditio, an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem et venditionem contrahi, operarum autem locationem et conductionem. sed plerisque placuit emptionem et venditionem contrahi. atqui si meum aurum ei dedero, mercede pro opera constituta, content locationem et conductionem contrahi.

shall be given to me for his exertions, but for each of those who are killed or wounded 1000 *denarii*: it is disputed whether a buying and selling or a letting and hiring is contracted. And the general opinion is that there seems to be a contract of letting and hiring in regard to those who escaped unhurt, but a buying and selling in regard to those who were killed or wounded: and that this is made evident by the result, the selling or letting of each being made, as it were, under condition. For there is now no doubt that things can be sold or let under a condition¹. 147. Likewise², this question is raised; supposing an agreement has been made by me with a goldsmith, that he shall make rings for me from his own gold, of a certain weight and certain form, and receive, for example, 200 *denarii*, whether is a buying and selling or a letting and hiring contracted? Cassius says that a buying and selling of the material is contracted, and a letting and hiring of the workmanship. But most authors think that it is a buying and selling which is contracted. But if I give him my own gold, a hire being agreed upon for the work, it is allowed that a letting and hiring is contracted³.

¹ D. 19. 2. 20. pr. ² D. 19. 2. 1. ³ D. 18. 1. 20 and D. 18. 1. 65.
148. Societatem coire solemus aut toterum bonorum, aut unius alicuius negotii, veluti mancipiorum emendorum aut vendendorum.

149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Quintus Mucius etiam contra naturam societatis esse censuit: sed Servius Sulpicius, cuius praevaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucrmi partem capiat, si modo opera eius tam pretiosa videatur, ut aequum sit eum cum hac pactione in societatem admiti. nam et ita posse coire societatem constat, ut unus pecuniam conferat, alter non conferat, et tamen lucrurn inter eos commune sit; saepe enim opera alicuius pro pecunia valet. (150.) Et illud certum est,

148. We are accustomed to enter into a partnership either as to all our property, or as to one particular matter, for instance, the purchase or sale of slaves.

149. But it has been a much disputed question whether a partnership can be entered into on terms that one of the partners shall have a larger share of the gain and pay a smaller share of the loss. This, Quintus Mucius says, is irreconcileable with the very nature of partnership: but Servius Sulpicius, whose opinion has prevailed, so firmly held that a partnership of this kind could be entered into, that he affirmed one could also be entered into on terms that one of the parties should pay no portion whatever of the loss, and yet take a part of the gain, provided his services appeared so valuable that it was fair that he should be admitted into the partnership on this arrangement. For it is undoubtedly possible to enter into a partnership on such terms, that one shall contribute money and the other none, and yet the gain be common between them: for frequently the services of one are as valuable as money. 150. And this too is certain, that if there have been

1 D. 17. 2. 30. Servius in this passage assents to the doctrine of Mucius, holding that Mucius meant that there could not be a different apportionment of loss on the bad transactions, and of profit on those successful. Servius then goes on to state, as Gaius says, that if Mucius had meant that there could not be a different apportionment of gain or loss on a balance of accounts, he would have been wrong; but as he never implies that Mucius held such a view, Gaius is, as it seems to us, giving an unfair account of Mucius' rule in the present passage.
si de partibus luceri et damnii nihil inter eos convenerit, tamen aequis ex partibus commodum et incommodum inter eos commune esse. sed si in altero partes expressae fuerint velut in lucro, in altero vero omissae, in eo quoque quod omissum est similis partes erunt.

151. Manet autem societas eousque, donec in eodem sensu perseverant; at cum alius renuntiaverit societati, societas solvitur. sed plane si quis in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrificat, cogetur hoc lucrum communicare. si quid vero aliud luceri fecerit quod non captaverit, ad ipsum solum pertinet. mihi vero, quidquid omnino post renuntiatam societatem acquiratur, soli conceditur.

(152.) Solvitur adhuc societas etiam morte socii; quia qui eum habet alium personam.}

152. Further, a partnership is dissolved by the death of a partner, because he who makes a contract of partnership selects for himself a definite person. 153. It is said

1 Therefore if three men be in partnership and one renounce, the remaining two are no longer partners.
III. 154—156.]

Mandatum.

that a partnership is also dissolved by a capitis diminutio', because on the principles of the civil law a capitis diminutio is held to be equivalent to death; but if the partners consent to be partners still, a new partnership is considered to arise. 154. Likewise, if the goods of any one of the partners be sold publicly or privately, the partnership is dissolved. But in this case also, a new partnership is contracted by mere consent, exactly as the former one was, by virtue of the principle of the jus gentium, of which all men can avail themselves on the ground of natural reason.

155. A mandate is created whether we give a commission for our own benefit or for another person's; i.e. whether I give you a commission to transact my business or that of another person there will be an obligation between us, and we shall be mutually bound one to the other, and so an action will lie for "that which it appears you ought in good faith to afford to me." 156. But if I give you a commission for your own benefit, the mandate is superfluous: for what you would do for your own sake, you are considered to do of your own accord and not on my mandate: therefore, if you tell me that you have money lying idle at home, and I advise you to put it out at interest, even if you bestow it on loan to one from whom you cannot recover it, you will nevertheless have no action of mandate.

1 I. 118; III. 101. 2 III. 78. 3 We have adopted Klenze's reading, suggested in a note to his Edition of 1839.

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que si otiosam pecuniam domi te habere mihi dixeris, et ego te hortatus fuerim, ut eam fenerares, quamvis eam ei mutuam dederis a quo serraré non potueris, non tamen habebis mecum mandati actionem. item et si hortatus sim, ut rem aliquam emeres, quamvis non expedierit tibi eam emisse, non tamen mandati tibi tenebor. et adeo haec ita sunt, ut quaeatur an mandati teneatur qui mandavit tibi, ut Tilio pecuniam fenerares [desunt 2½ lin.], quia non aliter Titio credidisses, quam si tibi mandatum esset.

157. Illud constat, si faciendum quid mandetur quod contra bonos mores est, non contrahi obligationem, velut si tibi mandem, ut Tilio pecuniam fenerares, ut quaeatur an Titio credidisses, quam si tibi mandatum esset.

158. Item si quid post mortem meam faciendum mihi mandetur, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse.

159. Sed recte quoque consummatum mandatum, si dum adhuc integra res sit revocatum fuerit, evanescit. (160.) Item against me. Likewise, if I advise you to buy something or other, even if it be not to your advantage that you made the purchase, I still shall not be answerable to you in an action of mandate. And this rule is so universally true, that it is a disputed point whether a man is liable to you for mandate who gave you a mandate to lend money on interest to Titius for you would not have lent the money to Titius, unless the mandate had been given to you.

157. It is certain that if a mandate be given for the doing of something contrary to morality, no obligation is contracted; for instance, if I give you a mandate to commit a theft or injury upon Titius.

158. Likewise, if a mandate be given me for the doing of something after my death, the mandate is void, because it is an universal rule that an obligation cannot begin to operate in the person of one’s heir.

159. Even if a mandate be duly completed, yet if it be recalled before the subject of it has been dealt with, it be-

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1 By comparing this passage with Justinian, Inst. 111. 26. 6, we see that the lacuna may be filled up: “but it has been decided (according to Sabinus’ view) that such an one is liable if his mandate be to lend to a particular person, as to Titius; for &c.”

2 111. 100.
III. 161. Mandatum.

si adhuc integro mandato mors alterutrius alicuius interveniat, id est vel eius qui mandarit, vel eius qui mandatum susceperit, solvitur mandatum. sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandaverit, ignorans eum decessisse executedus fuerit mandatum, posse me agere mandati actione: aliquin justa et probabilis ignorantia damnum mihi adferet et huic simile est quod plerisque placuit, si debitor meus manumissus dispensatori meo per ignorantium solventis, liberari eum: cum aliquin stricta iuris ratione non posset liberari eo quod alii solvisset quam cui solvere deberet.

161. Cum autem is cui recte mandaverim egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest implesse eum mandatum, si modo comes void. 160. Likewise, if the death of either of the parties occur before the execution of the mandate is commenced, that is, either the death of him who gave the mandate, or of him who undertook it, the mandate is made null. But for convenience the rule has been adopted, that if after the death of the mandator, I, being ignorant that he is dead, carry out the mandate, I can bring an action of mandate: otherwise, a justifiable ignorance, very likely to occur, would bring loss upon me. Similar to this is the rule generally maintained, that if my debtor make a payment by mistake to my steward after I have manumitted him, he is free from his debt: although, on the other hand, by strict rule of law, he could not be free, because he had paid a person other than him whom he ought to have paid1.

161. When a man to whom I have given a mandate in proper form has transgressed its terms, I have an action of mandate against him for an amount equal to the interest I have that he should have performed the mandate, provided

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1 Payment to a slave is payment to the master, for the slave has no independent persona: also the master, having made the slave his steward, thereby authorized strangers to pay money to him; and therefore, if the slave appropriated the money, the master had to bear the loss. After the manumission the slave has an independent persona, and cannot be dispensator any longer, that being an office tenable only by one of the familia. By strict law therefore the debtor's payment is void, for it is to a wrong person; but equity will not allow the debtor to suffer, if he be without notice. The same difficulty would arise if the slave were deprived of his stewardship without being emancipated.
Mandatum.

1 Implere potuerit: at ille mecum agere non potest. itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis c emeres, tu sestertiis cl emeris, non habebis mecum mandati actionem, etiamsi tanti velis mihi dare fundum quanti emendum tibi mandassem. idque maxime Sabino et Cassio placuit. Quodsi minoris emeris, habebis mecum scilicet actionem, quia qui mandat ut c milibus emeretur, is utique mandare intellegitur ut minoris, si posset, emeretur.

162. In summa sciemdum est, quotiens faciendum aliquid gratis dederim, quo nomine si mercedem statuissem, locatio et conductio contrahetur, mandati esse actionem, veluti si soloni polienda curandave vestimenta aut sarcinatori sarcienda dederim.

163. Expositis generibus obligationum quae ex contractu nascuntur, admonendi sumus adquiri nobis non solum per

only he could have performed it: but he has no action against me. Thus, if I have given you a mandate to buy me a piece of land, say for a hundred thousand sesterces, and you have bought it for a hundred and fifty thousand sesterces, you will have no action of mandate against me, even though you be willing to give me the land for the price at which I commissioned you to buy it. And this was decidedly the opinion of Sabinus and Cassius. But if you have bought it for a smaller price, you will doubtless have an action against me; because when a man gives a mandate for a thing to be bought for a hundred thousand sesterces, it is considered obvious that he gives the mandate for its purchase at a lower price, if possible.

162. Finally, we must observe that whenever I give any thing to be done gratuitously as to which there would have been a contract of letting and hiring had I settled a hire, an action for mandate lies; for instance, if I give garments to a fuller to be smoothed and cleaned, or to a tailor to be repaired¹.

163. Now that the various kinds of obligations which arise from contract have been set out in order, we must take notice that acquisition can be made for us not only by ourselves, but

¹ Although there could be no payment in the case of a mandate, yet on the completion of the work the fuller or tailor, to take the example in the text, had a claim enforceable by action for his expenses and loss of time, and the liberal construction of the amount of these always made in a bona fidei action would ensure the workman a due recompense.
nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu mancipiove sunt. (164.) Per liberos quoque homines et alienos servos quos bona fide possidemus adquiritur nobis; sed tantum ex duabus causis, id est si quid ex operis suis vel ex re nostra adquirant. (165.) Per eum quoque servum in quo usumfructum habemos similiter ex duabus istis causis nobis adquiritur. (166.) Sed qui nudum ius Quiritium in servo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur quam usufructuarius et bonae fidei possessor. nam placet ex nulla causa ei adquiri posse: adeo ut etsi nominatim ei dari stipulatus fuerit servus, mancipiove Domini acceperit, quidam existimant nihil ei adquiri.

167. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli adquirit, veluti cum ita stipuletur: TITIO DOMINO MEO DARI SPONES? aut cum ita man-

also by those persons whom we have under our potestas, manus, or mancipium. 164. Acquisition is also made for us by means of free men and the slaves of other people whom we possess in good faith: but only in two cases, viz. if they acquire any thing by their own work or from our substance. 165. Acquisition is also in like manner made for us in these two cases by a slave in whom we have the usufruct. 166. But he who has the mere Quiritary title to a slave, although he is owner, yet is considered to have less right in this respect than an usufructuary or possessor in good faith. For it is ruled that the slave can in no case acquire for him: so that even though the slave have expressly stipulated for a thing to be given to him, or have received it by mancipation in his name, some think no acquisition is made for him.

167. A slave held in common undoubtedly acquires for his owners according to their shares of ownership, with the exception that by stipulating or receiving by mancipation expressly for one he makes acquisition for that one only; for instance, when he stipulates thus: Do you engage that it shall be given to my master Titius? or when he receives by man-

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1 II. 86.  
2 II. 91.  
3 II. 92.  
4 II. 88. Ulp. xix. 20.

cipio accipiat: HANC REM EX IURE QUIRITIUM LUCII TITII DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE AENEAQUE LIBRA. (167 a.) Illud quaeritur num quod unius domini nomen adiectum efficit, idem faciat unius ex dominis iussum intercedens. nostri praeceptores perinde ei qui iussisset soli adquiri existimant, atque si nominatim ei soli stipulatus esset servus, mancipiove accipisset. diversae scholae auctores proinde utrisque adquiri putant, ac si nullius iussum intervenisset.

168. Tollitur autem obligatio praeципue solutione eius quod debeatur. unde quaeritur, si quis consentiente creditor aliud pro alio solverit, utrum ipso iure liberetur, quod nostris praecceptoribus placet: an ipso iure maneat obligatus, sed adversus petentem exceptione doli mali defendi debet, quod diversae scholae auctoris visum est.

169. Item per acceptilatitlne tollitur obligatio. acceptatio


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autem est veluti imaginaria solutio. quod enim ex verborum obligatione tibi debeam, id si velis mihi remittere, poterit sic fieri, ut patiaris haec verba me dicere: QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et tu respondes: HABEO. (170.) Quo genere, ut diximus, tantum hae obligationes solvuntur quae ex verbis consistunt, non etiam ceterae: consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi. sed et id quod ex alia causa debeat potest in stipulationem deduci et per acceptilationem imaginaria solutione dissolvi.

(171.) Tamen mulier sine tutoris auctore acceptum facere non potest; cum aliqüin solvi ei sine tutoris auctoritate possit.

(172.) Item quod debetur pro parte recte solvi intelligitur: an autem in partem acceptum fieri possit, quaesitum est.

173. Est etiam alia species imaginariae solutionis per aes et libram. quod et ipsum genus certis in causis receptum est,

ceptilation is, as it were, a fictitious payment. For if you wish to remit to me what I owe you on a verbal obligation, this can be done by your allowing me to say these words: Do you acknowledge as received that which I promised to you? and by your replying: I do. 170. By this process, as we have said, only verbal obligations can be dissolved, and not the other kinds: for it seemed reasonable that an obligation made by words should be capable of being dissolved by other words. But that also which is due on other grounds¹ can be converted into a stipulation², and dissolved by a fictitious payment in the way of acceptilation. 171. A woman, however, cannot give an acceptilation without the authorization of her tutor, although, on the contrary, an (actual) payment can be made to her without his authorization³. 172. Likewise, it is allowed that the part-payment of a debt is valid, but it is a moot point whether there can be an acceptilation in part⁴.

173. There is also another mode of fictitious payment, that by coin and balance⁵: a form which is adopted in certain

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¹ Sc. re, litteris or consensus.
² The form of words by which this was done is to be found in Justinian, III. 29. 2, and is there called the Aquilian stipulation. The inventor, Aquilius Gallus, was a contemporary of Cicero. The Aquilian stipulation acted as a novation. See § 176 below.
³ II. 85.
⁴ But it was eventually ruled that an acceptilation in part was allowable. D. 46. 4. 13. 1—3.
⁵ An instance of actual payment per aes et libram is to be found in Livy, vi. 14.
veluti si quid eo nomine debeatur quod per aes et libram gestum est, sive quid ex iudicati causa debeatur. (174.) Adhibentur autem non minus quam quinque testes et libripens. deinde is qui liberatur ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS EO NOMINE JURE NEXI SUM DAMNAS SOLVO LIBEROQUE HOC AERE AENEACLE LIBRA. HANC UBI LIBRAM PRIMAL POSTREMAM FERII NIHIL DE LEGE JURE OBLIGATUR. deinde asse percutit libram, cumque dat ei a quo liberatur, veluti solvendi causa. (175.) Similiter legatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus sententiae se damnatum esse significat, ita heres defuncti iudicio damnatum se esse dicat. de eo tamen tans, cases, as for instance, when the debt is due on a transaction effected by coin and balance, or when it is due by reason of a judgment. 174. Not less than five witnesses and a "balance-holder" are called together. Then the man who is to be freed from his obligation must speak thus: "Inasmuch as I am bound to you by reason of nexum for so many thousand sesterces on such and such a transaction, I pay (you) and free (myself) by means of this coin and copper balance. Now that I have struck this balance for the first and last time (i.e. once for all) there is no legal obligation by virtue of the terms (lege) (of our former bargain)." Then he strikes the balance with the coin, and gives it to the person from whose claim he is being freed, as though by way of payment. 175. In like manner does a legatee release the heir from a legacy left by damnation, provided only that in like manner as a judgment-debtor admits himself bound by the sentence of the court, so must the heir of the deceased admit himself to be bound by a judgment. But a release in this form can only be

1 I. 119.
2 Jure nexi sum damnas is a reading suggested by Huschke, who has subsequently stated his preference for velut lege mancipii sum damnas. The mention of nexum, however, agrees very well with what is said in the preceding paragraph, that a contract solemnized per aes et libram is dissolved by the same process, for as Cicero tells us (De Orat. III. 40),

"nexum est quod per libram agitur." See also P. 40us sub verb.
3 We have adopted Lachmann's emendation ubi, instead of 4ibi, the more usual reading; and with him have supplied nihil before de lege. See the phrase prima postremaque in a form of treaty given by Livy, I. 34.
4 II. 201.
5 Before the fiction of payment can be allowed to take place, there
tum potest hoc modo liberari quod pondere, numero constet; et ita, si certum sit, quidam et de eo quod mensura constat intellegendum existimant.

176. Praeterea novatione tollitur obligatio, veluti si quod tu mihi debeas a Titio dari stipulatus sim. nam interventu novae personae nova nascitur obligatio, et prima tollitur transita in posteriorem: adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur. veluti si quod mihi debes a Titio post mortem eius, vel a muliere pupillo sine tutoris auctoritate stipulatus fuero. quo casu rem amitto: nam

given when the thing owed is a matter of weight or number: although some think it may be applied also to a thing which is a matter of measure, provided the thing be definite.

176. An obligation is also dissolved by novation, for instance, if I stipulate with Titius that what you owe me shall be given me by him. For by the introduction of a new person a new obligation arises, and the original one is dissolved by being transferred into the later one: so that, sometimes, although the later stipulation be void, yet the original one is dissolved by reason of the novation; for example, if I stipulate with Titius for payment by him after his death of what you owe me, or with a woman or a pupil without the authori-

must be an admission of a debt by judgment (equally a fiction); since a legacy is not properly one of the obligations admitting of acceptation per aet et libram, as we see from § 173.

But other commentators, Huschke for instance, think that the reading should be: scilicet ubi qua de causa alteri damnamum se esse significatur, heres illi testamento dare damnamum esse dicat: i.e. "provided that at the stage of the proceedings where the payer states the grounds of his obligation to the other, the heir must state himself bound by testament to deliver to him:" for they impugn the explanation just given, because the legacy, they say, is an obligation per aet et libram, the testament of which it is a part being so solemnized. On the release generally, see Cicero de

Legg. 11. 30, where solvo is used in the sense of liber.

1 The contract superseded in a novation might be of any kind, real, verbal, litteral, or consensual, but that by which it was superseded was always a stipulation: the original contract further might be natural, civil, or praetorian, and the superseding contract too might be binding either civilly or naturally. These points are clearly laid down by Ulpian, see D. 46. 2. 1, 3. The obligation entered into by a pupil is binding naturally, therefore supersedes the original contract, but will not be enforced by the civil law: that entered into by a slave is not binding either naturally or civilly, therefore causes no novation, and the old contract remains effective.

2 III. 100.
Novatio under condition. [III. 177—179.]

et prior debitor liberatur, et posterior obligatio nulla est. non idem iuris est, si a servo stipulatus fuero: nam tunc proinde ad huc obligatus tenetur, ac si postea a nullo stipulatus fuissem.

(177.) Sed si eadem persona sit a qua postea stipuler, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio vel sponsor aut dies adiciatur aut detrahatur.

(178.) Sed quod de sponsore dixi, non constat. nam diversae scolae auctoris placuit nihil ad novationem proficere sponsoris adiictionem aut detractionem. (179.) Quod autem diximus, si condicio adiciatur, novationem fieri, sic intellegi oportet, ut ita dicamus factam novationem, si condicio exitirit: alioquin, si defecerit, durat prior obligatio. sed videamus, num is

zation of the tutor. In such a case I lose the thing, for the original debtor is set free, and the later obligation is null. But the rule is not the same if I stipulate with a slave, for then (the original debtor) is held bound, just as though I had not subsequently stipulated with any one. 177. If the person with whom I make the second stipulation be the same as before, there is a novation only in case there be something new in the later stipulation; for instance, if a condition, or a sponsor, or a day (of payment) be inserted or omitted. 178. But what I have said about the sponsor is not universally admitted; for the authorities of the school opposed to us think the insertion or omission of a sponsor has not the effect of causing a novation. 179. Also our assertion that a novation takes place if a condition be inserted must be thus understood, that we mean a novation takes place if the condition come to pass: if on the contrary it fail, the original obligation stands good. But the point we have to consider is whether he

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1 III. 115.
2 Sponsors were obsolete in Justinian’s time, but he ruled that the introduction of a fidejussor worked a novation. Inst. III. 29. 3.
3 This passage is at first sight confused, but it may be thus interpreted. Supposing a new condition to be inserted, the question arises, whether is there an immediate novation or a novation conditional? If there be an immediate novation, the old agreement is swept away altogether, and the new agreement is only to be carried out on fulfilment of the condition; so that if the condition fail, the promisee will get nothing at all. This view Gaius at once discards. The novation is, according to him, presumptively conditional, and so if the condition fail, the old obligation remains intact according to the letter of the civil law. But admitting this view to be correct, all that as yet has been shewn is that an action will be grant-
qui eo nomine agat doli mali aut pacti conventi exceptione possit summoveri, et videatur inter eos id actum, ut ita ea res peteretur, si posterioris stipulationis extiterit condicio. Servius tamen Sulpicius existimavit statim et pendente condicione novationem fieri, et si defecerit condicio, ex neutra causa agi posse, et eo modo rem perire. qui consequenter et illud respondit, si quis id quod sibi Lucius Titius deberet, a servo fuerit stipulatus, novationem fieri et rem perire; quia cum servo agi non potest. sed in utroque casu alio iure utimur: non magis his casibus novatio fit, quam si quod tu mihi debeat a pere-

who sues in such a case can be met by an exception of fraud or "agreement made," and whether we must consider that the transaction between the parties is to the effect that the thing is to be sued for only in case the condition of the latter stipulation come to pass. Servius Sulpicius, however, thought that at once and whilst the condition was in suspense a novation took place, and that if the condition failed no action could be brought on either case, and so the thing was lost. And consistently with himself he also delivered this opinion, that if any one stipulated with a slave for that which Lucius Titius owed him (the stipulator), a novation took place and the thing was lost; because no action can be brought against a slave. But in both these cases we adopt a different rule; for a novation no more takes place in these cases than it

ed, and not that the plaintiff will succeed, for he may be met by an exception of dolus malus or pactum conventum, because the defendant may allege that the intent of the parties was to abolish the old certain obligation and introduce a new conditional one in its place. This question Gaius leaves unsettled, it can only be decided by the circumstances of each particular case; and so we may sum up his views thus: the presumption is that it is the novation which is conditional, an action will therefore be granted on the old agreement when the condition fails, but the presumption may be rebutted by shewing that it was not the novation, but the second stipulation that was conditional.

The latter part of the paragraph informs us that Servius Sulpicius maintained the doctrine of which Gaius disapproves, viz. that the novation was immediate; and that he regarded from a like point of view a stipulation made with a slave, considering it to work an absolute novation, and so destroy the pre-existent obligation, without, however, being itself valid. Gaius concludes the paragraph by reiterating his dislike of these principles of interpretation. See § 176. Justinian's view agrees with that of Gaius. See Inst. iii. 29. 3.
grino, cum quo sponsi communio non est, spondes verbo stipatus sim.

180. Tollitur adhuc obligatio litis contestatione, si modo legitimo iudicio fuerit actum. nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione: sed si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc est quod aput veteres scriptum est, ante litem contestatam dare debitem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere. (181.) Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso would if I stipulated by means of the word spondes with a foreigner, with whom it is impossible to deal in sponson 1.

180. An obligation is also dissolved by the litis contestatio 2, when proceedings are taken by a statutable action. For then the original obligation is dissolved and the defendant begins to be bound by the litis contestatio: but if he be condemned, then, the litis contestatio being no longer binding (lit. being swept away), he begins to be bound on account of the judgment. And this is the meaning of what is said by ancient writers, that "before the litis contestatio the debtor ought to give, after the litis contestatio he ought to suffer condemnation (submit to award), after condemnation (award) he ought to do what is adjudged." 181. Hence it follows that if I sue for a debt by statutable action 3, I cannot afterwards, by the letter of the civil

1 III. 93. Sponsus = sponsoris promissio. Thirsk, sub verb.
2 The Roman lawyers did not consider that a contested right was a subject of litigation as soon as the plaintiff had taken the first step towards an action. The moment when it did become a subject of litigation was the litis contestatio. Till the preliminary proceedings before the Praetor were terminated there was room for a peaceable accommodation between the parties, and it was only at the point when the litigants were remitted to a iudex, the instant when the proceedings in jure terminated and those in iudicio began, that the matter must inevitably be left to the decision of the law. The meaning of the term litis contestatio is thus given by Festus: "Contestari est cum uterque reus dicit, Testes estote. Contestari litem dicuntur duo aut plures adversari quod ordinato judicio utraque pars dicere solet, Testes estote;" where he evidently is referring to the time anterior to the introduction of the formulary process, when legis actiones were in use. This ceremony became in later times a mere form, but the name was still retained. Ulpian says, "proinde non originem judicis spectandum, sed ipsum iudicati velat obligationem," referring to the obligation of a reus after award. D. 15. 1. 3. 11.
3 The differences in procedure be-
Iure agere non possim, quia inutiliter intendo dari mihi opor-
tere: quia litis contestatione dari oportere desistit. alter atque si imperio continenti judicio egerim: tunc enim nihilominus obligatio durat, et ideo ipso iure postea agere possim; sed
law, bring another action for the same, because I plead\(^1\) in
vain that "it ought to be given to me," inasmuch as by the \textit{litis contestatio} the necessity that it should be given to me ceased. It is otherwise if I proceed by action coexistent with \textit{imperium}, for then the obligation still remains, and therefore, by the

tween \textit{judicia legitima} and \textit{judicia imperio continenti} are to be found in Gaius, IV. 109—109. Mühlenbruch (in his notes on Heineccius, IV. 6. 27) gives, in substance, the following account of the origin of the appellations and the reasons for the diversity of practice of the two systems: "The reason for the numerous and important differences between the two kinds of \textit{judicia} was that in early times the statute law was confined in its application to a few persons and a narrow district, and cases involving other persons or arising outside this district were settled at the discretion and by the direct authority (\textit{imperium}) of the magistrates: and although in later times this free action of the magistrate was restrained within well-ascertained limits, yet it continued an admitted principle, that in the \textit{judicia} based on the \textit{imperium} of the magistrate there was less adherence to strict rule than in those which sprung from the \textit{leges}. See Cic. \textit{pro Rosc.} § 5. As the state grew, the ancient distinction became a mere matter of outward form, and the one system became so interwoven with the other, that it seems marvel the separation was kept up so long. Hence it at length died away without any direct enactment, and it is indisputable that in Justinian's time no vestiges of it remained." See also Zimmern's \textit{Traité des actions chez les Romains}, § XXXIV.

The Praetor's edict being annual, a right of action based on one of its clauses was not necessarily recognised by the succeeding Praetor; and even if he did grant a like action, this was not because his predecessor upheld a certain rule, but because he himself had enacted the same. Hence the action was under the new edict, even though the facts on which it was based dated from the time when the old edict was in force; and the original right of action had perished with the termination of the preceding Praetor's \textit{imperium}. Also if an action had been brought and decided under the old edict, another could still be brought under the new edict, for the offence against that had not yet been a matter of suit. Hence the need of the \textit{exceptio}.

As we have mentioned \textit{imperium} above, this is perhaps the place to remark that this \textit{imperium} implies a power of carrying out sentences: a magistrate who was merely executive was said to have \textit{imperium mcerum or potestas}: one like the Praetor, &c., who could both adjudge and carry into execution, possessed \textit{imperium mixtum}, i.e. a combination of \textit{potestas} and \textit{jurisdiction}; for \textit{jurisdiction}, sometimes called \textit{notex}, is the attribute of a magistrate who can only investigate, and must apply to other functionaries to carry out his decisions: thus a \textit{judex} had \textit{jurisdiction} only. See Heineccius, \textit{Antig. Rom.} pp. 637, 638, Mühlenbruch's edition, and D. 3. 1. 3.

\(^1\) IV. 41. 2 IV. 107.
182. Transeamus nunc ad obligationes quae ex delicto ori-
tur, veluti si quis furtum secerit, bona rapuerit, damnnum
dederit, iniuriam commiserit: quarum omnium rerum uno ge-
nerre consistit obligatio, cum ex contractu obligationes in IIII
genera deducantur, sicut supra exposuimus.

183. Furtorum autem genera Servius Sulpicius et Masurius
Sabinus IIII esse dixerunt, manifestum et nec manifestum,
conceptum et oblatum. Labeo duo, manifestum, nec manifestum;
nam conceptum et oblatum species potius actionis esse furto
letter of the law, I can afterwards bring another action: but
I must be met by the exception rei judicatae or in judicium
deductae. Now what are statutable actions, and what are
actions coexistent with imperium, we shall state in the next
commentary.

182. Now let us pass on to actions which arise from delict, for
instance, if a man have committed a theft, carried off goods
by violence, inflicted damage, done injury: the obligation
arising from all which matters is of one and the same kind,
whereas, as we have explained above, obligations from con-
tract are divided into four classes.

183. Of thefts, then, Servius Sulpicius and Masurius Sabinus
say there are four kinds, manifest and nec-manifest, concept
and oblate: Labeo says there are two, manifest and nec-
manifést: for that concept and oblate are rather species of

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1 IV. 106, 123. The first excep-
tion is to the effect that the matter
has already been adjudicated upon,
the second that it has been carried
beyond the litis contestatio, and that
thus there has been a novatio. See
App. (R). In the last-named ex-
ception it is obviously immaterial
whether the court has yet arrived at
a judgment or not. See for a curi-
ous case connected with this ex-
ception, Cic. de Orat. 1. 37.

2 Besides the methods of dissolv-
ing an obligation already mentioned
there were (1) compensatio and de-
ductio, the setting off of what the cre-
ditor owes to the debtor, in order to

3 It must be noticed that all the
actions mentioned in §§ 183—225 are
civil actions on delict. Furtum, ra-
pina, etc. were also punishable crim-
inally, but with this fact we have
at present nothing to do.

4 They all arise re.

5 III. 89.
cohaerentes quam genera furtorum; quod sane verius videtur, sicut inferius apparebit. (184.) Manifestum furtum quidam id esse dixerunt quod dum fit deprehenditur. alii vero ulterius, quod eo loco deprehenditur ubi fit: velut si in oliveto olivarum, in vineto uvarum furtum factum est, quamdiu in eo oliveto aut vineto fur sit; aut si in domo furtum factum sit, quamdiu in ea domo fur sit. alii adhuc ulterius, eousque manifestum furtum esse dixerunt, donec perferret eo quo perferre fur destinasset. alii adhuc ulterius, quandoque eam rem fur tenens visus fuerit; quae sententia non optimuit. sed et illorum sententia qui existimerunt, donec perferret eo quo fur destinasset, deprehensum furtum manifestum esse, improbata est, quod videatur a quorum admittere dubitationem, unius dici an etiam plurium dierum spatio id terminandum sit. quod eo pertinet, quia saepe in alius

action attaching to theft than kinds of theft: and this view appears to be the more correct one, as will be seen below. 184. Some have defined a manifest theft to be one which is detected whilst it is being committed. Others have gone further, and said it is one which is detected in the place where it is committed: for instance, if a theft of olives be committed in an oliveyard, or of grapes in a vineyard, (it is a manifest theft) so long as the thief is in the vineyard or oliveyard: or if a theft be committed in a house, so long as the thief is in the house. Others have gone still further, and said that a theft is manifest until the thief has carried the thing to the place whither he intended to carry it. Others still further, that it is manifest if the thief be seen with the thing in his hands at any time; but this opinion has not found favour. The opinion, too, of those who have thought a theft to be manifest if detected before the thief has carried the thing to the place he intended has been rejected, because it seemed to leave the point unsettled, whether theft must in respect of time be limited to one day or to several. This

1 III. 186, 187. Gaius, with his usual dislike of definitions, does not give one of theft. Justinian's will be found in Inst. iv. 1. 1. Those of Sabinus given by Aulus Gellius, xi. 18 are: "Qui alienam rem adrectavit, cum id se invito domino facere judicare debet, furti tenetur," and "Qui alienum tacens luci faciendi causa sustulit, furti constringitur, sive scit cujus sit, sive nescit," Gaius implies that this or something like it is his definition in §§ 195, 197 below.
242  Furtum nec-manifestum, conceptum.  [III. 185—188.

civitatibus surreptas res in alias civitates vel in alias provincias destinat fur perferre. ex duabus itaque superioribus opinionibus alterutra adprobatur: magis tamen plerique posteriorum probant.  (185.) Nec manifestum furtum quod sit, ex iis quae diximus intellegitur: nam quod manifestum non est, id nec manifestum est.  (186.) Conceptum furtum dicitur, cum aput aliquem testibus praesentibus furtiva res quaesita et inventa est: nam in eum propria actio constituta est, quamvis fur non sit, quae appellate concepti.  (187.) Oblatum furtum dicitur, cum res furtiva tibi ab aliquo oblata sit, eaque aput te concepta sit; utique si ea mente data tibi fuerit, ut aput te potius quam aput eum qui dederit conciperetur. nam tibi, aput quem concepta est, propria adversus eum qui optulit, quamvis fur non sit, constituta est actio, quae appellate oblati.  (188.) Est etiam

has reference to the fact that a thief often intends to convey things stolen in one state to other states or other provinces. Hence, one or other of the two opinions first cited is the right one; but most people prefer the second. 185. What a nec-manifest theft is, is gathered from what we have said: for that which is not manifest is “nec-manifest.” 186. A theft is termed concept when the stolen thing is sought for and found in any one’s possession in the presence of witnesses: for there is a particular kind of action set out against him, even though he be not the thief, called the actio concepti. 187. A theft is called oblate, when the stolen thing has been put on your premises by any one and is found there: that is to say, if it have been given to you with the intention that it should be found with you rather than with him who gave it: for there is a particular kind of action set out for you, in whose hands the thing is found, against him who put the thing into your hands, even though he be not the thief, called the actio oblati. 188. There is also an

1 The difference between nec-manifest and concept theft is that in the first the thief delivers up the stolen thing or admits his guilt without throwing on the plaintiff the trouble of a search, whilst in the other he denies his culpability but submits quietly to the search: of course if he offer resistance the case becomes one of furtum prohibitus.

2 Paulus, S. R. II. 3r. 3.
prohibiti furti adversus eum qui furtum quaerere volentem prohibuerit.

189. Poena manifesti furti ex lege XII tabularum capitalis erat. nam liber verberatus addicebatur ei cui furtum fecerat; (utrum autem servus efficeretur ex additione, an adiudicati loco constitueretur, veteres quaerabant); servum aequo verberatum e saxo deicidebant. postea improbata est asperitas poenae, et tam ex servo persona quam ex liberi quadrupli actio Praetoris edicto constituta est. (190.) Nec manifesti furti poena per legem XII tabularum dupli inrogatur; quam etiam Praetor conservat. (191.) Concepti et oblati poena ex lege XII tabularum

actio prohibiti furti against one who offers resistance to a person wishing to search.

189. The penalty of a manifest theft was by a law of the Twelve Tables capital\(^1\). For a free man, after being scourged, was assigned over to the person on whom he had committed the theft: (but whether he became a slave by the assignment, or was put into the position of an *adjudicatus\(^2\), was disputed amongst the ancients): a slave, after he had in like manner been scourged, they hurled from a rock. In later times objection was taken to the severity of the punishment, and in the Praetor's edict an action for four-fold was set forth, whether the offender were slave or free\(^3\). 190. The penalty of a nec-manifest theft was laid at two-fold by the law of the Twelve Tables: and this the Praetor retains\(^4\). 191. The penalty of concept and oblate theft was three-fold by the law of the Twelve

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\(^1\) Tab. viii. 1. 14. For the meaning of "capital" see note on III. 213.

\(^2\) *Adjudicatus*, more usually *addicatus*, (but Gauss probably uses the former appellation in this passage to avoid confusion, having already written *addicebatur* in a different signification,) means an insolvent debtor delivered over to his creditor. The *adjudicati* were not reduced to slavery, (the common opinion to that effect being erroneous,) but they had to perform for their creditor servile offices. That they differed from slaves is proved by many facts; e.g. when by payment of the debt they

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\(^3\) If the master declined to pay the penalty for his slave, he could give him up as a *noxia*. I v. 75.

\(^4\) See Maine's ingenious explanation of the wide differences in the ancient penalties of *furtum manifestum* and *nec manifestum*. Ancient Law, p. 379.
tripli est; quae similiter a Praetore servatur. (192.) Prohibiti actio quadrupli ex edicto Praetoris introducta est. lex autem eo nomine nullam poenam constituit: hoc solum praecipit, ut qui quaerere velit, nudus quaerat, linteo cinctus, lancem habens; qui si quid invenerit, iubet id lex fur tum manifestum esse. (193.) Quid sit autem linteum, quae situm est. sed verius est consulti genus esse, quo necessariae partes tegentur. quare lex tota ridicula est. nam qui vestitum quaerere prohibit, is et nudum quaerere prohibiturus est: eo magis quod ita quaesitae res inventa maiori poenae subiciatur. deinde quod lancem sive iede haberi iubeat, ut manibus occupantis nihil subiciatur, sive iede, ut quod invenerit, ibi imponat: neutrum eorum procedit, si id quod quaerator eius magnitudinis aut naturae sit, ut neque subici neque ibi imponi possit. certe non dubitatur, cuiuscum-

Tables: and this too is retained by the Praetor. 192. The action with four-fold penalty for prohibited theft was introduced by the Praetor's edict. For the law had enacted no penalty in this case; but had only commanded that a man wishing to search should search naked, girt with a linteum and holding a dish; and if he found any thing, the law ordered the theft to be regarded as manifest. 193. Now what a linteum may be is a moot point: but it is most probable that it was a kind of cincture with which the private parts were covered. Hence the whole law is absurd. For any one who resists search by a man clothed, would also resist search by him naked: especially as a thing sought for in this manner is subjected to a heavier penalty if found. Then as to its ordering a dish to be held, whether it be that nothing might be introduced stealthily by the hands of the holder, or that he might lay on it what he found: neither of these explanations is satisfactory, if the thing sought for be of such a size or character that it can neither be introduced by stealth nor placed on the dish. On this point, at any rate, there is no

1 Tab. VIII. L 15.
2 The linteum is called licium sometimes, e.g. in Festus: "Lance et licio dicebatur apud antiquos, quia qui fur tum ibat quaerere in domo aliena, licio cinctus intrabat, lance mque-ante oculos tenebat propert matrum familias aut virginum præsentiam."
3 Festus in the passage just quoted assigns a third reason. Other authors adopt that first given in the text, and say that the dish was carried on the head and supported by both hands. See Heinecc. Antiq. IV. 1. § 19.
II. 194—196. States of fact constituting Furtum.

Dispute, that the law is satisfied whatever be the material of which the dish is made. 194. Now, since the law orders that a theft shall be manifest under the above circumstances, there are writers who maintain that a theft may be regarded as manifest either by law or by nature: by law, that of which we are now speaking; by nature, that of which we treated above. But it is more correct for a theft to be considered as manifest only by nature. For a law can no more cause a man who is not a manifest thief to become manifest, than it can cause a man who is not a thief at all to become a thief, or one who is not an adulterer or homicide to become an adulterer or homicide: but this no doubt a law can do, cause a man to be liable to punishment as though he had committed a theft, adultery or homicide, although he have committed none of them.

195. A theft takes place not only when a man removes another’s property with the intent of appropriating it, but generally when any one deals with what belongs to another against the will of the owner. 196. Therefore, if any one make use of a thing which has been deposited1 with him, he commits a theft. And if any one have received a thing to be used, and convert it to another use, he is liable for theft.

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1 See note (M) in Appendix.
veluti si quis argentum utendum acceperit, quod quasi amicos ad coenam invitaturus rogaverit, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius secum aliquo duxerit; quod veteres scripserunt de eo qui in aciem perduxisset. (197.) Placuit tamen eos qui rebus commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intellegant id se invito domino facere, eumque, si intellexisset, non permissurum; et si permissurum crederent, extra furti crimem videri: optima sane distinctione, quia furtum sine dolo malo non committitur. (198.) Sed et si credat aliquis invito domino se rem contractare, domino autem volente id fiat, dicitur furtum non fieri. unde illud quaesitum est, cum Titius servum meum sollicitavit, ut quasdam res mihi subriperet et ad eum perferret, et servus id ad me pertulerit, ego, dum volo Titium in ipso delicto deprehendere, permiserim servum quasdam res ad eum perferre, utrum furti, an servi corrupti iudicio teneatur Titius mihi, an neutro: reponsum, neutro.

For example, if a man have received silver plate to be used, asking for it on the pretext that he is about to invite friends to supper, and carry it abroad with him; or if any one take with him to a distance a horse lent him for the purpose of a ride: and the instance the ancients gave of this was a man’s taking a horse to battle. 197. It has been decided, however, that those who employ borrowed things for other uses than those for which they received them, only commit a theft in case they are aware that they are doing this against the will of the owner, and that if he knew of the proceeding he would not allow it: and if they believe he would allow it, they are not considered to be chargeable with theft: the distinction being a very proper one, since theft is not committed without wrongful intent. 198. And even if a man believe that he is dealing with a thing against the will of its owner, whilst the proceeding is agreeable to the will of the owner, it is said there is no theft committed. Hence this question has been raised; Titius having made proposals to my slave to steal certain things from me and bring them to him, and the slave having informed me of this, I, wishing to convict Titius in the act, allowed my slave to take certain things to him: is then Titius liable to me in an action of theft, or in one for corruption of a slave, or in neither: the answer was, that he was liable.
in neither, not in an action of theft, because he had not dealt with the things against my will, nor in an action for corruption of a slave, because the integrity of the slave had not been corrupted. 199. Sometimes there can be a theft even of free persons, for instance, if one of my descendants who are under my potestas, or my wife who is under my manus, or my judgment-debtor, or one who has engaged himself to me as a gladiator be abducted. 200. Sometimes, too, a man commits a theft of his own property, for example, if a debtor take away by stealth a thing he has given in pledge to his creditor, or if I take by stealth my own property from a possessor in good faith. Therefore, it has been ruled that a man commits a theft who, on the return of his own slave whom another possessed in good faith, conceals him. 201. Conversely, again, we are sometimes allowed to take possession of another's property and acquire it by usucaption, and no theft is considered to be committed; the items of an inheritance, for example, of which a necessary heir has not previously obtained possession: for when the heir is of the

1 See Justinian's reasons for giving an opposite decision in Inst. IV. 1. 8.
2 Technically styled plagiarism.
3 IV. 21.
4 Auctoratus is defined by Paulus: "qui auctoramento locatus est ad gladium:" and Dirksen explains auctóramentum to be an equivalent of jusiurandum. Gladiators were not all captives or criminals; Roman citizens sometimes sold themselves to fight in the arena.
5 See II. 9, 51, 58. In the first and second of these passages it is not
rans he de exte placuit, ut pro herede usuapi possit. debitor quoque qui fiduciam quam creditori mancipaverit aut in iure cesserit detinet, ut superiore commentario rettulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur qui ipse furtum non fecerit: qualis est cuius ope consilio furtum factum est, in quo numero est qui nummos tibi excussit, ut eos alius surriperet, vel obstitit tibi, ut alius surriperet, aut oves aut boves tuas fugavit, ut alius eas exciperet; et hoc veteres scripsent de eo qui panno rubro fugavit armentum. Sed si quid per lasciviam, et non data opera, ut furtum committeretur, factum sit, videbimus an utilis Aquiliae actio dari debeat, cum per legem Aquiliam quae de damno lata est etiam culpa puniatur.

"necessary" class, it has been ruled that there may be usucapion pro herede. A debtor also who retains the possession of a pledge which he has made over to his creditor by mancipation or cession in court, can, as we have stated in the preceding Commentary, possess it and acquire it by usucapion without committing theft.

202. Sometimes a man is liable for a theft who has not himself committed it: of such kind is he by whose aid and counsel a theft has been committed: and in this category must be included one who has struck money out of your hand that another may carry it off, or has put himself in your way that another may carry it off, or has scattered your oxen or sheep that another may make away with them; and the instance the ancients gave of this was a man's scattering a herd by means of a red rag. But if anything be done in wantonness, and not with set purpose for a theft to be committed, we shall have to consider whether a constructive Aquilian action should be granted, since by the Lex Aquilia, stated that the possessio pro herede of a stranger is tolerated only when the heir is "necessary" (II. 153), but that such is the case is to be gathered from II. 57, 58, and the passage now before us.

1 II. 59, 60.
2 The meaning of the passage is this: "in the case supposed there is no actio furti; the point therefore which we shall have to consider in any particular instance is whether a constructive Aquilian action will lie." Utilis has been explained above in the note on II. 78. The action would be utilis and not directa, because the direct action could only be brought when the damage was done corpori corpori, III. 219.
203. Furti autem actio ei competit cuius interest rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si eius interesse rem non perire. (204.) Unde constat creditorem de pignore subrepto furti agere posse; adeo quidem, ut quamvis ipse dominus, id est ipse debitor, eam rem subripuerit, nihilominus creditoris competit actio furti. (205.) Item si subri pueri, aut sarcoinaor sarcienda vestimenta mercerio certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil interesse non possit, si modo est fullo aut sarcoinaor suum posse seque quodam aliquando sequi possit, si modo is fullo aut sarcoinaor ad rem praestandam sufficiat; nam si solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio competit, quia hoc casu ipsius interesse rem salvam esse. (206.) Quae de fullo aut sarcoinaor diximus, eadem transferamus et ad eum cui rem commodavimus: nam ut illi mercedem capiendo custodiam

which was passed with reference to damage, culpable negligence\(^1\) is also punished.

203. The action of theft can be brought by anyone who has an interest that the thing should be safe, even though he be not the owner: and thus again it does not lie for the owner unless he have an interest that the thing should not perish. 204. Hence it is an admitted principle that a creditor can bring an action of theft for a pledge which has been carried off: so that even if the owner himself, that is the debtor, have carried it off, still the action of theft lies for the creditor. 205. Likewise, if a fuller have taken garments to smooth or clean, or a tailor to patch, for a settled hire, and have lost them by theft, he has the action of theft and not the owner: because the owner has no interest in the thing not perishing, since he can by an action of letting recover his own from the fuller or tailor, provided the fuller or tailor have money enough to make payment: for if he be insolvent, then, since the owner cannot recover his own from him, the action lies for the owner himself, for in this case he has an interest in the thing being safe. 206. These remarks about the fuller or tailor we shall also apply to a person who has lent a thing to any one: for in like manner as the former by receiving hire becomes responsible for

\(^1\) III. 231.
praestant, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare. (207.) Sed is aput quem res deposita est custodiam non praestat, tantumque in eo obnoxius est, si quid ipse dolo fecerit: qua de causa, si res ei subrepta fuerit quae restituerenda est, eius nominate depositi non tenetur, nec ob id eius interest rem salvam esse: furti itaque agere non potest; sed ea actio domino competet.

208. In summa sciendum est quaesitum esse, an impubes rem alienam amovendo furtum faciat.plerisque placet, quia furtum ex adfectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intellegat se delinquere.

safe keeping, so does the borrower by enjoying the advantage of the use also become responsible for the same. 207. But a person with whom a thing is deposited is not responsible for its keeping, and is only answerable for what he himself does wilfully: hence, if the thing which he ought to restore be stolen from him, he is not liable to an action of deposit in respect of it, and thus he has no interest that the thing should be safe; therefore he cannot bring an action of theft, but that action lies for the owner. 208. Finally, we must observe that it is a disputed point whether a child under puberty commits a theft by removing another person's property. It is generally held that as theft depends on the intent, he is only liable to the charge, if he be very near puberty and therefore aware that he is doing wrong.

1 The depository is only liable for dolus, the text says. The general rule in contracts was that the person benefited was liable for culpa levis, i.e. for even trivial negligences, whilst the person on whom the burden was cast was only liable for culpa lata, gross negligence. Dolus imports a wilful injury; culpa an unintentional damage, but one caused by negligence. The depository would be liable for dolus and culpa lata. Gaius, therefore, is not speaking with strict accuracy when he says the depository is liable only "si quid ipse dolo fecerit;" but perhaps he had in his thoughts the well-known maxim, culpa lata dolo aequiparatur, in which case his dictum is correct. On the subject of culpa see Mackeldy, Syst. Jur. Rom. § 343, and Jones, On Bailments, pp. 5—34.

2 Probably Gaius is not writing technically when he uses the expression "pubertati proximus." The sources, however, sometimes speak of a child under seven as iusstanti proximus, and one between seven and fourteen as pubertati proximus. See Savigny, On Possession, translated by Perry, p. 180, note (b).
209. Quia res alienas rapit tenetur etiam furti: quis enim magis alienam rem invito domino contrectat quam qui rapit? itaque recte dictum est eum improbum furem esse. sed propriam actionem eius delicti nomine Praetor introduxit, quae appellatur vi bonorum raptorum; et est intra annum quadrupli actio, post annum simpli. quae actio utilis est, et si quis unam rem, licet minimam, rapuerit. 

210. Damni iniuriae actio constituitur per legem Aquiliam. cuius primo capite cautum est, ut si quis hominem alienum, eamve quadrupedem quae pecudum numero sit, iniuria occidente, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur. (211.) Is iniuria autem occidere intellegitur cuius

209. He who takes by violence the goods of another is liable for theft (as well as rapina): for who deals with another's property more completely against the owner's will than one who takes it by violence? And therefore it is rightly said that he is an atrocious thief. But the Praetor has introduced a special action in respect of this delict, which is called the actio vi bonorum raptorum, and is an action for fourfold if brought within the year, and for the single value if brought after the year: and is available when a man has taken by violence a single thing, however small it may be.

210. The action called damni iniuriae (of damage done wrongfully) was introduced by the Lex Aquilia, in the first clause of which it is laid down that if any one have wrongfully slain another person's slave, or an animal included in the category of cattle, he shall be condemned to pay to the owner the highest value the thing has borne within that year. 

211. A man is considered to slay wrongfully when the

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1 The fourfold penalty in this actio includes restitution of the thing, so that more correctly the penalty is threefold. In an actio furti manifesti, on the contrary, the penalty is really fourfold, the thing itself being recovered separately by a vindicatio. See IV. 8; Just. Inst. IV. 6. 19.

2 We have several times already come across the word utilis derived from uti (as), but utilis here is the more common adjective derived from sitor, to use.

3 The words of this clause of the law are given in D. 9. 2. 2. pr. In D. 9. 2. 1 we are told that the Lex Aquilia was a plebiscite, and Theophilus assigns it to the time of the secession of the plebs, probably meaning that to the Janiculum, 385 B.C. The second clause was on a different subject, as Gaius tells us in § 215, the third is quoted in D. 9. 3. 37. 5.
dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenderit: itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit. (212.)

Nec solum corpus in actione huius legis aestimatur; sed sane si servo occiso plus dominus capiat damnii quam pretium servisit, id quoque aestimatur: velut si servus meus ab aliquo heres institutus, ante quam iussu meo hereditatem cerneret, occisus fuerit; non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. Item si ex gemellis vel ex comœdis vel ex symphoniaicis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius quoque computatur quod ceteri qui supersunt depretiati sunt. Idem iuris est etiam si ex pari mala­rum unam, vel etiam ex quadrigis equorum unum occiderit. (213.) Cuius autem servos occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel
death takes place through his malice or negligence: and damage committed without wrongfulness is not punished by this or any other law: so that a man is unpunished when he commits a damage through some mischance, without negligence or malice. 212. In an action on this law the account taken is not restricted to the mere value of the thing destroyed, but undoubtedly, if by the slaying of the slave the owner receive damage over and above the value of the slave, that too is included; for instance, if a slave of mine, instituted heir by any one, be slain before he has made creation for the inheritance at my command. For not only the price of the man himself is computed, but the amount of the lost inheritance also. So too if one of twins or one of a band of actors or musicians be slain, not only is the value of the slaughtered slave taken into account, but besides this the amount whereby the survivors are depreciated. The rule is the same if one of a pair of mules or of a team of horses be killed. 213. A man whose slave has been slain is free to choose whether he will make the slayer defendant on a capital charge or sue

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1 II. 164.
2 Capitalis does not necessarily mean "capital" in our sense of the word, but signifies "affecting either the life, liberty, or citizenship and reputation." See Dirksen sub verbo.

The law under which the criminal suit could be brought in the present case was the Lex Cornelia de sicariis (72 B.C.), the penalty whereof was interdiction from fire and water, and consequently loss of citizenship; Hei-
III. 214—217. | Lex Aquilia, et. II. III. 253

hac lege damnum persequi. (214.) Quod autem adiutum est
in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT,
illud efficit, si clodum puta aut luscum servum occiderit, qui in
eo anno integer fuerit, ut non quanti mortis tempore, sed quanti
in eo anno plurimi fuerit, aestimatio fiat. quo fit, ut quis plus
interdum consequatur quam ei damnum datum est.

215. Capite secundo in adstipulatorem qui pecuniam in
fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti
actio constituitur. (216.) qua et ipsa parte legis damni nomine
actionem introduci manifestum est. sed id caveri non fuit
necessarium, cum actio mandati ad eam rem sufficeret; nisi
quod ea lege adversus infitiantem in duplum agitur.

217. Capite tertio de omni cetero damno cavetur. itaque
si quis servum vel eam quadrupedem quae pecudum numero
est vulneraverit, sive eam quadrupedem quae pecudum numero non
for damages under this law. 214. The insertion in the law of
the words: “the highest value the thing had within the year,”
has this effect, that if a man have killed a lame or one-eyed
slave, who was whole within the year, an estimate is made
not of his value at the time of death, but of his best value
within the year. The result of which is that sometimes a
master gets more than the amount of the damage he has
suffered.

215. In the second clause (of the Aquilian law) an action
is granted against an adstipulator who has given an accep-
tilation in defraudance of his stipulator, for the value of
the thing concerned. 216. And that this provision was in-
troduced into this part of the law on account of the damage
accruing is plain; although there was no need for such a
provision, since the action of mandate would suffice, save
only that under this (the Aquilian law) the action is for
double against one who denies his liability.

217. In the third clause provision is made regarding all
other damage. Therefore if any one have wounded a slave or
a quadruped included in the category of cattle, or either killed
or wounded a quadruped not included in that category, as a

neccius, Antiq. Rom. IV. 18, 58.
According to the Code (III. 35. 3), a
master whose slave had been killed
could bring both a criminal and a civil
action.

1 III. 110.
2 III. 169.
3 III. 111.
4 IV. 9, 171.
est, velut canem, aut feram bestiam velut ursum leonem vulneraverit vel occiderit, ex hoc capite actio constituitur. in ceteris quoque animalibus, item in omnibus rebus quae anima carent, damnum iniuriae datum hac parte vindicatur. si quid enim usum aut ruptum aut fractum fuerit, actio hoc capite constituitur; quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum enim intellegitur quod quoquo modo corruptum est. unde non solum usta aut rupta aut fracta, sed etiam scissa et collisa et effusa et diruta aut perempta atque deteriora facta hoc verbo continentur. (218.) Hoc tamen capite non quanti in eo anno, sed quanti in diebus xxx proxumis ea res fuerit, damnum vindicatur is qui damnum dederit; ac ne plurimi quidem verbum adicitur: et ideo quidam diversae scholae auctores putaverunt liberum esse ipsum datu, ut duntaxat de XXX diebus proxumis vel eum Praetor formulae adiceret quo plurimi res fuit, vel alium quo minoris fuit. sed Sabino placuit perinde habendum ac si etiam hac parte plurimi verbum adiectum esset: nam legis latorem

dog or a wild-beast, such as a bear or lion, the action is based on this clause. And with respect to all other animals, as well as with respect to things devoid of life, damage done wrongfully is redressed under this clause. For if anything be burnt, or broken, or shattered, the action is based on this clause: although the word "broken" (ruptum) would by itself have met all these cases: for by ruptum is understood that which is spoiled in any way. Hence not only things burnt, or broken, or shattered, but also things torn, and bruised, and spilled, and torn down or destroyed, and deteriorated, are comprised in this word. 218. Under this clause, however, the committer of the damage is condemned not for the value of the thing within the year, but within the 30 days next preceding: and the word plurimi (the highest value) is not added, and therefore certain authorities of the school opposed to us have maintained that the Praetor has full power given him to insert in the formula¹ a day, provided only it be one of the thirty next preceding, when the thing had its highest value, or another day on which it had a lower one. But Sabinus held that the clause must be interpreted just as though the word plurimi had been inserted in this place also, for he said the

¹ IV. 30.
contentum fuisse, *quod prima parte eo verbo usus esset.* (219.)

Et placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit. *itaque alio modo damno dato utiles actiones dantur:* velut si quis alienum hominem aut pecudem inciserit et fame necaverit, aut iumentum tam vehementer egerit, ut rumberetur; *aut* si quis alieno servo persuaserit, ut in arborem ascenderet vel in puteum descenderet, et *et* aut ascendendo aut descendo ceciderit, et aut mortuus fuerit aut aliqua parte corporis laesus sit. item si quis alienum servum de ponte aut ripa in flumen proiecerit et is suffocatus fuerit, *tum* hic corpore suo damnum dedisse eo quod proiecerit, non difficiliter intellegi potest.

220. Injuria autem committitur non solum cum quis pugno pulsatus aut fuste percussus vel etiam verberatus erit, sed et si cui convicium factum fuerit, sive quis bona alicuius quasi de-

author of the law thought it sufficient to have expressed the word in the first part thereof. 219. Also it has been ruled that an action lies under this law only when a man has done damage by means of his own body. Therefore for damage done in any other mode utiles actiones¹ are granted: for instance, if a man have shut up another person’s slave or beast and starved it to death, or driven a beast of burden so violently as to cause its destruction: or if a man have persuaded another person’s slave to go up a tree or down a well, and in going up or down he have fallen, and either been killed or injured in some part of his body. But if a man have thrown another person’s slave from a bridge or bank into a river and he have been drowned, it is plain enough that he has caused the damage with his body, inasmuch as he cast him in.

220. Injury² is inflicted not only when a man is struck with the fist, or beaten with a stick or lashed, but also when abusive language³ is publicly addressed to any one, or when

¹ See note on II. 78.
² For the different significations of the word *injuria* see Justinian, Inst. iv. 4. pr., a passage which is in great measure borrowed from Paulus.
³ An explanation of the word *convicium* is given by Ulpian in D. 47. 10. 15. 4: “Convicium autem dicitur vel a concitatione vel a conventu, hoc est, a collatione vocum, quum enim in unum complures voces conferuntur, convicium appellatur, quasi convocium.” Hence *convicium* means either abusive language addressed to a man publicly, or the act of inciting a crowd to beset a man’s house or to mob the man himself.
bitoris sciens eum nihil debere sibi proscripsit, sive quis ad infamiam alicuius libellum aut carmen scripsit, sive quis matremfamilias aut praetextatum adsedtatum fuerit, et denique aliis pluribus modis. (221.) Pati autem iniuriam videmur non solum per nosmet ipsos, sed etiam per liberos nostros quos in potestate habemus; item per uxores nostras quamvis in manu nostra non sint. itaque si veluti filiae meae quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum agi iniuriam potest, verum etiam meo quoque et Titii nomine. (222.) Servo autem ipse quidem nulla iniuriam intellegitur fieri, sed domino per eum fieri videtur: non tamen iisdem modis quibus etiam per liberos nostros vel uxores, iniuriam pati videmur, sed ita, cum quid atrocius commissum fuerit, quod aperte in contemptiam domini fieri videtur, veluti si quis alienum servum verberaverit; et in hunc casum formula proponitur. at si quis servo

any person knowing that another owes him nothing advertises\(^1\) that other's goods for sale as though he were a debtor, or when any one writes a libel or a song to bring disgrace on another, or when any one follows about a married woman or a young\(^2\) boy, and in fact in many other ways. 221. We can suffer injury not only in our own persons but also in the persons of our children whom we have under our \textit{potestas}; and so too in the persons of our wives, even though they be not under our \textit{manus}. For example then, if you do an injury to my daughter who is married to Titius, not only can an action for injury be brought against you in the name of my daughter, but also one in my name, and one in that of Titius. 222. To a slave himself it is considered that no injury can be done, but it is regarded as done to his master through him: we are not, however, looked upon as suffering injury under the same circumstances (through slaves) as through our children or wives, but only when some atrocious act is done, which is plainly seen to be intended for the insult of the master, for instance, when a man has flogged the slave of another; and a \textit{formula} is set forth\(^3\) to meet such a case. But if a man

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\(^1\) Sc. obtains from the Praetor an order for possession and leave to advertise, by making false representations to that magistrate.

\(^2\) \textit{Praetextatus} signifies under the age of puberty, as at the age of fourteen the \textit{toga virilis} was assumed and the \textit{toga praetextata} discarded.

\(^3\) Sc. in the Edict.
III. 223, 224. ] Penalty for Injury. 257

223. Poena autem iniuriarum ex lege XII tabularum propter membro quidem ruptum talio erat; propter os vero fractum aut collium trecentorum assium poena erat statuta, si libero os fractum erat; at si servo, CL. propter ceteras vero injurias xxv assium poena erat constituta. et videbantur illis temporibus in magna paupertate satis idoneae istae pecuniae poenae esse.

224. Sedi nunc alio iure utimur. permittitur enim nobis a Praetore ipsis iniuriam aestimare; et iudex vel tanti condemnat quanti nos aemtimaverimus, vel minoris, prout illi visum fuerit. sed cum atrocem iniuriam Praetor aestimare soleat, si simul constituerit quantae pecuniae nomine fieri debeat vadimonium, hac ipsa quantitate taxamus formulam, et iudex quamvis possit have used abusive language to a slave in public or struck him with his fist, no formula is set forth, nor is one granted to a demandant except for good reason.

223. By a law of the Twelve Tables§ the penalty for injury was like for like in the case of a limb destroyed; but for a bone broken or crushed a penalty of 300 asses was appointed, if the sufferer were a free man, and 150 if he were a slave. For all other injuries the penalty was set at 25 asses. And these pecuniary penalties appeared sufficient in those times of great poverty. 224. But now-a-days we follow a different rule, for the Praetor allows us to assess our injury for ourselves: and the judex awards damages either to the amount at which we have assessed or to a smaller amount, according to his own discretion. But in cases where the Praetor accounts an injury “atrocious,” if he at the same time have settled the amount of vadimonium which is to be given, we limit the formula to this quantity, and although the

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1 That is to say he has neither an action framed on any known formula, nor even one “praescriptis verbis,” unless there be some special circumstances of aggravation.

3 Tab. viii. II. 2, 3, and 4.

4 The alteration is said by A. Cellius to have been occasioned by the conduct of one Veratius, “qui pro delectamento habebat os hominis liber manus suae palma verberare, cum servus sequebatur crumenam plenam assum portitans: et quemcunque depalmaverat, numerari statim secundum duodecim tabulas viginti quinque asses jubebat.” Aest. Att. 20. 1.

Tab. vi. 184. 4 vi. 51.
vel minoris damnare, plerumque tamen propter ipsius Praetoris auctoritatem non audet minuere condemnationem. (225.) Atrox autem iniuria aestimatur vel ex facto, velut si quis ab aliquo vulneratus aut verberatus fustibusve caesus fuerit; vel ex loco, velut si cui in theatro aut in foro iniuria facta sit; vel ex persona, velut si magistratus iniuriam passus fuerit, vel senatoribus ab humili persona facta sit iniuria.

judex can award a smaller amount of damages, yet generally, on account of the respect which is due to the Praetor, he dare not make his award smaller than the “condemnation”. 225. Now an injury is considered “atrocious” either from the character of the act, for instance, if a man be wounded, or flogged, or beaten with sticks by another; or from the place, for instance, if the injury be done in the theatre or the forum; or from the person, for instance, if a magistrate have suffered the injury, or it have been inflicted by a man of low rank on a senator.

1 IV. 39, 43;
BOOK IV.

Superest, ut de actionibus loquamur.

1. *Si quaeritur*, quot genera actionum sint, verius videtur duo esse: in rem et in personam. Nam qui IIII esse dixerunt ex sponsionum generibus, non animadverterunt quasdam species.

1. It now remains for us to speak of actions. If it be asked how many classes of actions there are, the more correct answer is that there are two, those *in rem* and those *in personam*: for they who have asserted that there are four, framed on the different classes of *sponsiones*, have not noticed the fact that some individual kinds of actions unite together and

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1 It is thought better to keep the terms *in rem* and *in personam*, than to employ the apparent English equivalents "real" and "personal;" for though "personal" may, and frequently does, closely correspond with the Roman term *in personam*, "real" cannot be said to be equivalent to *in rem*; for an English real action is essentially connected with land, whilst the Roman *actio in rem* applied to movables as well as immovables. This, however, is but one point of difference out of many. See Savigny, *Syst. des bent. Röm. Recht.*, translated into French by Guénoux, *Traité de dr. Rom. V.* §107, p. 44. Austin, Vol. III. p. 215 (Vol. II. p. 1011, third edition).

2 *Sponsiones* belong to the time of the formulæ method of suit, therefore the explanation now given of them will hardly be intelligible to a reader who is not acquainted, at least in outline, with the nature of the formulæ, which is discussed somewhat later in this book.

When a controversy was raised on any point, whether of fact or of law, one of the litigants might challenge the other in a wager (*sponsio*), "si ita esset," i.e. that if it were as the challenger asserted, the challenged should pay him some amount specified: and generally, but not always, there was a *restitutio*, or counter-wager, that if it were not as the challenger stated, the challenger should pay the same amount to the challenged.

The origin of these *sponsiones* is referred by Heffter to a period subsequent to the passing of the Lex Silia (IV. 13), which brought into use the condition *de pecunia certa erat*, for it is evident that by the introduction of a *sponsio* an obligation of any kind whatever might be turned into an equivalent pecuniary
Actions in personam and in rem. [IV. 2, 3.

actionum inter genera se rettulisse. (2.) In personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est contendimus, id est cum intendimus dare, facere, praestare oportere. (3.) In rem actio est, cum aut corporalem rem intendimus nostram esse, aut ius aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi, aquamve ducendi, vel altius tollendi vel prospiciendi. item actio ex diverso adversario est negativa.

form themselves into classes. 2. The action in personam is the one we resort to whenever we sue some person who has become bound to us either upon a contract or upon a delict, that is, when we assert in our "intention" that he ought to give or do something, or perform some duty. 3. The action is one in rem, when in our "intention" we assert either that a corporeal thing is ours, or that some right belongs to us, as, for example, that of usus or ususfructus, of way, of passage for cattle, of conducting water, of raising one's buildings, or of view and prospect. So, on the other hand, the opposite party's action is (also in rem, but) negative.

...
4. Actions, therefore, being thus classified, it is certain that we cannot claim a thing that is ours from another person by the form: "Should it appear that he ought to give it," for that cannot be given to us which is ours, inasmuch as that only can be looked upon as a gift to us which is given for the express purpose of becoming ours; nor can a thing which is ours become ours more than it already is. But from a detestation of thieves, in order that they may be made liable to a greater number of actions, it has been settled that besides the penalty of double or quadruple the amount (of the thing stolen), thieves may, with the object of recovering the thing, also be made liable under the action running thus: "Should it appear that they ought to give the thing;" although there also lies against them the form of action whereby we sue for a thing on the ground that it is our own. 5. Now actions in rem are called vindications, whilst actions in personam, wherein we assert that our opponent ought to give us something, or that something ought to be done by him, are called condicions.

6. Sometimes the object of our action is to recover only the...
Adionsior the thing or the penalty.

7. Rem tantum ut poenam tantum, alias ut rem et poenam. (7.) Rem tantum persequirur velut actionibus quibus ex contractuis agimus. (8.) Poenam tantum consequimur velut actione furti et iniuriarum, et secundum quorundam opinionem actione vi bonorum raptorum; nam ipsius rei et vindicatio et condictio nobis competit. (9.) Rem vero et poenam persequirur velut ex his causis ex quibus adversus infitiantem in duplum agimus: quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, et rerum legatarum nomine quae per damnationem certae relictae sunt.

10. Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sua vi ac potestate constant. quod ut manifestum fiat, opus est ut prius de legis actionibus quaeramur.

11. Actiones quas in usu veteres habuerunt legis actiones...
IV. 12, 13. 

**Actio Sacramenti.**

appellabantur, vel ideo quod legibus proditae erant, quippe tunc edicta Praetoris quibus complures actiones introductae sunt nondum in usu habebantur; vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observabantur unde eum quis de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est eum rem perdisse, quia debuisset arbores nominare, eo quod lex xii tabularum, ex qua de vitibus succisis actio competeret, generali de arboribus succisis loqueretur. (12.) Lege autem agebatur modis quinque: sacramento, per iudicis postulationem, per condictionem, per manus iniectionem, per pignoris captione.

13. Sacramenti actio generalis erat: de quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur, eaque actio perinde periculosae erat falsi nomine, atque use were called *legis actiones*¹, either from the fact of their being declared by *leges*, for in those times the Praetor's edicts, whereby very many actions have been introduced, were not in use; or from the fact that they were adapted to the words of the *leges* themselves, and so were adhered to as inflexibly as those *leges* were. Hence, when in an action for vines having been cut down, the plaintiff used the word *vites* in his plaint, it was held that he must lose the case; because he ought to have used the word *arbores*, inasmuch as the law of the Twelve Tables, on which lay the action for vines cut down, spoke generally of trees (*arbores*) cut down. 12. The *legis actiones*, then, were sued out in five ways: by *sacramentum*, by *judicis postulatio*, by *condictio*, by *manus injectio*, by *pignoris captio*.

13. The *actio sacramenti* was a general one; for in all cases where there was no provision made in any *lex* for proceeding in another way, the form was by *sacramentum*²; and this action was then just as perilous in the case of fraud, as at

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¹ See the derivation given by Pomponius to the same effect, D. 1. 2. 6.
² See D. 43. 27; where, however, the old law is only referred to, not quoted.
³ According to Varro (*de Ling. Lat.* V. § 180, p. 70, Müller's edition) the name *sacramentum* was derived from the place of deposit, a temple (*in sacro*); for it would seem that in the most ancient times the deposit was actually staked in the hands of the magistrate, and that the practice of giving sureties instead was an innovation of a later age.
hoc tempore periculosa est actio certae creditae pecuniae propter sponsionem qua periclitatur reus, si temere neget, et restitulationem qua periclitatur actor, si non debitum petat: nam qui victus erat summam sacramenti praestabat poenae nomine; eaque in publicum celebrat praedessque eo nomine Praetori dabantur, non ut nunc sponsionalis et restitutio poenae lucro cedit adversario qui vicerit. (14.) Poena autem sacramenti aut quingenaria erat aut quinquagenaria. nam de rebus mille aeris plurisve quingentis assibus, de minoris vero quinquaginta assibus sacramento contendebatur; nam ita lege XII tabularum cautum erat. sed si de libertate hominis controversia erat, etsi pretiosissimus homo esset, tamen ut assibus sacramento contendetur eadem lege cautum est, favoris causa, ne satisda-

the present day is the action "for a definite sum of money lent," on account of the sponsion whereby the defendant is imperilled, if he oppose the plaintiff's claim without good reason, and on account of the restitutio whereby the plaintiff is imperilled if the sum in dispute be not due; for he who lost the suit was liable by way of penalty to the amount of the deposit, which went to the treasury, and for the securing of which sureties were given to the Praetor: the penalty not going at that time, as does the sponsional and restitutio penalty now, into the pocket of the successful party. (14.) Now the penal sum of the sacramentum was either one of five hundred or one of fifty (asses). For when the suit was for things of the value of a thousand asses or more, the deposit would be five hundred, but when it was for less, it would be fifty: for thus it was enacted by a law of the Twelve Tables. If, however, the suit related to the liberty of a man, although a man is valuable beyond all things, yet it was enacted by the same law that the suit should be carried on with a deposit of fifty asses, with the view of favouring such suits and in order to prevent the defenders of liberty:

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1 An action, that is to say, under the Lex Silia. See note on IV. 1.
2 Tab. II. 1. 1.
3 For this phrase, favoris causa, used in a similar sense, see D. 33. 3. 74, and D. 50 4. 8.
4 Adverteres = the friends who came forward on behalf of the man held in servitude, who of course, from the disability of his status, could do nothing for himself. Cf. Plant. Curs. v. 2. 68. Terent. Adelph. II. 1. 40; Suet. Caes. 80.
Preliminary proceedings before the Praetor.

We must now be reminded that all these actions were of necessity carried on in special and formal language. If, for instance, the action were one in *persona*m against an individual who had bound himself by coin and balance, the plaintiff used to interrogate him in the Praetor's presence in this form: "As I see you in court, I demand whether you give formal consent to (the settlement of) the matter in respect of which you have entered into a mancipatory obligation with me?" Then on this person's refusal the plaintiff went on thus: "Since you say no, I challenge you in a deposit of five hundred (asses), if I have been deceived and defrauded through you and through trust in you." Then the opposite party also had his say, thus: "Since you assert and do not deny that I have entered into a mancipatory obligation with you in relation to the subject-matter of this action, I too challenge you with a deposit of five hundred (asses), in case you have not been deceived or defrauded through me or through trust in me." At the close of these proceedings on

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1 We have adopted in the opening of this paragraph, down to the words "ad judicem accipiendum venirent," the conjectural reading of Heffter. The reading may be right or not, (its sense is undoubtedly accordant with what we know of the ancient law,) but at all events it renders the passage more complete.

2 Sc. entered into a contract by mancipation; see note on 11. 27.

3 That this was the form of the ancient action against an *auctor* who was present in court is clear from Cicero *pro Cæcina*, c. 19, *pro Mu-raena*, c. 13.

*Auctor*, in the language of the old lawyers, was the individual who was bound by any engagement, contracted according to the forms of the civil law, to perform some specific act or to give some specific thing and all its interest and profits.
iudicem, et Praetor ipsis diem praestituebat, quo] ad iudicem
accipandum venirent. postea vero reversis dabatur e Xviris
xxx iudex: idque per legem Pinariam factum est; ante eam
autem legem nondum dabatur iudex. illud ex superioribus in-
telligimus, si de re minoris quam m aeris agebatur, quinquag-
genario sacramento, non quingenario eos contendere solitos
uisse. postea tamen quam iudex datus esset, commendari-
num diem, ut ad iudicem venirent, denuntiabant. deinde cum
ad iudicem venerant, antequam aput eum causam perorarent,
solebant breviter ei et quasi per indicem rem exponere: quae
dicebatur causae collectio, quasi causae sue in breve coactio.

(16.) Si in rem agebatur, mobilia quidem et moventia, quae
utriusque parte demandauerant, et Praetor
statim per
dictum diem, ut ad iudicem venirent; postea, tamen,
the others were
sent to or from
a court.

either side the parties demanded a judex, and the Praetor
fixed a day for them to come and receive one. Afterwards, on
their reappearance in court on the thirtieth day, a judex was
assigned them from among the Decemviri (stilibus judicandis1):
and this was so done in accordance with the Lex Pinaria2; for
before the passing of that lex it was not the practice for a
judex to be assigned3. From what has been stated above, we
gather that when the dispute was in respect of a matter of
smaller value than one thousand asses the parties were wont
to join issue with a deposit of fifty and not of five hundred
asses. Next, when their judex had been assigned to them,
they used to give notice, each to the other, to come before him
on the next day but one. Then, when they had made their ap-
pearance before the judex; their custom was, before they argued
out their cause, to set forth the matter to him briefly and,
as it were, in outline: and this was termed causae collectio4,
being, so to speak, a brief epitome of each party's case. 16. If
the action were one in rem, the process by which the claim
used to be made in court5 for movable and moving things

1 This is a difficult passage on ac-
count of the obliterated state of the
MS. We have again adhered to
Heffter's conjectural reading, viz. e
Decemviris xxx (die).
2 For the Decemviri stilibus judi-
candis, see App. (N).
3 This translation is in accord-
ance with Heffter's emendation of
nondum; Hollweg reads statim;
Huschke, who has filled up the pre-
ceding lacuna differently from Heff-
ter, would supply iis e Decemviris.
4 See App. (O).
5 In later times there was another
form of proceeding, viz. ex jure,
which is the one specially ridiculed.

ad hunc modum. qui vindicabat festucam tenebat. deinde
ipsam rem adprehendebat, velut hominem, et ita dicebat: HUNC
EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM
SUAM CAUSAM SICUT DIXI. ECCE TIBI VINDICTAM INPOSUI:
et simul homini festucam inponebat. adversarius eadem simi-
liter dicebat et fasiebat. cum uterque vindicasset,
Praetor dicebat: MITTITE AMBO HOMINEM. illi mittebant. qui prior
that could be brought or led into court, was as follows: the
claimant, having a wand in his hand, laid hold of the thing
claimed, say for instance, a slave, and uttered these words:
"I assert that this slave is mine by Quiritary title, in ac-
cordance with his status," as I have declared it. Look you, I lay
my wand upon him:" and at the same moment he laid his
wand on the slave. Then his opponent spoke and acted in
precisely the same way; and each having made his claim the
Praetor said: "Let go the slave, both of you." On which
they let him go, and he who was the first claimant thus in-

by Cicero in pro Mur. 13. The process (technically called manus
consertio) is fully described in both its forms by Aulus Gellius, xx. 10,
the sum of whose observations may be thus given: "By the phrase ma-
num consertere is meant the claim-
ing of a matter in dispute by both
litigants in a set form of words and
with the thing itself before them.
This presence of the thing was abso-
lutely necessary according to a Law
of the Twelve Tables commencing:
Si qui in jure manum consertunt
(Tab. IV. 1. 5), and the proceedings
(vindicia, manus corruptio) must take
place before the praetor." Hence we
see that in olden times the praetor
must have gone with the parties to
the land, when land was the subject of
dispute, although movables may pos-
sibly, and probably, have been brought
by them to him. Gellius proceeds:
"But when from the extension of the
Roman territory and the increase
of their other business, the praetors
found it inconvenient to go with the
parties to distant places to take part
in these proceedings, a practice arose
(although contrary to the directions of
the Twelve Tables), that the ma-
nus consertio should no longer be
done before the praetor (in jure), but
that the parties should challenge one
another to its performance without
his presence (ex jure). Then they
went to the land together and bring-
ing back a clod therefrom made their
claim over that clod alone in the
praetor's presence, in the name of the
entire field." This method is referred
to by Festus (sub verb. vindiciare),
"Vindiciae olim dicebantur illae
(glebae) quae ex fundo sumtae in jus
allatae erant." In Cicero's time the
proceedings seem to have been still
more fictitious: the litigants went
out of court, nominally ut conserent
manus, but returned after a few
minutes' absence, feigning that the
consertio had in the meantime taken
place, and then the rest of the pro-
cess followed as set down by Gaius
in the text.

1 For this meaning of causa, see 1.
3. pr.; D. 8. 2. 28, the word has the
same or an analogous signification.
vindicaverat, ita alterum interrogabat: POSTULO ANNE DICAS QUA EX CAUSA VINDICAVERIS. ille respondebat: IUS PEREGI SICUT VINDICTAM INPOSUI. deinde qui prior vindicaverat dicebat: QUANDO TU INIURIA VINDICAVISTI, D AERIS SACRAMENTO TE PROVOCO. adversarius quoque dicebat: SIMILITER EGO TE, seu lasses sacramenti nominabant. deinde eadem sequabantur quae cum in personam ageretur. Postea Praetor secundum alterum eorum vindicas dicebat, id est interim aliquem possessorum constituebat, eumque iubebat praedea adversario dare litis et vindiciarum, id est rei et fructuum: alios autem praedae ipse Praetor ab utroque accipiebat sacramenti, quod id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo

terrogated the other: "I ask you whether you will state the grounds of your claim." To that his opponent replied: "I have fully complied with the law inasmuch as I have touched him with my wand." Then the first claimant said: "Inasmuch as you have made a claim without law to support it, I challenge you in a deposit of five hundred asses." "And I too challenge you," said his opponent. Or the amount of the deposit they named might be fifty asses. Then followed the rest of the proceedings exactly as in an action in personam. Next the Praetor used to assign the vindicae to one or other of the parties, that is, give interim possession of the thing sued for to one of them, ordering him at the same time to provide his adversary with sureties of the thing in dispute and its profits. The Praetor also took other sureties for the deposit from both parties, because that deposit went to the treasury. The litigants made use of a

1 IV. 15.
2 Festus says: "Vindiciae was the term applied to those things which were the subjects of a lawsuit; although the suit, to speak more correctly, was about the right which the vindicae (the clod, tile, &c.) symbolically represented." Festus, sub verb. vindicae.
3 Praes is a person who binds himself to the state (becomes bail, for instance, for the payment of the sacramentum), and is so called because when interrogated by the magistrate if he be praes, i.e. ready and willing to be surety, he replies praes or prae- sum, I am ready. Festus, sub verb. praes.
4 We keep to the translation "deposit" because that term is a convenient one; but it is to be remembered that it was only in very early times that a deposit really took place, and that at the time of which Gaius is treating, sureties were given, and nothing actually deposited.
5 IV. 13.
IV. 17. Assignment of Vindiciae.

quodam iusti dominii: maxime enim sua esse credebant quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta praeposuitur. (17.) Si qua res talis erat, ut non sine incommodo posset in ius adferri vel adduci, velut si columna aut grex alicuius pecoris esset, pars aliqua inde sumebatur. deinde in eam partem quasi in totam rem praesentem siebat vindicatio. itaque ex grege vel una ovis aut capra in ius adduceret, vel etiam pilus inde sumebatur et in ius adferetur; ex nave vero et columna aliqua pars defringebatur. similiter si de fundo vel de aedibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in ius adferetur et in eam partem perinde atque in totam rem praesentem siebat vindicatio: velut ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controversia erat, aeque [folium desperitum].—Enim vero modum aequalem paene capiendi iudicis observabant, qui wand instead of the spear, which was the symbol of legal ownership; for men considered those things above all others to be their own which they took from the enemy: and this is the reason why the spear is set up in front of the Centumviral Courts¹. 17. When the thing in dispute was of such a nature that it could not be brought or led into court without inconvenience, for instance if it were a column, or a flock or herd of some kind of cattle, some portion was taken therefrom, and the claim was made upon that portion, as though upon the whole thing actually present in court. Thus, one sheep or one goat out of a flock was led into court, or even a lock of wool from the same was brought thither: whilst from a ship or a column some portion was broken off. So, too, if the dispute were about a field, or a house, or an inheritance, some part was taken therefrom and brought into court, and the claim was made upon that part as though it were upon the whole thing there present; thus for instance, a clod was taken from the field, or a tile from the house, and if the dispute were about an inheritance, in like manner²......

¹ IV. 31. See App. (N).
² An entire leaf of the MS. is missing here. Gösch is of opinion that the matter thus lost comprised, 1st, the remaining portion of the actio sacramenti; 2nd, an exposition of the action per iudicis postulationem; and 3rd, the commencement of that which is carried on in the three following paragraphs, viz. the form of an action per conditionem.
etiam ad iudicem postulandum adhibitus est, denique condictio autem adpellari coepta a lege Varia.

18. Et haec quidem actio proprie condictio vocabatur: nam actor adversario denuntiabat, ut ad iudicem capiendum die xxx adesset. nunc vero non proprie condictionem dicimus actionem in personam esse, qua intendimus dare nobis opor.

tere: nulla enim hoc tempore eo nomine denuntiatio fit. (19.) Haec autem legis actio constituta est per legem Siliam et Calpurniam: lege quidem Silia certae pecuniae, lege vero Calpurnia de omni certa re. (20.) Quare autem haec actio desiderata sit, cum de eo quod nobis dari potuerimus sacramento aut per iudicis postulationem agere, valde quaeritur.

21. Per manus iniectionem aequo de his rebus agebatur, quibus ut ita ageretur legae aliqua cautum est, velut iudicati

......Our ancestors had in use a form, called capiendi judicis, almost identical with that employed in the judicis postulatio: and this at a later time, after the passing of the Lex Varia¹, was called a condictio. 18. And it was with propriety so called, for the plaintiff used to give notice to his opponent to be in court on the thirtieth day for the purpose of taking a judex⁶. At the present time, however, we apply the name, condictio, improperly to an action in personam in the “intention” of which we declare that our opponent ought to give something to us, for now-a-days no notice is given in such a case. 19. This legis actio was established by the Leges Silia and Calpurnia; being by the Lex Silia applicable to the recovery of an ascertained sum of money, and by the Lex Calpurnia to that of any ascertained thing. 20. But why this action was needed it is very difficult to say, seeing that we could sue by the sacramentum or the action per judicis postulationem for that which ought to be given to us⁴.

21. Similarly an action in the form of an arrest (manus injectio) lay for those cases where it was specified in any⁴ lex that this should be the remedy; as in the case of an action

¹ These words are filled in according to a conjectural reading of Heffter’s, inserted in the text above.
³ See App. (P).
⁴ We have here followed G minced’s reading: “lege aliqua cautum est,”
Manus Injectio.

IV. 22.

upon a judgment which was given by a law of the Twelve Tables. That action was of the following nature: he who brought it uttered these words: "Inasmuch as you have been adjudicated or condemned to pay me ten thousand sesterces and have withheld the money fraudulently, I therefore lay my hands upon you for ten thousand sesterces, a debt due on judgment:" and at the same moment he laid hold of some part of his body; nor was he against whom the judgment had been given allowed to remove the arrest and conduct his action for himself, but he named a protector (vindex), who managed the case for him: a defendant who did not name a protector was taken off by the plaintiff to his house and put in chains there. 22. Afterwards certain leges allowed the action per manus injecionem against some specified persons under other particular circumstances "as though upon a judgment:" for instance, the Lex Publilia did so against him for whom a sponsor had paid money, if he had not repaid it to the sponsor instead of Heffer's: "Lege Aquilia cautum est:" 1stly, because, as the former says, it would otherwise be difficult to understand why the word aequus is introduced here, 2ndly, because of the next paragraph: "velut lege xii. Tabularum," 3rdly, because the reading accords with that in § 28 of this book.

1 Tab. III. 1. 3.
2 The distinction between dolus malus and dolus bonus, the latter being lawful, is to be found in D. 4. 3. 1—3.
3 See IV. 46. Boethius, ad Cic. Top. l. 2, § 10 says: "Vindex est qui alterius causam suspecti vindicandam." There is a curious law of the Twelve Tables on this subject, "Assiduo vindex assiduus est; proletario quo quis volet vindex esto," Tab. I. 4; in which passage assiduus is to be interpreted parsimiosus. Festus thus defines vindex: "Vindex ab eo, quod vindicat, quem in qui prensus est ab aliquo tenetur."
4 III. 127.
pro eo depensum esset non solvisset sponsoris pecuniam; item lex Furia de sponsu adversus eum qui a sponsore plus quam virilem partem exegisset; et denique complures aliae leges in multis causis talem actionem dederunt. (23.) Sed aliae leges ex quibusdam causis constituerunt quasdam actiones per manus iniectionem, sed puram, id est non pro iudicato: velut lex Furia testamentaria adversus eum qui legatorum nomine mortisve causa plus consibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia adversus foeneratores, ut si usuras exegissent, de his reddendis per manus iniectionem cum eis ageretur. (24.) Ex quibus legibus, et si quae aliae similes essent, cum agebatur, manum sibi depellere et pro se lege agere licebat. nam et actor in ipsa legis actione non adictiebat hoc verbum pro iudicato, sed nominata causa ex qua agebat, ita dicebat: ob eam rem ego tibi manum inicior; cum hi quibus pro iudicato actio data erat, nominata

within the six months next after it had been paid for him: so, too, did the Lex Furia de Sponsu against him who had exacted from a sponsor more than his proportion of a debt: and in fact many other leges allowed an action of the kind in various cases. 23. Other leges again allowed in certain cases actions per manus iniectionem, but (made them) substantive, i.e. not “as though upon a judgment:” for example, the Lex Furia Testamentaria allowed such an action against a man who had taken more than a thousand asses by way of legacy or donation in prospect of death, in spite of his not being exempted by the lex so as to have the right of taking such larger sum: and the Lex Marcia allowed such an action against usurers, so that if they exacted usurious interest, proceedings for restitution of the same could be taken against them by the form per manus iniectionem. 24. When therefore an action was brought upon these leges and others like them, the defendant was at liberty to remove the arrest and conduct his action for himself, for the plaintiff did not in the legis actio add the phrase pro iudicato (“as though upon a judgment”), but specifying the reason why he sued, went on thus: “on that account I lay my hand on you:” whereas they to whom the action was given “as though

1 For an account of this law, see III. 121, 122.
2 See Just. Inst. II. 7. 1.
3 II. 325. Ulp. 1. 2.
Manus Injectio pro Judicato.

causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO. nec me praeterit in forma legis Furiae testamentariae PRO IUDICATO verbum inseri, cum in ipsa lege non sit: quod videtur nulla ratione factum. (25.) Sed postea lege Varia, excepto iudicato et eo pro quo depensum est ceteris omnibus cum quibus per manus injectionem agebatur permissum est sibi manum depellere et pro se agere. itaque iudicatus et is pro quo depensum est etiam post hanc legem vindicem dare debebant, et nisi darent, domum ducebantur. idque quamdiu legis actiones in usu erant semper ita observabant; unde nostris temporibus is cum quo iudicati depensive agit tur iudicatum solui satisfacere cogitur.

upon a judgment," after specifying the reason why they were suing, proceeded thus: "on that account I arrest you as though upon a judgment." I have not, however, forgotten that in the form of proceeding under the Lex Furia Testamentaria the phrase, pro iudicato, is inserted, though it does not appear in the lex itself; but that insertion seems made without reason. 25. Afterwards, however, permission was given by the Lex Varia 1 to all other persons, save him against whom a judgment had passed and him for whom money had been paid (by a sponsor), when sued in the form per manus injectionem, to remove the arrest and conduct their action for themselves. A judgment-debtor, therefore, and one for whom money had been paid were compelled even after the passing of this lex to nominate a protector, and unless they did so they were carried off to the plaintiff’s house. And this rule was always adhered to so long as legis actiones were in use; whence even in our times he who is defendant in an action either on a judgment or for money paid by a sponsor 2 is compelled to give sureties 3 for the payment of that which shall be adjudicated 4.

1 Varia is Heftter’s suggestion. The name is illegible in the MS.
2 II 191. 127.
3 IV. 101.
4 Those who desire further information on the subject of manus injectio are referred to Heftter’s Observations on Gai. IV. pp. 15—17. It will be seen from a perusal thereof that Gaius’ enumeration of the cases wherein such action is allowed is not exhaustive. The oft-quoted laws, 1 and 2 of Tab. 1. of the Twelve, are not referred to here, because they seem to treat of a somewhat different matter, viz. arrest of a defendant who refused to appear in court at all, whereas the present subject of our author is the arrest of one who had
26. The *legis actio per pignoris capionem* was for some matters a remedy originating from old custom, for others one derived from a *lex*. 27. That (*capio*) which dealt with military proceeded was the creation of custom. For a soldier was allowed to take a pledge from the paymaster for the due discharge of his pay: and the money which was given as pay was called "military proceeds" (*aes militare*). So, too, the cavalry soldier was allowed to take a pledge for the payment of the money necessary for the purchase of his charger, and this money was called *aes equestre*. So also could these soldiers take a pledge for the money necessary for the purchase of provender for their chargers, and this was called *aes hordearium*. 28. *Pignoris capio* was also (sometimes) introduced by *lex*, as, for instance, by a law of the Twelve Tables against a man who purchased a victim for sacrifice and did not pay the price: as also against him who did not pay the hire of a beast of burden which some one had let out to him for the express purpose of expending the receipts therefrom on a *daps*, i.e.

appeared in the original action, had lost it, and had then evaded payment of the judgment laid on him. For the same reason Hor. *Sat.* 1. 9. 74 and the well-known passages from Plautus (*Curcul. and Pers.*) are not brought forward.

1 The money for purchasing the horses of the *equites* was provided by the state (Livy, 1. 43), that for the feeling of them by widows; the pledge therefore would be taken in the former case, as for *aes militare*, from the *tribunus aerarii*, in the latter from the widow. See Aul. Gell. *VII.* 10.

* Tab. XII. 1. 1.
IV. 29. 30. [Legis Actiones replaced by Formulae.]

impenderet. item lege censoria data est pignoris capto publicanis vectigalium publicorum populi Romani adversus eos qui aliqua lege vectigalia deberent. (29.) Ex omnibus autem istis causis certis verbis pignus capiebatur; et ob id plerisque placebat hanc quoque actionem legis actionem esse. quibusdam autem non placebat: primum quod pignoris capto extra ius peragebatur, id est non aput Praetorem, plerumque etiam absente adversario, cum alioquin ceteris actionibus non alter uti possent quam aput Praetorem praesente adversario: praeterea nefarito quoque die, id est quo non licebat lege agere, pignus capi poterat.

30. Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate veterum qui tunc iura condiderunt eo res perducta est, ut vel qui minimum errasset litem on a sacrificial feast. So also a pignoris capio was given by a lex censoria to the farmers of the public revenues of the Roman people against those who owed taxes under any lex. 29. In all these cases the pledge was taken with a set form of words; and hence it was generally held that this was a legis actionio too: but some authorities have dissented from that view; firstly, because the pignoris capio was a process transacted out of court, i.e. not before the Praetor, and generally too in the absence of the opposite party, whereas the plaintiff could not put other (legis) actiones in force except before the Praetor and in the presence of his opponent; and further because a pledge might be taken even on a dies nefastus, that is to say, on a day when it is not allowed to transact court-business.

30. All these legis actiones, however, by degrees fell into discredit, for through the excessive refinements of those who at that time determined the law, matters reached such a pitch that a litigant who had made the very slightest error lost his cause. Therefore these legis actiones were got rid of by the

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1 Dapto was the archaic word for the sacred ceremonies at the winter and spring sowing. See Festus, sub verb.  
2 This is Dirkse's suggestion, which Heffer adopts. Gossen proposes "Lex Praetoria" for a reading; Mommsen, "Lex praedatoria." The legis censoriae referred chiefly to the letting out of the revenues, public lands and public works. For the concern of the censors in such matters see D. 50. 16. 203, Varro, de R. R. II. 1.  
3 See note on II. 279.  
4 Constitere is used in this sense of determining or expounding in 1. 7.  
5 See an example in IV. 11.
perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones effectumque est, ut per concepta verba, id est per formulas litigaremus. (31.) Tantum ex duabus causis permissum est lege agere: damni infecti, et si centumviral iudicium fit. proinde vel hocie cum ad centumviro itur, ante lege agitur sacramento aput Praetorem urbanum vel peregrinum. propter damni vero infecti nemo vult lege agere, sed potius stipulatium quae in edicto proposita est obligat adversarium per magistratum, quod et commodius ius et plenus est. per pignoris [desunt 24 lin.] apparat. (32.) Item in ea forma quae publica

Lex Aebutia and the two Leges Juliae, and the result has been that our litigious process is now carried on by directions framed upon the case, i.e. by formulae. 31. In two cases only were the litigants allowed to resort to a legis actio, viz. in the case of anticipated damage, and in that of an action appertaining to the centumviral jurisdiction. In fact, even at the present day, when the parties resort to the centumviri, there are preliminary proceedings in the form of the actio sacramenti before the Praetor Urbanus or Praetor Peregrinus. In the case of anticipated damage, however, no one cares now to proceed by way of legis actio, but rather binds his opponent before a magistrate by the stipulation set forth in the edict (of the Praetor), for this process is at once more convenient and more complete.... 32. For instance, in the formula which

1 See App. (N).
2 Sc. directions given to the judex by the Praetor.
3 See App. (N).
4 Iv. 95.
5 The proceedings alluded to were as follows: he who anticipated damage from the ruinous condition of his neighbour's buildings or other nuisance, called on him to promise separation in case injury ensued (the stipulation referred to in the text); and if this were refused, he obtained from the Praetor the missio ex primo decreto, whereby he was put into possession of the buildings, &c. to hold them in pledge. After a reasonable interval, the stipulation being still refused, he obtained a missio ex secundo decreto, and so became owner ex jure Quirilium, if the offender had the complete dominium, or obtained a juridical possession enabling usu-capiion, if the offender had Bonitarian ownership only. See Mackeldey, § 484, D. 39. 7.
6 Heftier has endeavoured to fill up the break of 24 lines occurring at this point: his suggested reading may be translated to this effect: "At the present day there is no proper legis actio in the form per pignoris capionem, but only a fictitious process employed in certain actions; a result brought about by the Lex Julia Judiciaria. Of these fictions there are many, attaching to statutable and civil actions. For there are actions
IV. 33.

Fictions.

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cano proponitur talis fictio est, ut quanta pecunia olim si pignus
captum esset, id pignus is
a quo captum erat luere deberet,
tantam pecuniam condemnetur. (33.) Nulla autem formula
ad condictionis fictionem exprimitur. sive enim pecuniam sive
rem aliquam certam debitam nobis petamus, eam ipsam dari
nobis oportere intendimus; nec ullam adiungimus condi-
tionis fictionem. itaque simul intellegimus eas formulas quibus
pecuniam aut rem aliquam nobis dare oportere intendimus,
sua vi ac potestate valere. eiusdem naturae sunt actiones
commodati, fiduciae, negotiorum gestorum et aliae innume-
rabies.

is set forth for the benefit of a revenue-collector, there is a
fiction to the effect that the defendant shall be condemned in
the amount at which in olden times, when a pledge was taken,
he from whom that pledge had been taken would have had
to ransom it. 33. But no formula is framed on the fiction of
a condiction, for whether we be suing for money or some
ascertained thing due to us, we state in the intentio that such
thing itself "ought to be given to us," without adding any
fictitious condiction. Hence we understand at once that those
formulae in the intentio of which we declare that money or some
thing "ought to be given to us" avail of their own special
force. The same characteristic belongs to the actions of loan,
of fiduciary pact1, of gratuitous services2, and to other actions
innumerable3.

so based on a fictitious legis actio,
that we insert in the condemnatio the
amount or act which our opponent
would have had to give or perform,
if the legis actio provided for the pur-
pose had been carried out in regular
form. Hence we do not sue directly
and upon the actual obligation, but
indirectly upon the tie springing
from the (supposed) legis actio. It is
to be remembered, however, that we
cannot now-a-days thus sue upon a
fiction of legis actio in all cases where
the old legal system allowed process
by real legis actio, but only when the
legis actio is of the form per pignoris
capionem... This appears from the
formulae themselves, which the
Prætor has set forth in his edict,
for instance;" &c. &c. (as in the
text).

1 II. 50.
2 See Mackenzie's Roman Law,
p. 237. D. 44. 7. 5. pr.
3 The topic of fictions is of im-
portance as an introduction to the
learning relating to the formulary
system. Hence it is that Gaius has
thought it necessary to give an elab-
orate account of the old legis ac-
tiones, which were, as we see, almost
entirely obsolete in his day, and to
explain the connection between one
of the legis actiones and fictions on
the one hand, and the influence of
fictions in pleading upon the forma-
34. Habemus adhuc alterius eiusmod generis fitiones in quibusdam formulis: velut cum is qui ex dicto bonorum possessio succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti suumesse, neque id quod defuncto debebatur potest intendere dare sibi oportere; itaque ficio se herede intendit veluti hoc modo: Iudex esto. Si Aulus Agerius, id est ipse actor, Lucio Titio heres esset, tum si paret fundum de quo

34. We have besides fictions of another kind in some formulae: for instance when a person who has sued for "bonorum possessio" in accordance with the edict" brings an action upon the fiction that he is heir. For since he succeeds to the position of the deceased by praetorian and not by statutable right, he has no direct actions, and cannot set out in his "intentio" either that what belonged to the deceased is "his own," or that his adversary "ought to give him" that which was owed to the deceased: therefore feigning himself heir, he states his "intentio" somewhat in this fashion: "Let so and so be judex. If Aulus Agerius (that is the plaintiff himself) was the heir of Lucius Titius, then should it appear that that estate about which the

lary system on the other. The whole subject of fictions has been analyzed very minutely and explained most thoroughly by Savigny in his Syst. des Röm. Rechts (see the French translation by Guénoux, Traité du droit Romain, v. § CCXV. pp. 76—84), Zimmern 100 has given a short chapter on the same subject as introductory to the formulary system (see Zimmern translated by L. Étienne, Traité des Actions: tome partie, section ii. Art. premier. §1. p. 140). The whole of Savigny's short chapter should be studied as explanatory of the sections of Gaius numbered from 34 to 60, and also as explanatory of the vast extension of pleading by the introduction of what were called utilis actions, through the advantages which the use of fictions offered. One part however deserves special notice here, viz. where he points out the difference between actiones fictitiae and actiones utiles. "Utilis actio and actio fictitia," says he, "were originally exactly equivalent." Gaius using the term utilis and Ulpian the term fictitia. But there was this difference between them, that whereas fictitia expresses the form of procedure actually adopted, utilis expresses the very essence of the thing itself, that is to say, the extension of an institution owing to the practitioners' wants. Therefore the actions named in §§ 32, 33 of this commentary are fictiae, those in §§ 34—38 are utiles. 1 III. 32 et seqq. 2 That is, no action is specially provided for his claim by the civil law.
AGITUR EX IURE QUIRITIUM EIUSS ESSE OPORTERE; vel si in personam agatur, praeposita similius fictione illa sita, sita
TUM SI PARET NUMERIUM NEGIDIUM AULO AGERIO SEXTERTIUM X MILIA DARE OPORTERE. (35) Similiter et bonorum emptor ficto se herede agit. sed interdum et alio modo agere solet. nam ex persona eius cuius bona emeritus sumpta intentione convertit condemnationem in suam personam, id est ut quod illius esset vel illi dare oporteret, eo nomine adversarius huic condemnetur: quae species actionis appellatur Rutiliana, quia a Praetore Publii Rutilio, qui et bonorum venditionem action is brought is his by Quiritary right," &c.; or if the action be one in personam1, a similar fiction is prefixed, and the formula runs on: "Then should it appear that Numerius Negidius ought2 to give to Aulus Agerius 10,000 sesterces." 35. So too the purchaser of an insolvent's estate3 sues under the fiction of being heir. Sometimes, however, he sues in another way. For commencing with an intentio running in the name of him whose property he has bought, he changes the condemnatio so as to make it run in his own name; that is (he claims) that his opponent ought to be condemned to make payment to him (the plaintiff) on account of what belonged to the other (whose estate he has bought) or on account of what he was bound to give to that other. This form of action is called Rutilian, because it was framed by the Praetor Rutilius, who is also said to have been the inventor of the proceeding called bonorum venditio4. The form of action first named, in which the purchaser

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1 We have translated Göschens’s reading: "Si in personam agatur:" Heffter reads: "vel si quid debetatur L. Titio;" which of the two we adopt is immaterial, an action on a debt being, of necessity, in personam.

2 "The word oportere," says Paulus, "does not apply to the extent of the Judex’s powers, for he can give larger or smaller damages, but refers to the present value (of the subject-matter of the agreement or claim)," D. 30. 16. 37. Thus, suppose in a stipulatory contract between S. and T. the clause Quisquid te dare facere oportet were inserted; then in case of any dispute between the parties, the claim would be restricted to the actual sum that was due, or that the thing was worth at the time when the contract was made. See D. 45. 1. 65. 1 and 45. 1. 125.

3 "Hence," says Savigny, Traité du droit Rom. (translated by Guénoux, v. p. 88), "the expression oportere in the intentio must always be understood to apply to the actual existence of a debt arising out of some strictly legal engagement or transaction, and not to a debt that may result from a judicial decision."

4 III. 77—81.
introduxisse dicitur, comparata est. superior autem species actionis qua ficto se herede bonorum emptor agit Serviana vocatur. (36.) Eiusdem generis est quae Publiciana vocatur. dat autem haec actio ei qui ex iusta causa traditam sibi rem non-dum usucapit eamque amissa possessione petit. nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucapisse, et ita, quasi ex iure Quiritium dominus factus esset, intendit hoc modo: IUDEX ESTO. SI QUEM HOMINEM AULUS AGERIUS EMIT, ET IS EI TRADITUS EST, ANNO POSSEDSET, TUM SI EUM HOMINEM DE QUO AGITUR EIUS EX IURE QUIRITIUM ESSE OPORTERET et reliqua. (37.) Item civitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, velut si furtum fa-

of the insolvent's estate sues under the fiction of being the heir, is called Servian. 36. Of the same kind is that action known as Publician. This is granted to him who has not yet completed his usucapion of something delivered to him on lawful grounds, and who having lost the possession seeks to recover the thing. For inasmuch as he cannot declare that the thing is his in Quiritary right, he is by fiction assumed to have completed his usucapion, and then, as though he had become owner by Quiritary title, he frames his intentio in this manner: "Let so-and-so be judex. Supposing Aulus Agerius to have possessed for a year the slave whom he bought and who was delivered to him, then if it should appear that that slave, about whom this action is brought, ought to be his by Quiritary title," &c. 37. Again, Roman citizenship is by a fiction ascribed to a foreigner, if he sue or be sued in some case for which an action is granted by our laws, provided only it be just that such action should be extended to a foreigner; for instance, if a foreigner commit a theft and an action be brought against him,

1 The author of this law is generally supposed to be the Praetor Publicius mentioned by Cicero in pro Client. c. 45.
2 II. 41.
3 There is an example of this fiction in Cic. in Verr. II. 2. 12, "Judicia hujusmodi: qui cives Romani erant, si Siculi essent, quum Siculos eorum legibus dari oporteret. Qui Siculi, si cives Romani essent," etc.
Fictions.

IV. 38.

fiding.

dat

daperegrinus
It
cum eo
agatur,
formula ita concipitur: IUDEX
ESTO.
SI PARET OPE CONSILIOVE DIONIS HERMAEI LUCIO TITIO
FURTUM FACTUM ESSE PATERAE AUREAE QUAM OB REM EUM,
SI CIVIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPOR-
TERET et reliqua. item si peregrinus furti agat, civitas ei Ro-
mana fingitur. similiter si ex lege Aquilia peregrinus damni
injuriae agat aut cum eo agatur, ficta civitate Romana iudicium
datur. (38.) Praeterea aliquando fingimus ad
versarium nostrum
capit diminutum non esse. nam si ex contractu nobis obligatus
obligatave sit et capite deminutus deminutave fuerit, velut mulier
per coemptionem, masculis per adrogationem, desinit iure civili
debere nobis, nec directo intendere possimus dare eum eamve
oportere; sed ne in potestate eius sit ius nostrum corrumpere,
introducta est contra eum eamve actio utilis, rescissa capitis

the formula is framed thus: "Let so-and-so be a judex. Should
it appear that a theft of a golden goblet has been committed
on Lucius Titius with the aid and counsel of Dio Hermaeus,
for which matter, were he a Roman citizen, he would have to
make satisfaction for the loss as though he were a thief", &c.
Again, if a foreigner bring an action for theft, Roman citizenship
is by fiction ascribed to him. Similarly, if a foreigner sue under the Lex Aquilia for damage done contrary to law, or
if he be sued on such account, an action is granted on the
fiction of his having Roman citizenship.

38. Besides this we sometimes feign that our adversary has
not suffered a capitis diminutio. For if any one, man or
woman, be bound to us on a contract, and undergo capitis
diminutio, a woman, for instance, by coemption or a man by
arrogation, such person is no longer bound to us by the civil
law, nor can we declare directly in our
intentio
that he or she
"ought to give:" but to prevent either of them having the
power of destroying our right, an
utilis actio
has been invented
for use against them, in which their capitis diminutio is set aside,

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1 He was not the actual thief, but only an accomplice; but he was liable to an action just as though he were the actual thief. Hence pro is here used in precisely the same signification as in the phrase pro judi-
deminutione, id est in qua fingitur capite demnatus demnutave non esse.

39. Partes autem formularum hae sunt: demonstratio, intentio, adiudicatio, condemnatio. (40.) Demonstratio est ea pars formulae quae praecipue idem inseritur, ut demonstretur res de qua agitur. velut haec pars formulae: QUOD AULUS AGERIUS NUMERIO NEGIDIO HOMINEM VENDIDIT. item haec: QUOD AULUS AGERIUS APUT NUMERIUM NEGIDIUM HOMINEM DEPOSIT. (41.) Intentio est ea pars formulae qua actor desiderium suum concludit. velut haec pars formulae: SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTE. item haec: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTE. item haec: SI PARET HOMINEM EX IURE QUIRITIUM AULI AGERII ESSE. (42.) Adiudicatio est ea pars formulae qua permittitur iudici rem alciui ex litigatoribus adiudicare: velut si inter coheredes familiae ercis-

in which, that is to say, there is a fiction that they have not suffered any capitiam diminutum.1

39. Now the parts of a formula are these, the demonstratio, the intentio, the adiudicatio and the condemnatio. 40. The demonstratio is that part of a formula which is inserted at the outset for the purpose of having the matter described about which the action is brought; this part of a formula, for example: "Inasmuch as Aulus Agerius sold a slave to Numerius Negidius:" or this: "inasmuch as Aulus Agerius deposited a slave with Numerius Negidius." 41. The intentio is the part of a formula in which the plaintiff declares his demand: this part of a formula, for instance: "If it appear that Numerius Negidius ought to give to Aulus Agerius 10,000 sesterces;" or this: "whatever it appears that Numerius Negidius ought to give or do for Aulus Agerius;" or this: "if it appear that the slave belongs to Aulus Agerius by Quiritory title." 42. The adjudicatio is that part of a formula in which the iudex is permitted to adjudicate something to one of the litigants, as in the suit

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1 IV. 80.
2 These examples are well selected, being examples of the intentiones of the three most common forms of action, viz. the first an intentio suitable for an actio in personam of the character described as certae condemnations, the second for an actio in personam of the class insertae condemnationes; the third for an actio in rei.
between coheirs for partition of the inheritance, or between partners for a division of the partnership effects, or between neighbouring proprietors for a setting out of their boundaries. For in such cases this part of the formula runs: "Let the judex adjudicate to Titius as much as ought to be adjudicated."

43. The condemnatio is that part of a formula in which power is granted to the judex to condemn (i.e. mulct) or acquit: this part of a formula, for instance: "Judex, condemn Numerius Negidius to pay 10,000 sesterces to Aulus Agerius; if it do not appear (that the circumstances put forth in the intentio are true), acquit him;" or this: "Judex, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding 10,000 sesterces; if it do not appear (that the circumstances set forth in the intentio are true), acquit him;" or this: "Judex, condemn Numerius Negidius to pay (10,000 sesterces) to Aulus Agerius," &c.

1 See Just. Inst. IV. 17. 4—7; Ulp. xix. 16.
2 IV. 48 et seqq.
3 Heffter and Göschen read "ut non adicatur: si non paret, absolvito," the MS. being illegible at this point. Dirksen, however, thoroughly objects to this addition, on the ground that the condemnatio always contained an express direction to the judex to condemn or acquit. It is perhaps presumptuous to dispute with such authorities as Heffter and Goschen, but we must say that Dirksen's objection to their reading seems unanswerable: for we find it expressly stated by Paulus "qui damnare potest, is absolvendi quoque potestatem habet;" D. 42. I. 3. Gaus, too, says himself in IV. 114: "vulgo dicitur omnia judicia esse absolutoria."

Perhaps the words "X MILIA" have been transposed and should come after "non adicatur," so that the meaning will be that in some formulæ the judex is simply ordered to make an award, without any restriction as to the amount, there being no addition of X MILIA or any other sum. Formulæ arbitraræ (for which see IV. 141, n.) are an example. In Klenze's edition of 1819 the collocation of the words is as we suggest.
qua, ut non adiciatur. (44) Non tamen istae omnes partes simul inveniuntur, sed quaedam inveniuntur, quaedam non inveniuntur. certe intentio aliquando sola invenitur, sicut in praecandidialibus formulis, qualis est qua quaeritur an aliquis libertus sit, vel quanta dos sit, et aliae complures. demonstratio autem et adudicatio et condemnatio numquam sola inveniuntur, nihil enim omnino sine intentione vel condemnatione valet; item condemnatione vel adjudicatio sine demonstratione vel intentione nullas vires habet, et ob id numquam sola inveniuntur.

45. Sed eas quidem formulas in quibus de iure quaeritur in ius conceptas vocamus. quales sunt quibus intendimus nostrum esse aliquid ex iure Quiritium, aut nobis dare oportere, aut pro fure damnum desiderare oportere; in

without the addition…44. All these parts, however, are not always found together in the same formula, but some appear and some do not appear. Of a certainty the intentio is sometimes found alone, as in praecandidial formulae, such, for instance, as that wherein the matter in issue is whether a person is a freedman, or that where it is what is the amount of a dos; and many others. But the demonstratio, the adjudicatio and the condemnatio are never found alone: for (the formula) is utterly useless without an intentio or a condemnatio: and again a condemnatio or adjudicatio is of no effect without a demonstratio or an intentio: therefore these are never found alone.

45. Now those formulae wherein the issue is about the law, we call in jus conceptae. Of this kind are those in which we lay our intentio to the effect that something is ours by Quiritary title, or that some one ought to give us something, or ought to pay damages as though he were a thief. In these the intentio

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1 Praecandidial actions were essentially in rem. They were brought to establish some fact as preliminary to a pending action. See Zimmer's Traité des actions chez les Romains, § LXVI., Heinecenu's Antiq. Rom. IV. 6. 44, note t.
2 The subject of dos is discussed in Ulp. VI. See also Mackenzie's Roman Law, p. 103.
3 The reading: "item condemnatione vel adjudicatio sine demonstratione vel intentione nullas vires habet," is Goschen's. Hefter leaves standing in his edition the corrupt form "item condemnatio sine demonstratione vel intentione vel adjudicatione nullas vires habet," but admits in a note that no sense can be got out of it.
4 IV. 37.
quibus iuris civilis intentio est. (46.) Ceteras vero in factum conceptas vocamus, id est in quibus nulla talis intentionis concepto est, sed initio formulae, nominato eo quod factum est, adiunctur ea verba per quae iudici damnandi absolvendi potestas datur. quis est formula qua utitur patronus contra libertum qui eum contra edictum Praetoris in ius vocat; nam in ea ita est: RECUPERATORES SUNTO. SI PARET ILLUM PATRONUM AB ILLO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN IUS VOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE. SI NON PARET, ABSOLVITE. ceterae quoque formulae quae sub titulo de in ius vocando propitae sunt in factum conceptae sunt: velut aduersus eum qui in ius vocatus neque venerit neque vindicem dederit; item contra eum qui vi exemperit eum qui in ius vo-

is one of the civil law. 46. All other formulae we style in factum concepiae; formulae, that is to say, in which the intentio is not drawn up in the manner above, but at the outset of which, after a specification of that which has been done, words are added whereby power of condemning or acquitting is conferred on the judex. Of this kind is the formula which the patron employs against his freedman who summons him into court contrary to the Praetor's edict, for it runs: "Let so and so be recuperatores". Should it appear that such and such a patron has been summoned into court by such and such a freedman contrary to the edict of such and such a Praetor, then let the recuperatores condemn the said freedman to pay to the said patron 10,000 sesterces; should it not appear so, let them acquit him." The other formulae which are set forth under the title de in ius vocando are in factum concepiae: as, for instance, that against him who when summoned into court has neither made his appearance nor assigned a protector; also that against

1 For a full discussion of the phrases formula in ius, formula in factum, see App. (Q).
2 An example of a formula in ius concepiae is to be found in Cie. pro Ruc. Com. c. 4.
3 See notes on L. 20, iv. 105.
4 See Just. Inst. iv. 16. 3; D. 2. 4. 24 and 25. From these passages we also perceive that the copyist of the MS. has by a mistake written 10,000 for 5000 sesterces in the condemnatio of the formula quoted in the text.
5 These are commented on in D. 2. 4.
6 See note on iv. 21. Whether the vindex was in Gaius' time re-
catur. et denique innumerabiles eiusmodi aliae formulae in albo proponuntur. (47.) Sed ex quibusdam causis Praetor et in ius et in factum conceptas formulas proponit, velut depositi et commodati, illa enim formula quae ita concepta est: IUDEX ESTO. QUOD AULUS AGERIUS APUT NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET EX FIDE BONA, EIUS IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO, NISI RESTITUAT. SI NON PARET, ABSOLVITO—in ius concepta est. at illa formula quae ita concepta est: IUDEX ESTO. SI PARET AULUM AGERIUM APUT NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUSSIS EAMQUE DOLO MALO NUMERII NEGIDIUM AULO AGERIO REDDITAM NON

him who has by force prevented a person summoned into court from making his appearance. In fact there are innumerable other formulae of a like description set forth in the edict. 47. There are, however, cases in which the Praetor publishes both formulae in jus conceptae and formulae in factum conceptae, for instance, in the actions on deposit and on loan1; for the formula which is drawn up in this form: "Let so-and-so be judex. Inasmuch as Aulus Agerius has deposited a silver table with Numerius Negidius, from which transaction this suit arises, whatever Numerius Negidius ought in good faith to give or do to Aulus Agerius on account of this matter, do thou, judex, condemn Numerius Negidius to give or do to Aulus Agerius, unless he restore (the table)2; should it not so appear, acquit him," is a formula in jus concepta: but that which is drawn up thus: "Let so-and-so be judex: should it appear that Aulus Agerius has deposited with Numerius Negidius a silver table, and that this through the fraud of Numerius Negidius has not been restored, do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius so much money as the thing in dispute shall

quired in all cases where neither the summons was obeyed nor bail tendered, or was only needed in centumviral causes and actions apennis and judicata, is a disputed point. See Heffter's notes on this passage. 1 iv. 60 See App. (M).
2 In the MS. after the word condemnato appear the letters n. r., which Heffter thinks are incapable of any satisfactory explanation. It is Huschke's suggestion that they stand for nis restitution, as inserted in our text. For this kind of formula see D. 16 3 1, 21 and D. 13 6 3 3. See also note on iv. 141.
ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET, ABSOLVITO—in factum concepta est. similis etiam commodati formulae sunt.

48. Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio concepta est. itaque etsi corpus aliquod petamus, velut fundum hominem, vestem, aurum, argentum, iudex non ipsum rem condemnat cum cum quo actum est, sicut olim fieri solebat. sed aestimata re pecuniam eum condemnat. (49.) Condemnatio autem vel certae pecuniae in formula ponitur, vel incerta. (50.) Certae pecuniae in ea formula qua certam pecuniam petimus; nam illic ima parte formulae ita est: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SEXTERTIUM X MILIA CONDEMN. SI NON PARET, ABSOLVE. (51.) Incertae vero condemnatione pecuniae duplicem significationem habet. est enim una cum aliqua praefinitione, quae vulgo dicitur cum taxatione, velut si incertum aliquid petamus; nam

be worth: should it not so appear, acquit him," is a formula in factum concepta. There are similar formulae for loan also.

48. The condemnation of all the formulae which have one is drawn with a view to pecuniary compensation; therefore, although we be suing for some specific article, as for instance, for a field, a slave, a garment, gold, silver, the iudex does not condemn the defendant (to restore) the thing itself, as was the custom in old times, but condemns him to pay money according to the valuation of the thing. 49. The condemnation is drawn in the formula for a sum certain or for a sum uncertain. 50. It is for a sum certain in the formula by which we sue for a sum certain, for at the end of the formula there occurs the direction: "Do thou, iudex, condemn Numerus Neglius to pay to Aulus Agerius 10,000 sesterces: should it not so appear, acquit him." 51. The condemnation may be for a sum uncertain in two different senses. For there is one kind with a definite maximum prefixed, which is generally styled cum taxatione; for instance, when we are suing for something

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1 So called because the word dum-taxat occurs in it, as in the instance here given and in that in IV. 43. Festus gives another explanation, connecting taxat and taxatio with tangit. See Festus, sub verb. If we regard dum-taxat as two words, we might accept Festus' definition, trans-
condemnation. si non paret, absolve. diversa est quae infinita est, velut si rem aliquam a possidente nostram esse petamus, id est si in rem agamus, vel ad exhibendum; nam illic ita est: quanti ea res erit tanta pecuniam iudex numerium negidium aulo agerio condemnna. si non paret, absolvit. (52.) Qui de re vero et iudex si condemnat, certam pecuniam condemnare debet, et si certa pecunia in condemnatione posita non sit, debet autem iudex attendere, ut cum certae pecuniae condemnatione posita sit, neque maioris neque minoris summa petita condemnnet, aliquin litem suam facit. item si taxatio posita sit, uncertain, for then in the final part of the formula the wording is: "on this account, judex, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding 10,000 sesterces; should it not so appear, acquit him." The other kind is that which is unlimited; for instance, when we are claiming anything as being ours from one who is in possession thereof, that is when our action is one in rem, or for the purpose of having the thing produced in court, for then the condemnation runs; "Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius as much money as the thing in dispute is worth: if it do not so appear, acquit him." 52. But if he who is judex in a case condemn, he must condemn in a specific amount, even though no specific amount have been stated in the condemnation. A judex must on the other hand take care, when the condemnation is limited to a sum specified, not to condemn for a larger or smaller amount than that sued for, otherwise "he makes the cause his own." So also where a taxatio has been inserted,
ne pluris condemnet quam taxatum sit, alias enim similiter litem suam facit. minoris autem damnare ei permittum est [desunt 7 fere lin.].

53. Si quis intentione plus complexus fuerit, causa cadit, id est rem perdit, nec a Praetore in integrum restititur, praeterquam quibusdam casibus in quibus [actori succurritur propter actatem, vel si tam magna causa iusti erroris interveniret, ut etiam constantissimus quisque labi possit. plus autem quattuor modis petitur: re, tempore, loco, causa. re: velut si quis pro x milibus quae ei debantur, xx milia petierit, aut si is cuius ex he must not condemn for more than the sum "taxed," for otherwise he will, as before, "make the cause his own:" he may, however, condemn for less....

53. Where a person has comprised in his intention more (than is due to him), he fails in his cause, i.e. he loses the thing he is suing for, and he cannot be restored to his former position1 by the Praetor, except in certain cases in which [the2 plaintiff is assisted owing to want of age, or where there appears some reason for the mistake so great that even the most wary person might have been misled. 'Too much is sued for in four ways, in substance, in time, in place, in quality'. It is sued for in substance in the case of a man seeking to recover 20,000 sesterces instead of the 10,000 owed to him, or in the case of a man who having a share in a particular thing lays his intention...

1 Here restitutu in integrum = to have the right of bringing a new action on the old facts. As soon as a litigated matter had arrived at the litis contestato a novatio took place, and the defendant was no longer under obligation to fulfill his original engagement, but bound to carry out the award of the court: if then the court acquitted him, the plaintiff obviously could no longer sue on the old obligation, as that had been extinguished by the novatio. Hence restitutu in integrum signifies that the plaintiff is freed from the damaging effects of the novatio, or, in other words, can bring a new action on the original case. See iii. 18b, 181. Paulus, S. R. i. 7.

2 The remainder of this section is translated from the conjectural reading of Heffer, printed in the text above.

4 "Causa cadimus aut loco, aut summa, aut tempore, aut qualitate. Loco, alibi: summa, plus: tempore, repetendo ante tempus: qualitate, ejusdem speciei rem mihiorem postulantes." Paulus, S. R. i. 10. See also Just. Inst. iv. 6. 33, where the alterations effected by Zeno's constitution are specified, with the exception of that in respect of a plus petitio tempore, which was that a plaintiff should have to wait twice as long as he originally would have had to wait, and to pay all costs." C. 3. 10. 1.
parte res est, totam rem, vel maiore ex parte suam esse intenderit. tempore: veluti si quis ante diem vel conditionem petuerit, loco plus petitur: veluti cum quis id quod certo loco dan promissum erat, alio loco petit, sine commemorazione eius loci. verbi gratia si in stipulacione ita erat. X MILIA CAPUAEE DARE SPONDES? DARE SPONDEO, deinde detracta loci mentione x militia Romae pure intenderit: si PARET NUMERIUM NEGIDIIUM AULO AGERIO X MILIA SS. DARE OPORTERE. plus repetere enim intellegitur, quia promissori pura intentione utilisatem adimit, quam haberet, si Capuae solveret. Si quis tamen eo loco agat, quo daret promissum est, potest] petere id etiam non adfecto loco. (53a.) Causa plus petitur, velut si quis in intentione tollat electionem debitoris quam is habet obhigationis iure. velut si quis ita stipulatus sit: SESTERTIUM X MILIA AUT HOMINEM STICHUM DARE SPONDES? deinde alterutrum ex his petat; nam quamvis petat quod minus est, plus tamen petere videtur, quia potest adver-

for the whole or too large a part of it. It is sued for in time in the case of a man suing before the arrival of the day named or the happening of the condition fixed. It is sued for in place in the case of a man suing in some other place for the money which it had been promised should be paid in a particular place, without referring to the place so specified: for instance, suppose the stipulation had been in this form: "Do you engage to give me 10,000 sesterces at Capua?" "I do so engage;" and then the plaintiff, omitting all mention of the place fixed on, were to lay his intention at Rome in the general form, thus: "Should it appear that Numerius Negidius is bound to give to Aulus Agerius 10,000 sesterces." For the plaintiff is assumed to be suing for too large an amount, because by this ordinary intention he deprives the promiser of the advantage he might have had by the payment being made at Capua. If, however, the plaintiff bring his action in the place where it was promised that the money should be given, he can sue for it even without adding the name of the place.] (53a.) It is sued for in quality in the case where a creditor in his intention deprives his debtor of that right of election which he has by virtue of the obligation between them; as when a stipulation is worded thus: "Do you promise to give 10,000 sesterces or your slave Stichus?" and thereupon the creditor claims one or the other of these: now here although he may actually sue for
sarius interdum facilius id praestare quod non petitur. similiter si quis genus stipulatus sit, deinde speciem petat. velut si quis purpuram stipulatus sit generaliter, deinde Tyriam specialiter petat: quin etiam licet vilissimam petat, idem iuris est propter eam rationem quam proxime diximus. idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatum aliquem petat, velut Stichum, quamvis vilissimum. itaque sicut ipsa stipulatio concepta est, ita et intentio formule concipi debet. (54.) Illud satis apparet in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversarium dare facere oporteret intendatur, nemo potest plus intendere. idem iuris est, et si in rem incertae partis actio data sit; velut si heres QUANTAM PARTEM ..., QUO DE AGITUR, PAREAT IPSIUS ESSE: quod genus actionis in paucissimis causis dari solet. (55.) Item palam est, si quis aliud that of smaller value, yet he is regarded as suing for the larger, for it might be that his opponent could more easily give that which is not demanded. Similarly when a person having stipulated generally, sues specifically; as when the stipulation has been for purple cloth generally, and the action is specifically for Tyrian cloth. now here although he may be suing for that which is of least value, yet for the reason we have just stated, the rule is the same. So too is it when the stipulation has been for a slave generally, and the suit is brought for a particular slave, viz. Stichus, although he be really of the least value. Hence as the stipulation has been worded, so ought the intention of the formula to be drawn. 54. Of this there is no doubt, that in what are called "uncertain formulae" too large an amount cannot be sued for, because when a definite amount is not sued for, but the intention is laid for "whatever our opponent ought to give or do," no one can be guilty of a plus petitio. The same rule also holds when an action in rem has been granted for an undetermined part, for instance, if the heir sue for "such part in the land about which the action is as shall appear to belong to him," a kind of action which is allowed in very few instances. 55. Again, it is clear that

1 IV. 49—52. 
2 We have translated Huschke's reading: Heffter's is "velut potest heres, quantum partem petat in eo fundo quo de agitur nescius esse."
Plus Petio in the Condemnatio. [IV. 56, 57.

pro alio intenderit, nihil eum periclitari eumque ex integro agere posse, quia nihil in iudicium deducitur, velut si is qui hominem Stichum petere deberet, Erotem petierit; aut si quis ex testamento dare sibi oportere intenderit, cui ex stipulatu debebatur; aut si cognitor aut procurator intendent sibi dare oportere. (56.) Sed plus quidem intendere, sicut supra diximus, periculosum est: minus autem intendere licet; sed de rei quo intra eiusdem praeturam agere non permittitur. nam qui ita agit per exceptionem excluditur, quae exceptio appellatur litis divisae.

(57.) At si in condemnatone plus petenum sit quam oportet, actoris quidem periculum nullum est, sed si inquam formulam acceperit, in integrum restituitur, ut minuatur condemnatio. si vero minus positum fuerit quam oportet, hoc solum sequitur quod posuit: nam tota quidem res in iudicium dedu-

when a man lays his intentio for one thing instead of another, he is not put in peril thereby, and can sue again, because nothing is really laid before the judex; for instance, when a man who ought to sue for the slave Stichus sues for Eros; or when a man to whom a matter is due upon a stipulation sets forth in his intentio that it is due to him upon a testa-

ment; or when a cognitor or procurator has worded his intentio that something is due to himself (instead of to his principal).

56. But although, as we have said above*, it is dangerous to lay an intentio for too much, we may lay one for too little: but then we may not sue for the residue within the term of office of the same Praetor. For if we so sue, we are met successfully by the exceptio styled litis divisae*. 57. Where, however, too much is comprised in the condemnatio the plaintiff is in no peril: but if he have received* an improperly-drawn formula the proceedings are quashed* in order that the condemnatio may be lessen-

ed. But if too small an amount be stated, the plaintiff only obtains what he* has stated: for the whole matter is laid before

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1 IV. 83, 84.
2 IV. 53.
3 IV. 122. By Zeno’s constitution, referred to in note on IV. 53, the judex was allowed in such a case to augment the amount in giving his decision.
4 Sc. from the Praetor.
5 See note on IV. 53. Possibly the rule in the text is laid down because an error in the condemnatio must be due to carelessness on the part of the magistrate who issued the formula, and not produced by a misstatement made by the plaintiff himself, as is a plus petio in the intentio.
6 He must mean the Praetor.
citur, constringitur autem condemnationis fine, quam iudex egressi non potest. nec ex ea parte Praetor in integrum restituit: facilius enim reis Praetor succurrat quam actionibus. loquimur autem exceptis minoribus xxv annorum; nam huius aetatis hominibus in omnibus rebus lapsis Praetor succurrat. (58.) Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet: et hoc est quod dicitur falsa demonstratione rem non perimi. (59.) Sed sunt qui putant minus recte comprehendii. nam qui forte Stichum et Erotem emerit, recte videtur ita demonstrare: QUOD EGO DE TE HOMINEM EROTEM EMII, et si velit, de Sticho alia formula idem agat, quia verum est eum qui duos emerit singulos quoque emisse: idque ita maxime Labeoni visum est. sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et in aliis actionibus est, velut commodati, depositi. (60.) Sed nos apud quosdam

the iudex, and yet is cut down by the limitation of the condemnatio, beyond which the iudex must not go. Nor does the Praetor in this instance allow a fresh action: for he is more ready to assist defendants than plaintiffs. But from these remarks we except those who are under 25 years of age: for the Praetor in all cases of mistake on the part of such persons readily grants them relief. 58. If a larger or smaller sum than that due be set down in the demonstratio, there is nothing for the iudex to try, and the matter remains as it was at starting: and this is what is meant by the saying, "that the matter in dispute is not brought to a conclusion by a false demonstratio." 59. Some lawyers, however, think that it is not bad pleading to state too small an amount in the demonstratio. For, to take an instance, a person who has bought Stichus and Eros is entitled to draw his demonstratio thus: "Inasmuch as I bought the slave Eros of you," and if he please may claim Stichus in like manner by another formula, because it is true enough that the purchaser of two slaves is also the purchaser of one of them: and this certainly was Labeo's opinion. On the other hand, when the purchaser of one thing sues for two, his demonstratio is false. This doctrine holds in other actions also, such as those of loan and deposit. 60. We have, however, found it laid down by
some writers, that in the action of deposit and in all other actions where the consequence is ignominia\(^1\) to one who suffers an adverse verdict, he who has stated too much in his demonstratio loses the suit. As when a man after making a deposit of one thing has stated two, or when after being struck on the cheek with a blow of the fist, he has stated the demonstratio of his action for injuries that some other part of his body was struck. We will examine this statement a little more at length to see whether we ought to consider it correct. No doubt, since there are, as we have stated above\(^2\), two formulae for an action of deposit, one in ius concepta, the other in factum concepta, and in the former the matter in dispute is first inserted in the demonstratio, then particulars are given, and lastly the issue of law is introduced in these words: “Whatever the defendant is bound on that account to give or do for me:” whilst in the formula in factum concepta the thing in dispute is described in the intento itself without any demonstratio\(^3\), in this form: “Should it appear that he deposited such and such a thing with the defendant:” (all this being premised) there can

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\(^1\) A list of the actions which carried this consequence with them is to be found in IV. 183. What was the exact effect of an ignominious verdict is not, however, very clear: but that it did seriously affect the person against whom it was recorded seems obvious from the careful enumeration of the various causes producing ignominia or infamia to be found in D 3 2.

\(^2\) IV. 47.

\(^3\) The reading is Heßler's: Gneist has “statim initio intentionis loco” instead of “sine demonstratione in ipsa intentione.”
REM ILLAM DEPOSUISE: dubitare non debemus, quin si quis in formula quae in factum composita est plures res designaverit quam deposuerit, item perdat, quia in intentione plus po—[desunt 48 lin.].

61. *In bonae fidei* iudicis libera potestas permittitur iudici ex bono et aequo aestimandi quantum acti seri debat. *In quo et illud continetur, ut habita ratione eius quod invicemactorem ex eadem causa praestare oporteret, in rei quum eum cum quo actum est condemnare debat.* (62.) Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciace, pro socio, tutelae, commodati. (63.) *Tamen* iudici — — — *compensationis rationem habere non ipsius* formulae verbis praecipitur; sed quia id bonae fidei iudicio conveniens videtur, ideo officio eius contineri creditur. (64.) Alia causa est illius actions qua argenta-

be no doubt that if in a formula *in factum concepta* the plaintiff has described more things than he has deposited, he loses his suit, because he has claimed too much in the *intentio*.

61. *In actions bonae fidei* full power is allowed to the *judex* to assess according to principles of fairness and equity the amount which ought to be paid to the plaintiff. In this commission is also contained the duty of taking account of anything which the plaintiff in his turn is bound to pay upon the same transaction, and so condemning the defendant to pay the balance only. 62. Now the *bonae fidei* actions are these: actions arising on sale, letting, voluntary agency, mandate, deposit, fiduciary agreement to restore, partnership, guardianship, loan. 63. The *judex*, however, is not enjoined in the actual words of the formula to take account of set-off: but it is considered to be within the scope of his office, because it seems consonant with the notion of a *bonae fidei* action. 64. The

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1 Heffer and Huschke are both of opinion that the matter here missing was similar to that contained in Just. *Inst. iv. 6. 36—39.*
2 The distinction between actions *stricti juris* and *bonae fidei* is treated of in Just. *Inst. iv. 6. 38—30* As the whole subject is fully discussed and explained by Mackelday and Zimmerm, we need only refer to Mackelday’s *Systema Juris Rom.* § 197, and Zimmerm’s *Traité des actions chez les Romains.* § LXIII.
3 See Paulus, *S. R. ii. 5. 3* and D 13. 6. 18. 4.
4 See Lord Mackenzie’s *Rom. Law*, p. 237: D. 44. 7. 5. pr.
5 11. 59. 69.
Compensatio and Deductio. [IV. 65, 66.

ius experitur: nam is cogitur cum compensatone agere, id est ut compensatio verbis formulae comprehendatur. Staque argentarius ab initio compensatone facta minus intendit sibi dare oportere. Ece enim si sestertium x mula debit Titio, atque ei xx debit Titius, sta intendit: si paret Titum sibi x milia dare oportere amplius quam ipse Titio debet. (65) Item—bonorum emptor cum deductione agere debet, id est ut in hoc solum adversarius condemnetur quod superest, deducto eo quod invicem ei defraudatoris nomine debetur. (66.) Inter compensacionem autem quae argentario interponitur, et deductionem quae obicitur bonus emptor, illa differentia est, quod in compensacionem hoc solum vocatur quod eiusmodi generis et naturae est. Veluti pecunia cum pecunia compensatur, triticum cum tritico, vinum cum vino: adeo ut quibusdam placeat non omni case is different in the kind of action by which a banker sues; for he is compelled to sue cum compensatone, i.e. the set-off must be comprised in the wording of the formula. Therefore, making the set-off at the outset, the banker declares in his intento that the reduced sum is due to him. Thus, suppose he owes Titius 10,000 sesterces and Titius owes him 20,000, his intento is thus laid by him: "Should it appear that Titius is bound to give him 10,000 sesterces more than he owes to Titius." 65. Again the purchaser of an insolvent's goods ought to bring his action cum deductione, that is to say, for his opponent to be condemned to pay the balance only after the sum has been deducted which is reciprocally due to him on the part of the bankrupt. 66. Between the set-off declared by a banker and the deduction opposed to the purchaser of an insolvent's goods there is this difference, that in the set-off nothing is taken into account except what is of the same class and character: as, for instance, money is set off against money, wheat against wheat, wine against wine; nay, some

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1 III. 77.

2 As to the meaning of this passage there has been much discussion; the ei which we have taken into our text instead of sibi (before defraudatoris) is a suggestion of Haschke. The meaning will then in our opinion be, that where the same man is at once a debtor and creditor of the bankrupt estate, he must not be compelled to pay what he owes in full, and receive for that due to him only a dividend, but a set-off must first be made and then a dividend be paid to him on the balance due.
modo vinum cum vino, aut triticum cum tritico compensandum, sed ita si eiusdem naturae qualitatisque sit. in deductionem autem vocatur et quod non est eiusdem generis. itaque si a Titio pecuniam petat bonorum emptor, et invicem frumentum aut vinum Titio debeat, deducto quanti erit, in reliquum experitetur. (67.) Item vocatur in deductionem et id quod in diem debetur; compensatur autem hoc solum quod praesenti die debetur. (68.) Praeterea compensationis quidem ratio in intentione ponitur: quo fit, ut si facta compensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. deductio vero ad condemnationem ponitur, quo loco plus petenti periculum non intervenit; utique bonorum emptor agent, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.

69. Quia tamen superius mentionem habuimus de actione qua in peculium filiorumfamilias servorumque agatur, opus est, persons think that wine cannot in all cases be set off against wine, nor wheat against wheat, but only when the two parcels are of like character and quality. But in the case of a deduction things are taken into account which are not of the same class. Hence if the purchaser of an insolvent's goods sue Titius for money and himself turn owe corn or wine to Titius, after deduction of the value thereof he claims for the balance. 67. In a deduction account is also taken of that which is due at a future time; but in a set-off only of that due at the instant. 68. Moreover the reckoning of a set-off is stated in the intentio; the result of which is that if the banker on making his set-off claim too much by a single sesterce, he fails in his cause, and so loses the whole matter at issue. But a deduction is placed in the condemnation; and there is no danger to a man who makes a plus petito there: at least when the plaintiff is the purchaser of an insolvent's goods, for although such an one sues for a specified sum, yet he frames his condemnation for an uncertain one.

69. As we have already mentioned the action which may be brought for the peculium of children under potestas and of slaves,
Exercitorian and Institorian Actions. [IV. 70, 71.

ut de hac actione et de ceteris quae eorumdem nomine in parentes dominosve dari solent diligentius admoneamus.

70. Inprimis itaque si iussu patris dominive negotium gestum erit, in solidum Praetor actionem in patrem dominumve comparavit: et recte, quia qui ita negotium gerit magis patris dominive quam filii servive fidem sequitur. (71.) Eadem ratione comparavit duas alias actiones, exercitoriam et institoriam. tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navi praeposuert, et quod cum eo eius rei gratia cui praepositus fuit negotium gestum erit. cum enim ea quoque res ex voluntate patris dominive contrahi videatur, acquisium Praetori visum est in solidum actionem dari. quin etiam, licet extraneum quis quacunque magistrum navi praeposuert, sive servum sive liberum, tamen ea Praetoria actio in eum redditur. ideo autem exercitoria actio appellatur, quia ex-

it is now necessary for us to explain more carefully the nature of this action and of others which are usually granted against parents or masters in the name of such persons.

70. In the first place, then, if any undertaking have been entered into by the express command of the father or master, the Praetor has provided a form of action for the whole debt against such father or master; and this is very proper, because he who enters into such an engagement puts his confidence in the father or master rather than in the son or slave. 71. On the same principle the Praetor has drawn up two other actions, known respectively as “exercitorian” and “institorian.” The former of these is resorted to when a father or master has made his son or slave the captain of a vessel, and some engagement has been entered into with one or the other with reference to the business he was appointed to manage. For as the engagement is contracted with the consent of the father or master, it seemed to the Praetor most equitable that there should be a means of recovering the full amount. And, what is more, although the owner of the vessel have placed some stranger, whether bond or free, in command, still this Praetorian action is granted against him (the owner). The reason why the action is called “exercitorian” is because the name exercitor is given to the per-

\footnote{An exercitor was not necessarily...}
ercitor vocatur is ad quem cottidianus navis quae estus pervenit. Institoria vero formula tum locum habet, cum quis tabernae aut culbit negotiationi filium servumve aut etiam quemlibet extra-neum, sive servum sive liberum, praeposuerit, et quid cum eo eius rei gratia cui praepositus est contractum fuerit. ideo autem institoria appellatur, quia qui tabernae praeposuit institor appellatur. quae et ipsa formula in solidum est.

72. Praeterea tributona quoque acto in patrem dominumve pro filius filiusbusve, servis ancillabusve constituta est, cum filius servusve in peculiari merce scienc patri dominove negotiatur. nam si cum eo eius rei causa contractum erit, sta Praetor tuis dict, ut quodquid in his mercibus erit, quodque inde receptum erit, id inter patrem dominumve, si quid ei debifitur, et ceteros creditores son to whom the daily profits of a vessel accrue. The "institorian" formula can be employed, whenever a person has placed his son, or slave, or even a stranger, whether bond or free, to manage a shop or business of any kind, and some engagement has been entered into with this manager in reference to the business he has been set to manage. It derives its name "institorian" from the fact that the person who is set to manage a shop is called institor. This formula, too, is for the full amount.

72. Besides these actions, another, called the "tributorian" action, has been granted (by the Praetor's edict) against a father or master on account of his sons and daughters, or male and female slaves, when such child or slave trades with the merchandise of his peculium with the knowledge of his father or master. For if any contract have been entered into with such trader on account of such business, the rule ordained by the Praetor is that all the stock comprised in the peculium and all profit which has been derived therefrom, shall be divided between the father or master, if anything be due to him, and the

the owner of a vessel, but might be a charterer. See D. 14. 1. 1. 15.
1 Or with the servants or apprentices of the manager. See Paulus, S. R. ii. 8. 3: "Quod cum discri-pulis eorum qui officinis vel tabernis praesunt contractum est, in magistris vel institoribus tabernae in solidum actio dabitur." See D. 14. 3. 3. and 14. 3. 8.
2 So Heffter reads: Huschke has "Praetoris dicto de eorum mercibus rebusve" instead of "pro filius filiabusve, servis ancillabusve."

The paragraphs which follow are supplied from Just. Just. iv. 7. 3 and 4, a page being lost from the MS. at this point.
other creditors, in proportion to their claims. And as the Praetor allows the father or master to make the distribution, therefore in case of complaint being made by any one of the creditors that his share is smaller than it ought to be, he gives this creditor the action called "tributorian."

73. In addition to the above, an action has been introduced "relating to the peculium and to whatever has been converted to the profit of the father or master;" so that even though the transaction in question have been entered into without the wish of the father or master, yet if, on the one hand, anything have been converted to his profit, he is bound to make satisfaction to the full amount of that profit, and if, on the other hand, there have been no profit to him, he is still bound to make satisfaction so far as the peculium admits. Now everything which the son or slave necessarily expends upon the father's or master's business is taken to be to the profit of the father or master, as for example when the son or slave has borrowed money and with it paid his father's or master's creditors, or propped up his ruinous buildings, or purchased corn for his household, or bought an estate or anything else that was wanted. Therefore if out of ten sestertia, for instance, which your slave has borrowed from Titius, he have paid five to a creditor of yours, and spent the other five in some way or other, you ought to be condemned to make good the whole of the
IV. 74.] Actio de peculio et de in rem verso.

serit, pro quinque guidem in solidum damnari debes, pro ceteris vero quinque evenus, quatenus in peculo sit: ex quo saliect apararet, si tuta decem sestertia in rem tuam versa fuerint, tota decem sestertia Titium consequi posse. licet enim una est actio qua de peculio deque eo quod in rem patris dominive versum sit agitur, tamen duas habet condemnationes. itaque iudex apud quem ea actione agitur ante dispicere solet, an in rem patris dominove versum sit, nec alter ad peculii a'estimationem transiit, quam si aut nihul in rem patris dominive versum intellegatur, aut non totum. Cum autem quaeritur quantum in peculio sit, ante deductur quod patri dominove quique in poilestae eius sit a filio servove debetur, et quod superest, hoc solum peculum esse intellegitur. aliquando tamen id quod ei debet filius servusve qui in potestate patris dominive est non deductur ex peculio, velut si is cui debet in huius ipsius peculio sit.

74. Ceterum dubium non est, quin is quoque qui iussu patris

first five, but the other five only so far as the peculium goes. Hence it appears that if the whole of the ten sestertia have been spent upon your business, Titius is entitled to recover them all. For although there is but one and the same form of action for obtaining the peculium and the amount converted to the profit of the father or master, yet it has two condennationes. Therefore the iudex before whom the action is tried ought first to ascertain whether anything has been converted to the profit of the father or master, and he can only go on to settle the amount of the peculium after satisfying himself that nothing, or not the whole amount in question, has been so converted. When, however, a question arises about the amount of the peculium, anything which is owed by the son or slave to the father or master or to a person under his potestas is first deducted, and the balance alone is reckoned as peculium. Still, sometimes, what a son or slave owes to a person under the potestas of his father or master is not deducted, for instance, when he owes it to a person in his own peculium.

74. Now there is no doubt that he who has entered into

1 That is, debts owing by a servus ordinary to his servus sucurus are not reckoned in the calculation. If the amount had been deducted as due to the sucurus, it would, when paid, have been again in the peculium of the ordinary, and thus the deduction would have been nugatory.
dominice contractus, cuique institoria vel exercitoria formula competet, de peculio aut de in rem verso agere possit. sed nemo tam stultus est, ut qui aliqua illarum actionum sine dubio solidum consequii possit, in difficultatem se deducat probandi in rem patris dominive versum esse, vel habere filium servumve peculum, et tantum habere, ut solidum sibi solus possit. Is quoque cui tributoria actio competet, de peculio vel de in rem verso agere possit: sed huic sane plerumque expedit hac potius actione uti quam tributoria. nam in tributoria eius solius peculi ratio habetur quod in his mercibus erit quibus negotiatur filius servusve, quodque inde receptum erit, at in actione pecullii totius: et potest quisque tertia forte aut quarta vel etiam minore parte peculi negotiari, maximam vero partem in praedius vel in alius rebus habere; longe magis si potest adprobari id quod debatur totum in rem patris dominive versum esse, ad hanc actio-

a contract (with a son or slave) at the bidding of the father or master, and who can avail himself of an institorian or exercitorian formula, may also bring the action styled de peculio aut de in rem verso. But no one who could recover the whole amount by one of the first-named actions would be so foolish as to involve himself in the difficult task of proving that conversion had taken place to the profit of the father or master, or that the son or slave had a peculium, and one so great that he could be paid his debt in full from it. Again, he for whom a tributorian action hes, can also proceed by the action de peculio vel de in rem verso. but for this man it is obviously better in most cases to resort to the last-named action rather than to the tributorian action. For in the tributorian action so much only of the peculium is taken into consideration as is comprised in the stock-in-trade wherewith the son or slave is trafficking, or has been taken therefrom as profit, but in the actio peculii the whole is considered; and it is possible for a man to traffic with a third, or fourth, or even a smaller part of his peculium, and to have the larger part invested in land or other property. Still more clearly ought the creditor to have recourse to this action if it can be proved that what is owed was altogether spent on the business of the father or master. For, as we have said above 1,
nem transire debet. nam, ut supra diximus, eadem formula et de peculo et de in rem verso agitur.

75. Ex maleficiis filiorum familias servorumve, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones prodita sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere: erat enim iniquum nequittance eorum ultra ipsorum corpora parentibus dominisve damnosan esse. (76.) Constitutae sunt autem noxales actiones aut legibus aut edicto. legibus, velut furti lege XII tabularum, damni iniuriae [velut] lege Aquilia. edicto Praetoris velut iniuriarum et vi bonorum raptorum. (77.) Omnes autem noxales actiones capita sequuntur. nam si filius tuus servusve noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem pervenerit, cum illo incipit actio esse; si sui iuris coeperit the same formula deals both with the peculium and with outlays for the father's or master's profit.

75. For the wrongful acts of sons under potestas or of slaves, such as theft or injury, noxal actions have been provided, with the view of allowing the father or master either to pay the value of the damage done or to give up (the offender) as a noxa: for it would be inequitable that the offence of such persons should inflict damage on their parents or masters beyond the value of their persons. 76. Now noxal actions have been established either by leges or by the edict. By leges, as the action of theft under a law of the Twelve Tables, or that of wrongful damage under the Lex Aquilia: by the edict of the Praetor, as the actions of injury and of goods taken by force. 77. Again, all noxal actions follow the persons (of the delinquents). For if your son or slave have committed a noxal act, so long as he is under your potestas the action lies against you: but if he pass under the potestas of another, the action forthwith lies against that other; if he become sui juris, there is a

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1 "Noxa est corpus quod nocuit, id est servus, noxia ipsum maleficium." Just. Inst. iv. 8. 1. See Festus, sub verb. mora. The terminology of Justinian does not accord with that of Gaius, who in §§ 77 and 78 below uses noxa where according to Justinian's rule we should have had noxia.

2 Tab. xii. 1. 2, where the word moria is used in the sense affixed to it by Justinian.


4 D. 9. 4. 43.
esee, directa actio cum ipso est, et noxae deditio extinguitur. ex diverso quoque directa actio noxalis esse incipit: nam si pater familias noxam commiserit, et hic se in adrogationem tibi dederit aut servus tuus esse coeperit, quod quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa fuit. (78.) Sed si filius patri aut servus domino noxam commiserit, nulla actio nascitur: nulla enim omnino inter me et eum qui in potestate mea est obligatio nascitur. ideoque et si in alienam potestatem pervenerit aut sui iuris esse coeperit, neque cum ipso, neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus servus filiusve noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio, an quiescat. nostri praeceptores intercldere putant, quia in eum casum de­ducta sit in quo actio consistere non potuerit, ideoque licet exierit de mea potestate, agere me non posse. diversas scholae

direct action against himself, and the possibility of giving him up as a noxa is at an end. Conversely, a direct action may become a noxal one: for if a paterfamilias have committed a noxal act, and then have arrogated himself to you or become your slave, which we have shown in our first Commentary may happen in certain cases, then the action which previously was directly against the offender begins to be a noxal action against you. 78. But if a son have committed a noxal act against his father or a slave against his master, no action arises: for there can be no obligation at all between me and a person under my potestas. And so, though he may afterwards have passed under the potestas of another, or have become sui juris, there can be no action either against him or against the person under whose potestas he now is. Hence this question has been raised, whether in the event of an injury being committed against me by a slave or son of another person, who subsequently passes under my potestas, the right of action is altogether lost or is only in abeyance. The authorities of our school think that it is lost, because the matter has been brought into a state in which there cannot possibly be an action, and that therefore I cannot sue, although the wrongdoer have passed subsequently from under my potestas.

1 I. 99. 2 I. 160.
The authorities of the school opposed to us think that the right of action is in abeyance so long as he is under my potestas, since I cannot bring an action against myself; but that it is revived when he has passed out of my potestas. 79. Again, when a son under potestas is given up by mancipation for a noxal cause, the authorities of the opposed school hold that he ought to be given by mancipation thrice, because by a law of the Twelve Tables it has been provided that unless a son be thrice mancipated he cannot escape from the potestas of his father: but Sabinus and Cassius and the other authorities of our school hold that one mancipation is sufficient; for in their opinion the three sales specified by the law of the Twelve Tables refer to voluntary mancipation.

80. So much for those persons who are under potestas, when an action arises in consequence either of their contract or their delict. But so far as those who are under manus or mancipium are concerned the law is thus stated: if an action be brought on their contract, unless they be defended to the full amount by him to whose authority they are subject, all...
etiam cum ipsa muliere quae in manum convenit agi potest, quatum tutoris auctoritas necessaria non est. [desunt 11 lin.] (81.) quamvis ut supra quoque diximus reo non permissum fuit demortuos homines dedere, tamen et si quis eum dederit qui fato suo vita exesserit, aeque liberatur.

82. Nunc admonendi sumus agere posse quemlibet aut suo nomine aut alieno. alieno, veluti cognitorio, procuratorio, tutorio, curatorio: cum olim, quo tempore erant legis actiones, in usu fuisset alterius nomine agere non licere, nisi pro populo et libertatis causa. (83.) Cognitor autem certis verbis in litem coram

the property which would have been theirs, if they had not been subject to such authority, must be sold. But when the capitis diminuto is treated as non-existent\(^1\) in an action coexistent with the imperium\(^6\), the action may be brought personally even against a woman under manus\(^7\), because in such a case the authorization of her tutor is not required\(...) although, as we have said, it was never permitted to a defendant to surrender dead slaves (instead of paying the damage they had done); yet if a man give up a slave who has died a natural death he is free from liability, as in the other case\(^8\).

82. We must next be reminded that a man can bring an action either in his own name or in the name of another: he brings one in the name of another when, for instance, he sues as a cognitor, procurator, tutor, or curator: although formerly, when the legis actiones were in use, it was not allowable for a man to sue in the name of another, save in the case of a popular action\(^*\) or in defence of freedom\(^7\). 83. A cognitor\(^*\) then is substituted (for a principal) in a set form

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1 III. 84, IV. 38.
2 IV. 103—109.
3 i. 108.
4 The reading here adopted is a conjecture of Hüscke.
5 Zeno abolished noxal surrender of children, but that of slaves continued to Justinian’s time. Just. iv. 8.
6 These actions are treated of in D. 47. 23.
7 That is, as assertor libertatis; see IV. 14, and note thereon.
8 The institution of cognitores was precedent in point of time to that of procuratores. and naturally so, because the invasion of the principle that one person could not represent another was much less barefaced in the one case than in the other. Cicero mentions the cognitor in the Orat. pro Rosc. Comm. c. 18. Festus, sub verb., gives the same definition as in our text. “Cognitor est qui litem alterum suscipit coram eo cui datus est. Procurator autem absentis nominis actor fit.” A cognitor was always appointed to conduct a suit, a procur-
adversario substituitur. nam actor ita cognitorem dat: QUOD EGO A TE VERBI GRATIA FUNDUM PETO, IN EAM REM LUCIUM TITIUM TIBI COGNITOREM DO; adversarius ita: QUANDOQUE TU A ME FUNDUM PETIS, IN EAM REM PUBLIUM MAEVIIUM COGNITOREM DO. potest, ut actor ita dicat: QUOD EGO TECUM AGERE VOLO, IN EAM REM COGNITOREM DO; adversarius ita: QUANDOQUE TU MECUM AGERE VIS, IN EAM REM COGNITOREM DO. nec interest, praesens an absens cognitor detur: sed si absens datus fuerit, cognitor ita erit, si cognoverit et susceperit officium cognitoris. (84.) Procurator vero nullis certis verbis in litem substituitur; sed ex solo mandato, et absente et ignorante adversario, constituitur. quinetiam sunt qui putant vel eum procuratorem videri cui non sit mandatum, si modo bona fide accedat ad negotium et caveat ratam rem dominum habiturum. igitur et si non edat

of words, in order to carry on a suit, and in the opponent's presence. For the method in which the plaintiff appoints one is as follows: "Inasmuch as I am suing you for an estate," to take an example, "I appoint Lucius Titius to be my cognitor against you for that matter:" that in which the opposite party does so is: "Since you are suing me for the estate, I appoint Publius Maevius as my cognitor for that matter." Or it may be that the plaintiff uses these words: "As I desire to bring an action against you, I appoint a cognitor for the purpose;" and the defendant these: "Since you desire to bring an action against me, I appoint a cognitor for the purpose." The presence or absence of the cognitor at the time of appointment is not a material point: but if he be absent at the time he is appointed, he will become agent only on receipt of notice and acceptance of the duty. 84. A procurator, on the other hand, is substituted for the purposes of the suit without any special form of words: and is appointed by simple mandate¹, and even in the absence or ignorance of the opposite party. Nay, there are some who think that even if there be no mandate given, a person may be considered a procurator, provided only he act in the business in good faith, and give sureties that what he does shall be ratified by his principal². Therefore, even though the procurator frequently for other business:

Paul. S. R. 1. 3. 2. Cognitors had become obsolete in Justinian's day. ¹ III 155 et seqq. ² Such a person was called negotiorum gestor, and the obligation

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308 Framing Formula in Actio alieno nomine. [IV. 85—87.

mandatum procurator, experiri postest, quia saepe mandatum initio litis in obscurro est et postea apert judicem ostenditur. (85.) Tutores autem et curatores quemadmodum constituantur, primo commentario rettulimus.

86. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam convertit. nam si verbi gratia Lucius Titius pro Publio Maevio agat, ita formula concipitur: SI PARET NUMERIUM NEGIDIUM PUBLIO MAEVIO SESTERTIUM X MILIA DARE OPORTERE, IUDEX NUMERIUM NEGIDIUM LUCIO TITIO SESTERTIUM X MILIA CONDEMNA. si non paret, ABSOLVE. in rem quoque si agat, intendit Publii Maevii rem esse ex iure Quiritium, et condemnationem in suam personam convertit. (87.) Ab adversarii quoque parte si interveniat aliquid, cum quo actio constituitur, intenditur dominum dare oportere; condemnation autem in eius personam convertitur qui iudicium accepit.

curator produce no mandate, he may conduct the action, because a mandate is frequently kept back at the commencement of a suit, and produced afterwards before the judex. 85. As to the manner of appointing tutors and curators we have given information in our first Commentary.

86. He who sues in the name of another inserts his principal's name in the intentio, but in the condemnatio inserts his own instead. For if, for example, Lucius Titius be acting for Publius Maevius, the formula is thus drawn: "Should it appear that Numerius Negidius is bound to give 10,000 sesterces to Publius Maevius, do thou, judex, condemn Numerius Negidius to pay the 10,000 sesterces to Lucius Titius: should it not so appear, acquit him." If again the action be in rem, he lays his intentio that such and such a thing is the property of Publius Maevius in Quiritary right, and then in the condemnatio changes to his own name. 87. If, again, there be on the part of the defendant some agent against whom the suit is laid, the statement in the intentio is to the effect that "the principal ought to give:" but in the condemnatio the name is changed to that of him who has undertaken the conduct of the case. But when the action is in rem, the name of the

between him and the person he represents is of the class styled quas ex contractu. See App. (M). 1 1. 144 et seq.
When Satisdation is requisite.

sed cum in rem agitur, nihil in intentione facit eius persona cum quo agitur, sive suo nomine sive alieno aliquis judicio interveniat: tantum enim intenditur rem actoris esse.

88. Videamus nunc quibus ex causis is cum quo agitur vel hic qui agit cogatur satisdare. (89.) Igitur si verbi gratia in rem tecum agam, satis mihi dare debes. acquam enim visum est te ideo quod interea tibi rem, quae an ad te pertineat dubium est, possidere conceditur, cum satisdatione mihi cavere, ut si victus sis, nec rem ipsam restitues nec litis aestimationem sufferas, sit mihi potestas aut tecum agendi aut cum sponsoribus tuis. (90.) Multoque magis debes satisdare mihi, si alieno nomine iudicium accipias. (91.) Ceterum cum in rem actio duplex sit (aut enim per formulam petitoriam agitur aut per sponsionem): si quidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur iudicatum solvi:

person against whom the action is brought has no effect on the intentio, whether such person be defending his own cause or acting as agent in a suit appertaining to another: for the wording of the intentio is simply that "the thing is the plaintiff's."

88. Let us now see under what circumstances he who is sued or he who sues is under the necessity of finding sureties. 89. If then, to take an example, I bring an action in rem against you, you must furnish me with sureties. For since you are allowed to have the interim-possession of the thing, in respect of which there is a doubt whether the ownership is yours or not, it has been considered equitable that you should provide me with sureties, so that if you lose the suit and will neither deliver up the subject nor pay the assessed value, I may have the power of proceeding either against you or your sureties. 90. And still more ought you to furnish me with sureties, if you defend an action in the name of another person. 91. Inasmuch, then, as the action in rem may be brought in two different forms (for proceedings are taken either by a petitory formula or by a sponsion); if the former course be adopted, that particular stipulation is employed which has the name judicatum solvi (that the award of the judex shall be paid): but if the latter, that stipulation

1 "Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo:" D. 46. 7. 6. The
The two modes of suing in Rom. [IV. 92—94.

si vero per sponsionem, illa quae appellatur pro praede litis et vindiciarum. (92.) Petutoria autem formula haec est qua actor intendit rem suam esse. (93.) Per sponsionem vero hoc modo agimus. provocamus adversarium tali sponsione: si HOMO QUO DE AGITUR EX IURE QUIRITIUM MEUS EST, SESTER­TIOS XXV NUMMOS DARE SPONDES? deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere. qua formula ita demum vincimus, si probavenmus rem nostrnm esse. (94) Non tamen haec summa sponsionis exlgitur: nec enim poenalis est, sed praedualis, et propter hoc solum fit, which is called pro praede litis et vindiciarum. 92. A petitory formula is one in which the plaintiff claims the thing to be his own. 93. The mode of procedure by sponsion is as follows. We challenge our adversary in a sponsion running thus: "if the slave who is the subject of this action be mine in Quiritary right, do you engage to give me 25 sesterces?" Then we serve him with a formula, in the intentio of which we assert that the amount of the sponsion is due to us: and under this formula we are victorious only on our proving that the thing is ours. 94. The amount of this sponsion is not, however, in any case exacted: for it is not penal but praedualis, being introduced for the sole

three objects at which the stipulatio aimed were these, (1) to secure payment of the award of the judex, the litis aetematis, in ease of non-restituition of the subject of the suit, the litis. (2) to secure the attendance of the defendant in court: (3) to prevent any acts being done by him to the detriment of the subject of the suit. The plaintiff, if successful, could of course sue on his judgment, by psynoris capio for instance; but it was more convenient to sue his opponent on his stipulation; and besides, the fact of there being sureties, multiplied the chances of obtaining adequate compensation.

We see then that by this device the actio in rem directed against no one in particular, has been converted into an actio in personam against our opponent. We sue him for the amount of a wager; but whether he has won or lost that wager can only be decided by the court pronouncing its opinion on our claim of ownership.

"Praejudicial," says Zimmern, "in the language of practice, was not exactly a preliminary proceeding, in the same sense as actio praefuludicialis, but a decision which might sooner or later be appealed to as a precedent" Zimmern’s Traité des actions chez les Romains, § xcvi.

There is some difficulty at first sight in comprehending how his victory in the sponsion benefited the plaintiff. He had certainly
IV. 95. ] Stipulatio pro Praede Litis et Vindiciarum.

ut per eam de re iudicetur. unde etiam is cum quo agitur non restipulatur: idae autem appellata est pro praede litis vindiciaorum stipulatio, quia in locum praedaum successit; quia olim, cum lege agebatur, pro lite et vindiciis, id est pro re et fructibus, a possessori petitori dabantur praeda. (95.) Ceterum si apud centumviro agitur, summam sponsionis non per formulam petimus, sed per legis actionem: sacramento enim reu' provocamus; eaque sponsio sestertiorum cxxv nummorum fit, purpose of obtaining a decision on the main issue by its means. Hence it is that the defendant does not enter into a restipulation. This stipulation again is called pro praeda litis et vindiciaorum, because it was substituted for the praeda or sureties¹, who in olden times, when the proceedings were by legis acto, used to be assigned by the interim-possession to the plaintiff, for the assuring of the lis et vindiciae, i.e. the thing itself and the profits thereof. 95. But when the action is tried before the centumviro² we do not sue for the amount of the sponsion by a formula, but by a legis actio; for we challenge the defendant by the sacramental wager; and the sponsion arising out of it is to the amount of 125 sesterces³, according to the

gained his wager, but the real object of the suit was not the winning of a trifling such as 25 sesterces, but the securing of a transfer to him by his adversary of the lands in debate. He could not proceed on his judgment, for an actio judicata was not intended to transfer possession, and this was what his opponent now wrongfully withheld from him. Besides, although it had been decided that the field was his, the verdict he had obtained was one for 25 sesterces, and for this alone could he have brought an actio judicata; if such action had been allowed him at all; but we know that it was expressly refused him, for says Gaius: "nec enim poenalis est summa sed praecjudiciales." How then did he proceed? On the stipulation pro praeda litis et vindiciaorum, for therein his adversary had bound himself by a verbal contract to let the lands, or their value, follow the judgment as to the wager. If then the lands were not delivered, he had a personal action on this stipulation, and could, in lieu of the lands, get their value, or possibly more than their value, as the amount secured would no doubt be such as to make it worth the defendant's while to give the lands rather than forfeit his bond.

¹ See note on IV. 16.
³ We are told in IV. 14 that the sacramentum was 500 asses (or sometimes 50). As a sesterce was worth 4 asses, the number 125 above is correct. The sesterce was originally 2\ \frac{1}{2} \text{asses}, but in B.C. 217, when the weight of the as was reduced to one ounce, the sesterce was altered to 4 \text{asses}, so as to be still a quarter of a denarius: for the denarius in olden times was 10 \text{asses}, but after B.C. 217 was 16.
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Surties in suits alieno nomine. [IV. 96—100.

scilicet propter legem — — —. (96.) Ipse autem qui in rem agit, si suo nomine agit, satis non dat. (97.) Ac nec si per cognitorem quidem agatur, ulla satisdatio vel ab ipso vel a domino desideratur. cum enim certis et quasi sollemibus verbis in locum domini substituatur cognitor, merito domini loco habetur. (98.) Procurator vero si agat, satisdare iubetur ratam rem dominum habiturum: periculum enim est, ne iterum dominus de eadem re experiatur. quod periculum non intervenit, si per cognitorem actum fuit; quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit. (99.) Tutores et curatores eo modo quo et procuratores satisdare debere verba edicti faciunt. sed aliquando illis satisdation remittitur. (100.) Haec ita si in rem agatur: si vero in personam, ab actors quidem parte quando satisdari debet quando quaerentes, eadem repetemus quae

Lex ...... 96. In the case of an actio in rem the plaintiff, if suing in his own name, does not furnish sureties. 97. Nay, even though a suit be brought by means of a cognitor, no sureties are required either from him or from his principal. For since the cognitor is put into the place of the principal in words of a formal and almost solemn character 1 he is fairly regarded as occupying the position of the principal. 98. But when a procurator brings an action, he is ordered to furnish sureties that his principal will ratify his proceedings: for there is the risk that the principal may again sue for the same thing. When the proceedings are conducted by means of a cognitor this risk does not exist, because when a man sues by such an agent, he no more has a second action than he would have if he himself sued. 99. According to the letter of the edict tutors and curators ought to furnish sureties in the same manner as procuratores; but from this necessity of finding sureties they are sometimes excused. 100. The above are the rules when the action is in rem, but if it be in personam, what we have already stated with reference to the action in rem will be our conclusion, if we want to know when sureties ought to be furnished on the part of the plain-

1 IV. 83.
2 Cicero treats the subject of satisdation by cognitores and procuratores at some length in his oration Pro Quinct. c. 7, 8.
Surdits in suits suo nomine.

Diximus in actione qua in rem agitur. (101.) Ab eius vero parte cum quo agitur, si quidem alieno nomine aliiquis interveniat, omnimodo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur. sed si quidem cum cognitore agatur, dominus satisdare iubetur; si vero cum procuratore, ipse procurator. idem et de tutore et de curatore iuris est. (102.) Quod si proprio nomine aliquis iudicium accipiat in personam, certis ex causis satisdari solet, quas ipse Praetor significat. quarum satisdationum duplex causa est. nam aut propter genus actionis satisdatur, aut propter personam, quia suspecta sit. propter genus actionis, velut iudicati depressive, aut cum de moribus mulieris agetur: propter personam, velut si cum eo agitur qui decoxerit, cuiusve bona a creditoribus proscriptave sunt, sive cum eo herede agatur quem Praetor suspexit aestimaverit.

tiff. 101. As to the case of a defendant,—when a man defends in another's name, sureties must always be furnished, because no one is considered competent to take up another's defence unless there be sureties: but the furnishing thereof is laid on the principal, when the proceedings are against a cognitor; whilst if they be against a procurator, the procurator himself must provide them. The latter is also the rule applying to a tutor or curator. 102. On the other hand, if a man be defendant on his own account in an action in personam, he has to give sureties in certain cases wherein the Praetor has so directed. For such furnishing of sureties there are two reasons, as they are provided either on account of the nature of the action, or on account of the untrustworthy character of the person. On account of the nature of the action, in such actions as those on a judgment or for money laid down by a sponsor or that for immorality of a wife: on account of the person, when the action is against one who is insolvent, or one whose goods have been taken possession of or advertised for sale by his creditors, or when the action is brought against an heir whose conduct the Praetor considers suspicious.

1 D. 3. 3. 40. 2, D. 3. 3. 46. 2, D. 3. 3. 53, D. 46. 7. 10. 2 See Ulpian, vi. 12, 13. 31, D. 42. 5. 33. 1. 4 Cic. pro Quinct. c. 8. D. 42. 5.
103. Omnia autem iudicia aut legitimo jure consistunt aut imperio continentur. (104.) Legitima sunt iudicia qua in urbe Roma vel intra primum urbis Romae miliarium inter omnes cives Romanos sub uno iudice accipiuntur: eaque e lege Iulia judiciaria, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est quod vulgo dicitur, e lege Iulia litem anno et sex mensibus mori. (105.) Imperio vero continentur recuperatoria et quae sub uno iudice accipiuntur inter-veniemte peregrini persona iudicis aut litigatoris. in eadem causa sunt quaecumque extra primum urbis Romae miliarium tam inter cives Romanos quam inter peregrinos accipiuntur.

103. All proceedings before *judices* either rest on the statute law or are coexistent with the *imperium* of the Praetor¹. 104. Of the former kind are those which are heard before a single *iudex* in the city of Rome or within the first milestone from the city of Rome, all the parties whereto are Roman citizens: and these, according to the provisions of the Lex Julia Judiciaria², expire unless they have been decided within a year and six months. This is what is meant by the common saying that a suit dies in a year and six months by the Lex Julia Judiciaria³. 105. In the other class are comprised proceedings before *recuperatores*⁴, and those which are carried on before a single *iudex*, when a foreigner is concerned either as *iudex* or litigant. In the same category are all proceedings taken beyond the first milestone from the city of Rome, whether the parties in them be citizens or foreigners. These proceedings are said to be “coexistent with the *imperium*,” because

¹ 111. 180, 181. For the meaning of *imperium*, see note there.
² Temp. Augusti.
³ D. 46. 7. 2. From the following passages it will be seen that the suffering an action to die, if done wilfully, was sometimes equivalent to fraud or dolus, D. 4. 3. 18. 4 and D. 47. 8. 3. 1.
⁴ *Recuperatores* were possibly, at their original institution, delegates chosen from two nations at variance as to some right or question, to act as umpires and arrange the dispute amicably. Hence the name was subsequently applied to persons who had a function analogous to that of a *iudex* in cases where foreigners were concerned. In accordance with the original notion of their being delegates chosen by different parties, they would in all cases be more than one in number; and so the name came to be applied to others who sat (two or more together) to decide cases connected with the *jus gentium*, even when both parties were Roman citizens. See note on 1. 20. Also read Beaufort’s *Rep. Rom.* v. 2.
ideo autem imperio contineri iudicia dicuntur, quia tamdui valent, quambdiu is quia ea praecepit imperium habebit. (106.)

Et siquidem imperio continenti iudicio actum fuerit, sive in rem sive in personam, sive ea formula quae in factum concepta est sive ea quae in jus habet intentionem, postea nihilominus ipso iure de eadem re agi potest. et ideo necessaria est exceptio rei judicatae vel in iudicium deductae. (107.) at vero si legitimo iudicio in personam actum sit ea formula quae iuris civilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio supervacua est. si vero vel in rem vel in factum actum fuerit, ipso iure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicatae vel in iudicium deductae. (108.) Alia causa fuit ulim legis actionum. nam

they are effectual only during such time as the Praetor who authorized them remains in office (retains his imperium). 106. If then the proceedings resorted to be "coexistent with the imperium," whether they be in rem or in personam, and whether they have a formula the intentio whereof is in factum or one whereof the intentio is in jus¹, another action may nevertheless according to the letter of the law be brought afterwards upon the same facts. And therefore there is need of the exceptio rei judicatae or the exceptio in iudicium deductae². 107. But if proceedings in personam by statutible action be taken under a formula which has a civil law intentio, by the letter of the law there cannot be a second action on the same facts, and therefore the exceptio is superfluous. But if the action be in rem, or in factum, another action may nevertheless according to the letter of the law³ be afterwards brought upon the same facts, and therefore the exceptio rei judicatae or that in iudicium deductae is necessary. 108. In olden times the case

¹ IV. 45. App. (Q).
² III. 181. App. (R).
³ An obligation is said to be destroyed ipso jure in two cases; firstly when there had already been a judgment in a legitimum iudicium, in which cases the Praetor will grant no formula for a second action; and this is the case dealt with here: secondly, when there had been no action, but a payment real or fictitious, (solutio or acceptatio), had taken place. A formula would then be granted, and the plaintiff would not apply for the insertion of an exceptio, pleading, as it were, a general issue, and establishing his defence in iudicio by proof of the payment: this latter case is, however, foreign to the topic Gaus is here discussing. See Thémis, vi. p. 413.
Fnpdua/ and all actions.

109. Quo loco admonendi sumus, eas quidem actiones quae ex lege senatusve consultis profisciscuntur, perpetuo solere Prae-

was different with the legis actiones, for when once an action had been tried about any matter, there could not according to the letter of the law be another action on the same facts: and there was not any employment at all of exceptiones, as there is now. 109. Further, an action may be derived from a lex and yet not be “statutable,” and, conversely, it may not be derived from a lex and yet be “statutable.” For if, to take an example, an action be brought in the provinces under the Lex Aquilia\(^1\) or Ovinia\(^2\) or Furia\(^3\) the action will be one “coexistent with the imperium;” and the rule is the same if we bring an action at Rome before recuperatores\(^4\), or before one judex when there is a foreigner connected with the suit\(^5\). So, conversely, if in a case where an action is granted under the Praetor’s edict the trial be at Rome before a single judex and all the parties be Roman citizens, the action is “statutable.”

110. At this point we must be reminded that the Praetor’s practice is to grant at any time\(^6\) those actions which arise

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1 III. 210. Nothing is known about this law.

2 The Lex Furia de Sponsu; for this lex is stated in III. 121 to be applicable to Italy only as a matter of course, and therefore if carried into effect in a province must have been a title in the edict of the praefect of that province, and so not “statutable,” but “coexistent with the imperium.”

3 See note on I. 20, IV. 105.

4 Either as judex or litigant; see IV. 105.

5 The Praetor granted these actions any length of time after the ground of action arose: the others he only allowed to be brought if the formula were applied for within one
Actions which lie for or against an heir.

IV. 111, 112. Actions which lie for or against an heir. (111.) aliquando tamen ipse quoque Praetor in actionibus imitatur ius legitimum: quales sunt eae quas Praetor bonorum possessibulS ceterisque qui heredis loco sunt accommodat. furti quoque manifesti actio, quamvis ex ipsius Praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit.

112. Non omnes actiones quae in aliquem aut ipso iure competent aut a Praetore dantur, etiam in heredem aequo competent aut dari solent. est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec compete nec from a lex or from senatusconsulta, but in general to grant those which spring from his own special jurisdiction only within one year. III. Sometimes, however, the Praetor in his actions imitates the precedent of the statutable actions: for instance, in those actions which he grants to bonorum possessores and others who occupy the position of heir. The action of manifest theft also, though issuing from the jurisdiction of the Praetor himself, is granted at any time; and very properly, since the Praetor's pecuniary penalty has been imposed instead of the capital penalty (of the Twelve Tables).

112. Not every action which is either maintainable by strict law or granted by the Praetor against anyone, is equally maintainable or granted against his heir. For there is a firmly-established rule of law that penal actions on debts do not lie against

year. It is very likely that the rule originally was that they could only be applied for whilst the same Praetor was in office whose year had witnessed the offence, but subsequently the space of time was a definite one, and irrespective of the possible tenure of one Praetor and succession of another. After the time of Theodosius perpetuum came to have a restricted meaning, and a perpetua actio was one which could be brought within 30, or in some cases 40 years, and no action thenceforward was actually "perpetual."

1 Sc. Grants them perpetuo.

2 III. 32, IV. 34.
3 III. 189.
4 From D. 44. 7. 35 we obtain the general rule that Praetorian actions for restitution were perpetual, those for a penalty annual. Also that annual actions did not lie against the heir of the delinquent, except to such extent as he had benefited by the wrong. The penal action for theft was an exception as to duration, but if brought against the heir, was only for the amount of his profit. However, with this limitation it was for restitution only, and so the rule still applies.
Prætorem dare, velut furti, vi bonorum raptorum, inuiriuarum, damni inuiae: sed heridibus actores hiuismodi actiones competunt nec denegantur, excepta inuiriaria actione, et si qua alia similis inuieriatur actio. (113.) Aliquando tamen etiam ex contractu actio neque heredi neque in heredem competit. nam adstipulatoris heres non habet actionem, et sponsoris et fide promissoris heres non tenetur.

114. Superest ut dispiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciat actori, quid officio iudicis conveniat: utrum absolvere, an utleo potius damnare, quia iudicii accipiendi tempore in ea causâ fuit, ut damnari debeat. nostri præceptorès absolvere eum debere the heir (of the offender), nor will the Praetor grant them, for instance the actions of theft, of robbery, of injury, of wrongful damage: but actions of this kind lie for the heir (of the person aggrieved), and are not refused to him, except the action of injury and any other action that can be shewn to resemble it. 113. Sometimes, however, even an action on a contract does not lie for or against the heir of a party: for the heir of an adstipulator has no action, and the heir of a sponsor or fidepromissor is not bound.

114. The next point for our consideration is this: supposing after the matter has been submitted to the judex, but before award, the defendant make satisfaction to the plaintiff, what is the duty of the judex? Ought he to acquit, or rather to condemn him because at the time when the matter came before the judex he was in such a plight that he ought to be condemned. Our authorities hold that the judex ought to

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1 III. 182—223.
2 The reason for this is that the actio inuiriaria was regarded by the Roman law as a purely personal remedy; "the heir had suffered no wrong," says Ulpian, in D. 47. 10. 13. pr., and Paulus, referring to a similar case, says the original action is "vindicatae non pecuniae," D. 37. 6. 2. 4. But we learn from the passage of Ulpian just quoted, that if the proceedings had reached the lites contestatae in the life-time of the aggrieved party, they could be continued by his heir.

Other actions of like kind are those of a patronus against a libertinus who has sued him without the Praetor's leave, D. 2. 4. 74; those against a man who has by violence prevented an arrest, D. 2. 7. 5. 4; those against eolumnatores, D. 3. 6. 4, &c. &c.

4 III. 114. 5 III. 130.

6 His own admission, evidenced by his coming to terms, shows that he was deserving of condemnation.
IV. 115, 116.** Exceptions.**

existimant: nec interesse cuius generis fuerit iudicium. et hoc est quod volgo dicitur Sabino et Cassio placere omnia iudicia esse absolutoria. De bona fide iudicis autem idem sentunt diversae scholae auctores, quod in his quidem iudicis liberum est officium iudicis. tantumdem etiam de in rem actionibus putant

— [desunt 17 lin.].

115. Sequitur ut de exceptionibus dispiciamus. (116.)

Comparatae sunt autem exceptiones defendendorum corum gratia cum quibus agitur: saepe enim accidit, ut quis iure civili teneatur, sed imquum sit eum iudicio condemnari. velut si stipulatus sim a te pecuniam tamquam credendi causa acquit him: and say that the nature of the action 4 is a matter of no importance. And hence comes the common saying, that Sabinus and Cassius held “that all issues before a judex allow of acquittal.” The authorities of the opposite school hold the same opinion with regard to actions in Jonae juda, because in these the discretion of the judex is unfettered. With regard to actions in rem they think that it is so far . . . .

115. The next matter for our consideration is that of exceptions. 116. Exceptions then are provided for the purpose of protecting defendants: for it frequently happens that a man is liable according to the civil law, and yet it would be inequitable that he should be condemned in the suit: for instance, if I have stipulated for money from you on the pretence that I am about to advance you a loan, and then do

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1 Sc. Whether it be stricts jure or bona fide. Justinian agreed with the Sabiniis, Just IV 17, 2.

2 A defendant might reply to the plaintiff’s demand in three different ways: (i) by a denial of the facts alleged, which is styled by later writers lites contestata mora negatoria (2) by asserting facts which destroyed the right of action ipso jure, although that might originally have been well-founded, such facts for instance as payment real or fictitious (solitum or acceptilato); of such replies the judex as a matter of course took notice, without any express direction in the formula that he should do so: (3) by asserting facts which did not destroy the right of action ipso jure, but on account of which the Praetor allowed a defence, quia iniquum fuit eum condemnari; and of these the judex could take no notice (except in actions ex fide bona), unless the cognizance of them was by the formula expressly given to him. Such facts, included in a formula by means of a special clause, were exceptions. See Mackeldy, Syst. Jur. Rom. § 206 a, p. 306. Exceptions then were equitable defences, creatures of the formulary system, and not in existence during the period of the leges actiones.

3 See Cic. de Invent. II. 19, 20, de Off. III. 14, 15.
numeratus, nec numeraverim. nam eam pecuniam a te peti posse certum est; dare enim te oportet, cum ex stipulatu teneris: sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere. item si pactus fuerro tecum, ne id quod mihi debeas a te petam, nihilominus id ipsum a te petere possim dare mihi oportere, quia obligatio pacto convento non tollitur: sed placet debere me petentem per exceptionem pacti conventi repellere. (117.) In his quoque actionibus quae non in personam sunt exceptiones locum habent. velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam mancipio dem; nam si eam rem a me petas, datur mihi exceptio per quam, si metus causa te fecisse vel dolo malo arguero, repellere. item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omnino summoveris. (118.) Exceptiones autem alias in edicto Praetor habet pro-

not so advance it. In such a case it is clear that the money can be sued for as against you: for it is your duty to pay it since you are bound by the stipulation: but as it is inequitable that you should be condemned on account thereof, it is held that you must be defended by the exception of fraud. So also if I have made a pact with you not to sue you for that which you owe to me, I can nevertheless claim that very thing from you by the formula “that you ought to give me it,” because the obligation is not removed by the agreement made between us; but it is held that I ought, if I sue, to be repelled by the exception of agreement made. 117. Exceptions are also resorted to in actions which are not in personam, as for example if you have compelled me by fear, or induced me by fraud, to give you something by mancipation; for if you sue me for that thing, an exception is granted me, by which you will be defeated if I prove that you acted with the intent of causing fear or with fraud. Again, if you have with full knowledge purchased from a non-possessor an estate which is a subject of suit, and seek to get it from the possessor, an exception is opposed to you by which you will be completely defeated. 118. Some exceptions are pub-

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1 See note on 111. 89.  
2 From a passage in the Fragmenta de Jure Fisci, § 8, it would appear that it was a somewhat serious of-
IV. 119.]  Wording of exceptions.

positas, alias causa cognita accommodat. quae omnes vel ex legibus vel ex his quae legis vicem optinent substantiam capiunt, vel ex iurisdictione Praetoris prorita sunt.

119. Omnes autem exceptiones in contrarium concipiuntur, quam adfirmat is cum quo agitur. nam si verbi gratia reus dolo malo aliquid actorem facere dicit, qui forte pecuniam petit quam non numeravit, sic exceptio concipitur: SI IN EA RE Nihil DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT. item si dicatur contra pactioem pecunia peti, iia concipitur exceptio: SI INTER AULUM AGERII ET NUMERII NEXIDIIUM NON CONVENIT NE EA PECUNIA PETERITUR. et denique in ceteris causis similiter concipit solet. ideo scilicet, quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur, ut condicionalem faciat condemnationem, id est ne alter iudex eum cum quo agitur condemnet, quam si nihil in ea re qua de

lished by the Praetor in his edict, some he grants on cause being shown: but all of them are founded either on legis or enactments having the force of legis, or else are derived from his own jurisdiction.

119. Now all exceptions are worded in the negative of the defendant's affirmation. For if, to take an instance, the defendant assert that the plaintiff is doing something fraudulently, suing, for example, for money which he has never paid over 1, the exception is worded thus: "if nothing has been done or is being done in this matter fraudulently on the part of Aulus Agerius." Again if it be alleged that money is sued for contrary to agreement, the exception is thus drawn: "if it has not been agreed between Aulus Agerius and Numerius Negidius that that money shall not be sued for:" and, in a word, there is a similar mode of drawing in all other cases. The reason of this is, no doubt, because every exception is proposed by the defendant, but added to the formula in such manner as to make the condennnatum conditional, i.e. that the iudex is not to condemn the defendant unless nothing have been done fraudulently on the part of the plaintiff in the

fence to purchase a res lutigna, for See on the same subject D. 44. 6. 1
by an edict of Augustus a penalty of and D. 50. 3. 1. 2.
50 sestertia was imposed, besides
the bargain being declared void.

1 IV. 116.
agitur dolo actoris factum sit; item ne alter iudex eum con-
demnet, quam si nullum pactum conventum de non petenda pecunia factum erit.

120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae. (121.) Peremptoriae sunt quae perpetuo valent, nec evitari possunt, velut quod metus causa, aut dolo malo, aut quod contra legem senatusve consultum factum est, aut quod res iudicata est vel in judicium deducta est, item pacti conventi quo pactum est ne omnino pecunia peteretur. (122.) Dilatoriae sunt exceptiones quae ad tempus nocent, veluti illius pacti conventi quod factum est verbi gratia ne intra quinque annos peteretur: finito enim eo tempore non habet locum exception. cui similis exceptio est luis dividuae et rei residuae. nam si quis partem rei petierit et intra eiusdem praetorium reliquam partem petat, hac exceptione summovetur,

matter in question; or again that the *judex* is not to condemn him unless no agreement have been made that the money should not be sued for.

120. Exceptions are said to be either peremptory or dilatory. 121. Those are peremptory which are available at all times, and which cannot be avoided, for example the exception of intimidation, or of fraud¹, or that something has been done contrary to a *lex* or senatus-consultum, or that the matter has been already adjudicated upon, or laid before a *judex²*, and so also that an agreement has been made that the money should not be sued for under any circumstances. 122. Dilatory exceptions are those which are good defences for a certain time only, as that of an agreement having been made to the effect that money should not be sued for, say, within five years; for on the expiration of that time the exception is no longer available. Similar to this is the exception *litis dividuae*, and that *rei residuae*. For if a person have brought his action for a part of the thing claimed, and then sue for the remainder within the time of office of the same Praetor, he is met by the

1 D. 4. 2. 14. 1. The penalty for intimidation, if pursued by *actio*, was fourfold damages within the year, simple damages afterwards. The *actio* for fraud could be brought within the year for the recovery of the loss sustained by the plaintiff; after the year there was only an *actio in factum* to receive from the defendant his gain. 2 IV. 106. App. (R).
IV. 123, 124.]

Dilatory exceptions.

quae appellatur litis dividuae. item si is qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios iudices cant, si intra eiusdem praeturam de his quae ita distulerit agat, per hanc exceptionem quae appellatur rei residuae summovetur. (123.) Observandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem: alioquin si obiecta exceptione egerit, rem perdit. nec enim post illud tempus quo integra re evitare poterat, adhuc ei potestas agendi superest, re in iudicium deducta et per exceptionem perempta. (124.) Non solum autem ex tempore, sed etiam ex persona dilatoriae exceptiones intelleguntur, quales sunt cognitoriae; velut si is qui per edictum cognitorem dare non potest per cognitorem agat, vel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere. nam si obiciatur exceptio cognitoria, si ipse talis erit, ut ei non liceat cognitorem dare, ipse agere potest: si vero cognitori non liceat cog-

exception styled *litis dividuae*\(^1\). And so too, if he who had several suits against the same defendant have brought some and postponed others, in order that they may go before other *judices*, and then pursue those others which he had postponed within the time of office of the same Praetor, he is met by the exception called *rei residuae*. 123. He then against whom a dilatory exception has been pleaded ought to be careful to put off his action: for otherwise, if he go on with his action after the exception has been pleaded, he will lose the cause. For not even after the time when he could have avoided it if no prior proceedings had been taken, has he any longer a right of action surviving, when the matter has once been laid before a *judex* and overthrown by the exception\(^2\). 124. Exceptions are dilatory not only in relation to time, but also in relation to the person; of which latter kind are cognitory exceptions; as in the case of a person who, though incapacitated by the edict from nominating a *cognitor*\(^3\), nevertheless employs one to carry on an action, or in that of a person who has the right of nominating a *cognitor*, but nominates one who is unfit for the office: for if the cognitory exception be pleaded, then, supposing the principal to be disqualified from nominating a *cognitor*, he can in person carry on the action; whilst if the *cognitor* be disqualified

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\(^1\) IV. 56
\(^2\) III. 180, IV. 131.
\(^3\) IV. 83.
Nituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et potest tam hoc quam illo modo evitare exceptionem. Quod si dissimulaverit eam et per cognitorem eget, rem perdit. (125.) Sed peremptoria quidem exceptione cum reus per errorem non fuit usus, in integrum restituatur servandae exceptionis gratia: dilatoria vero si non fuit usus, an in integrum restituatur, quaeritur.

126. Interdum evenit, ut exceptio quae prima facie iusta videatur, inique noceat actori. Quod cum accidat, alia adiectione opus est adiuvandi actoris gratia: quae adiectio replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Nam si verbi gratia pactus sim tecum, ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et si agam tecum, exsipias tu, ut ita demum mihi condemneris, si non convenerit from undertaking the office, the principal has free choice of suing either by means of another cognitor or in person; and he can by either of these modes avoid the exception; but if he treat the exception with contempt1 and sue by the first cognitor, he loses his case. 125. When, however, the defendant has through some error not availed himself of a peremptory exception, he is restored to his former position2 for the sake of preserving the exception: but if he have omitted to use a dilatory exception, it is doubtful whether he can be so restored.

126. It sometimes happens that an exception, which at first sight appears just, unfairly prejudices the plaintiff. When this occurs, another addition (to the formula) is needed to relieve the plaintiff, and this is called a replication, because by means of it the effect of the exception is rolled back again and untied. Thus, for example, supposing I have agreed with you not to sue you for money you owe to me, and that afterwards we make an opposite agreement, i.e. that I may sue you: then should I bring my action and should you meet me with an exception that you ought to be condemned to pay me 3 if there have been

1 This is not the ordinary meaning of dissimulare, but that it here bears the sense we have assigned to it is obvious by reference to Theophilus (i. 1), who (evidently translating this sentence) writes: et δι δἐδ ἄπειρον καταφρονεῖ τῆς τομῆς παραγράφος.

2 I.e. is allowed a new trial. See note on IV. 53.
Interdum autem evenit, ut rursus replication quae prima facie

no agreement that I should not sue for the money,” this excep-
tion of agreement made is to my prejudice; for the agreement
is a matter of fact, even though we have since agreed to the
contrary. But as it would be unjust for me to be kept out of
my rights by the exception, a replication is allowed me on the
ground of the subsequent agreement, thus: “if it have not
been subsequently agreed that I may sue for the money.”
Again suppose a banker seeks to recover the price of a thing
which has been sold at auction, and the exception is raised
against him, that the purchaser is to be condemned to
pay only “if the thing which he purchased have been de-

erived:” this is a good exception; but if at the auction it has
been stated at the outset that the thing is not to be delivered
to the purchaser until he pay the price, the banker is relieved
by a replication to the following effect: “or if it were an-
ounced at the outset that the thing was not to be deli-
vered to the purchaser unless the purchaser paid the price.”
127. But sometimes it happens that a replication in its turn,

1 We might have expected the replication to be worded: “if it have been subsequently, &c.” but the negative in the exception runs through all the succeeding sentences of the formula, and so a double negative is needed in the replication: the defendant is to be condemned when there “has not not been,” i.e. when there has been, an agreement subsequent to, and in contradiction of the first agreement.

2 The general rule is that goods need not be paid for till delivery is made, but a special agreement to the contrary is valid, as the text states.
which at first sight is a fair one, presses unduly on the defendant: and when this occurs there is need of an addition (to the formula) for the purpose of assisting the defendant; which is called a duplication. 128. And if again this appear at first sight fair, but for some reason or other press unduly on the plaintiff, another addition is needed for the relief of the plaintiff; which is called a triplication. 129. The variety of business transactions has caused the use of all these additions to be extended in some cases even beyond what we have specified.

130. Now let us consider the subject of the praescriptiones which are employed for the benefit of the plaintiff. 131. For it often happens that in consequence of one and the same obligation there is something to be paid or done at once and something at a future time. For instance, when we have stipulated for the payment of a certain sum of money every year or every month: for then on the termination of a certain number of years or months, there is a present obligation that the money

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1 See App. (Q).

"Omnis autem in quaerendo... oratio praescribere primum debet (ut quibusdam in formulis, Ea res agetur) ut inter quos disseritur conveniat, quid sit id de quo disseratur." Cc. de Fin. 11. 1.

In De Orat. 1. 37, Cicero ridicules a lawyer who had claimed the benefit of a praescriptio for his client, the defendant in a suit. Cicero calls it indeed an exception, but it is evident that he uses the term as synonymous with praescriptio, for he gives the wording "cujus pecuniae dies fusset," a well-known praescriptive form.
intellegitur, praestatio vero adhuc nulla est. si ergo velimus id quidem quod praestari oportet petere et in iudicium deducere, futuram vero obligationis praestationem in incerto relinquere, necessa est ut cum hac praeinscriptione agamus: EA RES AGATUR CUIUS REI DIES FUIT. aliqquin si sine hac praeinscriptione egerimus, ea scilicet formula qua incertum petimus, CUIUS intenio his verbis concepta est: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTERE, totam obligationem, id est etiam futuram in hoc iudicium deducimus, et quantumvis in obligatione fuerit, tamen id solum consequimur, quod litis contestatae tempore praestari oportet, ideoque removemur postea agere volentes. item si verbi gratia ex empto agamus, ut nobis fundus mancipio detur, debemus sta praeclibert: EA RES

for that period shall be paid, whilst as to the future years there is undoubtedly an obligation contracted, but as yet there is no necessity for payment. If, therefore, we wish to sue for the sum actually due and to lay the matter before a judex, leaving the future discharge of the obligation in uncertainty, we must commence our action with this praeinscription: "Let that amount which is already due be the matter of suit." Otherwise, if we have proceeded without this praeinscription, that is, by the formula through which we sue for an uncertain sum, and the intention of which runs: "Whatever it appears that Numerius Negidius ought to give or do to Aulus Agerius;" in such case we have included in this reference to a judex the whole obligation, i.e. even the future part of it; and whatever be the amount it deals with, we can only obtain that portion which was due at the time of the litis contestatio, and therefore we are estopped if we wish to bring another action afterwards. Suppose again, as another example, that we bring a suit on a purchase, for the purpose of having an estate transferred to us by mancipation;

1 The litis contestatio has worked a novation (III 180), the original contract is transmuted into an obligation to pay the award of the court, and the court can only award the amount presently due.

It is not known why the rule was established that a formula "quod dare facere oportet" should include future as well as present undertakings: it was not so in stipulations, as we see from D. 45. 1. 76. 1. "Cum stipulamur: quidquid te dare facere oportet, id dumtaxat quod praeenti die debetur in stipulationsetiam futurum: et ideo in stipulatione adicetur verbum: oportet, vel sta praesens in demum; hoc ideo fit, &c."
AGATUR DE FUNDO MANcipando: ut postea, si velimus vacuum possessionem nobis tradi, de tradenda ea vel ex stipulatu vel ex empto agere possimur. nam si non praescrimus, toto illius iuris obligatio illa incerta actione: quidquid ob eam rem numerium Negidium Aulo Agerio dare facere oportet, per litis contestationem consumitur, ut postea nobis agere volentibus de vacua possessione tradenda nulla supersit actio. (132.) Praescriptiones autem appellatas esse ab eo, quod ante formulas praescribuntur, plus quam manifestum est.

133. Sed his quidem temporibus, sicut supra quoque indicavimus, omnes praescriptiones ab actore proficiscuntur. olim autem quaedam et pro reo opponebantur. quals illa erat praescriptione: ea res agatur: si in ea re praetium hereditati non fiat: quae nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditaritis alio generi iudicii praetium hereditati faciat, velut cum res singulas petat; esset enim iniquum per unus partis petitionem maiori quaestioni de we ought to prefix this praescription: “Let the question before the court be the transfer of the land by mancipation;” so that if we subsequently desire to have the possession vacated and transferred to us, we may be able to sue for delivery either upon a stipulation or upon a purchase. For if we do not so praescrbe, the binding force of the whole engagement is destroyed by the litis comptatio in the uncertain action: “Whatever Numerius Negidius ought to give or do to Aulus Agerius;” so that if we subsequently desire to bring an action for the vacation and delivery of the possession, no action will lie for us. 132. That praescriptiones have their name from the fact of their being prefixed to formules is more than evident.

133. At the present day, as we have also stated above1, all praescriptiones proceed from the plaintiff, but in olden times some of them were set up by the defendant. Such was the praescription which ran thus: “Let this be the question tried: provided only that there be thereby no prior decision as to the inheritance;” but this is now thrown into the form of an exception, and is resorted to when the claimant of an inheritance takes in some other way proceedings which affect the question of inheritance, for instance, when he brings

1 IV. 130.
ipsa heredestate praejudicari. quare etiam his temporibus ei, unde petitur, exceptio hanc in rem comparatur . . . . . (134.) Ab actore autem vel nunc praeescriptiones quaedam speciales prater eas quas supra enumeratus adhibenda sunt . . . . . si verbi gratia dominus servus alicuius ex stipulatione eius agere velit, in qua et præ­­sentes et futuras obligationes ex pacto insunt, forte si ita convenisset, ut ea pecunia quae in stipulatum deducta est menstrua V HS. refunderentur: intentioni actoris loco demonstrationis ista prae­­scribendum est: ea res agatur quod Chrysogonus Lucii Seii servus aktor de Numerio Negido trucies HS. stipulatus est convenitque inter eos, ut ex ea pecunia menstrua V HS. refunderentur cuius res dies fuit. Deinde intentione formulae determinatur si cui

a suit for individual portions of it; for it would be unfair1 [to allow the more important question as to the inheritance itself to be prejudged by the petitory suit] for a particular part thereof. And therefore even now-a-days an exception is provided to this end for the benefit of him from whom the inheritance is claimed . . . . 134. On the plaintiff's side, too, there are even at the present day several special praescriptiones employed in addition to those we have named above . . . . thus when the owner of some slave is desirous of bringing an action upon the slave's stipulation, wherein are contained by virtue of an agreement payments both present and future, the arrangement having been, for example, that out of the money forming the subject of the stipulation five sesteria should be repaid monthly; a praescription ought to be inserted prior to the plaintiff's intention and in the place of a demonstration, to this effect: "Let the matter of suit be the amount which is now due from the fact that the plaintiff, Chrysogonus, the slave of Lucius Seius, stipulated for 300 sesteria to be paid him by Numerius Negidius, and that an agreement was entered into between them that out of the money five sesteria should be repaid monthly." Then] in the intention of the formula the person is specified to whom the payment ought to be made: and obviously it is the master to whom the subject of the slave's stipulation ought to be given. But it is in the

1 The whole of the passage in brackets is translated from Heftter's conjectural reading, given in the text above. This has been suggested to Heftter by various passages in the Digest, viz. D. 44. 1. 21, D. 5. 1. 54, D. 12. 1. 40 and D. 45. 1. 126. 2.
praescription that the question as to the pact¹ is raised, which pact ought to be truly alleged² according to its obvious sense. 135. All that we have said about slaves we shall understand to apply also to other persons who are subject to our authority. 136. We must also be reminded that if we sue the very person who has promised us a thing of uncertain value, our formula is so set forth³ that in it a praescription takes the place of the demonstration, thus: "Let so and so be judex. Inasmuch as Aulus Agerius stipulated for something uncertain from Numerius Negidius; whatever in respect thereof, but only in respect of that part which is already due, Numerius Negidius ought to give or do to Aulus Agerius, &c." 137. If an action be brought against a sponsor or fideiussor⁴, there is usually in the case of a sponsor a praescription in this form: "Let the subject of the action be the amount now due from the fact that Aulus Agerius stipulated for something un-

¹ Sc. the pact regarding the monthly payments. This was regarded as forming an element of the stipulation, as it was made at the same time, for "pacta incontinenti facta stipulatónbus messe creduntur". 11. 13. 1. 40.
² This is Heffer's explanation of verum: see his note ad locum. In the praescription, therefore, what really took place between the stipulating parties is to be described, and the name of the slave to be given. This transaction having been examined and its real nature established, the owner of the slave is thereupon in a position to claim the money as plaintiff; for as soon as his slave's claim has been made out, he has the benefit of it.
³ Sc. in the Praetor's Edict.
⁴ III. 115.
IV. 138—140.] Interdicts and Decrees.

EST, QUO NOMINE NUMERIUS NEGIDIUS SPONSOR EST, CUIUS REI DIES FUIT; IN PERSONA VERO FIDEIUSSORIS: EA RES AGATUR. QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE SUA ESSE IUSSIT, CUIUS REI DIES FUIT; DEINDE FORMULA SUBICTUR.

138. Superest ut de interdictis dispiciamus. (139.) Certis igitur ex causis Praetor aut Proconsul principaliter auctoritatatem suam finiendis controversiis interponit. quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contentitur. et in summa aut iubet aliquid fieri, aut fieri prohibet. formulae autem verborum et conceptiones quibus in ea re utitur interdicta decretae vocantur. (140.) Vocantur autem decreta cum fieri aliquid iubet, velut cum praecipit, ut aliquid exhibeat aut restituat: interdicta vero cum prohibet fieri, velut cum praecipit: ne sine vitio possidenti vis fiat, certain from Lucius Titius, in respect whereof Numerius Negidius was sponsor, &c.;” and in the case of a fideiussor: “Let the subject of the action be the amount now due from the fact that Numerius Negidius became fideiussor in an unascertained sum for Lucius Titius, &c.” Then follows the formula.

138. We now have to discuss the subject of interdicts. 139. In certain cases then the Praetor or Proconsul interposes his authority at the outset to bring disputes to a conclusion: and this he does more particularly in suits about possession or quasi-possession1, summarily ordering something to be done or forbidding it to be done. The forms of words which he employs for this purpose we call interdicts or decrees. 140. They are called decrees when he orders something to be done, as when he directs that a thing shall be produced in court or be delivered up. They are called interdicts when he prohibits a thing being done, for instance, when he directs “that no violence be done to one who is in

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1 Possession proper can only exist with reference to corporeal things: the possession of an incorporeal thing, a right, such as usufruct, is no true possession, and yet has many of the essentials of true possession, and is protected by interdicts. Quasi-possession is the term applied to the exercise of such rights, and the nature of it is fully treated of in Savigny’s Treatise on Possession (Perry’s translation), pp. 130—134.
neve in loco sacro aliquid fiat unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria vocantur. (141.)
Nec tamen cum quid iussisset fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatoresve itur, et ibi, editis formulis, quaeritur, an aliquid adversus Praetoris edictum factum sit, vel an factum non sit quod is fieri iussisset. et modo cum poena agitur, modo sine poena: cum poena, velut cum per sponsionem agitur; sine poena, velut cum arbitre petitur. et quidem ex prohibitoris interdictis semper per sponsionem agi solet, ex restitutoris vero vel exhibitoris modo per sponsionem, modo per formulam agitur quae arbitraria vocatur.

possession innocently¹, or that something be not done on sacred ground." Hence all interdicts² are named either restitutory, exhibitory, or prohibitory. 141. The matter is not, however, at once concluded when the Praetor has commanded or forbidden the doing of something, but the parties go before a judex or before recuperatores, and there, upon the issuing of formulae, investigation is made whether anything has been done contrary to the Praetor's edict³ or whether anything has not been done which he ordered to be done. And sometimes a penalty accompanies the action, sometimes it does not: there is a penalty attached, for instance, when the proceedings are by sponsio; there is no penalty, for instance, when an arbitre⁴ is demanded. In prohibitory interdicts the course of proceeding is always by sponsio, in restitutory or exhibitory interdicts sometimes by sponsio, sometimes by the formula called arbitraria⁵.

² *Interdict* is here used as a general term, including decrees also, for exhibitory and restitutory orders are plainly of the latter character. So also Justinian says in *Inst. iv. 15. 1*, *sub fnem*.
³ "That is to say, against the *edictum perpetuum*, or annual edict, published by every Praetor on commencing his duties. Therefore no one was guilty of acting contrary to an interdict unless that interdict was in accordance with the terms of the annual edict, and this is the meaning of D. 50. 17. 102. pr. The interdict was issued on an *ex parte* statement, and therefore there was a possibility that the Praetor had been misled by false representations as to the facts of the case.
⁵ *A formula arbitraria* is one which has in its *condemnatio* the words *nisi restituat*. The *condemnatio* must
IV. 142—144 | Interdicta adipiscendae possessionis.

142. Principalis igitur divisio in eo est, quod aut prohibitoria sunt interdicta, aut restitutoria, aut exhibitoria. (143.) Sequens in eo est divisio, quod vel adipiscendae possessionis causa comparata sunt, vel retinendae, vel reciperandae.

144. Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, cuius principium est QUORUM BONORUM: eiusque vis et potestas haec est, ut quod quisque ex his bonis quorum possessionis data est pro herede aut pro possessori possideret, id ei cui bonorum possessionis data est restituatatur. pro herede autem possidere videtur tam qui heres est, quam qui putat se heredem esse: pro possessori possident qui sine causa aliquam rem hereditaria vel etiam totam hereditatem, sciens ad se non pertinere, possident. ideo autem adipiscendae possessionis vocatur, quia ei tantum utile est qui

142. Of interdicts then the primary division is that they are either prohibitory, restitutory, or exhibitory. 143. There is another division based on the fact that they are provided for the purpose of obtaining, retaining, or recovering possession.

144. An interdict for the purpose of obtaining possession, the first words of which are "Quorum bonorum," is provided for the bonorum possessor: its force and effect being that whatever anyone possesses pro herede or pro possessor out of the goods of which the possession has been given to another, is to be delivered up to that person to whom the possession of the goods has been given. Now not only the heir, but also any one who thinks himself heir, is held to possess pro herede: whilst a possessor pro possessor is anyone who possesses without title any item of the inheritance or the whole inheritance, knowing that he has no claim to it. The interdict is styled adipiscendae possessionis, because it is only available for a man

in all cases be for a fixed sum of money (IV. 52), but by making it depend on this condition "nisi restituat," the arbiter could compel specific performance or specific delivery. It was when such a clause was included in the formula transmitted to him that the functionary generally called judex received the name of arbiter. In assessing the alternative amount to be paid on non-compliance the reckoning was always made by him ex bona fide and not ex stricto jure.

1 III. 34. The words of the interdict are given in full in D. 43. 2. 1. pr.
nunc primum conatur adipisci Rei possessionem: itaque si quis
adeptus possessionem amisit, desinit ei id interdictum utile
esse. (145) Bonorum quoque emptori similiter proponitur in-
terdictum, quod quidam possessorum vocant. (146.) Item ei
qui publica bona emerit, eiusdem condicionis interdictum pro-
pontur, quod appellatur sectorium, quod sectores vocantur
qui publice bona mercantur. (147.) Interdictum quoque quod
appellatur Salvianum apiscendae possessionum comparatum est,
eoque utitur dominus fundi de rebus coloni quas is pro
merce-
dibus fundi pignori futuris pepigisset.

148. Retinendae possessionis causa solet interdictum reddi,

who is now for the first time endeavouring to obtain possession
of a thing; and therefore if after obtaining possession he lose
it again, the interdict ceases to be of service to him. 145. So
too, an interdict is set forth in the edict for the benefit of the
purchaser of a bankrupt's goods, which some call by the
name interdictum possessoriorum. 146. So too, an interdict
of like character is set forth for the benefit of a purchaser of
public property, to which the name interdictum sectorum is
given, because those who buy property sold for the good of
the state are called sectores. 147. The interdict also which
is called Salvianum is provided for the purpose of obtaining
possession, and the owner of land employs it with reference
to the property of his tenant which the latter has pledged for
the rent of his farm.

148. An interdict for the purpose of retaining possession

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1 Hence "restituatur" a few lines above does not mean to restore, but
to deliver up, a sense in which the word has been frequently used be-
fore, e.g. in ll. 148—148, passim. In fact restituere is a word of ex-
tremely wide signification, and also means sometimes to remove a nu-
ance, as in D. 43 12. 1. 19 and D. 43 13. 11.

2 111. 89.

3 No trace of this interdict is to be found in the sources probably
because the later and more general interdict, "Ne vis fiat ei qui in pos-
sessionem minus est," D. 43 4, was found to be a sufficient protec-
tion for bonorum emptores, and so the other fell into disuse. Zimmer
asserts that the old interdict, as well as that termed sectorum, was framed
upon the interdict quorum bonorum.

4 See Pseudo-Asconius on Cic. in
Verr. II. 1. 52 and II 1. 61. Festus
says: "Sectores et qui secant dicen-
tur, et qui emita sua persequuntur," In 2 Phil. 26, Cicero calls Antony
"Pompeii sector," and in § 29 of
the same oration speaks of money
"quam pro sectione debebas." For
further information see Heinæus,
Antiq. Rom. II. 1. 22.
is usually granted when two litigants both lay claim to the ownership of a particular thing, and the first question for decision is which of them ought to be possessor and which plaintiff; to this end the interdicts uti possidetis and utrubi are provided. The interdict uti possidetis is granted for the possession of land or a house, the interdict utrubi for the possession of moveables. And if the interdict be granted for land or a house, the Praetor orders that he is to be preferred who is in possession at the time of the grant of the interdict, provided it be without violence, clandestinity, or sufferance as against his opponent; but if it be granted for a moveable, he orders him to be preferred who, as against his adversary, has possessed the thing for the greater part of the year without violence, clandestinity or sufferance. This is fully stated in the actual wording of the interdict. But
solum sua ciiique possessio prodest, sed etiam alterius quam iustum est ei accedere, velut eius cui heres extiterit, eiusque a quo emerit vel ex donatione aut dotis datione acceperit. itaque si nostrae possessioni iuncta alterius iusta possessionem, nos eo interdicto vincimus. nullam autem propria possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullum est nihil accedere potest. sed et si vitiosam habeat possessionem, id est aut vi aut clam aut precario ab adversario adquisitam, non datur; nam ei possessione sua nihil prodest. (152.) Annus autem retro­sus numeratur. itaque si tu verbi gratia anni mensibus posse­sideris prioribus v, et ego VII posterioribus, ergo potior ero quanti­tate mensium possessionis; nec tibi in hoc interdicto prodest, in the interdict utrubl a person not only profits by his own possession, but also by that of any other person which law­fully accrues to him, for instance by that of one whose heir he is, or that of one from whom he has bought the thing or received it as a gift or an assignment of dos1. If therefore the good possession which belonged to another when joined to our possession exceed the possession of our opponent, we succeed upon this interdict. But no accession of time is allowed or can be allowed to a man who has no possession of his own: for to that which is a nullity nothing can be added. And further, if he have a tainted possession, i.e. one acquired by violence, clandestinity, or sufferance as against his opponent, no accession is allowed: for his own pos­sion does not count for him. 152. The year is reckoned backwards; therefore if you, for example, have been in possession for the first five months of the year, and I for the last seven, I shall be in the better position by the amount of the months of my possession2; nor will it be of service to you, as regards this interdict, that your possession was earlier

1 1. 178, Ulp vi.
2 Instead of the words "quantitatem . . . possessor est," Heftler read, "quaelibet vero plurum mensium possessiones causa tibi in hoc interdicto aequarabat anni possessionem;" i.e. a man is understood to have had possession for the major part of the year, who has had possession only for two months, provided the opponent's possession, which has continued for the residue of the year, be vitiosa, and so not to be reckoned; see D. 50. 16. 152, D. 43. 31. 1.
IV. 153. [Possessio per alium.]

quod prior tua eius anni possessio est. (153.) Possidere autem videmur non solum si ipsi possideamus, sed etiam si nostro nomine aliquid in possessionem sit, licet is nostro iuri subiectus non sit, qualsis est colonus et inquilinus. per eos quoque aput quos deposuerimus, aut quibus commodaverimus, aut quibus gratuitem habitationem constituerimus, ipsi possidere videmur.

et hoc est quod volgo dicitur, retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. quinetiam ple­rique putant animo suo retineri possessionem, quod nostro­rum praetoriorum sententia est. Diversae autem scholae auctori­bus contrarium placet, ut animo solo, quamvis voluerimus ad rem reverti, tamen retinere possessionem non videamus. apisci vero

in the year. 153. We are regarded as possessors not only when we possess personally, but also when any other is in possession in our name, even though he be not subject to our authority, as a tenant of land or of a house. We are also considered to possess by means of those with whom we have deposited or to whom we have lent anything, or to whom we have given a right of habitation gratuitously. And this is the meaning of the common saying “that possession can be retained by means of any one who is in possession in our name.” Moreover many lawyers think that possession can be retained by mere will, and this is the opinion of our authorities. The authorities of the other school uphold the opposite view, that even though we have the wish to return to the thing, yet we are not to be regarded as retaining possession by mere will. Now who those persons are by whom we

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1 But if we suppose the five to come last and the seven first, it is obvious that these interdicts, though styled retinendas possessiones, were really recuperandas possessiones, unless we hold that the possession disallowed is no possession at all, but a mere detention.

2 Est suum possessionem does not mean the same as possidere, the former expression denoting the mere fact of detention, the latter that the detention is protected by means of interdicts; hence a tenant is “in possession,” whereas his landlord “possesses.” See Savigny On Possession, translated by Perry, Bk. 1. § 7.

3 Savigny holds that possession is acquired by a conjunction of three elements, (1) the physical power of dealing with a thing and of preventing others doing so, (2) a knowledge that we have this power, (3) an intent to use it as owners of the thing and not for another’s benefit. If we hold the thing with the intent of giving the ownership to another, that other acquires through us a derivative possession and we have merely detention. The first two
Recuperandae possessionis causa solet interdictum dari, si quis vi deiectus sit. nam ei proponitur interdictum cuius principium est: UNDE TU ILLUM VI DEIECISTI. per quod is qui deiecit cogitur ei restituere rei possessionem, si modo is qui deiectus est nec vi nec clam nec precario possidet ab adversary: quod si aut vi aut clam aut precario possederit, impune acquire possession we have stated in our second Commentary: and there is no doubt that we cannot acquire possession by mere will.

154. An interdict for recovering possession is generally granted when a man has been forcibly ejected. For there is set forth for his benefit the interdict which commences with the words: "Unde tu illum vi deiecest." by means of which the ejector is compelled to restore the possession of the thing, provided only he who was ejected did not possess as against his adversary by violence, clandestinity, or sufferance: but if he did get the possession by violence, clandestinity,

1 Although we can retain possession by merely having the power of reproduction of the original factum, which Gaus call "by mere will," aumo solo; yet to acquire possession, the factum, as stated in the note above, must be of a much more marked character, viz. an actual power of dealing.

3 This is fully explained in Savigny's Treatise on Possession, Bk. IV. § 43; where the amount of violence necessary to found a claim for its benefit, and the effect of self-redress, are also entered into.

The interdict ran on "id illi restitutas," i.e. "Restore to him that from which you have ejected him."

4 It is a well-known principle that the possessor was not liable under the interdict, if his wrongful dealing had been directed against a person different from the applicant for the same.
IV. 155—159. Simple and double Interdicts.

deicitur. (155.) Interdum tamen etiam ei quem vi deiecerim, quamvis a me aut vi aut clam aut precario posseideret, cogor tei restituere possessionem, velut si armis vi eum deiecerim: nam Praetor [desunt 4 lin.].

156. Tertia divisio interdictorum in hoc est, quod aut simplicia sunt aut duplicia: (157.) simplicia velut in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria. nam actor est qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat. (158.) Prohibitoriorum autem interdictorum alia duplicia, alia simplicia sunt. (159.) Simplicia sunt veluti quibus prohibet Praetor in loco sacro aut in flumine publico ripave eius aliquid facere or sufferance, he is ejected with impunity. 155. Sometimes, however, I should be compelled to restore possession of the thing to a person whom I had ejected, even though he had got the possession as against me by violence, clandestinity, or sufferance, for instance, if I ejected him forcibly with arms, for the Praetor....

156. A third division of interdicts is based on the fact that they are simple or double. 157. Those are simple, for instance, where one party is plaintiff and the other defendant, of which kind are all restitutory or exhibitory interdicts. For the plaintiff is he who requires that the thing be produced or restored, and the defendant is he at whose hands the production or restoration is required. 158. But of prohibitory interdicts some are double, some are simple. 159. Those are simple, for instance, in which the Praetor prohibits the defendant from doing something in a sacred place, or in a public river, or on its bank: for here the plaintiff is he who

1 See Savigny’s Treatise on Possession, p. 331. The possessor who was ejected by any of the three modes named could immediately repossess himself, and his original possession was considered by the law never to have been disturbed. See Paulus, S. R. v. 6. 7.

2 See Savigny’s Treatise, p. 344. Cic pro Tullio, c 44, Cic. pro Cíc. c. 32; where is described the difference between us quotidiana (which was allowed against a vicious possessor) and us armata (which was always prohibited).

3 It is not improbable, as Heffter suggests, that Gaus in this lost part spoke of the interdict unde us hem; employed against the heirs of the wrong-doer. The word heredes does not appear in the lacuna, and the fact that the heirs were liable is stated in D. 43. 16. 1. 48, D. 43. 16. 3 pr., D. 43. 16. 3. 18.
reum: nam actor est qui desiderat ne quid fiat, reus is qui aliquid facere conatur. (160.) Duplicia sunt, velut uti possidetis interdictum et utrubi. ideo autem duplicia vocantur, quia par utriusque litigatori in his condicio est, nec quisquam praecipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet: quippe Praetor pari sermone cum utroque loquitur. nam summa conceptio eorum interdictorum haec est: uti nunc possidetis, quominus ita possideatis vam fieri veto. item alterius: utrubi hic homo de quo agitur, apud quem maiore parte huius anni fuit, quominus is eum ducat vam fieri veto.

161. Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus; et incipiamus a simplicibus. (162.) Si igitur restitutorium vel exhibitorium interdictum redditur, velut ut restituatur ei possessio qui vi deiectus est, aut desires that the thing be not done, and the defendant is he who attempts to do it. 160. The double are such interdicts as uti possidetis and utrubi: which are called “double” from the fact that the position of each litigant in respect of them is the same, and that neither is regarded as being specially defendant or plaintiff, but each sustains the character of defendant and plaintiff at once, inasmuch as the Praetor addresses both in like language: for the general drawing of these interdicts is as follows: “I forbid violence to be employed to prevent you from possessing in the manner you now possess.” So also in the case of the other interdict: “I forbid violence to be employed to prevent that man, whether of the two he be, with whom the slave who is the matter of action has been during the greater part of this year, from removing him.”

161. Having now explained the different kinds of interdicts, our next task is to consider their process and result: and let us begin with the simple interdicts. 162. If then a restitutory or exhibitory interdict be granted, for instance that possession shall be restored to one who has been forcibly ejected, or that a freedman shall be produced to whom his

1 Sc. by means of a special interdict, “de libero homine exhibendo,” which, like our writ of Habeas Corpus, was a process for bringing up the body of a freeman who was under detention. “The special object of the interdict,” says Ulpian, “was to defend liberty and to prevent free
patron wishes to appoint his services, the matter is brought to a result sometimes without risk, sometimes with risk. 163. For if the defendant have demanded an arbiter, he receives a formula of the kind called arbitraria; and then, if by the award of the judex he be bound to restore or produce something, he restores or produces it without any penalty, and so is freed from liability: but if he do not restore or produce it, he is condemned to pay its value. The plaintiff also who sues a man not under obligation to produce or restore anything, can do so without making himself liable to any penalty, unless proceedings for vexatious litigation be instituted against him. The authorities of the school opposed to us think, however, that a defendant who has demanded an arbiter is barred from instituting a suit for vexatious litigation, since by the very fact (of demanding an arbiter) he seems to have made admission that he ought to restore or produce something. But we very properly follow the other rule, for a man may demand an arbiter without being under any apprehension of losing his case. 164. He who wishes to demand an arbiter, ought to be careful to do so before going out of court, that is, before

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1 See IV. 141. n.
2 IV. 174, 175.
3 The argument resembles that in

As to the freedman's operae, see I. IV. 114.
he leaves the Praetor's presence; for if people make the demand at a later stage, it will not be granted. 165. Hence, if the defendant do not ask for an arbiter, but go out of court without speaking, the matter is carried on to its issue "with risk." For the plaintiff challenges his opponent with a sponson: "Unless he have failed to produce or restore in violation of the Praetor's edict:" and the latter again makes a restipulation in reply to his adversary's sponson. Then the plaintiff serves his opponent with a formula in claim of his sponson; and the defendant in his turn serves the other with a formula in claim of his restipulation. But the plaintiff tacks on to the formula in claim of the sponson another precept to the judex in reference to the restitution or production of the thing, so that if the plaintiff succeed in his sponson, and the thing be not produced or restored, [his opponent shall be condemned for the value of the thing].

1 Hollweg suggests the reading which we have translated within the brackets: it is obvious that the sentence must have ended in some such manner.

It will be observed that the proceedings are identical with those described in IV. 93, the sponson being in both cases prejudicial only and intended to lead up to a decision on the stipulation, pro praete litis et cussudcarum in the one case, de re restituenda vel exhibenda in the other, which stipulations were tacked on to the sponsions and really contained the gist of the case.

Hence in his Treatise on Possession (Book IV. § 36), Savigny says that unless the defendant on an interdict admitted the plaintiff's demand the process on the interdict became identical with that in an ordinary action.

See Cic. pro Casina, 8, pro Tull. § 53.
166. Postquam igitur Praetor interdictum reddidit, primum litigatorum alterutrius res ab eo fructum licitando rei tantisper in possessione constituitur, si modo adversario suo fructuaria stipulatione satisfat, cuivit potestas haec est, ut si contra ipsum esset postea pronuntiatum, fructus duplum praestet. nam inter adversarios qui Praetore auctore certant, dum contentio fructus licitationis est, scilicet quia possessorem interim esse interest, rei possessionem ei Praetor vendit, qui plus lucetur. postea alter alterum sponsione provocat: nisi adversus edictum praetoris possessionibus nobis vis facta esset. invicem ambo restipulan­tur adversus sponsionem vel [4 lineae]. — iudex apud quem

166. Now after the Praetor has granted an interdict, first of all the matter in dispute is put for the interim into the possession of one or other of the litigants according to the result of their bidding for the grant of the fruits by the Praetor, provided only the successful bidder gives security to his opponent by the "fructuary stipulation," the force and effect of which is, that if the decision subsequently go against him, he pays twice the value of the fruits. For since the litigants, who are bidding one against the other with the Praetor's sanction, are each of them anxious to prevail in this bidding for the fruits, because it is an advantage to be interim-possession, therefore the Praetor sells the possession of the subject to the one who makes the highest offer for it. After this one of them challenges the other with a sponsion running thus: "Unless violence have been done to us contrary to the Praetor's edict whilst we were in possession." Both in their turn restipulate against the sponsion......"...the

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The text here adopted is that of Huschke. Heffter's varies considerably from it verbally, but only slightly in sense: the chief difference being that, instead of fructus duplum praestet, Heffter suggests possessio restituitur, and inclines to translate ab eo in the earlier part of the passage "as against his opponent," not "from the Praetor." Krüger reads eam summiam adversario solvat, instead of fructus duplum praestet; for although the double value was recovered, it was not recovered on the fructuary stipulation. That stipulation caused the forfeiture of the simple value, and then by a separate action the fruits themselves or another simple value could be obtained. See IV. 167.

For tantisper in the sense of interim see D. 9. 3. 1. 9, D. 37. 10. 3. 13, and Gaius, 1. 188.

This paragraph is corrupt, and none of the conjectures made by the editors of the text seem happy enough to merit insertion.
Fructus Licitatio.

[IV. 167.

de ea re agitur illud scilicet requirit quod Praetor interdicto complexus est, id est uter eorum eum fundum easve aedes per id tempus quo interdictum redditur nec vi nec clam nec precario possideret. cum iudex id exploravent, et forte secundum me iudicatum sit, adversarum quidem et sponsionis et restitipationis summam quas cum eo feci condemnat, et convenienter me sponsionis et restitipationis quae mecum factae sunt absolvit, et hoc amplius si aput adversarium meum possessione act, quae fructus licitatione vicit, nisi restituat mihi possessionem, Cascelliano sive secutoro iudicio condemnatur. (167.) Ergo is qui fructus licitatione vicit, si non probat ad se pertinentem possessionem, sponsionis et restitipationis et fructus licitationis summam poenae nomine solvere et praeterea possessionem restituere iubetur: et hoc amplius fructus quos interea percepit reddit. summa enim fructus licitationis non pretium

judex before whom the suit on the subject is conducted proceeds of course to investigate the point which the Praetor dealt with in his interdict, viz. which of the parties was in possession of the land or house at the time when the interdict was granted, holding such possession without violence, clandestinely, or surreptitiously. When the jude, has investigated this point, and his decision has been, we will suppose, in my favour, he condemns my opponent to pay the amounts of the sponsion and restituation which I entered into with him, and consequently acquits me from the sponsion and restituation which he entered into with me. And besides this, if the (interim-) possession be with my opponent, because he beat me in the bidding for the fruits, he is condemned in a Cascellian or Secutory action, unless he restore the possession to me. 167. Therefore the successful bidder for the fruits, in case he do not prove that the possession belongs to him, is ordered to pay the amount of the sponsion and restituation and of his bid for the fruits by way of penalty, besides restoring the possession; and further than this, he restores the fruits which he has enjoyed in the meanwhile. For the amount of the bid for the fruits is not the price of the fruits, but is paid by way of

1 IV. 156.
2 Muhlenbruch gives a clear and concise summary of interdict procedure in his edition of Heineccius.

Antiqq. Rom. IV. 15. 6.

est fructuum, sed poenae nomine solvitur, quod quis alienam possessionem per hoc tempus retinere et facultatem fruendi nancisci conatus est. (168.) Ille autem qui fructus licitatione victus est, si non probavit ad se pertinere possessionem, tantum sponsonis et restipulationis summam poenae nomine debet. (169.) Admonendi tamen sumus liberum esse ei qui fructus licitatione victus erit, omissa fructuaria stipulatione, sicut Casscelliano sive secutorio iudicio de possessione reiperanda expemitur, ita separatim et de fructus licitatione agere: in quam rem proprium iudicium comparatum est, quod appellatur fructuarium, quo nomine actor iudicatum solvi satit accipiit. dicitur autem et hoc iudicium secutorium, quod sequitur sponsionis victoriam; sed non aequo Casscellianum vocatur. (170.) Sed quia nonnulli interdicto reddito cetera ex interdicto facere nolent; atque ob id non poterat res expediri, Praetor — — — — — comparavit interdicta [desunt 47 lineae].

penalty for a man’s attempting to retain during such (intermediate) time the possession and the power of enjoyment appertaining to another. 168. On the other hand, if he who has been beaten in the bidding for the fruits fail to prove that the possession belongs to him, he only owes by way of penalty the amount of the sponsion and restipulation. 169. We must, however, bear in mind that he who is beaten in the bidding for the fruits is at liberty, even though no fructuary stipulation have been made, to proceed separately for the amount offered for the fruits, just as he can proceed separately for the recovery of the possession by the Casscellian or Secutory action: and for this purpose a special form of proceeding has been provided, called judicium fructuarium, by means of which the plaintiff can obtain security for the payment of the award of the judex'. This action is called “secutory” as well as the other, because it follows upon success in the sponsion, but it has not also the title Casscellian. 170. But inasmuch as some persons, after the interdict had been issued, refused to conform their subsequent conduct to the terms of the interdict, and so matters could never be brought to a conclusion, therefore the Praetor...... provided (other) interdicts......

1 iv. 91.
171. Sed adversus res quidem infintantes ex quibusdam causis dupli actio constituitur, velut si iudicati aut depensi aut damni inuriae aut legatorum per damnationem rectorum nomine agitur: ex quibusdam causis sponsionem facere permititur, velut de pecunia certa credita et pecunia constituta: sed certae quidem credita pecuniae tertiae partis, constituta vero pecuniae partes dimidiae. (172.) Quodsi neque sponsionis, neque dupli actionis periculum ei cum quo agitur imungatur, aut ne statim quidem ab intio pluris quam simpli sit acto, permittit Praetor iusiurandum exigere non calumniae causa infintias ire: unde quia heredes vel qui heredum loco habentur,

171. In some cases an action for double the value of the matter in dispute is allowed against defendants who deny their liability, as in the instance of the actions of judgment\(^1\), of money laid down by a sponsor\(^2\), of wrongful damage\(^3\), or for legacies left by damnation\(^4\): in some cases it is allowable to enter into a sponsion, as for example, in suing upon the loan of an ascertained sum\(^5\), or for an agreed amount\(^6\); but in the case of an ascertained loan the sponsion is allowed for a third part\(^7\), in the case of an agreed amount it may be for a half. 172. But if the risk neither of a sponsion nor of an action for the double amount be cast upon the defendant, or if the action at starting be not for a larger amount than the simple sum demanded, the Praetor allows the exacting of an oath, "that the traverse is not pleaded vexatiously"\(^8\): hence, since heirs and those who are esteemed as heirs\(^9\) are

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1 IV. 9, 21, 25. 2 III. 177.
3 III. 210, 216.
4 IV. 201—208, 282.
5 III. 124.
6 Constitution was one of the \textit{Pacta Praetoria}, mentioned in App. (M). It was a pact whereby a man entered into a new and special engagement to pay a debt already existing, and such debt might be either owed by the man himself or owed by another person. Thus a constitution would render actionable a promise which previously was a \textit{mendum factum} not giving rise to an action, and the process provided for its recovery by the Praetor.
7 Cic. \textit{pro Rosc. Com.} 5.
8 Paulus, S. R. II. 1, D. 10. 2. 44.
9 From Cic. \textit{pro Rosc. Amer.} 20 we learn that in earlier times the penalty for falsely taking the oath \textit{de calumnia}, was branding on the forehead with the letter K (for Kalumnia); and Heineccius thinks this penalty was inflicted whether the perjury took place in a civil or criminal action. See Heinecc. \textit{Antiq.} IV. 16.
10 Sc. \textit{Bonorum possessores}; II. 119 et seq.
nunquam poenis obligati sunt, item feminis pupillisque remitti solet poena sponsionis, igitur modo eos iurare. (173.) statim autem ab initio pluris quam simpli actu est, velut furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli: nam ex his causis et alis quibusdam, sive quis neget sive fatur, pluris quam simpli est actio.

174. Actoris quoque calumnia coercetur modo calumniae iudicio, modo contrario, modo iure iurando, modo restitutione. (175.) Et quidem calumniae iudicium adversus omnes actiones locum habet. et est decimae partis causae; adversus interdicta autem quartae partis causae. (176.) Liberum est cum quo agitur aut calumniae iudicium opponere, aut iusiurandum exigere non calumniae causa agere. (177.) Contrarium autem iudicium ex certis causis constituitur:

never liable to penalties\(^1\), and since the penalty of the sponsion is generally remitted in the case of females and minors, the Praetor orders such persons merely to take the oath. 173. Examples of actions which from their very outset are for more than the simple value of the thing in dispute are the action of manifest theft for four-fold, of non-manifest theft for double, those of concept and oblate theft for three-fold\(^2\); for in these and some other cases the action is for more than the simple value, whether the defendant deny or admit the claim.

174. Vexatious conduct on the part of the plaintiff too is restrained; sometimes by the action of vexatious litigation, sometimes by a cross-action, sometimes by an oath\(^3\), sometimes by a restitulation. 175. The action of vexatious litigation is admitted in opposition to all actions whatever, and is for a tenth part of the matter in dispute; or when it is allowed against interdicts, for the fourth part. 176. It is in the defendant's power to elect whether he will reply with the action of vexatious litigation, or require the oath "that the action is not brought vexatiously." 177. The cross-action is applicable to certain special cases; for instance, to that of the action

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\(^1\) Another reading is "jure civilis, non amplius obligati sint;" the meaning of which is the same as that of "poenis nunquam obligati sunt."

\(^2\) Similar to that referred to in IV. 172.

\(^3\) Iii. 189—191.
of injury 1, and the proceedings taken against a woman when she is charged with having fraudulently transferred possession to another after having been put in possession ventris nomine 2: so also to the case of a person bringing his action on the ground that although he had received from the Praetor a grant of possession, his entry has been opposed by some one or other. When the cross-action is in reply to an action of injury it is granted for the tenth part (of the claim in that action), when it follows the two last-named it is for the fifth part. 178. The penalty involved in a cross-action is the more severe one, for in the action of vexatious litigation a man is never mulcted in the tenth unless he be aware that he is bringing his action improperly, and be taking proceedings for the mere purpose of annoying his opponent, expecting to succeed rather through the mistake or unfairness of the judex than through the merits of his cause: for vexatiousness like theft consists in intention 3. In a cross-action, on the other hand, the plaintiff, if he be unsuccessful in his suit, is always mulcted, even though he were induced by some idea or other to believe that he was bringing his action properly. 179. Undoubtedly in all cases where we can proceed by cross-action,

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1 III. 324.
2 This was when a woman on the death of her husband asserted that she was pregnant and claimed succession on behalf of the unborn child.
3 In such a case, as we see, interim-possession of the property was given to her. See D. 3. 2. 15—19. D. 25. 5, D. 25. 6, D 29. 2. 30. 1.
4 III. 197, 208.
ex quibus causis contrario iudicio agere potest, etiam calumniæ iudicium locum habet: sed alterutro tantum iudicio agere permittitur, qua ratione si iusiurandum de calumnia exactum fuerit, quemadmodum calumniæ iudicium non datur, ita et contrarium non dari debet. (180.) Restipulationis quoque poena ex certis causis fieri solet: et quemadmodum contrario iudicio omnimodo condemnatur actor, si causam non tuerit, nec requiritur an scierit non recte se agere, ita etiam restipulationis poena omnimodo damnatur actor. (181.) Sane si ab actore ex restipulationis poena petatur, ei neque calumniæ iudicium opponitur, neque iurisiusrandi religio inungitur: nam contrarium iudicium in his causis locum non habere palam est.

182. Quibusdam iudiciis damnati ignominiosi sunt, velut furti, vi bonorum raptorum, iniuriarum; item pro sociis, fiduciae,

the action of vexatious litigation can also be employed: but we are allowed to use only one of the two. According to this principle, if the oath against vexatiousness have been required, the cross-action cannot be allowed, inasmuch as the action of vexatious litigation is not (allowed). 180. The restipulatory penalty is also one applicable only to certain special cases: and just as in the cross-action the plaintiff is in all cases condemned to pay when he has failed in the original suit, and the question whether he did or did not know that he was suing improperly is never raised, so in the case of the restipulatory penalty is he condemned to pay in every instance. 181. Clearly, if a restipulatory penalty be claimed from the plaintiff, no action of vexatious litigation can be brought against him, nor can the obligation of an oath be laid upon him: for it is plain enough that there can in such cases be no cross-action.

182. In some actions those against whom a judgment is given are branded with infamy, for instance the actions of theft, robbery with violence, injury, also those in respect of partner-

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2 The plaintiff in the original action, i.e. the defendant in the cross-action.
3 The meaning of this paragraph is after all very simple. We are told in § 174 that the calumnia of the plaintiff can be met in four different ways, we are now informed that the defendant must select one of these remedies, and that he cannot employ first one and then another. The doctrine agrees with that in § 179.
Ignotia.

183. In summa sciendum est eum qui aliqueum in ius vocare vult et cum eo agere, et eum qui vocatus est naturali ratione ac lege sustam personam habere debeere. quare etiam sine permissu

ship, fiduciary engagement, guardianship, mandate, deposit. But not only those condemned for theft, robbery, or injury are branded with ignominy, but even those who have bought the plaintiff off, and thus it is laid down, and very properly too, in the edict of the Praetor: for there is a considerable difference between the position of a debtor upon a delict and one upon a contract, a point which the Praetor takes note of in the portion of the edict just alluded to. For he has drawn a line of demarcation between contracts and delicts. Where, however, a person is sued in another’s name, for instance, as his procurator, he is exempt from ignominy. The same rule applies to the case of a person sued as a fidejus sor, because he too is condemned to pay on behalf of another.

183. In conclusion, be it known that both he who wishes to summon another into court and sue him and who is so summoned ought upon principles of equity as well as law to have a status invested with full legal attributes. Hence,
Vadimonium.

Praetoris nec liberis cum parentibus constituetur actio, nec patrono et liberto, si non impetrabatur venia dicti, et in eum qui adversus ea egerit poena pecuniaria statutur. (184.) Quando autem in ius vocatus fuerit adversarius, si eo die finitum fuerit negotium, vadimonium ei faciendum est, id est ut promittat se certo die sisti. (185.) Siunt autem vadimonia quibusdam ex causis pura, id est sine satisfatione, quibusdam cum satisfatione, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est ut qui non steret, is protinus a recuperatoribus in sumnum vadimonii condemnetur: eaque singula diligentiter Praetoris edicto significantur. (186.) Et si quidem iudicati depensio agetur, tanti fiat vadimonium, quanti ea res erit; si vero ex ceteris causis, quanti actor iuraverit non calumniae causa postulare vadimonium promittit, nec tamen pluris quam partis.

therefore, without permission of the Praetor no action can be brought by children against their parents; nor between a patron and his freedman, unless special exemption be granted them from the rule of the edict; and should any one act in contravention of these regulations a pecuniary penalty\(^1\) is imposed on him. 184. When a defendant has been summoned to court, unless the business be concluded on the day of summons, he must enter into a vadimonium, that is, he must promise that he will appear on a day fixed. 185. In some cases the vadimonia are simple, that is, without sureties, in some they are with sureties, in some they are with an oath, in some with recuperatoribus introduced, which means that if a man fail to make appearance he will at once be condemned by the recuperatoribus for the amount of his vadimonium: and each of these matters is carefully explained in the Praetor's edict. 186. If then the action be upon a judgment or for money laid down by a sponsor\(^2\), the amount of vadimonium will be the value of the matter in dispute; but if it be on other grounds, the vadimonium will be such amount as the plaintiff shall fix after having sworn that he does not demand a promise of vadimonium to himself with any vexatious object; but its amount cannot be fixed higher than half the value of the subject of the suit, or than 100,000 sesterces. If then

\(^1\) The penalty was 5000 sesterces, IV. 46. Just. Inst. IV. 16. 3. See also D. 2. 4. 4.

\(^2\) III. 115.
dimidiae, nec pluribus quam sestertium c milibus fit vadimonium. itaque si centum milium res erit, nec iudicati depressive agetur, non plus quam sestertium quinquaginta milium fit vadimonium. (187.) Quas autem personas sine permissu Praetoris impune in ius vocare non possumus, easdem nec vadimonio invitas obligare nobis possumus, praeterquam si Praetor aditus permittit.

the subject be worth 100,000 sesterces, and the action be not one on judgment or for money laid down by a sponsor, the vadimonium cannot exceed 50,000 sesterces. 187. All persons whose appearance in court we cannot without risk compel except by the Praetor's permission¹, we are also unable to compel to furnish vadimonium to us against their will, save in cases where the Praetor is applied to and gives permission.

¹ IV. 183.
THE

RULES OF ULPIAN.

G. 23
THE
RULES OF ULPIAN.

1. *Perfecta lex est, quae utat aliquid fieri, et si factum sit, rescindit, quals est lex .... Imperfecta lex est, quae utat aliquid fieri, et si factum sit, nec rescindit, nec poenam iniungit ei, qui contra legem fecit, quals est lex Cincia, quae plus quam ... donari prohibet, exceptis personis quibusdam ut ut cognatis, et si plus donatum sit, non rescindit. 2. Minus quam perfecta lex est, quae utat aliquid fieri, et si factum sit, non rescindit, sed poenam iniungit ei, qui contra legem fecit; quals est lex Furia testamentaria, quae plus quam mille asse legati nomine mortuari causa prohibit capere praeter exceptas.

1. [A perfect law is one which forbids something to be done, and rescinds it if it be done, of which kind is the Lex.... An imperfect law is one which forbids something to be done, and yet if it be done neither rescinds it nor imposes a penalty on him who has acted contrary to the law: of which character is the Lex Cincia prohibiting donations beyond a specified amount, except those to certain persons, relations for instance; and yet not revoking a gift in excess. 2. A law short of perfect is one which forbids something to be done, and if it be done does not rescind it, but imposes a penalty on him who has acted contrary to the law: of which character is the Lex Furia Testamentaria, prohibiting all persons, save those specially exempted, from taking more than a thousand asse as a legacy or gift in

personas, et adversus eum, qui plus cepit, quadrupli poenam constituit.

3. Lex aut rogatur, id est furtur; aut abrogatur, id est prior lex tollitur; aut derogatur, id est pars prima legis tollitur; aut subrogatur, id est adicitur aliquid primae legi; aut obrogatur, id est mutatur aliquid ex prima lege. **

4. Mores sunt tacitus consensus populi, longa consuetudine inveteratus.

TIT. I. DE LIBERTIS.

5. Libertorum genera sunt tria, ciues Romani, Latini Iuniani, dediticiorum numero.

6. Ciues Romani sunt liberti, qui legitime manumissi sunt, id est aut vindicata aut censu aut testamento, nullo iure impediente.

7. Vindicta manumittuntur apud magistratum populi Romani.

prospect of death, and appointing a fourfold penalty against anyone who has taken a larger sum.

3. A law is either "rogated," that is to say introduced: or "abl"ogated," that is to say a former law is revoked: or "derogated," that is to say a part of a former law is revoked: or "subrogated," that is to say something is added to a former law: or "obrogated," that is some portion of a former law is altered.

4. Customs are the tacit consent of a people established by long-continued habit.

I. ON FREEDMEN.

5. There are three classes of freedmen, viz. Roman citizens, Junian Latins, and those in the category of dediticii.

6. Roman citizens are freedmen manumitted in the regular mode, that is to say by vindicta, censu or testamento, and in contravention of no regulation.

7. The manumission by vindicta takes place before a magis-

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1 See D. 50. 16. 102, and Festus on the several words, regare, abrogate, etc.
2 Gaius, I. 11.
3 See, the requirements as to age of master or of slave, I. 12, 13, Gaius, I. 17, 28; or the consent of the consilium, Gaius, I. 18; or the limitations of the Lex Furia Caninia, Gaius, I. 44, 45, etc.
Junian Latins.

manī, uelut consulem praetorem uel proconsulem. 8. Censu
manumitatebantur olim, qui lustrali censu Romae iussu domi-
norum inter ciues Romanos censum profitebantur. 9. Ut
testamento manumissi liberi sint, lex duodecim tabularum
facit, quae confirmat testamento datas libertates his verbis: ‘uti
legassit suae rei, sta ius esto.’

10. Latini sunt liberti, qui non legitime, uelut inter amicos,
nullo iure impediente manumissi sunt, quos olim praetor tantum
tuebat in forma libertatis; nam ipso iure servī manebant. hodie
autem ipso iure liberi sunt ex lege Iunia, a qua lege Latini
Iuniani nominati sunt inter amicos manumissi.

11. Dediticiorum numero sunt, qui poenae causa uincti
sunt a domino, quibusue stigmata inscripta fuerunt, quīe
propter noxam tortī nocentesque inuenti sunt, quīe traditi
sunt, ut ferro aut cum bestis depugnarent, uel ob eam rem
trate of the Roman people, as a Consul, a Praetor, or a Pro-
consul.

8. Manumission was effected by census in olden times when
slaves at the quinquentennial registration entered themselves on
the roll amongst the Roman citizens by order of their masters.
9. The liberty of those who have been manumitted by testa-
ment results from a law of the Twelve Tables which confirms
testamentary gifts of liberty in these words: “as one has dis-
posed of his own property, so let the right be.”

10. Latins are freedmen who have not been manumitted in
regular form, those for instance manumitted privately (inter
amicos), provided no regulation be contravened: and these in
olden times the Praetor merely used to protect in the semblance
of liberty; for in strict law they remained slaves. But at the
present day they are free by strict law on account of the lex
Iunia, by which lex those manumitted in the presence of our
friends were styled Junian Latins.

11. Those are in the category of dediticii who have been
put in chains by their masters as a punishment, or who have
been branded, or who have been tortured for a misdeed and
found guilty, or who have been delivered over to fight with the
sword or against wild beasts, or cast into a gladiatorial school

1 Tab. v. l. 3, Pomponius agrees with Ulpian in his interpretation of
These words. See D. 50. 16. 120.
2 Gaius, l. 71, III. 55.
in ludum uel custodiam coniecti fuerunt, deinde quoquo modo manumissi sunt. idque lex Aelia Sentia facit.

12. Eadem lege cautum est, ut minor triginta annorum seruus uindicata manumissus ciuus Romanus non fiat, nisi apud consilium causa probata fuerint. prondc sine consilio manumissum eius aetatis seruus manere putat; testamento uero manumissum perinde haberi iubet, atque si domini uoluntate in libertate esset, ideoque Latinus fit. 13. Eadem lex eum domnum, qui minor uiginti annorum est, prohibet seruum manumittere, praeterquam si causam apud consilium probauerit. 13a. In consilio autem adhibentur Romae quidem quinque senatores et quinque equites Romanoi; in provincius uero uiginti recipitores, ciues Romani.

14. Ab eo domino, qui soluendo non est, seruus testamento liber esse iussus et heres institutus, etsi minor sit triginta annis, uel in ea causa sit, ut deditus fieri debeat, cius Romanus et heres fit; si tamen alius ex eo testamento nemo or into a prison for the like cause, and have afterwards been manumitted by any form¹. And these rules the Lex Aelia Sentia establishes.

12. By the same lex it was provided that a slave under thirty years of age when manumitted by vindicta should not become a Roman citizen, unless cause for manumission had been proved before the council²; in fact it lays down that a slave of that age manumitted without application to the council remains a slave still: but when he is manumitted by testament it directs him to be regarded as though he were holding his freedom at his master’s will, and therefore he becomes a Latin.

13. The same lex prohibits a master under twenty years of age from manumitting a slave, unless he have proved cause before the council². 13a. The council consists at Rome of five senators and five Roman knights, but in the provinces of twenty recipitores, Roman citizens³. 14. A slave ordered to be free and instituted heir in a testament by an insolvent master, although he be under thirty years of age, or so circumstanced that he ought to become a dediteus, yet becomes a Roman citizen and heir: provided only no one else be heir under that

¹ Gaus. 1 13. ² ib. 1. 18 ³ ib. 1. 38. ⁴ ib. 1. 20.
heres sit. quod si duo pluresue liberi heredesque esse iussi sint, primo loco scriptus liber et heres fit: quod et ipsum lex Aelia Senta facit. 15. Eadem lex in fraudem creditorum uel patroni manumittere prohibet.

16. Qui tantum in bonis, non etiam ex iure Quiritium seruum habet, manumittendo Latinum facit. In bonis tantum alcuius seruus est uelut hoc modo, si cius Romanus a cuie Romano seruum emerit, isque traditus ei sit, neque tamen mancipatus ei, neque in iure cessus, neque ab ipso anno possessus sit. nam quamdiu horum quid non fit, is seruus in bonis quidem emptorius, ex iure Quiritium autem venditoris est.

17. Mulier, quae in tutela est, item pupillus et pupilla, nisi tutore auctore manumittere non possunt.

18. Communem seruum unus ex dominis manumittendo partem suam amittit, eaque adcrescit socii; maxime si eo modo manumiserit, quo, si proprium haberet, ciuem Romanum facturus esset. nam si inter amicos eum manumiserit, plerisque testamenti. But if two or more be ordered to become free and heirs, the one first-named becomes free and heir: and this too the Lex Aelia Sentia enacts. 15. The same lex forbids manumission in fraud of creditors or a patron.

16. He who holds a slave merely by Bonitary title and not also by Quiritary, makes him a Latin by manumission. A slave belongs to a man by Bonitary title only in such a case as the following: when a Roman citizen has bought a slave from another Roman citizen, and the slave has been delivered to him, but not transferred by mancipation or cession in court, nor possessed by him for a year. For so long as some one of these circumstances be wanting, that slave belongs to the purchaser by Bonitary title, but to the vendor by Quintary.

17. A woman under tutelage, and a pupil, male or female, cannot manumit, except with the tutor’s authorization.

18. If one of two joint-owners manumit a common slave, he loses his portion and it accrues to his partner; at any rate if he manumit him in a form whereby he would have made him a Roman citizen if he had had the sole property in him. For if he

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1 Gains, l. 21.
2 Ib. l. 37; 47.
3 Ib. l. 17, 35, II. 40.
4 Ib. l. 119, II. 24, 41.
5 For Tutela, see Tit. xi.
place, eum nihil egisse. 19. Seruus, in quo alterius est ususfructus, alterius proprietas, a proprietatis domino manumissus liber non fit, sed seruus sine domino est.

20. Post mortem heredis aut ante institutionem heredis testamento libertas dari non potest, excepto testamento militis. 21. Inter medias heredium institutiones libertas data utrisque adeuntibus non ualeat; solo autem priore adeunte iure antiquo ualeat. sed post legem Papiam Popiaeam, quae partem non adeuntis caducam facit, si quidem primus heres uel ius libertatis uel ius antiquum habeat, ualere eam posse placuit; quod si non habeat, non ualere constat, quod loco non adeuntis legatarii patres heredes sunt. sunt tamen, qui manumit him privately it is generally held that the act is void.

19. If the usufruct of a slave belong to one man and the ownership to another, and he be manumitted by him who has the ownership, he does not become free, but is a slave without a master.

20. A gift of liberty cannot be bestowed in any testament, except that of a soldier, to take effect after the death of the heir, nor (can it be inserted) before the institution of the heir. A gift of liberty inserted between the appointments of two heirs is void, if both take up the inheritance: but if the one first-named alone take it up, the gift is valid according to the ancient law. But since the passing of the Lex Papia Popiaeae, which makes to lapse the portion of one who does not take up the inheritance, it has been ruled that the gift stands good in case the heir first-named has either the right derived from children or the ancient right: but when he has neither of these rights, it is decided that the gift does not stand good, because the legatees who have children become heirs in the place of the heir who fails to accept: but there are persons who maintain

1 "But only so long as the usufruct lasts; after that he becomes a Laus." Mommsen.
2 Gaius, II. 230, 233.
3 We see from Tit. XVIII. that ascendants and descendants of the testator to the third degree were exempted from the provisions of the Lex Papia Popiaeae. These therefore are the persons referred to as having the ius antiquum.
4 These legatees are by hypothesis named in the testament subsequently to the gift of freedom, for that gift is inter medias institutiones. Hence, when they become heirs in the place of the first-named heir, all the heirs are posterior to the legacy of freedom; which is therefore void: for it can only subsist as a charge.
et hoc casu valere eam posse dicunt. 22. Qui testamento liber esse iussus est, mox, quam uel unus ex hereditibus adierit hereditatem, liber fit. 23. Justa libertas testamento potest dari his seruis, qui et testamenti faciendi et mortis tempore ex iure Quiritium testatoris fuerunt.

24. Lex Furia Caninia iubet, testamento ex tribus seruis non plures quam duos manumitti; a quattuor usque ad decem dimidiam partem manumittere concedit; a decem usque ad triginta tertiam partem, ut tamen adhuc quinque manumittere liceat, aeque ut ex priori numero; a triginta usque ad centum quartam partem, aeque ut decem ex superiori numero liberari possint; a centum usque ad quingentos partem quintam, simi-

that it stands good in this case too. 22. A slave who is ordered in a testament to become free, becomes free the instant that even one of the heirs takes up the inheritance. 23. Full freedom can be given by testament to those slaves who belonged to the testator in Quiritary right both at the time of his making the testament and at his death.

24. The Lex Furia Caninia directs that not more than two slaves out of three shall be manumitted by testament; allows a half to be manumitted out of a number between four and ten; a third out of any number between ten and thirty, but still allowing five at least to be manumitted, just as they would have been out of the antecedent number; a fourth of any number from thirty up to a hundred, but, as before, permitting ten to be manumitted on the reckoning of the antecedent number; a fifth of any number from one hundred to five hundred, but

upon an antecedent heir, as stated in l. 10 and in Gaius, ii. 219, 230.

Cujacius reads "ea lege aeranum partis haeres fiat" instead of "lega-
tari patres heredes sunt," and this reading agrees with what is stated in xvii. 2, "hodieomnia caduca fisio vindicatur." Cujacius probably gives correctly the passage as altered by the abbreviation of Ulpian, whilst Huschke endeavours to go back to the original words of Ulpian himself; but in either case the words which follow in the text "sunt ta-
men etc." refer to the rule enunciated in xvii. 3, "caduca cum oneru suo funt"

1 In this case the gift of liberty is supposed to be after the institution of all the heirs, or at any rate after that of the one who accepts the in-
heritance. For Ulpian says else-
where: "Testamento liber esse jus-
sus tum fit liber, quam adita fuerit hereditas qualibet ex parte, si modo ab eo gradu, quo liber esse jussus est, adita fuerit, et pure quis manumissus sit." D. 40. 4. 25.

2 Sc. civitas Romana, Gaius, ii. 267.
liter ut ex antecedenti numero uiginti quinque possint fieri liberi. et denique praecipit, ne plures ommino quam centum ex ciusquom testamento liberi fiant. 25. Eadem lex cauet, ut libertates seruis testamento nominatim dentur.

TIT. II. DE STATV LIBERO (VEL STATV LIBERIS).

I. Qui sub conditione testamento liber esse iussus est, statu liber appellatur. 2. quae quondam pendet conditio, seruus heredis, cum existit, statum liber est. 3. Statu liber seu alienetur ab herede, seu usus captatur ab alioqu, libertatis conditionem secum trahit. 4. Sub hac conditione liber esse iussus: si decem milia heredi dedet, etsi ab herede abalienatus sit, emptori dando pecuniam ad libertatem perueniet; idque lex duodecem tabularum utebet. 5. Si per heredem factum sit, quominus statu liber conditioni pareat, proinde fit liber, atque

still enabling twenty-five to be liberated on the reckoning of the antecedent number; and finally it directs that not more than a hundred in all shall be set free by virtue of any man's testament. 1

25. The same lex provides that gifts of freedom shall be conferred on slaves by name in a testament. 2

II. ON Statuliberi.

I. The name Statuliber is applied to a slave ordered in a testament to become free under some condition. 2. Because the statuliber, so long as the condition is pendent, is a slave of the heir; when it is fulfilled, is at once free. 3. The statuliber, whether alienated by the heir, or acquired by anyone through usucapion, carries with him the condition of his freedom.

4. If ordered to be free under the condition: “If he give 10,000 sesterces to the heir,” he will attain to freedom, even though he have been alienated by the heir, by giving the money to his purchaser; and this a law of the Twelve Tables provides. 5. If anything be done by the heir to prevent the statuliber complying with the condition, he becomes free just as though

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1 Gaius, I. 47, 43, 45.  
2 Ib. II. 230.  
3 Ib. II. 200.  
4 Ib. II. 42.  
5 Supposed to be the lost law,

Tab. VII. I. 12.
si condicio expleta fuisset. 6. Set et extraneo pecuniam dare iussus et liber esse si paratus sit dare, et is, cui iussus est dare, aut nolit accipere, aut antequam acciperit monatur, proinde fit liber ac si pecuniam dedisset.

7. Libertas et directo potest dari hoc modo LIBER ESTO, LIBER SIT, LIBERV M ESSE IVBEO, et per fideicommissum, ut puta ROGO, FIDEI COMMITTO HEREDIS MEI, VT STICHVM SERVVM MANVMITTAT. 8. Is, qui directo liber esse iussus est, testatoris uel orcinus fit libertus; is autem, cui per fideicommissum data est libertas, non testatoris, sed manumissionis fit libertus. 9. Cuius fidei committit potest ad rem aliquam praestandam, eusdem etiam libertas fidei committit potest. 10. Per fideicommissum libertas dari potest tam proprio seruo testatoris, quam heredis aut legatisu, uel cuuuslibet extranei seruo. 11. Alieno seruo per fideicommissum data libertate si dominus eum iusto pretio non uendat, extinguatur libertas, quoniam nec pretii computatio pro libertate fieri potest. 12. Li-

the condition had been fulfilled. 6. Also if he be ordered to give money to some stranger and so become free, and be prepared to give it, but he to whom he was ordered to give it refuse to accept or die before accepting, he becomes free just as though he had given it.

7. Liberty can either be given directly, in such phrase as "Be thou free," "Let him be free," "I order him to be free," or by fideicommissum, for instance in the words, "I request, I entrust to my heir's good faith that he manumit my slave Stichus." 8. One ordered in express terms to be freed becomes a freedman of the testator or libertus orcinus. but one whose liberty is given him by fideicommissum becomes the freedman of the manumittor and not of the testator. 9. Any man who can be charged by fideicommissum to perform anything, can also be charged by fideicommissum to confer freedom. 10. Liberty can be given by fideicommissum either to the testator's own slave, to the slave of an heir or legatee, or to the slave of any stranger. 11. If liberty be given to a stranger's slave by fideicommissum and the owner will not sell him for a fair price, the liberty is extinguished, because no calculation of price in lieu of liberty is possible. 12. As

1 These paragraphs, 7—11, are repeated almost verbatim in Gaius, II. 263—267, 272.
bertas sicut dari, ita et adimi tam statim testamento quam
codicilis testamento confirmatis potest; ut tamen eodem modo
adimatur, quo et data est.

TIT. III. DE LATINIS.

1. Latini ius Quiritium consequuntur his modis: beneficio
principali, liberis, iteratione, militia, naue, aedificio, pistrino;
praeterea ex senatusconsulto mulier, quae sit ter enixa. 2. Beneficio principali Latinus ciuitatem Romanam accipit, si ab
imperatore ius Quiritium impetrauerit. 3. Libris ius Quiri-
titum consequitur Latinus, qui minor triginta annorum manu-
missione tempore fuit: nam lege Iunia cautum est, ut si ciueIIJ
Romanam uel Latinam uxorem duxerit, testatione interposita,
quod hberorum quaerendorum causa uxorem duXtrit, postea
filio filiaue nato natae et anniculo facto, possit apud pra-
torem uel praesidem provinciae causam probare et fieri ciuis

III. ON LATIN.

1. Latins obtain Roman citizenship in the following ways1:
by grant of the emperor, by children, by iteration, by military
service, by a ship, by a building2, by the trade of baking3; and
besides, in virtue of a senatus-consultum, a woman obtains it by
bearing three children. 2. A Latin obtains Roman citizenship
by grant of the emperor, if he acquires the right through direct
request to him4. 3. A Latin obtains Roman citizenship by
children, if at the time of his manumission he was under the
age of thirty years: for it was provided by the Lex Junia that
if a Latin take to wife a Roman citizen or a Latin, making
attestation that he marries her for the purpose of obtaining
children, he can, after the birth of a son or daughter and their
attainment of the age of one year, prove his case before the
Praetor or the governor of a province and become a Roman

1 Gaius, I. 38.
2 See note on Gaius, I. 34.
3 Bakers had other privileges; for instance they were allowed to decline
   a tutorship, see D. 37. 1. 46.
4 Gaius, III. 72, 73.
Romanus, tam ipse quam filius filiae eus et uxor; scilicet si et ipsa Latina sit; nam si uxor ciuis Romana sit, partus quoque ciuis Romanus est ex senatusconsulto, quod auctore diuo Hadriano factum est. 4. Iteratione fit ciuis Romanus, qui post Latinitatem, quam acceperat maior triginta annorum, iterum iuste manumissus est ab eo, cuius ex iure Quiritium seruus fuit. sed huic concessum est ex senatusconsulto, etiam liberis ius Quiritium consequi. 5. Militia ius Quiritium accipit Latinus, si inter uigilés Romae sex annis militauerit, ex lege Visellia. at postea ex senatusconsulto concessum est ei, ut, si triennio inter uigiles militauerit, ius Quiritium consequatur. 6. Nau Latins ciuitatem accipit, si non minorem quam decem milium modiorum nauem fabriqueit, et Romam sex annis frumentum portauerit, ex edicto diui Claudii. ***

citizen, both himself and his son or daughter, and his wife; that is to say if she too be a Latin; for if the wife be a Roman citizen, her offspring also is a Roman citizen by virtue of a senatus-consultum passed at the instance of the late emperor Hadrian 1. 4. A Latin becomes a Roman citizen by iteration 2, if after the gift of Latinity has been conferred on him when over thirty years of age, he be a second time manumitted in due form by the person whose slave he was in Quiritary right. But by virtue of a senatus-consultum 3 it is allowed such an one to acquire Roman citizenship by children also.

5. A Latin receives Roman citizenship by military service in virtue of the Lex Visellia 4, if he have served six years in the Roman guards: but afterwards by a senatus-consultum it was allowed him to obtain Roman citizenship by serving three years in the guards. 6. A Latin receives Roman citizenship, in virtue of an edict of the late emperor Claudius, by a ship, if he have built one of the burden of not less than 10,000 modii and imported corn in it to Rome for six years ...

1 Gaius, i. 29, 30. 2 i. 1. 35. 3 Sc. that of Pegasus and Pusio mentioned by Gaius, i. 51. 4 Introduced by L. Visellius Varto in the time of Claudius.
Patria Potestas. [IV. 1—V. 4.]

TIT. IV. DE HIS QVI SVI IVRIS SVNT.

1. Sui iuris sunt familiarum suarum principes, id est pater familiae, itemque mater familiae.

2. Qui matre quidem certa, patre autem incerto nati sunt, spuri adpellantur.

TIT. V. DE HIS QVI IN POTESTATE SVNT.

1. In potestate sunt liberi parentum ex iusto matrimonio nati.

2. Iustum matrimonium est, si inter eos, qui nuptias contrahunt, conubium sit, et tam masculus pubes quam femina uiri potens sit, et utrique consentiant, si sui iuris sint, aut etiam parentes eorum, si in potestate sint. 3. Conubium est uxoris iure ducendae facultas. 4. Conubium habent ciues

IV. ON THOSE WHO ARE SUI JURIS.

1. Those who are heads of their own families are sui juris, that is the father of a family, and the mother of a family. 2. Those sprung from a known mother, but an unknown father, are called spurius.

V. ON THOSE WHO ARE UNDER POTESTAS.

1. Children born from a lawful marriage are under the potestas of their parents.

2. It is a lawful marriage, if there be conubium between those who contract the marriage, if the man be of the age of puberty as well as the woman of the age of child-bearing, and if they both consent, supposing them to be sui juris, or if their parents also consent, supposing them to be under potestas. 3. Conubium is the right of marrying a wife. 4. Roman citizens have conubium

1 Cicero (T. 4) states that a wife was mater familias only when under manus: "Genus est uxor, ejus duae formae, una matrum-familias, quae in manum convenerunt, aliaea earum quae tantummodo uxor res habentur." Aulus Gellius (18. 6) says the same. But during her husband's life-time a wife in manu was certainly not princeps familiae, for she was regarded as a daughter of her husband; she would therefore become princeps familiae only on the death of the husband, and her familia would consist of herself only, for "mulier familiae suae et caput et finis est." D. 50. 16. 195. 5.

2 Gaus, t. 64.
Romani cum ciuibus Romanis; cum Latinis autem et peregrinis ita si concessum sit. 5. Cum seruis nullum est conubium. 6. Inter parentes et liberos infinite, cuiuscumque gradus sint, conubium non est. inter cognatos autem ex transuerno gradu olim quidem usque ad quartum gradum matrimonia contrahi non poterant: nunc autem etiam ex terto gradu licet uxorrem ducere; sed tantum fratris filiam, non etiam sororis filiam, aut amitam uel materteram, quamuis eodem gradu sit. eam denique, quae nouerca uel priuigna uel nurus uel scorsus nostra fuit, uxorrem ducere non possumus. 7. Si quis eam, quam non licet, uxorrem duxent, incestum matrimoniunm contrahit. ideoque liberi in potestate eius non sunt, sed quasi uulgo concepti spurii sunt.

8. Conubio interueniente liberi semper patrem sequuntur: non interueniente conubio matris conditioni accedunt, excepto eo, qui ex peregrino et ciue Romana nascitur; nam si peregrinus nascitur, quoniam lex Mensia ex alterutro peregrino

with Roman citizens; but with Latins and foreigners only when there has been a special grant to that effect. 5. With slaves there is no conubium. 6. Between ascendants and descendants in any degree without limitation there is no conubium. Formerly also marriages could not be contracted between those collaterally related within the fourth degree: but now it is allowable to take a wife even of the third degree; but only a brother's daughter, and not also a sister's daughter or the sister of a father or a mother, although they are in the same degree. Lastly we cannot marry one who has been our step-mother or step-daughter, daughter-in-law, or mother-in-law. 7. If any man marry a woman whom he is prohibited to marry, he contracts an incestuous marriage, and therefore his children do not come under his potestas, but are spurious, like those born out of wedlock.

8. If there be conubium between the parents, the children always follow the father: if there be not conubium they follow the condition of the mother: excepting anyone born from a foreigner and a Roman woman, for he is a foreigner from his birth, inasmuch as the Lex Mensia orders that a child sprung from a foreigner on either side shall follow the condition of his

1 Gaus, 1 57  
2 Ib. 1, 55—64.  
3 IV. 2.
natum deterioris parentis conditionem sequi iubet. 9. Ex ciue Romano et Latina Latinus nascitur, et ex libero et ancilla seruus; quoniam, cum his casibus conubia non sint, partus sequitur matrem. 10. In his, qui iure contracto matrimonio nascuntur, conceptionis tempus spectatur: in his autem, qui non legitime concipiantur, editionis; ueluti si ancilla conceperit, deinde manumissa pariat, liberum parit; nam quoniam non legitime concepit, cum editionis tempore libera sit, partus quoque liber est.

TIT. VI. DE DOTIBVS.

1. Dos aut datur, aut dicitur, aut promittitur. 2. Dotem dicere potest mulier, quae nuptura est, et debitor mulieris, si iussu eius dicat; item parent mulieris uirilis sexus, per uirilem sexum cognatione iunctus, uelut pater, auis paternus. dare, promittere dotem omnes possunt.

inferior parent. 9. The offspring of a Roman citizen and a Latin woman is a Latin from his birth, and that of a free man and a slave woman is a slave; for there being no conubium in these cases, the offspring follows the mother. 10. The time of conception is regarded in the case of those who are born from a lawful marriage; that of birth in the case of those conceived illegitimately: for instance, if a female slave have conceived, and then after manumission bear her child, the child she bears is free: for as she did not conceive legitimately and is herself free at the time of birth, her offspring is free also.

VI. ON MARRIAGE-PORTIONS.

1. A marriage-portion is either given, declared or promised. 2. A woman about to marry can declare a marriage-portion, and so can the debtor of a woman, provided he does so at her order: and so can a male ascendant of a woman related to her through a line of males, as a father or a paternal grandfather. Any person can give or promise a marriage-portion.

1 Gaius, 1. 89—92. 2 Dotus dictus is an assignment made by the wife, her ascendant or her debtor, and not put into stipulatory form, as is more fully explained by the following extract from the
3. A marriage-portion is said to be either "profectitious," *i.e.* one which the father of the woman has given: or "adventitious," *i.e.* one which has been given by somebody else.

4. If the woman die during the continuance of the marriage a marriage-portion which proceeded from the father returns to the father, a fifth being retained in the husband's control for each child as far as the marriage-portion will go. But if the father be no longer alive, it remains with the husband. 5. An adventitious portion, on the contrary, always remains in the husband's hands, unless the donor made a stipulation that it should be returned to him; and such a marriage-portion has the specific name of "receptitious."

6. When a divorce takes place, the woman herself has the action for the wife's property, *i.e.* the suit for recovery of the marriage-portion, if she be *sui iuris*; but if she be under the
Retentions out of Marriage-portions. [VI. 7—10.]

testate patris sit, pater adiuncta filiae persona habet actionem; nec interest, adventicia sit dos, an profecticia. 7. Post diuortium defuncta muliere heredi eius actio non aliter datur, quam si moram in dote mulieri reddenda maritus fecerit.

8. Dos si pondere, numero, mensura contineatur, annua, bima, trima die redditur; nisi si ut praesens reddatur, conuenit. reliqua dotes statim redduntur.

9. Retentiones ex dote sunt aut propter liberos, aut propter mores, aut propter inspras, aut propter res donatas, aut propter res amotas.

10. Propter liberos retentio fit, si culpa mulieris aut patris, cuius in potestate est, diuortium factum sit; tunc enim singulorum liberorum nomine sextae retinentur ex dote; non plures

potestas of her father, he has the action in the joint name of his daughter and himself: and whether the marriage-portion be adventitious or profectitious makes no matter. 7. If the woman die after a divorce has taken place, an action does not lie for her heir, unless the husband made delay in restoring the marriage-portion to his wife.

8. If the marriage-portion consist of things weighed, numbered or measured, it is restored by instalments at the end of one, two and three years respectively: unless there have been an agreement for its immediate restoration. Other marriage-portions are restored at once.

9. Retentions out of a marriage-portion are made either on account of children, or on account of immorality, or on account of expenses, or on account of donations, or on account of abstractions.

10. Retention is made on account of children, if the divorce take place through the fault of the woman or of her father under whose potestas she is: for in such case a sixth is retained out of the marriage-portion on account of each child: but not a greater number of sixths than three. 11. A

1 The dos was usually paid over to the husband by the father in three instalments,—sometimes in more by special agreement,—therefore when returned would naturally be paid back in the same way. See D. 23. 4. 19; Cic. Epp. ad Fam. 6. 18. The prima pensio in a return of dos is mentioned in Epp. ad Att. XI. 4, the secunda in Epp. ad Att. XI. 25, the tertia in Epp. ad Att. XI. 23.
VI. II—13.] Retentions for immorality.

Retentions for immorality, si matrimonium repetitum sit, dos, quae semel functa est, amplus fungi non potest, nisi alud matrimonium sit.

12. Morum nomine, graviorem quidem sextae retinentur; leuiorum autem octaua. Mores sunt adulteria tantum; leuiores omnes reliqui. 13. Mariti mores punitur in ea quidem dote, quae annua die reddi debet, ita ut propter marriage-portion which has once undergone the retention of sixths, cannot undergo it again, if the marriage be renewed, unless the marriage be varied.

12. Retention is made for immorality;—a sixth for each immorality of a grosser kind, an eighth for immorality of a lighter kind. Adulteries alone constitute the grosser immorality, all others are the lighter. 13. In the case of marriage-portion which ought to be returned by annual instalments, the immorality of a husband is punished by making

1 Huschke’s reading of this passage differs widely from that of former editors, and although it admits of a satisfactory interpretation, yet the language is so involved that we can scarcely believe that we have before us Ulpian’s words. The sense, however, as his text stands, is that “if a divorce take place and the husband repay the portion with deductions (not amounting to the maximum of three sixths), and then a renewal of the marriage between the same parties be followed by a second divorce; on this second divorce he must restore to the wife the whole of the balance of her original portion which she brought back to him at the second marriage, unless the birth of further children or other cause may have changed the conditions of the marriage (made it alud matrimonium) and given the husband claims additional to those he had at the time of the first divorce. If at the time of that first divorce he was entitled to the maximum, he obviously could not receive any addition whatever from the second divorce.

The reading more generally adopted is “Sextae in retentione sunt non in petttione. Dos, quae semel functa est, amplius fungi non potest, nisi alud matrimonium sit,” of which the former part states that although the husband may claim a deduction of the sixths when restoring the marriage-portion, he cannot bring a suit for their recovery after paying back the portion in full; and the words which follow enunciate, though with less distinctness, the doctrine of Huschke just given; or may mean that as between the same parties there can be no new retention if they contract a second marriage and subsequently separate, but that if a woman be married to two husbands in succession and be twice divorced, each husband can claim his sixths in respect of the children born to him.

2 Huschke defends the reading sextae retinentur, instead of sexta retinentur as adopted by Bocking, for he says that a woman may commit several adulteries and be fined one-sixth of her portion for each; but that there is no accumulation of penalties in the case of lesser immorality.

3 Bocking and Huschke both say
maiores mores praesentem dotem reddat, propter minores senum mensium die. in ea autem, quae praesens reddi solet, tantum ex fructibus iubetur reddere, quantum in illa dote, quae triennio redditur, repraesentatio facit.

14. *Impensarum species sunt tres:* aut enim necessariae dicuntur, aut utiles, aut voluptuosae. 15. *Necessariae sunt impensae:* quibus non factis dors deterior futura est, uelut si quis ruinosas aedes refecerit. 16. *Vtiles sunt,* quibus non factis quidem deterior dors non fuerit, factis autem fructuosior effecta est, ueluti si *uir* uneta et oiueta fecerit. 17. *Voluptuosae sunt,* quibus neque omissis deterior dors fuerit, neque factis fructuosior effecta est; quod euenit in uiridianis et picturis similibusque rebus.

him restore it at once for grosser immorality, and by instalments at intervals of six months for lighter immorality: whilst in the case of that which is usually restored at once, he is ordered to restore so much out of profits as the payment in advance would amount to in the case of a marriage-portion returnable by three yearly payments.

14. Of expenses there are three kinds: for they are styled either necessary, or profitable, or ornamental. 15. Expenses are “necessary” where the marriage-portion would be deteriorated by their not being incurred; as, for instance, if any one repair a falling house.

16. “Profitable” expenses are such, that if they were not incurred the marriage-portion would not be deteriorated, but by their being incurred it is made more productive; as, for instance, if a man plant vineyards or oliveyards. 17. “Ornamental” expenses are such, that if they were forborne the marriage-portion would suffer no deterioration, and by their being incurred it is not made more productive; which is the case with lawns and pictures and such like.

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that *annua die* is not to be interpreted “at the end of a year,” but “by annual instalments,” *i.e.* in three portions “*annua, brima, trima die.*”

1 A calculation is made of the amount he would have lost by having to pay at once a marriage-portion properly returnable in three instalments—then to the marriage-portion, which he pays back at once according to agreement, a further sum is added equal to that loss.
TIT. VII. DE IURE DONATIONUM INTER VIRVM ET VXOREM.

1. Inter uirum et uxorem donatio non valet, nisi certis ex causis, id est mortis causa, diuortii causa, serui manumittendi gratia. Hoc amplius principalibus constitutionibus concessum est mulieri in hoc donare uiro suo, ut is ab imperatore lato clavo uel equo publico similiue honore honoretur.

2. Si marito uxor diuortii causa res amouerit, rerum quoque amotorum actione tenebitur.

3. Si maritus pro muliere se obligauerit uel in rem eius inpendent, diuortio facto eo nomine cauere sibi solet stipulatione tribunicia.

4. In potestate parentum sunt etiam hi liberi, quorum causa probata est, per errorem contracto matrimonio inter disparis conditionis personas: nam senatusconsulto sue ciuis

VII. ON THE LAW OF GIFTS BETWEEN HUSBAND AND WIFE.

1. A gift between husband and wife does not stand good except in certain cases, that is, in prospect of death, in prospect of divorce, and to procure the manumission of a slave. Besides a woman is allowed by imperial constitutions to make a gift to her husband to the end that he may receive from the emperor the distinction of senatorial or equestrian rank, or some honour of the same nature.

2. If the wife in prospect of a divorce abstract property from her husband, she will further be liable in the action "for things abstracted."

3. When a husband has bound himself for his wife or spent money upon her property, on the occurrence of a divorce it is usual for him to assure himself on that account by a tribunician stipulation.

4. Those children too are under the potestas of their parents whose case has been proved, after a marriage has been contracted under a misapprehension between persons of unequal condition. For by a senatus-consultum if a Roman citizen have

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1 The constitution of Antonine is one of those referred to. See D. 24.
2 "That is, the plebeian tribunes, when application is made to them by husbands called upon to restore a marriage-portion, will interfere on their behalf unless they are secured by their wives entering into this stipulation." Huschke.
3 Gazus, 1. 65—75. The subject of potestas is now resumed from v. 1, the
Romanus Latinam aut peregrinam uel eam, quae dediticiorum numero est, quasi eum Romanam per ignorantiam uxorem duxorit, siue cuius Romana per errorem peregrino uel ei qui dediticiorum numero est, aut quasi cius Romano aut etiam quasi Latino ex lege Aelia Sentia nupta fuerit, liberorum nomine, qui ex eo matrimonio procreati fuerint, causa probata, ciuitas Romana datur tam liberis quam parentibus, praeter eos, qui dediticiorum numero sunt; et ex eo fiunt in potestate parentum liberi.

TIT. VIII. DE ADOPTIONIBVS.

I. Non tantum naturales liberi in potestate parentum sunt, sed etiam adoptiui. 2. Adoptio fit aut per populum, aut per praetorem uel praesidem prouinziei. Ila adoptio, quae per populum fit, specialiter arrogatione dicitur. 3. Per populum qui sui iuris sunt arrogantur; per praetorem autem filii-

in ignorance married a Latin or foreign woman or a woman in the category of dediticus, taking her for a Roman citizen, or if a Roman woman have been married by mistake to a foreigner or one in the category of dediticus, either thinking him a Roman citizen or even thinking him a Latin and intending to take advantage of the Lex Aelia Sentia; on proof of the case on behalf of the children born from that marriage, Roman citizenship is given both to the children and the parents, unless the latter be in the category of dediticus: and thereby the children come under the potestas of their parents.


I. Not only are actual children under the potestas of their ascendants, but adopted children also. 2. Adoption takes place either by authority of the populus, or by that of the Praetor or the governor of a province. That adoption which takes place by authority of the populus has the special name of arrogation. 3. By authority of the populus those sui juris are arrogated: by authority of the Praetor those under potestas are

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law as to marriages and marriage-portions forming a parenthesis extending from v. i to vii. 3 inclusive.

1 III. 3.

2 Gaius, I. 97—103.
Arrogation.

4. Arrogatio Romae duntaxat fit; adoptio autem etiam in provinciis apud praesides. 5. Per praetorem uel praesidem provinciae adoptari tam masculi quam feminae, et tam puberes quam inpuberes possunt per populum uero Romanum feminae ne nunc quidem arrogantur; pupilli autem, qui alim iuventutem non poterant arrogari, nunc causa cognita possunt ex constitutione duui Antonini Pi. 6. Qui generare non potest, utelut spado, utroque modo potest adoptare; idem iuris est in persona caelebris.

7. Item is, qui filium non habet, in locum nepotis adoptare potest. 7a. Feminae uero neutro modo possunt arrogari, quoniam nec naturales liberos in potestate habent. 8. Si patr familiae arrogandum se dederit, liberi quoque eius quasi nepotes in potestate fiunt arrogatoris.

Tit. IX. De His qui in manu sunt.

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1. Farreo conuenit uxor in manum certis uerbis et given in adoption by their ascendants. 4. Arrogation takes place at Rome only, but adoption in the provinces too in the presence of the governors thereof. 5. By authority of the Praetor or the governor of a province both males and females, those under puberty and those over puberty, can be adopted. Women are not arrogated even at the present day by authority of the Roman populus; but pupils, who also in former times could not be arrogated, now can after investigation of their case, by virtue of a constitution of the late emperor Antoninus Pius. 6. One who cannot procreate, as an eunuch-born, can adopt by either method. The same rule applies also to an unmarried person. 7. Likewise he who has no son, can adopt a person to stand to him as grandson. 7a. But women cannot adopt by either method, because they have not even their actual children under their potestas. 8. If a person who is sui juris give himself in arrogation, his children also pass under the arrogator's potestas in the capacity of grandchildren.

IX. On those who are under manus.

1. A woman comes under manus by a conferreation in a set

1 Gaius, 1. 104.  
2 Id. 1. 107.
testibus x præsentibus et sollemni sacrificio facto, in quo panis quoque farreus adhibetur. ***

TIT. X. QVI IN POTESTATE MANV MANCIPOVE SVNT QVEMADMODVM EO IVRE LIBERENTVR.

1. Liberi parentum potestate liberantur emancipatione, id est si posteaquam mancipati fuerint, manumissi sint. sed filius quidem ter mancipatus, ter manumissus sui iuris fit; id enim lex duodecim tabularum iubet his uerbis: si pater filium ter ununduuit, filius a patre liber esto. ceteri autem liberi praeter filium, tam masculi quam feminae, una mancipatione manumissioneque sui iuris fiunt. 2. Morte patris filius et filia sui iuris fiunt; morte autem aui nepotes ita demum sui iuris fiunt, si post mortem aui in potestate patris futuri non sunt, uelut si moriiente aui pater eorum aut etiam decessit aut de potestate dimissus est: nam si mortis

form of words uttered in the presence of ten witnesses, and by the performance of a solemn sacrifice, in which a cake of fine flour is used.

X. HOW THOSE WHO ARE UNDER POTESTAS, MANUS OR MANCIPIUM, ARE SET FREE FROM THE TIE.

1. Descendants are freed from the potestas of their ascendants by emancipation, i.e. if they are manumitted after being mancipated*. But a son becomes sui iuris only after being mancipated three times and manumitted three times: for a law of the Twelve Tables directs this in the following words: "If a father sell his son three times, let the son be free from the father." Whilst descendants other than a son, whether male or female, become sui iuris by one mancipation and one manumission. 2. A son and a daughter become sui iuris by the death of their father*; but grandsons become sui iuris by the death of their grandfather, only in case they will not fall under the potestas of their father on the grandfather's death; for example, if at the time of their grandfather's death their father either be dead or released from potestas: for they come into their father's

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1 Gaius, l. 112.
2 Ibid. l. 132.
3 Tab iv. l. 3.
4 Gaius, l. 147.
X. 3—XI. 1.]  
Postliminy.

...aui tempore pater eorum in potestate eius sit, mortuo auo in patris sui potestate fiunt. 3. Si patri uel filio aqua et igni interdictum sit, patria potestas tollitur, quia peregrinus fit is, cui aqua et igni interdictum est; neque autem peregrinus ciuem Romanum, neque ciuis Romanus peregrinum in potestate habere potest. 4. Si pater ab hostibus captus sit, quamuis seruus hostium fiat, tamen cum reuersus fuerit, omnia pristina iura recipit iure postliminii. sed quamdiu aput hostes est, patria potestas eius in filio interim pendebit; et cum reuersus fuerit ab hostibus, in potestate filium habebit; si uero ibi decesserit, sui iuris filius erit. Filius quoque si captus fuerit ab hostibus, simili propter ius postliminii patria potestas interim pendebit. 5. In potestate parentum esse designunt et hi, qui flamines Diales inaugurantur, et quae virgines Vestae capiuntur.***

TIT. XI. DE TUTELIS.

1. Tutores constituantur tam masculis quam feminis: sed

potestas on the death of their grandfather, if at that moment their father be in his potestas. 3. If the father or son be interdicted from fire and water, the parental potestas is destroyed, because one who is interdicted from fire and water becomes a foreigner, and neither can a foreigner have a Roman citizen under his potestas nor a Roman citizen a foreigner. 4. If a father be taken by the enemy, although he becomes a slave of the enemy, yet on his return he recovers all his original rights by the rule of postliminy. But so long as he remains with the enemy, his parental potestas over his son is for the time suspended: and on his return he will have his son under his potestas, but if he die there the son will be sui juris. So too if the son be taken by the enemy, the parental potestas will in like manner be suspended for the time by the rule of postliminy. 5. Those also cease to be under the potestas of their ascendants who are admitted flamens of Jupiter or elected vestal virgins.

xi. ON TUTELAGES.

1. Tutors are appointed both to males and females: but to

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1 Gaius, l. 128.  
2 ib. l. 139.  
3 ib. l. 130, 145.
Various kinds of Tutors. 

masculis quidem inpuberibus dumtaxat propter aetatis infirmitatem; feminis autem tam inpuberibus quam puberibus et propter sexus infirmitatem et propter forensium rerum ignorantiam.

2. Tutores aut legitimi sunt, aut senatusconsultis constituti, aut moribus introducti.

3. Legitimi tutores sunt, quicunque ex lege aliqua descendunt; per eminentiam autem legitimi dicuntur lege duodecim tabularum introducti, seu propalam, quales sunt agnati, seu per consequentiam, quales sunt patroni. 4. Agnati sunt a patre cognati uirilis sexus, per uirilem sexum descendentes, eiusdem familiae, uelut a patre fratre, patrei, fratris filii, fratres patruelis.

*** 5. Qui liberum caput, mancipatum sibi uel a parente uel a coemptionatore, manumisit, per similitudinem patroni tutor effetit, qui fiduciarius tutor appellatur.

6. Legitimi tutores alii tutelam in iure cedere possunt.

males only whilst they remain under the age of puberty, on account of their infirmity of age: to females, however, both under and over the age of puberty, as well on account of their infirmity of sex as on account of their ignorance of forensic matters.

2. Tutors are either statutable, appointed by senatus-consulta, or introduced by custom.

3. Statutable tutors are those originating from any lex: but those are more specially styled statutable who are introduced by a law of the Twelve Tables, whether in direct terms, as agnates are, or constructively, as are patrons. 4. Agnates are male relatives connected on the father's side, tracing through the male sex, and of the same family, as brothers on the father's side, a father's brothers, a brother's sons, the sons of two brothers.

5. He who has manumitted a free person mancipated to him either by an ascendant or by a coemptionator, becomes tutor because of his analogy to a patron, and is called a fiduciary tutor.

6. Statutable tutors can transfer their tutorship to another

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1 Gaius, t. 144. 189—193.
2 ib. t. 155. 165. In the latter paragraph we have an explanation of the "per consequentiam" of Ulpian.
3 Emancipation or adoption broke the agnatic tie previously subsisting, hence the introduction of the words "eiusdem familiae."
4 Gaius, t. 113—115, 136.
5 ib. t. 166.
7. Is, cui tutela in iure cessa est, cessicis tutor appellatur; qui siue mortuus fuerit, siue capite minutus, siue ali tutelam perrot cesserit, redit ad legitimum tutorem tutela. sed et si legitimus decesserit aut capite minutus fuerit, cessicia quoque tutela extinguitur. 8. Quantum ad agnatos pertinet, hodie cessicia tutela non procedit, quoniam permissum erat in iure cedere tutelam feminarum tantum, non etiam masculorum; feminarum autem legittimas tutelas lex Claudia sustult, excepta tutela patronorum.

9. Legitima tutela capitis diminutione amittitur. 10. Capitis diminutionis species sunt tres, maxima, media, minima. 11. Maxima capitis diminutio est, per quam et ciuitas et libertas amittitur, ueluti cum incensus abquis uenierit, aut mulier, quod alieno seruo se iunxerit denuntiante domino, eius ancilla facta fuerit ex senatusconsulto Claudiano. 12. Media capitis diminutio dicitur, per quam, sola ciuitate amissa, libertas re-

by means of a cession in court. 7. He to whom the tutorship is ceded is called a cessician tutor; and if he either die, or suffer capitis diminutio, or cede the tutorship again to another, the tutorship returns to the statutable tutor: and so too if the statutable tutor die or suffer capitis diminutio, the cessician tutorship is also extinguished. 8. So far as the agnates are concerned, cessician tutorship does not exist at the present day; since it used to be allowed to make cession of the tutelages of females only and not of those of males; and the Lex Claudia abolished the statutable tutelages of women, except when held by patrons.

9. A statutable tutorship is lost by capitis diminutio. 10. There are three varieties of capitis diminutio, maxima, media, and minima. 11. Capitis diminutio maxima is that by which both citizenship and liberty are lost, as in the case of a man being sold for not enrolling himself on the censor's register, or in that of a woman who cohabits with another person's slave against his master's warning, and is made his slave in accordance with the senatus-consultum of Claudius. 12. Capitis diminutio media is the name applied when citizenship alone is lost and liberty retained, which is the case with one interdicted
minima capitis diminutio est, per quam, et cuitate et libertate salua, status dumtaxat hominis mutatur; quod fit adoptione et in manum conuentione.

14. Testamento quoque nominatim tutores dati confirmantur eadem lege duodecim tabularum his uerbis: 'uti legassit super pecunia tutelaue suae rei, ita ius esto:' qui tutores datius appellantur. 15. A parentibus dari testamento tutores pos- sunt liberis, qui in potestate sunt. 16. Testamento tutores dari possunt hi, cum quibus testamenti faciendi ius est, praeter Latinum Iunianum; nam Latinus habet quidem testamenti factionem, sed tamen tutor dari non potest; id enim lex Iunia prohibet. 17. Si capite diminutus fuerit tutor testamento datus, non amittit tutelam; sed si abdicaverit se tutela, desinit esse tutor. abdicare se tutela est dicere, nolle se tutorem esse;

from fire and water. 13. Capitis diminutio minima is that whereby the status only of a man is changed, his citizenship and liberty being unaltered; a result which follows on adoption and the passing under manus.

14. Tutors appointed by name in a testament are also confirmed by the same law of the Twelve Tables in these words: "In accordance with the testamentary disposition which a man has made regarding his family, his money or the tutelage of his property, so let the right be:" and these tutors are called dative. 15. Tutors can be given in a testament by ascendants to those descendants who are under their potestas. 16. Any persons with whom the testator has testamenti facto can be appointed tutors in a testament, except a Junian Latin. For a Latin has testamenti facto, and yet cannot be appointed tutor; the Lex Junia forbidding it. 17. If the tutor appointed in a testament suffer capitis diminutum, he does not lose his tutorship: but if he renounce the tutorship, he ceases to be tutor; and to renounce it is to state that he declines to be tutor. Further a testamentary tutor cannot transfer his office by ces-

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1 Tab. v. I. 3.
2 Gaius, l. 154.
3 Id. I. 144.
4 The various meanings of this phrase are to be found in note on
5 Sc. minima.

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Testamentary tutors. [XI. 13—17.
in iure cedere autem tutela\textit{m} testamento datus non potest; nam et legitimus in iure cedere potest, abdicare se non potest.

18. Lex Atilia iubet, mulieribus pupillisue non habentibus tutores dari a praetore et maiore parte tribunorum plebis, quos tutores Atilianos appellamus. sed quia lex Atilia Romae tantum locum habet, lege Iulia et Titia prospectum est, ut in provinciis quoque similiter a praesidibus earum dentur tutores. 19. Lex Junia tutorem fieri iubet Latinae uel Latinorum inpuberis eum, cius \emph{ea isue ante manumissionem ex iure} Quiritium fuit. 20. Ex lege Iulia de maritandis ordinibus tutor datur a praetore urbis ei mulieri virginiue, quam ex hac ipsa lege nubere oportet, ad dotem dandam, dicendam promittendamue, si legitimum tutorem pupillum habeat. sed postea senatus censuit, ut etiam in provinciis quoque similiter a praesidibus earum ex eadem causa tutores dentur. 21. Praeterea etiam in locum muti furiosius tutor alnum daendum esse tutorem ad dotem constituemandam, senatus censuit.

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1 Gaius, l. 185. 2 \textit{ib.} l. 167. 3 VI. 1. 4 Gaius, l. 178, 183.
22. Item ex senatusconsulto tutor datur mulieri ei, cuius tutor abest, praeterquam si patronus sit qui abest: nam in locum patroni absentis a liberta tutor peti non potest, nisi ad hereditatem adeundam et nuptias contrahendas. idemque permission est in pupillo patroni filio. 23. Hoc amplius senatus censuit, ut si tutor pupilli pupillaeue suspectus a tutela submotus fuerit uel etiam iusta de causa excusatus, in locum eius tutor alius detur.

24. Moribus tutor datur mulieri pupilloue, qui cum tutore suo lege aut legitimo iudicio agere uult, ut auctore eo agat (ipse enim tutor in rem suam auctor fieri non potest), qui praetorius tutor dicitur, quia a praetore urbis dari consueuit.

25. Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt; mulierum autem tutores auctoritatem dumtaxat interponunt.

26. Si plures sint tutores, omnes in omni re debent auctori the marriage-portion. 22. Likewise by a senatus-consultum a tutor is appointed to a woman whose tutor is absent, unless the absentee be a patron: for one cannot be applied for by a freed woman in the place of an absent patron, except to take up an inheritance or to arrange a marriage. And the same appointment is permitted in the case of a patron's son being a pupil.

23. Besides this the senate has decreed that if the tutor of a pupil, whether male or female, be removed from his tutorship as untrustworthy, or excused for a just reason, another tutor may be appointed in his place.

24. A tutor is appointed by custom to a woman or pupil who wishes to sue the proper tutor under a lex or by statutable proceedings, that she may act under his authorization (for the proper tutor cannot authorize in a matter concerning himself): and such an one is called a Praetorian tutor, because it is the custom for him to be appointed by the Praetor Urbanus.

25. The tutors of pupils, male or female, both transact their business and give their authorization: but the tutors of women give their authorization only.

26. If there be several tutors, they must all give their au-

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1 Gaius, 1. 180.
2 ib. 1. 173—177, 179.
3 ib. 1. 181.
4 XI. 2.
5 Gaius, iv. 103
6 ib. 1. 184.
7 ib. 1. 190—191.
tatem accommodare, praeter eos, qui testamento dati sunt; nam ex his uel unius auctoritas sufficit.

27. Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo iudicio agant, si se obligent, si ciule negotium gerant, si libertae suae permittant in contubernio alieni serui morari, si rem mancipi abaliendent. pupillis autem hoc amplius etiam in rerum nec mancipi alienatione tutoris auctoritate opus est.

28. Liberantur tutela masculi quidem pubertate: puberem autem Cassiani quidem eum esse dicunt, qui habitus corporis pubes apparat, id est qui generare possit; Proculeiani autem eum, qui quattuerdecim annos expleuit, uerum Prisco usum, eum puberem esse, in quem utrumque concurrit, et habitus corporis, et numerus annorum. 28a. Feminae autem tutela liberantur trium liberorum iure; libertae tantum, quae in patroni tutela sunt, quattuor liberorum iure ab ea liberantur.

thorization to each individual transaction, except they be testamentary tutors, for in their case the authorization of any one is enough.

27. The authorization of their tutor is needful for women in the following matters: if they take proceedings under a lex or by statutable action, if they bind themselves by contract, if they transact any business connected with the civil law, if they permit one of their freedwomen to cohabit with another person's slave, if they alienate a thing mancipable. Further than this, pupils require their tutor's authorization for the alienation of things non-mancipable.

28. Males are set free from tutelage by puberty: and the Cassians say that he is of puberty who shows the fact by his bodily development, i.e. who can procreate; whilst the Proculians say that he is who has completed his fourteenth year; but Priscus maintains that he is of puberty in whom both requirements are fulfilled, viz. both bodily development and the number of years. 28a. Women on the other hand are liberated from tutelage by prerogative of three children: freedwomen who are under the tutelage of a patron are liberated from it only by prerogative of four children.

1 Gaius, iv. 103...
2 E.g. a cesso in iure, or a mancipato, or an in iure hereditatis.
3 Gaius, l. 196.
4 lb. l. 194.
TIT. XII. DE CURATORIBVS.

1. Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a praetore constituantur. 2. Lex duodecim tabularum furiosum, itemque prodigum, cui bonis interdictum est, in curatione iubet esse agnatorum. 3. A praetore constitutur curator, quem ipse praetor voluerit, libertinus prodigis, itemque ingenuis, qui ex testamento parentis heredes facti male dissipant bona: his enim ex lege curator dari non poterat, cum ingenuus quidem non ab intestato, sed ex testamento heres factus sit patri; libertinus autem nullo modo patri heres fieri possit, qui nec patrem habuisse uidetur, cum serulisis cognatio nulla sit. 4. Praeterea praetor ex lege Plaetoria dat curatorem etiam ei, qui nuper pubes factus idonee negotia sua tueri non potest.***

xii. ON CURATORS.

1. Curators are either statutable, i.e. such as are given under a law of the Twelve Tables, or honorary, i.e. such as are appointed by the Praetor.
2. A law of the Twelve Tables orders a madman, and likewise a prodigal interdicted from the management of his property, to be in the curation of his agnates. 3. A curator is appointed by the Praetor, being such person as the Praetor himself chooses, to prodigal freedmen, and likewise to free-born persons who are made heirs by the testament of their ancestor and criminally waste his goods: for to such persons a curator could not be given under the law, inasmuch as the freeman is heir to his father not on intestacy but by his testament; and the freedman cannot be heir to his father in any way, for he is not even considered to have a father, there being no relationship among slaves. 4. Moreover the Praetor by the Lex Plaetoria gives a curator to one who has just attained puberty, but cannot properly superintend his own business...

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1 Tab. v. 1. 7.
2 Huschke thinks the words "paternus et avitus" have been lost out of the text; and probably such is the case, 1st, because something of the sort seems implied in the following paragraph and is needed to bring out its force, and 2nd, because Paulus III. 4. 7 says "Morbuses per Praetorem bonus interdictur hoc modo: Quando tibi bona paternas avitique nequittia tua dispersis, libe-
XIII. I—XIV. I. | Lex Julia.

TIT. XIII. DE CAELIBE ORBO ET SOLITARIO PATRE.

1. Lege Iulia prohibitur uxores ducere senatores quidem liberique eorum libertinas et quae ipsae quarumque pater materue artem ludicram fecerunt; 2. idem et ceteri autem ingenui prohibitur uxorem ducere palam corpore quaestum facientem, et lenam, et a lenone lenaue manumissam, et in adulterio deprehensam, et judicio publico damnatam, et quae artem ludicram fecerent: adicit Maucicianum senatusconsultum a senatu damnatam. ***

TIT. XIV. DE POENA LEGIS IVLIAE.

1. Feminis lex Iulia a morte uiri anni tribuit vacationem, xiii. on the unmaried, the childless, and the father who has lost his children.

1. By the Lex Julia senators and their descendants are forbidden to marry freedwomen, or women who have themselves followed the profession of the stage, or whose father or mother has done so; 2. and both they and all other freeborn persons are forbidden to marry a common prostitute, or a procuress, or a woman manumitted by a procurer or procuress, or a woman caught in adultery, or one condemned in a public action, or one who has followed the profession of the stage; and the senatusconsultum Mauricianum adds one condemned by the senate...

xiv. on the penalty of the Lex Julia.

1. The Lex Julia allows women a respite from its requirements for one year after the death of a husband, and for six

rosque tuos ad egestatem perducis, ob cam rem tibi eae commercioque interdico.”

1 App. (G).

2 Just. Inst. IV. 18; D. 23. 2. 43. The latter passage is well worth reading, as we find in it Ulpian’s own interpretation of each word and expression of the portion of the Lex Julia referred to above.

4 See App. (G) where it is explained that by the vacatio above-named is meant a permission to women to take without the usual qualification legacies, inheritances or lapses devolving on them within the specified periods after their husband’s death or their divorce.
Retention of Tenth.

[TIT. XV. DE DECIMIS.

1. Vir et uxor inter se matrimoni nomine decimam capere possunt: quod si ex alio matrimonio liberos superstes habeant, praeter decimam, quam matrimoni nomine capiunt, totidem decimas pro numero liberorum accipiunt. 2. Item communis filius filiae post nominum diem amissus amissaue unam decimam adicit; duo autem post nominum diem amissi duas decimas adiciunt. 3. Praeter decimam etiam usumfructum tertiae partis bonorum et uxor capere possunt, et quandoque liberos habuerint, eiusdem partis proprietatem; hoc amplius mulier, praeter decimam, dotem relegatam sibi.

months after a divorce: but the Lex Papia allows a respite for two years after the death of a husband and for a year and six months after a divorce...

XV. ON TENTHS.

1. A husband and wife can receive one from the other a tenth on account of their marriage1. And if they have children by another marriage surviving, they can, in addition to the tenth on the title of their marriage, take further tenths in number equal to that of their children. 2. Likewise a son or daughter common to them and lost after his or her naming-day adds one tenth, and two lost after their naming-days add two tenths2.

3. Besides the tenth, a husband or wife can also receive the usufruct of a third part of the consort's goods: and when they have had children, the ownership of the same amount: and in addition to this the wife over and above the tenth can take her marriage-portion if bequeathed to her as a legacy.

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1 Sc. although orbis or orba can receive a tenth of the deceased partner's estate under her or his testament.

2 Festus says the naming-day was the eighth or ninth after birth: "Lustrici dies infantium appellantur puellarum octavus, puerorum nonus, quia his lustrantur et us nomina impununtur."
XVI. On the Power of Taking the Whole as Between Husband and Wife.

1. Sometimes husband and wife can receive, one from the other, the entire inheritance, for instance if both or either of them be not yet of the age which the lex insists on children, i.e. if either the husband be under 25, or the wife under 20 years of age; also if both of them have, whilst their marriage subsists, exceeded the ages limited by the Lex Papia, i.e. the husband 60, the wife 50; likewise if relations within the sixth degree have married. 1a. There is also complete testamenti factio1 between them, if they have obtained from the Emperor the privileges attaching to children, or if the husband be absent on public business, both whilst he is still absent and within a year after he has ceased to be absent, or if they have a son or daughter born from their union2, or have lost a son of the age of fourteen or a daughter of the age of twelve: or have lost two children of the age of three years, or three after their naming-days, provided nevertheless that even one child lost at any age under puberty gives them the right of receiving the whole estate

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1 Gaius, 11. 114 n.
2 This is to mark the fact that the words “habet liberos, non habet liberos” in the Lex Papia Poppaea do not render it needful for two or more children to be born of the marriage, but even one will suffice. D. 50.

16. 148, 149.
intra annum tamen et sex menses etiam unus cuiuscumque actatis inpubes amissus solidi capiendi ius praestet. Item si post mortem uri intra decem menses uxor ex eo pepererit, solidum ex bonis eius capit.

2. Aliquando nihil inter se capiunt: id est, si contra legem Iuliam Papiamque Poppaeam contraxerint matrimonium, uerbi gratia si famosam ingenios uxorem duxerit, aut libertam senator.

3. Qui intra sexagesimum vel quae intra quinquagesimum annum neutri paruerit, licet ipsis legibus post hanc aetatem liberatus esset, perpetus tamen poenis tenetur ex senatusconsulto Persiclanio. 4. Sed Claudiano senatusconsulto

within a period of one year and six months from the death. Likewise if the wife within ten months after her husband’s death bear a child by him, she takes the whole of his goods.

2. Sometimes they cannot take anything one from the other, i.e. when they have contracted a marriage contrary to the Lex Julia et Papia Poppaea, when for instance any freeborn man has married a woman of abandoned character, or when a senator has married a freedwoman.

3. A man who has conformed to neither lex within his sixtieth year, or a woman who has not done so within her fiftieth, although after such age exempt from compliance according to the rules of the leges themselves, yet will be liable to their standing penalties by reason of the senatus-consultum Persiclanum. 4. But by the senatus-consultum Claudianum a man

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1 Heineccius explains this passage at length in his Antiquitates Romanae, App. lib. 1 cap. 1. § 37. He states, in opposition to Gothofrolius, that the Lex Papia did not forbid the marriages of men above sixty years of age with women above fifty, which idea had been deduced from a passage of Suetonius, (Claud. 23): “Caput Papiae Poppaeae legis a Tiberio Caesare, quasi sexagenari generare non possent, addito, obrogavit.”

The Lex Papia, he says, freed men and women of the ages just named from the penalties of celibacy; and Tiberius did not forbid marriages between these persons (any more than the Lex Papia had done), but made such unions unavailing to save the parties from the penalties of the law, laying it down as a presumption iuris et de jure that no children could be born from them: and this rule was embodied in the senatus-consultum of Persicus, consul three years before Tiberius’ death.

The senatus-consultum Claudianum allowed the marriage of a man over sixty with a woman under fifty to save the former from the penalties of the law, because from such a
Lap ses.

VII. I.

A testamentary gift which the donee fails from any cause to take, although left to him in such manner that he could have taken it according to the civil law, is called a lapse, for it has in a way slipped from him; for instance, if a legacy be left to an unmarried man or to a Julian Latin, and the unmarried man do not within a hundred days conform to the lex, or the Latin do not obtain Roman citizenship; or if the heir

above sixty who marries a woman under fifty, will be accounted as if he had married whilst under sixty. But if a woman above fifty be married to a man under sixty, the marriage is styled "unequal," and by the senatus-consilium Calvisianum is ordered to be of no avail for taking inheritances, legacies or marriage-portions. Therefore on the death of the wife her marriage-portion will lapse.

1. Quod quis sibi testamento relictum, ita ut iure civili capere possit, alqua ex causa non cepellt, caducum appella tur, ueluti ceciderit ab eo: uerbi gratia si caeli bi uel Latino Iuniano legatum fuellt, nec intra dies centum uel caelebs legi pararet, uel Latinus ius Quiritium consecutus sit; aut si ex parte heres scriptus uel legatarius ante apertas tabulas deceased.

TIT. XVII. DE CADVCIS.

1. A testamentary gift which the donee fails from any cause to take, although left to him in such manner that he could have taken it according to the civil law, is called a lapse, for it has in a way slipped from him; for instance, if a legacy be left to an unmarried man or to a Julian Latin, and the unmarried man do not within a hundred days conform to the lex, or the Latin do not obtain Roman citizenship; or if the heir

marriage there was some chance of issue.

The senatus-consilium Calvisianum, on the other hand, forbade the penalties to be remitted when the wife was above fifty and the husband under sixty, because from this marriage there was no reasonable prospect of children.

Mommsen says these two paragraphs have been retained through inadvertence by the abbreviator of Ulpian: for their provisions had been abolished by a law of Constantine; and the abbreviator in all other cases has struck out obsolete rules.

The marriage-portion, which in general went to the husband or father, went instead to the fiscus, if the marriage had been impar.

Sc Julia et Papa Poppaea.  
*Tit. III.*
Lapses. [XVII. 2—XIX. 1.

serit uel peregrinus factus sit. ***

2. Hodie ex constitutione imperatoris Antonini omnia caduca fisco uindicantur; sed ser-uato iure antiquo liberis et parentibus. 3. Caduca cum suo onere fiunt: ideoque libertates et legata uel fideicommissa ab eo data, ex cuius persona hereditas caduca facta est, salua sunt: set et legata et fideicommissa cum suo onere fiunt caduca.***

TIT. XVIII. QVI HABEANT IVS ANTIQVVM IN CADVCIS.

1. Item liberi et parentibus testatoris usque ad tertium gradum lex Papia ius antiquum dedit, ut hereditibus illis institutis, quod quis ex eo testamento non capit, ad hos pertuneat aut totum aut ex parte, prout pertinere possit. ***

TIT. XIX. DE DOMINIIS ET ADQVlSITIONIBVS RERVM.

1. Omnes res aut mancipi sunt aut nec mancipi. mancipi

appointed to a part, or if a legatee die or become a foreigner before the opening of the testament'....2. At the present day, in accordance with a constitution of the Emperor Antoninus, all lapses are claimed for the treasury: the ancient rule, however, being upheld for the benefit of descendants and ascendants.

3. Lapses carry with them their own burdens: and therefore gifts of freedom, legacies and fideicommissa charged upon him from whom the inheritance lapses, stand good, and of course legacies and fideicommissa also lapse subject to their burdens.

xviii. Who have the ancient right in Lapses.

1. The Lex Papia Poppaea has further granted the ancient right to descendants and ascendants of the testator as far as the third degree. So that when these are instituted heirs anything which another person does not take under the testament belongs to them wholly or in part, according as it can belong....

xix. On Dominium and Acquisitions of things.

1. All things are either mancipable or non-mancipable*

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1 No doubt Ulpian proceeded to state the provisions of the Lex Julia et Papia Poppaea as to lapses, (for which see Gaus, II. 206, 207) but the abbreviator has struck out this passage.

2 Gaus, II. 15—17.
Acquisition of Ownership.

res sunt praedia in Italico solo, tam rustica, quam urbana, quals domus; item iura praediorum rusticorum, uelut uia, iter, actus, aquaeductus; item serui et quadrupedes, quae dorso colloue domantur, uelut boues, muli, equi, asini. ceterae res nec mancipi sunt. elefanti et cameli quamuis collo dorsoue domantur, nec mancipi sunt, quoniam bestiarum numero sunt.

2. Singularum rerum dominium nobis adquiritur mancipatione, traditione, usucapione, in iure cessione, adjudicatione, lege.


The former are praedial property on Italic soil, both rural, as a field, and urban, as a house; also rights belonging to rural praedial property, as via, iter, actus, aquaeductus: also slaves and those quadrupeds which are tamed by yoke and saddle, as oxen, mules, horses, asses. All other things are non-mancipable. Elephants and camels, although they may be tamed by yoke and saddle, are non-mancipable because they are in the category of wild beasts.

2. We acquire ownership over individual things by mancipation, by tradition, by cession in court, by usucapion, by adjudication, and by operation of law.

3. Mancipation is the form of transfer peculiar to things mancipable: and it is transacted with a special phraseology, and in the presence of a balance-holder (libripens) and five witnesses. 4. The parties to a mancipation may be Roman.
et Latinos coloniarios Latinosque Iunianos eosque peregrinos, quibus commercium datum est. 5. Commercium est emendendumque inuicem ius. 6. Res mobiles non nisi praesentes mancipari possunt, et non plures simul quam quot manu capi possunt; immobiles autem etiam plures, et quae diversis locis sunt, mancipari possunt.

7. Traditio aequa propria est alienatio rerum nec mancipii. Harum eum rerum dominium ipsa traditioe adprehendimus, scilicet si ex iusta causa traditae sint nobis.

8. Usucapione dominuum adipiscimur tam mancipi rerum, quam nec mancipi. usucapio est autem domini adpectio per continuationem possessionis anni vel biennii: rerum mobilium anni, immobilium biennii.

9. In iure cessio quoque communis alienatio est et mancipi rerum et nec mancipi. quae fit per tres personas, in iure cedentis, uidicantus, adjudicentis: 10. in iure cedit dominus; citizens, Latin colonists¹, Junian Latins, or those foreigners to whom the privilege of commercium has been given². 5. Commercium is the reciprocal right of purchase and sale⁴. 6. Moveable things can be mancipated only when produced before the parties³, and then no more at one time than are able to be taken by the hand; but immoveable things can be mancipated several together as well as lying in different localities.

7. Tradition, in like manner, is the method of transfer appropriate to things non-mancipable⁵. For we acquire the ownership of these things by the delivery itself, provided always that they have been delivered to us in consequence of a transaction recognised by the law. 8. By usucapion⁶ we obtain the ownership of things both mancipable and non-mancipable. Now usucapion is the acquisition of ownership through continuous possession for one or two years—one, where the things are moveable—two, where they are immoveable. 9. Cession in court also⁷ is a mode of transfer common to both classes of things. It is transacted by means of three parties, the cessor in court, the claimant and the adjudicant. 10. The owner is

¹ App. (A).
² But see note on xx. 13 The capacity here named is but an instance of those included in commercium.
³ Gaus, l. 121.
⁴ ib. 11. 19, 20, 65.
⁵ ib. 11. 42—44.
⁶ ib. 11. 24.


XIX. 11—16.] Cession and Adjudication. 393

uindicat is, cui cedtur; addicit praetor. 11. In iure cedi res etiam incorporales possunt, usus ususfructus et hereditas et tutela legitima libertae. 12. Hereditas in iure ceditur uel antequam adeatur, uel posteaquam adita fuerit: 13. antequam adeatur, in iure cedi potest ab herede legitimus; posteaquam adita est, tam a legitimo quam ab eo, qui testamento heres scriptus est. 14. Si antequam adeatur, hereditas in iure cessa sit, proinde heres fit, cui cessa est, ac si ipse heres legitimus esset; quod si posteaquam adita fuerit, in iure cessa sit, 15, qui cessit, permanet heres, et ob id creditoribus definuncti manet obligatus; debita uero pereunt, id est debitoribus defuncti liberantur; 15. res autem corporales, quasi singulae in iure cessae essent, transeunt ad eum, cui cessa est hereditas.

16. Adjudicacione dominium nanciscimur per formulam familiae herciscundae, quae locum habet inter coheredes; et per formulam communi diuidundo, cui locus est inter socios; et per formulam finium regundorum, quae est inter uicinos. nam si

cessor, the transferee is claimant, and the Praetor is adjudicant. 11. Even incorporeal things can be transferred by cession¹, as for instance an usufruct, and an inheritance, and the statutable tutelage of a freed woman². 12. An inheritance is transferred by cession either before or after entry³. 13. Before entry the transfer may be effected by a statutable heir; after entry both by a statutable heir, and by him who has been appointed heir in a testament. 14. If the inheritance have been transferred before entry, the transferee becomes heir just as if he himself had been the statutable heir; but if the transfer be made after entry, the transferor continues to be heir, and on this account remains bound to the creditors of the deceased; the debts, however, perish; in other words, the debtors of the deceased are set free; 15. but the corporeal things pass to the transferee of the inheritance just as if they had been separately transferred by cession.

16. By adjudication⁴ we obtain ownership by means of the formula "for severing an estate," which is applicable to coheirs, by means also of the formula for dividing partnership property, applicable to partners, and by means of the formula

¹ Gaius, II. 29—38. ² I. I. 168. ³ I. II. 34—37, III. 85—87. ⁴ I. IV. 42.
iudex uni ex cohereditibus aut sociis aut uicinis rem aliquam adiudicauerit, statim illi adquiritur, siue mancipi siue nec mancipi sit.

17. Lege nobis adquiritur uelut caducum uel ereptorium ex lege Papia Poppaea, item legatum ex lege duodecim tabularum, siue mancipi res sint siue nec mancipi.

18. Adquiritur autem nobis etiam per eas personas, quas in potestate, manu mancipiue habemus. itaque si quid eae mancipio puta acceperint, aut traditum eis sit, uel stipulatae fuerint, ad nos pertinet; 19. item si heredes institutae sint legatumue eis sit, et hereditatem iusso nostro adeuntes nobis adquirunt, et legatum ad nos pertinet. 20. Si seruus alterius in bonis, alterius ex iure Quiritium sit, ex omnibus causis adquirit ei, cuius in bonis est. 21. Is, quem bona fide possidemus, siue

for setting out boundaries, applicable to neighbouring proprieors; for if a judex have adjudicated anything to one of several co-heirs, partners, or neighbours, acquisition thereof immediately accrues to him, whether the thing be mancipable or non-mancipable.

17. We acquire ownership by operation of law, as in the case of a lapse or an escheat by force of the Lex Papia Poppaea, and in that of a legacy by force of a Law of the Twelve Tables, whether the subject be a thing mancipable or a thing non-mancipable.

18. Ownership is also acquired for us by means of persons whom we have in our potestas, manus or mancipium. If then, for instance, such persons have received something by way of mancipation, or if something have been delivered to them by tradition, or if they have stipulated for something, that thing belongs to us; 19. so too if these persons have been instituted as heirs, or if a legacy have been left them, they acquire for us the inheritance upon entry therein by our direction, and the legacy belongs to us. 20. If a slave belong to one person by Bonitarian and to another by Quiritarian title, he acquires in all cases for his Bonitarian owner. 21. An individual

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1 1. 21. Other instances of lapses are to be found in xvi. 4; xvii, xxii. 3; xxiv. 12, 13; xxv. 17; xxvii. 7.
2 "Ut i legassit super familia pecunia tutellave suae rei, ita jus esto." Tab. v. l. 3. See D. 50. 16. 130.
3 Gaius, ii. 86—90; iii. 163.
4 ib. ii. 88.
labor siue alienus seruus sit, nobis adquirit ex duabus causis tantum, id est, quod ex re nostra et quod ex operis suis adquirit: extra has autem causas aut si bii adquirit, si liber sit, aut domino, si alienus seruus sit. eadem sunt et in eo seruo, in quo tantum usumfructum habemus. * * *

TIT. XX. DE TESTAMENTIS.

I. Testamentum est mentis nostrae iusta contestatio, in id sollemniter facta, ut post mortem nostram ualeat. 2. Testamentorum genera fuerunt tria, unum, quod calatis comitiis, aliterum, quod in procinctu, tertium, quod per aes et libram appellatum est. sed illis duobus testamentis abolitis hodie solum in usu est, quod per aes et libram fit, id est per mancipationem imaginariam. in quo testamento libripens adhibetur et familiae emptor et non minus quam quinque testes, cum whom we possess in good faith, whether he be a free man or a slave belonging to another, acquires for us in two cases only, viz. when his acquisition is the product of something belonging to us and when it is the product of his own labour. Acquisitions resulting from causes other than these either belong to the man himself, if he be free, or to his owner, if he be the slave of another person (than his bona fide possessor). The same rules apply also to the case of a slave in whom we have only an usufruct.

XX. ON TESTAMENTS.

I. A testament is the legal attestation of our intentions, made in solemn form for the express purpose of being carried out after our death. 2. There used to be three kinds of testaments; one which was made at the specially-summoned comitia, another which was made in battle-array, a third which was called “by coin and balance.” The two former having been abolished, the only one in use at the present day is that which is solemnized by coin and balance, that is, by means of an imaginary mancipation. And in this form of testament a balance-holder (libripens) is employed, also a purchaser of the estate (familiae emptor), and not less than five witnesses, with whom

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1 Gaius, II. 92, III. 164.
2 ib. II. 91, III. 165.
3 ib. II. 101—104.
4 “Proinclus est expeditus et armatus exercitus.” Gaius, II. 101.
quibus testamenti factio est. 3. Qui in potestate testatoris est aut familiae emptoris, testis aut libripens adhiberi non potest, quoniam familiae mancipatio inter testatorem et familiae emptorem fit, et domestici testes adhibendi non sunt. 4. Ob id et filio familiae familiaris emente pater eius testis esse non potest; 5. et ex duobus fratrisbus, qui in eiusdem patris potestate sunt, alter familiae emptor, alter testis esse non potest, quoniam quod unus ex his mancipio accipit, adquirit patri, cui filius suus testis esse non debet  6. At pater et filius, qui in potestate eius est, item duo frater, qui in eiusdem patris potestate sunt, testes utrique, vel alter testis, alter libripens fieri possunt, alio familiae emente, quonam nihil nocet ex una domo pluris testes aliens negotio adhiberi. 7. Mutus, surdus, funosus, pupillus, femina neque familiae emptor esse, neque testis libripens fieri potest. 8. Latinus Ianuanus et familiae emptor

the testator can lawfully deal in testamentary matters. 3. He who is in the potestas of the testator or of the purchaser of the estate cannot be employed as a witness or as a balance-holder, since the mancipation of the estate is a transaction between the testator and the purchaser of the estate, and members of their households must not be employed as witnesses. 4. For this reason also where a filius familiaris is the purchaser of the estate, his father cannot be a witness. 5. Of two brothers under the potestas of the same father, one cannot be the purchaser of the estate and the other a witness, since that which one of them takes by the mancipation he acquires for his father, for whom his other son cannot be a witness. 6. But a father and a son under his potestas, as also two brothers under the potestas of the same father, may both of them be witnesses, or one may be a witness and the other the balance-holder, when some third party is the purchaser of the estate; for there is no harm in several witnesses from the same household being employed when the business affects a stranger. 7. A dumb person, a deaf person, a madman, a minor, or a woman cannot be made purchaser of the estate, or witness or balance-holder. 8. A

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1 See note on Gaius, ii. 114.  
2 Gaius, ii 105, 107.  
3 ib. ii. 106.  
4 Domesticus testis is not only a son or slave, but any one amenable to coercion, as we see from D. 28. 1. 20 i & 3. D. 22.5. 6.  
5 This paragraph is quoted almost verbatim in D. 22. 5. 17.
et testis et libripens fieri potest, quoniam cum eo testamenti factio est.

9. In testamento, quod per aës et libram fit, duae res aguntur, familiae mancipatio et nuncupatio testamenti. nuncupatur testamentum in hunc modum: tabulas testamenti testator tenens ita dicit: HAECE VT IN HIS TABVLIS CERISVE SCRIPTA SVNT, ITA DO, ITA LEGO, ITA TESTOR; ITAQVE VOS, QVIRITES, TESTIMONIVM MIHI PERHIBETOT. quae nuncupatio et testatio uocatur.

10. Filius familiae testamentum facere non potest, quoniam nihil suum habet, ut testari de eo possit. sed diuus Augustus Marcus constituit, ut filius familiae miles de eo peculio, quod

Junian Latin can be made either purchaser of the estate, balance-holder or witness, inasmuch as testamentary dealing with him is legal.

9. In the form of testament by coin and balance two matters are transacted, the mancipation of the estate, and the nuncupation of the testament. The testament is nuncupated after this manner: the testator holding the tablets of the testament says as follows—"These things as they are written in these tablets of wax, I so give, I so bequeath, I so claim your evidence, and do you, Quirites, so grant it me." And this is called the nuncupation and attestation.

10. A filius familias cannot make a testament inasmuch as he has nothing of his own, so as to be able to declare any intention regarding it. But the late emperor (Marcus) by a speaking of tutors (xi. 2) Ulpian does not consider the senatusconsultus constitutus, to be a subdivision of the moribus introductus, but an entirely distinct class; and therefore whatever be the system of nomenclature adopted by other writers, Ulpian certainly does not adhere to that which Huschke attributes to him.

If we read "Marcus," there is the objection that earlier emperors had laid down the same regulations before Marcus' day; and therefore Böcking, although allowing that Emperor's name to stand in his text, inclines in his notes to the reading.
in castris adquisitum, testamentum facere posse. 11. Qui de statu suo incertus est, facere non potest, quod patre peregre mortuo ignorant, se sui iuris esse, testamentum facere non potest. 12. In pubes, licet sui iuris sit, facere testamentum non potest, quoniam nondum plenum judicium animi habet. 13. Mutus, surdus, furiosus, itemque prodigus, cui leges interdictiones loquitur non possunt: mutus, quoniam uerba nuncupationis loqui non potest; surdus, quoniam uerba familiae emportors exaudire non potest; furiosus, quoniam mentem non habet, ut testari de ea re possit; prodigus, quoniam commercium illi interdictum est, et ob id familiam mancipare non potest.

Constitution enacted that a filius, being a soldier, might make a testament affecting that portion of his peculium which he acquired whilst on service. 11. Where a man has become uncertain about his status (through ignorance, for example, that he is sui iuris in consequence of his father having died abroad,) he cannot make a testament. 12. A youth not of the age of puberty, though he chance to be sui iuris, cannot make a testament, inasmuch as he is not yet endowed with full mental capacity. 13. A dumb person, a deaf person, a madman, and also a prodigal who is restrained by interdict from the management of his property, cannot make a testament. The dumb person because he cannot utter the nuncupatory formula, the deaf person because he cannot fully hear the words of the purchaser of the estate, the madman because he has not mental powers for making testamentary disposition as to the subject in hand, the prodigal because he has been laid under a general prohibition as to legal transactions, and on that account can-

"Militibus concessit," rejecting as frivolous the defence put forward for the other reading, that Ulpian wrote his Rules early in life, and was unaware at the time that the regulations of Marcus were only a republication of those of his predecessors. 3 Bocking prefers the old reading factus to factum (which we have adopted from Huschke), and defends it on the ground that the uncertainty spoken of in the passage is of a peculiar kind, impossible under any circumstances to be removed at the time the testament is made. But there does not seem to be any such cardinal distinction as Bocking would make out between the present instance and others given in D. 28. 1. 14. 15, and therefore we have followed Huschke. The principle that persons uncertain as to their status cannot make a testament is laid down in the most general terms in D. 28. 3. 6. 8, D. 29. 7. 9—the only exception being in favour of veterans. 3 Gaius, II. 113. 3 Commerium was the right of
14. Latinus Iunianus, item is, qui deditiorum numero est, testamentum facere non potest: Latinus quidem, quoniam non minatim lege Iunia prohibitus est; is autem, qui deditiorum numero est, quoniam nec quasi ciuís Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae ciuitatis ciuís est, ut secundum leges ciuitatis suae testetur.


TIT. XXI. QVEMADVM HEtES INSTITVI DEBEAT.

1. Heres institui recte potest his verbis: TITIVS HERES ESTO, TITIVS HERES SIT, TITIVM HEREDEM ESSE IVEO; illa autem non mancipate his estate. 14. A Junian Latin, as also a person classed among the dediticii, cannot make a testament\(^1\): the Latin because he is specially prohibited by the Lex Junia: and he who is classed among the dediticii because he can neither make testamentary disposition as a Roman citizen, seeing that he is a foreigner, nor as a foreigner, seeing that he is a citizen of no ascertained state, so as to be able to make his testament in accordance with the laws of his state. 15. Women after their twelfth year can make testaments, with the authorization of their tutors\(^2\), as long as they are under tutelage. 16. A public slave of the Roman people has the right of making a testament as to half his peculum\(^3\).

XXI. HOW AN HEIR OUGHT TO BE INSTITUTED.

1. An heir can be properly instituted by the following phraseology:—"Titius, be thou heir;" "Let Titus be heir;"

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\(^{1}\) Gaius, I. 23—25.

\(^{2}\) This agrees with what is said in Plin. Ep. II. 113, 118.

\(^{3}\) This goes with what is said in Plin. Ep. II. 16, but there are various passages in D. 28. 1, such as §§ 16, 19 and 20, 7, which assert that a slave could in no case make a testament; and as these draw no distinction between public and private slaves, many commentators judge the present passage to be an interpolation, and false in fact.
tem institutio HEREDEM INSTITVO, HEREDEM FACIO plenique
inprobata est.***

TIT. XXII. QVI HEREDES INSTITVI POSSVNT.

1. Heredes institui possunt, qui testamenti factionem cum
testatore habent. 2. Dedituorum numero heres institui non
potest, qua peregrinus est, cum quo testamenti facio non est.
3. (Latinus Iuanus heres institui potest; et) si quidem mortis
testatoris tempore uel intra diem cretionis cuis Romanus sit,
heres esse potest; quodsi Latinus manserit, lege Iuana capere
hereditatem proutetur. idem iuris est in persona caelibus
propter legem Iuliam. 4. Incerta persona heres institui non
potest, uelut hoc modo: QVISQVIS PRIMVS
AD FVNVS MEVM VENERIT, HERES ESTO;
quoniam certum consilium debet esse
testantis. 5. Nec inmunicipium, nec municipes heredes institui

“I order Titius to be heir” But an institution running thus:
“I institute as heir,” or “I make heir,” has been generally
disapproved’......

XXII. WHO CAN BE INSTITUTED HEIRS.

1. Those can be instituted heirs who have testamentary ca-
pacity relatively to the testator’. 2. One who is classed among
the deditus cannot be instituted heir, because he is a foreigner,
for whose benefit a testament cannot be made’. 3. A Junian
Latin can be instituted heir*, and can take up the inheritance,
provided he be a Roman citizen at the time of the testator’s death,
or within the period for creation5, but if he have continued to be
a Latin, he is prohibited from taking the inheritance by the Lex
Junia. The same rule is applied to an unmarried person by
reason of the Lex Julia’. 4. An uncertain person cannot be
insituted heir, as for instance in this way: “Whoever shall
first come to my funeral, let him be my heir”; for a testator’s
intention ought to be clear. 5. Neither a municipal corpora-

1 Gaius, II. 117.
2 On the various senses of testa-
ments facio, see note on Gaius, II.
114.
3 Ib. I. 25, II. 110.
4 Ib. I. 23, 24, II. 110.
5 Ib. XXII. 27.
6 Ib. II. 111.
7 This rule applies to legacies
also, see XXIV. 18, Gaius, II. 238.
possunt, quoniam incertum corpus est, et neque cernere universi, neque pro herede gerere possunt, ut heredes sint: senatusconsultum tamen concessum est, ut a libertis suis heredes institui possint. Sed fideicommissa hereditas municipibus restitui potest; denique hoc senatusconsulto prospectum est. 6. Deos heredes instituire non possumus praeter eos, quos senatusconsultus constitutionibus seu principum instituere concessum est, sicuti Iouem Tarpeium, Apollinem Didymaeum Mileti, Martem in Gallia, Minerum Iliensem, Herculem Gaditanum, Dianam Efesiam, Matrem deorum Sipylenem, quae Smyrnae colitur, et Caelestem Selene deam Carthaginis.

7. Seruos heredes instituere possumus, nostros cum libertate, alios sine libertate, communes cum libertate uel sine libertate. 8. Eum seruum, qui tantum in bonis noster est, nec cum libertate heredem instituere possumus, quia Latinitatem consequitur, quod non proficit ad hereditatem capiendam.
9. Alienos seruos heredes instituere possumus eos tantum, quorum cum dominis testamenti factionem habemus. 10. Communis seruus cum libertate recte quidem heres instituitur quasi proprius pro parte nostra; sine libertate autem quasi alienus propter socii partem. 11. Proprius seruus cum libertate heres institutus si quidem in eadem causa permanerit, ex testamento liber et heres sit, id est necessarius; 12. quod si ab ipso testatore uiuente manumissus vel alienatus sit, suo arbitrio vel iussu emptoris hereditatem adire potest. sed si sine libertate sit institutus, omnino non consistit institutio. 13. Alienus seruus heres institutus si quidem in ea causa permanerit, iussu domini debet hereditatem adire; quod si uiuo testatore manumissus aut alienatus a domino fuerit, aut suo arbitrio aut iussu emptoris potest adire hereditatem.

an inheritance. 9. Slaves belonging to other people we can only institute heirs when we have testamentary capacity in reference to their masters. 10. A slave who is the common property of ourselves and others is duly instituted heir with a gift of liberty, inasmuch as he is ours so far as our own share in him is concerned; and without a gift of liberty, inasmuch as he is another's property so far as our partner's share in him is concerned. 11. Our own slave when instituted heir with a gift of liberty, becomes free and heir under the testament, i.e. “necessary” heir, provided only he continue in the same condition; 12. but if he be manumitted or alienated by the testator himself during his lifetime, he can enter upon the inheritance of his own accord or by order of his purchaser. If, however, he be instituted without a gift of liberty, the institution is altogether ineffectual. 13. Where a slave who is owned by some other person has been instituted heir, in the event of his continuance in the same condition he ought to enter upon the inheritance by his master's order; but if he be manumitted or alienated by his master during the testator's lifetime he will be able

1 XXII. 3.
2 D 28. 5. 31. pr.; D. 28. 5. 52.
3 Cujacius in his commentary ad loc. says: "If he is instituted with a gift of liberty, he becomes the sole property of the other partner (1. 18), and therefore the whole inheritance goes to that partner: if without a gift of liberty, the inheritance is divided between the partner and the heir of the testator."
4 Gaius, ii. 188.
to enter upon the inheritance either of his own accord or by order of his purchaser. 14. *Sui heredes* must be either instituted heirs or disinherited. Now *sui heredes* are the descendants whom we have under our *potestas*, whether natural or adopted; also a wife who is under *manus*, and a daughter-in-law who is under the *manus* of a son who is himself under *potestas*. 15. After-born descendants too, that is, those still in the womb, if they be such as would have been under our *potestas* if born, are classed among *sui heredes*. 16. The fact of one of the *sui heredes* being a son neither instituted heir nor disinherited by name, prevents the testament from being valid. 17. If other classes of descendants, a daughter for instance or a grandson, or a granddaughter, be passed over, the testament is valid, but they attach themselves therein to the appointed heirs; to *sui heredes*, for a proportional portion, to extraneous heirs for one-half the estate. 18. Any after-born descendants of either sex, if not named, by their after birth make void a testament which otherwise was valid. 19. Those who are in the womb we can

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1 Gaius, II. 189.
2 ib. II. 123, 138—143, 156, 159.
3 Sc. at the time the testament is made. See note on Gaius, I.
4 Gaius, II. 130—134, III. 4.
5 ib. II. 123.
6 "These omitted persons do not become heirs in opposition to the testament, but become heirs ex testamento as though tacitly instituted therein." Huschke.
7 Gaius, II. 124.
8 ib. II. 130—134.
heredes nobis futuri sint, possumus instituere heredes: si quidem post mortem nostram nascantur, ex iure ciuili; si uero uiuentibus nobis, ex lege Iunia.

20. Filius, qui in potestate est, si non instituatur heres, nominatim exheredari debet; reliqui sui heredes utriusque sexus aut nominatim aut inter ceteros. 21. Postumus filius nominatim exheredandus est; filia postuma ceteraque postumae feminae uel nominatim uel inter ceteros; dummodo inter ceteros exheredatis aliquid legetur. 22. Nepotes et pronepotes ceterique masculi postumi praeter filium uel nominatim uel inter ceteros cum adiectione legati sunt exheredandi; sed tamen est nominatim eos exheredari; et id observatur magis.

23. Emancipatos liberos utriusque sexus quamuis iure ciuili neque heredes instituere neque exheredare necesse sit, tamen praetor iubet, si non instituuntur heredes, exheredari, masculos institute as heirs, supposing they would have been sui heredes to us in case they had been born; by virtue of the civil law, if their birth take place after our death; but if in our lifetime, by virtue of the Lex Junia.

20. If a son who is under potestas be not instituted heir he ought to be disinherited by name; all other sui heredes of either sex may be disinherited either by name or in a general clause. 21. An after-born son must be disinherited by name, an after-born daughter and other after-born female descendants either by name, or in a general clause, provided, however, that some legacy be left to those who are disinherited in a general clause. 22. Grandsons and great-grandsons and other after-born males, except a son, must be disinherited either by name or in a general clause, with the addition of a legacy; it is, however, safer that they be disinherited by name, and that is the more usual practice.

23. As to emancipated children of either sex, although by the civil law it is not necessary either to institute them heirs or to disinherit them, yet the Praetor orders that unless they be instituted as heirs they shall be disinherited, if males by name, but if females (either by name) or in general clause, otherwise.

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1 Gaus, i. 177, 128.
2 Ib. ii. 130—131. It will be observed that Gaus insists on a male postumus being disinherited by name, and does not agree with Ulpian, that, unless he be a son, he may be disinherited inter ceteros with a legacy.
omnes nominatim, feminas uel inter ceteros; alioquin contra tabulas bonorum possessionem eis pollicetur.

24. Inter necessarios heredes, id est seruus cum libertate heredes scriptos, et suos et necessarios, id est liberos, qui in potestate sunt, iure ciuili nihil interest: nam utrique etiam inuiti heredes sunt. sed iure praetorio suis et necessarioris heredibus abstinere se a parentibus hereditate permittitur, necessarioris autem tantum heredibus abstinendi potestas non datur.

25. Extraneus heres siquidem cum cretione sit heres institutus, cernendo fit heres; si uero sine cretione, pro herede gerendo. 26. Pro herede gerit, qui rebus hereditariis tamquam dominus utitur, uelut qui actionem rerum hereditaria facit, aut seruus hereditarii cicari dat. 27. Cretio est certorum dierum spatium, quod datur instituto heredi ad deliberandum, utrum expetiat ei adire hereditatem nec ne, uelut: Titius he promises them possession of the goods as against the testament1.

24. Between heredes necessarii, that is, slaves appointed as heirs with a gift of liberty, and heredes sui et necessarii, that is, descendents under potestas, there is no distinction according to the civil law, for both these classes are heirs even against their will; but by the Praetorian law the privilege is accorded to heredes sui et necessarii of renouncing their ancestor's inheritance, whilst to heredes necessarii alone this privilege is not accorded2.

25. If an extraneous heir have been instituted "with cretion," he becomes heir by the act of cretion: but if he have been instituted "without cretion" he becomes heir by acting as heir3. 26. A man acts as heir who makes use of the effects belonging to the inheritance as though owner, as for instance where he puts up the effects to auction, or gives provisions to the slaves belonging to the inheritance4. 27. "Cretion" is a space of certain days which is given to the instituted heir for the purpose of deliberating whether it be advisable for him to enter upon the inheritance or not: as for instance (in the following direction): "Titius, be thou heir and make thy

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1 Gaius, II. 135.
2 Ib. II. 153, 156, 158. Heredes necessarii had however the beneficium separations, which enabled them to deduct any acquisitions they had made since the testator's death. Gaius, II. 55.
3 Ib. II. 166—168.
4 Cic. pro Qunct. 4. 15.
HERES ESTO CERNITOQVE IN DIEBVS CENTVM PROXIMIS, QVIBVS SCIERIS POTERISQVE. NISI ITA CREVERIS, EXHERES ESTO.

28. Cernere est uerba cretionis dicere ad hunc modum: QVOD ME MEIVS HEREDEM INSTITVIT, EAM HEREDITATEM ADEO CER-
NOQVE. 29. Sine cretione heres institutus si constituerit, nolle se heredem esse, statim excluditur ab hereditate, et amplius eam adire non potest. 30. Cum cretione uero heres institutus sicut cernendo fit heres, ita non aliter excluditur, quam si intra diem cretionis non creuerit: ideoque etiamsi constituerit, nolle se heredem esse, tamen, si supersunt dies cretionis, pænitentia actus cernendo heres fieri potest.

31. Cretio aut uulgars dicitur aut continua: uulgaris, in qua adiciuntur haec uerba: QVIBVS SCIERIS POTERISQVE; continua, in qua non adiciuntur. 32. Ei, qui uulgarem cretionem habet, dies illi duntaxat computantur, quibus scit, se heredem institutum esse, et potuit cernere ei vero, qui continuam habet cretion within the next one hundred days after thou hast knowledge and ability, but if thou dost not so make thy cretion, be disinhended. 28. To make cretion is to utter the words of cretion in this way: “Since Maevius has instituted me heir, I enter upon that inheritance and make my cretion for it.” 29. If he who has been instituted heir without cretion, have declared that he will not be heir, he is forthwith excluded from the inheritance, and has no further opportunity of entering upon it. 30. But in like manner as he who is instituted heir with cretion becomes heir by the act of cretion, so he is not excluded on any other ground than that of not having made his cretion within the period limited; and therefore although he may have decided that he will not be heir, yet if any portion of the limited period remains, by repenting this act and by making cretion he can become heir.

31. Creton is styled either common or continuous: common creton being the one in which these words are added, “after thou hast knowledge and ability;” continuous, the one in which they are not added. 32. Against him who has the common creton those days only are reckoned during which he knew that he was instituted heir and was able to decide, whilst

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1 Gaius, ii. 164—166.  2 Gaius, ii. 168.  3 Gaius, ii. 169.  4 Gaius, ii. 171.
creotionem, etiam illi dies computantur, quibus ignoravit se heredem institutum, aut scit quidem, sed non potuit cernere.

33. Heredes aut instituti dicuntur aut substituti: instituti, qui primo gradu scripti sunt; substituti, qui secundo gradu vel sequentibus heredes scripti sunt, velut: TITUS HERES ESTO CERNITOQVE IN DIEBVS PROXIMIS CENTVUM, QVIBVS SCIES POTERISQVE. QPUD N1 ITA CREVERIS, EXHERES ESTO. TVNC MEVVS HERES ESTO CERNITOQVE IN DlEBVS CENfVM et reliqua. similiter et deinceps substitui potest.

34. Si sub imperfecta cretione heres institutus sit, id est non adiectis his verbis: SI NON CREVERIS, EXHERES ESTO, sed si ita: SI NON CREVERIS, TVNC MEVVS HERES ESTO, cernendo quidem superior inferiorum excludit; non cernendo autem, sed pro herede gerendo in partem admittit substitutum: sed postea diuus Marcus constituit, ut et pro herede gerendo ex asse fiat heres.

against him who has continuous cretion those days also are reckoned during which he was unaware of having been instituted heir, or did know it but could not decide¹.

33. Heirs are said to be either instituted or substituted. Those are instituted who have been inscribed heirs in the first degree, those are substituted who are inscribed in the second or following degrees, thus: "Titus, be thou heir, and decide within the next one hundred days after thou shalt have knowledge and ability, but unless thou shalt so decide be disinherited. In that case, Maevius, be thou my heir, and decide within the next one hundred days, &c." And so in similar terms can successive substitutions be made².

34. If an heir have been instituted under an imperfect cretion, that is, without the addition of the words: "If thou dost not decide, be disinherited," but only in this form: "If thou dost not decide, then, Maevius, be thou heir," by the act of deciding the first heir excludes the one after him, whilst by not deciding, but by acting as heir, the first heir admits the substituted heir into a half of the inheritance³. The Emperor Marcus, however, afterwards enacted by a Constitution, that even by acting as heir the first-named person becomes

¹ Gaius, II. 172, 173. 
² Ib. II. 174. 
³ Ib. II. 177, 178. It is remark.
heir to the whole. But if he have neither decided nor acted as heir, he is excluded, and the substitute becomes heir to the whole inheritance.

XXIII. HOW TESTAMENTS ARE BROKEN.

1. A testament, though made in proper legal form, is invalidated in two ways, if it be broken, or if it be rendered ineffectual.

2. A testament is broken by a change, that is, if another testament have been afterwards made in proper legal form. So too it is broken by agnation, that is, when a suus heres is agnated who has been neither instituted heir nor disinherited in the form prescribed. 3. A suus heres is agnated either by afterbirth, or by adoption, or by coming under manus, or by succeeding to the position of a suus heres, as a grandson does to that of a deceased or emancipated son, or by manumission, that is, if a son who has been manumitted after a first or second mancipation has reverted to his father’s potestas.

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1 Gaius, II. 144, 131.  
2 *ib. II. 138.  
3 *ib. II. 139, III. 3.  
4 *ib. II. 133.  
5 *ib. II. 141, III. 6. As to the phrase "ex prima secundae mancipatione," see X. 1. Gaius, I. 132.
4. A testament is made ineffectual where a testator has suffered \emph{captis diminutis}, or where there is no surviving heir under a testament legally made.

5. When a person who has made a testament has been captured by the enemy, his testament is valid; if he return, by virtue of the rule of posthumity⁴; but if he die, by the Lex Cornelia⁵, which confirms his succession in like manner as if he had died in the state.

6. If a testament have been sealed with the seals of seven witnesses, though it may have become broken or ineffectual according to the civil law, yet the Praetor gives possession of the goods in accordance with the testator's directions to the appointed heirs, provided the testator was a Roman citizen and \emph{suus juris} at the time of his death⁶; and this possession such heirs take \emph{cum re}⁷; that is effectually, provided there be no one else legally heir.

7. To descendants who are under the age of puberty and still subject to \emph{potestas}, whether they be born or after-born, their ascendants can substitute heirs in two ways, viz. either in the form prescribed for making a substituted heir to extraneous

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¹ Gaius, II. 145.
² x. 4. Gaius, I. 129.
³ For further information as to this \emph{lex}, see D. 38. 1. 12, 28. 3. 15.
⁵ XXVIII. 13. Gaius, II. 148, 149.
⁶ III. 35–37.
Legacies. [XXIII. 8—XXIV. 1.

liberi, substitutus heres fiat; aut proprio iure, id est, ut si post mortem parentis heredes facti intra pubertatem decesserint, substitutus heres fiat. 8. Etiam exheredatis filiis substituere parentibus licet. 9. Quemuis, non aliter tamen inpuberi filio substituere quis heredem potest, quam si sibi heredem insti-
tuerit uel ipsum filium uel quemlibet alium. 10. Milites quo modo cunque fecerint testamenta, ualent, id est etiam sine legitima observatio. nam principalibus consti-
tutionibus permissum est illis, quo modo cunque uellent, quo modo cunque possent, testari. sed quod testamentum miles contra iuris regulam fecit, ita demum ualet, si uel in cas-
tris mortuos sit, uel post missionem intra annum.

TIT. XXIV. DE LEGATIS.

1. Legatum est, quod legis modo, id est imperatiue testa-
heirs, so that if the descendants do not become heirs the sub-
stitute shall become heir; or in a special manner, so that the
substitute shall become heir in case those who have been made
heirs should die under the age of puberty and after their
ascendant's death1. 8. Ascendants are allowed to make substi-
tutions even to disinherited children2. 9. A person cannot
substitute anybody as heir to a son under years of puberty
except he have previously instituted as heir to himself either
that son or some other one else3.

10. In whatever manner soldiers may have made their testa-
ments, they are valid, that is, even without any legal form. For
by certain Imperial Constitutions they have been privileged to
declare their intentions as they will and as they can4. But
where a soldier has made a testament contrary to the rule of
law, it is only valid if he have died either on service or within a
year after his discharge.

XXIV. ON LEGACIES.

1. A legacy is that which is left by testament in legal form,

2. Legamus autem quattuor modis: per uindicacionem, per damnationem, sinendi modo, per praeceptionem. 3. Per uindicacionem his uerbis legamus: DO LEGO, CAPITO, SVMITO, SIBI HABETO; 4. per damnationem his uerbis: HERES MEVS DAMNAS ESTO DARE, DATO, FACITO, HEREDEM MEVM DARE IVBEO; 5. sinendi modo ita: HERES MEVS DAMNAS ESTO SINERE LVCIVM TITIVM SVMERE ILLAM REM SIBIQUE HABERE; 6. per praeceptionem sic: LVCIVS TITIVS ILLAM REM PRAECIPITO.

7. Per uindicacionem legari possunt res, quae utroque tempore ex iure Quiritium testatoris fuerunt, mortis, et quam testamentum faciebat, praeterquam si pondere, numero, mensura continerantur; in his enim satis est, si vel mortis dumtaxat tempore eius fuerint ex iure Quiritium. 8. Per damnationem omnes res legari possunt, etiam quae non sunt testatoris, dummodo that is, imperatively. For those bequests which are made precatively are called fideicommissa.

2. Now we make legacies in four ways: by vindicatio, by damnatio, 'sinendi modo,' by praeceptio. 3. We give a legacy by vindication in these words: "I give and bequeath," "acquire," "take," "have for himself"; 4. by damnation in these words: "Let my heir be bound to give," "give," "do," "I order my heir to give," 5. by form of sufferance thus: "Let my heir be bound to suffer Lucius Titius to take that thing and to have it for himself"; 6. by praeception, thus: "Let Lucius Titius first take that thing." 7. By vindication those things can be left in legacy which were the testator's property in Quiritary right at both times, i.e. at the time of his death and at the time when he made his testament, unless they are dependent on weight, number or measure; for as to these it is sufficient if they were the testator's property in Quiritary right at the time of his death only. 8. All things can be left by damnation, even those which are not the testator's, provided, however, they are such as can be

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1 Gaius, II. 192.  
2 ib. II. 192.  
3 ib. II. 201.  
4 ib. II. 200.  
5 ib. II. 215.  
6 ib. II. 196.
Joint or Several Legacies. [XXIV. 9—12.

tales sint, quae dari possint. 9. Liber homo aut res populi aut sacra aut religiosa nec per damnationem legari potest, quoniam dari non potest. 10. Sinendi modo legari possunt res propriae testatoris et heredis eius. 11. Per praecpectionem legari possunt res, quae etiam per uindicationem.

11a. Si ea res, quae non fuit utroque tempore testatoris ex iure Quiritum, per uindicationem legati sit, licet iure ciuili non ualeat legatum, tamen senatusconsulto Neroniano confirmatur; quo cautum est, ut quod minus pactis uerbis legatum est, perinde sit ac si optimo iure legatum esse: optimum autem ius legati per damnationem est.

12. Si duobus eadem res per uindicationem legata sit, siue coniunctim, uliuit TITIO ET SEIO HOMINEM STICHVM DO LEGO, siue disiunctim, uliuit TITIO HOMINEM STICHVM DO LEGO, SEIO EVNDEM HOMINEM DO LEGO, concursu partes sint; non con-

given. 9. A free man, or anything belonging to the populus, or a thing that is sacred, or religious, cannot be legacied even by damnation, because it cannot be given. 10. By form of sufferance things belonging to the testator himself or his heir can be legacied. 11. Anything capable of being legacied by vindication can be legacied also by praecpection.

11a. Where a thing that was not the testator's property by Quinitary title at both (the above-mentioned) times has been left by vindication, though by the civil law the legacy is not valid, yet it is upheld by the senatus-consultum Neronianum; in which it was enacted that when a legacy is made by inapt words it shall be the same as if it had been made in the most advantageous form, and the most advantageous form of legacy is that by damnation.

12. Where the same thing has been left to two persons by vindication, whether jointly, as "I give and bequeath to Titius and Seius my slave Stichus," or severally, as for instance, "I give and bequeath to Titius my slave Stichus, I give and bequeath the same slave to Seius"; half goes to each, if they join in accepting; but in the case of one not accepting, his part used to accrue to the other according to the civil law: but

1 Gaius, II. 202, 203.  
2 Id. II. 4.  
3 Id. II. 210.  
4 Id. II. 210.  
5 Id. II. 197. Fragmenta Vat. § 85.  
6 Gaius, II. 199.
currente altero pars eius iure civili alteri addisceret: sed post legem Papiam Popēaeam non capientis pars caduca fit. 13. Si per damnationem eadem res duobus legavit, si quidem coniunctum, singulis partes debentur (et non capientis pars iure civili in hereditate remanet; nunc autem caduca fit); quodsi disiunctum, singulis solidum debetur.

14. Optione autem legati per uindicacionem data, uelut TITIUS HOMINEM OPTATO, ELEGITO, legatarii est electio, idemque est et si tacite data sit optio hoc modo: TITIO HOMINEM DARE, si uero per damnationem, uelut HERES MEVS DAMNAS ESTO TITIO HOMINEM DARE, heredis electio est quem uelit dare.

15. Ante heredis institutionem legari non potest, quoniam suis et potestas testamenti ab heredis institutione incipit. 16. Etiam post mortem heredis legari non potest, ne ab heredis since the passing the lex Papia Poppaea, the share of him who does not take becomes a lapse1. 13. Where the same thing has been left by damnation to two persons, if it be jointly, then half is due to each (and the share of the one who did not take used to remain the inheritance according to the civil law, but now becomes a lapse); but if it be severally, then the whole is due to them individually2.

14. In the case of an optional legacy being given by way of vindication, for instance in the words: “Titius, do thou choose or select a slave,” the selection is with the legatee; and the rule is also the same if the option be given tacitly3; in this form: “I give and bequeath a slave to Titius.” But if it be by way of damnation, for instance, “Let my heir be bound to give a slave to Titius,” the heir has a right to elect what slave he will give.

15. No legacy can be inserted before the institution of the heir, since the whole force and power of a testament start from the institution of the heir4. 16. Also no legacy can be left (to

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1 Gaius, II. 206—208.
2 ib. II. 205.
3 We follow Huschke’s conjectural reading. Cujacius suggests “si tacite legaverim hominem,” i.e. “if I have given by legacy a man without further specification,” which accords in sense with what Huschke supplies, although the meaning of tacite is somewhat different in the two cases.
4 Gaius, II. 229.
herede legari uideatur, quod iuris ciuilis ratio non patitur. in mortis autem heredis tempus legari potest, uelut CVM HERES MORIÆVR.

17. Poenæ causa legari non potest. poenæ autem causa legatur, quod coercendi heredis causa reliquitur, ut faciat quid aut non faciat, non ut ad legatarium pertineat, ut puta hoc modo: SI FILIAM TVAM IN MATRIMONIVM TITIO CONLOCVERIS, DECÆ MIVLÀ SEIO DATO.

18. Incertæ personæ legari non potest, ueluti QVICVMQVE FILIO MEO FILIAM SVAM IN MATRIMONIVM CONLOCVERIT, EI HERES MEVS TOT MIVLÀ DATO. sub certa tamen demonstratione incertæ personæ legari potest, uelut EX COGNATIS MEIS, QVI NVNC SVNT, QVI PRIMVS AD REVNV5 MEV5 VENERIT, EI HERES MEVS ILLVD DATO.

19. Neque ex falsa demonstratione, neque ex falsa causa take effect) after the heir's death, for fear that there be an appearance of a legacy being made chargeable on the heir of the heir, which the principles of the civil law do not allow. But a legacy can be left (to take effect) at the time of the heir's death, as in this form: "When the heir shall be dying."

17. A legacy cannot be left by way of penalty; and a legacy is by way of penalty when something is left for the purpose of constraining the heir to do or not to do an act, and not for the purpose of giving something to the legatee, as for instance in this way: "If thou bestow thy daughter in marriage on Titius, give 10,000 sesterces to Seius."

18. A legacy cannot be left to an uncertain person; for instance, thus: "Whosoever shall have bestowed his daughter in marriage on my son, do thou, my heir, give him so many thousand sesterces." A legacy can however be left to an uncertain person under a definite description, for instance thus: "Do thou, my heir, give such and such a thing to him of my relations now existing who shall first come to my funeral."

19. A legacy is not rendered ineffectual either by a false

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1 Gaius, II. 232.
2 Ib. II. 335. This rule, as well as those in the two preceding paragraphs, Justinian abolished; although he retained the rule that heirs could not be charged with a penalty on non-performance of an impossible, immoral or illegal act.
See Inst. II. 20. 34—36.
3 Gaius, II. 238.
Invalid Legacies.

A legacy is infirmatus if there is a false demonstration. A false demonstration is such as this: "The estate which I bought of Titius I give and bequeath to Titius," when in fact the estate was not bought of Titius. A false cause is as follows: "I give and bequeath to Titius that estate, in consideration of his having managed my business," whereas Titius never had managed the testator's business.

20. A legatario legari non potest. 21. Legatum ab eo tantum dari potest, qui heres institutus est: ideoque filio familiae herede instituto uel seruo, neque a patre neque a domino legari potest. 22. Heredi a semet ipso legari non potest. 23. Ei, qui in potestate, manu mancipioue est scripti heredis, sub conditione legari potest, ut requiratur, quo tempore dies

description or by a false consideration. A false description is such as this: "The estate which I bought of Titius I give and bequeath to Titius," when in fact the estate was not bought of Titius. A false consideration is as follows: "I give and bequeath to Titius that estate, in consideration of his having managed my business," whereas Titius never had managed the testator's business.

20. A legacy cannot be charged upon a legatee. 21. A legacy can only be charged upon the person who has been appointed heir in a testament; and therefore if a filius-familias or a slave be instituted heir, a legacy cannot be charged upon his father or his master. 22. A legacy cannot be left to the heir, charged upon himself. 23. A legacy can be left conditionally to a person who is under the potestas, manus or mancipium of the appointed heir; so that the question to be asked will be whether he is not under the potestas of the heir at the

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1 Just Inst. n. 20. 30 and 31.
2 Gais. n. 160, 271. The words "heres institutus est" are supplied by Huschke; Cujacius suggested "ex sua persona institutus est."
3 Sc. it cannot be charged upon them, although they get the inheritance by consenting to the son's or slave's acceptance. That this is the meaning is plain from a strikingly analogous dictum in D. 48. 6. 8. 1.
4 An example of the application of this rule is given in D. 30. 1. 116. 1. A and B are coheirs of an estate in equal portions, and a specific field is given as a legacy to B, C and D: B's share of that field will be one-sixth, C's or D's fivetwelfths. For B, C, D conjoin in dividing the moiety of the field which appertained to A as heir; but the other moiety, appertaining to B as heir, C and D alone divide; for B cannot have a legacy charged upon himself, and so as to that moiety the legacy is to C and D only.
A legacy can be left even without condition to a person in whose potestas, manus or mancipium the appointed heir is; but if he become heir through his means he cannot take the legacy.  

25. Just as separate things can be legacied so can an aggregate of things, that is to say a share, which species of legacy is called a "partition;" as for instance in this way: "Let my heir share and divide my inheritance with Titius;" in which case half the property is regarded as legacied to Titius: but of course other shares can be legacied, as a third or a fourth.  

26. By the civil law a legacy can be left of the usufruct of any things which admit of their usufruct being enjoyed without injury to their substance; and this usufruct may either be of separate things or of several things together.  

27. By a senatus-consultum it was provided that even though the usufruct legacied be that of things valuable for consumption only, as for example wine, oil, corn, the things are to be delivered to the

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1 Gaius, II. 244.  
2 The italicized words in the text are supplied by Huschke. Lachmann and Bocken, without venturing on so bold an emendation, simply suggest the removal of the word non, which is indistinct in the MS.  
This had been proposed by Cujacius previously. With either alteration the doctrine agrees with Gaius, II. 245, D. 30. 1. 25, D. 30. 1. 91. pr. D. 36. 2. 17, &c.  
3 Gaius, II. 254.
traeantur, cautionibus interpositis de restituendis eis, cum ususfructus ad legatarium pertinere desierit.

28. Civitatibus omnibus, quae sub imperio populi Romani sunt, legari potest; idque a dìuo Nerua introductum, postea a senatu auctore Hadriano diligentius constitutum est.

29. Legatum, quod datum est, admodum potest uel eodem testamento, uel codicillis testamento confirmatis; dum tamen eodem modo adimatur, quo modo datum est.

30. Ad heredem legatarii legata non aliter transeunt, nisi si iam die legatorum cedente legatarius decesserit. 31. Legatorum, quae pure uel in diem certum relictà sunt, dies cedit antiquo quidem iure ex mortis testatoris tempore; per legem autem Papiam Poppaeam ex apertis tabulis testamenti; eorum uero, quae sub condicione relictà sunt, cum conditio extuterit.

32. Lex Falcidia iubet, non plus quam dodrantem totius legatee, but security must be provided for their restitution when the usufruct shall cease to belong to the legatee. 32. A legacy can be left to any of the civic communities which exist under the sway of the Roman people; a privilege which was introduced by the late emperor Nerva, and was afterwards more definitely established by the senate at the instance of Hadrian.

29. A legacy when given can be adeemed either by the same testament, or by codicils confirmed by the testament, provided, however, that the mode of its ademption be the same as of its bequest.

30. Legacies do not pass to the heir of the legatee except the death of the legatee take place after the vesting of the legacies. 31. The vesting of legacies left unconditionally, or (to be retained) until a certain day, dated from the death of the testator under the old jurisprudence; but by the Lex Papia Poppæae from the opening of the tablets of the testament; where, however, the legacies are left conditionally, the vesting dates from the time of the fulfilment of the condition.

32. The Lex Falcidia forbids more than three-fourths of

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1 Just. Inst. II. 4. 2.
2 Though an inheritance cannot. XXII. 5.
patrimonii legari, ut omnimodo quadrans integer apud heredem remaneat.

33. Legatorum perperam solutorum repetitio non est.

TIT. XXV. DE FIDEICOMMISSIS.

1. Fideicommissum est, quod non ciuilibus uerbis, sed pre­catiue re­linquitur, nec ex rigore iuris ciuils proficiscitur, sed ex uoluntate datur relinquuntis. 2. Verba fideicommissorum in usu fere haec sunt: FIDEICOMMITTO, PETO, VOLO DARI et simi­lia. 3. Etiam nutu relinquui posse fideicommissum usu recep­tum est. 4. Fideicommissum relinquere possunt, qui testa­mentum facere possunt, licet non fecerint: nam etiam intestato quis moriturus fideicommissum relinquere potest. 5. Eae res per fideicommissum relinquui possunt, quae per damnationem legari possunt. 6. Fideicommissa dari possunt his, qui bus le-

an inheritance to be expended in legacies, so that a clear fourth may always remain with the heir.

33. There is no right of recovering legacies wrongly paid.

XXV. ON FIDEICOMMISSA.

1. "A fideicommissum is a devise expressed not in strict legal phraseology but by way of request; and does not take effect by force of the Civil Law, but is given in compliance with the wish of the person leaving it. 2. The phraseology of fideicommissa generally employed is such as this: "I commit to your good faith, I ask, I wish to be given," and so forth. 3. It has been established by usage that a fideicommissum can be given even by a nod. 4. Those who can make a testament, although they have not made one, can leave a fideicommissum; for even a man about to die intestate can leave a fideicommissum. 5. Those things can be left by fideicommissum which can also be left as legacies "by damnation." 6. Fideicommissa can be

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1 Gaius, I. 227.
2 Ib. II. 283. Huschke by com­parison with this passage of Gaus suggests that the reading should be "per damnationem perperam" instead of "perperam."
3 Ib. II. 249.
4 Ib. II. 369.
5 Ib. II. 270.
6 XXIV. 8, 25. Gaius, II. 160—
gari potest. 7. Latini Ianiani fideicommissum capere possunt, licet legatum capere non possint. 8. Fideicommissum et ante heredis institutionem, et post mortem heredis, et codicillis etiam non confirmatis testamento dari potest, licet ita legari non possit. 9. Item Graece fideicommissum scriptum ualet, licet legatum Graece scriptum non ualeat. 10. Legatarii uel filio, qui in potestate est, seruoque heredibus institutis, seu his legatum sit, patris uel domini fidei committi potest, quamuis ab eo legari non possit. 11. Qui testamento heres institutus est, codicillis etiam non confirmatis rogari potest, ut hereditatem totam uel ex parte alii restituat, quamuis directo heres institui ne quidem confirmatis codicillis possit. 12. Fideicommissa non per formulam petuntur, ut legata, sed cognitione Romae quidem consulum aut praetoris, qui fideicommissarius uocatur; in prouincis uero praesidis prouinciae. 13. Poenae given to the same persons to whom legacies can be left. 7. Junian Latins can take a fideicommissum, though they cannot take a legacy. 8. A fideicommissum can be given both before the institution of the heir and (to take effect) after the death of the heir, and also by codicils unconfirmed in a testament; though legacies cannot be left in this way. 9. Again a fideicommissum written in Greek is valid, though a legacy written in Greek is not. 10. If the son of a legatee under his potestas, or his slave be appointed heir, or if a legacy be left to them, a fideicommissum can be charged upon the father or owner although a legacy cannot be so charged. 11. A person who has been instituted as testamentary heir can be requested by codicils, though unconfirmed, to restore the inheritance either wholly or in part to another, although an heir cannot be instituted directly even by confirmed codicils. 12. The process for recovering fideicommissa is not, like that for legacies, by formula, but at Rome falls under the jurisdiction of the Consuls or of the Praetor called Fideicommissary Praetor; in the provinces under that of their presidents. 13. Not even fideicom-
causa, uel peregrino, uel incertae personae ne quidem fideicommissa dari possunt.

14. Is, qui rogatus est aliis restituere hereditatem, lege quidem Falcidia locum non habente, quoniam non plus puta quam dodrantem restituere rogatus est, ex Trebelliano senatusconsulto restituit, ut ei et in eum dentur actiones, cui restituta est hereditas. lege autem Falcidia interueniente, quoniam plus dodrantem uel etiam totam hereditatem restituere rogatus est, ex Pegasiano senatusconsulto restituit, ut deducta parte quarta ipsi, qui scriptus est heres, et in ipsum actiones conseruentur; is autem, qui recipit hereditatem, legatarii loco habeatur. 15. Ex Pegasiano senatusconsulto restituta hereditate commoda et incommoda hereditatis communicantur inter heredem et eum, cui reliquae partes restitutae sunt, interpositis stipulationibus ad exemplum partis et pro parte stipulationum. partis autem et pro parte stipulationes proprie dicuntur, quae de lucro et

missa can be given by way of penalty, or to a foreigner, or to an uncertain person.

14. Where a person has been requested to hand over the inheritance to another, supposing the Lex Falcidia be not in question, because he has not been asked to hand over more than three-fourths, he hands it over under the senatusconsultum Trebellianum, so that all actions are granted for and against him to whom the inheritance has been handed over. But supposing that the Lex Falcidia does apply, in consequence of his having been requested to hand over more than three-fourths or even the whole of the inheritance, then he hands it over under the senatusconsultum Pegasianum, so that, after the deduction of the fourth, all actions are maintained for and against him who has been appointed heir: whilst he who receives the inheritance is regarded as being in the position of legatee. 15. If the inheritance have been handed over under the senatusconsultum Pegasianum, the method whereby the advantages and disadvantages of the inheritance are shared between the heir and the person to whom the residue has been handed over, is by stipulations being entered into after the model of the stipulations "of and for a part." Now those stipulations are properly called

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1 Gaius, II. 285, 287, 288.  
2 ib. II. 253—257.
damno communicando solent interponi inter heredem et legatarium partiarum, id est, cum quo partiri ius est heres. 16 Si heres damnosam hereditatem dicat, cogitur a praetore adure et restituere totam, ita ut ei et in eum, qui recipit hereditatem, actiones dentur, proinde atque si ex Trebelliano senatus-consulto restituta fuisset. idque ut ita fiat, Pegasiano senatus-consulto cautum.

17. Si quis in fraudem tacitam fidem adcommodauerit, ut non capienti fideicommissum restituat, nec quadrantem eum deducere senatus censuit, nec caducum uindicare ex eo testamento, si liberos habeat.

18. Libertas dari potest per fideicommissum.

**TIT. XXVI. DE LEGITIMIS HEREDIBVS.**

1. Intestatorum ingenuorum hereditates pertinent primum

"of and for a part" which are usually entered into, for the object of dividing the gain and loss, between the heir and a partary legatee¹, i.e. a person with whom the heir is ordered to share the inheritance. 16. If the heir declare the inheritance to be rumous, he is compelled by the Praetor to enter upon it and hand over the whole, so that all actions may be granted for and against the person receiving the inheritance, just as though it had been handed over under the senatus-consultum Trebellianum, and provisions to this effect have been enacted by the senatus-consultum Pegasianum².

17. If any one have fraudulently given a secret promise to hand over a fideicommissum to a person incapable of taking it, the senate has ruled that he can neither deduct a quarter, nor claim a lapse under that testament, supposing that he has children³.

18. Liberty can be given by means of a fideicommissum⁴.

**XXVI. ON STATUTABLE HEIRS.**

1. The inheritances of intestate free-born persons belong
ad suos heredes, id est liberos, qui in potestate sunt, ceterosque, qui in liberorum loco sunt; si sui heredes non sint, ad consanguineos, id est fratres et sorores ex eodem patre; si nec hi sint, ad reliquos agnatos proximos, id est cognatos uirilis sexus, per mares descendentes, eiusdem familiae: id enim cautum est lege duodecim tabularum hac: si intestato moritur, cui suus heres nec est, agnatus proximus familiam habeto.

2. Si defuncti sit filius, et ex altero filio iam mortuo nepos unus uel etiam plures, ad omnes hereditas pertinet, non ut in capita diuidatur, sed in stirpes, id est, ut filius solus mediam partem habeat et nepotes, quotquot sunt, alteram dimidiam: aequum est enim, nepotes in patris sui locum succedere ct eam partem habere, quam pater eorum, si uiueret, habiturus esset.

first to their sui heredes, that is, their descendants under their potestas and all other persons in the position of descendants; then, if there be no sui heredes, to the consanguines, that is, brothers and sisters begotten of the same father: then, failing these also, to the other agnates of nearest degree, that is, relations of the male sex, tracing their descent through males and of the same family; for this was enacted by a law of the Twelve Tables in the following words: "If any one die intestate without any suus heres, then let the nearest agnate have the estate."

2. If the deceased leave one son and also one grandson, or even more, born of another son deceased, the inheritance belongs to them all, not in such manner as to be divided per capita, but per stirpes, that is, that the surviving son have one half share and the grandsons, however many, have the other half: for it is fair that the grandsons should succeed to their father's place and have that share which their father would have, were he living.

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1 Gaius, II. 1-5, 9-11.
2 Tab. v. I. 4.
3 Huschke is of opinion that a paragraph has been omitted between the words "habeto" and "Si defuncti"—which he supplies thus: "Si agnatus defuncti non sit, eadem lex duodecim tabularum gentiles ad hereditatem uocat his verbis: 'si agnatus nec est, gentiles familiam habento.'
4 Nunc nec gentiles nec gentilicia iura in usu sunt." i.e. "If there be no agnate of the deceased, the same law of the Twelve Tables calls the gentiles to the inheritance in the following words; 'If there be also no agnate, let the gentiles have the estate.' At the present day neither gentiles nor the rules regarding gentiles are recognized." See Gaius, III. 17.
5 Gaius, III. 8.
XXVI. 3—7.] Division per Capita.

3. Quamdiu suus heres speratur heres fieri posse, tamdiu locus agnatis non est; uelut si uxor defuncti praegnans sit, aut filius apud hostes sit.

4. Agnatorum hereditates dividuntur in capita; uelut si sit fratris filius et alterius fratris duo pluresue liberi, quotquot sunt ab utraque parte personae, tot fiunt portiones, ut singuli singulas capiant. 5. Si plures eodem gradu sint agnati, et quidam eorum hereditatem ad se pertinere noluerint, uel antequam adierint, decesserint, eorum pars ad accrescit his, qui adierint: quod si nemo eorum adierit, ad insequentem gradum ex lege hereditatis non transmittitur, quoniam in legitimis hereditatis successio non est. 6. Ad feminas ultra consanguineorum gradum legitima hereditas non pertinet; itaque soror fratri or sororius legitimae heres fit, amita uero uel fratris filia et deinceps legitima heres non fit. 7. Ad liberos matris intestatae hereditas in manum conversione ex lege duodecim tabularum non pertine-

3. So long as there is any expectation of a suus heres possibly becoming heir, there is no place for the agnates, as where the wife of the deceased is pregnant, or his son is in the enemy's hands. 4. The inheritances of agnates are divided per capita; for instance, if there be a brother's son and two or more children of another brother, whatever be the number of persons in the two branches taken together, the inheritance is divided into that number of portions, so that each person may take one. 5. If there be several agnates in the same degree, supposing some of them to be unwilling that the inheritance should belong to them, or to have died before their entry upon it, their share accrues to those who have entered; but if none have done so, the inheritance is not in law transmissible to the next degree, because there is no representation among statutable heirs. 6. A statutable inheritance does not belong to women beyond the degree of consanguineae, therefore a sister becomes statutable heir to her brother or sister, but a father's sister or a brother's daughter, &c. does not become statutable heir. 7. According to the law of the Twelve Tables the inheritance of an intestate mother did not belong to her descendants, unless the marriage had been with conventio in manum, because women

1 Gaius, III. 13. 2 Jb. III. 16. 3 Jb. III. 12, 22. 4 Jb. III. 14, 23.
bat, quia feminae suos heredes non habent; sed postea imperatorem Antoninum et Commodum oratione in senatu recitata id actum est, ut matrum legitimae hereditates ad filios pertineant, exclusis consanguineis et reliquis agnatis. 8. Intestati filii hereditas ad matrem ex lege duodecim tabularum non pertinet; sed si ius liberorum habeat, ingenua trium, libertina quattuor, legitima heres fit ex senatusconsulto Tertulliano; si tamen ei filio neque suus heres sit quie inter suos heredes ad bonorum possessionem a praetore uocatur, neque pater, ad quem lege hereditas bonorumue possessione cum re pertinet, neque frater consanguineus: quod si soror consanguinea sit, ad utrasque pertinere iubetur hereditas.

have no sui heredes; but at a later period the rule was made by an oration of the Emperors Antoninus and Commodus delivered in the senate, that the statutable inheritances of mothers should belong to their sons, to the exclusion of the consanguinei and the other agnates'. 8. The inheritance of an intestate son does not belong to his mother by virtue of any law of the Twelve Tables; but if she have the prerogative of children, which in the case of a free-born woman is acquired by three, in that of a freedwoman by four, then she is made statutable heir by virtue of the senatusconsultum Tertullianum; provided only that her son have neither a suus heres nor any one who is called by the Praetor amongst the sui heredes to the possession of the goods, nor a father to whom in law the inheritance or the possession of the goods belongs effectually, nor a brother by the father's side; but if he have a sister by the father's side, then the inheritance is directed to belong to both (viz. the mother and this sister)².

¹ Gaius gives the old law in III. 24, without any mention of the enactment of Antoninus and Commodus, commonly known by the name of the S. C. Orphitanum; but Justinian devotes a title of his Institutes (III. 4) to the exposition of that senatusconsultum.
² Gaius III. 23, 24. In Gaius, however, there is no mention of the S. C. Tertullianum. That S. C. forms the subject of a title in Justinian's Institutes (III. 3) where full information may be found. The jus liberorum was conferred by the Lex Papia Poppaea, A.D. 10; see App. (G). As to the phrase "cum re" see Gaius, II. 148, 149; III. 35—37.
XXVII. i—XXVIII. i. **Successions of Freedmen.**

**TIT. XXVII. DE LIBERTORVM SVCESSIONIBVS** [UEL BONIS].

1. Libertorum intestatorum hereditas primum ad suos heredes pertinet; deinde ad eos, quorum liberti sunt, uestrum patronum, patronam liberosue patroni. 2. Si sit patronus et alterus patroni filius, ad solum patronum hereditas pertinet. 3. Item patroni filius patroni nepotibus obstat. 4. Ad liberos patronorum hereditas defuncti pertinet ita ut in capita, non in stirper, diuidatur.

5. Legitimae hereditatis ius, quod ex lege duodecim tabularum descendit, capitis minutione anmittitur. ***

**TIT. XXVIII. DE POSSESSIONIBVS DANDIS.**

1. Bonorum possessio datur aut contra tabulas testamenti, aut secundum tabulas, aut intestati.

**XXVII. ON THE SUCCESSIONS (OR GOODS) OF FREEDMEN.**

1. The inheritance of intestate freedmen belongs first to their sui heredes; then to those whose freedmen they are, such as their patron or patroness, or their patron’s descendants. 2. Should there be a patron and the son of another patron, the inheritance belongs to the patron alone. 3. The son of a patron again is preferred to the grandsons of a patron. 4. The inheritance of the deceased (freedman) on going to the descendants of the patron is divisible per capita and not per stirpes.

5. The right of statutory inheritance originating from the law of the Twelve Tables is lost by capitis diminutio.

**XXVIII. ON GIVING POSSESSIONS.**

1. Possession of goods is granted either in opposition to, or in accordance with the testamentary directions, or upon an intestacy.

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1 Gaius, III. 40.
2 ib. III. 60.
3 ib. III. 61.
4 Tab. v. 1. 8.
5 Gaius, III. 51. The other statutory inheritances followed the same rule, Gaius, III. 51, 57. 6 Gaius in his Commentaries says little on the topic of Bonorum Possessio, giving as his reason in III. 33 that he had written a special treatise on the subject, which we may conjecture to be his "Commentari ad Edictum Urbicum."
2. Contra tabulas bonorum possessori datur, liberis vel emancipatis testamento praeteritis, licet legitimo iure non ad eos pertinent hereditas. 3. Bonorum possessio contra tabulas liberis tam naturalibus quam adoptiuis datur; sed naturalibus quidem etiam emancipatis, non tamen et illis, qui in adoptiua familia sunt; adoptiuis autem his tantum, qui in potestate manserunt. 4. Emancipatis liberis ex edicto datur bonorum possessorio, si parati sint cauere fratribus suis, qui in potestate manserunt, bona, quae moriente patre habuerunt, se conlaturos.
5. Secundum tabulas bonorum possessorio datur scriptis hereditibus, scilicet si eorum, quibus contra tabulas competit, nemo sit, aut petere voluerit. 6. Etiam si iure ciuili non ualeat testamentum, forte quod familiae mancipatio vel nuncupatio defuit, si signatum testamentum sit non minus quam septem testium ciuium Romanorum signis, bonorum possessorio datur.

2. *Bonorum possessorio* in opposition to the testament in opposition to the testament is given to descendants, even if emancipated, who have been passed over in the testament, though by statutable rules the inheritance does not belong to the latter. 3. *Bonorum possessorio* in opposition to the testamentary dispositions is given to descendants both actual and adopted: and to actual descendants even when emancipated, though not also to those who are in an adopted family; but to those adopted children alone who have remained in the potestas (of the adopter). 4. The *Bonorum possessorio* is granted to emancipated descendants by virtue of the Edict, if they are prepared to give security to their brothers who have continued under potestas, that they will bring into the division the property they had at the death of their father.

5. *Bonorum possessorio* in accordance with the testamentary dispositions is granted to the appointed heirs, provided there be no one to whom possession belongs in opposition to the dispositions, or provided none of these wish to claim it. 6. And further if a testament be invalid according to the Civil Law, because, perhaps, the emancipation of the estate, or the nuncupation was wanting, still *bonorum possessorio* is granted if the testament have been sealed with the seals of not less than seven witnesses, Roman citizens.

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1 D. 37. 4.  
2 XXII. 23.  
3 XXIII. 6.  
4 Gaius, II. 119.
7. Intestati datur bonorum possessio per septem gradus: primo gradu liberis; secundo legitimis heredibus; tertio proximis cognatis; quarto familiae patroni; quinto patrono, patronae, item liberis uel parentibus patroni patronaeue; sexto uiro, uxori; septimo cognatis manumissoris, quibus per legem Furiam plus mile asses capere licet: et si nemo sit, ad quem bonorum possessio pertinere possit, aut sit quidem, sed ius suum omiserit, populo bona deferuntur ex lege Iulia caducaria. 8. Liberis bonorum possessio datur tam his, qui in potestate usque in mortis tempus fuerunt, quam emancipatis; item adoptiuis, non tamen etiam in adoptionem datis. 9. Proximi cognati bonorum possessione accipiunt non solum per feminini sexus personam cognati, sed etiam agnati capite diminuti: nam licet legitimum

7. Bonorum possessio upon an intestacy is granted through seven degrees: in the first degree to descendants; in the second to statutable heirs; in the third to the nearest relations; in the fourth to the family of the patron; in the fifth to the patron or patroness, and to the descendants or ascendants of the patron or patroness; in the sixth to the husband or wife; in the seventh to the relations of the manumittor, who are allowed by the Lex Furia to take more than one thousand asses; and if there be no one, to whom the bonorum possessio can belong, or if there be such an one, but he have abandoned his right, the property devolves upon the populus by virtue of the Lex Julia concerning lapses. 8. The bonorum possessio "to descendants" is conferred both upon those who remained under potestas up to the time of the ascendant's death, and upon those who have been emancipated; likewise upon those received in adoption, but not upon those given in adoption. 9. Not only do those persons receive the bonorum possessio "as nearest relation," who are related through a person of the female sex, but also such agnates as have undergone a capitis diminutio: for although by the capitis diminutio

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1 The first, second, third, and sixth degrees of intestate succession here named, form the subject of separate titles of the Digest, viz. 38. 6, 38. 7, 38. 8, 38. 11. The other degrees were rendered superfluous by Justinian's new regulations regarding patronage, as he himself tells us in Inst. III. 9. 5. See App. (K).

2 I. 2.

3 Gaius II. 150.


5 XXVII. 5, Gaius, III. 27, 30.
ius agnationis capitis minutione amiserint, natura tamen cognati manent.

10. Bonorum possessio datur parentibus et liberis intra annum, ex quo petere potuerunt; ceteris intra centum dies.

11. Qui omnes intra id tempus si non petierint bonorum possessio, sequens gradus admittitur, pennde atque si superiores non essent; idque per septem gradus fit.

12. Hi, quibus ex successorio edicto bonorum possessio datur, heredes quidem non sunt, sed heredis loco constituuntur beneficio praetoris. ideoque seu ipsi agant, seu cum his agatur, ficticiis actionibus opus est, in quibus heredes esse finguntur.

13. Bonorum possessio aut cum re datur, aut sine re: cum re, cum is, qui accipit, accipit cum effectu, ut bona retineat; sine re, cum alius iure ciuili eunincere hereditatem possit; ueluti si sit

they have lost the statutable right of agnation, they still remain relations by nature.

10. *Bonorum possessio* is granted to the ascendants and descendants within one year from the time when they became able to make their claims; to all other persons within one hundred days. 11. And when any of these classes have not made their claim within this fixed time, the next degree is admitted, just as if those preceding were non-existent, and this is the case throughout the seven degrees.

12. Those to whom *bonorum possessio* is granted by virtue of the successory edict are not indeed heirs, but are by the Praetor's grant placed in the position of heirs; and therefore whether they are themselves suing or are being sued, fictitious actions must be employed in which they are feigned to be heirs.

13. The grant of *bonorum possessio* is made either "with benefit" or "without benefit." With benefit, when the recipient receives effectively, so that he can retain the property; without benefit, when some one else can by help of the Civil Law wrest the inheritance from him. For instance, if there be an heir appointed in a testament, the *bonorum possessio* on intestacy is "without benefit," because this appointed heir can

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1 Gaius, III. 33, IV. 34.
8 ib. III. 35—37. See also above, XXIII. 6, XXVI. 8.
Successions of Freedmen.

scriptus heres, intestati bonorum possessio sine re est quoniam scriptus heres eunice hereditatem iure legitimo potest.

TIT. XXIX. DE BONIS LIBERTORVM.

I. Cius Romani liberti hereditatem lex duodecim tabularum patrono defert, si intestato sine suo herede libertus descessit: ideoque suae testamento facto decedat, licet suus heres ei non sit, seu intestato, et suus heres ei sit, quamquam non naturalis, sed uxor puta, quae in manu fuit, vel adoptitus filius, lex patrono nihil praestat. sed ex edicto praetoris, seu testato libertus moriatur, ut tamen aut nihil aut minus quam partem dimidiam bonorum patrono relinquat, contra tabulas testamenti partis dimidii bonorum possessio illi datur, nisi libertus aliquem ex naturalibus liberis successorem sibi relinquat; siue intestato decedat, et uxorem forte in manu vel adoptium filium relinquat, aeque partis mediae bonorum possessio contra suos heredes patrono datur.

by his statutable right wrest the inheritance from the bonorum possessor.

XXIX. ON THE PROPERTY OF FREEDMEN.

I. A law of the Twelve Tables\(^1\) confers the inheritance of a Roman citizen freedman upon the patron, where the freedman has died intestate without leaving a suus heres\(^2\): and therefore if he either die after making a testament, although leaving no suus heres, or die intestate, and leave a suus heres, even one not connected by birth, but a wife, for instance, who has been under his manus, or an adopted son, the law abovementioned grants nothing to the patron. But by virtue of the Praetor's edict if, on the one hand, the freedman die testate, bequeathing nothing or less than half to his patron, possession of one half of the goods is granted to the patron in spite of the testamentary directions, unless the freedman leave as his successor some one of his actual descendants; and if, on the other hand, he die intestate and leave, say, a wife under manus, or an adopted son, possession of one half of the goods is in the same way granted to the patron to the detriment of the sui heredes\(^3\).

\(^1\) Tab. v. l. 8.  \(^2\) XXVII. i. Gaius, iii. 40.  \(^3\) ib. iii. 41.
2. In bonis libertae patrono nihil iuris ex edicto datur. itaque seu testata decedat, id tantum iuris patronus habet, quod ei testamento, ipso tutore autore, datum est; seu intestata moritur liberta, semper ad eum hereditas pertinet, licet liber sint libertae, qui quoniam non sunt sui heredes matris, non obstant patrono. 3. Lex Papiae Poppaea postea libertas quattuor liberorum iure tutela patronorum habuit; et cum intulerit, iam posse eas sine auctoritate patronorum testari, prospexit, ut pro numero liberorum libertae superstitum iuris patroon debatur. 4. Liberi patroon iuris sexus eadem iura in bonis libertorum parentum suorum habent, quam ipse patronus.

5. Feminae uero ex lege quidem duodecim tabularum idem ius

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1 XI. 27. Gaius, I. 192. We have filled up the lacuna according to Huschke's conjecture. Lachmann suggested: "sive auctor ad testamen tum facendum factus sit," a reading approved of by Goschen and Bock. Something is plainly wanting to make the sentence complete, and the seu before intestata cannot grammatically stand alone, but indicates that another seu either precedes or follows. Hence some editors have treated the sentence in the MS. as the first of the alternatives and supplied the other thus: "itaque seu intestata moritur liberta, semper ad eum hereditas pertinet, licet liber sint libertae, quoniam non sunt sui heredes matris seu testamentum juris facert, heres scriptus obstat patrono." The meaning of the passage is the same whichever way it is amended, for the testament of the freedwoman could only be legal if made with the consent of the patron. See Gaius, III. 43.

2 Ib. III. 43.
3 Ib. I. 194.
4 Ib. III. 44.
5 Ib. III. 45.
habent, atque mascoli patronorum liberi; contra tabulas autem testamenti liberti aut ab intestato contra suos heredes non naturales bonorum possessio eis non competit; sed si ius trium liberorum meruerint, etiam haec iura ex lege Papia Poppaea nanciscuntur. 6. Patronae in bonis libertorum illud ius tantum habebant, quod lex duodecim tabularum introduxit; sed postea lex Papia patronae ingenuae duobus liberis honoratae, libertinae tribus, id iuris dedit, quod patronus habet ex edicto. 7. Item ingenuae trium liberorum iure honoratae eadem lex id ius dedit, quod ipsi patrono tribuit.****

Tables¹ female descendants have just as much right as male descendants of patrons, but bonorum possessio does not appertain to them either in opposition to the testamentary directions of a freedman, or on his intestacy as against those sui heredes who are not such by blood; yet if they have obtained the prerogative of three children, they acquire these rights also by virtue of the Lex Papia Poppaea.²

6. Patronesses used to have only such rights over their freedmen's property as the law of the Twelve Tables established; the Lex Papia Poppaea, however, afterwards gave to a patroness of free-birth³ enjoying the privilege of two children, and to a freedwoman enjoying that of three, the same rights that the patron has under the Edict.⁴ So too the same lex gave to a woman of free-birth enjoying the privilege of three children all the rights which it conferred upon the patron himself.⁵

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¹ Tab. v. l. 8, previously referred to in § 1.
² Gaius, III. 46, 47.
³ The word ingenuae is not in the MS. but was inserted by Cujacius and adopted by succeeding editors in accordance with the words of Gaius referred to in the next note.
⁴ Gaius, III. 49, 50. But observe that Gaius says that the Lex Papia Poppaea did not give to a free-born patroness having two children or to a freedwoman patroness having three children the full rights of a patron, but eadem fori iura, allowing the complete rights only to a free-born patroness having three, or a freedwoman patroness having four children. This agrees with Ulpian's statement that the one class had only the rights under the Edict, the other the rights under the Lex Papia Poppaea.
⁵ ib. III. 50.
APPENDIX.

(A). On Status, Civitas, Latinitas, &c.

ALTHOUGH Gaus gives all the more important rules as to Status, yet he never collects them together, so that it will be advantageous to put his scattered observations in a connected form, and to supplement them with information drawn from other sources.

Firstly, Status consists of three elements, (1) Liberty, (2) Citizenship, (3) Family. This is implied rather than stated in Gaus, i. 159, et seqq.

In Gaus, i. 9, the primary element, liberty, is touched upon. All men are either free or slaves. Freemen, again, may be Romans or foreigners: if Romans they may either possess the full franchise, Civitas, have the lower kind denominated Latinitas, or be in the still inferior degree of Deductus. (Gai. i. 12.)

Secondly, both the perfect Civis and the Latinus may possess their rights either by birth or by manumission. This fact as to Civis is stated explicitly in Gaus, i. 10; and that there were Latins by birth is indicated by him in iii. 56. When Gaus wrote there were no Deductus except emancipated slaves, but in earlier days there were Deductus who had not been raised from servitude to this inferior species of freedom, but depressed into it from their absolute liberty as Peregrini. That this state of things had passed away may perhaps be gathered from the otherwise puzzling word quondam in Gai. i. 14.

Hence, leaving the discussion of the elements involved in Familia to another note, we may tabulate thus with regard to Liberty and Citizenship, denoting by A, B, C, respectively, the first, second and third grades of the members of the Roman state:

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Homo

Liber

Ingenuus Libertinus

Peregrinus Latinus Civis

Colonanus Jumanus

Servus

A A A B C

We have now to consider the various privileges of the three orders of Roman citizens. A full Civis Romanus had two sets of rights, those political and those private. His political rights were the Jus Suffragii, or capacity to vote in the Comitia, and the Jus Honorum, or eligibility for holding offices and magistracies. It would be foreign to our purpose to enter at length into the distinctions originally existing between Patricians
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and Plebeians as to these matters, for in the time of Gaius such differences had long ceased to exist. Originally the Plebeians had neither of the \textit{jura} named above, but gradually their inferiorty ceased, and they stood precisely on the same footing as the Patricians.

The private rights of a \textit{Cives Romanus} were the \textit{Conubium}, or capacity to contract \textit{juriae nutritiae}, whence flowed the peculiar relations of \textit{Patria Potestas} and \textit{Agnatio}, and the \textit{Commercium}, which gave to its possessor the power of making contracts and conveyances (especially in reference to land) by the peculiar form styled \textit{Mancipatio}, of writing a Testament or inheriting under one (privileges summed up in the phrase \textit{Testamentis Factis}), of making a \textit{Cessio in Jure}, \&c. \&c. From the \textit{Conubium} too and from the \textit{Testamentis Factis} the plebeians had been originally debared, but this badge of inferiorty, like the other, had long died out.

The next class to \textit{Cives} in early times was that of the \textit{Coloni Romani}, who had the \textit{Conubium}, \textit{Commercium} and \textit{Testamentis Factis}, and could enjoy \textit{Dominium ex Jure Quiritiun}, but were devoid of \textit{Jus Honorum} and \textit{Jus Suffragii}. Then came the \textit{Latini}, who had \textit{Commercium} only. Whether this included \textit{Testamentis Factis} or not is disputable, but probably it did involve it, for when Ulpian (xx. 14) says that the \textit{Latini Juniani} were restrained from this by the special provisions of the \textit{Lex Iulia}, he would seem to imply that the other and older \textit{Latini} had possessed it.

These \textit{Latini}, generally designated \textit{Veteres Latini}, became full citizens by the Julian law, and so too did the \textit{Coloni Romani}; therefore the \textit{Latini}, or rather \textit{Latini Colonarii}, of Gaius' time were a new creation (see note on Gaius, i. 93), and their privileges were in all material points similar to those of the \textit{Latini Juniani}, to whom accordingly we pass on, mere remarking by the way that the new \textit{Latini Colonarii} were so called, not because of race or blood, but from the analogy of their \textit{Status} to that of the \textit{Veteres Latini}.

The \textit{Latini Juniani} then had \textit{Commercium}, and though they had not the full \textit{Testamentis Factis}, they had a modified form of it; as they could be balance-holders and witnesses, or even be instituted heirs, for they were allowed to become purchasers of the patrimony, as Ulpian states (xx. 8), and the purchasers were at the time of which he is speaking the heirs themselves. Probably, therefore, when in later days the heir was no longer allowed to be purchaser (Gaius, ii. 103) they could still be heirs. But although they could be instituted heirs (or purchasers), they could not take up the inheritance unless prior to the time when the testament came into operation they had attained to the full \textit{Civitas}. Ulpian, xxii. 3.

Moreover they were debared from the most important part of the \textit{Testamentis Factis}, the making of a testament of their own, as we have already shown on the authority of Ulpian (xx. 14), and this is corroborated by Gaius, i. 93.

Further these \textit{Latini} had no \textit{Conubium}, although facilities were afforded for their becoming \textit{Cives Romanus}, and in such an event they would of course obtain this and all other civic rights (see Gaius, i. 38—39); and naturally they were deprived of the higher powers of voting or holding magistracies.

As to the \textit{Dediticii}, Gaius gives so complete an account of their disqualifications in i. 25—27, that it is unnecessary to do more than call attention to the passage.

We may observe in conclusion that the son of a \textit{Dediticius} would on his father's death be a \textit{Peregrinus}, and the son of a \textit{Latimus Junianus} in the same event a \textit{Latimus Colonarius}. Over neither of them, therefore, had the patron those rights as to inheritance which he had possessed over their fathers, and which are described in Gaius, iii. 56—76.
(B). On Potestas, Dominium, Manus, and Mancipium.

Potestas means primarily right or domination over oneself or something external to oneself. In many passages of the sources it is used as synonymous with jus, and as equivalent to full and complete ownership.

The only place in the fragments of the XII. Tables where the word occurs is the following: "Si furiosus est, adjutorum gentiliumque in eo pecuniaque ejus potestas esto" (Tab. 5, l. 7); and what is there denoted by it is evidently a power of superintendence and direction. We may conclude then that potestas was not the archaic word, but the combination of positive rights and authority possessed by the head of the household, the poterfamilias. Maine thinks that manus was the old word expressing this and all the other notions subsequently marked with the separate and distinctive appellations of dominium, potestas, mancipium, and manus. But whatever was the comprehensive archaic term, or whether there was one at all, potestas in the classical jurists is the word used to express the rights and authority exercised by the poterfamilias over the persons of the familia, just as dominium denotes his power over the inanimate or unintelligent components of the same.

We may further observe that potestas has two widely different significations in the writings of the classical jurists, according as they are speaking of the authority exercised over a slave, dominus potestas, or that over a child, patria potestas. The powers involved in the first were obviously much more extensive than those involved in the second, although it is said they were identical in the earliest days of Rome.

Mancipium, which originally means hand-taking (manu capere), is in its technical sense connected with a particular form of transfer called mancipatio, and stands in the sources, 1st, for the mancipatio itself (see Gaum, II. 59, II. 204, IV. 131); 2nd, for the rights thereby acquired; 3rd, for the subject of the mancipatio, the thing to be transferred; 4th, for a particular kind of transferable objects, viz. slaves, to whom it is applied, so says the law of the Digest (D 1. 5. 4. 3), because "ab hostibus manu capiuntur:" although the more probable reason for the application of the term is to be found in the fact that slaves were viewed by the Roman lawyers as mere things, and so capable of transfer from hand to hand.

The importance of the term mancipium, so far as regards the historical aspect of Roman law, lies in the fact that from its connection with the word manus we gather a correct idea of the ancient notion of property, which was in effect the dominion over those things only that could be and were actually transferred from hand to hand.

As potestas came gradually to bear a restricted meaning in the law sources, and instead of being a general term for authority of any kind began to signify authority over persons only, and those too such alone as were in the familia of the possessor of the potestas; so mancipium became a technical term implying the power exercised over free persons whose services had been transferred by mancipia; and manus, originally almost identical with mancipium, was limited to the one case of power over a wife.

A freeman held in mancipium was a quasi-slave relatively to his lord, although still a freeman in regard of all other members of the Roman state.

(C). On Arrogation and Adoption.

The process of arrogatio resembled the passing of a lex, and took place in the Comitia Curiata. Legislative sanction was required for so solemn an act as the absorption of the family of the arrogatus into that of the arrogans (see Gaus, I. 107) for two reasons: firstly, because the maintenance of a family and its sacred rites was viewed as a matter of religion and as influencing the prosperity of the state; secondly, because the populus claimed a right of succession to all vacant inheritances as "parens omnium" (Tac. Ann. III. 28), and arrogation naturally prevented vacancies occurring.

This method of adoption per populum was practised long after the empire was established. In Cicero's time it seems to have been frequently employed, and in the Pro Domno, c. 29, we have a passage containing the form of words used: "Credo enim, quamquam in illâ adoptione legitime factum est nihil, tamen te esse interrogatum, Auctore esse, ut in te P. Fonteius vitae necisque postestatem habere, ut in filio." Augustus, Nero, and other emperors, adopted in this form, viz. by order of the populus; nor was it till after Galba's time that it fell into disuse, as is evident from the speech which Tacitus puts into that emperor's mouth: "Si te privatus lege curiata apud pontifices, ut mors est, adoptarem, &c." (Hist. I. 15.)

Adoption, or rather arrogation, by imperial rescript afterwards replaced the older method. The reader desirous of further information on this topic, the principal interest of which lies in its relation to the history of social life in ancient Rome, is referred to Heineccius' Antiq. Rom. Synth. I. 11, pp. 143-152, Muhlenuhr's edition, and Maine's Ancient Law, chap. V.

(D). On Tutors.

Tutors may be thus tabulated according to their species:

A. Testamentarii
   - (a) Optivi, Gaus, I. § 154.
   - (b) Dativi, ib. § 154.

B. Legitimi
   - (γ) Agnati, ib. § 155.
   - (δ) Patroni, ib. § 165.
   - (ε) Quasi-patroni, ib. § 175.

C. Fiduciarii
   - (dh) Manumissores liberarum personarum, ib. § 166.
   - (η) Liberi quasi-patronorum, ib. § 175.

D. Cessici (θ), ib. § 168.

E. Dativi (a magistratibus dati)

Tutela was exercised over minors or women. Those under tutela were placed in that position because, either as a matter of fact or of implication of law, they were incapable of exercising the legal rights which appertained to them as persons sua iuris. In Gaus' time the notion that women were incapable at any age of managing their affairs was exploded (Gaus, I. 190), and therefore the tutor of a woman, in many cases, had to interpose his auctoritas at the woman's command, and not at his own discretion. (Ulpian, XI. 27.) In the case of a minor the tutor's power to compel either acts or
On Tutors.

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forbearances was unlimited; an "actio tutelae," however, to be brought by his ward on attaining puberty, hung over him, and constrained him to act for the ward's benefit (Gaius, 1. 191). When the tutela was exercised over a woman for the benefit of tutor and ward at once, in the case, that is to say, of the two latter of the three classes of tutelae legitimae above, we are told that the tutor had great power to compel forbearances (ib. 1. 192), but we are not told whether he could insist on acts, e.g. whether he could compel the purchase of land, as well as stop the sale of land; but the absence of mention of this, the greater power of the two, would imply that he had not got it, as the tutor of a minor had. The tutelae legitimae of the agnati over women were abolished in Gaius' time; previously the same remarks would have applied to them.

A. Tutores testamentarii were allowed by the law of the Twelve Tables: "uti legasit super pecunia tutelave suae rei ita esto." Hence this class might be called legitimi equally with the succeeding, but to avoid confusion the two are marked by different appellations.

B. Tutores legitimi are of three kinds:—

I. The agnati of one to whom the paterfamilias had appointed no testamentary guardian. The clause of the Twelve Tables which authorized the agnati to act is lost, but Gaius is explicit in his statement that their authority is based on the Tables (Gaius, 1. 155).

II. The patroni and their children (Gaius, 1. 165); by implication arising from the wording of the Tables. The son very properly succeeds his father as tutor, since there had been no manumission he would have succeeded him as dominus, and therefore he fairly inherits the rights reserved out of the dominium.

III. The manumittor of a free-born person, when that manumittor was the paterfamilias himself (Gaius, 1. 175). If, however, the manumittor were a stranger, he would not be a tutor legitimus, but only a tutor fiduciarius (ib. 1. 166): and again, the children of a tutor legitimus of this class, which we may call the class of quasi-patroni, would be tutores fiduciarii (ib. 1. 175). The father is allowed to have tutela legitimae, because when he mancipated the son as a preliminary to emancipation by himself, he is regarded as retaining in some degree his potestas (ib. 1. 140); and although emancipation dissolves the potestas, yet the tutela is, in reference to the father's intent, allowed to be of the highest kind—legitima. When, however, the father is dead this reason no longer operates, and the tutela of the brother of the emancipatus is only fiduciaria; for if at the father's death both sons had been under potestas, after the death each would have been independent of the other, and therefore although the tutela must be kept up (for the son of a manumittor succeeds to his father's position as patronus or quasi-patronus, and consequently to the tutorship attached to that character), yet the tutela is altered in kind to meet the equity of the case. Whether the tutela is of one character or the other is no matter of indifference, if the manumitted person be a woman; for, as above observed, the coercive powers of a tutor legitimus were great, whilst those of a tutor fiduciarius were nil.

C. Tutores fiduciarii are of two kinds:—

I. Manumittors of free persons mancipated to them by a parent or coemptionator. Such persons have only the tutorship of the nominal character, because when mancipation is made to a stranger for purposes of
manumission, the law implies a trust that the manumittor will not use his position for his own profit (Gaius, l. 141).

II. Children of guan-patroni, whose case we have discussed just above.

D. Tutores cessici. This kind is fully explained in the text, and requires the less comment as it went out of use very soon after Gaius' time.

E. Tutores dativi:

I. Praetorii, given by the praetor for various reasons (Gaius, l. 176–181), and when given supplanting for the time the authority of the tutor of one of the preceding classes,—deputy-tutors, in fact, for a longer or shorter period.

II. Attilani, tutors appointed by the magistrate in cases where a minor or woman has no tutor at all.

(E). On Acquisition.

The various modes of acquisition recognized by the Roman Law are divided into two classes, (1) Natural, (2) Civil; the former existing in the jurisprudence of all nations, the latter peculiar to the Roman legal system. These and their subdivisions may be thus tabulated.

See Halifax's Analysis of the Civil Law.

I. Natural modes of acquisition.

(a) Occupancy.

(1) Of animals. Gaius, II. 66, 67, 68.

(2) Of property of the enemy. Ib. II. 69.

(3) Of things found. Just. Inst. II. 1. 18 and 39.

(b) Accession.

(1) Natural.

(a) The young of animals. Just. Inst. II. 1. 19 and 37.

(b) Alluvion. Gaius, II. 70.

(γ) Islands rising in the sea or a river. Ib. II. 72.

(δ) Channels deserted by a river. Just. Inst. II. 1. 23.

(2) Industrial.

(a) Specification. Gaius, II. 79.


(γ) Confusion of liquids. Ib. II. 1. 27.

(δ) Commixtion of solids. Ib. II. 1. 28.

(ε) Buildings. Gaius, II. 73.

(γ) Writing. Ib. II. 77.

(η) Painting. Ib. II. 78.
On Acquisition.

(3) Mixed.
   (a) Planting. *Ib. II. 74.
   (b) Sowing. *Ib. II. 75.
   (c) Perceptio fructuum. *Just. Inst. II. 1. 35, 36.

(c) Tradition (delivery). Gaius, II. 65.
   (1) On sale. *Just. Inst. II. 1. 41.
   (2) On gift. *Ib.
   (3) On loan (*mutuum, which is a transfer of property, because the same thing has not to be restored). Gaius, III. 90.

II. Civil modes of acquisition.

(A) Universal.
   (a) Succession on death.
      (1) By testament (*hereditas). Gaius, II. 98.
      (2) By law (*hereditas). *Ib. II. 98.
      (3) By the Edict (*bonorum possessio). *Ib. II. 98.
      (4) By *fidecommissum. *Ib. II. 248.
   (b) Arrogation. *Ib. II. 98, III. 83.
   (c) *Conventus in manum. *Ib. II. 98, III. 83.
   (d) Bankruptcy. *Ib. II. 98, III. 77.
      (2) Involuntary (*sextio bonorum).
   (e) *Additio bonorum libertatum servandarum causa.
      *Just. Inst. III. 11. pr.
   (f) *Cessio in jure *hereditatis. Gaius, III. 85.

(B) Singular.
   (a) *Mancipatio. II. 22.
   (b) *Cessio in jure. II. 22.
   (c) *Usucapio. II. 41.
   (d) *Donatio propra. *Just. Inst. II. 7. 2.
   (e) *Donatio impropria.
      (1) Propra *muptias. *Just. Inst. II. 7. 3.
      (2) Mortis causa. *Ib. II. 7. 1.
   (f) Succession on death.
      (1) Legacy. Gaius, II. 97, 191.
      (2) *Fidecommissum singularis. *Ib. II. 260.
      (3) *Caducum. *Ib. II. 206.
   (g) *Adjudicatio (Ulpian, xix. 16).
With regard to the donationes, (d) and (e), it is to be observed that in general a transfer of property results immediately from the gift, and thereupon is founded a right of action for transfer of the possession also. Donatio mortis causa is, however, an exception, for therein the possession is transferred at once, together with the property, but the property is resumable at the donor’s pleasure, and if he exercise his privilege, he can as proprietor recover the possession by action.

Ulpian (xix. 2) gives several of these civil titles to singular succession, and adds another, “ex lege,” which subdivides into legata, caduca, donationes, and all other methods not matters of immemorial custom, but introduced by specific enactments.

(F). On the causes rendering a Testament invalid.

When a testament would not stand, it might be either,

\[
\begin{align*}
\text{Injustum,} & \quad \text{Non jure factum,} \\
\text{Imperfectum:} & \quad \text{Nullius momenti,} \\
\text{Nullum:} & \quad \text{if the testator have not testamentis facto: or if the heir have it not:}
\end{align*}
\]

\[
\begin{align*}
\text{Ruptum:} & \quad \text{by an agnation or quasi-agination; by a subsequent testament: by revocation or destruction:}
\end{align*}
\]

\[
\begin{align*}
\text{Invitum or infra:} & \quad \text{through a capitius diminuto of the testator, or through no heir appearing under the testament:}
\end{align*}
\]

\[
\begin{align*}
\text{Dsitutum:} & \quad \text{also when no heir appears under it:}
\end{align*}
\]

\[
\begin{align*}
\text{Rexcissum or Inafficitum:} & \quad \text{when a querela inafficiensi is sustained. \ See Just. Inst. ii. 18.}
\end{align*}
\]

(G). On the Lex Julia et Papia Poppaea.

On account of the distaste for marriage prevalent at Rome in the time of Augustus, and the consequent rapid diminution of the number of the citizens, that emperor felt bound to apply a remedy. Heineccius (xxv. 3) adduces instances of legislation to the same end in earlier days, which those who are curious on the question will find worth their perusal; and the growing evil had been a subject of anxiety to Julius, who meditated bringing forward a law to encourage marriage, but his sudden murder caused the plan to end fruitlessly. In his days the evil had grown to such a height that the extinction of the Roman name seemed imminent, for we learn from Appian that at the first census taken after the civil war the number of citizens was only one half of that previous thereto. (Appian de Bell. Civ. ii. 103.) By the time of Augustus matters were still worse, and so in A.D. 4 the Lex Julia de maritiandis ordinibus was carried. But as this enactment was not fully enforced until A.D. 10, and as the Lex Papia Poppaea was passed in the same year, the two are most frequently spoken of as though they were one law, and cited under the name of the Lex Julia et Papia Poppaea.
The most important provisions of the famous *lex* or combination of leges were as follows:

I. Amongst candidates for office that one should have a preference who had the greatest number of legitimate children. *Tac. Ann. xv. 19.*

II. Of the two consuls he should be senior (*quii prior sumebat fasces*) whose children were the most numerous. (*Aul. Gall. Noct. Att. ii. 15.)*

III. A relief from all personal taxes and burdens should be granted to citizens who had a certain number of children:—three, if they lived at Rome; four, if they lived in Italy; five, if they lived in the Provinces.

IV. Senators should not marry freedwomen or women of a depraved character, (*item, a lene manumissas, quae artem luderum exercerent, vel filias eorum quae quamodo artem facerent*): but the restriction was not extended to freedwomen in the case of other freeborn citizens, not senators.

V. Women should be freed from tutelage by the *jus librarum*, i. e. by bearing three children, if they were freeborn women, or four, if they were freedwomen. *Gaius, l. 145, 194; Ulpian, xxix. 3.*

The *jus librarum* conferred other privileges also, the chief being that a mother possessing it could succeed to the inheritance of her children: but this right sprang from the *S. C. Tertullianum*, which merely adopted the definition of *jus librarum* in the *Lex Julia* et *Papia Poppea*, and made it a title to the succession.

The three or four children need not be living at the time the privilege of exemption from tutelage or of succession was claimed: it was sufficient if they had been born alive. (*Paulus S. R. iv. 9. 9.)*

Closely connected with the *jus librarum* was the rule (also contained in the *Lex*) that patrons, who otherwise could claim *contra tabulas* a *pars virili* with the children of a freedman in case the freedman died possessed of 100,000 sesterces or more, lost the right if the freedman left three children: and that patronesses obtained this same right of patrons, to share *pro virili parte* with the freedman's issue, if they themselves had three children. *Gaius, iii. 43, 50.*

VI. Unmarried persons were to take nothing either by way of inheritance or of legacy, and married persons without children were to take only one half of the inheritance or legacy bequeathed to them. *Gaius, ii. 171, 144, 206—208, 286.*

But it is to be observed that the *Lex Papia Poppea* allowed a woman a respite from marriage, and consequently from the penalties incurred by celibacy, for two years after the death of her husband, and for eighteen months after a divorce: therein adopting the principle, although altering the details of the *Lex Julia*, which had allowed a period of one year or of six months from the same terminations of a marriage respectively.

In connection with these provisions of the *Lex Julia* et *Papia Poppea* important alterations were introduced into the law of accruals and lapses. Let us first consider the old law on the subject.

Previous to the *Lex*, legacies which utterly failed from the death or incapacity of the legatee, or from any original invalidity of the bequest, *lapsed* to the inheritance, and so benefited the heir. But this rule did not
immediately apply to co-legatees: these only lapsed if both or all the co-legatees were unable to take.

Hence if some of the co-legatees were able to take, there might be accrual instead of lapse. Thus

(1) If the joint-legacy had been given *disjunctum* (in which case the co-legatees were styled *re conjuncti*), there was no accrual, for each legatee had from the beginning a title to the whole thing:

(2) If it had been given *conjunctum* (in which case the co-legatees were termed *re et verbis conjuncti*), accrual was generally allowed, i.e. the surviving legatee or legatees took the share of their deceased associate, the only exception being in a legacy by damnation, where there was a lapse (Gaius, ii. 205):

(3) If the joint legacy had been given with a specification of the shares to be enjoyed by each legatee (in which case the co-legatees were said to be *verbis conjuncti*), there was no accrual but a lapse, on account of the separation of the interests *ab initio*.

The *Lex Papia Poppaea* swept away all these regulations and left the law thus: all inheritances and legacies to unmarried and childless persons were void and were termed *caduca* (but *cadibus* by marrying within one hundred days could avoid the forfeiture; and in the case of *orbi* only one half the bequest was *caduca*, Ulpian, xvii. 1, Gaius ii. 286):

Legacies which would have lapsed or accrued by the civil law were put under the same rules, and said to be *in causâ caduca*. These rules were that *caduca* should go:

(1) to co-legatees joined *re et verbis* or *verbis* and having children. (As we said above, those joined *re* would of course get the full legacy from the universality of their original title, and therefore wanted no help from the law): failing these, they went

(2) to the heirs who had children: failing these again,

(3) to legatees generally (not *conjuncti*) who had children,

(4) to the *fiscus*.

The only exception to these regulations was in the case of ascendants and descendants not more remote than the third degree, who took inheritances and accruals, whether they had children or not. Ulpian, xviii.

All these rules were again abolished by Justinian (see Code vi. 51. 11), and the old regulations were restored almost exactly, but the exceptional law as to legacies by damnation was not re-enacted.

Caracalla had previously abrogated the *Lex Papia Poppaea*, and made *caduca* go to the *fiscus*.

VII. The husband could not be heir or legatee of the wife, nor the wife of the husband, to an amount greater than one-tenth of the property of the defunct, together with the usufruct of another third, unless children had been born from their marriage. But there were certain exceptions to this rule, depending on the age of the parties, and there was a capacity for taking one-tenth extra by title of each child born from a precedent
marriage and still alive, and one-tenth also by title of each child born from the marriage with the defunct and lost before his or her decease; and further, the devise of the usufruct of the third was capable of being changed into a devise of the ownership in the same case of a child being born from the marriage and subsequently dying. Ulpian, xv. xvi.

VIII. The Lex Julia et Papia Poppaea also contained a most complicated statement of the rights of a patrona and filia patrum, with their modifications according to the possession or non-possession of the jus liberorum by these persons or the libertas or liberta, which are fully set forth by Gaius, (III. 39—76), but need no discussion here, because they refer to a stage of jurisprudence utterly alien from modern ideas, and therefore solely of antiquarian interest.

(H). On the Decurionatus.

The decuriones were the members of the senate of a municipium, i.e. of a town which was allowed to manage its own internal affairs. Originally the municipes or burgesses, convened in their general assembly, seem to have held the sovereign power; they elected the magistrates (see Cic. pro Cluentio, 8), and they enacted the laws (Cic. de Leg. III. 16): but the power of the assembly gradually declined, and the senate usurped its functions, directly administering all business, instead of adopting and passing the matters sent up to it by the municipes. The senate and its members are denoted by different names at different periods of Roman history, originally ordo decurionum (for instance, in Macrobius, Sat. II. 3. 11, where there is an anecdote that Caesar found it more difficult to get a decurionatus at Pompeii than at Rome), then ordo simply, finally curia, and the members curiales or decuriones. During this last period the magistrates of a municipium were nominated by the decuriones, and the functions of government apportioned between the two. The first infringement on the rights of the municipes as a body may be referred to the time of Augustus, who ordered that the right of suffrage at elections should be confined to the decuriones; and from that time the name of municipes, originally applied to all the inhabitants, is confined by writers on the subject to the members of the senate or curia.

As the decuriones were thus invested with so large an amount of power and influence, it may be asked why in later times it was difficult to find men willing to become members of the corporation, and why had devices to be invented to keep up the numbers of the curia; for instance that of allowing legitimatio to be effected by enrolment of an illegitimate son as a member of the curia (per oblationem curiae). The answer is, that the absorption of all power by the emperors in later times rendered the office one of intolerable responsibility, and further, that heavy fees attended the enrolment of a new member.
(I). On the Classification of Legacies.

The following table exhibits the resemblances and differences of the various forms of legacy:

<table>
<thead>
<tr>
<th>I.</th>
<th>II.</th>
<th>III.</th>
<th>IV.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Per Vindicatorem.</strong></td>
<td>**Per Damnata-</td>
<td><strong>Succendi modo.</strong></td>
<td>**Per Praeceptio- **</td>
</tr>
<tr>
<td>Form.</td>
<td>tionem.</td>
<td></td>
<td>tionem.</td>
</tr>
<tr>
<td>Direct bequest</td>
<td>Simple charge</td>
<td>Charge upon</td>
<td>Direct bequest</td>
</tr>
<tr>
<td>to the legatee.</td>
<td>upon the heir.</td>
<td>the heir in a peculiar form.</td>
<td>to one of several joint-heirs.</td>
</tr>
<tr>
<td>Process for recovery.</td>
<td></td>
<td>Condictio.</td>
<td>Judicium familiae ercis-</td>
</tr>
<tr>
<td>Vindicatio.</td>
<td>Condictio.</td>
<td></td>
<td>cundae.</td>
</tr>
<tr>
<td>Subject.</td>
<td>Property ex</td>
<td>Property of</td>
<td>Property of</td>
</tr>
<tr>
<td></td>
<td>pure Quirimum</td>
<td>the testator or</td>
<td>the testator.</td>
</tr>
<tr>
<td></td>
<td>of the testator.</td>
<td>the heir.</td>
<td></td>
</tr>
<tr>
<td>Disjoint Legacy.</td>
<td>Paid in full to each legatee.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(K). On Bonorum Possessio.

In the law-sources Bonorum Possessio and Possessio Bonorum are by no means convertible terms, but the former indicates a Prætorian inheritance (if such a term may be allowed), and the latter a possession allowed to creditors, legatees and certain others, enumerated by Heineccius in his notes on Inst. III. 10. (See his Antig. Rom. Synagma.)

Bonorum Possessio was either contra tabulas testamenti, or secundum tabulas testamenti, or ad intestato.

Of these Bonorum Possessiones, the second-named came earliest into existence, being granted by the Prætor in support of a testament invalid by the Civil Law through some technical informality, but yet duly evidenced

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1 The rules as to this kind of legacy are given according to Gaius and the Salicnans: the Proculians (see Ulpian, xxiv.

22) considered a legacy by praeciptum identical with one by vindication.
successions again and the difficulty in understanding the subject arises from the fact that both clarity and the fame Bonorum," which was attached to it. Gaus, III. 34.

Next were invented the Bonorum Possessiones ab intestato, but of these again heirs already entitled by the Civil Law could avail themselves.

Last in point of time the Bonorum Possessiones contra tabulas came into use.

When the system was completed the order of admission under the Praetor's Edict was, firstly, those claiming contra tabulas; secondly, those claiming secundum tabulas; thirdly, those entitled ab intestato.

As Ulpian states all that is essential regarding the Possessiones contra and secundum tabulas in Tit. xxviii., we may pass them over without further notice, and proceed to explain the third Possessio, that ab intestato. The difficulty in understanding the subject arises from the fact that both Ulpian and Justinian in their enumeration of the grades (seven according to the one, eight according to the other), combine in one view the successions to ingenui who had never undergone a mancipation and emancipation, the successions to ingenui who had passed through this process, and the successions to liberti. We will take the grades as they stand in the lists furnished by our authorities; but it will be seen that if the successory rights of patrons and quasi-patrons were eliminated, and the table thus made applicable to the estates of those persons only who were ingenui and had never been in the status called mancipium, the grades would be reduced to four, namely those numbered I, II, IV and VII below.

I. Liberi formed the first class or grade to whom the Praetor granted Bonorum Possessio ab intestato; and by liberi we understand, 1st, descendants who had never passed from their ancestor's potestas; 2nd, those who had been completely transferred by adoption into a stranger's potestas, and then ranked as liberi of the stranger, losing all claims both civil and prætorian on their ancestor; 3rd, those who had been emancipated, and so had lost their civil-law claims on their emancipator (whether he were their parent by nature or by adoption), and succeeded to him only through the Praetor’s aid.

II. The second class consisted of the legitiimi or statutable heirs, i.e. all on whom the laws of the Twelve Tables or later leges or senatusconsulta had conferred successory rights. Thus agnates who claimed under the rules of the Twelve Tables, mothers under the S. C. Tertullianum, children of intestate females under the S. C. Orphitanum, were admitted in this degree.

If the deceased had been emancipated, his patron or quasi-patron stood at the head of this class of successors, ranking next to those named in the first class; at any rate he did so under the laws of the Twelve Tables, but later enactments introduced from time to time so many modifications into this rule, that, to avoid confusion, we have judged it expedient to tabulate the subject separately in the next portion of the Appendix.

III. The third class, styled Decem Persona, is mentioned by Justinian only and not by Ulpian; doubtless because it was only of importance at an earlier stage of Roman jurisprudence, when manumissions of free persons after emancipation were not unfrequent. The quasi-patron, or manumittor, would by the civil law have been entitled to succession on the intestacy of a quasi-freedman, in preference to the agnates of the latter; but the Praetor interfered and postponed him to the following relations of the manumitted,
Appendix.

The father, mother, grandson, daughter, grandson, grand-daughter, brother or sister. Thus the third class is hardly a class at all, but an interpolation into the second class, leaving the order of succession therein when the deceased was a manumitted ingenius to be, 1st, the decem personae; 2nd, the quasi-patrons and his suus heredes; 3rd, the other agnates of the manumitted, not included in the decem personae.

When a slave was manumitted he could have no decem personae, for none were agnates to him, or even cognates, except descendats born after his manumission, and these would be entitled in the first class, as liberi.

It may be noticed that the decem personae introduce another confusion into the order of succession; for they were not of necessity agnates, but in some cases cognates, and cognates properly form the next or fourth order of successors. That they were not invariably agnates is evident, for the grand parent might be maternal, and the brother or sister uterine.

IV. The fourth class consisted of the cognates of nearest degree, cognati proximi; and we see the reason why the word proximi is introduced, if we bear in mind that descendans took per stirpes, and were not of necessity equally near of kin to the deceased, whereas cognates took per capita, and as there was no representation amongst them, they must of necessity be all of one degree.

V. The fifth class was one altogether unconnected with the succession to ordinary ingenii, i.e. to those not manumitted, consisting of the agnates of a patron (or quasi-patron), to whom the laws of the Twelve Tables gave no rights, if they were not also suus heredes.

VI. The sixth class comprised the patron, patroness, and their descendans and ascendants; and although these persons seem to have been provided for already, yet we must remember that the Civil Law recognized the rights of those only who had not suffered capitum diminutio, and thus the present title of the successory edict was needful to bring in those patrons, &c., who had undergone such a change of status, and therefore were no longer legitimi. It was also needed to bring in the descendans of patrons, who by the strict Civil Law could not claim through a female ancestor.

VII. Husband or wife were the next class, and thus a reciprocal succession was established between those who had been married without a conventio in manum.

VIII. The last class again had reference only to the property of liberti or quasi-libertis, conferring it, in case of failure of all other claimants, upon the cognates of the manumittor.

If a person entitled under any particular class failed to put in his claim within the prescribed period (Ulpian, xxviii. 10), this did not absolutely destroy his rights, but merely diminished them, for he might still take concurrently with claimants of a lower order. It will be observed that the succession given by the Praetor might either be (1) in confirmation of the Civil Law, as in the case of the possessio secundum tabulas granted to the testamentary heir, or that contra tabulas to omitted children, or that ab intestato to the suus heres, agnate or patron: (2) supplementary to the law, as in the case of the cognates, for whom the Civil Law made no provision whatever; (3) in derogation of the law, as in the case of the possessio secundum tabulas, when the testament was deficient in the matter of manumission or nuncupation.

The succession of patrons (or quasi-patrons) on the intestacy of their freedmen is so entirely a matter of antiquarian interest, that for all practical ends attention need be paid to the succession to ingenii alone; and there-
fore we will conclude by giving a comparative table of those entitled on such persons' decease intestate, under the law: of the Twelve Tables and under the Praetorian Edict as it stood in Gaius' time.

**TWELVE TABLES.**

I. Sui heredes.

II. Agnati et agnatae.

III. Gentiles.

**PRAETORIAN EDICT.**

I. (a) Sui heredes.

(β) Emancipated descendants.

(B. P. unde libers.)

II. Agnati et Consanguineæ.

(B. P. unde legütini.)

III. (a) Agnati capite demnuti. Gaius, III. 27.

(β) Agnatiæ ...... 29.

(γ) Agnati sequentes ...... 28.

(δ) Libern in adoptivâ familiâ ...... 31.

(ε) Cognati ...... 30.

(B. P. unde cognati vel proximulis causia.)

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**On the Inheritance of Freedmen and Freedwomen.**

The subject of inheritances of freedmen and freedwomen, except from an antiquarian view, is of no great interest: but for those who wish to pursue it we subjoin the following analysis of the cases treated of by Gaius and Ulpian:

I. When a freedman died leaving his patron, or a male descendant¹ of his patron, surviving him:

(a) by the Laws of the Twelve Tables, a suis heres or scriptus heres had precedence of the patron:

(b) by the Praetorian Edict, no suis heres except an actual descendant, not specially disinherited, had this priority; but it was not lost by emancipation or adoption: whilst as against a scriptus heres, not being a descendant, or as against one who was a suis heres merely by operation of the civil law, the patron could claim half:

(γ) by the Lex Papia Poppaea even actual descendants, if less than three in number, and if the freedman died worth 100,000 sesterces, did not bar the patron's claim, but he took a pars viriles with them. In other respects the Praetorian rules were left standing. Gaius, III. 39—43, 45; Ulpian, xxix. 1, 4.

II. When a freedwoman died leaving her patron, or a male descendant¹ of her patron, surviving her:

(a) by the Laws of the Twelve Tables the patron excluded the descendants of the freedwoman:

(b) the Praetor left the law as he found it:

(γ) by the Lex Papia Poppaea the patron's right was restricted to a pars viriles. Gaius, III. 43—45; Ulpian, xxix. 1, 4.

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¹ See a descendant tracing through a line of males.
III. When a freedman died leaving a daughter of his patron, or other female descendant, surviving him:

(a) by the Laws of the Twelve Tables this daughter had the same claims as the son of the patron:

(β) the Praetor ignored her claims:

(γ) the Lex Papia Poppaea allowed her to rank as a son, if she had three children. Gaius, III. 46; Ulpian, XXIX. 5.

IV. When a freedwoman died leaving a daughter of her patron, or other female descendant, surviving her:

(a) by the Laws of the Twelve Tables this daughter had the same claims as the son of the patron:

(β) the Praetor ignored her claims:

(γ) the Lex Papia Poppaea allowed her to rank as a son if she had three children and the freedwoman less than four; but if the freedwoman had four children and made a testament in their favour, the filia patroni had no claim; if the freedwoman died intestate, the filia patroni claimed a pars virilis if the freedwoman made a testament and disinherited her children, a moiety went to the filia patroni. Gaius, III. 47.

V. When a freedman died leaving his patroness, or a male descendant of his patroness, surviving him:

(a) by the Laws of the Twelve Tables the rights of a patroness were the same as those of a patron, but her descendants had no rights.

(β) The Praetor admitted the descendants to the same rights:

(γ) By the Lex Papia Poppaea, if the patroness had three children and was freeborn, she had the full rights granted to the patron by the same Lex; and if she had two children, being herself freeborn, or had three children, being herself a freedwoman, she was entitled to the rights conferred on patrons by the Edict. Gaius, III. 49, 50; Ulpian, XXIX. 6, 7.

VI. When a freedwoman died leaving her patroness, or a male descendant of her patroness, surviving her:

(a) by the Laws of the Twelve Tables the rights of a patroness were the same as those of a patron:

(β) the Praetor admitted her descendants to the same rights:

(γ) By the Lex Papia Poppaea adopted the Civil and Praetorian rules, unless the freedwoman died intestate, in which case the patroness with children had the rights of a patron under the Edict. Gaius, III. 51, 52.

VII. When a freedman died leaving a daughter of his patroness or other female descendant, surviving him:

(a) by the Laws of the Twelve Tables such daughter had no rights:

(β) but under the Praetorian Edict she was admitted:

(γ) by the Lex Papia Poppaea she was again excluded, unless she had a child. Gaius, III. 53.

VIII. When a freedwoman died leaving a daughter of her patroness or other female descendant, surviving her:

(a) by the Laws of the Twelve Tables such daughter had no right:

3 Sc. a descendant tracing through a line of males.
On the Classification of Obligations.

(β) but under the Praetorian edict she was admitted:

(γ) by the Lex Papia Poppaea she was again excluded, unless she had a child. Gaus, III. 53.

It will be observed that the rights of the patron over a Roman citizen freedman are transmitted, if transmitted at all, to his descendants and not to the heirs appointed in his testament. Gaus, III. 48, 58.

The inheritance of a Latin on the contrary belonged in all cases to the patron and his appointed heir. Gaus, III. 58.

(M). On the Classification of Obligations.

Obligations according to the Roman law are divided into (A) Natural and (B) Civil.

A. Natural obligations again are divided into (a) those which the civil law absolutely reproubes (see Warnkoenig's Commentaries, Vol. II. p. 158), and (b) those on which an action cannot be founded, but which can be used as an exception or ground of defence: nuda pacta.

B. Civil obligations are also subdivided into (a) civil obligations in the strictest sense, i.e. obligations furnished with an action by the civil law, (β) praetorian obligations, which are enforced by an action granted through the later legislation of the Praetor's edict.

(a). Of these civil obligations in the strictest sense there are two subdivisions, viz. (I) those which are altogether unconnected with the jus gentium and based on the civil law only, legibus constitutae: (II) those recognized by the jus gentium, and received into and furnished with an action by the civil law, jure civile comprobatae.

Under (I) we may classify (1) obligations springing from contracts stricti juri, which were actionable because entered into with special forms which the civil law prescribed: (2) obligations by delict; (3) what were called obligationes ex variis causarum figuris, arising chiefly from quasi-contracts or quasi-delicts, but not entirely confined to these.

Under (II) we may range (1) contracts of the kinds styled real and consensual: (2) two descriptions of pact (see A. b. above), of which the law took cognizance in later times, viz. Pacta adjecta and Pacta legitima, an explanation of which will be found below.

A real contract is one wherein execution by either party is a ground for compelling execution by the other: a consensual contract, one which binds both parties immediately upon their settlement of the terms.

(β). The praetorian obligations were chiefly those called constitutum perumae, i.e. a promise to pay a debt of our own already existing according to natural law, but not enforceable by action, or to pay a debt, legal or moral, of another person; for the execution of which, after the promise had passed, the Praetor in his edict furnished an action: and praecarium, a grant of the use of a thing during the pleasure of the grantor, who again could only recover possession by means of a remedy (the interdictum de preario) provided by the edict.


Dismissing these Praetorian obligations, we will briefly indicate the species included under the genera numbered I. and II. above.

G.
Contracts stricti juris (I, 1, above) were either verbal or literal; the verbal being the stipulations so fully described by Gaius (III. 92—127); the literal being the nomina, chirographae and syngraphae, as to which he also says enough (III. 138—134) to render further particulars unnecessary here.

To these ought to be added, nexum, a contract solemnized per as et libram; of which little mention is made by Gaius, its employment being in his day almost a thing of the past.

The obligations from delict (I. 2, above) were fourfold, as Gaius tells us (III. 187—215), arising either from furturn, rapina, damnum iniuriae datum, or iniuria

As to the variae consarum figurae (I. 3, above), Gaius says but little, and that little indirectly and inferentially (e. g. in III. 91). We stated above that these figurae included two important branches, quasi-contracts and quasi-delicts; of the former subdivision we may bring forward especially the instances of Negetorium gestio, business transacted for a man without his knowledge or consent, whereby a jurial relation arises, which is described in detail by Mackelday in his Systema Juris Romani, §§ 406—412; and solutio vindicati, touched upon by Gaius slightly, but as to which Mackelday also gives full information in §§ 416—417; and lastly, communio aedifici a community of interest cast upon two or more persons without agreement of their own, for which we shall again refer the reader to Mackelday, §§ 454—457.

The quasi-delicts were chiefly injurious acts of slaves or descendants for which the master or ascendant was bound to make reparation, some of which are named by Justinian in Inst. IV. 5, 1 and 3; the act of a judex qui ludem suum facit (Gal. IV. 53) is another instance. A further example is that of a man who has left an obstacle on a high way, or kept some thing suspended over one, which by proving a nuisance to or by falling on a passer-by or his property works him damage.

The other figurae were obligations arising from the contracts of our sons, slaves, and agents, remedied by the actions id quod jus (IV. 70), executoria and in situatoria (IV. 71), tributoria (IV. 72), de peculo et de in rem vero (IV. 73), or from the delicts of our sons and slaves or from mischief committed by our cattle, remedied by the actions nostralis and de passera (IV. 75—80 and Just. Inst. IV. 8 and 9).'

We now need only specify the chief contracts and facta giving rise to an action which fall under Class II. above, and our enumeration of obligations is completed.

Real contracts, then, are mutuum, a loan where the borrower has not to return the identical thing lent, but an equivalent: commodatum, a loan where the borrower has to return the identical thing he has received: depositum, a loan for the benefit of the lender, or in other words a deposit of a thing for the sake of custody; with which is classed sequestration, the placing of a thing in the hands of some third person till its ownership is decided by a suit pignus, a deposit as a pledge: hypotheca, a pledge without an actual deposit but with one implied. Besides these there are certain contracts, which for want of a more specific name are styled innominati, and by the Roman lawyers are ranked in four subdivisions, viz., Do ut des, Do ut facias, Faco ut des, Faco ut facias; and the first of which, though called innominate, has a name, perpetuato.

Consensual contracts are Emptio Venditio, Locatio Conducitio, Societas and Mandatum, treated of by Gaius (III. 135—163), Emphyteusia, or a lease perpetual on condition of the regular payment of a rent, and Superficies, a lease of a similar character, but referring only to the building on a particular plot of land, and not affecting the land, and therefore terminated by the destruction of the building.

The contracts described as real or consensual are bona fide, that is
to say, the *judex* who has to decide cases arising out of them may entertain equitable pleas or answers. So also are the quasi-contracts and quasi-debts.

*Pacta adjecta* and *Pacta legismum* (see II. 2 above) still remain to be mentioned. The former are agreements attached to *bonae fides* contracts, and regarded by the law of later times as forming part of the contract, so that on their breach an action may be brought. Examples are an agreement that on the purchaser selling again what he has bought, the vendor shall have a right of pre-emption, &c. &c. (see Mackeldy, § 419). *Pacta legismus* are of various kinds, but the chief are the *pactum donationum* and that *de dote constitutenda*. These again are too minute in their nature to be discussed in an elementary treatise, and we refer the reader desirous of information to Mackeldy, §§ 420—428.

(N). On the *Decemviri, Centumviri, Lex Pinaria, Lex Aebutia, Leges Juliae*.

A. The *Decemviri sultitus judicandis*.

From the time of the XII Tables *decemviri* seem always to have existed in the Roman state, a fact which is indicated by Livy (III. 58) in the words he quotes from a law of the consulship of Valerius and Horatius: "ut qui tribunus plebis sedebis judicibus *decemviris* nocusset, ejus caput Jovi sacrum esset, familia ad aedem Cerens Liberis Liberaeque venum iret." Livy further tells us that the Decemviri, so called by pre-eminence, by whom the XII Tables were drawn up, themselves exercised judicial functions "sanguli decimo quoque die," (III. 33). When the consular government was re-established a court of *decemviri* was still kept in existence, and, according to Hefner, had the cognizance of almost all suits up to the date of the institution of the Praetor's office (B.C. 367). Until that event Hefner also holds that there was no giving of a *judex*, except in cases where the law specially provided for suits being conducted *per judicis postulationem*: grounding his opinion on Tab. I. I. 7: "Nis pagant, in commoto ast in foro ante meridiem causam conjucto, quom perorant ambo praesentes post meridiem prasenti stitem addicito:" so that the *decemviri* had what in later times was styled *cognition extra ordinarily* in all sacramental cases.

B. The *Lex Pinaria*.

This *lex*, enacted about B.C. 350, effected a great change in the functions of the *decemviri*. A large number of actions had already been withdrawn from their cognizance, and transferred to that of the Praetor; and possibly because this magistracy was now overburdened with business, the Lex Pinaria empowered him to appoint a *judex* from the number of the *decemviri*, such *judex* not receiving a general but a special commission, that is, one confined to the particular case entrusted to him. There is indeed a passage from Pomponius in the *Digest* (D. 1. 2. 2. 19) which seems to refer the institution of *decemviri* to the same period as that of the *quaestorii varum*., &c., the words being, "deinde quam esset necessarius magistratus qui hastae praesesset, Decemviri litibus judicandis sunt constituti. Eodem tempore et quaestorii varum* etc." But as we know from Livy that the office existed previously, we must admit that the strict meaning of *constituti* should not be pressed, but that we ought rather to understand that some new function was conferred on the *decemviri*; and *hasto* will then be interpreted as the sacramental actions for which the Lex Pinaria authorized the Praetor to call in the *decemviri* as *judices*. This explanation may, however, necessitate our placing the *Lex Pinaria* in the year 308 B.C. instead of
Appendix.

350 B.C., because Pomponius says the *quaestorii* were instituted at the same time as the *triurnviri capitales*, and the date of their institution is B.C. 308; but, on the one hand, we are not bound to consider that Pomponius is accurate to a few years in his very sketchy account; and, on the other, even if he be, there is no very valid reason for the commonly-received opinion that B.C. 350 is the date of the *Lex Piniaria.*

C. The Lex Aburita. Gaius says that by this law and the two Julian laws the *leges actions* were abolished, save in two cases, viz. actions referring to *damnum in iussum* and actions tried before the *centumviri*. Those who wish to know exactly how much was effected by the *Lex Aburita* and the *Lexes Juliae* respectively, should consult Heffer's *Observations on Gaius* IV. pp. 18—41, a portion of his work too long for transcription here. The results he arrives at are these: the *Lex Aburita* may be divided into two principal clauses; 1st that the *centumviri* should judge in all sacramental cases of a private nature, save only that the cognizance of questions touching liberty of citizenship should be left to the *decemviri stiliibus judicandis*; and that all other causes which had previously been sued out *per judicis arbitrio postulatlonem* or *per condicionem* should thenceforth be matters of *formula*, the Praetor having the jurisdiction thereof and appointing a *judex*, who must give a decision within eighteen months from his appointment.

D. The Centumviri. This college consisted of 105 members, three from each of the thirty-five tribes, and Cicero gives a list, the concluding words of which imply that it is not an exhaustive one, of their functions: "*jaclure se in causis centumviralibus, in quibus usucapionem, tutelarum, gentilium, agnationum, alluvionum, circunludionum, nexorum, mancipiorum, partetum, lamamum, stiplicidiorum, testamentorum, cesternarumque rerum innumerabilium jura versentur.* (De Orat. I. 38.)

E. The Leges Juliae. In the reign of Augustus important changes in the constitution of the centumviral courts took place. The *decemviri stiliibus judicandis* had still some slight original and independent jurisdiction left to them, but the Julian laws gave them a new function, that of presidents of the court of the *centumviri*, an office previously held by ex-questors. The number of the *centumviri* either at the same time or soon after was increased to 180, and they were divided into two or four tribunals, (some think more,) which in some cases sat separately, although in others of more importance the whole body acted together as judges. Whether much alteration was made by the Julian laws in their cognizance is a disputed point: some jurists have held that they could no longer deal with *actions in rem*, which thenceforth were all *per formulam*, others have denied this statement; but there is very little evidence either way.

F. The Form of Process in a Centumviral Cause. The plaintiff first made application to the Praetor Urbanus or Peregrinus, (having previously given notice to his adversary of his intention to do so,) for leave to proceed before the *centumviri*. If leave were granted, formalities similar to those described by Gaius in IV. 16 were gone through, *sponserem*, however, forfeitable to the opposing party, taking the place of the old *sacramenta*, forfeitable to the state. The *decemviri* then convened the *centumviri*, or those divisions of them who had to decide on the question, according to the nature of the case. The rest of the process presented no peculiar features.

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1 See Cic. *pro Caecina*, 33: *pro Demo.*
2 See Festus, sub verb.
3 Heffer maintains that application could in some cases be made to the Praetor Peregrinus. See *Obs.* p. 39.
On the Proceedings in a Roman Civil Action.

In the present note it is proposed to describe the various steps of a Roman action at law from its commencement to its termination.

We shall, however, first briefly notice the nature and extent of the jurisdiction of those higher officials by whom all points of pleading and technical preliminaries were decided.

It is, of course, unnecessary to speak here of the early history of Roman actions, or to examine the historical account of the changes by which jurisdiction in civil suits was supposed to have passed from the kings (if it ever was in their hands) to the consuls.

It is sufficient to take up the narrative at the time when the Praetors were the supreme Judges, invested with that twofold legal authority which is described by the technical terms jurisdictio and imperium. (See iii. 181, n.) Two functions were comprised in the jurisdictio, one of issuing decrees, the other of that of assigning a judex (judicis datus).

When therefore the litigants had made up their minds to settle their disputes by law, they were accustomed to appear before the Praetor in a place specially assigned for trials. In old times this place was always the comitium; at a later period the Comitium or Forum was reserved for Judicia Publica, whilst private suits were tried under cover in the Basilica. If the Praetor heard the cause in his superior seat of justice, he was said to preside pro tribunali, if in his ordinary seat, he was said to try de plano.

The applications for relief at his hands were of course much more important and informal at the sitting de plano than at those pro tribunali, where all those cases were investigated which required a special argument. Hence it became customary for the Praetor, whenever some very important business was brought before him pro tribunali, to obtain the assistance of a comiti, the members of which sat behind ready to instruct him when difficult points of law arose in the course of the hearing. “Often,” says Pliny, “have I pleaded, often have I acted as judex, often have I sat in the comiti.”

The Praetor’s court was closed on certain days, for, as is well known, there were dies fasti, dies nefasti and dies intercos. “On the former days,” says Varro (de Ling. Lat. vi. 28–30, 53), “the Praetor could deliver his opinions without offence, on the dies nefasti, or close days, the Praetor was forbidden to utter his solemn injunctions Do, Dico, Addico” consequently on those days no suits could be heard. The business before the court was distributed methodically over the dies fasti; thus on one day postulations only would be taken, on another cognitiones, on a third decrees, on a fourth manumissions, and so on, an arrangement perfectly familiar to the practising English lawyer, who takes care to provide himself with the cause lists and public notices of the courts he has to attend.

From this short notice of the superior courts and their characteristics we proceed to describe the actual method in which suits were conducted.

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1 See Plautus, Pseudolus, iii. 6 16.
2 Hunc Martialis allusion.
Sed e in alto tu hec tribunali
Et e curulis juras gentibus reddis.
3 Cf. Cic. de Orat. i. 37. The governors of provinces were similarly as
sisted by a body of Jurists called
consulare, cf. D i. 29.
4 Epist. i. 10.
5 See note on Gaius, ii. 179.
6 The Praetors, be it noticed, used to
on circuits, for the despatch of business,
to certain specified places: hence Forum
Claudius, Cornelius, Domitius, &c.
Before resorting to law it was usual to endeavour to bring about an amicable settlement of the matters of difference by means of the intervention of friends. If their efforts were unavailing, the dispute was referred to Court, and the first step in the suit was the process termed In jus vocatio. In old times this In jus vocatio was of a very primitive character. The plaintiff on meeting the defendant bade him follow him into court; should the defendant refuse or delay to obey the mandate, the plaintiff called on the bystanders to bear witness to what he was doing, touching them on the ear as he did so, after which he could drag his opponent off to court in any way he pleased. In course of time this rough and ready form of summons was got rid of, and at length the method of direct application to the Praetor was adopted, by whom a fine was imposed in case his order for appearance was disobeyed. The defendant, if he obeyed the summons and made his appearance, was able to obtain an interim discharge, either by procuring some one to become surety for his further appearance, or by entering into what was called a transactio, that is, a settlement of all matters in dispute. Should neither of these courses have been adopted, on the defendant announcing his intention to fight the case the next step in the business was the editio actionis. This moved from the plaintiff, and was in effect the actual commencement of the case itself. By it the defendant was formally challenged, and upon it he might, or rather was obliged, either to accept service, or to ask for a short delay in order to consider as to the propriety of accepting. The plaintiff, however, might, if he pleased declare his aim and object to the defendant at the time when the vocatio in jus was issued, or after its issue he might informally and out of court state his demand to his opponent, or tell him the form of action he intended to adopt. Whichever mode he did adopt, the result was that the presiding magistrate and the defendant learned from the plaintiff that he intended to "postulate," i.e. make a formal demand of a formula.

No particular phraseology or formal language was imposed upon the plaintiff in the publication of the editio. As the selection of the particular form of action was entirely in the plaintiff's power, he was permitted to vary the form at any time before the final settlement of the pleadings (that is, between the actionis editio and the deductio in judicium), for "edita actio speciem futuras litis demonstrat" says the Code.

Of course such changes on the plaintiff's part were met on the defendant's side by applications for delay, and the costs consequent upon these delays were thrown upon the plaintiff. Sometimes the form of action prayed for was inadmissible in itself, sometimes the mode in which it was presented to the court was objectionable: in either of these events the Praetor refused to allow it, and whether this refusal were immediately upon the actionis editio or at a later period, the Praetor was not bound to declare such refusal by a decrevum, but could if he chose simply pay no attention to the application. Hence, during the régime of the legis actiones, the importance of strict and precise compliance with the rules of pleading, for the consequence of ill-drawn or badly-worded pleading on the part of the plaintiff was failure, or, to use the technical phraseology, causa cadet.

1 See Horace, Sat. I. 9. 74, and Plautus, Cistellum, v. 2. 23.
2 See D 2 15.
3 See Plautus, Pers. 4. 9. 8-10.
4 Technically called denunciatio, D. 9. 7, and D. 5. 3. 20. 11.
5 The term postulato embraced all applications for formulae to the Praetor. It frequently happened that the delivery of the formulae depended upon long arguments in which the skill and knowledge in pleading of the advocates were fully called into play. These arguments always took place in the superior court, in Just, and pro tribunali.
6 C. 2 1 5.
On the Proceedings in a Roman Civil Action.

During the formulæry period there was not so much risk of this mishap, for the Praetor himself used then to mark the verbal mistakes and errors in the plaintiff's intexto, and neither was the issue of fact fixed, nor the case sent for trial to the judex, till the formula was properly drawn. Thus time and opportunity were given by the court for the correction of all technical omissions and mistakes before trial. Still the plaintiff, even under the formulæry procedure\(^1\), incurred the danger we are speaking of, for the trial being at his risk and peril, if it turned out eventually that the formula adopted did not fit in with his cause of action, he failed in his suit, although the shape of the action had been settled by the Praetor.

It is clear then that up to this stage the chief, if not the only active part in the proceedings was played by the plaintiff, and that whilst it was open to the defendant to take advantage of all his opponent's mistakes, he himself was called upon to do nothing, so far as his defence was concerned, before the vadimonium was settled.

These preliminaries therefore being completed, the plaintiff's next step was vadari resum, that is, in a particular and set form of words to pray that the defendant might find sureties to give bail for his appearance in court on a fixed day, generally the day after that following the application. That this form taxed largely the skill and care of the jurists of the day is evidenced by Cicero's words:\(^2\) "Caesar asserts that there is not one man out of the whole mass before him who can frame a vadimonium." The form itself is lost\(^3\), we may, however, surmise something of its nature from a passage in the oration Pro Quinctio. It seems clear that in the ordinary vadimonium were fixed the day and place\(^4\) when and where the parties were to appear before the Praetor in order to have the formula drawn up\(^5\), whilst in cases where the trial was to take place out of Rome the name of the magistrate in the provinces who was to give the formula was inserted, and on the contrary where a defendant who was living in the provinces claimed a right of trial before a Roman tribunal there was a statement of the name of the magistrate in Rome by whom the formula was to be drawn up.

Various other technicalities attached to the vadimonium. Two or three only need be specified. In the first place, as we have seen, bail might be exacted when a man entered into a vadimonium; but it might also be entered into without any bail or surety, and then it was termed purum; again the defendant might be called upon to swear to the faithful discharge of his promise, or recuperatores might be named with authority to condemn the defendant in case of the full amount of his vadimonium in case of non-appearance\(^6\). If the defendant answered to his bail he was said vadimonium sustiner; if he forfeited his recognizances, vadimonium deserere; if the day of appearance were put off, vadimonium differe was the technical phrase\(^7\).

The consequences that ensued after the entry into a vadimonium were as follows: where the two parties appeared in person upon the day fixed, the object of the vadimonium being thus secured, the vadimonium itself was at an end, and the proceedings went on in the regular way which will presently be described: if, however, one or the other of them failed

\(^1\) Thus Cicero, "Ita jus civile habemus constituendum ut causa causas qui non quero - admodum oportet egisse." De Institutione, 11 19

\(^2\) See also Quint Inst Or 111. 6 63

\(^3\) Ad Quinct Frat 11 15

\(^4\) Unless the lines in the Curculio, 1 3 5, have preserved it

\(^5\) In the event of the venue not being necessarily fixed by the circumstances of the case

\(^6\) Cic pro Quinct. 7; ajud sine, and Gaus, iv 184

\(^7\) Gaus, iv 152. The Praetor's edict made special provision for all these cases:

\(\text{So Juvenal, Sat. ii 213, "dulcit vadimonum Prætor'"}

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to appear when the Praetor directed their case to be called on (catavus), the result, in case the plaintiff made default, was that he lost his case, (causa cadubat), but the judgment was not final and in bar of all further proceedings. In case the defendant made default, his tendemomum was said to be desertum, and the plaintiff was authorized to sue him or his bail (which he pleased) ex stipulatu, for the amount stated in the vademonial formula.

Another means of securing attendance in court was a sponsio, entered into by the parties themselves without the intervention of sureties; and then on default of appearance a missio in possessione was granted. This was given by the Praetor's edict, and enabled the plaintiff to be put in possession of the defendant's goods.

Such was the process by which care was taken on the one hand to prevent frivolous and vexatious actions, and on the other to bring the parties to question of issue, or to that stage where a formula could be granted. For this purpose the forms were these.—The Praetor having taken his seat in court, ordered the list of all the actions that had been entered and demanded two days back to be gone through, and the parties to them to be called into court. His object in doing this was to dispose of the matter in hand, and to fix the different judicia. The case, therefore, being called on, supposing both parties were ready, the defendant, in reply to the citation, said, "Where art thou who hast put me to my bail? where art thou who hast cited me? see here I am ready to meet thee; do thou on thy side be ready to meet me." The plaintiff to this replied, "Here I am:" then the defendant said, "What sayest thou?" The plaintiff rejoined, "I say that the goods which thou possessest are mine and that thou shouldst make transfer of them to me." This colloquy being ended, the next step was for the plaintiff to make his postulatio to the Praetor for a formula and a judex. These the Praetor could refuse, in some cases at once, in others upon cause shown. Supposing he assented to the postulatio, he granted a formula, but first heard both parties upon the application. At this stage the defendant was allowed either to argue that there was no cause of action, or to urge the insertion of some particular plea; the plaintiff on the other hand was entitled to ask for a judicium parum, that is, a simple issue without any special plea, or to press for a replication to such plea as was granted, and to this the defendant might rebut (triplicare) and the plaintiff sur-rebut (quadruplicare), and so on. These preliminary arguments took place pro tribunali, the technical term for them being constitutio judicis. On their conclusion the formula was settled, and the postulatio judex having been made, the final act followed by which an end was put to the pleadings, the issue of fact being drawn and sent in the formula to the judex or to recuperatores. If the issue had proved to be one of law, the matter would have never gone to a judex at all, but have been settled in purum by the Praetor. The formula itself and its component parts are so fully and clearly described in the text of Gaus that it is needless to do more than refer to that for explanation of them.

We have now arrived at the period of the proceedings when the parties were in a position to have the real question between them settled; that is to say, when they were before a judex whose business it was to try the point

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1 This missio in possessione was granted against any one who was to blame for preventing a suit from going on regularly. Its consequences were severe in their effect upon the defendant's property and character. Cicero denounced in strong language the hardship of granting a sponsio in case of Quinctus. See Pro Quinct. 8, 9, and 37.


3 IV. 39.
remitted to him in the formula. A few words, then, upon the nature and extent of the jurisdiction of the judex will not be out of place. The judex was a private person, not a trained lawyer; his position with reference to the parties was a combination of arbitrator and juryman; arbitrator, because he was entrusted with what in effect was the settlement of the matter in dispute between the parties; juryman, because his action was confined simply to announcing his decision. If he had been able to complete the inquiry by giving a decisive judgment and enforcing it himself, his powers would have been very similar to those of an English county court judge. They were, however, more limited. Yet, though he was bound by the terms of the formula to try the question of fact, he was not so completely confined to it as to be unable to examine and decide upon such matters of law as were incidentally connected therewith. To protect him against the chance of mistakes in law he was allowed to claim and receive the advice of the Praetor or Praesid. and in later times, if not in the days of Cicero, he was also able to obtain advice from a constituim who sat on benches near him. And, further, his decisions upon legal points were subject to the control and review of the Praetor, who might annul the sentence, and either refuse to execute it or, if necessary, send it for a further hearing.

In the trial itself his authority was strictly confined to the facts specially laid before him; in other words, he had no power to travel out of the record and decide upon collateral matters of fact, at least in actions stricti juris, for he was able to add pleas in equitable actions (actioes bonae fidei). The intentio and the condonamabile were his guiding lights; from them he learned the real nature of the inquiry, and by them he was strictly limited. From the one he knew what the plaintiff was to establish; by means of the other he was at little or no difficulty in making his decision.

The cause then was called on, and the parties were summoned into court, in jndicium. On their appearance, the oath of calumnia was administered to them, and when it had been taken, the advocates (patroni) were expected to open the cases of their clients. This they did with a very short outline of the facts. After this brief narrative, called causae collectae,

1 The matter was now in judicio, as opposed to the previous enquirer, which were in jure. Were it necessary to try to find corresponding English terms, one might apply those of *settings at Nai Prus and in Banco*

It is beyond the scope of this note to dwell at full length on the important subject of Roman pleading. There are therefore many matters which cannot now be explained; such as the consequences resulting from the lita contestatio; the novation effected by the lita contestatio (I., 276, 188, and D. 45, 29); the plaintiff's power of interrogating in jure (not very unlike our own common law interrogatories), confessions and acknowledgments; the oath tendered by the parties each to the other before the Praetor; the primae and secundae actio and the causae ampliatae, the law terms and times of trial at Rome and in the Provinces, and other matters of a similar nature, which would fill the pages of a more exhaustive commentary on the Roman Procedure than this assumes to be. A list of Judges selected from the body of cases was drawn up by each Praetor on the commencement of his year of office, and entered in his Album Prum thus let the insurgent made their own selection (cf. *pro Consularis. 43*). Strictly speaking, the plaintiff nominated the judex, but the defendant's acceptance was necessary.

2 *Cic de Orat. 11, 70.*

This assistance was confined entirely to questions of law, for as to matters of fact, the judex was to rely upon his own judgment and to decide "prosista religioso suggent." D. 5, 1, 29, 1. The important and varied work of the judex is evidenced by the fact that a book of the Digest, containing upwards of 80 laws, is devoted to the judex, D. 5, 1.

3 *Aul Gall. Nova At 1114 c. 2.*

4 "Ultra id quod in judicium deductum est excedere poestas judicis non potest." D. 10, 3, 18.

5 *iv. 172, 176.* The judex himself, on taking his seat, had to swear to do his duty faithfully and legally. This he did in a set form of words, and with his hand on the altar (the jdealis Libellus).

6 *iv. 15.* In the Digest it is called causae conspecto. D. 50, 17, 1.
the evidence was adduced, and at the close of the evidence each advocate made a second speech, urging all that could be said in his client’s favour and commenting on the evidence that had been brought forward. The time occupied by these speeches was not left to the discretion of the advocates, but limited to so many "clipsydrae." When the cause had thus been fairly gone through, the last stage in the "judicium" was the sentence. Here the "judeex" was, as we have mentioned above, strictly limited by the formula, and if he travelled out of it, and either assumed to decide upon what was not before him or touched upon collateral matter, he was said "litum suam facere," and was liable to a penalty for his mistake. With the announcement of his sentence his power and authority in the suit ended. The execution of the sentence rested with the Praetor, but a delay of 30 days was allowed between the sentence and its execution. When that time had expired the sentence became what was called a "res judicata," and upon it the successful party could bring his action for twice the amount of money awarded by the "judeex," and could also obtain a "missio in possessionem" until his opponent’s property was sold to pay the judgment-debt. All this part of the cause was in the hands of the Praetor, whose "imperium" enabled him to direct proceedings against the party refusing to comply with the decision of a "judeex.

(P). On the Legis Actio per Judicis Postulationem.

The strict nature of the "actio sacrament" and the serious risk attaching to it of losing the amount deposited by way of sacramentum must have led to devices for withdrawing the settlement of litigious matters from that action and getting them tried in a less strict form, in fact to the introduction of a process in which equitable constructions might be permitted. It is here then that we may find the germ of those equitable actions which, under the name of actiones bona fides, formed so important and valuable an adjunct to the Roman system of procedure.

That the custom of demanding a "judeex" was a very ancient one even in Cicero’s time we learn from a passage in the de Officis (iii. 10), where he speaks of it as "that excellent custom handed down from the practice of our forefathers."

Various well-established facts show not only the early efforts made to mitigate the severity of the old common-law forms by equitable expedients, but the direction that those efforts took, viz. the withdrawal of suits from the common-law judges and from the trammels of common-law forms.

Hence we may reasonably conclude in the first place, that all actions which might by any possibility be treated equitably were allowed to be heard by a "judeex" or an "arbitrator," and next with equal reason infer, that all actions of strict law which could be settled in a clearer and safer manner by some process not so narrow or so unsuited to the question at issue as that of the "actio sacrament," such as suits about boundaires, about injures caused by rainfalls and waterflows, all matters requiring technical knowledge and skilled witnesses, or, as in the case of the "actio famillae resuscindae," careful and detailed treatment, and all actions requiring an adjustment and rateable allotment of claim, or a division of damages and interest instead of an assignment of the thing itself, were referred to a "judeex," withdrawn from the sacramental process, and handed over to that called "judeex postulato." See Cic. de Legg. iii. 21, D. 43. 8. 5, D. 39. 3. 24, D. 10. 2. 1.

1 Pliny. Ep. ii. 11, iv 9, vi 2. 2 Cic de Legib 1 sti. D. 43. 8. 5. D. 39. 3 24 D 10 2 1.
(Q). On the terms *Formula in jus concepta, Formula in factum concepta, Actio directa, Actio in factum.*

At first sight it would seem as though there were a close analogy between the English lawyers' distinction of an issue of law and an issue of fact, and Gauß' classification of * formulae in jus conceptae* and *formulae in factum conceptae*; but on nearer inspection, the analogy proves altogether fallacious.

For when the facts were admitted by both parties to a suit, and they prayed only for an application of the known law to those facts, no formula was issued at all: the question of law was settled by the Praetor himself, *in jure*, and so the suit terminated. The Praetor only remitted a case to a Judex either (1) that he might ascertain certain disputed facts, and then apply to them a known law; or (2) that he might simply ascertain the facts and then report his finding, in which latter case the formula was termed *praetudiciales*, and the decision was a mere preliminary to further litigation; or (3) that he might ascertain the facts, and apply to his finding certain rules of equity which the Praetor judged fair and fitting, although neither the Civil Law nor the Edict contained a regulation exactly applicable to the question in debate.

For litigation falling under the first head *formulae*, common forms as they might be styled, were provided beforehand, and embodied in the Edict. But it was essential that the Judex should have an intimation whether the law to be applied by him should be civil or praetorium, and thus for two reasons, viz. because the plaintiff had in many cases a choice of remedies, one civil and one praetorium, and because the powers of the *judex* and the pleas he could admit depended on the character of the law he was applying.

Such intimation was conveyed to him by the manner in which the formula was worded. Supposing the plaintiff's claim to be based on some enactment of the civil law, the formula was in general furnished with all the three parts, called *demonstratio, intentio* and *condemnatio*; whilst if it were based on some clause of the Edict, the *demonstratio* was included in the *intentio*, the formula begun with *a sui parte*, and thus appeared to have but two parts, the *intentio* and the *condemnatio*.

Hence when the jurists speak of *conceptio in jus* and *conceptio in factum*, they are not referring to the nature of the issue to be tried, whether of law or of fact, but to the nature of the enactment, civil or praetorium, on which the litigation turned.

The action, indeed, was *directa* or *vulgaris*, whether its issue were one of fact or one of law, provided only the legal point as to the applicability of which there was a dispute, or the legal principle to be applied after the disputed facts had been investigated, was set down in express terms either in a *lex* or *sententia consilii* or in the Edict. And of these *actiones directae* there was a subdivision according to the source of the determining legal principle. When that principle was contained in a *lex* or *sententia consilii*, the formula of the *actio directa* was *in jus concepta*; when it was contained in a clause of the Edict, the formula of the *actio directa* was *in factum concepta*. Gauß, *iv. 45 sub fin.*

A *lex* might have been furnished with an action by the Praetor in addition to the remedy attaching under the *jus civil*, or the Praetor might by his Edict have supplemented the deficiencies of such a *lex*, and granted an express action in cases arising on these supplementary provisions; and so we can understand the statement of Gauß (*iv. 47*) about the double formulae, *in factum* as well as *in jus*, given in certain cases.
Thus we conclude that all actions wherein proceedings were taken on a known law were *directae*; that they would never get beyond the step called *in jure*, if there were no controverted facts, but only a dispute as to whether the law was or was not applicable to admitted facts: that, on the contrary, a formula would be issued, and proceedings *in judice* would follow, if facts were in dispute and evidence had to be taken; and then the formula would be *in ius concepta* or *in factum concepta* according as the law which was to settle the dispute was civil or praetorian.

But besides the *actiones directae* and the *actiones praetudiciales* there was the third class already mentioned, viz. actions to be tried by certain equitable rules which the Praetor set forth, *pro re nata* and according to his own opinion of what was proper, in cases which fell under no existing enactment, but yet involved a manifest wrong. These were the *actiones non vulgares*, more often called *actiones in factum*, and the formulae issued on their behalf were of necessity *in factum conceptae*, for their decision was in no way dependent on the Civil Law. So that a formula *in factum concepta* was attached to all *actiones in factum*, and to some *actiones directae*.

Of *actiones non vulgares* or *in factum* there were three kinds, their point of union being that in all the Praetor had either to make, or at any rate to modify a formula, and that to none of them did a common formula apply exactly as it stood in the Edict:

These three kinds were

1. *Actiones utiles*, or actions resembling some *actio directa* (their name being derived from *uti*, the adverb, not from *ut* the verb). The Praetor in such an action allowed a formula to be, as it were, borrowed, and applied to a case which it was not originally intended to meet, but which closely resembled that for which it had been framed.

   *Actiones fictitiae* were a particular branch of *actiones utiles*.

2. *Actiones cum praescriptu*: granted where the circumstances out of which they sprang constituted a civil or praetorian obligation, but the common formula provided was too large in its scope, so that a plaintiff who made use of it would be liable to be met by the exception called *plus petitione*. The common formula therefore was cut down to its proper limits by the addition of a *praescriptu* prefixed with the Praetor’s approval. Gaius, iv. 130.

3. *Actiones in factum praescriptus verbis*: purely equitable actions for the remedy of some wrong for which the law (civil or praetorian) had altogether failed to make provision, and for which therefore the Praetor drew up a new and special formula, with an account of the circumstances of the case prefixed, and containing in its *condemnation* a remedy of the Praetor’s own invention, which was to be applied in case the plaintiff could establish his case.

See Henecius, iv. 6. 26, Mackeldy, § 194, Zimmern’s *Trait des Actions chez les Romains*, § 51.

(R). On the Exceptions *Rei Judicatae* and *In Judicium Deductae*.

In iv. 106–108 Gaius draws the attention of his class to a rule of practice in pleading, by which it was laid down that in certain actions the defences of “judgment recovered” and “matter already in issue” could be set up as of course and under the general issue, whilst in certain other actions they could only be made use of when specially pleaded. A few
words about these two pleas and the rule of practice relating to them will not perhaps be out of place. The pleas, technically called exceptus res in judicium deductae, meant that the exact question in controversy between the parties had already been argued before the Praetor, and had been settled by him in the shape of a formula. That is to say, the plaintiff on some former occasion had raised the same points, and had called upon the defendant to reply to them in jure, and every step in pleading up to the litis contestatio had been taken. The other pleas, res judicatae, meant that matters had gone even further than the litis contestatio. That is to say, that the Praetor had drawn the formula, and sent it down to the judex with the precise question of fact for trial, and that the decision of the judex had been given.

Now there were three sets of actions in which the effect of these defences required consideration.

There was, first, a class of actions based on the imperium of the Praetor and unconnected with the strict rules and technicalities of the old civil law, and for which a time of limitation was prescribed coexistent with the duration of each particular Praetor in office.

Next, there was a class of actions arising from obligations and dependent upon the old civil law, both by their very nature and from the fact that the declaration or intentio was of a civil law form, i.e. not standing alone but preceded by a demonstratio.

Lastly, there was a class of actions, either real and arising from domicinum, or personal upon the case (in factum) and independent not only of the old strict civil law, but of all standing rules, civil or praetorian.

In the first of these sets the rule was that the defence of "judgment recovered," and "mater still in issue," had to be specially pleaded. There were two reasons for this: firstly, because being praetorian remedies they were not affected by rules of pleading applicable to the old civil law actions; and therefore, as there was nothing in strict law to prevent a second action being brought, it was necessary to allow a protection to the defendants in the shape of a plea: and secondly, because during each succeeding Praetor's year of office the nature and subject of the actions tried by his predecessor might easily be forgotten, and therefore a reminder in the shape of a special plea like the one before us was absolutely necessary.

In the second set of actions the rule was that where the same plaintiff brought a second action upon the same facts against the same defendant, the defence of "judgment recovered" or "mater still in issue" was available as part of the defendant's proofs under the general issue, and without any special plea. The reason for this was that inasmuch as these were strictly legal actions with a civil law intentio, the plaintiff was ipso jure, by force of the civil law itself, barred from attempting any further claim.

In the third class there are two sets of actions, one founded on domicinum or jus in re, the other to a certain extent founded on obligation, but not of the same kind as in the old civil law personal actions; and the rule applicable to such actions was that in order to avail himself of his special defence, it was necessary for the defendant to raise the point by his plea.

It is clear that in the actions of the latter kind, i.e. personal actions in factum, both the reasons which have been given above for requiring special pleas in actions based on the imperium apply with extra force. For if proceedings founded on standing rules of a particular Praetor's edict were not ipso jure a bar to further proceedings before a new Praetor, still less could those proceedings be such a bar which had been allowed by the former Praetor merely because of his own personal theories of equity, enunciated at the time application for redress was made to him, and never cast
into the form of general rules; and again, the details of such matters were even more liable to be forgotten than were those of the other kind.

Then as to those actions springing out of dominium, i.e. real actions, the reason why a special plea of "judgment recovered" or "matter still in issue" was necessary is obvious. In all these actions the plaintiff is maintaining a right against the whole world, and has no particular aforeknown person by whom this general right can be impeached. As then he has to meet any and every opponent, so it is clear a victory over this or that person may not entirely and as a matter of course silence even him, for he may renew the attack on new grounds. In the case of an obligation-claim between A and B, where the judge decides that B has not to perform the particular obligation, the processes are few and simple and the ground of attack is single, but in a claim founded on a jus in re there may be a variety of proofs in support of a claim, shaped in more ways than one, and the grounds of attack may be varied in proportion to the intricacy of the right at stake. Here then there is nothing in strict law (ipsa jure) to prevent a plaintiff who has failed once from trying to succeed a second time, and therefore, as in the first set of actions so here, to prevent vexatious litigation, the defendant is allowed to resort to his plea of "judgment recovered" or "matter still in issue," which, as the text says, is a matter of necessity.

(S). On the Dissolution of Obligations.

The subject of dissolution of obligations being touched upon but briefly by Gaus, and altogether omitted by Ulpian, it is deemed advisable to state here the Roman rules on the matter, with such brevity as is consistent with a thorough comprehension of the subject.

The modes of dissolution we shall discuss are the following: solution and oblation, acceptilation, compensation, confusion, novation, and loss or destruction of the subject (interitus rei).

I. First, then, as to solution:

This is defined in the Digest to be the actual performance of the matter of the obligation, and took place whenever the debtor or some one on his account performed and discharged the obligation contracted, without change or modification. The fundamental rule of the Roman law applicable to the ipsa jure dissolution of obligations was that every obligation must be dissolved in the same way in which it was contracted. Therefore, unless the subject-matter of the obligation was really and effectually performed, given or transferred, no solution resulted. "Actual solution," says Pothier, "means the actual accomplishment of that to which a man is bound; where therefore his obligation is to do something, its solution is effected only by doing that thing; where it is to give something or to transfer the property in something, only by actually giving in the one case, or by transferring the property in the other." Examples showing how strictly the rule against alteration into an equivalent was enforced are abundant in the Digest.

So far for the subject-matter of the obligation. As regarded the parties the requisites were:

1 D 50 16. 176
2 D 50. 17. 35 and 100.
3 Traité des Obligations, Part III. ch. 1.
On the Dissolution of Obligations.

(1) That the payer or transferor possessed full power to give or transfer. Supposing that established, it mattered little whether the solution had been made by the debtor directly or by another party on his account; for when it could be shown that the thing given or transferred really belonged to the payer, and also that the gift or transfer was made and received expressly to relieve the debtor from the claim, any opposition on his part on the ground of ignorance or unwillingness was fruitless.

(2) That the gift or transfer was made to the creditor himself or his properly-constituted agent; which constitution might be either by precedent appointment, or subsequent ratification, or even by mere knowledge when the withholding of ratification was fraudulent.

As regarded the place for payment, the rule was that if this had been specially provided for, the parties were bound by their agreement; but if no place had been specified, then payment was to be made at the place where the subject-matter of the obligation had been received; or if that was impossible, in the place where the debtor resided.

When a time was fixed for the payment, the agreement on this head was to be observed; but we see from D. 45. 1, 135. 2, that equitable excuses for delay were not always rejected. When no time had been fixed, the payment was due at once, but no action could be brought till formal demand had been made.

When the contracting party made the duration of a right which must have some end depend upon his own will, the right ceased at his death. Thus in a lease or a tenancy at will, with the proviso that the lessor or landlord was to enter upon the land when he wished, it was held that upon his death the lease or tenancy was at once terminated.

In general the party obliged was at liberty to perform his obligation before the time appointed, unless it could be shewn that the stipulation as to time was made for the convenience of the other party.

Under the head of solution should be noticed one method of dissolving an obligation, which from the mode of proceeding has been termed by later commentators oblacion, and consisted of an offer of performance or payment made by the debtor at the proper place and time. This oblacion or tender, as we see from Marcellus' words in the Digest, was not originally equivalent in law to a payment, and so did not spex juris destroy the creditor's right of action against the debtor, but the latter was allowed to prove the facts under his plea of dolus (want of equity). In later times, however, the debtor's position was much improved; and tender, when properly made, was as valid a dissolution of an obligation as any of the forms expressly recognized: for according to an imperial decision in the time of Diocletian and Maximian it was held that tender accompanied with a deposit of the money, solemnly sealed, in the hands of a competent magistrate or in some public place, was the same as payment, and barred the creditor's claim to the debt.

II. Acceptation is described by Gaius (III. 169—172), and was originally a method of dissolution applicable only to verbal contracts. But the Aquilian stipulation, of which a full account is given by Justinian (III. 29. 2), enabled all contracts to be novated, or changed into verbal agreements, and thus acceptation became possible, whatever the nature of the original contract might be.

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1 D 46 3 23 and 53
2 D 46 3 49h 38, 64; D. 44 4 6.
3 D 19 2 4
4 See cases in illustration collected in Linder's Study of Jurisprudence, § 93.
5 p 86
6 This was the law in Papian's time as is clear from D. 22 1 7.
III. Compensation was a setting-off of one claim against another, and so causing the dissolution of both or the diminution of one by the amount of the other.

The characteristics of this mode of dissolution were:

1st. That in Gaius' days it was raised in the pleadings, either by the plaintiff himself making a set-off and suing for the balance, or by its introduction into the formula by the defendant in the way of plea; so that compensation was in this latter case unlike solution, resembling more the English set-off, which must be pleaded specially.

2nd. That it was allowed in actions bonae fide only, owing its introduction into Roman procedure to equitable reasons; for, as Pomponius says, its necessity is obvious, when we consider how much more equitable and simple it is to allow a method of settling cross-claims by one action, and so by mutual payments avoid a multiplicity of suits.

3rd. That the debts to which compensation applied were debts of a certain fixed quantity, or, as we should term them, liquidated.

4th. That the time for payment of the debt proposed to be set-off must have arrived.

5th. That the debts which could be set-off were debts of the same kind or nature, money, for instance, against money, corn against corn, &c., for compensation debitis ex pars specie licet ex causa dispers ad multitor.

IV. Confusion, as its name imports, arose from the combination of creditor and debtor in one and the same person, either through the creditor becoming heir of the debtor, or the debtor heir of the creditor, or when some third person became heir to both of them. In these cases the entire obligation with all its accessories was extinguished. But where a confusion intervened between the principal debtor and his surety, or between the creditor and a surety of the debtor, the result was an extinction of the accessory obligation only, the original one (between the immediate parties) remaining unaltered.

A point of great importance is discussed in D. 46. 1. 71, viz. whether a confusion intervening between a creditor and one of two joint-debtor sets free the other joint-debtor or a surety bound for both of them. The Treasury in a certain case had succeeded to the estate of the creditor, who had died intestate and without heirs, and to the estate of one of his debtors on a forfeiture; proceedings were taken by the Treasury, not against the joint-debtor, but against a mandator, on whose guarantee the money had been advanced; and the Treasury won the cause; for although by the confusion the mandator's liability on behalf of the one debtor was gone, his liability on behalf of the other still remained; and that other one could have been sued with effect, inasmuch as the creditor had originally a right of suing either debtor in solidum, had, in fact, two separate rights of action, of which either, though not both, could be used, and the Treasury as representing the creditor still retained one of them, and so could enforce it either against the co-debtor or his surety.

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1 D. 46. 2. 3.
2 Paulus, S. R. 11. 5. 3.
3 In D. 46. 3. 107, Pomponius explains the two kinds of dissolution of verbal obligations; viz. dissolution in fact, i.e. by solution, and dissolution in law, of which acceptation and confusion are instances.
4 D. 46. 3. 43, 44. 3. 93.
On the Dissolution of Obligations.

V. We now come to novation. The importance of this part of the Roman Law of Obligations to the English student has been very recently demonstrated. In the European Assurance Arbitration Cases re Blundell, Lord Westbury, in speaking of the rules governing the question of novation, said, "It is strange that our Legislature adopted in fact the rule of the Civil Law, from which we have borrowed the term Novation." He then cites the well-known passage of the Institutes of Justinian; and, after commenting upon it, remarks on the necessity in the mind of Justinian that there should be a definite rule on the subject which should exclude presumption, and attributes to him an enactment that no novation should be arrived at, save upon written evidence of the intention of the parties.

A somewhat more extended survey of the Roman Law of novation will not, it is hoped, be out of place, as we cannot quite assent to the statement of Lord Westbury just quoted.

The definition of novation, as given in the Digest, is very precise: "A transfer of a pre-existing debt to another obligation (be it a strictly legal or an equitable one) accompanied by its complete fusion therein." Therefore to establish novation two distinct obligations must have existed; and so, when after an advance of money without any stipulatary contract, it was agreed that a stipulation should be added, as these two transactions were not distinct, it was held that there was only one contract created by them, and consequently no resulting novation. And the same view was recognised in a case where the stipulation was entered into at one time and the money advanced at another, for payment was simply the carrying out of the verbal contract, and not a transformation of it into a real one.

From the definition of novation we proceed to consider, 1st, the obligations that might be novated; 2nd, the obligations that were capable of effecting a novation; 3rd, the parties who could make it; 4th, the form; and 5th, the effect of novation.

And here it should be noticed that the novation now under discussion is the one known by the term voluntarv, in contradistinction to another form effected by litis contrectatio.

1st. What obligations could be novated? The answer to this is simple enough, viz. every obligation; natural, civil, or praetorian; verbal, real, literal, consensual. All were susceptible of novation, and so, whether the contract had been entered into by stipulation or in any other way, it could be novated into a verbal obligation, provided only there was clear proof of intention that such should be the case; for, in the absence of such proof, the result would be two separate obligations, one appendant to the other.

Whether the obligation to be novated was dependent upon the arrival of a fixed time, or upon the happening of an uncertain event or the arrival of an uncertain time, was a matter of great importance. If it was dependent on a time certain to arrive, the obligation, being vested, was equivalent to an absolute one, and could be at once novated, even before the advent of the day fixed—but not so when it was dependent on an uncertain time or an uncertain event: the novation was then only conditional on the event coming to pass, and therefore if the event failed, the first agree-

\[\text{\textsuperscript{1}} \text{ See "Times" newspaper, Nov. 7.}\]
\[\text{\textsuperscript{2}} \text{ Inst. III. 90. 3.}\]
\[\text{\textsuperscript{3}} \text{ C. 84. 8.}\]
\[\text{\textsuperscript{4}} \text{ D. 45. 2. 1.}\]
\[\text{\textsuperscript{5}} \text{ D. 45. 2. 6. 1.}\]
\[\text{\textsuperscript{6}} \text{ Ibid.}\]
\[\text{\textsuperscript{7}} \text{ Gais. III. 180.}\]
\[\text{\textsuperscript{8}} \text{ Gais. III. 176 n.}\]
\[\text{\textsuperscript{9}} \text{ D. 45. 1. 1.}\]
\[\text{\textsuperscript{10}} \text{ D. 45. 2. 2.}\]
ment had fallen through before it could be transformed into another\(^1\). But the fulfilment of the condition affecting the first obligation might be contemporaneous with the creation of the substituted obligation, as we see from an example given by Ulpian\(^2\); this, however, leaves the principle intact that a prior conditional obligation cannot be novated till it becomes vested.  

2d. As to the obligation by which the first one was novated, the rule was equally simple—it must be a verbal one, and must be entered into with the intention of producing novation. If in itself certain, it acted on the previous obligation at once, if that was either certain or dependent upon a fixed time; but if the previous obligation was uncertain either as to time or condition, the novation, as we have already said, was postponed\(^3\). On the other hand, if the new stipulation was conditional, the establishment of the novation was always deferred until the condition was fulfilled; unless the condition was one certain to be fulfilled, in other words no true condition; "for he who stipulates for a condition certain to come to pass, really enters into an absolute stipulation\(^4\)." Thus the general rule was that the existence of a condition deferred the contemplated novation, and whether the condition appeared in the first obligation or in the second, the result was the same\(^5\).  

3rd. As to the parties by whom novation might be made. All persons to whom valid payment could be made might make novation of an obligation, and no others. On this ground therefore it was held that neither a minor unauthorized by his guardian, nor a spendthrift interdicted from the management of his affairs, nor a wife unauthorized by her husband, could do such an act\(^6\).  

As all persons to whom debts could be paid might, as a rule, make novation, an important question was raised as to the power of one of several co-creditors in solido to do this. Paulus held that it was beyond his power\(^7\), but Ulpian, who has examined the law on the subject with great care, held that he might, though he admits that it was a doubtful matter (\emph{quaeritur})\(^8\). He bases his conclusion on the fact that either co-creditor could take payment, sue or acceptilate. Modern views are all on the side of Ulpian, and we may refer those who wish to investigate the question more fully to the arguments of Pothier and Mayne\(^9\).  

4th. As to the form of a novation. According to Ulpian there must be a stipulation made \emph{animo novandi}\(^10\). After Justian's legislation the stipulating form was not absolutely needful, but the \emph{animus} remained as important as ever. The reason why stipulation had been insisted upon is simple enough. Stipulation, as the text of Gaus shows, was a mode of contracting of a very precise and formal character. Each party stated his views in the most direct and positive language; the question was clear, distinct and express, and the answer exactly tallied with it. Hence from these circumstances and from the publicity of the proceeding there could be no doubt about what was meant, and no difficulty in showing by proof what had been offered and accepted. Thus the old law insisted on stipulation because that most clearly brought out the intention. But with an increasing population, a larger development of commerce, a steady flow of
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foreigners to Rome, and an inclination for innovation in all branches of the law, especially in that relating to contracts, the exact and technical nature of stipulatory agreements became distasteful. Other forms of contract were preferred, and stipulations were conducted with less precision and less regard to their peculiar phraseology than had formerly been imperative. In consequence of this the intention of the parties was frequently obscure, and a variety of presumptions were invented by which the lawyers sought to fix the intention of loosely-worded agreements, and decide whether they were of a supplementary or a novating character. "The old lawyers," says Justianus, "had that novation took place only when the parties entered into the second obligation with the intent of novating; and as upon this point doubts arose, resulting in the introduction of presumptions varying in different cases, we have laid down that novation takes place only when the contracting parties have expressly declared that their intention in making the second contract is to effect a novation of the first." The enactment to which Justianus refers is a Constitution of the year 530 A.D., in the consulship of Lampadius and Orestes, which concludes with these words: "our general declaration is that novation must be effected by expressed intention only, and not presumed from agreement or covenant; and where there is no express statement of such intention, the matter in dispute is without novation, or to use the Greek form ἄνευ κανόνος." It will be seen therefore from this Constitution that the fixed rule was that so long as the parties could prove to the court not only that they intended to novate, but that they used words which would make their intention beyond all doubt, that was sufficient. In what form the declaration was made, whether in writing or not, was of no importance. And therefore, although writing was, no doubt, generally resorted to, because of its being more permanent and better calculated to establish proof of the intention of the parties, still it would be going too far to admit with Lord Westbury that "no novation could be arrived at, save upon written evidence of intention."

The 5th head, viz. the effect of the novation, has now to be considered. The primary effect was, as we have already seen, that the former debt or obligation was as completely extinguished as if it had been paid or performed, and hence it followed that the hypothecations which were accessory to the old debt were extinguished with it, although of course the creditor might transfer these accessory hypothecations to the second obligation by the stipulations upon which the novation was formed. But if the things pledged did not belong to the first debtor, or if the novation was in the nature of a change of debtor, whether with or without an alteration of the obligation itself, the consent of the person to whom the hypothecation belonged was necessary.

And this mention of a change of debtor leads us to remark that besides the method of novation by the transfer of one obligation into another, there was another method called delegation, by which without alteration of the obligation a third party was accepted by the creditor in place of his original debtor. To this form of dissolution three parties were necessary, viz. 1st the old debtor, the party delegating, 2nd the new debtor, the party delegated, who entered into an obligation either to the creditor or to some one appointed by him, and 3rd the creditor, who by the substitution of the new debtor discharged the old one. All that was needed
to establish delegation was proof of consent on the part of the creditor to accept the change, and a stipulatory agreement on the part of the new debtor to accept the obligation imposed on him. It should be noticed that the introduction of a condition had the same effect upon a delegation as upon an ordinary novation; viz. that it suspended the operation of the delegation until the condition was fulfilled; for as much as the obligation of the substitute depended upon the accomplishment of the condition, so also did the discharge of the delegant from his precedent obligation.

V. On dissolution by the destruction, loss or changed form of the subject-matter of the obligation (interitus rei), we need not dilate. It is enough to give Mackeldey's short but terse and clear enunciation of the rules on this topic. For more extensive information the reader may have recourse to the Pantheon Justinianae by Pothier, or the same author's Treatise upon Obligations.

The rules of Mackeldey are:—when the subject-matter of the obligation was a particular specific thing, and its loss, destruction or change was accidental, the debtor was discharged from the performance of his obligation;—when the obligation was alternative and both subjects were lost, destroyed or changed accidentally, the debtor was, as before, set free: but if one only of the subjects perished, the debtor was bound to give the other. When, however, the loss, destruction or change of a specific subject or of one of several alternative subjects was caused by the fault of one of the parties, the result varied according as the creditor or debtor was blameable. If the creditor was in fault, the destruction of the subject, if single, or of any one of the subjects, if alternative, set the debtor free absolutely; but if the debtor was in fault, the creditor could demand the price of what was destroyed, lost or changed: or if the obligation was alternative, he could elect between this price and any of the subjects still surviving.

We have been obliged in this note to confine our attention to those dissolutions which operate ipso jure, but it is to be borne in mind that dissolutions were in numerous cases brought about by the use of pleas or exceptions. These we do not discuss; firstly because of their highly technical character, and secondly because the ancient and modern systems of pleading have so little in common, that it is scarcely of practical value and is certainly beyond the scope of our elementary treatise to dwell on such points. We will simply mention some of these pleas, which are referred to most frequently in the Law sources; viz. Pacti Conventi, Pacti ne petatur, Transactio Juris jurandi, Praescriptionis, Rei judicatae, Rei in judicium deductae, Conditionis expletae, Diei venientis, &c., as to which full information can be obtained in Warnkenig's Commentarii Juris Romani Privati.

1 D. 45 a. 27
2 For further information, see Pothier On Obligations, translated by Evans, Vol.
3 Systema Juris Romani, § 404.
4 Tom. II. Lib. III Cap. IIII §§ 1, 2.
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