THE COMMENTARIES OF
GAIUS
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TRANSLATED WITH NOTES BY

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Dixi meipsius post scripta geometrarum nihil extare quod vi ac
substituere cum Romanorum iurisconsultorum scriptis comparari
possi, tantum nervi inest, tantum profunditatis.

Leibnitz.

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INTRODUCTION.

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; 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

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1 Cambridge Essays, published by J. W. Parker and Son in 1896.
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 jurisconsults, 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 ipsissimae 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 Ulpian, Gaius, and others of the ante-Justinianae 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 Commentaries, 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 jure, in jure respondeendi. 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 Digest, 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 studious habits, possibly gave him a distaste for a form of 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 Austin; lawyers admirably fitted for the quiet thought and learned meditation of the study, but averse from the stir and bustle of the forum; but 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 responsum, 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.

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 form to 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 persona and who are not, who are under potentas 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 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 manumission, in jure cessio, or tradition, but founded on and terminated by certain special causes. In this part of his work it is very important to bear in mind that the reader is not to look for a detailed account of the forces 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 their nature will be visible. Gaius’s work is in every respect a book of practice; it considers actions as 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 have 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 pergrini 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 Merivale’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 Pius. 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 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 pergrini 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 Lattium, 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

1 We are indebted to Bocking’s short but valuable Adnotation ad Tabulas systematicas for this analysis of the Commentaries, especially for the particular fact here adverted to.

1 Ch. LXVII.
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 auch 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 astraent, the rules as to testamenta inofficiosa and the quarta legitima (although the cognate subjects of institution and disinheritance 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. 23 et seqq. and again in iii. 56 et seqq.; the description of agratio 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 double discussion of the effect of the Litis Contestatio, first in iii. 180, 181, secondly in iv. 156—158. 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 iii. 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 iii. 201.

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. Deinburg of Halle, of which they have since made free use. Die Institutionen des Gaius, ein Compendium aus dem Jahre 1869 nach Christi Geburt. Halle, 1869.
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 transamus ad jiciis commissa. Et prius de heraldibus 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 tenetur, fidejussoris autem heres tenetur;” the identity of phraseology 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 Heffer's variations and suggestions, for upon that book Heffer 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 Edito Princeps of 1820 was brought out by Göschcn, 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 Göschcn in 1824. It is of this edition that Böcking remarks: “Hujus exempli quam diu nostris manus stabit honor, nunquam pretium diminutur.” Death interrupted Göschcn in his task of bringing out a third edition, but his work was completed and published by Lachmann in 1842. Böcking's editions appeared successively in 1837, 1841, 1850 and 1855. Heffer's elaborate commentary and carefully emended text of the fourth book carries the date 1857.

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
The Commentaries of Gaius.

Book I.

De Jure Gentium et Civili.

1. Omnes populi qui legisbus et moribus reguntur partim su proprio, partim communii omnium hominum iure utuntur: nam quod quicunque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ipsius proprium ipsius civilitate; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos pereaque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communii omnium hominum.

1. All collections of human beings 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 set of people 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 sets of people and is called jus Gentium, the law, so to speak, which all nations employ.

The Roman people, therefore, make use of a system of law

2 Austin's Jurisprudence, Lect. 31, 32. See also Lect. 5, pp. 117, 161 (pp. 179 and 214, third edition). Maine's Ancient Law, ch. 5.
num iure utitur. Qae singula qualia sint, suis locis proponemus.

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

3. Lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit. Plebs autem a populo eo disat, quod populi appellationes universi cives significantur, communes etiam patricij; plebis autem appellationes sine patricij cetera cives significantur. Unde olim patricij dicebant plebiscitas non teneri, quia sine auctoritate eorum facta essent. sed postea lex Hortensia lata est, qua caustum est ut plebiscita universum populum tenerent. itaque eo modo legibus exaequata sunt.

which is partly their own in particular, partly common to all mankind. What each of these sets of rules is, we shall explain in their proper places.

2. Now rules of law consist of leges, plebiscita, senatus-consulta, 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 in therein, 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.


2 The senate up to the time of the Hortensian law had possessed a veto on the decrees of the tribes, this being then abolished, the result laid down in the text was the consequence. Lex Hortensia, n.c. 489.

4. Senatusconsultum est quod senatus iubet atque constituit, idque legis vicem optinet, quanvis fuerit quasestum. 5. Constitutio Principis est quod Imperator decreto vel edicto vel epistula constituat, nec umquam dubitatum est, quin il egis vicem optineat, cum ipse Imperator per legem imperium accipiat.

6. Ius autem edicendi habent magistratus populi Romani. sed amplissimum ius est in edictis duorum Praetorum, urbani et peregrini: quorum in provinciis jurisdictionem Praesides eorum habent; item in edictis Aedilicum curulium, quorum jurisdictionem in provinciis populi Romani Quaestores habent; nam in provinciis Caesars omnino Quaestores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.

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 constitutio 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.

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 Pergius, 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 (Aedilician) edict is not promulgated therein.

1 Theophilus says that the force of laws was given to Seta. by the Lex Hortensia (Theoph. lib. I. 3). But see Niebuhr's remarks on this law, Lectures on Roman History, Vol. I., pp. 211, 212.
2 Decretum = a decision given by the emperor in his capacity of judge. Legem = a general constitution. Rescriptum = a request. Senatusconsultum = the emperor's solution of a legal difficulty pronounced 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 Austin, Lect. 28, p. 200 (p. 223, third edition).
4 In the imperial times the provinces were divided into classes, prominent imperiali or Caesar, governed by legati appointed by the
7. Responsa prudentium sunt sententiae et opiniones corum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrant, id quod ida sintut legis vicem optinet; si vero dissentiant, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur.

DE JURIS DIVISIONE.

8. Omne autem ius quo utimur vel ad personas pertinent, vel ad res, vel ad actiones sed prius videamus de personis.

DE CONDICIONE HOMINUM.

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


7. The responses of the learned in the law are the expressed views 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 judeks is at liberty to follow which opinion he pleases, as is stated in a rescript of the late emperor Hadrian.

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 ingeni, some libertini.

emperor, and praetorius seniores, governed by proconsuls nominated by the senate. This division was done away with about the middle of the 3rd century.  

1 The jurisprudence 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 permissum est" refer. See D. i. 2. 2

2 See Austin, Lect. 28, on the classification of laws.

3 Austin discusses the signification of "person," natural or legal, in Lecture 12.

The distinction between the law of persons and of things is treated of in Lecture 40.

et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constituit interlegemus.

16. Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum, modo Latinum fieri dicemus. (17.) Nam in cuilibus persona haec concurrunt, ut maior sit anno-

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 deerit, Latinus erit.

De manumissione vel causae probatione.

18. Quod autem de aetate servi requiritur, legi Aelia Sentia introductum est. nam ea lex minores xxx annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, aut consilium iusta causa manumissionis adprobata,

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 dediticii.

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

"ex iure Quiritium;" and (3) liberated by a regular and lawful

manumission, i.e. by vindicta, census, or testamento, such an

one becomes a Roman citizen; but if any one of these qualifica-

tions be wanting he will be a Latin.

18. The requirement as to the age of the slave was intro-

duced 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

liberati fuerint. (19.) Iusta autem causa manumissionis est

veluti si quis filium filiamve, aut fratrem sororemve naturalem,

aut alium, aut paedagogum, aut servum procuratoris habendi

gratia, aut ancilam matrimonii causa, aput consilium manu-

mitat. [De recuperatoribus.] (20.) Consilium autem ad-

hibetur in urbe Roma quidem quiunque senatorum et quiunque
equitum Romanorum puberum; in provinciis autem viginti

recuperatorum civium Romanorum. idque fit ultimo die con-

ventus: sed Romae certis diebus aput consilium manumittance

tur. Maiores vero triginta annorum servorum manumittit

solent, adeo ut vel in transitu manumittatur, veluti cum

Practor aut Proconsule in balneum vel in Meatrum eat. (21.)

Prateraen minor triginta annorum servorum manumissionem potest

civis Romanus fieri, si ab eo domino qui solvendo non erat,

testamento eum liberet et hereditem reliquiet—[desunt lib. 24].

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 procurator, 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 puberty: in

the provinces of twenty Recuperatores, Roman citizens.

And 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

an heir.

There are three essentials of "manumissionis legitima": of

the slave shall be even thirty yrs of age. 

1 "Pleno jure" = "ex jure Quir.

itum." I. e. not merely "in bonus." for the signification of which terms see iii. 42. Compare also § 17, below.

2 For further information as to dediticii see iii. 74; Ulp. i. 11.

3 i. e. it is of opinion that the rights which ensued upon the various kinds of manumission, were not identical, Hist. of Rome, Vol. 3.

p. 594. Ulpian, 1. 6, 8, 16, 17, 16.

4 See Lord Mack-

enzie's Roman Law, p. 310, and Cicero pro Tullio, 8. The name was subsequently applied to officers


5 ii. 154; Ulpian, i. 14.

6 1 v. 84.

7 1. 106.

8 Recuperator. See Lord Mackenzie's Roman Law, p. 310, and Cicero pro Tullio, 8. The name was subsequently applied to officers holding an analogous position in the provinces. Ulpian, i. 13; cf. Plin. Ep. iii. 20.
22. \textit{...manumissi sunt, Latini Iuniani dicuntur: Latinii diximus, quia adsimulati sunt Latinis coloniariis; Iuniani diximus, quia per legem Iuniam libertatem accepsumur, cum olim servi viderentur esse.} (23.) Non tamen illis permittit lex Junia nec ipsius testamentum facere, nec ex testamento alieno capere, nec tutores testamenti dari. (24.) Quod autem diximus ex testamento cos capere non posse, ipsa intelligendum est, ut nihil directo hereditatis legatorum nomine cos posse capere dicamus; alioquin per fideicommissum capere possunt.

25. Hi vero qui deditciorum numero sunt nullo modo ex testamento capere possunt, non magis quam qui libere peregrini.

22. \textit{.......... are manumitted are called Latini Iuniani; Latini because they are put on the same footing with the Latin colonists; Iuniani because they have received their liberty under the Lex Jundia, whereas in former times they were considered to be slaves.} 23. The Lex Jundia 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 tutors (guardians) 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.

25. But those who are in the category of deditci 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 themselves. 26. The liberty, therefore, of those who are in the category of deditci is of the lowest kind, nor is access to Roman citizenship allowed them by any lex, senatusconsultum, 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 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 their condition as Latins, may be so regarded.
nascitur ex novo senatusconsulto quod auctore divo Hadriano factum est, civis Romanus nascitur. (31.) Hoc tamem in adipsicade civitatis Romanae etiam miniores triginta annorum manumissi et Latinorum factum ex lege Aelia Sentia habuerunt, tamen postea senatusconsulto quod Pegaso et Pusio Consulibus factum est, etiam majoribus triginta annorum manumissi Latinis factis concessum est. (32.) Ceterum etiam ante decassert Latinus, quam annalicai fuit causa probari, potest mater eius causam probare, et sic et ipsa et cives Romanae [desunt 39. Ibn. (33. 34.)] si quis alienius et in bonis et in iure Quirini sit, manumissus

which was enacted at the instance\(^1\) 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 consulsiphs of Pegaso and Pusio, to those also who were manumitted and made Latins when over thirty years of age.\(^2\) Further, even if the Latin die 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 citizen.

33. 34.\(^3\)

35. If a slave belong to any man both in bonis and in iure Quirini\(^4\), when manumitted, (by this same owner, that is

\(^1\) The comiti or senate in early impari times still legislated in appearance, but their legislation was according to the emperor’s suggestion. The comiti being incommo- dious tools, the work of legislation was usually done by the senate, the smaller and more manageable body; but the senate had no free action, their senatusconsulta were at the in- tervento of the prince. See Austin, Vol. III. P. 290 (p. 534, third edition).

\(^2\) A.D. 75.

\(^3\) Who were Latinus, that is to say, by failure of one or other of the conditions marked (4) and (5) in § 17 above.

\(^4\) In the 19th and 20th lines of the missing 39, Gersten proposes a reading founded on the appearance of the M.S., 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 (sixth) of his patrimony in the construction of a house at Rome, he should obtain the Quirini rights.”

From Ulpian, Ill. 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 media burden and uses it for carrying corn to Rome for six years.”
Hindrances to Manumission.

to say,) he can both become a Latin and obtain the "Jus Quiritium" (i.e. become a Roman citizen.

Moreover the law does not allow any one who chooses to manumit: 8 For he who manumits with the view of defrauding his creditors or his patron 9 effects nothing, since the Lex Aelis Sentia bars the gift of freedom. Likewise by the same law a master under twenty years of age is not allowed to manumit except by vindicta, (after) a lawful cause for manumission has been proved before the council. Lawful cause of manumission is, for instance,

1 This passage is capable of two interpretations, either the one here given, which is in effect that a master could, under the conditions specified, confer upon his slave either the Latinus or the civitas; (the latter would be the result of a manumission per vindictam;) or else it may refer to the method of manumission termed liberitio, and this, as Ulpian tells us, was the result of a second manumission granted to one who from a slave had been made a Latin, the patron being his original master. See Ulpian, lib. 4.

2 The patronus is the former master of a libertinus. The jura patronatus were:

(a) Obligatio: duties attaching upon the libertinus by operation of law, e.g. to furnish board for the patron if taken prisoner, to assist in furnishing dower for his daughter, and to contribute to his expenses in law-suits, &c.

(b) Jura in bonis: rights of succession on the part of the patronus to the goods of the libertinus. Nut. 39 et seq.

(c) Operum: services reserved by special agreement as a consideration for the manumission. It is scarcely necessary to say that a freedman is styled libertinus in respect of his class, libertinus in reference to his former master.

4 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 Theophilus 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 valueless. Niebuhr and Göschen think the passage should have the following collocation of words, "non aliud vindicta manumittendi permittitur quam si apt," &c."

1 1. 19.
2 This was one of the modes of manumission arising out of custom, and reorganized 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.

proceeding was established for the manumission of slaves 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 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 vindicta, causis, or inter amicos, may set free their whole gang, provided no other cause stands 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, should not be allowed to manumit more than four. But that those who have more than ten and not........5.

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 Furia Caninia sets aside whatever is done for its evasion. There are also special senatusconsulta by which all devices for the evasion of the lex are set aside.

47. Finally, we must observe that the provision of the Lex

1 The owner of twelve could manumit five, for he would reckon the number, ex quo dimidia aut tertia aut quarta aut quinta pars liberari potest, unique tot manumittere licet, quo ex antecedenti numero licuit. et hoc ipsa legem provisum est. erat enim sancia absolutum, ut ex servorum dominio quinque liberare liceret, quia usque ad dimidiam partem ex eo numero manumittere ei conceditur, ulterior autem xii servos habenti non plures liberet manumittere quam qui. at eis qui plures quam x neque [46. Nam et si testamento scriptus in orbem servis libertas data sit, quia nullus ordo manumissionis inventur, nulli liberi erant; quia lex Furia Caninia quae in fraudem eius facta sint rescindit. sunt etiam specialia senatusconsulta, qui. bus rescissa sunt ea quae in fraudem eius legis extorquita sunt.

47. In summæ scindendum est, eam lege Aelia Sentia cautum
Sui juris, alieni juris. Potestas.

Aelia Sentia, that those manumitted for the purpose of defrauding creditors are not to become free, applies to foreigners as well as citizens (diuam), (for) the senate so decreed at the instance of Hadrian: but the other clauses of the lex do not apply to foreigners.

Next comes another division of the law of persons. For some persons are sui juris, some are subject to the jus (authority) of another. But again of those persons who are subject to the authority of another, some are in potestas, some in manus, some in mancipium. Let us consider now 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.

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

Slaves, then, are in the potestas of their masters, which potestas is a creature of the jus gentium; 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 master. But at the present day neither Roman citizens, nor any other men who are under the empire of the Roman people, are allowed 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

1. This is one of the instances of the value of the discovery of Gaius's treatise in relation to historical information. The existence of this regulation of the Lex Aelia Sentia, by which an enfranchisement made for the purpose of defrauding creditors affected foreigners as well as citizens, was utterly unknown before the publication of these commentaries.
2. Ulpian, iv. 1.
3. See Appendix (A).
4. But see Austin, Vol. ii. p. 564 (p. 583, third edition), on the question of slavery being according to natural law or not.

Potestas over Slaves.

gentes animadvertere possimus dominis in servos vitae necisque potestatem esse, et quocumque per servum adquiritur, id domino adquiritur. (53.) Sed hoc tempore neque civibus Romulis, nec ulla alia dominus qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire. Nam ex constitutione sacraetissimi Imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eiusdem Principis constitutionem coercetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas Principum confugiat, praecipit, ut si intolerabilis videatur dominorum saevitia, cognatur servos suos vendere. Et utrumque recte fit; male enim nostro iure uti non debemus:
qua ratione et prodigis interdictur honorum suorum administratio.

54. Ceterum cum apud cives Romanos duplex sit dominium, (nam vel in bonis vel ex iure Quiritium vel ex utroque iure culisque servus esse intellegatur), ida demum servum in potestate domini esse dicemus, si in bonis eius sit, etiam si simul ex iure Quiritium elasdem non sit. Nam qui nudum ius Quiritium in servo habet, ipse potestatem habere non intellegitur.

55. Item in potestate nostra sunt liberi nostri quos instis nuptiis procreavimus. quod ius proprium civium Romanorum est. fere enim nulli ali sunt homines, qui talium in filios suos habent potestatem, qualem nos habemus. idque divas Hadrianas edicto quo proponitur de his, qui sibi libertique suis ab eo civitatem Romanam petebant, significavit. nec me praeest Galataram gentem credere, in potestate parentum liberos esse.

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 in bonis or ex iure Quiritium, or by both titles), we shall hold that a slave is in his master's potestas only in case he be his in bonis, even if he be not the same man's ex iure Quiritium also. For he who has the bare jus Quiritium over 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 this 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.

1 Conubium est usoria ducendae familiaris. Conubium habent cives Romanos omnes civibus Romanis; cum Latinius autem petraein ius et patris si conesseam 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 relationship, also had an important bearing on the causa probatio; as far as the former is concerned, conubium existed as an undisputed right between all free persons, but only as a privilege (and therefore requiring proof) between Latins and foreigners.

2 Cives does not here tell us what were the rights of a father having patria potestas. Originally no doubt the potestas over sons was the same as over slaves, including the power of life and death, and the right to all property which the son acquired. The former power gradually fell into abeyance, and the latter in the case of sons was infringed upon by the rules which sprang up regarding peculium casenae and quasi-casenae, for which see D. 14. 6. 2, and Sandars. Pedilatia, p. 339. Read also Maine, pp. 215-16.

3 Nuptiae and matrimonium seem to be used indiscriminately by Galvis. Nuptiae properly would be the ceremonies of marriage, matrimonium the marriage itself.
59. Inter eas enim personas quae parentem liberorumve locum inter se optinent nuptiae contrahi non possunt, nec inter eas cumulium est, velut inter patrem et filiam, vel materem et filium, vel avum et neptem: et si tales personas inter se coeferint, nefarias **atque incestas nuptias contraxisse dicuntur,** et haec adeo ha sunt, ut quamvis per adoptionem parentem liberorumve loco sibi esse coeperint, non possint inter se matrimonio conungi, in tantum, ut et dissoluta adoptione idem iuris manifest: itaque eam quae nobis adopitio filiae aut nepis loco esse coeperit non poterimus uxorem ducere, quamvis eam emancipaverimus.

60. Inter eas quoque personas quae ex transverso gradu cognatione inter se sunt quaedam similis observatio, sed non tanta. (61.) Sane inter fratrem et sororem prohibite sunt nuptiae, sive eodem patre cademque matre nati fuerint, sive alterutro corum. sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptio, sane inter me et

59. Thus between persons who stand to one another in the relation of ascendants and descendants, marriage cannot be contracted, nor is there cumulium between them, for instance, between father and daughter, or mother and son, or grand-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 certainly 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

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1 Ulpian, v. 6.  
2 Ibid.  
3 i. e. Whether they be of the whole or half blood.

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Prohibited Degrees.

62. Fratris filiam uxorem ducere licet: idque primum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset. sororis vero filiam uxorem ducere non licet; et haec inter nos nuptiae esse non possunt, quia neque eadem duobus nupta esse posse, neque idem duas uxores habere.

63. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur, neque liberar. **Hic enim qui ex eo coitu nascentur, matrem quidem habere videntur, patrem vero** has been dissolved by emancipation, I can marry her: and moreover if I have been emancipated there will be no bar to the marriage.

62. It is lawful to marry a brother's daughter, and this first came into practice when Claudius took to wife Agrippina, the daughter of his brother. But it is not lawful to marry a sister's daughter. And these things are so laid down in constitutions of the emperors. Likewise it is unlawful to marry a father's or mother's sister.

63. Likewise one who has aforesaid been our mother-in-law or daughter-in-law or step-daughter or step-mother. The reason for our saying "aforesaid" is that if the marriage still subsists whereby such affinity has been brought about, marriage between us is impossible for another reason, since neither can the same woman be married to two husbands, nor can the same man have two wives.

64. If then any man has contracted an unholy and incestuous marriage, he is considered as having neither wife nor children. For the offspring of such a cohabitation are regarded as having a mother indeed, but no father at all: and hence they
non utique: nec ob id in potestate eius sunt, sed quales sunt
ii quos mater vulgo concepit. nam nec hi patrem habere om-
nino intelleguntur, cum eis etiam incertius sit; unde solent
spurius filii appellari, vel a Graeca voce quasi cedependo con-
cepti, vel quasi sine patre filii.

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

67. Item si civis Romanus Latinam aut peregrinam uxorem
duxerit per ignorantium, eam eum civem Romanam esse cre-
deret, et filium procreaverit, hic non est in potestate, quia ne
quidem civis Romanus est, sed aut Latinus aut peregrinus, id
are not in his potestas, but are as those whom a mother has
couceived out of wedlock. For these too are considered to
have no father at all, inasmuch as in respect of them also he is
uncertain: and therefore they are called spurious children,
either from a Greek word, being as it were conceived ποταμίον
(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
ancestors, are subsequently brought under their potestas.

66. For instance, if a Latin, having married a wife in accord-
ance 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

1 Ulpiam, iv. 2. Sinpatrīi according to the second derivation is con-
tacted down into spurius.

2 l. 19. Ulp. vii. 4.
error, they

60. Item si Latina peregrina, quem Latinum esse crederint, supserint, potest ex senatusconsultu filio nato causam erroris probare, et ita omnes uident cives Romani, et filios in potestate patris esse incipit. (70.) Idem inris omnino est, si Latinus per errorrem peregrinam quasi Latinam aut cive Romana et lege Aelia Sentia uxorem duxerit. (71.) Praeterea si cives Romanus, qui se credissent Latinum, duxissent Latinum, permettuntur ex filio nato erroris causam probare, tamquam si ex lege Aelia Sentia uxorem duxissent. Item his qui hicet cives Romani essent, peregrinos se esse credissent et peregrinas uxoribus duxissent, permetttuer ex senatusconsulto filio nato causam erroris probare: quo facto peregrina uxor civis Romana fiet et filius quoque ita non solum ad civitatem Romanam perveniret, sed etiam in potestate patris redigitur. (72.) Quaecumque de filio esse diximus, cadem et de filia dicta intellegemus. (73.) Et quantum ad erroris causam probandum attinet, nihil interest cuius actatis filius

in his condition, and therefore the son, although he is a Roman citizen by birth, is not brought under his father's potestas. 60. 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 cause of error, and so they all become Roman citizens, and the son is at once 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 cause 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 cause 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 cause
Romana peregrino uspserit, is qui nascitur, licet omni modo peregrinus sit, tamen interveniente conubio insitus filius est, fam-
quan si ex peregrina eum procerasset. hoc tamen tempore e 
seutus consulto quod autore divo Hadriano factum est, esti 
non fuerit conubium inter civem Romanam et peregrinem, qui 
nascitur insitus patris filius est. (78.) Quod autem diximus in 
ter civem Romanam peregrinumque matrimonio contracto eum 
qui nascitur, peregrinum [descend 11 lin.], (79.) Adeo autem 
hoc ita est, ut [descend 3 lin.] sed etiam, qui Latini nominantur: 
sed ad alios Latinos pertinet, qui proprios populos propriisque 
civitatis habebant et erant peregrinorum numero. (80.) Approx 
ratione ex contrario ex Latino et cive Romana qui nascitur, 
civis Romanus nascitur. fuerunt tamen qui putaverunt ex lege 
Aelia Sentia contractum matrimonium Latinum nasce, quia videt 
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 foreigner1.............. 79. ............... 
80. On the same principle, in the converse case, the child of a 
Latin man and a Roman woman is a Roman citizen by birth. 
Some, however, have thought that when a marriage is con 
tracted 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 

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 Gisler 
conjecturally fills up the lacuna. In 
§ 78, with an explanation that a 
special lex (Messia) had settled that 
the rule of the child's condition being 
of the mother when no conua 
sumption subsisted should be set aside. See 
Ulpian, v. 8, and D. 1. 5. 21. 
This paragraph again is alto 
gether in confusion. Probably what 
is implied by it is that except in the 
case touched by the Lex Mensia, the 
child of a marriage without con 
ubium follows his mother's con 
dition by the jus gentium. Then 
follows the further explanation, that 
as marriages without conubium are 
all alike to this incident, it matters 
not whether the Latins concerned 
are technical Latins (Junians), or 
actual Latins by birth, "Latios Latinos" 
as Gaius terms them, who, as we 
now learn, were classed among the 
foreigners.

Conubium.

eo casu per legem Aelia Sentiam et Iuniam conubium inter 
eos datur, et semper conubium effect, ut qui nascitur patris 
conditione accedit: aliter vero contracto matrimonio eum qui 
nascitur iure gentium matris conditionem sequi. at vero indi 
civis Romanus est; sed hoc iure utinam ex senatusconsulto, 
quo autore divo Hadriano significatur, ut omnino medio ex Latino 
cive Romana natus civis Romanus nascatur. (81.) His 
convenienter etiam illud senatusconsulto divo Hadriano autore 
-significatur, ut ex Latino et peregrina, item contra ex peregrino 
et Latina qui nascitur, matris conditionem sequatur. (82.) 
Ille quique his conveniens est, quod ex ancilla et libero iure 
gentium servas nascatur, et ex libera et servo liber nascitur. 
(83.) Animadvertere tamen debemus, ne iuris gentium regulam 
vel lex aliqua vel quod legis vicem optinet, aliquo casu 
mutaverit. (84.) Ecce enim ex senatusconsulto Claudianus 
poterat civis Romana quae alieno servo volente domino eius 

Junia, and conubium always has the effect that the child 
follows the condition of the father; but that when the 
marrige is contracted in any other way the child by the jus 
gentium follows the condition of the mother. Nowadays 
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§, 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 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 birth§. 
83. We ought, however, to be on our guard lest any lex, or any 
thing equivalent to a lex, may have changed in any instance the 
rule of the jus gentium. 84. Thus, for example, by a sena 
tusconsultum of Claudius, a Roman woman who cohabited with 
another person's slave with the master's consent, might herself 

1 1. 30, 56, 67. Ulpian, v. 8. 71. 66. 2 Ulp. v. 9.
coit, ipsa ex pactione libera permanere, sed servum procreare
nam quod inter eam et dominium iusti servvi convenerit, ex
senatusconsulto ratum esse iubetur. sed postea divus Hadri-
anus iniquitate rei et inegantia iuris motus restituit iuris gen-
tium regulam, ut cum ipsa mulier libera permaneret, liberum
patriat. (85.) Ex leg.,...ex ancilla et libero poterant liberi
nasci: nam ea lege cavitur, ut si quis cum aliena quam
credibilis liberam esse coeperit, si quidem masculi nascantur,
libri sint, et vero feminae, ad eam pertinente cuius mater
ancilla fuerit, sed et in hac specie divus Vespasianus inde-
gantia iuris motus restituit iuris gentium regulam, ut omni
modo, etiam si masculi nascantur, servi sint eius eius matre
fuerit. (86.) Sed ilia pars eiusdem legis salva est, ut ex libera
et servo alieno, quem siebatur esse, servi nascantur.

by special agreement remain free, and yet bear a slave; 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 rule,
restored the regulation of the jure gentium that when the
woman herself remains free, the child she bears shall also be
free. 85. By the Lex......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 cohabitated with 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 jure 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,
Peri, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit, nam ille ille id legite in consciuntur, statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberii sunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. At huius legitime consciuntur, ex conceptionis tempore statum sumunt. (93.) \[\text{Cic.} \text{pro Dom.} \text{v.} 20.\]

Patria Potestas.

Roman citizen and be then manumitted and bear her 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. Therefore if a Roman woman, whilst pregnant, be interdicted from fire and water, and so become a foreigner, and then bear her 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. 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 master; many authors draw a distinction and hold that if she conceived in lawful marriage, the child born from her is a

\[\text{Ulpian, v. 10.}\]

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 necessary of life was driven to inflict on himself banishment, and with it loss of citizenship. "Id autem ut esse facilius, non sese tecti auribus et ignis interdictis faciliter." C. \text{Cicero,} pro Dom. 20.

\[\text{I. 81. 160.}\]

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. 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 potestas. Which he only does it, on investigation of the circumstances, he judge 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 absentee. And these matters are so laid down in an edict of the late emperor Hadrian. Likewise if any man, and his pregnant wife with him, be presented with Roman citizenship, although the child born is, as we have said above, a Roman citizen, yet he is not in his potestas of his father: and this is laid down by a

\[\text{III. 30. Filius, Proleg.} \text{c.} 37. \]

\[\text{I. 92.}\]
patris non fit; idque subscriptione divi Hadriani significatur. 
qua de causa qui interlegit usorem suam esse praeventem, dum 
civitatem sibi et uxori ab Imperatore petit, simul ab eodem 
petere debet, ut eum qui natus erit in potestate sua habeat.

(95.) Alius causa est eorum qui Latini sunt et cum libris suis 
ad civitatem Romanam pervenient: nam homin in potestate 
fiunt liberi. quod ius quibusdam peregrinis [desunt libri.]

(96.) magistratum gerunt, civitatem Romanam consequunt; 

(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. 

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 

right (has been extended) to certain foreigners……. 

96. When they who discharge the duties of a magistrate obtain Roman 
citizenship: (the franchise) is the minus Latium (or, is a less extensive one), when those only who hold some magistracy or office of honor attain to Roman citizenship. And this is 

stated in many epistles of the Emperors.

97. Now not only our actual children are in our potestas, 

according to what we have already said, but also those whom we adopt.

98. But adoption takes place in two ways, either by authority 
of the populus, or under the jurisdiction of a magistrate, 

for instance the Praetor. 

99. By authority of the populus we adopt those who are sui juris: which species of adoption is styled arrogatio, for he who adopts is rogatus, i.e. is interrogated whether he wishes the man whom he is about to adopt to become his lawful son: and he who is adopted is rogatus whether he submits to that being done: and the populus are 

rogatus whether they order it to be done. Under the jurisdic-
tion 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- 
sn, granddaughter, great-grandson, great-granddaughter. 

That adoption which is performed by authority of the populus 
takes place nowhere but at Rome: but the other is frequently

1 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 Epitola. See note on 1. § 5 and Dilsees, Manuale 
Latinumatis, sub verbo, § 3. 

2 As stated in the note on § 22, Niebuhr held that the minus Latium 
meant the franchise of the old Latin towns: whilst the minus Latium was 
the franchise of the colonists north of the Tiber. The Julian law gave civils 
to all the old Latin towns, and therefore 

according to Niebuhr’s notion, the minus Latium long before Galus’ 
time had become obsolete: the only Latin franchise remaining being the 
minus. Memmison, 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 existing in Galus’ 
time, that neither had anything to do with the old Latins, and that the difference between the two was that in the case of the minus Latium the full civils was conferred on those who held office in the co-
lony, and on their wives, parents, and children; whilst in the case of the 
minus Latium, the full civils was conferred on the magistrates alone and not on his relations. See Memmison, Die Stadtrechte der Lat. 
Graec. &c., 170. and Galus, 1. 70. &c. 

3 With Memmison’s view of the subject agrees the account given by 
Appian (de Bello Civili, ii. 26) of the settlement of the city of Novo 
Compo by Caesar. He states that the inhabitants received the jus Latii, 
and that the consequence of this was that any of the citizens who held a superior magistracy for a year obtained the Roman civils. So also 
Asconius has a passage (in Fison 
15. 3. edit. Orelli) which may be translated: ‘Pompey gave to the original inhabitants the jus Latii, so that they might have the same privileges as the other Latin colonists, viz., that their members by holding a magistracy 
should attain to the Roman citizenship.’ This passage in Livy 
11. 8. refers to the old jus Latii, which was turned into full civils by the Lex Julia, but it is well worth reading.

minus latum [Latium] est, cum hi tantum qui vel magistratum 
vel honorem gerunt ad civitatem Romanam pervenient. idque 
complurios epistulis Principum significatur [1. lit.]

Non solum tamen naturales liberi, sed etiam e quae diximus, in potestate nostra sunt, verum et hi quos adoptamus.

Adoption: 33

1 1. 3. 
2 Ulpian, VIII. 1—3. 
3 See Appendix (B).
Adoption and Arrogation.

etiam in provinciis aput Praesides earum fieri solet. (101.)

Item per populum feminae non adoptantur; nam id magis placuit. Apud Praetorem vero vel in provinciis aput Proconsulem Legatumve etiam feminae solent adoptari.

102. Item impuberem apud populum adoptari aliquando prohibitus est; aliquando permissum est. nunc ex epistula optimi Imperatoris Antonini quam scriptis Pontificibus, si insta causa adoptionis esse videbatur, cum quibusdam conditionibus permissum est. apud Praetorem vero, et in provinciis aput Proconsulem Legatumve, cuisscumque actatis adoptare possumus.

103. Nulla vero utriusque adoptionis commune est, quia et hi qui generare non possunt, quales sunt spadones, adoptare possunt. (104.) Feminae vero nullo modo adoptare possunt, quin ne quidem naturales liberos in potestate habet. (105.) Item si quis per populum sive aput Praetorem vel aput Praesidem provinciae adoptaverit, potest eundem ali in adoptionem performed in the provinces also in the presence of their governors.

101. 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.

Further, in some cases it has been forbidden to adopt by authority of the populus one under the age of puberty; in other cases 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 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.

103. It is a rule common to both kinds of adoption, that those who cannot procreate, as eunuchs-born, can adopt. But women cannot adopt in any way, insomuch as they have not even their actual children in their potestas.

104. Likewise, 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. But it is a moot point whether a younger man can adopt an elder, and the doubt is common to both kinds of adoption.

105. There is this one 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 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.

Now let us consider about those persons who are in our manus. This also is a right peculiar to Roman citizens.

But whereas both males and females may be in our potestas, females alone come into manus. Formerly they came into manus in three ways, by usus, fideicommissus or composition.

A woman who remained married for an unbroken year came into manus by usus; for she who was acquired, as it were, by usurpation through the possession of a year, passed into the

1 Ulpian, viii. 6, note.
2 Ibid. 8a.
3 Justinian settled that the adoptor must be older than the adopted by 18 years (plena pubertate). Inst. 1. 14.
4 Ulpian, viii. 8. The emperor Justinian remodelled the whole law of adoption, enacting that the actual father should lose none of his rights, and be exempted from none 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 adoptio pleon, the old law remained in force. In the other kind (minus pleon) 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.
5 For an explanation of usucapio, see ii. 42 et seqq.
Capitulatur, in familiar viri translati filiaeque locum optimebat. Itaque leges duodecim tabularum caudam eae, si qua nollet eo modo in manus marii convenire, ut quotannis trinoctio abesse sitque ex nunc quibusque anni interrumpere. Set hoc totum ipsius legibus sublatum est, partim ipsa desuetudine obliterated est. (112) Farceo in manum convenit, fer quodam genus sacrifici — — in quo farceus parvis adhibetur: unde etiam confarreatio dicitur. sed cimplura praeterea huius juris ordinandici gratia cum certis et sollemnis verbis, preserentibus decem testibus aguntur et funt. quod ipsis eius nostris temporibus in usu est: nam flamines maiores, id est Diales, Martiales, Quirinales, sicat reges sacrorum, nisi sis confarreatis nuptis nativ, inaugurari non videant — confarreatio — — — — (113) Conempitio in manum convenit familiae of her husband, and gained the position of a daughter. Therefore it was provided by a law of the Twelve Tables, so that if any woman was unwilling to come under her husband's manus in this way, she should every year absent herself for the space of three (successive) nights, and so break the nexus 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 farceo through a particular kind of sacrifice — — in which a cake of fine flour (far) is employed: whence also the proceeding is called confarreatio; 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 being supreme in sacred matters, are not admitted to office, unless they are born from a marriage by confarreatio — — — — (113) Women come into manus by coempitio by means of a mancipatio, i.e. by

2 Tab. vi. l. 4.
1 Ulpian, ix. Servius thus describes a part of the ceremony used in the marriage of Flaminia and Flaminula: "Two seats were joined together and covered with the skin of 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 Dido's words, was said to be locata to her husband." See Servius on "Fac. iv. 104. 357. Tacit. Ann. iv. 16. 119.

per mancipationem, id est per quandam imaginiam venditionem, adhibitis non minus quam testibus, civibus Romanis pateribus, item libripriene, esse isis emit mulierem, culus in manus convenit. (114) Poste autem coempitio facere mulier non solum cum marito suo, sed etiam cum extraneo: unde aut matrimonii caus a facta coempitio dicitur, aut fiduciae causa. quae enim cum marito suo facta coempitio, ut aput cum filiac loco sit, dicitur matrimonii causa, feccis coempitio: quae vero alterius rei causa facta coempitio cum virtuo aut cum extraneo, velut tutelae evitamine causa, dicitur fiduciae causa feccis coempitio. (115) Quod est tale: si qua velit quis hes habeb tutores representer, ut alium nanciscatur, su auctoribus coempitio facta; deinde a coempitatorre red 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 libertus, (wherein) he into whose manus the woman is coming buys her for himself with an at. 114. But a woman can make a coempitio not only with her husband, but also with a stranger: whence a coempitio is said to be made either with intent of matrimony or with fiduciary intent. For she who makes a coempitio with her husband, to be to him in the place of a daughter, is said to make coempitio with the intent of matrimony: but she who makes a coempitio with her husband or a stranger for any other purpose, for instance to get rid of her guardian, is said to have made coempitio with fiduciary intent. 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 coempitio with their authorization: then being retransferred through mancipatio by the coempitator to such person as she

2 l. 119.
1 Guardianship (tutelio) is treated of in l. 147—200, without a knowledge of which it is difficult 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 repudiation of them required authorization on their part; although if they were unfit for their office, and yet voluntarily 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 (l. 196). The guardian, then, sells the woman to the coempitator by mancipatio. The coempitator 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 (l. 122). From the mancipium she is freed by emancipation, and so, by mere operation of law (l. 160) at once has the mancipator as her tutus fiduciarius."
cipit

pleases, and by him manumitted by *vindicta*, she thenceforth 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 *coemptio* took place also for the purpose of making a testament. 1 For then women had no right of making a testament (certain persons excepted), unless they had made a *coemptio*, been retransferred by *mancipatio*, and manumitted. But the senate, at the instance of the late emperor Hadrian, abolished this necessity of making a *coemptio*. . . . 115 b. But even if it be for fiduciary purpose that a woman has made a *coemptio* 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 *mancipium* of her husband, it is held that she obtains the rights of a daughter. 3

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 *mancipium* 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 place of a daughter to him, can nevertheless be mancipated by him. 118 a. But generally persons are mancipated, whether by ascendants or *coemptionators*, only when the ascendants or *coemptionators* wish to dismiss them from their power, as will be seen more clearly below. 119. Now *mancipatio*, as we have said above, 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 *librarius*, he who receives the thing in *mancipium* takes a coin in his hand and says as follows: "I assert this man to be mine *ex jur
HOMINEM EX IUNX QUIRITIIUM MEUM ESSE AIO, ISQUE MEHI EMPTUS EST HOC AERE AENEÆisque LIBRÆ: deinde aere percutit librum, idque aed et ei a quo mancipio accipit, quasi pretio loco. (120.) Eo modo et servites et liberae persona mancipiantur. animalia quaque quae mancipi sunt quo in numero habentur boves, equi, muli, assi; item praedia tam urbana quam rusticà quae et ipsa mancipi sunt, qualia sunt Italica, codem modo solent mancipari. (121.) In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae servi sunt et liberae, item animalia quae mancipi sunt, nisi in praesentia sunt, mancipari non possunt: adeo quidem, ut eum qui mancipio accipit adprehendere id ipsum quod ej mancipio datur unesse sit: unde etiam mancipatio dicitur, quia manu res capitur. praedia vero absens solent mancipari. (122.) Ideo autem aee et libra adhibetur, quia ob latere tantum nonnullum urbantur; et erant asses, dupondii, semisses et quadrantes, nec ullus aureus vel argentus.

Quirittium; 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 animals which are res mancipi, in which category are reckoned oxen, horses, mules, asses; likewise such estates, with or without houses on them, as are res mancipi, of which kind are those in Italy, 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 res mancipi, 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 so 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 distance. (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 Tables: and the force and effect of this coinage was not in its weight but its value. For instance the ass weighed a pound each, and the dupondii two; whereas the name dupondium, as being due pondus; a name which is still employed. The coins (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 so still 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

1 Probable Tab. 11. 1.
2 Isidor. Orig. xvi. c. 24.
3 When a free person is transferred from potestas, or as in the present case from manus, by mancipatio, the authority appertaining to the purchaser is neither personal nor personal; but mancipatio. 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 it. 186, 187, &c.
4 Read notes on l. 135, 133, and loc. 1. 138.
5 The reading proposed by Huschke is adopted: "Quod re vero coemptione emta mancipatis distet: instead of Gaius's: "Quare eis coemptionem feminae etiam mancipatur." Huschke says with truth that no satisfactory meaning can be got out of the latter.
Liberation from Poestas.

parentibus vero et a coemptionatoribus mancipati mancipiatur servorum loco constitutur, adeo quidem, ut ab eo cuius in mancipio sunt neque hereditatem neque legata alter capere possint, quam si simul codem testamento liberi esse iubentur, sicut iuris est in persona servorum. sed differentiae ratio manifesta est, cum a parentibus et a coemptionatoribus sibi; verbis mancipio accipuntur quibus servit; quod non similitur si in coercione.

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

127. Hi vero qui in poestate parentis sunt mortuo eo sui iuris iunt. Sed hoc distinctionem recipi, nam mortuo patre sanc omnino filii filiaeve sui iuris efficientur, mortuo vero a non omnino nepotes nepotaeque sui iuris iunt, sed ita, si post mortem atque patris sui poestatem recusari non sunt. itaque 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 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 coemption.

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 poestas. 126. How slaves are freed from poestas we may learn from the explanation of the manumission of slaves which we gave above.

127. But those who are in the poestas of an ascendant become sui juris on his death. This, however, admits of a qualification. For, undoubtedly, on the death of a father sons and daughters in all cases become sui juris; but on the death of a grandfather grandchildren, and granddaughters do not become

si moriente avo paterorum et vivent et in poestate patris fuerit, tune post obitum avo in poestate patris sui iust; si vero is, quo tempore avus moritur, atque mortuus est, aut exit de poestate patris, tune hi, quia in poestatem eius cadere non possunt, sui iuris iunt. (128) Cum autem est qui ob aliquod malefactum ex lege penali aqua et igni interdictur civilitate Romanae amittit, sequitur, ut qui eo modo ex numero civium Romanorum tollitur, proinde ac mortuo eo desinant liberi in poestate eius esse: nec enim ratio patitur, ut peregriniae conditionis homo civem Romanum in poestate habeat. Paria ratione et si qui in poestate parentis sit aqua et igni interdictum fuerit, desinit in poestate parentis esse, quia aequa ratio non patitur, ut peregriniae conditionis homo in poestate sit civis Romani parentis.

129. Quod si ab hostibus captus fuerit parentes, quamvis ser-
sui juris in all cases, but only if after the death of the grandfa ther they will not relapse into the poestas of their father. Therefore, if at the grandfather's death, their father be alive and in the poestas of his father, then after the death of the grand father they come under the poestas of their father: but if at the time of the grandfather's death, the father either be dead or have passed from the poestas of his father, then the grandchildren, inasmuch as they cannot fall under his poestas, 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 poestas, 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 poestas. On like principle, also, if one in the poestas of an ascendant be interdicted from fire and water, he ceases to be in the poestas of his ascendant; for it is equally contrary to reason that a man of foreign status should be in the poestas of an ascendant who is a Roman citizen.

129. If, however, an ascendant be taken by the enemy.

1. 1. 13, &c. 2. Ulpian, x. 2.

1. 90. Ulpian, x. 3. 2. Ulpian, x. 4. The nature of the ius postulatio 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 receptor; liberated captives were
although for the while he becomes a slave of the enemy, yet by virtue of the *jus potestitum* his authority over his descendants is merely suspended; for those taken by the enemy, *sui juris*, 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 1. If too the son or grandson himself be taken by the enemy, we shall in like manner rule that, by virtue of the *jus potestitum*, the *potestas* of the ascendant is merely suspended. 130. Further, male descendants escape from their father's *potestas*; if they be admitted flames of Jupiter, and female descendants if elected vestal virgins 2. 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 *patricia potestas*, since those who thus abandoned Roman citizenship were received as citizens of another state 3.

regarded as having never been absent. See D. 45. 15, especially Il. 4 and 12, where the technicalities of the subject are discussed and examined.

1 Justinian decided they should be *sui juris* from the time of the capture. Inst. 1. 12. 5.

2 Ulpian, x. 5. Tacit Ann. iv. 16.

3 Notes on l. 23. l. 98. See Cic. pro Cæcina. cap. 32. 345. pro done,

132. Emancipatione quoque desinunt liberi in potestatem patrentium esse. sed illius quidem testis demum mancipatione cederi vero liberi, sive masculini sexus sive feminini, una mancipatione exunt de parentium potestate: lex enim xii tantum in persona filli de tribus mancipationibus loquitur, *his verbis*: si pater filium *ter venundabit, filius a pater liber esto*. eaque res haec agitur: mancipat pater filium alieni; est enim vindicta manumissit: co facto revertitur in potestatem patriarchis. is est iurum mancipati vel cedentem vel aliis; set in usu est cedant mancipari: ipsum eum posten similiter vindicata manumissit: quo facto versus in potestatem patris sui revertitur. tunc tertio pater eum mancipat vel cedentem vel aliis; set hoc in usu est, ut cedant mancipari: eaque mancipatione desinit in potestate patris esse, eiam non dum manumissus sit, set adhuc in causa mancipii [Liv. 24].

132. Descendants also cease to be in the *potestas* of ascendants by *emancipation* 4. But a son indeed ceases to be in his ascendant's *potestas* after three mancipationes: other descendants, male or female, after one: for the Law of the Twelve Tables only requires three mancipationes 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 mancipates 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 mancipates 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 mancipated, but is in the condition called *mancipium* .......

c. 30; pro Balba, c. 11—13. In fact the direct object of the practice was to enable the new colonists to take up the civil rights of the place they were going to colonize, and so by renouncing the *deitar* or domicile of origin, escape from the *patricia potestas*. It is important to notice that this was done, and it may be presumed could only be done, by permission and authority of their ascendants. By his own set and will therefore "suo patrium suum exercere potest." 1 Ulpian, x. 1. 2. Tac. iv. 1. 3. 17. 4. He was not generally mancipated out of *mancipium*, for then, as a
Emancipation of descendants.

133. Liberum autem orditura est ei qui filium et ex eo nepotem in potestate habebit, filium quidem de potestate dimittet, nepotem vero in potestate retinere; vel ex diverso filium quidem in potestate retinere, nepotem vero manumittere; vel omnes sui iuris efficaciter.

134. Praeterea parents liberis in adoptionem datur in potestate eos habere desint; et in filio quidem, si in adoptionem datur, tres manumissiones et duas intercedentes manumissiones proxime fiant, ac fieri solent cum ea eum pater de potestate dimittit, ut sui iuris efficiatur. Deinde aut patri manumissat, et ab eo est qui adoptat vindicat apud Praetorem filium suum esse; et illo

133. He who has in his potestas a son and a grandson by that son, has unrestrained 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; and to make both sui juris. 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 emancipations 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 juris. Then he is either emancipated to his father, and from the father the adoptor claims him before the Praetor as being his son, and the father putting in no

person in manumission is in a servile position, the emancipator would have been his patronus and so have had extensive claims on his inheritance (I. 168, II. 39, &c.), but by the process called "Cessio in iure" (II. 24), he was redeemed into the potestas of a friendly plaintiff from the middle man's manumissum, and then emancipated. We have a right to say that he was ultimately brought under a potestas and not left in a manumissum, on account of the express statement of I. 97, that adopted children are in potestas, and because by contrasting §§ 133, 134, we see that the proceedings for emancipation and adoption were identical up to the final act of manumissation. 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 iure," 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 over the father possesses at the time the cessio is made. Hence the process resembles a Recovery in old English Law, where although the

counter-claim, the son is assigned by the Praetor to the claimant, or he is emancipated in court to the adopting father, who claims him as son from that person with whom he is left after the third emancipation. But the more convenient plan is for him to be emancipated to his father. In the case of other classes of descendants, whether male or female, one emancipation alone is sufficient, and they are either emancipated to their ascendant, or emancipated in court (to a third person). In the provincis the same process is gone through before the governor thereof.

135. A child conceived from a son once or twice manumitted, although born after the third emancipation 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 emancipation, is not born in the potestas of his grandfather. Yet 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

tenant had only a limited interest, yet the demandant claimed and got by default of the tenant's warrant a new lease.

3 "In tertia mancipatione." The preposition in implies that he has gone through the form of mancipation, but not yet received manumission. Hence he is in the third emancipation.
Emancipation of women.

in eis potestatem; si vero is dum in mancipio sit, decesserit, sui iuris sit. (135 a.) Et de — — — licet — — —
[1 lin.] ut supra diximus, quod in filio factum tres mancipationes, hoc facta una mancipatio in nepote.

136. Mulieres, quanvis in manu sint, nisi aequationem fecerint, potestatis parentis non liberantur. hoc in Flaminia Dialis senatusconsultum Maximi et Tuberonis auctorem, ut haec quod a suae tanta videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenissent. Sed mulieres quae aequationem fecerint potestatis parentis liberantur: nec interest, an in viri sui manu sibi, an extranei; quanvis habeat suo loco filiarum habeantur quae in viri manu sunt.

137. [3 lin.] remanicipatione desinent in manu esse, et quam ex remanicipatione manumissae fuerint, sui iuris efficentur [3 lin.] nihil magis potest cogere, quam filia patrem. set filia quidem mancipation, he falls into his potestas, whilst if the father die in mancipium he becomes sui iuris. 135 a. .......... as we have said above 1 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 compact. This rule is confirmed in the case of the wife of a Flamen Dialis 2 by a senatusconsultum, wherein it is provided, at the instance of the consul 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 compact are freed from the potestas of their ascendant 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 iuris;.......... can no more compel him, than a daughter can her father. But a daughter, even though

Mancipium.

nullo modo patrem potest cogere, etiamis adoptiva sit: haec autem virum repudiò missò proinde compellèrò potest, atque si ei manus mputa fuisset.

138. Hi qui in causa mancipii sunt, quia servorum loco habeantur, vindicta, census, testamento manumissi sui iuris fiunt. (136.) Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requiremus, cuius actatis sit qui manumitterit, et qui manumitterit: ac ne illud quidem, an patronum creditoremve manumissor habeat. Ac ne numeris quidem legis Pufiae Caniniae finitus in his personis locum habet. (140.) Quin etiam invito quoque eo cuius in mancipio sunt censu libertatem conseguo possum, excepto eo quem pater e facie mancipio dedit, ut siti remanicipetur: 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 3 can compel her husband as though she had never been married to him 4.

138. Those who are in the condition called mancipium, since they are regarded as being in the position of slaves, become sui iuris when manumitted by vindicta, census or testament. 4 139. And in such a case the Lex Aelia Sentia does not apply. Therefore we make no enquiry as to the age of him who manumitted 5, 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 Caunia has no application to such persons. 5 140. Moreover they can obtain their liberty by census 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 remanicipated to him: for then the father is regarded as

1 "Repulso missò." 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. Warnkoe做饭, ii. p. 52.
2 Can compel her husband to release her from manus; although a daughter cannot compel her father to release her from potestas; 3 the reason being that the husband by the "repuatio," has failed to fulfill his share of the compact.
3 1. 132.
4 1. 17.
5 1. 17.
6 1. 38.
7 1. 37.
8 1. 42.

1 The marriage of a Flamen and Flaminica was not by compact, but by conversion.
tune pater potestatem propriae 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. (142.) In summa adnomen nidum, adveros eos quos in mancipio habebmus nihil nobis contumeliosum facere licere: a quo iniuriam actionem tenendum. Ac ne diu quidem in eo iure detinentur 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 curatone, quaedam neutro iure tenetur. Videamus igitur quae in tutela vel in curatone sint: ita enim intelligenes eteas 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 census obtain his liberty against the will of the person in whose mancipium he is, when his father has given him in mancipium for a nocal 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. 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 nocal cause.

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

1 He intends to give up indeed his potestas as actual father, but to resume potestas as an adopting father. See note on 1. 132. 2 I. 75, 79. 3 I. 194. 4 I. 194. 5 Tab. V. 1. 1. 6 Ulpian, XI. 14—16. 7 I. 190. Cist. pro Murro. 8 Calp. August. See note on 11. 111.
meae tempore in potestate mea sit, nepotes quos ex eo habe
non poterint ex testamento meo habere tutorem, quamvis in
testamento mea fuerint: scilicet quia mortar move in patris sui
potestate futuri sunt. (147) Cum tamem in compluribus alius
causis postumi pro iam natis habeantur, et in hac causa placet
non minus postumis, quamiam natissimo tutores dari
possit: si modo in ex causa sint, ut si vivis nobis nascantur, in
potestate nostra sint. hos etiam heredes instituere possumus,
cum extraneos postumos heredes instituere permittam non
sint. (148.) Uxori quae in manu est proinde aci filiae, Item
nuni quae in fili manu est proinde ac nepiti tutor dari po
test. (149.) Rectissime autem tutor sic dari potest: LUXUM
TITIUM LIBERIS MEIS TUTOREM DO. sed et si ita scriptum sit:
LIBERIS MEIS VEL UXORI MEAE TITIUS TUTOR ESTO, recte
datum intellegitur. (150.) In persona tamen uxor quae in
manu est recepta est etiam tutoris optio, id est, ut eccles ci
permittere quem velit ipsa tutorum sibi optare, hoc modo:

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.

other cases posthumous children are esteemed as already born,
therefore in this case too it has been held that tutors can
be given by testament to posthumous as well as existing children;
provided only the children are of such a character that if they
were born in our lifetime, they would be in our potestas.
We may also appoint them our heirs, although we are not allowed
to appoint the posthumous children of strangers as our heirs.

A tutor can be given to a wife in manus exactly as to a
daughter, 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 Titius as
tutor to my descendants;" but even if the wording be:
"Titius be tutor to my descendants or to my wife," he is
considered lawfully appointed. 150. In the case, however,
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 affinis or, it may be, for one or
two matters only. 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.

To those who have no tutor given them by testament,
the agnates are tutors by a law of the Twelve Tables, and
they are called tutores legitimi. 156. Now the agnati are
those united in relationship through persons of the male sex,

1 Livii xxvii. 10. and Plaut. Tru
culent. Act. iv. sc. 4. 6.
2 Ulpian, xi. 3.
3 Ibid. 4.
159. Est autem capitis diminutio prioris capitis permutatio, eique 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 civitatem et libertatem annullit: quae — — — — — qui ex patria [35 lib.]; item feminas liberat ex senatusconsulto Claudiano ancillae sunt eorum dominorum, quibus invitus et demunciantibus nihil minus cum servis eorum coeteris.

161. Minor capitis diminutio est, cum eis quidem annullit, libertas vero retinuet. quod accidit et cui aqua et igni interdictum fuerit.

162. Minima capitis diminutio est, cum et civitas et libertas non annullaverit.

159. Capitis diminutio (Fig. 158) 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: likewise free women by virtue of a senatusconsultum of Claudius become slaves of these masters with whose slaves, in spite of their wish and warning, they have cohabited.

161. The minor capitis diminutio is when citizenship indeed is lost, but liberty retained, which happens to a man interdicted from fire and water.

162. The minima capitis diminutio is when citizenship and

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 cognation. 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. In olden times, indeed, so far as the law of the Twelve Tables is concerned, women too had agnates for tutors, but afterwards the Lex Claudia was passed, which abolished these tutelages so far as relates 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, it is well known, have not a tutor of that kind. By capitis diminutio the right of agnation is destroyed, but that of cognation is not changed: because a civil law doctrine may destroy civil law rights, but it cannot destroy those of natural law.

1 1. 80. 2 1. 171. Ulp. xi. 8.
tutela, sed status hominis commutatur, quod accidit in his qui adoptantur, item in his qui coemptionem faciunt, et in his qui emancipio dantur,ique ex manipiatione mancipiatura; adeo quiendum, ut quotiens quisque manципetar, aut remanципetar, totiēs capite diminuatur. (163.) Nec solum maioribus diminutionibus tuis adgnationes cumruptur, sed etiam minima. et ideo si ex duobus liberos alterum pater emancipaveris, post obiit eius neuter alteri adgnationes iure tutor esse poterit.

164. Cum autem ad agnatos tutela pertinet, non simul ad omnes pertinent, sed ad eos tantum qui proximo gradu sunt: [desunt lia. 104.]

165. Ex eadem iure duodecim tabularum libertorum et liberrarum tutela ad patronos liberosque eorum pertinuit, quae ei ipsa legitima tutela voatur: non quia nominatim ea iure de his tutela ostenditur, sed quia perinde accepta est per interpretationem, atque si velbus legis introducta esse coeunt ipsa, quod hereditates libertorum libertarumque, si instar decrescentur, inserat lex.

Liberty are retained, but the status of a man is changed; which is the case with persons adopted, likewise with those who make a cœptio, and with those who are given in mancipium, and with those who are mancipated after mancipiation: so that indeed as often as a man is mancipated or remancipated, so often does he suffer diminution. Not only by the greater diminution 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 Twelve Tables the tutelage of freedmen and freedwomen devolves on the patrons and their children, (and this too is styled a tutela legitima): not because express provision is made in that law with 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

ad patrones liberosque eorum pertinere, crediderunt veteran veteres voluisse legem eam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocaverit, consensum et tutors esse imposuerat.

166. Exemplo patronorum etiam fiduciariae tutelle recipiente sunt. eae enim tutele setelli fiduciariae vocantur proprie, quae ideam nosis sequuntur, quia liberum caput mancipatum nobis vel a parente vel a coemptionator manumissitur. (167.) Set Latinorum et Latinorum ipsius parturer tutela non omni modo ad manumissores, sunt bona eorum, pertinet, sed ad eos quorum ante manumissionem ex iure Quiritium fuerunt: unde si anactus ex iure Quiritium tuas sit, in bonis mea, a me quidem solo, non

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 paternal tutelages. For those are properly called fiduciary tutelages which devolve upon us, because we have mancipated a free person who has been mancipated to us either by a parent or a coemptionator. But the tutelage of Latin women or Latin men under puberty does not in all cases appertain to their mancipitators, as their goods do, but devolves on those whose property they were ex iure Quiritum before mancipation: therefore if a female slave be yours ex iure Quiritum, mine in bonis, if mancipated by me alone and

1 The argument is:
(1) The agnates who have the inheritance, also have the tutelage.
(2) Therefore they have the inheritance because they also have the tutelage.
(3) Therefore they have the inheritance by the express words of the law.
(4) Therefore they also have the tutelage.

1 L. 110, 116, 123.
etiam a te manumissa, Latina fieri potest, si homo eius ad me pertinet, sed eius tutela abi competet: nam iis legi Junia caveat. 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. Agnati, qui legitimi tutores sunt, item manumissoribus permissum est feminarum tutelam ali in iure cedere: pupillorum autem tutelam non est permissum cedere, quin non videtur onerosa, cum tempore pubertas sit finitura. (169.) Is autem qui ceditur tutela cescicius tutor vocatur. (170.) Quo mortuo aut capite diminuto revertitur ad eum tutorem tutela qui cessit, ipse quoque qui cessit, si mortuo aut capite diminutus sit, a cescicio tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habuerit. (171.) Set quantum ad agnatos pertinent, nihil hoc tempore de cessiccia tutela quaeritur, cum agnatorum tutelae in feminis legi Claudia sublatae sint. (172.) Sed fiduciaris quoque quidam putant

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 in bonis and ex iure Quiritium, the goods and the tutelage both go to the same man.

168. Agnates, who are legitimate tutors, and manumittors also, are allowed to transfer to others by cessio in iure the tutelage of women; but not that of pupils, because this tutelage is not looked upon as onerous, insomuch as it must terminate at the time of puberty. 169. He to whom a tutelage is thus ceded is called a tutor cesseret: 170. and on his death or cessation dimunuo the tutelage returns to him who ceded it. So too, if the man himself who ceded it die or suffer capite diminutum, the tutelage shifts from the cesseret and reverts to him who had the claim to the tutelage next in succession to the cesor. 171. But so far as relates to agnates, no questions now arise about cesseretian tutelage, insomuch as the tutelages of agnates over women were abolished by the Lex Claudia. 172. Some, however, have held that fiduciary tutors also have not power

verunt cedendae tutelae iis non habere, cum ipsi se oneri subiecerint, quod eti placeat, in parente tamen qui filiam neptemva aut pronepem alteri eae leg e mancipio dedit, ut sibi remaniparetur, remanipatamque manumissit, idem dico non debet, cum is et legitimus tutor habeatur; et non minus huic quam patronis honor praestandus est.

173. Praeterea, senatosconsulto mulieribus permissum est in absentis tutores locum ilium petere: quo petio prior desinit. nec interest quam longe abierit est tutor. (174.) Set exepitutur, ne in absentis patroni locum iacet libertae tutorem petere. (175.) Patroni autem loco habemus etiam parentem qui in e mancipio sibi remanipatam filiam neptemva aut pronepem manumissionem legitimam tutelam nactus est. Huius quidem liberi fiduciaaliutoris loco numeratur: patroni autem liberet cannem tutelam adimplerant, quam et pater eorum habuit.

(176.) Sed ad certam quidem causam etiam in patroni absentis
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 remanipated to him, and has manumitted her after the remanipication: since such an one is also reckoned a legitimate 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 in the place of a patron an ascendant who has acquired by manumission legitimate tutelage over a daughter, granddaughter or great-granddaughter remanipated to him out of mancipium. 176. The children, however, of such an one are regarded as fiduciary tutors, whereas the children of a patron acquire the same kind of tutelage as

1 i. 24. Ulpian, xi. 6–8. Note on l. 135. 2 i. 157.
locum permisit senatus tuorem petere, velati ad herediitatem adeundam. (177.) Idem senatus censuit et in persona pupilli patroni filli. (178.) Leaque lege Julia de maritandis ordi-
nibus ei quae in legitima tutela pupilli sit permittitur dotis constitutuendae gratia in Praetore urbano tuorem petere. (179.) Sane patroni filius etiam si in locum et libertas efficacia tutus, at in nulla re auctor fieri potest, cum ipse nihil permission sit sine tutores auctoritate agere. (180.) Item si qua in tutela legitima furiosis aut muti sit, permitte et senatusconsulto dotis consti-
tuendae gratia tuorem petere. (181.) Quibus casibus salvam manere tutelam patrono patronique filio manifestum est. (182.) Praeterea senatus censuit, ut si tutor pupilli pupillaeve sus-
peus a tutela remotus sit, sive ex iusta causa fuerit excussus,
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 1.
177. The senate has adopted the same rule in the case of the
son of a patron being a pupil. 178. So also by the Lex
Julia de maritandis ordinibus a woman who is in the legitimate
 tutelage of a pupil is allowed to apply for a tutor from the
Praetor Urbanus for the purpose of arranging her dotis 2. 179. For
the son of a patron undoubtedly becomes the tutor of a freed-
woman, even though he be under puberty, and yet he can in
no instance authorize 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 legitimate tutelage of a
maid or dumb person, she is by the senatusconsultum 3 allowed to
apply for a tutor for the purpose of arranging her dotis. 181.
In these cases it is plain that the tutelage remains intact
for the patron and the son of the patron. 182. Further the

is considered to be defective on ac-
count of his youth (or in the case of
a woman, her sex); and the tutor’s
presence and approval add a sound
weight to a duly performed act, the
two requisites insisted on by the law.
Authoritas is derived from auctor, and
signifies the complement or supply-
ing of a defect.
2 Probably that referred to in 1.
  173, and in Ulp. xi. 21.

in locum eius alias tutor datur, quo dato prior tutor amicit.
tutelam. (183.) Haec omnia similiiter et Romae et in pro-
vincis solente observari — — — — si vero — — — —
 — — (184.) Olim cum legis actiones in usu erant, etiam ex
illa causa tutor dalatur, si inter tutorem et mulierem pupillam
legis actione agendum erat: nam quia ipsa quidem tutor in re
sua auctor esse non poterat, alias datatur, quod autore ulla legis
actio pergeret; qui diceretur praetorius tutor, quin a Prae-
torio urbano datatur, post sublatas legis actiones quidam
putant hanc specimen damni tutoris non esse necessarium; sed
aditus dari in usu est, si legitimo judicium agatur.
185. Si cui nullus omnino tutor sit, ei datur in urbe Roma
ex legi Atilla a Praetore urbano et maiore parte Tribunorum
Aebis, qui Attilanus tutor vocatur; in provinciis vero a Prae-

tutor has ruled that if a tutor of a pupil, male or female, be
removed from his tutorship as untrustworthy 1, or be excused
on some lawful ground 2, another tutor may be given in his
place, and on his appointment the original tutor loses his
tutorship. 183. All these rules are observed in like manner
at Rome and in the provinces 3... 184.
Formerly when the legis actiones 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 be auctor in any matter that concerned
himself, another could be appointed by whom as auctor 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 appointed tutor has become unnecessary;
but it is still usual for such an one to be appointed, where pro-
cedings have to be taken by legal (as opposed to praetorian)
action.
185. Supposing a person to have no tutor at all, one is given
him, in the city of Rome by virtue of the Lex Atilla 4, by the
Praetor Urbanus and the major part of the Tribunes of the

2 Ulpian, xi. 22.
Ibid. 22.
For an account of
dot, see Lord Mackenzie-Rom. Lexi, p. 193; Sandars, p. 212, and Ulp. vii.

1 The auctoritas of the tutor is the
tutor’s presence and assent to the
deed of the pupil. The pupil him-
self performs the symbolical act or
utters the words necessary to effect
the transaction in hand, but his will

3 Just. 1. 26.
Just. 1. 25; Ulpian, xi. 23.
Ulp. xi. 20.
Ulpian, xi. 24.

4 Enacted about 150 B.C. Ulpian,
5 IV. 103.
sibiius provinciarum ex lege Julia et Titia. (186.) Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quandam condicio aut dies pendet, tutor dari potest; item si pure datus fuerit, quandam nemo heres existat, tandem ex his legibus tutor petendus est; qui desinit tutor esse postea quam quis ex testamento tutor esse coeperit. (187.) Ab hostibus quoque tutor capto ex his legibus tutor datur, qui desinit tutor esse, si is qui captus est in civitatem reversus fuerit: nam reversus recipit tutelam iure postliminii.

Ex his apparat quot sint species tutelarum, si vero quae ramus, in quo generis haec species deducuntur, longa erit disputatio: nam de ea rede valde vetustus dubitaverunt, namque diligenter hunc tractatum exsecuti sumus et in edicti interpretatione, et in his libris quos quo ex Quinto Mucio fecimus, hoc sufficient to make this remark only, that some have held that there are five classes, as Quinatus Muclus; others three, as Sulpicius; others two, as Laboe; whilst others have thought that there are as many classes as species. 188. But 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 festaeus. 190. But there is scarcely any reason of value to be assigned for the notion that women of full age should be put under tutelage. For the one generally received, that owing to their feebleness of intellect, they are so often deceived, and that it is right they should be directed by the authority of tutors, appears more specious than true. For women who are

Plebs, who is called an Atilian tutor: in the provinces, by the governors thereof, by virtue of the Lex Julia et Titia. 186. And therefore if a tutor be appointed to any one by testament under a condition or to act after a certain 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 jus postliminii.

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 explanation of the Edict and in those commentaries which we have based on the works of Quinatus Muclus. Meanwhile it is

1 Enacted 30 B.C.
2 The institution of the heir is the main point of a Roman will, and until he accepts the inheritance, no provision of the will can be carried out.
3 I. 129.
4 See this phrase discussed in note on II. 152.
5 I. 155.
6 T. 144.
7 See Livy, xxxiv. 2.; Cic. pro Marcello, c. 12.; and Ulp. xi. 1.

1 This Q. M. Scævola (son of Pub. M. Scævola) is the man from 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, "Juris peritorum eloquentissimus, doctissimum juris perfectionassi." See D. i. 2. 41. Cic. de Orat. i. 39. For a memoir of Sulpicius Rufus see Cicero, Brutus, i. 41, and for Antilius Laboe, D. i. 2. 47.
2 For an account of the various kinds of tutelles see Appendix (C).
Apx peregrinos non similiter, ut apud nos, in tutela sunt feminae; set tam tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier cogenitur, marium tuorem esse infet aut filium eius puberem.

With the exception of such freedwomen, all others hold the same standing in the tutelage of a patron as that enjoyed by a woman. For the other freedwomen who have tutors of another kind, as Atilia or fiduciary, are also freed by the prerogative of three children.

Besides, if she have been manumitted by a man, and with his authorization have made a testament, and then been remanancipated and manumitted, she ceases to have her patron as tutor, and begins to have as tutor him by whom she was manumitted, and such an one is called a fiduciary tutor. Likewise, if a patron

\[1\]

This privilege was conferred by the Lex Poppaea, A. D. 10.

The text is a continuation of the discussion on the rights and responsibilities of patrons and their tutelae. It mentions the different types of tutelae and the legal relationships between patrons and their tutelae, including the rights of freedwomen and their tutelage. The text also refers to the Lex Julia et Titia, which regulated the relationship between patrons and their freedwomen.

\[1\]

This privilege was conferred by the Lex Poppaea, A. D. 10.

\[2\]

It should be noticed that Gaius uses judicium and actio as interchangeable terms.
dictur. Item si patronus sine filius eius in adoptionem se dedidit, debet siti e legge Atilia vel Titia tutorem petere. Similiter ex hisdem legibus petere debet tutorum liberta, si patronus deecessit nec ultum vivit sexus liberorum in familia relinquit.

196. Masculi quando puberes esse coeperint, tutela liberantur. Puberem autem Sabinius quidem et Cassius ceterique nostri praecipitores cum esse putant qui habuit corpusibus pubertytem ostendit, hoc est qui generare potest; sed in hoc qui pubescere non possunt, quales sunt spadones, eam acetatem esse spectandam, cuius actatis puberes sunt. Sed diversae scolae auctores annis putant pubertytem aestimandam, id est cum pubertytem esse existimandum, qui xiiii annus excedit — [24 lignea.]

or his son have given himself in adoption, she ought to apply for a tutor for herself in accordance with the Leges Atilia and Tilia. So also a freedwoman ought to apply for a tutor under these same laws, if her patron die and leave in his family no descendant of the male sex.

196. Males are freed from tutelage when they have attained the age of puberty. Now Sabinius 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 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. 1

1 Ulpian, xi. 48. 2 Gaius was a disciple of the two great lawyers Sabinius and Cassius. The authorities of the opposite school, to whom he here refers, were Proculus and his followers.

It is scarcely necessary to remind the reader that the Sabinius, as that school was called, were distinguished by their preference for a strict and close adherence to the letter of the law; the Proculians for their decided inclination for a broader interpretation than strict adherence to the letter permitted. Much has been written on the distinctions between the two sects, and their influences on the laws and jurisprudence of Rome: among the leading authorities are Grimaldi, De Oris et Pris. Jus. Civ. § 45; Hoffman's Historia Juris. Pt. i. p. 312; Moscow, de oris et leg. Sab. d'Proc.; Hugo, Rechtsgeschichte, translated into French by Jourdan, Tom. i. pp. 174—256. Gibbon, c. 44. 3 Fourteenth year if a male, twelfth if a female. Just. i. 27.

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 in curation from being wasted or diminished by tutors and curators, the Praetor provides that both tutors and curators shall furnish sureties as to this matter. But this rule is not of universal application. For, firstly, tutors given by testament are not compelled to furnish sureties, because 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 les, 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.

1 As the laws relating to curators are to be found in Just, Just. i. 33 and Ulpian, xi. 8. 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. 2 Setare = to find sureties (third parties), and not to enter into a personal bond. The law as to sureties (fidei-auctoriter, fidei-promissorvm and fidei-vitore) will be found in Inst. ii. 115 — 127, and iv. 88 — 102.
BOOK II.

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

2. Summa itaque rerum divisi in deos articulos deducit: nam aliae sunt divini iuris, aliae humani.

3. Divini iuris sunt veluti res sacrae et religiosae. (4.) Sacrae sunt quae Diis superes consecratae sunt; religiosae, quae Diis manibus respecta sunt. (5.) Sae sacram 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 divini juris class are things sacred or religious.

3. Things sacred are those which are consecrated to the Gods above; things religious those which are given up to the Gods below. 5. Now land is considered sacred when made so by au-

thority of the Roman people: for it is consecrated by the passing of a law or the making of a sententias consultationum in respect of it.

6. On the other hand, we make ground and religious of our own free will by conveying a corpse into a place which is our own property, provided only that the burial of the corpse devolves on us. (7.) It has been generally held that in provincial land a place 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,

1 See note on 1. 6. 

2 See Festus sub verbo sacr.


The heir instituted in the will becomes heir only by entering upon the office and duties, therefore in the
Res corporales et incorpores.

alis merus existat, nullius in bonis sunt. (10.) Hae autem res quae humani juris sunt, aut publice sunt aut privatae. (11.) Quae publice sunt, nullius in bonis esse creduntur; ipsius enim universitas esse creduntur. Privatae autem sunt, quae singularum sunt.

12. Quodam praeterea res corporales sunt, quoddam incorpores. (12.) Res corporales sunt quae tange possunt, veluti fundus, homo, vestis, aurum, argentum et delinque aliae res immemoriales. (13.) Res incorpores sunt quae tangi non possunt: quaelibet est ca quae in iure consistunt, sed hereditatibus, usufructibus, obligationibus quosque modo contractet. nec ad rem pertinet quod in hereditate res corporales continuerunt; nam et fructus qui ex hereditate res corporales sunt.

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 garment, a man, gold, silver and, in a word, other things innumerable. Incorporeal things are those which 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 tenant) from land are corporeal, and that

interval between the death of the testator and the acceptance of the inheritance there was a vacancy and the res were 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 "intangible" 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.

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 preemption, 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 those profits. Savigny, On Possession, translated by Perry, Bl. ii. § 24, pp. 200-201. See D. 41. 48. 1. D. 7.


Res mancipi et nec mancipi.

fulum perempturi corporales sunt, et id quod ex aliquo obligabilione nobis debetur plerumque corporalis est, veluti fundus, home, pecunia: nam ipsum su successioem, et ipsum su utendium fruendum, et ipsum su obligationem incorporale est. eodem numero sunt et iura fractionum urbanorum et rusticorum, quae clame servitutis sequuntur. — [13. Fore lines desunt.]

15. Item [2. lin.] Ea autem animalia nostri quidem praefecerunt, quae sunt res

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 servitudes.

15. (The first six lines are supplied from Ulpian, xix. 11.) All things are either mancipi or nec mancipi. Res mancipi are those objects, secondly, that they were such only as had a value to an agricultural people, and, thirdly, that the few rights (as distinguished from material objects) which appeared among them were rights or easements and the right itself of the obligation, are incorporeal. In the same category are rights over estates urban or rustic, which are also called servitudes.

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 Galus (i. 1. § 3) we get the substance of the missing thirteen lines: "The rights over estates urban or rustic are also incorporeal. The rights over urban estates are those of servitudes (turning the drainage from your yard into your neighbor's premises, of windows, drains, raising a house higher, or restraining another from raising, and of lights, &c.) That a man is so to build that he does not block out the light from a neighboring house. The rights over rustic estates are those of way, or of road whereby animals may pass or be led to water, and of channels for water; and these also are incorporeal. These rights whether over rustic or urban estates are called servitudes.

2 Res mancipi, it is clear, were such things as were objects of interest and value in the eyes of the early possessors of Roman citizen-rights, or probably of those who laid the foundations of ancient Rome. Hence we see, firstly, how small in number were
capii.  (19.) Nam res nec mancipi nulla traditio alienari possunt, si modo corporales sunt et ob id recipiunt traditionem.

(20.) Itaque si iibi vestem vel aurum vel argentum tradidero, sive ex venditionem causa sive ex donatione sive quibus alia ex causa, ea fit et res sine ultra iuris solemnitatem.  (21.) In eodem causa sunt provinciaria praedia, quorum alia stipendiaria, alia tributaria vocamus.  Stipendiaria sunt ea quae in his provinciis sunt, quae propriae populi Romani esse intellegetur.  Tributaria sunt ea quae in his provinciis sunt, quae propriae Caesaris esse credantur.  (22.) Mancipi vero res acque per mancipationem ad alium transferuntur; unde sicer mancipi res sunt dictae, quod autem valet mancipatio, idem valet et in iure cessit.  (23.) Et mancipatio quidem quamadmodum factit, superiore commentary traditum.  (24.) In iure cessit autem hoc modo fit: apud magistratum populi Romani, vel apud Praetorem, vel apud Praesidem provinciae cui res in iure ceditur, rem tenens ita dicit: Hunc ego hominem ex iure Quiriniitum

and res nec mancipi.  19. For res nec mancipi can be alienated by mere delivery, provided only they be corporal, 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. Similarly, res mancipi are transferred to another by mancipation: whence no doubt they were called res mancipi.  But whatever effect a mancipation has, the same has also a cessio in iure.  23. How a mancipation is effected we have explained in the preceding Commentary.  24. A cessio in iure 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 ex iure Quiriniitum."  Then, after he has

states on Italian soil, whether rustic, as a field, or urban, as a house: likewise rights over rustic estates, as vitris, iter, aequae ductus; likewise slaves, and quadrupeds which are tamed by yoke and saddle (lit. by neck and back), as oxen, mules, horses, asses.  These animals our authorities hold to be mancipi the moment they are born: but Nerva and Proculus and other authors of the opposite school consider that they are not mancipi unless they be broken in: and if through their excessive fierceness they cannot be broken in, then they are regarded as being mancipi 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 nec mancipi: 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 nec mancipi, with the exception of servitutes over rustic estates on Italian soil; which are mancipi, although they are in the category of incorporeal things.

Now there is a great difference between res mancipi

1. Item right of passage for a man only, according to Justinian: Acta, right of driving cattle as well:

2. Mancipi, right of passage generally, including right of dragging stones, timber, &c. across, Inst. II. 3.

3. Cic. pro Scaev., c. 32.

4. 1. 16. 11. 7.

5. 2. 1. 119.

6. Ulpian, xix. 9.
made his claim, the Praetor questions the man who is making the cession, whether 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 leges actio; and can be transacted in the provinces also before the governors thereof. 25. Generally, however, and indeed almost always, we employ manipulations. 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 res mancipi have been passed neither by manipulation nor cesso in jure... 27. Finally, we must take notice that nemo suum is peculiar to Italian land: there is no nuxum of provincial land: for land admits of the application of nuxum only when it is mancipi, and provincial land is nee mancipi.

1 1 r. vi et sqq. 2 Most probably Gains went on to say that when a res mancipi was merely delivered, the man who received it had nixum only, and not cesso in jure. 3 See n. 41. 4 Nee is a conjectural reading, for which the more correct version would have been neae. Nee and nuxum are both substantives, the former an old word found in the Twelve Tables as antithetical to mancipium (see Tab. vi. l. i.), the latter a more modern expression, used to signify obligation generally, see D. 11, 6, 7, 31, 33 and D. 12, 6, 20, 7.

The meaning of nuxum is given by Varro (de l. L. vii. 105): "Nexum Mamilius scribit, quod quid pro libram et aedem geriat, in quo sint mancipia. Militum, quae per aedem et libram funt, ut obligentur, praeter quae mancipio denari. Nec verius esse ipsum verbum ostendit, de quo


1 Just. 11, 4, 8: 2 Just. 11, 4, 8.
cessio in jure.

bus vicini officiatur ceteraque similia iura constiteuere velit, pacationibus et scripitationibus id efficere potest; quia ne ipse quidem praedia mancipationem aut in iure cessionem recipiat. (32.) Et cum ususfructus et hominum et ceterorum animalium constitui possit, intelligere debemus horum ususfructum etiam in provincis per in iure cessionem constitui posse. (33.) Quod autem diximus ususfructum in iure cessionem tantum recipere, non est tenere dictum, quamvis etiam per mancipationem constitui possit co quod in mancipanda proprietate detrahili potest: non enim ipse ususfructus mancipatur, sed cum in mancipanda proprietate deducatur, co fit, ut apat illium ususfructus, aput alium proprietas sit. (34.) Hereditas quoque in iure cessionem tantum recipit. (35.) Nam si is ad quem ab intestato legitimo iure perint hereditas in iure eam aliui ante additionem cedit, id est ante quam heres existerit, periinde si heres est in iure cesseri, ad si ipse per legem ad hereditatem neighbour's lights be interfered with, and other similar rights, he can only do it by pacts and stipulations, because even the lands themselves do not admit of mancipation or cessio in jure. 32. Also, since it is possible for an ususfruct to be established over slaves and other animals, we must understand that ususfruct over them can be established by cessio in jure even in the provinces. 33. When, however, we said that ususfruct admitted of cessio in jure 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 ususfruct itself is not mancipated, although the result of its being withheld in mancipating the property is that the ususfruct is left with one person and the property with another. 34. An inheritance also is a thing which admits of cessio in jure only. 35. For if he to whom an inheritance on an intestacy belongs by statute law makes cessio in jure before 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

111. et seq.

1 Slaves and animals are res mancipi: therefore by the principle implied in § 31, the ususfruct 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 in Italy only.

Legitimus jure est by virtue of a rule of the Twelve Tables or some long as opposed to a rule of the Pratortis edit.

Cessio in jure hereditatis.

vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenebitur, debita vero persunt, coequo modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis perinde transseunt ad eum cui cessa est hereditas, ac si ea singula in iure cessa fuerant. (36.) Testamento autem scriptus heres ante aditum quidem hereditatum in iure cedendo eam alii nihil agit; postea vero quam adierit si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure perint hereditas, si post obligationem in iure cedat. (37.) Idem et de necessariis hereditibus diversae scholae auctores existimant, quod nihil videtur interesse utrum aliquis adhuc hereditatem fiat heros, an invitans existat: quod quale sit, suo loco apparet. sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem. (38.) Obligations quoquo

law to the inheritance: if, however, he make cessio 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; the corporeal items, however, of the inheritance pass to him to whom the inheritance is ceded, just as if they had been ceded singly. 36. But an heir appointed by testament, if he make cessio in jure before entry on the inheritance, does a valid 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 cessio in jure after (accepting) the obligation. 37. The authorities of the school opposed to us hold the same in regard to heredes necessarii, 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 think that the heredes necessarii does a void act when he makes cessio in jure of the inheritance. 38. Obligations, in what-

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.

3 11. 124; 111. 57.
Ownership ex jure Quiritium and in bonis.

modo contractae nihil eorum recipient, nam quod mihi ab aliquo debitur, id si velim tibi debere, nullo eorum modo qui
bus res corporales ad illum transferantur id efficere possunt; sed opus est, ut inhente me tu ab eo stipulatis: quae res efficit, ut a me liberetur et incipiatur tibi: quae dicitur novatio obligationis. (39.) sine hac vero novatione non poteris tuo nominem agere, sed debes ex persona mea quasi cognitor aut
procurator meus expetiri.

40. Sequitur ut adinomemus 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 Quiritium unusquisque dominus erat, aut non intellegebatur dominus. set postea divisionem accepti
dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. (41.) nam si tibi rem mancipi neque mancipa-
ever 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: this is called a novatio of the obligation.1

39. But without such novation you cannot bring a suit in your own name, but must sue in my name as my cogitator or
procurator.2

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
(absolute) or is not regarded as owner (at all). And this rule the Roman people followed of old, for a man was either owner ex iure Quiritium, or he was not regarded as owner. But afterwards ownership became capable of division, so that one man might be owner ex iure Quiritium, another hold in bonis.

41. For if I neither mancipate nor pass by cessio in iure, but merely deliver to you, a res mancipi, the thing becomes yours indeed in bonis but remains mine ex iure Quiritium, until through possessing it you acquire it by usucaption: for as soon as usucaption is completed the thing is at once yours in full title, i.e. both in bonis and ex iure Quiritium, just as though it had been mancipated or passed by cessio in iure. 42. Now the usucaption 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.3

43. Moreover usucaption runs for us even in respect of those things which have been delivered to us by one not the owner, whether they be res mancipi or res mancipi, 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 enquiries after his property, and that is the time allowed to the possessor for gaining the property by usucaption.

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1 "Usus-anctoritas fundi biennium, est non mancipium annus eto." Tab. vi. § 3. Quoted by Cic. Tog. vi. 49.

2 Sec also Cic. pro Caesar. 8. Ulp. xii. 8. For the alteration of the times of usucaption see Just. Inst. li. 6.
45. Set aliquando etiam maxime quis bona fide alienam rem possideat, nemquam tamen illi usucapio procedat, velut si qui rem furivam aut vi possessorum possidet; nam furivam lex xii tabularum usucapi prohibet, vi possessor lex Julia et Plautia. Item provincialis praeclara usucapionem non recipit. Item alius muteris quae in aggonarum tutela erat res mancipi usucapi non poterant, praeterquam si ab ipso tutorate autore traditae esse: idque si a lege xii tabularumactus erat. Item liberis homines et res sacras et religiosas usucapi non posse manifestum est. 49. Quod ergo vulgo dictur furivarium rerum et vi possessorum usucapionem per legem xii tabularum prohibitam esse, non eo pertinet, ut ne ipsa quisque per vim possideat, usucapi.

1 Tab. v. i. 2.
2 In the case of provincial lands the dominium was reserved to the Roman people, therefore obviously no private holder could avail himself of usucapi to acquire dominium.
3 In the case of provincial lands the dominium was reserved to the Roman people, therefore obviously no private holder could avail himself of usucapi to acquire dominium.
4 Tab. v. i. 2.
alieni potest aliquis sine vi possessionem nancisci, quae vel ex negligentia domini vacet, vel quia dominus sine successorere decesserit vel longo tempore afererit. nam si ad illum bona fide accipientem transtulerit, poterit usucapere possessor; et quamvis ipsa qui vacantem possessionem nactus est, intelligat alienem esse fundum, tamen nihil hoc bona fide possessor; ad usucapionem nocet, cum inprobita sit eorum sententia qui putaverint furtuim fundum fieri posse.

52. Kurzus ex contrario accidit, ut qui sciat alienam necem se possidere usucapire: veluti si rem hereditarium quin possessionem heres nondum nactus est, aliquis possederit; nam ei concessum est usucapere, si modo ea res est quae recipit 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 bona fide possessor's 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.

53. Again, in the converse case, sometimes happens that 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 takes possession of an item of an inheritance of which the heir has not yet obtained possession: for he is allowed to get it by usucapion, provided only it is a thing which admits of usucapion. This species of possession and usucapion is called pro herede. And this usucapion has been allowed to such an extent that even things appertaining to the soil are acquired by usucapion in one year. The reason why in this case the usucapion of things belonging to 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 usucapion, and that of one year. For a law of the Twelve Tables ordered that things appertaining to the soil should be acquired by usucapion of 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 in usucapion, yet the usucapion of one year remained established in respect of all the items of inheritances, even those connected with the soil. And the reason why 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

1 This paragraph is cited almost as it stands in D. 41. 5. 57, being there stated as taken from Gaii Lib. i. Institut. Laws 36 and 38, which are also very similar to §§ 50 and 52, are noted as taken from Gaii Lib. ii. 26. 54. that is to say, which will enable usucapion, viz. iustus causa and bona fide.
2 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 usucaptive title, which was technically called pro herede. In this case as neither bona fide nor good title at starting were necessary, the cause might really be founded on unfair motives; hence to use Gaii's phraseology it was an "improba possession et usucapio.

1 See D. 41. 5.
2 Tab. vi. 1. 3.
observatio fuit, et ut creditores habebant a quo situm consequentur. (56.) Hac autem species possessionis et usucapionis etiam lucrativa vocatur: nam scienti quisque rem alienam lucratit. (57.) Sed hoc tempore etiam non est lucrativa, nam ex auctoritate Hadriani sanausconsultum factum est, ut tales usucapiones revocarentur; et id quo potest heres ab eo qui rem usucapit, hereditatem petendo perinde em rem consecuit, atque si usucapta non esset. (58.) et necessario tamen herede extante ipso iure pro herede usucapi potest.

59. At hic etiam ex aliis causis scienti quisque rem alienam usucapit, nam qui rem aliius causae causa mancipio dedicerit vel in iure cessserit, si eadem ipse possederet, potest usucapere, anno scilicet, etiam soli si sit quae species usucapiosis dicitur usurcapit, quia id quo aliquando habuimus recipimus per was paid in those times, and that the creditors might have some one from whom to obtain their own. (56.) The 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 sanusconsultum was passed, that such usucapiions should be set aside; and therefore the heir by suing for the inheritance may recover the thing from him who 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 be force by law take place.

59. There are other cases besides in which a man with full knowledge gets by usucapion the property of another. For he who has given a thing to any one in mancipio or made casio in iure of it, by way of fiducia, provided he himself have the possession of the same, can acquire it by usucapion, and that too in one year, even though it appertains to the soil. This species of usucapion is called usurcapio.

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1 Savigny (Treatise on Possession, p. 53) takes this as an example of the rule. "Nemo sibi causam possessionis mutare potest." The whole of the passage pp. 49–54 is worth reading.
2 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 "reactiae res," and no account is taken of its being a pledge of land.
3 With reference to the matter here stated Savigny says, "Whoever simply permits another to enjoy property or an encumbrance 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.
4 Precarium is anything attached to or connected with the land, sometimes the word is used antithetically to persona. See D. 43. 20. 1. 43; and as to Praedram in the sense used in this paragraph see Cist. pro Balbo, c. 20, and In Verron, 11. 1. 54. Varro says that praedram properly signifies land pledged: de L. L. v. 49.
tura possessionem usurripri, nam qui mercatur a populó praediori appellatur.

62. Accidit aliquando, ut qui dominus sit alienandus rei potestatem non habeat, et qui dominus non sit alienare possit.

(63.) Nam dotate praedium marinus invita muliere per legem Iuliam prohibetur alienare, quamvis ipsius sit vel mancipatum ei dedit causa vel in iure cessam vel usucaptum. quiet enim eius utram ad Italica tantum prae, an etiam ad provincialia pertinent, dubitatur.

64. Ex diverso agnate furiosi curatur rem furiosi alienare potest ex legé XXI tabularum; item procurator, id est cui liber administratio permisa est; item creditor pignus ex pactione, quamvis eius ea res non sit. sed hoc forsitum ideo videatur possession is usurercepta from a praedictura. For he who buys from the people is called a praedictor.

65. 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 prevented from alienating lands forming part of the dos against the will of his wife; although the lands are his own through having been for the purpose of dos mancipated to him or passed by cessio in jure, or acquired by usucaption. Whether this rule is confined to Italian lands or extends also to those in the provinces is a doubtful point.

66. On the other hand, the agnate curator of a madman can by a law of the Twelve Tables 4 alienate the property of the madman; a praedictor 4 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 this

1 See, If the praedictor who buys from the popular praedictura of the land, do not take possession, the original dominus will get back his dominium by usucaption.
2 Lex Julia de adulteris, temp. Augusti: Paul. S. A. II. 24. This law which originally applied only to lands in Italy was extended by Justinian to the provinces also, see Just. Inst. t. 8. pr.
3 For the law of dos see Ulpian, vi.
4 The fragment of the law bearing on this topic (viz. Tab. V. I. 79) does not state this doctrine in so many words, but doubtless the rule given by Gaius was a direct consequence of the fact that this law gave the praedictor over jus publicum to the agnate. Cf. Cio. de Inst. Rhet. Lib. II. c. 50.
5 IV. 84.

fieri, quod voluntate debitoris intelligitur pignus alienari, qui olim pactus est, ut licet creditori pignus vendere, si pecunia non solvatur.

65. Ego ex his quae diximus adspert quaedam naturali iure alienari, quæ libentur in quae traditio alienantur; quae sunt ex natura, mancipationis et in iure cessionis et usucapidionis ius proprium est civilium Romanorum.

66. Nec tamen ea tantum quae traditio nostra sunt naturali nobis ratione adquiruntur, sed etiam quae occupando inde adplicetur, quia aperit nulla essent; quae sunt omnia quae terra, mari, coelo capitantur. (67.) itaque si forsan bestiam aut volucem aut piscem cepimus, quidquid ilia captum fuerit, id statim nostrum sit, et ex usque nostrum esse intelligitur, donec nostra custodia coerceat. cum vero custodiam nostram evanescat et in naturalem libertatem se receperit, rursus occupantis sit, quia nostrum esse desinit. naturalem autem liber

application may be considered as taking place because the pledge is 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 cessio in jure or usucaption, is 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 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, be-

1 On which view it is no example of one man alienating what belongs to another.
2 See Savigny, On Possession, p. 256, and also D. 41. 1. 3. and 41. 1. 5. pr.
3 See Appendix (D).
cause 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 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. At si in medio flumine insula nata sit, hace eorum omnium communis est qui ab utraque parte fluminis prope ripam praedia possident, si vero non sit in medio flumine, ad eos pertinent qui ab ea parte quae proxima est iuxta ripam praecipit.

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

74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radiibus terram complexa fuerit.

75. Idem contingit et in frumento quod in solo nostro ab aliquo satum fuerit. (76.) Sed si ab eo putamus fundum vel aedificium, et impensa in aedificium vel in seminaria vel in.

1 But if the builder had acted in bona fide 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 excepsio soli multi. He could, however, in no case bring an actio ad restitutionem to get back the actual building materials. But if the house were pulled down, then he was allowed to substitute them, even if the period of assumption for the house was completed, because "he who possesses an entirety, possesses the entirety only and not each individual part by itself." (Sav. On Prop. 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. 4. 1. 7. 12; D. 5. 3. 38.
Title by accession.

77. Eadem ratione probatum est, quod in chartulis sive membranis meis aliquis scripserit, licet aureis litteris, quem esse, quia litterae chartulis sive membranis cedunt. Itaque si ego eos libros casque membranam petam, nec impensam scripturae solvam, per exceptionem doli mali summoveri potero. (78.) Sed si in tabula mea aliquis pinxit velut imaginem, contra probatur: magis enim dieit tabularum picturae cedere, eum diversitas vis idonea ratio redditur. Certe scendum habe regulum si a me possidenti pergam inuam esse, nec solvas preterim tabulam, poteris per exceptionem doli mali summoveri. At si tu possidentes, consequens est, ut utilis mihi actio adversum te dari debet: quod casu nisi solvam impensam seed, or plant, he can resist us by an exceptio doli: at any rate if he be a possessor in good faith.

78. 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. Therefore, if I claim those books and those parchments, and yet will not pay the expense of the writing, I can be resisted by an exceptio doli mali. But if any one has painted on my tablet a likeness, to take an example, 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 can be 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 the exceptio doli mali. 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 exceptio doli mali, 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 other instances also natural principles are resorted to. 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

 nisi the adverb, and meaning "as a
logous." The special circumstances of the present case are: (1) that it is a general rule that a vindicat can only be brought by the dominus, the owner of the thing, when he is kept out of possession: (2) that you must there be 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. 303. (II. 641, third edition.)

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 Iurium quaestionum sive Aureatum.
Alienation by woman and pupil.

De Pupilis in Aliquid a Se Alienare Sossint.

80. Nam 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 manuum pecuniam aliqui sine tutoris auctoritate deducti, quia facit eam accipientis, cum scilicet ea pecunia res nec mancipi sit, contrahit obligationem. (82.) At 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 other school,) 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 be obtained by condition from 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 res mancipi: a res nec mancipi 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, insomuch as money is a res nec mancipi.

1 To which school Cassius himself belonged.
2 19. 2—5.
3 Ulp. XI. 37.
4 Malleum is one of the contracts perfected by delivery in cases where delivery passes the property: hence in this instance the novitum is binding, money being a res nec mancipi, and therefore capable of transfer by mere delivery. II. 80. Sec III. 92.

Authorization of the Tutor.

si pupillus idem fecerit, quia eam pecuniam non factit accipientis, nonnullam contrahit obligationem. unde pupillus vindicare quidem numeros suos potest, siculi extant, id est intendere suos ex turae Quiritium esse; nulla fide consumatur, vero ab eodem repetere potest quasi passivum. unde de pupillo quidem quaeritur, an numerosque quos mutuos deduct, ab eo qui accepti bona fide alienatos petere possit, quoniam is scilicet accipientis est numeros facere videtur. (83.) At ex contrario res tam mancipi quam nec mancipi mulciendos et pupillos sine tutoris auctoritate solvi possunt, quoniam meliorem conditionem suam facere ets quum sine tutoris auctoritate concessum est. (84.) Itaque si debitor pecuniam pupillo solvitat, facti quidem pecuniam pupilli, sed ipsa non liberatur, quia nullam obligationem pupillus sine

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 ex sua Quiritium; 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 bring an action for money he has lent by way of mutuum against him who received it from him, after it has been transferred in good faith to another person; for the alienor seems to make the money the property of the recipient. 83. But, on the other hand, both res mancipi and res nec mancipi 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

1 The case is one of bona fide alienation, and it is only novitum which should be attached if the necessity of making compensation.
2 Solvitur means to discharge an obligation. It is difficult to hit upon a precise equivalent in English, because the solvitur spoken of in this paragraph may be either de novitum, or proctata. 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 wholly expended what he had received. Just Inst. XI. 8. 2.
tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. set tamen si ex ea pecunia locupletior factus sit, et adhuc petat, per exceptionem doli mali summoveri potest. (85.) Mulieri vero etiam sine tutoris auctoritate recte solvi potest: nam qui solvit, liberatur oblatione, quia res nec mancipi, ut proxime diximus, a se dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accipiat pecuniam; at si non accipiat, sed habeare se dicat, et per acceptationem velit debitorem sine tutoris auctoritate liberare, non potest.

86. Adquiritur autem nobis non solum per nosnet ipsos, sed etiam per eos quos in potestate manu mancipiopive habemus; item per eos servos in quibus usumfructum habemus; item per homines liberos et servos alienos quos bona sd possidemus. de quibus singulis diligentier dispiciamus.

87. Igitur quod liberi nostri quos in potestate habemus, item quod servi nostri mancipio accipiant, vel ex traditione mancipiuncare, sive quid stipulentur, vel ex aliquibus causa ad authorizatione of the tutor, since without his tutor's authorization he is not allowed to alienate anything. But nevertheless if he have been made richer by means of this money, and yet sue for it again, he can be resisted by an exceptio dolis nulli.

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 res nec mancipi 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 say she has it, and desire to free the debtor by acceptatione 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 in potestas, manus or mancipium: 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 in potestas and, likewise, whatever our slaves receive in mancipium, or obtain by delivery, or stipulate for, or acquire in
adquiratur, quæri solet, quia ipsae non possidemus. (91.) De his autem servis in quibus tantum usuumfructum habemus ita placitum, ut quia quid ex re nostra vel ex operis suis adquiritur, id nobis adquiratur; quod vero extra eas causas, id ad dominum proprietatis pertinet. Itaque si iste servus heres institutus sit legatum suo quod ei datum fuerit, non nihil; sed domino proprietatis adquiratur. (92.) Idem placet de eo qui a nobis bona fide possidet, sive liber sit sive alienus servus. Quod enim placuit de usufructuario, idem probetur etiam de bona fide possessori. Itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, sive liber, vel ad dominum, si servus sit. (93.) Sed si bona fidei possessor usucaperit servum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest; usufructarius vero usucapere non potest, primum quia non possidet, sed habet ius utendi et fruendi; deinde quia scit

tioned, because we do not possess the persons themselves2. With regard to slaves in whom we have merely an usufruct, the rule is that whatever they acquire by means of our substance or their own labour is acquired for us3: but whatever from other sources than these, belongs to the owner of the property in them. Therefore, if such a slave be instituted heir or any legacy be left to him, it is acquired not for me but for the owner of the property. 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 faith4. 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 usucaption, since he thus becomes master, he can acquire by his means in every case: but an usufructuary cannot get by usucaption, firstly because he does not possess but has the right of usufruct, and secondly because he knows the slave to be

1 Savigny points out (Pratticia et Possidentia, 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). Gauss, consistently with himself, raises a doubt as to the last-named case in § 94. 2 Ulpian, xix. 21. 3 Ibid.

alienum servum esse. (94.) De illo querniter, an per eum servum in quo usuumfructum habemus possidere aliquam rem et usucapere possamus, quia ipsum non possidemus. Per eum vero quem bona fide possidemus sine dubio et possidere et usucapere possamus, loquitur autem in uniusque personae secundum distinctionem quam proxime exposuitus, id est si quid ex re nostra vel ex operis sibi adquirant, id nobis adquiratur. (95.) Ex his appareat per liberos homines, quos neque iuri nostro subjectos habemus neque bona fide possidemus, item per alienos servos, in quibus neque usuumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri possit. et hoc est quid dicitur per extrae neam personam nihil adquiri poe, extra possessione: de eam querniter, anno per liberam personam nobis adquiratur.

another's. 94. On the following point a question arises, viz. whether we can possess and get an usucaptive title to anything by means of a slave in whom we have the usufruct5, since we do not possess the slave himself. There is, however, no doubt that we can both possess and get by usucaption 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 this 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 in whom we have neither usufruct nor lawful possession. And hence comes the saying that nothing can be acquired for us through a stranger, except possession; for as to this it is questionable whether acquisition of it cannot be made for us by a free person6.

1 According to D. 41. 2. 8 and D. 41. 2. 49. 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 Papius was not so laid down until after Gaius's time, when, as we see, the question was a doubtful one.

2 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 by a free agent is asserted; for the fact of such acquisition being allowable is certain. The principal
98. In summa sciendum est iis qui in potestate manu mancipiove sunt nihil in iure cedi posse, cum enim personarum nihil sum esse possit, conveniens est scilicet, ut nihil sum esse per se in iure vindicare possint.


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

96. Finally, we must know that nothing can be passed by cessio in iure to those who are in potestas, 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).

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 man'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.

acquires through the agent at once and before he receives information of the transaction of the business if he gave a precedent mancipium (commission), but only after knowledge of the taking of possession and approval of the same (resubstitution), when the agent is self-appointed (negativa omnes iuris possessorum). See Sav. On Poss. pp. 239—256.

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

101. Testamentorum autem genera in G. W. Texta, nam aut calati comitis faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in proculitu, id est cum bellii causa ad pacem illam: proculitu est enim expeditus et armatus exercitus, alterum itaque in pace et in oto faciebant, alterum in proculitur exituri. (102.) Accessit deinde tertium genus testamenti, quod per aetas et libaram agitur, qui neque calati comitis neque in proculitu testamentum fecerant, is si subita morte urgetur, amico familiam suum [id est patrimonium suum] mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet, quod testamentum dicitur per aetas et libaram, scilicet quia per mancipationem peragitur. (103.) Sed

2. The comitia of which these meetings were set apart would, it is almost needless to say, be the comitia; as the plebeians had not in these 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 of the whole of it, the comitia, or in cases of emergency such portion as could readily be collected, the proculitus.
The two first-mentioned kinds of testament have fallen into disuse: and that alone is retained in use which is solemnized per aes et libram. 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 familia in mancipium from the testator, held the place of heir, and therefore the testator charged him with what he wished to be given to each 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 

libripens; after writing the tablets of his testament, mancipates his familia 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

\[1\] Ulpian, xx. 1.  
\[2\] Ibid. 3.  
\[3\] Ibid. 4. 5.
potestate est, velut frater eius. Sed si filiusfamilias ex castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur, nec is qui in potestate patris sit. (107.) De libripende cadem quae et de testibus dicta esse intellegentem; nam et is testimun numero est. (108.) Is vero qui in potestate hereditis aut legatarii est, cuiusque heres ipse aut legarius in potestate est, quique in eius potestate est, aere testis et libripens adhiberi potest, ut ipse quoque heres aut legarius iure adhibeantur. Sed tamen quod ad heredem pertinet quique in eius potestate est, cuiusque in potestate erit, minime hoc iure uti debemus.

instance. And if a filiusfamilias make a testament regarding his castrense peculium after his dismissal from service, his father cannot properly be employed as a witness; nor one who is in the potestas of his father. 107. We shall consider that what has been said about the witnesses is also said about the librigenius; for he too is in the number of the witnesses. 108. But a man who is in the potestas of the heir or a legatee, or in whose potestas the heir or a legatee himself is, or who is in the same potestas (with either of them), may so certainly be employed as a witness or librigenius, that even the heir or legatee himself may be lawfully so employed. Yet so far as concerns the heir, or one who is in his potestas, or one in whose potestas he is, we ought to make use of this right very sparingly.

1 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 parentium 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 (11. 87) was set aside in this case. If the testament were made during service, no formalities were needed (11. 109); hence the words “post missionem” are inserted in the text.

2 Marcellus, with whom Ulpian apparently agrees, held that a father could be made witness to a testament of a filiusfamilias respecting his castrense peculium. See B. 28. r. 20. 2.

The transaction, as Gaius tells us (11. 108), was still regarded as one between the testator and the familia emperor, and yet people were gradually 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 transformed into a law. Jus. ii. 10. 16.

Military testaments.

109. Sed hae diligens observationi in ordinandis testamentis militibus propter nulliam imperiam constitutionibus Principum remissa est. nam quamvis neque legitimum numerum testium adhiberint, neque vendiderint familia, neque muncipaverint testamentum, recte nihilominus testatur. (110.) Praeterea permissionestis et peregrinos et Latinos instituere heredes vel ilis legare; cum aliquos peregrini quidem ratione civili prohibentur capere hereditatem legataque, Latinis vero per legem Iuliam. (111.) Caelibus quoque qui legi Julia hereditatem legatque capere vetantur, item orbis id est qui liberos non habent, quos lex Papia plus quam semissem capere prohibet [23 init.]

112. Sed senatus divo Hadiano audore, ut supra quoque sign.

109. But these strict regulations as to the making of testaments 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 neither employed the lawful number of witnesses, nor sold (mancipated) their familia, nor muncipated 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 Julia. 111. Married persons also, who by the Lex Julia are forbidden to take an inheritance or legacies, also orbis, 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
flaccavimus, multiriibus etiam coemigione non facta testamentum facere permittit, si modo maioris facerent annorum xii tuore auetore; scilicet ut quae testula liberatae non essent in testari debent.

113. Videntur ergo melioris conditionis esse feminae quam masculi: nam masculus minor annorum xiii testamentum facere non potest, etiam si tuore auetore testamentum facere velit; femina vero post xii annunti testamenti faciendi suas nanciscitur.

114. Igitur si quareamus an inviol testamentum, imprimis advertere debemus an quis id fecerit habuerit testamenti factionem: deinde si habuerit, requiramus an secundum iuris civilis regulam testatus sit; exceptis miltibus, quibus proprie nimium infectitum, ut diximus, quomodo velit vel quomodo posset, permittitur testamentum facere.

Hadrian (as we stated above also), allowed women to make a testament, even though they had not entered into a coemipto, 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 tutela should make their testaments.

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 desires to make it with the authorization of his tutor: but a woman obtains the right of making a testament after her twelfth year.

114. If then we are considering whether a testament be valid, we first ought to consider whether he who made it had testamenti factio: 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.

Non tamen, ut iure civili valid testamentum, sufficit in observatione quae supra expostimus de familiae venditione et de testibus et de nuncupationibus. (116.) Ante omnia requirendum est in instituto heredis sollemni more facta sit: nam aliter facta institutione nihil proficit familiam testatoris in venire, testatur ut adhibere, ait nuncupare testamentum, ut supra diximus. (117.) Sollemnis autem instituto habe est: TITUS HERES ESTO. sed et illa iam comprobata videtur: TITUM HEREDEM ESSE DIXEO. at illa non est comprobata: TITUM HEREDEM ESSE VOLO. set et illae a plerisque improbatae sum: HEREDEM INSTITUO, item HEREDEM FACIO.

118. Observandum praeterea est, ut si mulier quae in tutela sit faciat testamentum, tutoris auctoritate facere debent: aliquum inutiliter iure civili testatur. (119.) Praetor tamen, si septem signis testament signatum sit testamentum, scriptis hereditibus secundum tabulas testamenti bonorum possessionem pollicitur: et si nemo sit ad quem ab intestato iure legitimo pertinat.

But to make a testament valid by the civil law, the observances which we have explained above as to the sale of the familia and the witnesses and the nuncupations, are not sufficient. 116. Above all things, we must enquire whether the institution of the heir was made in solemn form: for if it have been made otherwise, it is of no avail for the familia of the testator to be sold, or to call in witnesses, or to nuncupate the testament, in the manner we have stated above. 117. The solemn form of institution is this: "Titus be heir." But this also seems approved: "I order Titus to be heir." This, however, is not approved: "I wish Titus to be heir." These, too, are generally disapproved: "I institute heir," and "I make heir.

We must further observe that if a woman who is in tutela make a testament, she ought to make it with the authorization of her tutor: otherwise she will not make a testament invalid at the civil law. 119. The Praetor, however, if the testament be sealed with the seals of seven witnesses, promises to the written heirs possession of the property in accordance with the testament: and if there be no person to whom the inheritance belongs on
est; item ad feminam quae idea non utiliter testatis sunt, quod verbi gratia familiaris non vendiderint aut nuncupationem verba locutione non sint: an autem et ea testamenta feminam quae sine tutoris auctoritate fecerunt nec constituto pertinent, videbimus. (122.) Loquimur autem de id sicelicit feminis quae non in legitima parentum aut patronorum tutela sunt, sed de his quae alterius generis tutoris habent, qui eam invit cogintur auctores fieri: alioquin parentem et patronum sine auctoritate eius factum testamento non summoveri palam est.

123. Item qui filium in postestate habet curare debet, ut eum vel herodem instituat vel nominatin exheredit: alioquin si eum silentio praetererit, intuiller testabantur: adeo quidem, ut nostri praeceptores existiment, etiam vivo patre filius defunctus sit, neminem heredem ex co testamento existere posse, 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 familia, or have not spoken the words of nunciation: but whether the constitution also applies to those wills of women which they have made without authorization of the tutor, is a matter for us to consider.

122. But we are speaking about those women, of course, who are not in the tutela legitima of parents or patrons, but who have tutors of another kind, who are compelled to authorize even against their will: that in the other case, a parent or a patron cannot be set aside by a testament made without his authorization is plain.

123. Likewise, he who has a son in 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, even if the son die in the lifetime of the father, no heir can exist under that testament, that is, because the institution

...
scilicet quia statim ab initio non constituerit institutio. sed diversae scholae auctores, siguident filiorum mortis patris tempore vivat, sanie impeditum eum esse scriptis hereditatis et illum ab intestato heredem fieri conflictur: si vero ante mortem patris intercessus sit, posse ex testamento hereditatem adiri putant, nillo iam filio impedimento: quia scilicet existimant non statim ab initio intulit fieri testamentum filio praetorio.

(124.) Ceteras vero liberorum personas si praetenerit testator, valet testamentum. praeteritas istae persona scriptis hereditibus in partem adducunt: si sui institutis sint in virilicem; si extranei, in dimidia. id est si quis tres verbi gentia filios heredes instituerit et filiam praetenerit, filia adducendo pro quarta parte fit heres; placuit enim cum tuncam esse pro ea parte, quia etiam ab intestato eam partem habuitur esse: at si extraneos ille heredes instituerit et filiam praetenerit, filia adducendo ex dimidia parte fit heres. Quae de filia diximus, eadem et de

was invalid from the very beginning. But the authors of the opposite school admit that if the son be alive at the time of the father’s death he undoubtedly stands in the way of the written 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: that is, because they think 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 descendants, the testament stands good. These persons so passed over attach themselves to the written heirs for a portion; for a proportionate share, si sui heredes have been appointed heirs: 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 by intestacy. But if the man have instituted strangers as heirs and passed over a daughter, the daughter by attachment becomes heir to one-half. All that we have said as to a daughter we shall consider

to be also said of a grandson and all classes of descendants, whether of the male or female sex. 125. What means this then? Although women, according to what we have said, take away only one half from the written heirs, yet the Praetor promises them possession of all the goods in spite of the testament, by which means the stronger 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 lately the Emperor Antoninus has decided by a rescript that women who are state herodes, are to obtain no more by possession of goods than they would obtain by right of attachment1. A rule which applies in like manner to emancipated women, so that they are to have by possession of goods exactly what they would have had by right of attachment if they had been state herodes. 127. But if a son be disinherited by a father, he must be disinherited by name1: ‘‘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 jures creati." Cf. Theophilus, 11, 13, 5. 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 settle-
ment of the dispute by a rescript of the date 541 A.D. 2 Bodilson proposes to continue the passage "before the appointment of the heir (i.e. in a part of the will preceding the appointment of heir), or in the midst of the appointments of the heir (if there be several, but he cannot in any case be disinherited by a general clause (inter cedera)."

11 156. Ulp. xxii. 17.
exheredari, nominatin autem exheredari videtur sive ita exheredetur: *Titius* *Filius* *Meus* *Exheres* est, sive ita: *Filius* *Meus* *Exheres* est, non adiecto proprio nomine. (128.) *Masculorum* ceterorum personae vel feminini sexus aut nominatin exheredari; posuunt, aut inter ceteros, velit hoc modo: CETERI EXHEREDARI SUNTO: quae verba post institutionem hrecdum adici solent, sed hanc ita suum irre civili. (129.) Nam Praetor omnes vivris sexus, tam filios quam ceteros, id est nepotes quoque et pronepotes nominacion exheredari inhat, feminini vero inter ceteros: qui nisi fuerint ita exheredati, promittit et contra tabulas bonorum possessionem. (130.) Postumi quoque liberis vel heredas institut vel exheredari. (131.) Et in a par omnium conditionis est, quod et in filio postumo et in quolibet ex ceteris liberis, sive femininis sexus sive masculinis, praedictis. valt quotidem testamentum, sed postea aegitatione postumi sive

if he be either disinherited in these 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 things 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 contrary to the testament. 130. Posthumous descendants also must either be appointed heirs or disinherited. 131. And in this respect the condition of all of them is the same, that when a posthumous son or any other descendant, whether male or female, is passed over, the testament is still valid, but

The meaning of the last sentence is that he must be named, no general preposition, such as "ceteri exheredes sunt," 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. Inst. 11. 18) children so disinherited could bring the *pierda in officio testamenti*, "complaint of the will 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, xxvii. 41, 22.

postumae v.empitut, et ea ratione totum inforinatur: ideoque si mulier ex qua postuumus aut postuma sperdatur abortum fuerit, nihil impeditur est scriptum hereditibus ad herediatem acendum. (132.) Sed feminini quidem sexus postumae vel nominatio vel inter ceteros exheredari solent. dum tamen si inter ceteros exheredari, aliquid eis legitur, ne viderantur per oblivionem praedicati esse: masculos vero postumos, id est filium et dünopus, placet non aliter recte exheredari, nisi nominatim exheredari, hoc scilicet modo: quicquique mihi filius gentium fuerit, exheres esto. (133.) Postumorum loco sunt et hi qui in sui hereditis locum successuro quasi adhuc sicundo sunt parentibus sui heredes. ut esse si filium et ex eo nepotem neptenem in patestate habeant, quia filius gradu praecedet, is solus iura sui hereditis habet, quavis nepos quoque et nepitis ex eo in eadem patestate sint; sed si filius mens

is made void subsequently by the aegitation1 of the posthumous son or daughter, and thus becomes utterly inoperative. And therefore, if a woman, from whom a posthumous son or daughter is expected, miscarry, there is nothing to prevent the written heirs from entering on the inheritance. 132. Posthumous females may be disinherited 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 posthumous 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 reckoned as posthumous children, who, by succeeding into the place of a *suus heres*, become heirs to their ascendants by quasi-aegitation. For instance, if any man have in his *poletas* a son and a grandson or grandchild to him, the son alone has the rights of *suus heres*, because he is prior in degree, although the grandson also and granddaughter by him are in the same *poletas*, but

2 By *aegitation* is merely meant the fact of becoming an *aegatus*, which might be either by birth or adoption, or, as in the present case, by conception, for when there is a *ceperit* the child follows his father's condition and his rights vest at the time of conception (1. 98). Therefore the testator passes over a *suus heres*, as the child's rights extend back into the testator's lifetime.

3 See Ulp. xxiii. 31; Cic. De Orator, 1. 57, and Pro Cæcine, c. 35.
me vivó mortátor, aut qualitatem ratione excert de potestate mea, inquit régis nepos nepisse in eius locum succedere, et eo modo iura suorum heredum quasi adgnatione nunciusit. (134.) Ne ergo e o modo rumput mihi testamentum, si ius suum illius vel heredem instituere vel exheredare nominatim dèo, ne non iure fìsiunt testamentum, ita et nepotem nepisse ex eo necessè est mihi vel heredem instituere vel exheredare, ne forte, me vivó filio mortuo, succéndens in locum eius nepis nepisse quasi adgnatione rumput testamentum: idque legi Julia Velleia præsul m est; qui simul est, vel ut iniuriam postulum, id est virili sexus nominatim, feminini vel nominatim vel inter ceteros exheredantur, dum tamen iis qui inter ceteros exheredantur aliquid iegerat.

135. Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. sed Praetor omnes, tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, virilis sexus fictus et ulterioris.

if my son die in my lifetime, or depart from my possession by any means, the grandson or granddaughter at once succeeds into his place, and so obtains the rights of a suus heres by quasi-aqüatium. 134. Therefore, to prevent him or her from thus making my testament void, 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 illegal testament: lest, perchance, if my son die in my lifetime, the grandson or granddaughter by succeeding into his place should make void my testament by the quasi-aqüatium: and this is provided by the Lex Junia Velleia: wherein there is also a direction, that these quasi-aqüatiums are to be disinherit in the same way as posthumous children, i.e. males by name, females either by name or in a general clause, provided only that some legacy be left to those disinherit in a general clause.

135. According to the civil law it is not necessary either to appoint as heirs or disinherit emancipated children, because they are not sui heredes. But the Praetor orders all, both males and females, to be disinherit, 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. But if they be neither instituted heirs, nor disinherit in the manner we have stated above, the Praetor promises them possession of the goods contrary to the testament. 135 a. The children of a father subject to potestas do not take a possession of goods concurrently with their father, if he can have them in his possession: and if they put in a claim it will not be allowed. For they are barred by the father himself, and whether they be emancipated or be sui heredes makes no difference.

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

1 Ulpian, xxii. 25.
2 Since the father can have them in his potestas, it has to be explained how they can be emancipated. It should be noted that Huschke is strongly inclined to leave out this passage as a corrupt interpolation.
3 Therefore the praetor will grant
Invalidation of testaments by quasi-agnation.

138. Si quis post factum testamentum adoptaverit sibi filiam, aut per populum eum qui sui iuris est, aut per Praetorem eum qui in postestate parentis fuerit, omnimodo testamentum eius rumpitur quasi adgnatione sui heredes. (139.) Idem iuris est si cui post factum testamentum uxor in manum conveniat, vel quae in manu fuit nubat: nam eo modo filiae loco esse incipit et quasi sua est. (140.) Nec prodest sive haec, sive illi qui adoptatus est, in eo testamento sit institutus institutus. Nam de exheredatione eius supernauam videtur quareare, cum testamenti faciunti tempore suorum heredum numero non fuerit. (141.) Filius quoque qui ex prima secundave mancipatione manumittitur, quia revertitur in postestatem patrion, rumpit

138. If any man, after making a testament, adopt a son, either one who is sui juris by authority of the populus, or one who is in the postestates of an ascendant by authority of the Praetor, his testament is in all cases invalidated by this quasi-agnation of a sui heres. 139. The rule is the same if a man take a wife in manus after making a testament, or if a woman already in his manus be married to him: for in this way she begins to be in the place of a daughter5, and is a quasi sua heres. 140. Nor does it matter if such a woman, or a man who is adopted, be instituted heir in that testament. For as to disinheriting, it is superfluous to make enquiry, since at the time the testament was made they were not of the class of sui heres5. 141. A son also who is manumitted after a first or second mancipation3, invalidates a testament previously made, since he returns into his father’s postestas. Nor

then possessio hominis 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 Justinian, whose new system will be found in Inst. I. 31–33; 54 I. 11. 2. 1 L. 68, 99. 2 I. 115. 5 If they be already instituted in the testament, it must be as exceptu and not as sui heres. Therefore there is a quasi-agnation all the same, there having been no recognition of them in their present character, in fact such recognition having been impossible. “As to disinheriting,” Cuthbert says, “there is no need to make enquiry.” For as they were not sui heres at the time the testament was made there was no need to mention them at all. It is the subsequent quasi-agnation which invalidates the testament, not the fact of their being named or not named in it, for if manu, they must have been named in another character. 4 I. 138–135.

1 L. 67.

ante factum testamentum, nec prodest si in eo testamento heres institutus vel exheredatus fuerit. (142.) Simile ibus olim fuit in eius persona cuius nomine ex senatusconsulato erroris causa protrahatur, 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 rumpet testamentum. (143.) Nunc vero ex novo senatusconsulato quod auctore divi Hadriano factum est, si quidem vivo patre causa probatur, acque ut olim omnimodo rumpit testamentum: si vero post mortem patris, praecipui quidem rumpit testamentum, si vero heres in eo scriptus est vel exheredatus, non rumpit testamentum; ne licet diligentia facta testamenta rescinderentur a tempore quo renovari non possent.

144. Posteriori quoque testamento quod iure factum fuerit superius rumpitur. nec interest an extitierit aliquis ex eo heres, does it matter if he have been instituted heir or disinherited in that testament. 142. There was formerly a like rule in relation to a person with regard to whom a cause of error was proved in accordance with the senatusconsulatum, 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 citizen7. For whether he had been instituted heir by his ascendant or disinherited, and whether cause had been proved during the lifetime of his father or after his death, in all cases he invalidated the testament by his quasi-agnation. 143. But now, according to a new senatusconsulatum which was made at the instance of the late Emperor Hadrian, if cause be proved, he invalidates the testament in case he be passed over, but does not invalidate it in case he be appointed heir or disinherited therein: obviously, this is to prevent testaments carefully made from being set aside at a time when they cannot be re-executed.

144. By a testament of later date duly made one of earlier date is invalidated. And it matters not whether any one be.
an non exiterit: hoc enim solum spectatur, an existere potu-
erit. ideoque si quis ex posteriori testamento quod iure factum
est, aut noluerit heres esse, aut vivo testamentore, aut post mortem
eius antequam hereditatem adiret deceesserit, aut per cretionem
exclusus fuerit, aut condicione sub qua heres institutus est
defectus sit, aut proper caelebatum ex lege fulia summotus
fuerit ab hereditate: quibus casibus patrofamilias intestatus
moriur: nam et prius testamentum non valet, ruptum a poste-
rione, et posterius acque nullas vices habet, cum ex eo nemo
heres exiterit.

145. Allo quoque modo testamenta iure facta infirmantur,
velut cum is qui fecerit testamentum capite diminutus sit. quod
quibus modis accidit, primo commentario relatum est. (146.)
Hoc autem caso inuita ferei testantum dicemus, cum alioquin
et quae rumpuntur initia fiant; et quae statim ab initio non iure
fiant initia sunt; sed et ea quae iure facta sunt et postea propter

116 Invalidation by subsequent testament, &c.

Hoc autem caso inuita ferei testantum dicemus, cum alioquin
et quae rumpuntur initia fiant; et quae statim ab initio non iure
fiant initia sunt; sed et ea quae iure facta sunt et postea propter

come heir under the second testament or not: for the only point
regarded is whether any one could have become heir. There-
fore if any one appointed under the later and duly made test-
ament, 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 _credita_, or fail to fulfill some condition under
which he was instituted heir, or be debarred from the inher-
ance by the Lex Julia by reason of celibacy: in all these cases
the _paterfamilias_ dies intestate, for the earlier testament
is void, being invalidated 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 diminu-
itus_. In what ways this comes to pass has been explained
in the first Commentary. But in this case we shall say
that the testaments become _ineffectual_, although, on the
other hand, those which are invalidated are also _ineffectual,
and those which are _ineffectually made_ from the very beginning
are _ineffectual_, and those too which have been duly made,

1 See Appendix (E).
in utrae eum, bonorum possessionem accipit, si modo possunt hereditatem optime, habebunt bonorum possessionem cum re: si vero ab suis 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 suis hereditatem acquirere. si vero nemo sit aliquis iure civilis heres, ipse retineat hereditatem possunt, si possident, aut interdictum adversus esse habent qui bona

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)\(^1\). 1.49. For if any one have been instituted heir according to the civil law either in a former or a latter testament, or be heir on intestacy by statute law, he can wrest the inheritance from them\(^2\). But if there 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 statute heir; yet the written heirs are allowed to prevail, for instance if the point wherein the testament is unduly made he that the familia has not been sold, or that the testator has not spoken the words of nuncupation. 1.50. The case is different with those who hold possession of 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 caducis\(^3\) (lapses) and are ordered by the populus if no one become successor to the dead man. 1.51. ...................

possession is sine re. (See § 138.) Again the Praetor allowed only a limited time for heirs, whether scripti or ab intestato, to apply to him for bonorum possessionem (which it was an advantage to have in addition to hereditas because the interdictus Quorum Bonorum (IV. 144) was attached to it), and if they failed to apply within the time, the bonorum possessionem would be granted to applicates 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 a written 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 possessionem, and so in this case the hereditas was cum re and the bonorum possessionem was sine re. See III. 56; Ulpian, xxviii. 15.

\(^1\) It may very well happen that one man is heres according to the civil law, and another bonorum possessio according to the praetor's effect. 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 written heir is heres, but the Praetor will grant bonorum possessionem to the son; hence the hereditas is sine re, the bonorum possessionem is cum re. (See § 138.) Again the Praetor allowed only a limited time for heirs, whether scripti or ab intestato, to apply to him for bonorum possessionem (which it was an advantage to have in addition to hereditas because the interdictus Quorum Bonorum (IV. 144) was attached to it), and if they failed to apply within the time, the bonorum possessionem would be granted to applicates 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 a written 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 possessionem, and so in this case the hereditas was cum re and the bonorum possessionem was sine re. See III. 56; Ulpian, xxviii. 15.

\(^2\) In §§ 148, 149, the two separate cases of a first will or a second will being void at civil law, and bonorum possessionem 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 will be a second one, the heir under a valid first will has hereditas cum re: if the invalid will 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 will and that void, the hereditas cum re goes to the heir on an intestacy.

\(^3\) That is, an heir ab intestato, pointed out by the gentes civilia. The term technically means an heir who is not a mutus, but an agnatus. But probably there is here no reference to this distinction. Ulp. xxviii. 7.
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, 1 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 Fufidius, 2 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 whatever he acquires for himself after the death of his patron, whether before the sale of the goods or after, is reserved for himself. 3 And although the goods when sold only pay a part

2 It. 174.
3 The phrase "Sabino apjit Fufidius" is an ambiguous one. As Fufidius 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 Fufidius," thus making Fufidius the earlier writer of the two. Passages where opid is used in each of these senses are collected in Smith's "Dictionary of Roman and Greek Biography and Mythology," in the article on Perex, Uschiis, q. v.
4 This is called the bonitium separatum by later writers.

reserventur, et quamvis pro partione bona venierint, item ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit adquisitionem, veluti si Latium adquisierit, locupletior factus sit; cui ceterorum hominum quorum bona venierint pro partione, si quid postea adquirant, etiam saepius corum bona veniri solent.

156. Sui autem et necessarii heredes sunt veluti filii siliave, nepos neptisive ex filio, deinceps ceteri, qui modo in potestate morsius fuerunt. Sed uni nepos neptisive suos heres sit, non sufficit cum in potestate avi mortis tempore fuisse, sed opus est, ut pater quoque eius vivo patre suo desierit suus heres esse, aut morte interceps aut qualibet ratione liberatus potestate: tum enim nepos neptisive in locum sui patris succedunt. (157.) Sed sui quidem heredes ideo appellantur, quia domenic heredes sunt, et vivo quoque parente quodam modo domini

of the debts (pro partione venierint), yet his goods will not be sold a second time on account of the inheritance, unless he has acquired something in connexion with the inheritance; for instance 1, if he be a Latin and have been enriched through acquisitions he has made: 2 although 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 in the potestas of the dying man. But in order that a grandson or granddaughter may be suos heres, it is not enough for them to have been in 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 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

1 The word si should be repeated: potius factus sit. So also in II. 235.
2 111. 56.
existimatur. unde etiam si quis intestatus mortuus sit, prima causa est in successione librorum. necessarii veroideo dici curt, quia omnino modo, sive velit sive non velit, tam ab intestato quam ex testamento heredes sunt. (158.) sed his Praetor permittit abstinerse se ab hereditate, ut potius parentis bona veneant. (159.) Idem autem est et in uxoris persona quae in manu est, quia sive loco est, et in nurus quae in manu filii est, quia nepitis loco est. (160.) Quin ejus similitur abstinendi posteaestiam facit Praetor etiam [mancipato, id est] ei qui in causa mancipati est, cum liber et heres institutus sit; cum necessarium, non etiam suus heres sit, tamquam servus.

161. Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantium. in qua liber quoque nostri qui in potes-

extent 1. 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 own). 159. The rule is the same as to a wife who is in manus, because she is in the place of a daughter, and as to a daughter-in-law who is in 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 son, that is to) one who is in causa mancipii, when he is instituted free and heir: since as like a slave he is a heres necessaria, not suus autem 2.

161. All others who are not subject to a testator's authority are called extraneous heirs. Thus, our descendants not in our

1 Papianus, D. 38. 6. 7, gives another derivation: "suus homo est cum et ipse facit in potestate:" i.e. the ascendant had his polites and so he was nus "belonging to him" just as land or a chattel was also suus, because he had dominium over it.

3 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 abstinenti; and so the disgrace of the sale (§ 154.) fell on the memory of the deceased and not on themselves.

2 1. 1. 158. "Suus autem," i.e. necessarissius est mun.

This clause explains why a mancipated person should be appointed free and heir. A person in causa mancipii is technically a slave. 1. 172.

Potesas, 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 in 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 1.

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 themselves 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.

1 II. 188.
2 Sc. a heres suus et necessarius. 1. 158.
3 Sc. a heres extraneus. 1. 162.
164. Extraneus hereditibus solet certio dari, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis finis summoveeantur. Ideo autem certio appellata est, quia cernere est quasi decernere et constituere. (165.) Cum ideo ita scripsit: HERES TITUS ESTO: adicere debemus: CERNIQUE IN CENTUM DIEBUS PROXIMUM QUIRUS SITES POTERISQUE. QUOD SI ITA CREVERIS, EXHERES ESTO. (166.) Et qui ita heres institutus est si velit heres esse, debet in diem cretionis cernere, id est habe verba dicere: QUOD ME PUBLICUS MAEVUS TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNIQUE. Quodsi ita non creverit, summoveatur tempore cretionis exclusivum: nec quicquam proicit, si pro herede gerat, id quod est si rebus hereditariis tamquam heres utatur. (167.) At is qui sine cretione heres institutus sit, aut

164. To extraneous heirs certio 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 certio because the verb cernere means to deliberate, as it were, and decide. (165.) When, therefore, the clause has been written, "Thus be heir," we ought to add, "and make thy certio within the next hundred days after thou hast knowledge and ability. But if thou dost not thus make certio, be disinherit Erdogan. (166.) And if the heir thus instituted desire to be heir, he ought to make certio within the time allowed for certification, i.e. speak the words, "Inasmuch as Publius Maevus has instituted me heir in his testament, I enter on that inheritance and make certio for it." But if he do not thus make certio, he is debarred at the expiration of the time limited for certio. Nor is it of any avail for him to act as heir, i.e. to use the items of the inheritance as though he were heir. (167.) But an heir appointed without certio,

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3 Ulpian, tituli, 110—114. "Certi valet constitutio hisque heres quam constituit se heredem esse, dictum cernere, et quam id factum, crevisse." Varro, R. L. VII. 98. See also Momms, sub verbo.
minus iure civili aut longius aut brevius tempus dari: longius
tamen interdum Praetor coartat. (171.) Et quamvis omnis
creetio certis diebus constrinatur, tamen alia creetio vulgaris
vocatur, alia certorum dieum: vulgaris illa, quam supra expos-
simus, id est in qua adequantur haec verba: quotus sciet
poteritque; certorum dieurn, in qua detractis his verbis
cetera scribuntur. (172.) Quam creetionum magna differentia
est, nam vulgari creetione data nulli dies computatur, nisi
quibus scierit quisque se hereditem esse institutum et possit
cernere. certorum vero dieum creetione data etiam nescient:
se hereditem institutum esse numeratur dies continui; item ei
quoque qui aliquo ex causa cernere prohibetur, et eo amplius
ei qui sub condicione heres institutus est, tempus numeratur,
unde melius et aptius est vulgari creetione uti. (173.) Continua
haec creetio vocatur, quia continui dies numerantur sed quia

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 creation is tied down to some
fixed number of days, yet one kind of creation is called common
(vulgaris), the other creation of fixed days (certorum dieum):
the common is that which we have explained above, i.e. that
in which are added the words, "after he has knowledge and
ability:" that of fixed days is the creation in which the rest of
the form is written, and these words omitted. 172. Between
these creations there is a great difference: for when common
creation is appointed, no days are taken into account, except
those wherein the man knows that he is instituted heir, and
is able to make his creation. But when creation 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 creation, and further than this,
against one who is instituted heir under a condition. There-
fore it is better and more convenient to employ common creation.
173. This creation is called "continuous," because the days
are reckoned continuously. But since this creation is too strict,


3 n. 165.
admittit, et futu ambo acquis 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, quamdiu cernere et eo modo
heres fieri possit prior, etiam si pro herede gesserit, non-tamen
admittit substitutum: *cum vero cretio finitum sit, tum pro herede
gerentem admirare substitutum: olim vero placuit, etiam super-
ante cretione posse cum pro herede gerendo in partem substitutum
admittere et amplius ad cretionem reverti non posse.

179. Liberis nostris inpueribus quos in potestate habemus
non solum ita, ut supra diximus, substituere possessum, id est
ut *si* heredes non exitierint, alius nobis heres sit; sed eo amplius,
ut etiam si heredes nobis exitierint et adhuc inpuerbes
mortui fuerint, *vit iis aliquis heres, velut hoc modo: TITIUS*
to a portion, and both become heirs to equal shares. But
if he neither make cretion nor act as heir, he is undoubtedly
debarrd 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, even if he act as heir, yet 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
of puberty whom we have in our *pupillus*, 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,

1 Ulpian (xxviii. 34) calls this *im-
perfecta cretio.* He also mentions a
constitutio by which *goesta pro her-
eres* 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 para-
graph would point to the latter con-
clusion.

2 Ulpian, xxviii. 7–9. In the last
of these paragraphs it is laid down
much more plainly than by Gaius
(though he too implies the fact

thus: "Titius, my son, be my heir.
If my son shall not become
my heir, or if he became 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 descendant, it is
usual to make the vulgar substitution openly, *i.e.* in the place
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 tes-
tator lives, all that is written in his testament is unknown:
throughout) that the testament for
the pupil must be an appanage to
a testament of the ascendant, and
cannot exist otherwise.
substitutionem per quam, etiamsi heres exiterit pupillos et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, casque tabulas proprio lino propriaque cera consignamus; et in prioribus tabulis cavemus, ne inferiores tabulae vivo filio et adhecum inprobantur. Sed longe tutius est utranque genus substitutionis separatim in inferioribus tabulis consignari, quod si eis consignatae vel separatæ fuerint substitutiones, ut diximus, ex priore potest intelligi in alterm [alter] quoque idem esse substitutus.

182. Non solum autem heredes institutus impuberibus liberis iia substituere possimus, ut si ante pubertatem mortui fuerint, sit is herce quem nos voluerimus, sed etiam exheredatis. Itaque eo casu si quid pupillo ex hereditatibus legisuisse aut donationibus propequrum ad quod fuerit, id omne ad substitutum pertinent. (183.) Quaequeque diximus de substitutione impuberum liberorum, vel heredum institutorum vel exheredatorum, eadem etiam de postumis intelligentes.

184. Extraneo vero heredi in substituere non 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 inheritances, 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 posthumous children.

184. But if a stranger be instituted heir, we cannot substitute

possumus, ut si heres exiterit et intra aliquid tempus decesserit, alias eis heres sit: sed hoc solum nobis permission est, ut eum per fideicommissum obligemus, ut hereditatem nostram vel totam vel pro parte restituat; quod idus quale sit, suo loco trademus.

185. Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt. (186.) Sed nostro servus simul et liber et heres esse iuberi debet. id est hoc modo: STIGUS SERVUS MEUS LIBER HERES QUESITI VEL HERES LIBER QUESITI. (187.) Nam si sine libertate heres institutus sit, etiam si postea manumissus fuerit a domino, heres esse non potest, quia instituto in persona eius non constat; ideaque dicent alienatus sit, non potest iussu domini cernere hereditatem.

188. Cun libertate vero heres institutus, si quidem in easdem causa manerit, fit ex testamento liber idoneque necessarius heres.

to him in such manner, that if he become heir and die within some specified time, some other person is to be heir to him: 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 at once 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, even though he be afterwards manumitted by his master, he cannot be heir, because the institution was invalid in his then status; and therefore, even if he be alienated, he cannot make election for the inheritance at the order of his 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

1. IV. 296 et seq.; II. 277.
3. Justinians altered the law on this point, so that thenceforward the appointment of a slave as heir gave him liberty by implication. Inst. i. 14–15.
4. II. 164.
5. II. 185.
Appointment of slaves as heirs,

si vero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quoque 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 duravit, iussu novi domini hereditatem adire potest. (190.) Si autem servus alienus heres institutus est vulgari cretione data, sua intellegitur dies cretionis cedere, si ipse servus scierit se heredem institutum esse, nec ullam impedimentum sit, quominus certorem dominum faceret, ut illius iussu cernere potest.

191. Post haec videamus de legatis. Quae pars iuris extra

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 creton 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 creton appointed, the time of creton only begins to run, if the slave know that he is instituted heir, and there is no hindrance to his informing his master, so that he may make creton at his command.

191. Next, let us consider as to legacies *3. 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 damnatio, sinendi modo, or by praecepta.

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 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. The legacy “by vindication” is so called because after the inheritance is entered upon, the thing at once becomes the property of the legatee ex iure Quiritium;
Quiritium res legatarii fit; et si eam rem legaturum vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere eam rem quam ex iure Quiritium esse. (195.) In eo vero dissertant prudentes, quod Sabinus quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post adidum hereditatem patrem legarini, etiam si ignorant sibi legatum esse dimissum, et postea quam scierit et reputaverit, tum perinde esse atque si legatum non esset: Nerva vero et Proculus ceterique illius scholae autores non aliter putant rem legatarum fieri, quam si voluerit eam ad se pertinere. Sed hodie ex divi Pii Antonini constitutione hoc magis iure uti videtur quod Proculo placuit, nam cum legatus fuisse Latini per vindicationem coloniae: deliberent, inquirerent decuriones an ad se velit pertinere, prorinde ac si uni legatus esset. (196.) Eae autem solae res per vindicationem leganter recte quae ex iure Quiritium ipsius testatoris sunt. sed eae quidem 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 vindicatio, i.e. plead that the thing is his ex iure Quiritium. 195. As to the following point, however, the law authorities differ, in that Sabinus and Cassius and the rest of our authorities think 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 is ignorant that the legacy has been left to him; and that after he has become aware of it and refused it, it is then as though it had not been bequeathed: whilst Nerva and Proculus and the other authorities of that school think 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, in accordance with a constitution of the late emperor Flavius 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 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 ex iure Quiritium. But it has been ruled as to those things

(res quae pondere, numero, mensura constanter, placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. ceteras res vero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo facetur testamentum et quo moreretur; alioquin inutili esse legatum. (197.) Sed sane hoc iure iure civili. Postea vero autore Nerone Caesaris senatusconsultum factum est, quo cautum est, ut si eam rem quisque legaverit quae eius numquam fuerit, perinde utile sit legatum, atque si optimo iure reliquit esse. optimum autem ius est per damnationem legatum; quo generis etiam alieno res legati potest, sicut inferius apparebit. (198.) Sed si quis rem suam legaverit, deinde post testamentum factum eam alienaverit, plerique putant non solum iure civili inutili esse legatum, sed nec ex senatusconsulto confirmari, quod idem dicunt est, quis esti per damnationem ali-

which depend on weight, number, or measure, that it is sufficient if they be the testator's ex iure Quiritium 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 ex iure Quiritium 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 undoubtedly 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. 198. 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. But if a man bequeath a thing of his own, 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

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 pactus (apts.) verbi legatum est, perinde sit ali o iure legatum esse." Ulpian, xxiv. 11 6.

2 II. 203.
Per vindicationem.

quis rem suum legaverit sumpsque postea alienaverit, plerique putant, licet ipso iure debetur legatum, tamen legatum petenter per exceptionem doli mali repe(li) quasi contra voluntatem definicti petat. (199.) Illud constat, si duobus pluribus per vindicationem cadem res legata sit, sive conunctim sive disjunctim, si omnes veniant ad legatum, partes ad singulos pertinent, et deficientis portionem collegiariadrescere. conunctam autem ita legatur: TITI ET SIIO HOMINEM STICHIUM DO LEGO; disjunctam ita: LUCIUS TITIO HOMINEM STICHIUM DO LEGO. SEIO EUNDIEM HOMINEM DO LEGO. (200.) Illud quareitur, quod sub condicione per vindicationem legatum est, pendente condicione eum qui est. Nostri praecessores heredes esse putant exemplo statuliebri, id est eius servit qui testamento sub aliqua condicione liber esse iussus est, quem constant interest hereditis servum esse. sed diversae scholae auctores putant nullius interim cam rem esse; quod multo magis dicunt de eo

that even if a man bequeath his property by damnation and 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 exceptio doli mali, because he makes demand contrary to the will of the deceased. 199. It is an acknowledged rule that if the same thing is 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 his shares to his co-heirs. Now a legacy is left conjointly thus: "I give and bequeath the man Stichus to Titus and Scius;" disjointly, thus: "I give and bequeath to Lucius Titius the man Stichus. I give and bequeath to Scius the same man." 200. This question arises, whose is a legacy left by vindication under a condition, whilst the condition is unfurled? Our authorities think it belongs to the heir, after the precedent of the statutius, i.e. the slave who is in a testament ordered to become free under some condition, and who, if it is admitted, is the slave of the heir for the meantime. But the authorities of the other school think that the thing belongs to no one in the interim: and they assert this still

Per damnationem.

quod sine condicione pure legatum est, antequam legatarius admissit legatum.

201. Per damnationem hoc modo legamus: HERRES MEUS STICHIUM SERVUM MEUM DARE DAMNAS ESTO, sed et si dato scriptum sit, per damnationem legatum est. (202.) Quod generali etiam aliena res legari potest, ita ut heres redimere et praestare aut reparationem cius dare debent. (203.) Ea quoque res qua in rerum natura non est, si modo futura est, per damnationem legati potest, velit fructus qui in illo fundo nati erant, aut quo quid ex illa ancilla naturam erit. (204.) Quod autem ita legatum est, post aditam hereditatem, etiam pure legatum est, non ut per vindicationem legatum continuo legatario adquiritur, sed nihilominus heredes est. idea legarius in personam agere debet, id est intendere heredem sibi dare opor-tuere: 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 tantam tradiderit, more strongly as to 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 Stichus my slave;" 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 offshoot 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 then, if it be a res mancipi, the heir must give it by mancipium, or make casso in jure of it, and deliver up the possession: if it be a res nec mancipi, it is enough that he deliver it. For if he merely deliver a res mancipi, without

1 IV. 115 et seqq. 2 Ulpian, ii. 1, 3.
nec mancipiaveris, usucapione dumtaxat pleno iure fit legatarii: finitum autem usuccapio, ut supra quaeris diximus, mobilium quidem rerum anno, earum vero quae solo tenentur, biennio. (205.) Est et alia differentia inter legatum per vindicationem et per damnationem: si enim aedem rei duobus pluribusve per damnationem legata sit, si quidem coniunctum, plane singulis partibus debentur sint in per vindicationem legato. si vero disjunctum, singulis solidis rei debentur, ut sicget heres alteri rem, alteri acsini etc. eur genus praestare debent. et in coniunctis defectibus portio non ad collegaritium pertinet. sed in hereditaribus remanet.

206. Quod autem diximus deficientes portionem in per damnationem quidem legato in hereditate retineti, in per vindicationem vero collegatarium accrescere, admodum simus ante legem Papiam iure civilia, et alia: post legem vero Papiam deficientem portio caduca sit et ad eos pertinet qui in eo testamento liberos habent. (207.) Et quamvis prima causa sit in

manipulating it, it only becomes the legatee's in full title by usucapio; and usucapio, as we have also said above,1 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 to 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 before the Lex Papia; but that now, when the Lex Papia2 has been passed, the portion of one failing becomes a lapse, and belongs to those persons named in the testament who have children. 207. And although in claiming lapses, the first

1 II. 41. 2 A.D. 10. See note (G) in Appendix.
ex res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutili esse: quid ergo est? licet aliquid eam rem legaverit quae neque eius aucta fuerit, neque possita heredes eius unquam esse coeperit, ex senatusconsulto Neroniano proinde videtur ac si per damnationem relicta esset. (213.) Sicut autem per damnationem legata res non statim post aditam hereditatem legati efficitur, sed manet heredes eo usque, donec is heres tradendo vel mancipando vel in iure cedendo legatarii eam fecerit; ida et in sinendis modo legato irisc est: et ideo hucus quoque legati nomine in personam actio est quidquid herebedem ex testamento dare facere oporterit. (214.) Sunt tamen qui putant ex hoc legato non videri obligatum heredem, ut mancipet aut in iure cedat aut tradat, sed sufficeret, ut legatarii rem sumere paterent: quia nihil ultra ei testator imperavit, quam ut sitat, id est patiatur legatarum rem sibi habere. (215.) Maior illa 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 been to be the property of his heir, yet by the senatusconsultum of Nero, it is regarded as if left by damnation. 213. In like manner as a thing bequeathed by damnation does not become the property of the legatee immediately that the inheritance is entered on, but remains the heir’s, until the heir makes it the legatee’s by delivery, or mancipation, or esse in jure: so also is the law regarding a legacy sine et modis: and therefore in respect of this legacy also the action is personal: “whosoever the heir ought to give or do according to the testament.” 214. There are, however, those who think that in this kind of legacy the heir is not to be considered bound to mancipate, make esse in jure, 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

1 Ulp. xxiv. 11 a. Galus 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 one under discussion, and that only.

2 iv. 2.

dissentio in hoc legato intervenit, si eandem rem duobus pluribus disiunctum legasti: quidam putant utriusque solidum deberi, sicut per damnationem: nonnulli occupantes esse melior, condicionem aestimant, quia cum in eo genere legati damnetur heres patientiam praestare, ut legaturius rem habeat, sequitur, ut si priori patientiam praestiterit, et si rem sumpserit, securus sit adversus eum qui postea legatum petierit, quia neque haberit, ut patiatur eam ab eo sumi, neque dolo mali fecit quominus eam rem habeat.

216. Per praecpectionem hoc modo legaturius: LUCIUS TITIUS HONEMEM STICHUM PRÆCEPTIT. (217.) Sed nostri quidem praecptores nulli aliis illum modo legari posse putant, nisi ei qui aliquid ex parte heres scriptus esset: praecipere enim esse praeceptum sumere; quod tantum in eius personam procedit qui aliquid ex parte heres institutus est, quod est extra portionem hereditatis praecipientium legatui habiturus sit. (218.) Ideo-

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 suffers 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 brought it to pass that he has it not.

216. By praecption we bequeath in this manner: “Let Lucius Titius first take the man Stichus.” 217. But our authorities think that a bequest can be made in this form to no one who is not appointed heir in part: for praecipere means to take in advance: which only is possible in the case of one who is appointed heir to some part, since he can have the legacy in advance and clear of his share of the inheritance 1.

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 another benefit in addition to his legacy.
que si extranee legatum fuerit, inutili est legatum, adeo ut Sabinius existimaverit ne quidem ex senatusconsulto Nerono posse convalescere: nam eo, inquit, senatusconsulto ea tantum confirmantur quae verborum visio in re civili non valent, non quae propter ipsam personam legatarii non debenterut. sed Julianae ex Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum: nam ex verbis etiam hoc casu accidere, ut in re civili inutili sit legatum, unde manifestum esse, quod eadem alius 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 praeceteros quod ita legatum est nulla ratione putant posses consequi cum ei cui fuerit legatum, praeterquam iudicio familiaris eriscundae quod inter heredes de hereditate eriscundae id est dividenda accipi solet: officio enim iudicis id

218. Therefore, if the legatee have been left to a stranger, the legate is void, so that Sabinius 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 Julianae, according to Sextus, thought that the legatee 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 legatee 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 authorities think the legatee can obtain a legacy left in this manner by no other means than a judicium familiaris eriscundae, which is usually employed between heirs for the purpose of “eriscundating,” i.e. dividing the inheritance: for it appertains to the

1 Note on II. 114.
2 IV. 47.
_actio familiae eriscundae.

cum rem legatum videri. quae sententia dicitur divi Hadriani constitutione confirmata esse. (222.) Secundum hanc igitur opinionem, si ea res ex iure Quiritium defuncti fuerit, potest a legatiario vindicari, si et unus ex hereditibus sit sive extraneus: et si in bonis tantum testatoris fuerit, extraneo quidem ex senatoriis consulto utile erit legatum, heredi vero familiae heriscundae iudices officio praestabitur. quod si nullo iure fuerit testatoris, tam heredi quam extraneo ex senatoriis consulto utile erit. (223.) Si tamen hereditas, secundum nostrorum opinionem, sive etiam extraneis, secundum illorum opinionem, duobus pluribus cadem res coniunctam aut disjunctam legata fuerit, singuli partes habere debent.

ad legem falcidam.

224. Sed omi quidem licuit totum patrimonium legatis 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, ex iure Quiritium, 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 in honour, 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 left to two or more conjointly or disjointly, whether it be to heirs, according to our opinion, or to strangers too, according to theirs, all must take equal shares.

224. In olden times indeed 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 a law of the Twelve Tables seemed to permit, wherein it is provided, that whatever disposition 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 instituted heirs often abstained from the inheritance: and on that account many persons died intestate. (225.) For this reason the Lex Furia8 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 mortis causa9. 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 to each of five men. 226. Therefore, afterwards, the Lex Voconia4 was passed, whereby it was provided, that no one should be allowed to take more by way of legacy or donation mortis causa than the heirs took. Through this law the heirs seemed certain to have something at any rate: but yet a

1 I. 194. 2 I. 40. 41. 3 The derivation of the word eriscundus is given by Festus thus: "Erectum dictum est inter consors, ut in libris legum Romanarum legitur. Erectam a corroendo dictum, unde er esundae et erectae. Erecta autem vocuntur est a clendar." The sense of this may be thus given: 4 Between co-heirs, as we read in the Roman law-books, property is to be erectum citamunque. Erectum is a word connected with cense, to gather together, cliron from chl, to portion out. Hence the notion of Festus is that erectum implies "to gather together and then apportion." A joint inheritance is erectum citamnum, an inheritance to a single heir erectum nunc citum. See Oliviæ note on Cic. de Orat. 1. 66. 5 Sc. of Nero, I. 197. 6 See Appendix (H).
batur: nam in multas legatariorum personas distributo patrimonio poterant adeo heredi minimum relinquere, ut non expendiret heredi huius lucri gratia totius hereditatis onera sustinere. (227.) Latina est itaque lex Falcidia, quia caustum est, ne plus ei legare liceat quam dotrantem. itaque necesse est, ut heres quartum partem hereditatis habeat. et hoc non iure utimir. (228.) In libertatibus quoque tandis nimirum licentiam conpescuit lex Furia Caninia, sicut in primo commentario rettulimus.

DE INUTILITER RELICITIS LEGATIS.

229. Ante heredic institutionem inutiliter legatur, scilicet quia testamenta vim ex institutione heredis accepunt, et ob id velut caput et fundamentum intelligitur totius testamenti heredis institutionis. (230.) Huius ratione nec libertas ante heredis institutionem dari potest. (231.) Nostri praeceptores nec huius legatorem eo loco dari posse existimant: sed Laboe et Proculus mischift almost similar to the other ars: for by the patrimony being distributed amongst a large number of legatees, testators could leave so very little to the heir, that it would not be 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 of necessity must 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 from the institution of the heir, and therefore that institution is regarded as the head and foundation of the entire testament. 230. For a like reason, liberty 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 Laboe and

1 A. C. 39. Ulpian, xxiv. 32. 2 Ulpian, xxiv. 15. 3 la. 42. 4 ibid. 2. 20.
Legacies to an uncertain person invalid.

The si must be repeated: "Sed et si heres verbi gratia intra hiernium monumentum sibi non fecerit, x Titio dari iussit, poenae nomine legatum est. et denique ex ipsa definitione multas similis species propriae fingere possemus." (236.) Nec liberitas quidem poenae nomine dari potest: quamvis de ea se fuerit quiescunt. (237.) De tutore vero nihil possumus quaerere, quia non potest darioo tutoris heres compelli quotdam facere aut non facere: ideoque nec datu poenae nomine tutor; et si datus fuerit, magis sub condicioe quam poenae nomine datus videbitur. 238. Incertae personae legatum inutiliter relinquitur. incerta autem videtur persona quam per incertam opinionem animo suo testator subiectit, velut si ita legatum sit: qui primus ad funus meum venerit, ei heres meus x milia dato.

Let him give ten thousand sesterces to Scius." or thus: "If you do not bequeath your daughter in marriage on Titius, give ten thousand to Titius." And also1, if he shall have ordered ten thousand to be given to Titius, "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 special cases 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.

238. A legacy to an uncertain person is invalid.1 Now an uncertain person is considered to be one whom the testator brings before him 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

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1 The si must be repeated: "Sed et si, si heres, etc." Cont. II. 155. Legacies "poena nomine" were made valid by Justinian, who ordered them to be regarded as purely conditional. 2 Ulpiam, xxiv. 18. 3 Ulpiam, l. 25. See note on l. 45.
Legates under the potestas of the heir.

conditio non interveniente ducta est uxor, extraneus postumus patri contingit.

243. Ac ne heres quidem potest institu postumus alienus: est enim in certa persona. (243.) Cetera vero quae supra dictimas ad legata propriis pertinent; quamquam non immerito quibusdam placeat poenem nomine hereditem institu non posse; nihil enim interiti, utrum legitum dare induit heres, si fecerit aliquid aut non fecerit, an coheeres et adiciatur; quia tam coheredis additione quam legati datione compellitur, ut aliquid contra proposition suam faciat.

244. An et qui in potestate sit eius quem heredem instituissent, legitimam, quaeritur. Servius recte legari probat, sed evanescere legitum, si quod temporis dies legitore cedere solet, adhuc in potestate sit; ideoque sive purum legitum sit et vivo testatore ille potestate hereditis esse desideri, sive sub condicione et ante condi tionem in accidet, deberi legitum. Saepe debeat hereditas legata ad laster, quia habeat latere et alium legitum. Ulpian.

245. 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 hidden 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, so by the giving of a legacy, he is compelled to do something against his wish.

244. It is a disputed point whether we can validly give a legacy to one who is in the potestas of him whom we institute heir. Servius maintains that the legacy is valid, but becomes void if the legatee be still in potestas at the time when the legacy usually vests; and therefore, if either the legacy be left unconditionally, and during the testator's lifetime he cease to be in 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 can be left validly under condition, not validly unconditionally; for that although the legatee may happen to cease to be in 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 a legacy cannot be left validly even under a condition, because we cannot be indebted to those who are in our potestas any more under a condition than unconditionally. 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, 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 fideicommissum.

1 Ex Ulp. 2. 319, 233, 292.
2 Ulpian, xxiv. 56.
3 Ulpian, xxiv. 54.
4 Cedere diem significant factis eisdem, quia pecuniam venire diem, sine causis legatam, faciunt, non ipsam legatam. Ulpian. See D. 34. 7. 1. pr.
5 Ulpian, xxiv. 54.
6 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 precatio relinquens, nec ex rigore juris civilis profectum, sed ex voluntate datore petito.' Ulpian, xxv. 1.
247. Et prius de hereditatibus videamus.

248. In primis igitur sciemus est opus esse, ut aliquis heres recto iure instituatrum, eiusque fidei committatur, ut eam hereditatem ali restituat: inquit inutilis est testamentum in quo nemo recto iure heres institutum. (249) Verba autem utilia fideicommisso haec recte maxime in usu esse videtur: PETO, ROGO, VOCO, FIDEICOMMITTO: quae proinde firma singula sunt, atque si omnia in unum congrata sint. (250) Cum igitur 

248. And first let us consider as to inheritances.

248. First, then, we must know that some heir must be instituted in due form, and that it must be entrusted to his good faith that he deliver over the inheritance to another: for if this be not done, a testament is invalid in which no heir is 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 Titius, and beg of you, that as soon as you can enter on my inheritance, you will render and deliver it over to Gaius Seius." We may also ask him to deliver over a part: and it is in our power to leave fideicommissa 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: 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 was mulcted in connexion with the inheritance, or for anything which he had given 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 if any thing should afterwards come to the heir from the inheritance, that should be delivered over to him: and that he should also allow him to bring actions concerning the inheritance, in the capacity of procurator or rogator. 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.
post quod senatusconsultum deserunt iliae cautiones in usu haberi. Praetor enim utilis actiones ei et in eum qui recepit hereditatem, quasi heredi et in heredom dare coepit, caerque in edicto proponuntur. (254.) Sed tursus quia heredes scripti, cum aut totam hereditatem aut paene totam pleurumque resituart toahabitur, adire hereditatem ob nullum aut minimum lucrur recusabant, atque ob id extinguebantur fideicommissa, Pegaso et Pusione Consilii senatus censuit, ut ei qui rogatus esset hereditatem resitueres perinde licercet quartam partem retinere, atque e lege Falcidiae in legatis redhendi iza conceeditur. ex singulis quoque rebus quae per fideicommissum relinquuentur eadem retentio permissa est. per quod senatusconsultum ipse onera hereditaria sustinet; ille autem qui ex fideicommisso reliquum partem hereditatis recipit, legatarii partiarier loco est, id est eius legislagari cui pars bonusum legatur. quae species legati partitio vocatur, quia cum herede legatarius par-

came delivered over in accordance with the fideicommissum. After the passing of which senatusconsultum, these securities (the stipulations) ceased to be used. For the Praetor began to grant utilis 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 written 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 Fuscio the senate decreed, that he who was asked to deliver over the inheritance should be allowed to retain a fourth part, just as this right of retention is permitted by the Pegasus 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 partiar legatee, i.e. of a legatee to whom a portion of the goods is left. Which species of legates is called partitio, because the legatee shares (partitum) the inheritance with the heir. The

1 See note on II. 78. 2 Ulpian, xxiv. 25.

result of this is that the same stipulations which are usually entered into between the heir and the partiar legatee, are also entered into between him who receives the inheritance by way of fideicommissum and the heir, i.e. that the gains and loss of the inheritance shall be shared between them in proportion to their interests. 255. If then the written 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 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; but 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, if only he have done it of his own free will,
rit quam partem sive noberit retinere, ipse universa onera hereditaria sustinet; sed quarta quidem retenta quasi partis et pro parte stipulaciones interponi debent tamquam inter partitum legatum et hereditem; si vero totam hereditatem restituerit, ad exemplum emptae et venditae hereditatis stipulaciones interponendas sunt. (258.) Sed si recuset scriptus heres adire hereditatem, ob il l quod dicit eam sibi spectam esse quasi damnosam, caveat Pegasion senatusconsulto, ut desi deiante eo cui restitueri rogatus est, iussa Praetoris adeat et restituat, perindeque ei et in eum qui receperit actiones dentur, ac iuris est ex senatusconsulto Trehelliano. quo casu nullis stipulationibus opus est, quia simul et huic 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 restitueri rogetur, an ex parte heres institutus aut totam eam partem aut partis 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 partitary legatee and an heir: and if he have delivered over the whole inheritance, stipulations resembling those of a bought and sold inheritance must be employed. 258. But if the written heir refuse to enter upon the inheritance, because he says that it is suspected by him of being erroneous, it is provided by the senatusconsultum Pegasionum, 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 the senatusconsultum Trebellianum. In which case there is need of no stipulations, 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 account to be taken of

partem restitutur: nam et hoc casus de quarta parte eius partis ratio ex Pegasiono senatusconsulto haberi solet.

260. Potest autem quisque etiam res singulas per fideicommissum reliquere, velit fundum, hominem, vestem, argentum, pecuniam; et vel ipsum heredem rogare, ut aliumi restituant, vel legatari, quamvis a legatorio legari non posse. (261.) Item potest non solum propria testatioris res per fideicommissum relinquui, sed etiam heredis aut legatorii aut cujuslibet alterius. itaque et legatarius non solum de ea re regari potestit, ut cum aliumi restituant, quae ei legata sit, sed etiam de alia, sive ipsius legatorii sive alienas sit, sed hoc solum observationem est, ne plus quam quosque aliumi restitueri, quam ipse ex testamento cepert: nam quod amplius est inutiliter relinquitur. (262.) Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est, aut ipsum redimere et praestare, aut aestimatione eius solvere. si tuis est, si per damnationem alienas legatas sit, sunt tamen qui putant, si rem per fideicommissum

the fourth of that part according to the senatusconsultum Pegasionum.

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

262. Also, when another man's property is left by fideicommissum, it is incumbent on the person asked 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 left by damnation. There are, however, those who think that if the owner will not sell a thing left by fidei-
relictam dominus non vendat, extingui fideicommissum; sed aliquo esse causam per damnationem legati.

263. Libertas quoque servum per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legaturius. (264.) Nec interest ulterius de suo proprio servum testator roget, an de eo qui ipsius heredes aut legatarius vel etiam extranei sit. (265.) Itaque et aliquus servus redimi et manumiti debet, quod si dominus cum non vendat, sannextinguitur libertas, quod pro libertate præfici computatio nulla intervenit. (266.) Qui autem ex fideicommissio manumittitur, non testatoris fit libertus etiam testatoris servus sit, sed eius qui manumittit. (267.) At qui directo, testamento, liber esse inuetur, velut hoc modo: SICHIUS SERVUS MEUS LIBER ESTO, SVI STICHIUM SERVUM MEUM LIBERUM ESSE LIBERO, is ipius testatoris fit libertus. Nec aliquus ullius directo, ex testamento, libertatem habere potest, quam qui utroque fideicommissum the fideicommissum is extinguished: but that the case is different with a legacy by damnation.

268. Liberty can also be given to a slave by fideicommissum, in such a manner that either the heir or a legatee may be asked to manumit him. 269. Nor does it matter whether the testator make request as to his own slave, or one belonging to the heir himself, or to a legatee, or even to a stranger. 270. 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 calculation of the value of liberty is possible. 271. 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. 272. 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 ex iure Quiritium at both times, viz. that at which he made the testament, and that at which he died.

269. Things left by fideicommissum differ much from legacies left directly. 270. For, as an instance, an inheritance can be left by fideicommissum even by a nominal; whilst on the contrary, a legacy, unless a testament be made, is invalid. 271. 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. 272. 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. 273. 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 could give freedom.
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 asses, may still take an inheritance left her by fideicommissum. 275. Latins also, who are prevented by the Lex Junia from taking inheritances or legacies bequeathed 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.

* Fideicommissa and legacies contrasted.

1. 11. 154, 167. 2 Ulpian, xxvi. 11. 3 Sc. by the censors. The law is referred to by Cicero, in Verres, II. 1. 65, Liv. t. 42, De Bello, c. 8, and De Rep. lib. III. c. 16. Another provision of the law is mentioned in ii. 276. 4 I. 75, 77. 5 I. 18. It was not by a senatusconsultum but by a Lex Acta Senatvm that men were forbidden to institute a slave under thirty: still there need be no contradiction between this passage and i. 18. Testators, to avoid the operation of the Lex Acta Senatvm, 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 pariter testatus, pariter intestatus doctere postest." 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 consider that the heir ab intestato might occupy during the interval, then the S.C. confines us by the equally trite maxim: "Semel heres, semper heres." 1 11. 184. 2 But not a legacy: see ii. 233. 3 iv. 30 et seqq. 4 Ulpian, xxvi. 12: "Lis omne fideicommissum non in vindicatone, sed in petitione consistit." Paulin. S. R. iv. 1. § 18.
dicitur: de legatis vero, cum res agantur. (280.) Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debet: legatorum vero usurae non debentur; idque rescripto divi Hadriani significatur, scio tamen Iuliano placuisse in eo legato quod sinceri modo relinquatur idem iuris esse quod in fideicommissis: quam sententiam et his temporibus magis optimae video. (281.) Item legata Graece scripta non valent: fideicommissa vero valant. (282.) Item si legatum per damnationem relictum heres infirmit, in duplum cum eo agitur: fideicommissi vero nomine semper in simplicium persecutio est. (283.) Item quod quisque ex fideicommissio plus debito per errorem solvente, repetere potest; at id quod ex causa falsa per damnationem legati plus debito solutum sit, repeti non potest. idem sollicit iuris est de eo [legato] quod non debet in ex hac vel ex illa causa per errorem solutum fuerit.

284. Erant etiam aliae differentiae, quae nunquam sunt. legacies only on days appointed for such business. 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 in equal parts 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 lies 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 is 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

(285.) Ut ecce peregrini poterant fideicommissa capere: et fere habeant origo fideicommissorum. sed postea id prohibitus est; et nunc ex oratione divi Hadriani senatusconsultum factum est, ut ex fideicommissa fisco vindicaretur. (286.) Caeciliae quoque qui per legem Iuliam hereditates legataque capere prohibentur, olim fideicommissa videbantur capere posse. Item orbi qui per legem Papian, ob id quod liberos non habent, divididas partes hereditatum legatorumque perdunt, olim solida fideicommissa videbantur capere posse. sed postea senatusconsulto Pegasio periodo fideicommissa quae, ac legata hereditatesque capere posse prohibiti sunt. eaque translata sunt ad eas qui tento liberos habent, aut si nullus liberos habebat, ad populum, siquitur iuris est in legatis et in hereditatibus. (287.) Estem aut similis ex causa autem olim incertae personae vel postumo alieno per fideicommissam reliqui poterat, quamvis neque heres institut neque legari ei possit. sed senatusconsultum now exist. 288. For instance, foreigners could take fideicommissa: and this was almost the first instance of fideicommissum. 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, orbi, 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. But afterwords 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 popularis, 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 posthumous stranger, although such an one could not be appointed either heir or legatee. But by a senatusconsultum which was made at

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1. I. 109. 2. Ulpian, xxv. 9. 3. II. 101. 4. Ulpian, xxiv. 35.

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the instance of the late emperor Hadrian the same rule was established with regard to _fideicommissa_ as with regard to legacies and inheritances. 288. Likewise, there is now no doubt that a bequest by way of penalty cannot be made even by _fideicommissum_. 289. But although in many points of law 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: "Titius be tutor to my children?" or this, "I give Titus as tutor to my children," and he 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 fuerint, veluti filius filliae, nepos neptisve ex filio, pronepos pronepitve ex nepote filio nato praegнатus praegнатave._ nec interested _utrum naturales sint liberi_, an adoptivi. Ista demum tamen nepos neptisve et pronepos pronepitve suorum hereditum numero sunt, si procedens persona desiderit in potestate parentis esse, sive morte iis acciderit sive alia ratione, veluti emancipative: nam si per id tempus quos quis moritur filius in potestate eius sit, nepos ex eo suos heres esse non potest. _Idem et in ceteris_.

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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. 5. 16. Ulpian, XXII. 14. xxvii. 1. 2. 197.
deinceps liberorum personidictum intelligantiam. 3. Uxor quoque quae in manu est sua heres est, quia filiae loci est; item nuum quae in fili manu est, nam et hacte nepitis loco est, sed ida demum erit sua heres, si filius eius in manu erit, utu patr moritur, in postaetate eius non sit. idemque dicamus et de ex quae in nepitis manu matrimoni causae sit, quia praepotit loco est. 4. Postum quoque, qui si vivo parente nati essent, in postaetate eius futuri forent, sui heredes sunt. 5. Iudaeus erit de his quorum nomine ex legi Aelia Senta vel ex senatusconsulto post mortem patris causa probatur: nam et hi vives patre causa probata in postaetate eius futuri essent. 6. Quod etiam de eo filio, qui ex prima secundave mancipatione post mortem patris manumitted, intelligat.

7. Igitur cum filius filiave, et ex altero filio nepotes nepes ev extant, pariter ad hereditatem vocantur; nec qui gradu down with regard to other classes of descendants. 3. A wife also who is in manus is a sua heres, because she is in the place of a daughter; likewise a daughter-in-law who is in the manus of a son, because she again is in the place of a granddaughter. But she will only be a sua heres in case the son, in whose manus she is, be not in his father’s potestas when his father dies. And the same we shall also lay down with regard to a woman who is in the manus of a grand son matrimoni causa, because she is in the place of a great-granddaughter. 4. Posthumous children also, who, if they had been born in the lifetime of the ascendant, would have been in his potestas. 5. The law is the same as to those in reference to whom cause is proved after the death of their father by virtue of the Lex Aelia Senta or the senatusconsultum: for these too, if cause had been proved in the lifetime of the father, would have been in his potestas. 6. Which rule we also apply to a son who is manumitted from a first or second mancipation after the death of his father. 7. When therefore a son or daughter is alive, and also grandsons or granddaughters by another son, they are called 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 good 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 partes, 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. To. Now those are called agnates who are united by a relationship recognized by the law; and a relationship recognized by the law is one traced through persons of the male sex. Brothers

1 II. 159.
2 I. 29 et seqq.; I. 67 et seqq.
3 I. 114.
4 II. 141—143; L 134, 135.
Agnati.

...therefore born from the same father are agnates one to another (and are also called consangui
ei); 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 frater patruus, i.e. the sons of two brothers, who are
usually called consororini. 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 succession 1; 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 Ulpian, xxvi. 5.

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 agnata, equally with those of males: but our inheritance
do not belong to women who are beyond the degree of consanguinei. A sister therefore is legitimate heir to a brother or a sister;
but a father's sister and a brother's daughter cannot be legitimate heirs. A mother, however, or a stepmother, who by con
ventio in manum 2 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
heredas. 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

1 III. 10.
2 III. 11.
3 III. 11.
4 III. 7.
heredes esse. (20) Iedam iuris est, si iego liber non sit in presentia patris, quia sint cum eo civitate Romana donati, nec ab Imperatore in testamentum redacti fuerint. (21) Item agnati capitum dominium non admittuntur ex ea lege ad hereditatem, quia non habent consensus capitum dominionis permissum. (22) Item proximo agnato non adiuvant hereditatem, nihil magis sequens iure legitimo admittitur. (23) Item feminine agnateaque consanguineaque consanguineaorumpotestateexcedunt, nihil iuris ex legem habent. (24) Simili non admittuntur cognati qui per femininis sexus personas necessitudinem iunguntur; adeo quidem, ut nec inter matrem et filium filiare et ultro eurbo hereditatis capiendae ius consequatur, praeter quam si per in manum conventionem consanguinitatis iura inter eos constituerint.

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

Gentiles.  
inter suos heredes iuris est an potius in capita. Ineaudum tamen placuit in capita dividendum esse hereditatem, itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas dividetur, ita ut singuli singulas portiones erant.

17. Si nullus agnatus sit, adeem lex XII tabularum gentiles ad hereditatem vocat, qui sunt autem gentiles, primus commentario retulimus. et cum ilic admonuerimus totum gentilicum ius in desuetudinem abisse, supervacuum est hoc quoque loco de ea re curiosius tractare.

18. Haec quae lege XII tabularum finitae sunt intestatorum hereditates: quod ius quemadmodum strictum fieri, palam est intelligere. (19) Statim enim emancipati liberi nullos ius in hereditatem parentis ex ea lege habent, cum desicrit sui

1. T.y. 1. 5. "Si ad ignatus nec estis, gentiles familiaris naecator." The explanation referred to is not now extant; it was contained on the page of the MS. missing between §§ 164 and 165 of the first commentary. The subject being one of merely antiquarian interest, it will perhaps be sufficient to quote the following passage from Cicero, To.  

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Prætorian emendations of this strictness.

faissent, sive soli sint sive etiam sui heredes, id est qui in potestate patris fuerant, concurrant. (27.) Agnatus autem capite dominatus non secundo gradu post suos heredes vocat, id est non eo gradu vocat quo per legem vocarentur, si capite minuti non essent; sed tertio, proximatis nomine: licet enim capitis diminutione iuris legitimitur perderitini, certe cognitionis iura reintim. itaque si quis alius sit qui integrum iurus agnationis habebit, est poitior erit, etiam si longiore gradu fierit. (28.) Idem iuris est, ut quidam putant, in eis agnati persona, qui proximo agnato omittente hereditatem, nihil magis iure legitime admititur. sed sunt qui putant hunc codem gradum a Praetore vocari, quo etiam per legem agnatis hereditas datur. (29.) Femenae

as though they had been in the potestas of their ascendants at the time of their death, whether they be the sole claimants, or whether suos heredes also, i.e. those who were in 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 suis heredes, i.e. he does not call them in that degree in which they would have been called by the 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 stamtable right, they surely retain the rights of cognition. 28. 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. 29. 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 the law to the agnates.

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1. "Quia civilis ratio civilia quidem jure corrupere potest, naturals vero non potest." 1 L. 138. 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 ought 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.


certe agnatae quae consanguineorum gradum excudunt tertio gradu vocantur, id est si neque suas heres neque agnatus ultius erit. (30.) Eodem gradu vocantur etiam eae personae quae per femininum sex personas copulatae sunt. (31.) Liber i quae qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur.

32. Quos autem Praetor vocat ad hereditatem, hi heredes ipsos quidem iure non sunt, nam Praetor heredes fitue non potest: per legem enim tantum vel simul iuris constitutionem heredes sunt, velut per senatusconsultum et constitutionem principatum: sed eis si quidem Praetor del bonorum possessionem, loco hereditatis consignat.

33. Adhuc autem alios etiam completes gradus Praetor facil in bonorum possessione danda, cum id agit, ne quis sine successor moriatur, de quibus in his commentariori copiisse non agnatur, id est hoc ius totum propriis commentariori quoque alias explicavius. Hoc solam admonuisse sufficit [denunt fin. 36]. (34)

26. Female agnates who are beyond the degree of consanguinei are undoubtedly called in the third degree, i.e. when there is no suus heres or agnate. 30. In the same class are called those persons also 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 subject. It is sufficient to make this statement only.

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1. At this point several lines of the MS. are illegible, but the substance of the missing portion can be gathered from Ulpian, Tit. xxviii.
item ab intestato heredes suos et agnatos ad bonorum possessionem vocant, quibus casibus beneficium eius in eo solo videtur aliquam utilitatem habere, quod is qui ina bonorum possessionem petit, interdicto cuius principium est Quorum bonorum uti possit. 

What of 34. to 34-man. The III. II. The consanguineae. The immoquia. The translato. The possesiones contra tabulis testamentis, or secundum tabulis testamenti, or at testamenti. The reason why heirs entitled at the civil law took advantage of the second-named possessio is given in § 3. The same possessio was also granted in certain cases to those who could not claim according to strict law. It may be useful to contrast the Praetorian system of succession with that of the Twelve Tables.

**TWO TABLES.**

I. Sui heredes.
II. Agnati et consanguinei.
III. Gentiles.

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Bonorum possessio is either contra tabulis testamenti, or secundum tabulis testamenti, or ad testamenti. The reason why heirs entitled at the civil law took advantage of the possessed possessio is given in § 3. The same possessio was also granted in cases to those who could not claim according to strict law. It may be useful to contrast the Praetorian system of succession with that of the Twelve Tables.

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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 legally executed have made creation for the inheritance, but have not cared to sue for possession of the goods "in accordance with the tables," content with the fact that he is heir at the civil law, those, nevertheless, who are called to the goods of the intestate in case no testament be made, can sue for the possession of the goods; but the inheritance belongs to them sine re, since the written heir can wrest the inheritance from them. 37. 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 substrate 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 accordance with this, 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, and the hereditas remains with the written heir, cum re. But Gaius is here using hereditat to signify "the hereditaments," rather than "the inheritance."
proximis cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem. (38.) SUNT et alii quidam similis casus, quorum aliquid superius commodo commentario tradidimus.

39. Nunc de liberorum bonis videamus. (40.) Olim itaque licebat liberto patronum suum in testamento praecipere: nam in demo lex xxi tabularum ad hereditatem liberi vocat patronum, si intestatus mortuis esset libertus nullo suo herede velicto. Itaque intestato quoque mortuo liberto, si is suum heredem reliquerat, nihil in bonis eius patrono iri erat. et si quidem ex naturalibus libris aliquem suum heredem reliquiaret, nulla videbatur esse querela; si vero vel adoptivus filius filiave, vel uxor quae in manu esset suae heredes esset, aperte iniquum erat nihil iuris patrono superesse. (41.) Qua de causa postea Praetoris edicto haec iuris iniquitas emandata est, sive enim facultatem testamentum libertus, sive per testari, ut patrono suo partem dimidiam bonorum suorum relinquat; et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono.

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 book 1.

39. Now let us consider about the goods of freedmen. 2. Formerly then a freedman might pass over his patron in his testament; for a law of the Twelve Tables 3 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 patron had no claim to his goods. And if indeed the suus heres he left were one of his own actual children, there seemed to be no ground for complaint, but if the suus heres were an adopted son or daughter, or a wife in 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 "against the tablets of the

contra tabulas testamenti partis dimidiae bonorum possessio. si vero intestatus mortuat, suae herede relicto adoptivo filio, vel uxore quae in manu ipsius esset, vel numa quae in manu illi eius fuerit, datur aque patrone adversus hos suos heredes partis dimidiae bonorum possessio. prosunt autem liberto ad exclusendum patronum natirales liberi, non solum quos in postestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti sint, aut praeterrita contra tabulas testamenti bonorum possessionem ex edicto petierint: nam exheredati nullo modo repellunt patronum. (42.) Postea lege Papia aucta sunt iam patronorum quod ad locupletiores libertos periret. Cantum est enim ea lege, ut ex bonis eius qui testatorius nummorum centum million plurisse patrimonii reliquerit, et pactiores quam tres liberos habebit, sive testamento facio sive intestate mortuus erit, viridis pars patrone debeatur. itaque cum unum filium unamre filiam heredem reliquerit libertus, perinde pars dimidiam patrimonii deberet, ac si sine illo filio filiae moreretur; cum vero duas testamenta." But if he die intestate, leaving as suus heres an adopted son, or a wife who was in his own manus, or a daughter-in-law who was in the manus of his son, possession of half the goods is still given to the patron as against these suus heredes. But all actual descendants avail the freedman to exclude his patron, not only those whom he has in his potestas at the time of 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 "against the tablets of the testament" in accordance with the edict: for when dispossessed 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 has been provided by that law 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
duasve heredes reliquerit, tertia pars debeat; si tres relinquat, repellitur patronus. [Ulpian, 118, 127.]

45. Quae autem diximus de patrono, eadem intelligimus et de filio patrini, item de nepote ex filio, et de pro nepote ex nepote filio nato cognato. (46.) Filia vero patroni, item nepitis ex filio, et pro nepitis ex nepote filio nato cognato, quamvis idem ius habeat, quod legi titubat illum patronum datum est, Praetor iames vocat taintum masculini sexus patronum liberum, sed filia, ut contra tabulas testamenti liberis vel ab intestato contra fictum adoptivum vel auctorem munisse dominat pari sui honos possessionem petat, trium liberorum iure legi Papia consequitur: aliter hoc ius non habet. (47.) Sed ut ex bonis libertiae suae quattuor liberos habentis viriliis pars ei debetur, liberorum guidem iure non est comprehensum, ut quidam putant. Sed tam ea intestata liberta mortua, quae legis Papiae factum, ut ei viriliis pars debetur, si vero testamento facto mortua sit liberta, tale ius ei datur, quae datum est patronae tribus liberis honoratis, ut praenae bonorum possessionem habeat.

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, 45. 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 “against the tablets of the testament” of a freedman, or on his intestacy, in opposition to his adopted son, or wife, or 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

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1 Ulpian, xxix. 2.
2 Ulpian, xxix. 3.
3 Ulpian, xxix. 4.
his descendants have, "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 4 of a patron are to be completely debarred from the whole of the right which appertains to the patron either in respect of the goods of intestates or "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 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 "against the tablets of a testament" in which they were passed over, or 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 5. Whilst to a freeborn patroness having the prerogative of three chil-

1 Paragraphs 46, 47 are filled in conjecturally by Coxeet and others; whether correctly or not seems doubtful; at any rate the style of the Latin is very different from that generally employed by Gaius. For the matter contained in these two paragraphs see Ulpian, xxix. 5.
2 i. 161.
3 Ulpian, xxix. 6, 7.
53. Eadem lex patronae filiae liberis honorataræ—patroni iura dedit; sed in huius persona etiam unus filii filiave his sufficit.

54. Hactenus omnia sive iura quasi per indicem tetigisse sat utter: alioquin diligentior interpretando propriis commentarius exposita est.

55. Sequitur ut de bonis Latinorum libertorum displiciatur.

56. Quae pars iuris ut manifestior sat, admonendi sumus, de quo alio loco diximus, eos qui nunc Latini Iuniani diciuntur olim ex iure Quiritium servosuisse, sed auxilio Praetoris in libertatis forma servari solitos; unde etiam res corum peculiari iure ad patronos pertinent solita est: postea vero per legem Iuniam eos omnes quos Praetor in libertatem tuebat liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse voluit, atque si essent cives Romani ingeniui qui ex urbe Roma in Latinas colonias deducti Latinis colonisii esse coeperant: Iunianos ideo, quia per legem

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 them.

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 place, that those who are now called Julian Latins, were formerly slaves ex iure Quiritium, but by the Praetor's help used to be secured in the semblance of freedom: so that their property used to belong to their patrons by the title of peculum: 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 Julian 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; Iunianis, for the

\[\text{Iunianam libera facti sunt, etiamsi non cives Romani, quae leges Iuniae latorum, cum intelligenter futurum, ut cae fitiones res Latinorum defunctorum ad patronos pertinent desinerent, ob id quod necesse ut servii decedendent, ut possent iure peculiarii res eorum ad patronos pertinentem, neque liberti Latinorum bonis possent manumissionem iure ad patronos pertinentem, necessarium existimatum, ne beneficium situs datum in inuriam patronorum conuertere, caveare, ut bonor libertorum prorinde ad manumissiones pertinerent, ac si lex lata non esset. itaque quod dammodo peculi bonis Latinorum ad manumissiores rem pertinent. (57.) Unde eventit, ut multum different ex iure quae in bonis Latinorum ex lege Iunia constituta sunt, ab his quae in hereditate civium Romanorum libertorum observantur. (58.)\]

reason that they were made free by the Junian Law, though not made Roman citizens. Therefore, 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,1 he thought it necessary, 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 manumitores in like manner as if the law had not been passed. Therefore, the goods of Latins belong to their manumitores, 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

\[\text{1 The legitima hereditatis of patrons, being derived from the Law of the Twelve Tables, which did not recognize any title but that of iure Quiritium, could not apply to Latins, who were manumitted by owners having only the title ex bonis. Neither could it apply to slaves manumitted irregularly and so made Latins, for the Twelve Tables again recognized no manumission but one in due form of law, i.e. by vindicta, censum or testament. If the Lex Aelia Scauria had not been passed, there might perhaps have been a legitima hereditatis of the goods of freedmen manumitted when under thirty years of age, but as that lex had forbidden such freedmen to be cives Romanis, except in special cases, here again the rules of the Twelve Tables were inadmissible. See i. 17.}\]
Nam civis Romani liberti hereditas ad extraneos heredes patróni nullo modo pertinent: ad filium autem patroni nepotesque ex filio et prænepotes ex nepote filio nato progenatos omnimodo pertinent, etiam si a parente fuerint exheredati: Latinorum autem bona tamquam peculia servorum etiam ad extraneos heredes pertinent, et ad liberos manumissorum exheredatos non pertinent. (59.) Item civis Romani liberti hereditas ad duos pluresque patrones aequaliter pertinent, licet dispar in eo servio dominium habuerint: bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus inerit. (60.) Item in hereditate civis Romani liberti patronus alterius patroni filium excludit, et filius patroni alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patrum et ad alterius patroni heredem simul pertinent quo qua parte ad ipsum manumissorum pertinentem. (61.) Item si unius patróni tres forte liberi sunt, et alterius unus, hereditas civis Romani liberti in capita dividitur, id est tres fratres tres portiones 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 ascendants: 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 manumitter. 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 according to the proportion in which each was owner. 60. Likewise, in the case of an inheritance of a freedman who was a Roman citizen, one patron excludes the son of another patron; and the son of one patron excludes the grandson of another patron: but the goods of Latins belong to a patron himself and the heir of another patron conjointly, according to the proportion in which they would have belonged to the deceased manumitter himself. 61. Again, if, for instance, there be three descendants of one patron, and one of the other, the inheritance of a freedman who is a Roman citizen is divided per capita, i.e. the

1 II. 45. 48.  
2 Ulpian, xxvii. 2, 3.  
3 Ibid. xxvii. 4.  

ferant et unus quartam: bona vero Latinorum pro ea parte ad successores pertinent pro qua parte ad ipsum manumissorem pertinent. (62.) Item si alter ex his patronis suum partem in hereditatem civis Romani liberti spernat, vel ante mortuor quam cernat, tota hereditas ad alterum patrem: bona autem Latini pro parte decedentis patróni enduca sunt et ad populum pertinent.

63. Postea Lupo et Largo Consulibus senatus consulti, ut bona Latinorum primum ad eum pertinent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, ut quisque proximus esset; tunc antiquo iure ad heredes eorum qui liberassent pertinenter. (64.) Quo senatusconsulto quidam id actum esse putant, ut in bonis Latinorum eodem iure utamur, quo utinam in hereditate civium Romanorum libertinorum; idemque maxime Pegaso placuit. quae sententia aperte falsa est. nam civis Romani liberti hereditas numquam ad extraneos

three brothers take three portions and the only son the fourth: but the goods of Latins belong to the successors in the same proportion as that in which they would have belonged to the manumitter himself. 62. Likewise, if one of these patrons refuse his share in the inheritance of a freedman who is a Roman citizen, or die before he makes creation for it, the whole inheritance belongs to the other: but the goods of a Latin, so far as regards the portion of the patron who fails, become lapses and belong to the populus.

63. Afterwards, in the consulship of Lupo and Largo, the senate decreed that the goods of Latins should devolve; firstly, on him who freed them; secondly on the descendants of such persons (manumitters), 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 maintained by Pegaso in particular. But this opinion is plainly false. For the inheritance of a freedman who is a Roman citizen never belongs to the extraneous heirs
Claims of a Patron's children on the goods of Latinis. 187

aliens habeantur a paterna hereditate, quae ab hereditate ex herede
nulla modo dici possunt, non magis quam qui testamento
silentio praeteritae sunt. (68.) Ex his omnibus satis illud appare
reti, si is qui Latinum fecessit.—[discent 25 luc.] (69.) —
putant ad eos pertinere, quia nullo interveniente extraneo
herede senatusconsulto locus non est. (70.) Sed si cum liberas
suis etiam extraneum heredem patronos reliquos, Cezellus
Sabinus ait bona pro viribus partibus ad liberos defuncti
pertinere, quia cum extraneus heres intervenit, non habet lex
Junia locum, sed senatusconsultum. Javolenus autem ait tanti
rum eam partem ex senatusconsulto liberos patroni pro viribus
partibus habituros esse, quam extranei heredes ante senatus-
consultum legem Junia habiuri essent, reliquias vero partes pro
they are esteemed aliens from the ancestral inheritance; be
cause they can by no means be said to be disinherited from
the inheritance, any more than those 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 con-
cerned, the senatusconsultum does not apply. 70. But if a
patron have left a stranger heir conjointly with his descendants,
Cezellus 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 senatus-
consultum 4 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 senatus-

1 Gisborne imagines that if the la-
cena were filled up, the sense would
be: “The goods of a Latin are di
vided amongst the children of the
manumittor 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 con-
joined with them is considered in the
next paragraph.
As no mention of an equal division
being enjoined by the S. C. is to be
found in the portion of the text pre-
served 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 ex-
pressly disinherited. A clause there-
fore would be needed in the law to
say how these should be divided,
whether according to the portions in
which the children had been appoint-
ed heirs, (if they were appointed,) or
equally. The text tells us the law
declared for equality of division.
Descendants of a Patroness have no claim.

consulitum; 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 a Latin belonging to his mother prior to that of the extraneous heir of his mother. Cassius thought that the senatusconsultum 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 “against the tablets of the testament” is promised to children who have been passed over.

72. Aliquando tamen civis Romanus libertus tamquam Latinus mortuit, veluti si Latinus salvo iure patroni ab Imperatore ius Quintium consecutus fuerit: nam ita divus Traianus constituit, si Latinus invito vel ignorante patrono ius Quintium ab Imperatore consecutus sit: quibus casibus dum vivit iustus libertus, ceteris civibus Romanis libertis similis est et iustos liberos procreat, moriit autem Latin iure, nec ei liberti eius heredes esse possunt; et in hoc tantum habet testamenti factionem. ut patronum heredem institat, ideo si heredes esse noluerit, alium substituere possit. 

73. Et quia hae constitutiones videbatur effectum, ut nunquam isti homines tamquam cives Romani morerentur, quamvis eo iure postea usi essent, quo vel ex leges Adia Sentia vel ex senatusconsulto cives Romani essent: divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti facti

1 t. 59. Sc. the S. C. referred to in t. 67—73. See particularly §§ 69, 70.
le ex senatusconsulto, si Latinum manuisset, civitatem Romanam consequeretur, proinde ipsi haberentur, ac si lege Aelia Sentia vel senatusconsulto ad civitatem Romanam pervenisset.

74. Eorum autem quos lex Aelia Sentia dediticiorum numero factit, bona modo quasi civium Romanorum liberorum, modo quasi Latinorum ad patrones pertinent. (75) Nam eorum bona qui, si in aliquo vito non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patrones eadem lege tribununtur, non tamen hi habent eadem testamenti factionem; nam id plarisque placuit, nec inmerito: nam incredibile video batur pessimae condicionis hominibus velhisse legis latorem testamenti faciunti uss concedere. (76.) Eorum vero bona qui, si non in aliquo vito essent, manumissi futuri Latinii essent, proinde tribununtur patronis. ac si Latinii decessissent. nec me

afterwards availed themselves of the means whereby, if they had remained Latin, 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. For the goods of those whom the Lex Aelia Sentia puts into the category of dediticii belong to their patrons, sometimes like those of freedmen who are Roman citizens, sometimes like those of Latins. 75. For the good 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 facit; 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

1 See Mackelvey, p. 456. § 4. 

2 Addictio 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 actum (i.e. by provisional manumiscio 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 (addifico) to him: (1) 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 addictio followed, as in the first case. An addictio 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 person 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 mandamus, within the 60 days. If no payment were made within this time, the addictio became final; the debtor's civilitas was lost, and the creditors might even kill him and sell him beyond the Tiber. If there were several creditors, the law of the Twelve Tables, quoted by A. Gallus was applicable: "saequitas mandinis partes secante; si plus minus quantum se o. c. sine fronde esto." A. Gallus, xx. 1. 49.

Savigny holds that addictio was originally a remedy only applicable when there was a failure to repay money lent (certa pecunia creditor); and the patrician to increase their power over their debtors invented the transaction, called addictio, 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 addictio as well as the principal: for under the old law the remedy against the debtor's person was only in respect of the principal.

Nelther is of opinion that addictio of the debtor's person was done away with by the Lex Padellia A.D. 444; see Hill, of Rom., III. 145. Smith's edition, 1824.
Emplio Bonorum.

80. Neque autem bonorum possessorum neque bonorum emporum res pleno lvere sunt, sed in bonis efficaciter; ex iure Quiritium autem in demum adquiratur, si usus permanet. Interdum quidem bonorum emporum item plene ius quod est mortuum esse intelligitur, si per eos seclavit bonorum emptoribus addicitur qui publice sub iusta vendunt [dest 101].

(81.) Item quae debita sunt et causas fuerunt bona, aut ipse debebit, aut bonorum possessores neque bonorum emptor ipso lvere debeat aut ipsas debentur: sed de omnibus rebus utilibus actionibus et conventiunibus et expirantibus, quas inferioris proponemus.

82. Sunt autem etiam alterius generis successiones, quae neque lege xii tabularum neque Praetoris edicto, sed eo

Debtoribus, 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. If then the goods of a living person be sold, the Praetor orders them to be taken possession of (by the creditors) for thirty successive days, and to be advertised for sale; 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. 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.

1 IV. 21, see xii. Tab.; Tab. III. 1. 3.
2 III. 32.
3 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 Husebich, as Gneist himself states in a note.

80. Neque autem bonorum possessorum neque bonorum emporum res pleno lvere sunt, sed in bonis efficaciter; ex iure Quiritium autem in demum adquiratur, si usus permanet. Interdum quidem bonorum emporum item plene ius quod est mortuum esse intelligitur, si per eos seclavit bonorum emptoribus addicitur qui publice sub iusta vendunt [dest 101].

(81.) Item quae debita sunt et causas fuerunt bona, aut ipse debebit, aut bonorum possessores neque bonorum emptor ipso lvere debeat aut ipsas debentur: sed de omnibus rebus utilibus actionibus et conventiunibus et expirantibus, quas inferioris proponemus.

82. Sunt autem etiam alterius generis successiones, quae neque lege xii tabularum neque Praetoris edicto, sed eo

Debtoribus, 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. If then the goods of a living person be sold, the Praetor orders them to be taken possession of (by the creditors) for thirty successive days, and to be advertised for sale; 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. 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.

1 Bonorum possessorum = those whom the Praetor recognizes as successors, although they have not the heredities at the Civil Law. Cist. IV. 34; III. 32. Caius at this point digresses for an instant into the law of intestate or testamentary succession.
2 II. 47.
3 A manccepta according to Festus and Avienius Pelagius was the representative 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 (considus) by holding up his hand; hence the name. On the censor at the sale recognizing a particular manccepta as a purchaser, the legal consequence was that the full dominium was transferred to him for the body, whether the subject of the sale were a res manccepta or a res nec manccepta.
4 IV. 34, 35. See note on ii. 78.
The liability of the adopter for the adopted. 

83. To take an instance, when a person aut juris has given himself in adoption, or a woman who has made conventum in manum, attaches upon the coemptionator or the adopting father himself, if it be an inheritable property, or corporeal, and all that is due to them, is acquired by the adopting father or coemptionator, except those things which perish by a capitis diminutio, of which kind are usufruct, a claim to the services of freedmen contracted by oath; and matters secured by a statutory action.

But, on the other hand, a debt owing by him who has given himself in adoption, or by a woman who has made conventum in manum, attaches upon the coemptionator or the adopting father himself, if it be an inheritable property, or corporeal, and he is liable for it by direct proceedings, since such adopting father or coemptionator becomes heir personally (suo nomine), and he is not directly liable who has given himself to be adopted, nor is the woman who has made conventum in manum, because they cease to be heirs at 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 himself who gave himself to be adopted, nor the woman who made the conventum remain bound, being freed by the capitis diminutio, yet an utilis actu 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 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, make cessio in iure of it to another before exercising his election 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, perish, and thus the debtors to the inheritance are profited. 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.

1. 162 et seq. 2. See note on i. 46. 3. ib. 181.
496 Obligations.

ngent in iure cedendo, quaeritur nostris praecessores nihil eos agere existimant: diversae scilicet auctores idem eos agere putant, quod ceteri post aditam hereditationem nihil enim interessit, utrum aliquis cernendo aut pro here de here des fiat, an juris necessitate hereditati adstringatur. [fin. non.

88. Non transsumus ad obligationes. quorum summa divisio in duas species deductur: omnis enim obligatio vel ex contractu nasci tur vel ex deficio.

89. Et prius videamus de quin quae ex contractu nascentur, harum quatuor genera sunt: aut enim re contrahitur obligatio, aut verbis, aut litteris, aut consensu.

90. Re contrahitur obligatio velut mutui datione. quae pro-

and a necessarius harenae efficax anything by a censio in iure, is disputed.1 Our authorities think 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 it makes no difference whether a man become heir by creation, by acting as heir, or whether he be compelled to (enter upon) the inheritance by necessity of law.2

88. Now let us pass on to obligations;3 the main division whereof is drawn out into two species: for every obligation arises either from contract or from defect.

89. First, then, let us consider as to those which arise from contract.4 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, by the

1 11. 37.
2 To understand this passage fully we must recollect that a mensa harenae, as well as a necessarius, cannot free himself from the inheritance, in name at least. See ii. 157.
3 Justinian says: "Obligatio est juris vinculum quo necessitate adstringitur aliquis solvendae rei secundum nostrae civitatis juris." The latter words of the definition indicate that no obligation was recognized by the law unless it could be enforced by action.
4 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 be enforced as such, although it may be used as a defence. The Roman law regarded these 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 (I).
5 See Appendix (I).

91. prie in his ferre rebus contingit quae [res] pondere, numero, mensurae constant: quas est pecunia numerata, vinum, oleum, frumentum, aec, argentum, aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non cedam, sed alia eiusmod naturae red- dantur: unde etiam mutum appellatum est, quia quod ita ibi a me datum est ex meo tuum fit. (pt.) Is quoque qui non debitum acceptatur ab eo qui per errorem solvit re obligatur, nam praem de condici potest si partem eum dare optere, ac si mutum accipisset. unde quidam putant pupilum aut mulierem giving of a mutum. Strictly speaking, this gift 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, 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 mutum, because what is so given to you by me becomes yours from being mine. But also he who receives a payment not due to him from one who makes the payment by mistake is bound re. For the condition (worded): "should it appear that he ought to give" can be brought against him just as though he had received a mutum. Wherefore, some hold that a pupil or a woman to whom which

3 IV, 4, 5.
4 This is not a case of contract at all, but of what is called quasi-contract. Justinian [III. 43] divides obligations into four classes, the classes additional to those of Galus being quasi ex contractu, quasi ex delicto. These quasi-contracts are as Austin clearly shows: "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 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

1 "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 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 obligor, and for which damage the obligor is bound to make satisfaction. In the case of a quasi-delict there is no doubt a delict. So Galus himself says elsewhere: "Obligations are ex contractu assumptum, aut ex maleficio, aut proprio quodam jure ex variis causarum figuris." D. 44. 7; l. 1. P.
cui sine tutores auctoritate non debetur per errorem datum est non teneri conditione, non magis quam mutui datione, sed haec species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere valet negotium quam contrahere.

92. Verbis obligatione fit ex interrogatione et responsione, velut: DARI SPONDES? SPONDO; DABIS? DADO; PROMITIS? PROMITTO; FIDE PROMITTI? FIDE PROMITTO; FIDE IUBEO; FIDE TUBEO; FACIES? FACTAM. (93) Sed haec quidem verborum obligatione: DARI SPONDES? SPONDO, propria civium Romanorum est, ceterae vero iuris gentium sunt, itaque inter omnes homines, sive cives Romanos sive peregrinos, valent. et quamvis ad Graecam vocem expressae fuerint, velut hoc modo: δωτές; δόσος; ὀμολογεῖς; ὀμολογεῖ: πίπτα κελές; πίπτει κελέ ποιεῖς; ποιεῖν; etiam haec tamen inter cives Romanos valent; si modo Graecis sermone intellectum habentur. et e contrario quamvis Latine emunctur, tamen etiam inter peregrinos valent:

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 mutual having been given. But this species of obligation does not seem to arise from contract, since he who gives with the intent of paying wishes rather to end than to begin a contract.

92. An obligation verba originates from a question and answer, for instance: Do you engage that it shall be given? I do engage. Will you give? I will give. Do you promise? I do promise. Do you become fidemjessor? I do become fidemjessor. Do you become fidemjessor? I do become fidemjessor. Will you do? I will do. 93. But the verbal obligation: Do you engage that it shall be given? I do engage: is peculiar to Roman citizens, whilst the others appertain to the ius gentium, and therefore hold good amongst all men, whether Roman citizens or foreigners. And even if they be expressed in the Greek language, as thus: δωτε; δωσε; ὀμολογεῖς; ὀμολογεῖ: πίπτε κελές; πίπτει κελέ ποιεῖς; ποιεῖν; they still hold good amongst Roman citizens, provided only they understand Greek. And conversely, though they be pronounced in Latin, they nevertheless hold good amongst foreigners also, provided only they understand Latin.

1. 111. 114.

1. Se from σερβίον.
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) debi debis, or a promise of dower made by the wife, the intended wife, or the father of the intended wife, to the husband or intended husband, and (2) a promise made by a freedman to his patron and confirmed by oath. III. 83. Ulp. v. 1. 2. 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.
Invalid Stipulations.

nam aput peregrinos quid juris sit, singulorum civitatum iura requirentes aiud in alia lege reperiri. 97. Si id quod dari stipulamur tule sit, ut dari non possit, inutilis est stipulatio: veluti si quis hominem libernum quem servum esse credet, aut mortuum quem vivum esse credet, aut locum sacram vel religiosum quem putat esse humani iuris, sibi dax stipulatur. (97 a.) item si quis rem quae in rerum natura non est aut esse non potest, velut hiepostenturum stipulatum, acque inutilis est stipulatio.

98. Item si quis sub ea condicio stipulatur quae existere non potest, veluti si digito caelestis tegerit, inutilis est stipulatio. sed legatum sub impossibili condicione reliquum nostri praeceptores prorinde valere putant, ac si ea condicio idacta non esset: diversae scholae auctores non minus legatum inutili enquire into the rules of individual states, we shall find one thing in one system of legislation, another in another 1.

97. If that which we stipulatum 2 shall be given is of such a kind that it cannot be given, the stipulation is void; for instance, if a man stipulate for a free man to be given to him whom he thought to be a slave, or a dead man whom he thought to be alive, or a place sacred or religious which he thought to be humanis iuris 3. Likewise any one stipulate for a thing which does not exist or cannot exist, for instance a centum, the stipulation is in such a case also void. 98. Likewise, if any one stipulate under a condition which cannot come to pass, for instance, “if he touch Heaven with his finger,” the stipulation is void. But our authorities think that a legacy left under an impossible condition is as valid as it would be if the condition had not been conjoined: the

1 See Il. 170, note.
2 Gaius uses the verb stipulatum here for the first time, without having defined it: the stipulator is the interrogator in an obligation, Verba: stipulatum therefore signifies to ask for in solemn form.
3 As to the derivation of the word stipulatum there are many theories: Paulinus connects it with stipula, an old adjective signifying firm (S. R. V. 7: 1): Festus and Varro with stipu, a coin (Varro, de Ling. Lat. V. 184): Isidorus with stipula, a straw, because, he says, in osten times the contracting parties used to break a straw in two and each retain a portion, so that by reuniting the broken ends “quinque sumus aut signa subvenit.” (Origo. Verb. 24 § 30)

existant, quam stipulationem, et sane vix idonea diversitatis ratio reddi potest. (99) Praeterea inutilis est stipulatio, si quis ignors rem quam esse nam sibi dari stipulatur; nam id quod alienum est, id euri non potest.

100. Denique inutilis est talis stipulatio, si quis ita dari stipulatur: post mortem mean dari spondes? vel ita: post mortem quam dari spondes? vel ita: cum moriar, dari spondes? quid non potest alter intelligi pridie quam aliquis morietur, quam si morte securit sit; rursus morte securta in praeeritum rediducetur stipulatio et quotidammodo talis est: heredi meo dari spondes? quae authorities of the other school think the legacy no less invalid than the stipulation. And truly a satisfactory reason for the difference can scarcely be given. 99. Besides a stipulation is 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 promisee. 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
same inutilis est. (101.) Quaecumque de morte diximus, eadem et de capitibus diminutione dicta intelligimus.

102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non respondebit: velut si sestertia a te dare stipuleret, et tu numero sestertiorum vel milia promittas; aut si ego pure stipuleret, tu sub condicio promittas.

103. Praeterea inutilis est stipulatio, si ei dari stipulemur cuius iuri subjecti non sumus unde illud quasitum est, si quis sibi et ei cuius iuris subjectus non est dari stipulatur, in quantum valeat stipulatio. nostri praeventores putant in universum valere, et proinde ei soli qui stipulatur sit solidum deberi, atque si extranei nomen non adiecisset sed diversae scholaris auctores diminuendum et deberi existimant, pro aliis—[decum in liti.]

104. Item inutilis est stipulatio, si ab eo stipuler qui iuri meo subjectus est, vel si a me stipuler, sed de servis et de his qui in mancipio sunt illud praeterea iux observatur, ut non solum

have said about death we shall also understand to be said about capitibus diminutione.

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 him 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 him. . . . . . . .

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 in mancipium, that not only can they not enter into an obligation with the

person in whose potestas or mancipium they are, but not even with any one else.

105. That a dumb man can neither stipulate nor promise is plain. Which is the rule also as to a deaf man: because both he who stipulates ought to hear the words of the promiser, and he who promises the words of the stipulator. 106. A madman can transact no business, because he does not understand what he is about. 107. A pupil can legally transact any business, provided that the tutor he employed in cases where the tutor’s authorization is necessary, for instance, if the pupil bind himself: for he can bind another to himself even without the authorization of the tutor. 108. The law is the same as to women who are under tutela. 109. Now 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.

1. Ulpian, XI. 57.
2. IV. 32.
3. I. 107; II. 86.
4. That is, although they have little or no understanding, their stipulations or promises backed by the tutor’s authorization are binding.
Adstipulatorum.

110. Possimus tamen ad id quod stipulamur alium adhibere qui idem stipulatur, quum vulgo adstitulatorum vocamus. (111.) Sed huic prindae actio competit, prindique ei recte solvitur ac nobis. sed quidquid consentiit eae, mandati indicio nobis restituere cogerem. (112.) Ceterum potest etiam alius verbis uti adstitulator, quam quisquis nos usi sumus. In aequi si verbis gratia ego ita stipulatus sum: DARI SPONES? sic adstipulatori potest: IDEM FIDE TUA PROMITTIS? vel IDEM FIDE JURES? vel contra. (113.) Item minus adstitulator potest, plus non potest. itaque si ego sesterctia x stipulatus sum, ille sesterctia v stipulari potest: contra vero plus non potest. item si ego pure stipulatus sim, ille sub condicione stipulari potest;

110. We can, however, make another person a party to that which we stipulate for, so as to stipulate for the same, and such an one we commonly call an adstitulator. III. An action then will equally lie for him and payment can as properly be made to him as to us, but whatever he obtained he will be compelled to deliver over to us by an actio mandati.112. But the adstitulator 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 adstitulate thus: Do you become fidepromissor for the same? or: Do you become fidejusor for the same? or: vade perge.113. Likewise, he can stipulate for less, but not for more. Therefore if I have stipulated for ten sesterctia, 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.


Sponsors, Fidepromissors, Fidejussores. 205

contra vero non potest. non solum autem in quantitate, sed etiam in tempore minus et plus intelligitur: plus est enim statim aliquum dare, minus est post tempus. (114.) In hoc autem iure quodem singulari iure observantur, nam adstipulatoris heres non habet actionem. item servus adstitulando nihil agit, qui ex ceteris omnibus causis stipulatione domino adquirit. idem de eo qui in mancipio est magis placuit; nam et is servit loco est. is autem qui in potestate patris est, agit aliquis, sed parenti non adquirit; quos ex omnibus ceteris causis stipulando et adquirat. ac ne ipsis quidem alien actio competit, quam si unde capitis diminutione exerit de potestate parentis, velit morte eius, aut quod ipse fames Dialls inaugurat est, cadem de filii familias, et quae in manu est, dicta intelligimus.

115. Pro eo quoque qui promittit solent alii obligari, quorum alios sponsores, alios fidepromissores, alios fidejussores appellamus. (116.) Sponsor in interrogatur: IDEM DARI SPONES?

And the more and the less are considered with reference not 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. But as to this matter of law some peculiar rules are observed. For the heir of the adstitulator can bring no action. Likewise, a slave who adstitulates 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 in mancipium: for he too is in the position of a slave. But he who is in 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 has 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 Dialls. The same rule we shall adopt with regard to a woman in potestas or in mancip.

115. For the promiser also others are frequently bound, some of whom we call sponsores, some fidepromissores, some fidejussores. 116. A sponsor is interrogated thus: Do you engage that the same thing shall be given? a fidepromissor:

1 114 capitatis. 2 III. 157. 155 et seqq. 3 III. 115. 
4 IV. 55. 5 IV. 115. 6 11. 87. 7 I. 123. 8 I. 125.
Sponsors, Fidepromissors, Fidejussors.

fidepromissor: idem fidepromissor. fideiussor: idem fidepromissoris. 

fidepromissor: idem fidepromissor. fideiussor: idem fidepromissor.

Do you become fidepromissor for the same? a fideiussor? Do you become fideiussor 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. Sponsors, fidepromissors, and fidejussors, are in the frequent habit of taking, whilst providing that we be carefully secured. But an adstipulator we scarcely ever employ save when we stipulate that something is to be given us after our death, for since we effect nothing by the stipulation, an adstipulator is employed, that he may bring the action after our death; and if he obtain anything, he is liable to our heir upon an actio mandat a for its delivery over.

118. The position of a sponsor and fidepromissor is very much the same, that of a fideiussor very different. For the former cannot be attached to any but verbal obligations: although sometimes the promise himself is not bound, for instance, a woman or a pupil have promised any thing without authorization of the tutor, or any person have promised that something shall be given after his death. But if a slave or a foreigner have made the promise, it is questionable whether

the sponsor or fidepromissor is bound for him. A fidejussor 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 fidepromissor from the slave be a stranger, or the master for that which is due to him. 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: but the heir of a fidejussor is bound as well as himself (etiam). 121. Likewise, a sponsor and fidepromissor are freed from liability after two years, by the Lex Furia: 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 fidejussors are bound for ever, and whatever be their number, each is bound for the whole amount. And so it is allowable for the creditor to

1 From this section it would almost appear as if the notion of a co-fidepromissor existed in Roman jurisprudence, so as to warrant the belief that there was something like foreign international law. See 113. p. 95. IV. 22.

2 P.C. 95. IV. 22.

3 En solidaire, to use a corresponding French term. See as to bonds in solidarity upon a guarantee in the French law, The Mercantile Law of France, by Davies and Laurent, p. 41.
solidum petere. Sed ex epistula divi Hadriani compellitur creditor
a singulis, qui modo solvendo sit, partes petere. eo igitur distat
hace epistula a lege Furiae, quod si quis ex sponsoribus aut fide-
promissoribus solvendo non sit, non angustus omnes eorum,
quaqve erat. Cum autem lege Furiae tantum in Italia locum 
habet, consequens est, ut in provinciis sponsoribus quoque et fide-
promissore proinde aedificiares in petuente teneantur et singuli
in solidum obligantur, nisi ex epistula divi Hadriani hi 
quaeque adiuuari velitnunt. (122.) Praeterea inter sponsors et
fidepromissores lex Apuleia quaedam societatem introditit,
nam si quis horum plus sua portione solverit, de eo quod
amplus deedit adversus eadem actionem habet. Lex autem
Apuleia ante legem Furiam lati est, quo tempore in solidum
obligabantur: unde quaeritur, an post legem Furiam adhuc
legis Apuleiae beneficium superest et utique extra Italiam
superest; nam lex quidem Furiae tantum in Italia valeat, Apuleia
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 fide-
promissors also, as well as fidejussors, 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 Apuleia1 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
continues. And undoubtedly it continues in places out of
Italy: for the Lex Furia is only applicable in Italy, but the

1 H.C. 101.

vero etiam in ceteis prater Italiam regimina. Alia sana est
fidejussorum condicio; nam ad hos lex Apuleia non pertinet.
inque si creditor ab uno totum consecutus fuerit, huius solus
deo est. sed it ut ex supradictis appareat, est a quo creditor totum petit,
potir ex epistula divi Hadriani desiderare, ut pro parte in se
detur actio. (123.) Praeterea lege — cautum est, ut is qui
sponsores aut fidepromissores accipiat praedictam palam et decla-
ret, et de qua se sui accipiat, et quo sponsoris aut fide-
promissores in eam obligationem accepturus sit; et nisi praed-
dixerit, permittur sponsoribus et fidepromissoribus intra diem
xxx. praedicitum postulare, quo quaeratur, an ex ea lege
praedictum sit; et si indicatum fuerit praedictum non esse,
liberantur. Qua lege fidejussorum mentis nulla fit: sed in usu
est, etiam si fidejussores accipiamus, praedicere.

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. Fur-
ther by the Lex Pompeia2 it is provided that he who ac-
cepts sponsors or fidepromissors shall make a public state-
ment 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 pre-
liminary investigation3, in which the point investigated is
whether prior declaration was made according to the law; and
if it be decided that the declaration was not made, they are
freed from liability. In this law no mention is made of fide-
jussors: but it is usual to make a prior declaration, even if we
be accepting fidejussors.

1 This is Flaccius’s reading. He connects the Lex Pompeia with the
Unteria Lex, spoken of by Festus
2 See IV. 44
3 This is a mutilated fragment.
124. Sed beneficium legis Corneliae omnibus communi est, qua lege idem pro eodem apud eundem eodem anno velatur in ampliorem summan sanitatis pecuniae quam in xx miliis; et quamvis sponsor vel fidepromissor in ampliam pecuniam, velut si sestertium c milia se obligaverit, non tamen tumetur. Pecuniam autem credimus dicimus non solum eam quam credendi causa damus, sed omnem quam tum, cum contrahitur obligatio, certum est debitum iuris, id est quae sine aliqua condicio deductur in obligationem. Itaque et ea pecunia quam in diem certum dari stipulatur eodem numero est, quia certum est eam debitum iuris, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea lege significantur, itaque si vinum vel frumentum, et si spondamus vel hominem stipulium, hac lex observanda est. (125.) Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, veluti si dafis nominem, vel eius quid ex testamento ibi debessem, aut iussu iudicis satis accipiat. et adhibe lege vicesima hereditatione cavitur.

125. The benefit of the Lex Cornelia is common to all sureties. By this lex the same 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, 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" everything 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. 125. In some cases, however, the law allows us to take surety for an unlimited amount, for instance, if surety be taken in regard to a dot, or for something due to you under a testament, or by order of a iudex. And further, it is provided by the Lex

126. In eo iure quoque iuris par condicio est omnium, sponsors, fidepromissorum, fidejusorum, quod ida obligari non possunt, ut plus debant quam debet est pro quo obligatuar. at ex diverso ut minus debant, obligari possunt, sicut in ad-stipulatoris persona diximus. nam ut adstimulatoris, ita et horum obligatio accessit es principalis obligationis, nec plus in accessione esse potest quam in principali re. (127.) In eo quod par omnium causa est, quod si quis pro reo solvere, eius reciperendi causa habet cum eo mandata iudicium. et hoc amplius sponsors ex leges Publiciae proprie haebant actionem in duplum, quae appellatur dependens.

128. Litteris obligatio fit veluti in nominibus transcripticiis. fit autem nomen transcripticium duplum modo, vel a re in per

Vicesima Hereditatione that the Lex Cornelia shall not apply to the assignments of sureties appointed in that law.

126. In the following legal incident the position of all, sponsors, fidepromissors and fidejusors, is alike, that they cannot be bound so as to owe more than he for whom they are bound owes. But on the other hand they may be bound so as to owe less, as we said in the case of the adstimulator. For their obligation, like that of the adstimulator, 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 the principal, he has an actio mandata against him for the purpose of recovering it. And further than this, sponsors by the Lex Publicia have an action peculiar to themselves for double the amount, which is called the actio dependens.

128. An obligation litteris arises in the instance of nomina transcripticius. A nomen transcripticium occurs in two ways, 1

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1 The Lex Vicesima Hereditationum was enacted in the reign of Augustus (c. 15, 9 B.C.), and laid a tax on one-twelfth on all inheritances and legacies, except where the recipients were very near relatives.

2 III. 112.

3 III. 152 et seqq.

4 Who Publicius was is not certainly known. He is supposed to be named by Cicero in the Orat. pro Cluent. c. 45.

5 The working of this action is more fully explained by Galen in IV. 9, 25. 26.

6 In order to understand the nature of this obligation it is necessary to remember that among the Romans
sonam, vel a persona in personam. (129.) A re in personam transcriptio fit, veluti si id quod tu ex emptioni causa aut conductionis aut societatis mihi debes, id expensum tibi tulero. (130.) A persona in personam transcriptio fit, veluti si id quod mihi Titius debet tibi id expensum tulo, id est si Titius te delegerit mihi. (131.) Alia causa est eorum nominum qua arcaria vocantur. In enim rei, non litterarum obligatione consistit: quique non aliter valent, quam si numerata sit pecunia; numeratio autem pecuniae rei, non litterarum facit obligationem, qua de causa recte dicamus arcaria nominis nullam.

either from thing to person, or from person to person. 129. A transcription from thing to thing person takes place, for instance, if I set down to your debit what you owe me on account of a sale, a letting, or a partnership. 130. A transcription from person to person takes place if I set down to your debit what Titius owes to me, i.e. if Titius makes you his substitute to me. 131. The case is different with those nomina which are called arcaria. 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 should state 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 fast roughly made in day-books, called Adversaria or Calendaria, and were posted at stated periods in ledgers, called Codicii expres et accepti. Nomina was the general name for any entry, whether on the debitor or creditor side of the account. When any one keeping books entered a sum of money as received from Titius, he was said forre or refere acceptum Titius, 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 forre or refere expensum Titius, that is, to charge it to the debit of Titius. If it could be proved that an expensum had been set down with the debitor’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. Hence we, having his reasoning on a passage of Theophili, holds that a contract litteris is never an original contract, but always operates as a novitio of some precedent obligation. See Heineneid Antipat. iii. 38. 34. Cic. de Off. iii. 148.

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Facere obligationem, sed obligationis factae testimonium praebere. (132.) Unde proprie dicitur arcarias nominibus etiam peregironis obligari, quia non ipso nomine, sed numeratione pecuniae obligantur: quod genus obligationis iuris gentium est. (133.) Transcriptis vero nominibus an obligentur peregirini, merito quasriuerit, quia quodammodo iuris civiles est tallis obligation: quod Neris placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticum, etiam peregironis obligari: si vero a persona in personam, non obligari. (134.) Praeterea litterarum obligatione fieri videtur chirografs et syngraphs, id est si quis debere se aut datumur se correctly that nomina arcarias effect no obligation, but afford evidence of an obligation having been entered into. 132. Hence it is rightly said that even foreigners are bound by nomina arcarias, because they are bound not by the entry (nomen) itself, but by the paying over of the money, which kind of obligation belongs to the jus gentium. 133. But whether foreigners are bound by nomina transcriptia is justly disputed, because an obligation of this kind is in a manner a creature of the civil law; and so Neris thought. But it was the opinion of Sabino 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 and syngraphs, i.e. if a man state in writing that he owes or will give something: provided only there be no stipulation made

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1 A chirograph is signed by the debtor only, a sygraph 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 a contract. In Justinian’s time contracts and chirographs were regarded as identical; but see his regulations as to the time within which an exceptio non numerantia pecuniae could be brought in Inst. iii. 3. Mühlenbruch for some inexplicable reason considers nomina arcarias identical with syngraphs and chirographs; although the word praeterea in § 134 seems 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 arcarias the remark occurs, etiam peregironis obligari, the claim plainly implying that these are not peculiar to foreigners and therefore something different from syngraphs and chirographs.
Consensual Obligations.

135. Consensus tantum obligations in emptionibus et venditionibus, locationibus conductionibus, societatis, mandatis.

136. Ideo autem sitis modis consensu dicimus obligations contractibus, quia neque verborum neque scripturae ulla proprietas desideratur, sed sufficient eos qui negotium gerunt consensisse. Unde inter absentem quoque tali negotia contrahuntur, veluti per epistulam aut per internumuntio, cum aliquo verboum obligatio inter absentem fieri non possit. (137.) Item in his contractibus alteri obligatur de eo quod alteri alteri ex hono et aequo praestare oportet, cum aliquo in verborum obligationibus alius stipulerit, alius promittat, et in nominibus alius expensum ferendo obliget, alius obligetur. (138.) Sed regarding the matter. 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. 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 from one another, for example, by letter or messenger, whilst on the other hand a verbal obligation cannot arise between persons who are apart. Likewise, in 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 other hand, in verbal obligations one stipulates and the other promises, and in literal obligations one binds by an entry to the debit and the other is bound.

1 If there be, the obligation is verba, and the document becomes a causa, not absolutely conclusive, but only available as evidence. 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 111, 132 above.

Mackelvey (Syst. Juv. Rom. p. 343) divides obligations ex contractu into two classes, obligations naturales and obligations civiles, the former giving

absenti expensum ferri potest, etsi verbis obligatio cum absente contrahit non possit.

139. Empio et venditio contractuit cum de pretio converserit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. Nam quod absque nomine datum argumentum est emptio et venditio contractus.

140. Pretium autem certum esse debet: aliquo si ita inter cos converserit, ut quanti Titius rem aestimaverit, tanti sit empit. Labeo negavit ullam vim hoc negotium habere; quam sumentium Cassius probat: Offius et eam emptionem putat et venditionem; cuius opinionem Proculus secutus est.

141. Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut 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 have 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 agrees with his opinion; but Offius says there is a buying and selling, and Proclus follows his opinion. 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 rise to an exception only, and not to a direct action, the latter provided with an action. These obligations civiles again split up into two subdivisions, viz., obligations civiles (in the strict sense) and obligations praediorum: civil obligations (in the strict sense) are of two kinds, (a) those alien from natural law and found on the strictest civil law, e.g., stipulations and nomination, (b) those called jure civil commissi, i.e., received from the jus gentium into the civil law and therein protected by an action; to this last species he relatizes all real and consensual contracts, and all the partes legumen and praebiorum of later jurisprudence.

1 That is, not of the essence of the contract.

2 Justinian settled this dispute. If the referee fixed the price, the sale was valid; if he could not, or would not, the agreement was void.
toga aut fundus alterius rei pretium esse passit, valide quaeritur. nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eaque speciem emptionis et venditionis vetustissimam esse; argumentoque utuntur Graeco poeta Homeri qui aliqua parte sic ait:

"Ενθεν ἢ' ὁμοίως καρπομάκρος Ἀχαιοὶ,
Ἀλλαὶ μὲν χαλεψί, ἄλλα δ' ἀλευν σιδήρῳ,
Ἀλλαὶ δὲ μανίδες, ἄλλα δ' αὐτῇ βασσόν,
Ἀλλα δ' ἄθραπάδευον.

Diversae scholae auctores dissentient, alioque esse existimant permutationem rerum, alius emptionem et venditionem; alioquin non posse rem expediri permutationis rebus, quae videatur res venisse et quae pretii nomine data esse; sed rursum utramque videri et venisse et utramque pretii nomine datum esse absurdum videri. Sed ait Caecilius Sabinus, si rem Titio venalem habente, veluti fundum, acceperim, et pretii nomine hominem

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 Achaeans 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 to be considered to be at once sold, and also both given as the price, appears ridiculous.

But Caecilius 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

1 Iliad, vii. 472-475.

forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, ut fundus acciperetur.

142. Locatio autem et conductio similis regulis constitutur: nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi. (143.) unde si alieno arbitrio merces permissa sit, velut quatenus Titius aestimaverit, quaeritur an locatio et conductio contrahatur. Qua de causa si fulloni polienda curandave, saccini etiam vestimenta dederim, nulla statim mercede constituta, postea tantum datu adisset inter nos convenerit, quaeritur an locatio et conductio contrahatur; (144.) vel si rem tibi utendum dederim et invicem allam rem utendum acceperim, quaeritur an locatio et conductio contrahatur.

slave to be given as the price in order that the land may be received.

142. 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 from you another thing to be used, it is disputed whether a letting and hiring is contracted.

3 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 locatio conductio for wage of a mercer specified beforehand; it is not mandate because it is not gratuitous, there being an implication that a mercer will eventually be paid: hence the remedy can only be an actio praescripta potestis; for an account of which see Sandars Justinian, p. 413.

3 The contract in this case is one of the inominate real contracts—
145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videtur, ut in quibusdam causis quaeris solvat utrum emptio et venditio contrafactual cum locatio et conductio. Veluti si quae res in perpetuum locata sit, quod eventus in praedialis municipium quae ex legge locatum, ut quandum id vectigal praestetur, neque ipsa conductio necque heredii eius praelatum aperatur; sed magis placuit occurrencem ad conditionem esse.

146. Item si gladiatores ex legem tibi tradiderint, ut in singularibus qui integri exercent pro sodore denarii xx mih mi ditarentur, in eo vero singularis qui occasae aut debilitati fuerint, denarii mille:

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; for instance, if a thing be let for ever, which happens with the lands of corporations which are let out on 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.

146. Likewise, if I have delivered gladiators to you on condition that for each one who escapes unhurt 20 denarii shall be given to me for his exertions, but for each of those who are killed or wounded 1000 denarii: it is disputed whether

De ut dies, dec.—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 Bullmarts, p. 93.

1 D. 19. 2. 21.

2 This locatio in perpetuum or emphyteuse was by Justinian made a distinct kind of contract, subject to rules of its own. See Inst. hi. 24, 3, and the notes on pp. 271, 215 of Sanders' edition of the Institutes. Also read Savigny, On Ownership, pp. 77-79; D. 6. 2.

From these authorities and others we learn that emphyteuse was a comparatively modern contract, a lease of lands by a private individual or corporation to a private individual; whereas the older ager rusticus was always a lease proceeding from a corporation. The leases of ager rusticus were not always perpetual, but sometimes for a term of years. The emphyteuse leases made by a private individual were always hereditary. Hence they were closely analogous to the fee simple mentioned by Britton (see Nichols' translation of Britton, fol. 164), which was 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 frumenti.

1 Quaeritur utrum emptio et venditio, an locatio et conductio contrafactual. Et magis placuit eorum qui integrum exercent locationem et conductionem contractam videri, at eorum qui occasae aut debilitati sunt emptionem et venditionem esse: idque ex accidens apararet, tamquam sub condicio facta cutesque venditiones aut locationes. Jam enim non dubitatum, quin sub conditione res veniri aut locari possint. (147.) Item quaeritur, si cum aurifixa mih civi conveniret, et in auro suo certas certeque formae anulos mih faceret, et acciperet verba gratia denarios cc, utrum emptio et venditio, an locatio et conductio contrafactual. Cassius ait materiam quidem emptionem et venditionem contrahit, operarium autem locationem et conductionem. Sed plerisque placuit emptionem et venditionem contrahit. Atque si ac modum eum ei dedero, mercede pro opera constituta, venit locationem et conductionem contrahit.

148. Societatem coire solus aut totorum honorum, aut minus aliquius negotii, veluti ministriorum emendorum aut vendendorum.

A buying and selling or a letting and hiring is contracted. And the general opinion is that there seems to be a letting and hiring contracted of those who escaped unhurt, but a buying and selling of 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 was under condition. For there is no doubt that things can be sold or let under a condition.

Like wise, this question is raised, supposing an agreement has been made by me with a goldsmith, that he should 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 contracted.

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.

1 D. 19. 20. pr. 2 D. 19. 2. 21. 3 D. 18. 1. 20 and D. 18. 1. 52.
149. Magna autem quæstio fuit, an ita coiri possit societas, ut quis maiorem partem lucraret, minorem damni praestet. quod Quintus Mucius etiam contra naturam societatis esse censuit; sed Servius Sulpiacus, eius praebuit sententia, adeo ita coiri possit societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capit, si modo opera eius tam pretiosa videantur, ut aequum sit eum cum hac pactione in societatem admittat. nam et ita possit coire societatem constat, ut unius pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera alecimio pro pecunia valet.

150. But it has been a much disputed question whether a partnership can be entered into, so that one of the partners shall have a larger share of the gain and pay a smaller share of the loss\(^1\). This Quintus Mucius says is in fact irreconcilable with the nature of partnership: but Servius Sulpiacus, whose opinion has prevailed, thought that a partnership of this kind could so undoubtedly 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 undeniably possible to enter into a partnership on these 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 is certain, that if there have been no agreement between them as to the shares of gain and loss, yet the gain and loss must be divided between them in equal portions. But if the portions have been specified with

regard to the one case, as for instance, with regard to the gain, and not mentioned with regard to the other, the portions will be the same as to that of which mention was omitted.

151. A partnership continues so long as the partners remain in the same mind; but when any one of them has renounced the partnership, the partnership is dissolved\(^1\). But, certainly, if a man renounce a partnership for the purpose of enjoying alone some anticipated gain, for instance, if my partner in all property, when left heir by some one, renounce the partnership that he may alone have the benefit of the inheritance, he will be compelled to share this gain. If, on the other hand, he chance upon some gain which he did not aim at obtaining, this belongs to him solely. But whatever is acquired from any source after the renunciation of the partnership, is granted to me alone. 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 that a partnership is also dissolved by a capitis diminution\(^2\), because on the principles of the civil law a capitis diminutio is held to be equivalent to death; but if the partners consent

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1 D. 17. 2. 30. Servius in this passage ascribes to the doctrine of Mucius, holding that Mucius meant that there could not be a different appoimntment 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.

2 Therefore if three men be in partnership and one renounce, the remaining two are no longer partners.

1 I. 128; II. 101.
sent in societatem, nova videtur incipere societatis. (154.) Item si cuius ex sociis bona publica aut privatae venient, solvitur societas. sed hoc quoque eas societas de quo loquimur nona consensu contrahitur modo; juris enim gentium obligations contrahere omnes homines naturali ratione possent.

155. Mandatum consistit sive nostra gratia mandamus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, erit inter nos obligatio, et invicem alteri tenebimus, idque indicium est in id quod parit te mihi bona sive praetare oportere. (156.) nam si tua gratia tibi mandem, superdecum est mandatum; quod enim tu tua gratia facturus sis, id ex tua sententia, non ex meo mandatu facere videberis: in que si otiosis pecuniam domi te habere mihi dixeras, et ego te hortus fuerim, ut eam fenerares, quamvis cam ei mutuum dederes a quo servare non poteris, non tamen habebis mecum to be partners still, a new partnership is considered to arise. Likewise, if the goods of any one of the partners be sold publicly or privatively, the partnership is dissolved. But in this case also, the partnership about which we are speaking is contracted afresh by mere consent, for, any man can contract juris gentium obligations in a natural manner (i.e. without formalities).

155. A mandate arises, 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 give it on loan to one from whom you cannot recover it, you will nevertheless have no action of mandate 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 is 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 becomes 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,

1 By comparing this passage with Justinian, lib. 36, 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.”
Mandatum.

159. An  After the ard, to of me. I to bring carry death for mandatum, iuris quin cutus mortuo 1 161.

161. Cum autem est cum recte mandaverim egressus fuerit mandatum, ego quidem eteunus cum eo habeo mandati actionem, quatenus mea interest implicata eum mandatum, si modo impulerit potuerit: at ille mecum agere non potest, itaque si mandaverim tibi, ut verbi gratia fundum mihi sesterius c emeres, 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 paid.

162. 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 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 purchased for a hundred and fifty thousand sesterces, you will have no action of mandate against you, 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.

163. 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 repaired.

164. 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 also by those persons whom we have in our potses, master, or mandatum. 164. Acquisition is also made for us by means of

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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.

2 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 homae fidei action would ensure the workman a due recompence.

3 4: 36.
mines et alienos servos quos bona fide possidemus adquiritur nobis; sed tantum ex duabus causa, id est si quid ex operis suis vel ex re nostra adquirant. (165) Per cum quoque servum in quo usufructum habemus simuliter ex duabus istis causis nobis adquiritur. (166) Sed qui nundum ius Quiritium in servum habet, licet dominus sit, minus tamen iuris et re habere intellegitur quam usufructum et bona fidei possessor. Nam placet ex nulla causa ei adquiri possē; adeo ut ei nominatim ei dari stipulatus fuerit servus, mancipio nomine eius acceperit, quidam existimant nihil ei adquiri.

167. Communem servum pro dominica parte dominii adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli adquirit, veluti cum in stipulatione: TITIO DOMINO MEO DARI SPONDES aut cum in mancipio accipiale: HANC REM EX IURE QUIRITIUM LUCI TITI DOMINI MEI ESSERATIO, EAQUE ET IMPITA ESTO HOC AERIS AENEAE,

free men and the slaves of other people whom we possess in good faith: but only in two cases, viz. if they acquire anything 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 jus Quiritium in 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 in mancipium 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 in mancipium for one expressly 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 in mancipium, thus: I assert this thing to be the property ex iure Quiritium of my master Lucius Titius; and be it bought for him with this coin and copper balance. (167 a) It is questionable whether the fact of a command having been given by one particular master has the same effect as the addition (i.e. mention on the part of the slave) of the name of one particular master. Our authorities think the acquisition is made for that one only who gave the command, just as it would be if the slave stipulated or received in mancipium for him alone. The authorities of the other school think that acquisition is made for both masters, just as if no command had preceded.

168. An obligation is generally dissolved by payment of that which is owed. Whence arises the question, whether a man by paying one thing instead of another with consent of the creditor is free by the letter of the law, as our authorities think; or remains bound according to the letter of the law, and must be defended against a plaintiff by an exception of fraud, which is the view upheld by the authorities of the opposite school.

169. An obligation is also dissolved by accipitation. Accipitation 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

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1 Justinian decided in favour of the Sabinians, "nostri praecipere", in the next paragraph.
2 For exceptio see iv. 115 seqq.
Acquitatio.

1. fieri, ut patiaris haec verba me dicere: QUOD EGO TIBI PROMISI, HABEBE ACCEPTUM? et tu respondes: HABEO. (170.)

Quod genere, ut diximus, tantum habe obligationes solvitur quae ex verbis consistent, non etiam ceterae: consentium enim visum est verbis factam obligationem posse aliis verbis dissolvii. sed et id quod ex alia causa debentur potest in stipulationem deduci et per acceptillationem imaginarii solutione dissolvi.

(171.) Tamen noluer sine tutoris autore acceptum facere non potest; cum aliquum solvi et sine tutoris autoritate possit. (172.) Item quod debetur pro parte recte solvi intellegitur: an autom in partem acceptum fieri possit, quando est.

173. Est etiam alia species imaginarum solutionis per aet et libram, quod et ipsum genus certus in causis requisitum est, veluti si quid co nomine debentur quod per aet et libram gestum est, sive quid ex indicati causa debetur. (174.) Ad-

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 grounds can be converted into a stipulation, and dissolved by a fictitious payment in the way of acceptation. 171. A woman, however, cannot give an acceptation without the authorization of her tutor, although, on the contrary, an (actual) payment can be made to her without his authorization. 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 acceptation in part.

173. There is also another mode of fictitious payment, that by coin and balance; a form which is adopted in certain 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

Fictitious payment per aet et libram.

hibentur autem non minus quam quinque testes et librigen. deinde is qui liberatur ita operetur loquentur: QUOD EGO TIBI TOT MILIUS EX NOMINE TUEUM NEXI SUM DAMNAS SOLVO LIBRIGEN, QUOC AERI CUM LIBRA. HANC UBI LIBRAM PRIMAM POSTREMUM PEEH NUN DE LEGE JURE OBLIGATION. deinde asse percucit libram, cumque dat ei a quo liberatur, veluti solvendi causa. (175.) Similiter legisatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen scilicet, videt indicatus sententia se damnatum esse significat, ita heriae defuncti judicio damnatum esse dicat. de co tamen tantum potest hoc modo liberari quod pondere, numero constet.

librensis 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 nuxum for so many thousand sestertes 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 (leges) (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 legate acquire 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 an acquittance in this form can only be given when the thing owed is a matter of weight or

1 The form of words by which this was done is to be found in Justinian, tit. 50, 2, and is there called the Aquilian stipulation. The inventor, Aquilius Gallus, was a contemporary of Cicero. The Aquilian stipulation acted as aovation. See § 176 below.

2 i.e., 88.

3 An instance of actual payment per aet et libram is to be found in Livy, vi. 14.

4 See also Festus sub verbis.

5 We have adopted Lachmann's emendation nihil, instead of nils, the more usual reading; and with him have supplied nihil before de leges. See the phrase prima payment per aet et libram in a form of treaty given by Livy (i. 24).

6 § 170.

7 Before the fiction of payment can be allowed to take place, there 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
et in, si certum sit, quidam et de eo quod mensum constat intelligendum existant.

176. Praeterea novatione tollitur obligatio, veluti si quod tu mihi debes a Titio dari stipulatus sim, nam interveni novae personae nova nascitur obligatio, et prima tollitur transita in posterioreram: adeo ut in cælo, locut posterioris stipulato inutilis sit, tamen prima novationis iure tollatur, veluti si quod mihi debes a Titio post mortem eius, vel un millare pupillovene tutoris auctoritate stipulatus fuero, quod casum amitio: nam et prior debitor liberatur, et posterior obligatio nulla est. non idem iuris est, si servo proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuisset.

177. Sed si eadem persona sit a qua postea stipuler, ita

number; although some think it may be applied also to a thing which is a matter of measure, provided the thing be
definite.

178. An obligation is also dissolved by novation, for instance, if I stipulate with Titus 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 Titus for payment by him after his death of what you owe me, or with a woman or a pupil without the authorization 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

1 The contract superseded in a novation might be of any kind, real, verbal, literal, or consequential, 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. 2. The obligation entered into by a pupil is binding naturally, therefore superseded 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. 105.

demum novatio fit, si quid in posteriori stipulatione novi sit, forte si condicio vel sponsor aut dies adicatur aut detracturum.

178. Sed quod de sponsore dixi, non constat, nam diversae scholae nutoribus placuit nihil ad novationem proficere sponsoris adictionem aut detractioinem. (179) Quod ante dictum nimirum, si condicio adicatur, novationem fieri, sic intelligi aporetier, ut in dicamus fictam novationem, si condicio existerit: alioquin, sic deactio, sunt prior obligation. sed videamus, num iste 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 above about the sponsor is not universally admitted; for the authorities of the other school 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

1 III. 115.

2 III. 178. 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 condition? If there be an immediate novation, the old agreement is swept away altogether, and the new agreement is only to be carried out on fulfillment of the condition; so that if the condition fails, the promise will get nothing at all. This view Gaianis at once discards. The novation is, according to him, presumptively conditional, and so if the condition fails, the old obligation remains intact according to the letter of the civil law. But admitting this view to be correct, all that is yet has been shown is that an action will be granted, and not that the plaintiff will succeed, for he may be put by an exception of dolus malus or postrem concirurn, 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 Gaianis left 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 showing that it was not the novation, but the second stipulation that was conditional.

The latter part of the paragraph informs us that Servius Silvicianus maintained the doctrine of which Gaianis 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
qui ex nomine agat doli mali aut pacti conveniendi exceptione possit summoveri, et videatur inter eos id actum, ut ita ea res pereat, si posterioris stipulationis exitiori condicio. Servius tamen Sulpicius existimavit statum et pendente condicione novationem fieri, et si defequerit condicio, ex neutra causa agi possit, et co modo rem perire. Qui consequenter et illud respondit, quia id quod sibi Lucius Titius debet, a servo fuerit stipulatus, novationem fieri et rem perire; quiacum servo rgi non potest. Sed in utroque caso alio iure uturit: non magis his casibus novatio fit, quam si id quod tu mihi debas a peregino, cum quo sponsi communi non est, Spondeo verbis stipulatus sim.

180. Tollitur a/n hue obligatio litis contestationis, si modo

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 later 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 would if I stipulated with a foreigner, with whom it is impossible to deal in sponsio, by means of the word sponses.

180. An obligation is also dissolved by the litis contestatio, itself valid. Gaius concludes the paragraph by reiterating his dislike of these principles of interpretation. See 176. 111. 93. Spesunum; spesio promissa, Draken, sub verb.

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 possible accommodation between the parties, and it was only at the point when the litigious were remitted to a judex, the instant when the proceedings in iure terminated and those in judicio 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 utrque rea dicit, Festes estote. Contestari licet dicatur, aut utruses adversarum quod ordinatum judicio utrque sit, estote iudicatum," where he evidently referring to the obli- nation of a new after award. D. 12. 1. 5. 11.

The differences in procedure between judicia legum and judicia imperii contensiones are to be found in Gaius, i. 173—109. Mühlenbruch (in his notes on Heinsius, 17, 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 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 (imperium) of the magistrates; and although in later times this function of the magistrates was restrained within well-assigned limits, yet it continued an admitted principle, that in the judicia based on the imperium of the magistrate there was less adherence to strict rule than in those which sprang from the legis. As the state grew, the ancient distinction became a mere matter of outward form, and the one system became so interwoven with the other,
I cannot afterwards, by the letter of the civil law, bring another action for the same, because I plead in vain that “it ought to be given to me,” inasmuch as by the litis contestatio the necessity that it should be given to me ceased. It is otherwise if I proceed by action founded on the imperium, for then the obligation still remains, and therefore, by the letter of the law, I can afterwards bring another action: but I must be met by the exception rei indicatae or in iudicium deductae. Now what are actions based on statute law, and what are actions founded on the imperium, we shall state in the next commentary.

132. Now let us pass on to actions which arise from delict. That it seems a 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.

As we have mentioned imperium above, this is perhaps the place to remark that this imperium implies a power of carrying out sentences: a magistrate who was merely exécutor was said to have imperium iurum et voluntatis, like the Praetor, &c., who could both adjudge and carry into execution, possessed imperium voluntatis, i.e. authority over potestas and jurisdiction: for jurisdiction, sometimes called iudicium, is the attribute of a magistrate who can only investigate, and must apply to other functionaries to carry out his decisions: thus a judex had jurisdiction only. See Heineccius, Antap. Rom. p. 657, 658, Mühlbeck’s edition, D. 2. 1. 3.

2 4v. 107.
3 4v. 105, 175. The first exception of the fact that the matter has already been adjudicated upon, the second that it has been carried beyond the lis contestabilis, and that there has been a novitio. This last-named exception it is obviously immaterial whether the court has arrived at a judgment or not. See for a curious case connected with this exception, Cist. de Orat. 1. 37.
4 Besides the methods of dissolving an obligation already mentioned there were (1) compensatio and deductio, the setting off of what the creditor owes to the debtor, in order to lessen or extinguish the debt, see 4v. 61–68; (2) Confusio, when the obligation of the debtor and right of the creditor are united in the same person: (3) mutual consent, when a contract of the consensual kind has been made, but is fulfilled not yet undertaken by either party.
5 It must be noticed that all the

unur, veluti si quis furum fecerit, bona rapuerit, damnunm dederit, iuriam commiserit: quorum omnium rerum uno genere considerar obligatio, cum ex contracto obligationes in III. genera deducantur, sicut supra exposuimus.

183. Furturnam autem generis Servius Sulpicius et Masarius Sabinus in 5 esse dixerunt, manifestum et nec manifestum, conceptum et obtutum: Labeo duo, manifestum, nec manifestum; nam conceptum et obtutum species potius actionis esse furto cohaerentiam quam genera furturnam; quod sane verius videtur, sicut inferiori apparerit. (143.) Manifestum furturn quidam id esse dixerunt quod dum in deprehenditur, aliis vero ulterius, quod eo loco deprehenditur ubi fit: velut si in oliveto olivaram, in vineto uvarum furturn factum est, quamuid in eo oliveto aut

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 contract are divided into different classes.

183. Of thefts, then, Servius Sulpicius and Masarius Sabinus say there are four kinds, manifest and ne-manifest, concept and obtutum: Labeo says there are two, manifest and ne-manifest: for that concept and obtutum are rather species of 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:

actions mentioned in §§ 182–185 are civil actions on delict. Furturnam, rapina, etc. were also punishable criminally, but with this fact we have at present nothing to do.

They all arise by

2 11. 89.
3 11. 86. 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, xx. 18 are: “Qui alienum rem adiectavit, cum id se invito domino facere judicare debere, fert tenetur,” and “Qui alienum tacens lucrum falsandi causa sustulit, fert tenetur.” Gaius implies that this or something like it is his definition in §§ 195, 197 below.
Furtum manifestum, nec manifestum, conceptum.

vincent pro sit: aut si in domo furtum factum sit, quandam in ea domo fur sit, ali adhuc ulterior, ousque manifestum furtum case dixerat, donec perferret eo quo perfesse fur destinasset, ali adhuc ulterior, quandoque cum rem fur tenens visus fuerit; qua sententia non opiniat. sed et illorum sententia qui existimaverunt, donec perferret eo quo fur destinasset, reprehensam furtum manifestum esse, improbata est, quod videlicet aliquam additurer dubitationem, utres dicta ad eam plura dierum spatio id terminandum sit. quod eo pertinet, quia sape in alius civitatis sursepta res in alius civitates vel in alia provincias destinat fur perferre. ex dubius iaque superioribus opinionibus alterutrum adprobatur; magis tamen plerique postieriem probat. (185.) Nec manifestum furtum quod sit, ex iis quae dixerunt, idem factum esse, domo vineto asturium, alii esse domo vineto.

Hence, other, theft 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 is manifest if the thief be seen with the thing in his hands at any time; but this opinion has not found favor. 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 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 oblatum, when the stolen thing has been put into your hands by any one and is found with you: that is to say, if it has 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 oblatis. (188.) There is also an actio prohibitii furii against one who offers resistance to a person wishing to search.

The penalty of a manifest theft was by a law of the Twelve Tables capital. (189.) 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, was disputed between 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 prohibitii.

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 avoiding confusion, having already written additurer 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 were liberated from the creditor, they were treated thenceforth as ingenui and not as libertini: the creditor to
Penalties of furtum.

locus constitueretur, vetere quaerabant); servum aequo verberatum et saeco desinebat. postea improbrata est asperitas poenae, et tum ex servi persona quam ex liberi quadrupli actio Praetoris edicto constituit est. (190.) Nec manifesti futuri poena per legem xxi tabularum dupli inrogratur; quam etiam Praetor conservavit. (191.) Concepti et oblati poena ex leg. xxi tabularum tripli est; quaem similiter a Praetore servavit. (192.) Prohibiti actio quadrupli ex edicto Praetoris introducta est. lex autem co nomine nullam poenam consiuiti: hoc solum praecedit, ut qui quaerere veli, nodus quaerat, linctor cinctus, lanceam habens; qui si quid inveniret, iubet id lex futurum manifestum esse. (193.) Quod sit autem linteum, quaesitum est, sed verius est consilli genus esse, quo necessariae partes tegerentur. quare 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. 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. 191. The penalty of concept and oblate theft was three-fold by the law of the Twelve 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 1 that a man wishing to search should search naked, girt with a linteum and holding a dish; and if he found anything the thing he ordered the theft to be regarded as manifest. 193. Now that a linteum may be a moot point; but it is most probable that it was a kind of cincture with which the private parts were covered.

whom payment of the debt was tendered was compelled to accept it; the debtors retained their praenomen, cognomen, and if a slave, the praenomen and cognomen of the tribe. &c. See Heinsoo, Antiquit. Rom. III. 49. § 5. 1 If the master declined to pay the penalty for his slave, he could give him up as a natus. IV. 75. 2 See Maine's ingenious explanation of the wide difference in the ancient penalties of furtum manifestum and non manifestum. Ancient Law, p. 379.

The linteum is called licium sometimes, e.g. in Festus: "Lance et licii dicebatur spad antiquis, quae petit quare querere in domo aliena, licium cinctus intrahet, lanceamque ante ossibus tuchibat propriam matrimonias aut virginum praesentiam." 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 and found in this manner is subjected to a heavier penalty. 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 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 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, of which we are now speaking; by nature, 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.
homicida sit: at illud sane lex facere potest, ut perinde aliquis poena tenetur atque si furtum vel adulterium vel homicidium admississet, quamvis nihil eorum admissit.

195. Furtum autem fit non solum cum quis intercipienti causa rem alienam amovet, sed generaliter cum quis rem alienam in-vit domino contracta. (196.) Itaque si quis re quae apud eum deposita sit utatur, furtum commitit. et si quis utendum rem acceperit eamque in alium usum transulerit, furti obligatur. veluti si quis argentum utendum acceperit, quod quasi amicos ad coenam invitaturos rogaverit, et id peregre secum tulerit, aut si quis eum gestandi gratia commodatum longius secum aliquo duxerit; quod veteres scriptu re de eo qui in actem perdixisset. (197.) Placuit tamen cos qui rebus commodatis alter uteren tur quam utendas accepsent, ita furtum committere, si intelligent id se invito domino facere, eumque, si intellectisse, non permittamur; et si permittamur credentem, extra adulterum vel homicidium et his: but this no doubt the 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 takes use of a thing which has been deposited 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. 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 know 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.

\[\text{furti crimen videri: optima sana distinctione, quia furtum sine dolo malo non commititur. (198.) Sed si credat aliquis invito domino se rem contractare, domino autem volente id fiat, dicitur furtum non fieri, unde illud quiescunt est, cum Titius servum meum sollicitari, ut quasdam res mili subreret et ad eum perferret, et servus id ad me pertulerit, ego, dum volo Titum in ipso delicio reprehendere, permisserim servo quasdam res ad eum perferre, utrum furti, an servi corruptione iudice tenetur Titius mili, an neutro: responsum, neutro eum teneri, furtiideo quod non invitame res contractare, servi corruptione iudice quasi deterior servus factus non est. (199.) Interdum autem etiam liberorum hominum furtum fit, velut si quis liberorum nostrorum qui in potestate nostra sunt, sive etiam uxor quae in manu nostra sit, sive etiam indicatus vel auctoratus meas subreptas furtur. (200.) Aliquando 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 corruption of a slave, or 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 in my potestas, or my wife who is in my manus, or my judgment-debtor, or one who has engaged himself to me as a gladiator, be abducted. 200. Sometimes, too, a man

\[\text{1 See Justinian’s reasons for giving an opposite decision in Inst. iv.}
\[\text{2 Furtum in Latin is the plural of furtus.}
\[\text{3 Auctoratus is defined by Paulus: “qui subreptis locutus est ad gladium.”}
\[\text{4 Similarly styled plagium.}
\[\text{5 IV. 21.}]

\[\text{16}]}
etiam suae rei quisque furum committit, velit si debitor rem quam creditoris pignori dedit subtraxerit, vel si bonae fidei possessors rem massum possidenti subtraxerit. unde placuit eam qui serrum suum quem alius bona fide possidedit ad se reversum celaverit furto committere. (201.) Rursus ex diverso interdum rem alienam occupare et usucapere concessum est, nec creditor furto fieri, velit res hereditarius quam non prius nactus possessionem necessarius heres esse; nam necessario herede extante placuit, ut pro herede usucapi possit. debitor quoque qui factum quam creditoris mancipaverit aut in iure cessaret detinit, ut superiore commentario retulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur qui ipse furto non fecerit: quals est cuius ope consilio furto factum est, in quo numero commits a theft of his own property, for example, if a debtor take away by stealth a thing he has given for pledge to his creditor1, 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 usucapion, 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 "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 cessio in foro, 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

all captives or criminals; Roman citizens sometimes sold themselves to fight in the armies.

1 III. 204.

2 See II. 9, 52, 68. In the first and second of these passages it is not stated that the possessio pro herede of a stranger is tolerated only when the heir is "necessary" (II. 152), but that seems to be implied in the passage II. 58 and that now before us.

3 II. 59, 60.

est qui numinos tibi excussit, ut cos alius surripueret, vel obstitit tibi, ut alius surripueret, aut ores aut boves suas fugavit, ut alius eam excepseret; et hoc veteres scripturum de eo qui panno rubro fugavit armentum. Sed si quid per lasciviam, et non data opera, ut furto committeretur, factum sit, videmus ut an utilis Aquiliana actio dari debet, cum per legem Aquiliam quae de danno lata est etiam culpa puniatur.

203. Furto autem actio est commodissima interested rem salvare esse, hoc dominus non sit: itaque nec dominus alter competet, quam si cura interest rem non perire. (204.) Unde constat creditoris de pignore subrepto furto agere possit; adeo quidem, ut quamvis ipse dominus, id est ipse debitor, eam rem subjiciat, nihilominus creditor competet actio furii. (205.) Item si follo palienda curandae, aut sacrificare sacrificiae vestimenti 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 own 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 granted1, since by the Lex Aquilia which was passed with reference to damage, culpable negligence2 is also punished.

204. The action of theft lies for him whom it interests that the thing should be safe, even though he be not the owner: and this again it does not lie for the owner unless he has 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

1 The meaning of the passage is this: "in the case supposed there is no actio furii; the point therefore which we shall have to consider in any particular instance is whether a constructive Aquillian action will lie." Uxius has been explained above in the note on III. 78. The action would be utilis and not directa, because the direct action could only be brought when the damage was done corporis corporei. III. 410.

3 III. 511.
mercede certa acceperit, cæque furto amisit, ipse furti habet actionem, non dominus; quia domini nihil intenta ex non perisse, cum iudicium locati a fullone aut sarcinatore suum persequi possit, si modo est fullo aut sarcinetore ad rem praestandum sufficit; nam si solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio competit, quia hoc casu ipsius Interest rem salvam esse. (206.) Quæ de fullone aut sarcinetore diximus, eadem transferemus et ad eum cui rem commodavimus: nam ut illi mercedem capiendae custodiam praestant, ita hic quoque utendi commodum percinge similiter necesse habet custodiam praestare. (207.) Sed si quern res deposita est custodiam non praestat, tantumque in eo obnoxius est, si quid ipse dolo fecerit; qua

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 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
deco, si res ei subrepta fuerit quas restituentia est, eius nomine depositi non tenetur, nec ob id eius interest rem salvam esse: furri itaque agere non potest; sed ea actio domino competit.

208. In summa siendum est quasimtm esse, an impubes rem alienam amovendo furto faciat, pleurisque placet, quia furrum ex aedificis consistit, ita demum obligari eo criminem impulserem, si proximus pubertati sit, et ob id intelligat se delinquare. 209. Qui res alienas rapit tenetur etiam furri: quis enim magis alienam rem invito domino contractam quam qui rapit? itaque recte dictum est eum impuro furum esse. sed propriam actionem eius delicti nomine Praetor introduct, quae text

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.

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 insidious fur. But the Praetor has introduced a special action in respect of this delict, which is called the adi vi bonorum raptorum, and is an action for fourfold if brought within the year, and for the single value if brought

\footnote{1} The depositary is only liable for delictus, the text says. The general rule in contracts was that the person benefited was liable for culpa laevis, i.e. for even trivial negligences, whilst the person on whom the burden was cast was only liable for culpa laeva, gross negligence. Dolus imports a wilful injury; culpa an unintentional damage, but one caused by negligence. The depository would be liable for delictus and culpa laeva. Galus, therefore, is not speaking with strict accuracy when he says the depositary is liable only "si quid ipse dolo fecerit," but perhaps he had in his thoughts the well-known maxim, culpa laeva dolos apudparans, in which case his dictum is correct. For some useful remarks on the subject of culpa see Sandars's edition of the Institutes, pp. 546, 547. See also Jonas, On Bailments, pp. 5-34.

\footnote{2} The fourfold penalty in this technical when he uses the expression "pudicati proximum." The sources, however, sometimes speak of a child under seven as infantis proximus, and one between seven and fourteen as pudicati proximus. See Savigny, On Possession, p. 180, n. (b).
Damni injuria. Lex Aquilia, c. 1.

annum simpli. quae actio utilis est, et si quis unam rem, licet minimum, rapuerit.

210. Damni injuriae actio constituitur per legem Aquilam. cuius primo capite cautum est, ut si quis hominem alienum, canave quadrupedem quaeque numeros sit, inuria occiditis, quam ex res in eo anno plurimis fuerit, tantum domino dare damnum petatur. (211.) Is inuria autem occidi intelligitur cuius dolo aut culpa id acciderit, nec ulla lice domann quod sine inuria datur reprehendi: itaque inipvinus est qui sine culpa et dolo mala causa quodam damnum committerit. (212.) Nec solum corpus in actione huius legis aestimatur; sed sane si servio occiso plus dominus capiat damni quam pretium servi sit, id quoque aestimatur; velut si servus mens ab aliquo heres institutus, ante quam iussu meo hereditatem cerneret, occises 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 injuriae (of damage done wrongfully) was introduced by the Lex Aquilii, in the first clause of which it is laid down that if any one has 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 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

1 We have several times already come across the word utilis derived from us, but utilis here is the more common adjective derived from uel, to use.
2 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 plebe, probably meaning that to the Jucilium, 285 B.C. The second clause was on a different subject, as Gain tells us in § 214, the third is quoted in D. 9. 2. 27. 5.

Computation of Damages.

fuerit; non enim tantum ipsius pretium aestimatur, sed et hæreditatii amissae quantitates. item si ex gemelli vel ex conoedis vel ex symphoniacis unus occasius fuerit, non solum occisis fit aestimatio, sed eo amplius queque computatur quod ceteri qui supersunt depreptati sunt. idem iuris est etiam si ex pari multis unam, vel etiam ex quadrigis equorum unum occiderit. (213.) Cuius autem servus occisis est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege damnum persecut. (214.) Quod autem adiunctum est in hac lege: QUANTI IN EO ANNO PIURIMI EA RERI, illud efficit, si clodum puta aut luceium servum occiderit, qui in eo anno integer fuerit, ut non quanti moritis tempore, vel quanti in eo anno plurimi fuerit, aestimatio fat. quo fit, ut quis plus interdum consequatur quam ei damnunm datum est.

1 11. 163.
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 Dig. 71. 25. 30. The law under which the criminal suit could be brought in the present case was the Lex Cornelia de aequa (72 B.C.), the penalty under which was interdiction from fire and water, consequently loss of citizenship. Hei. acc. IV. 18. 58. According to the Code (111. 35. 3), a master whose slave had been killed could bring both a criminal and a civil suit.
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 adversas infintam in duplum agitur.

217. Capite tertio de omni cetero damnno cavetur. itaque si quis servum vel eam quadrupedem quae pecuniam numero est vulneraverit, sitae eam quadrupedem quae pecuniam numero non est, velut canem, aut feram bestiam velut ursum leonem vulneraverit vel occiderit, ex hoc capite actio constituitur. in ecteris quoque animalibus, item in omnibus rebus quae anima carent, damnum incurrere aliquam parte vindicatur, si quid enim usum aut ruptum aut fractum fuerit, actio hoc capite constituitur; quomqua potuerit sola rupti appellatio in omnes causas sufficere: ruptum enim intelligitur quod quoque modo corruptum est. unde non solum usta aut rupta aut fracta, sed etiam acissa

215. In the second clause (of the Aquilian law) an action is granted against an adstipulator1 who has given an acceptation2 in defraudance of his stipulator, for the value of the thing concerned. 216. And that this provision was introduced 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 mandate3 would suffice, save only that under this (the Aquilian law) the action is for double4 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 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

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1 III. 110. 2 III. 169. 3 III. 111. 4 IV. 9, 121.

et collisa et effusa et diruta aut perempta atque deteriora facta hoc vero continentur. (218.) Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proximius ea res fuerit, damnum est qui damnum dederit; ac ne plurimi quidem verbum adiectur: et ideo quidam diversae scholae autores putaverunt librum esse eius datum, ut dixisset de XXX diebus proximus vel eum Praetor formula adieret quo plurimi res fuit, vel alium quo minores fuit. sed Sabino placuit perinde habendum ac si eum hac parte plurimi verbum adieuctum esset: nam legis latorem contentumuisse, quod prima parte ex verbis noscatur. (219.) Et placuit ita demum ex ista legio actionem esse, si quis corporum suo damnum dederit. itaque ait modo damno dato utiles actiones dantur; velut si quis alienum hominem aut pecudem inclusurit et fame necaverit, aut iumentum tam vehementer egerit, ut rumpetur; aut si quis alieno servo persuaserit, ut in 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 committee 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 opposite school have maintained that the Praetor has full power given him to insert in the formula5 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 author of the law was satisfied with having employed the word in the first part of the law. 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 actiones6 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 wall, and

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1 IV. 30. 2 See note on II. 278.
arborum asceneret vel in putumum descenderet, et is ascenden-
dendo aut descendendo cocciderit, et aut mortuus fuerit aut
aliqua parte corporis laesus sit. Item si quis alium servum de
ponte aut ripa in flumen procerit et est suffocatus fuerit, tum
hic corporum suo damnum dedisse eo quod procerret, non diffi-
ciliter intelligi potest.

220. Injuria autem committitur non solum cum quis pango
pulsatns aut fuste percussus vel etiam verberatus erit, sed et si
cui convicium factum fuerit, sive quis bona alia quibus
debitoris scienti cum nihil debere sibi proscripterit, sive quis
ad infaminam alienius libellum aut carmen scripsit, sive quis
materfamiliasi aut praetextatum adscertas fuerit, et denique
allis pluribus modis. (221.) Pati autem inhumanum videmur
non solum per nosmet ipsos, sed etiam per liberis nostros qui in
in going up or down he have fallen, and either been killed or
injured in some part of his body. So also 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
cased the damage with his body insomuch as he cast him in.

220. Injury is inflicted not only when a man is struck with
the fist, or beaten with a stick or lashed, but also when
abusive language is publicly addressed to any one, or when
any person knowing that another owes him nothing advertises
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 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 in our potestas; and so

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1 For the different significations of the word injuria see Justinian, 14. 4. pr., a passage which is in great
measure borrowed from Paulus.

2 An explanation of the word convicium is given by Ulpian in D. 37,
10. 15. 44. "Convicium autem dici-
tur vel a concitatione vel a conventu,
hoc est, a collatione vocum, quam
enim inamus complures voces
conferuntur, convicium appellatur,
qua convocatum." Hence convi-
cium 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.

3 Sc. obtainis from the Prator an
order for possession and leave to ad-
verte, by making false representa-
tions to that magistrate.

4 Praetextatus signifies under the
age of puberty, as at the age of four-
teen the toga virilis was assumed and
the toga praetextata discarded.

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1 Sc. in the edit.
2 That is to say he has neither an
action framed on any known formula,
or even one "praescriptus verbis,
unless there be some special circum-
cstances of aggravation.

223. By a law of the Twelve Tables the penalty for in-
juries was like for like in the case of a limb destroyed; but
for a bone broken or crushed a penalty of 300 asses was ap-
pointed, if the sufferer were a free man, and 150 if he were a

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potestate habemus; item per uxores nostras quamvis in manu
nostri non sint, itaque si veluti filiae mese quae Titio nupta
est inhumanus, non solum filiae nomine, tecum agi injuria-
rum potest, verum etiam meo quoque et Titii nomine. (222.)
Servo autem nisi guidem nulla inhuman intelligitur fieri, sed
dominum per cum fieri videtur: non tamen isdem modis quibus
etiam per liberos nostros vel uxores, inhuman pati videmur, sed
ita, cum quid atrocius commissum fuerit, quod aperte in contu-
netiam domini fieri videtur, velut si quis alienum servum ver-
beraverit; et in hunc casum formulae proponitur. at si quis servo
convicium fecerit vel pulmo eum percoscerit, non proponitur
ulla formula, nec temere potentis datur.

223. Poena autem inhumanam ex lege xii tabularum propter
membrum quidem ruptum talio erat; propter os vero fractum
aut co/iium trecentorum assium poena erat statuta, si libero os
fractum erat; at si servo, ct. propter cetera vero inhumanas xv
too in the persons of our wives, even though they be not in
our manus. For example then, if you do an injury to my
dughter who is married to Titius, not only can an action for
injuries 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,
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 formula is set forth to meet such a case. But if a man
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.

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assium poena erat constituta. et videbantur illis temporibus in magna pauperitate satis idoneae iatae pecuniæ poenæ esse. (224.) Sed nunc alio luro utinam. permittitur enim nobis a Prætor eipsis inuiuriam aestimare; et iudex vel tanti condemnat quanti nos aestimaverimus, vel minoris, prosto illi visum fuerit. sed cum atroce inuiuriam Prætori aestimare solent, si simul constiterit quantae pecuniæ nomine fueri debent vadimoniun, haec ipsa quantitate taxamus formulum, et iudex quamvis possit vel minoris dammari, placuitque tamen propter eius Praetoris auctoritatem non audiendum minuere condemnationem. (225.) Atrax autem inuiuriam aestimatur vel ex facto, velut si quis ab alio vulneratus aut verberatus jussiususus caesus fuerit; vel ex loco, velut si cui in theatro aut in foro inuiuriam facta sit; vel ex persona, velut si magistratus inuiuriam passus fuerit, vel senatoribus ab humilis persona facta sit inuiuria.

slave. For all other injuries the penalty was set at 25 as. 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 iudex 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 "atrocius," if he at the same time have settled the amount of vadimoniun is which is to be given, we limit the formula to this quantity, and although the iudex 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 condemnatio. (225.) Now an injury is considered "atrocius" 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.

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1 2 iv. 184.  
2 2 iv. 51.  
3 2 iv. 39. 43.
Actions in personam and in rem.

qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est continuatus, id est cum intendimus dare, facere, praestare oporhere. (3) In rem actio est, cum aut corponem rem intendimus nostram esse, aut ipsi aliquid nobis competere, velit utendi, aut utendis fruendi, aut, agendi, aquamve ducendi, vel alius tollendi vel possessiendi. Item actio ex diverso adversario est negativa.

4. Sic itaque discretis actionibus, certum est non posse nos form ourselves 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 the intentio that he ought to give or do something, or perform some duty. 3. The action is in rem, when in the intentio we assert either that a corporeal thing is ours, or that some right belongs to us, as, for example, that of usufruct, or the use and enjoyment of 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

sacramentum, but, as Gaius observes, there was a difference between the two, for the sum of the sponsio or restitution went to the victorious litigant, whilst that of the sancrumentum was forfeited to the state.

Hoffner thinks the “four kinds of actions framed on the various classes of sponsiones” were:

1. Actions in rem with a sponsio pro privato actio or vindicatum, and without a restitution (see iv. 10).
2. Actions in personam for money lost or promised, with a sponsio and a restitution columnaria causa (see iv. 178).
3. Actions of any kind, where the proper matter was converted into a pecuniary sum by the introduction of a sponsio, and wherein there was also a restitution.
4. Actions in rem (or in personam) without a sponsio attached.

Hoffner defends his introduction of the fourth class by saying that the words of Gaius only state that there were four classes of actions distinguished by their various connection (or want of connection) with sponsiones, and not that all classes of necessity contained a sponsio.

See Heffer’s Observations on Gai. iv, pp. 86–89.

3. For example, taking Heffer’s classification of the four types of actions in rem pro privato in vindicatum are not a separate genus, but only a species comprised in the genus, actions in rem.

4. IV. 41.
5. Ubi is not treated of by Gaius, but a discussion of it is to be found in Just. Inst. II. 5.
6. That is, the opponent in his intentio alleges that these rights do not belong to the plaintiff. Cf. Just. Inst. iv. 6. 2, with Sandars’ note thereon, and D. s. 2. pr.

We cannot sue another person for a thing that is ours in this 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 condonations.

6. Sometimes the object of our action is to recover only the thing itself, sometimes only a penalty, sometimes both the thing and a penalty. 7. We sue for the thing only, as in actions

rem nostram ab alio ita petere, si PARE BUM DARE OPORTERE: nec enim quod nostrum est, nobis dari potest, cum solum id dari nobis intelligatur quod ita datur, ut nostram hab; nec res quae est nostra, nostra amplius fieri potest. plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra poenam duplici aut quadrupli rei recipiendae nomine fures ex hac actione etiam tenearunt, si PARE EOX DARE OPORTERE, quamvis sit etiam adversus co hos actio qua rem nostram esse petimus. (5) Appellantar autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare fieri oporhere intendimus, condonationes.

Vindicatio, Condictio.

rem nostram ab alio ita petere, si PARE BUM DARE OPORTERE: nec enim quod nostrum est, nobis dari potest, cum solum id dari nobis intelligatur quod ita datur, ut nostram hab; nec res quae est nostra, nostra amplius fieri potest. plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra poenam duplici aut quadrupli rei recipiendae nomine fures ex hac actione etiam tenearunt, si PARE EOX DARE OPORTERE, quamvis sit etiam adversus co hos actio qua rem nostram esse petimus. (5) Appellantar autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare fieri oporhere intendimus, condonationes.

Vindicatio, Condictio.

1. See a. condictio.
2. See a. vindicatio.
3. Savigny says that DARE, in the strict terminology of the formulary system, means to transfer property ex jure quiritium; whilst FARES, on the other hand, embraces every kind of act, whether juridical or not, and hence comprises, amongst other things, dare, solvere, numerare, averbar, reddere, non facere, curare ut fiat. Cf. D. 26. 1675, 189, 218.
agimus. 8. Poenam tantum consequiuitur velut actione furti et iniuriarum, et secundum quorumdam opinionem actione vi bonorum raptorum; nam ipsius rei et vindicatio et condicio nobis competit. (g) Rem vero et poenam consequiur velut ex his causis quiqius adversus imitiantem in dupliagmus: quod accidit per actionem judicati, depensi, damni iniuriae legis Aquiliae, et rerum legatarum nomine quae per damnationem certae relictae sunt.

10. Quadam praeterea sunt actions quae ad legis actionem exprimuntur, quaedam sua vi et potestate constat, quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

11. Actions quas in usu veteres habuerunt legis actions appellabantur, vel idaeo quod legibus prodite erant, quippe tunc edicta Praetoris quisbus complures actions introductae arising out of a contract. 8. We obtain a penalty only, as in the actions furti and iniuriarum, and, according to the views of some lawyers, in the action vi bonorum raptorum, for to recover the thing itself there lies for us either a vindication or a condiction. 9. We see for the thing and a penalty in those cases, for example, where we bring our action for double the amount against an opponent who denies (the fact we state): instances of which are to be found in the actions judicati, depensi, damni iniuriae under the Lex Aquiliae, and for the recovery of legacies where certain specific things have been left (by the form) per damnationem.

10. Moreover, there are some actions which are framed upon a legis action, whilst others rest on their own special force. In order to make this clear we must give some preliminary account of the legis actions.

11. The actions which our ancestors were accustomed to use were called legis actions, either from the fact of their being declared by leges, for in those times the Praetor's edicts,

\[\text{References:}\]

1 III. 159. 2 III. 250. 3 III. 209. 4 IV. 21, 21. See for an instance of this action Cis. pro Flacc. c. Pomponius to the same effect, D. 1. XXI. 5 III. 127.

\[\text{Further Reading:}\]

8 III. 216. 7 II. 201–208, 282. 6 IV. 32, 33. 9 See the derivation given by Pomponius to the same effect, D. 1. 2. 9. 6.
Poema Sacramenti.

qui victus erat summam sacramentum præstabar, poenae nomine; eoque in publicum adebat praeedesque eo nomine Praetorii dabantur, non ut unum sponsum et restitutum in poena suo cedit adversario qui vicerit. (14) Poema autem sacramentum un quinquagenaria erat aut quinquagenaria, nam de rebus nihili aeris plurisve quingentis assibus, de minoris vero quinquaginta assibus sacrum contendebat; nam in leges tabularum cautum erat, se si de libertate hominis controversia erat, eti pretiosissimus homo esset, tamen ut i. assibus sacramentum contendeatur, adem leges cautum est favoris causa, ne satisfatione oncarentur adsertores. (15) [Nunc adnomenis sumus, istas omnes actiones certis quiusdam et solemnibus verbis

reason, and on account of the restitutum whereby the plaintiff is imperilled if the sum in dispute be not due; for he who had 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 sponzional and restitutural penalty now, into the pocket of the successful party. 74. 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. 75. 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 assurers of liberty being burdened with excessive security. 15. 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 personam against an individual who had bound himself by a legal obligation; 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 consent to (the settlement of) the matter in respect of which you have entered into an 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 legal engagement 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 either side, the parties demanded a juro, and the Praetor fixed a day for them to come and receive one. Afterwards, on their reappearance in court, a juro was assigned from the number of the decemvirs on the thirtieth day: and this was

1 See note on 11. 27.
2 That this was the form of the ancient action against an author who was present in court is clear from Ciceron pro Caecinam, c. 19, pro Marcello, c. 12.
3 Author, 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. In the present case the defendant would become suitor by admitting his liability, for this admission would make him a reus presente in a stipulatory engagement.
4 This is a difficult passage on account of the obliterated state of the MS. We have again adhered to Heffer's conjectural reading, viz. decemvirs XXX (dix),
Causes collectae.

Xviris xxx index: nique per legem Pinarium factum est; ante eam autem legem nondum habuerat index. Illi ex superioribus intelligimus, si de re minoris quam m aeeris agebatur, quinquagenario sacramento, non quingenario eos contendere solitosuisse. Postea tamen quam index datur esset, comprehendendum diem, ut ad iudicem venirent, denuntiant. Deinde cum ad iudicem venerate, ante quem aperit cum causam pereratent, solebant breviter et quasi per iudicem rem expone: quae dicescibatur causae collectio, quasi causae suae in breve coacto.

(16.) Si in rem agerant, mobilia quidem et movemini, quae

so done in accordance with the Lex Pinaria; for before the passing of that law, it was not the practice for a judge to be assigned. From what has been stated above, we have gathered that when this 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 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 appearance 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 cause collecta being, so to speak, a brief epitome of each party's case. If the action were one in rem, the process by which the claim used to be made in court for moveable and moving things

that could be brought or led into court, was as follows: the claimant, having a wand in his hand, was held of the thing claimed, say for instance, a slave, and uttered these words: "I assert that this slave is mine ex jure Quiritium, in accordance 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 interrogated the other: "I ask you whether you can state the grounds of your claim." To this 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

(although contrary to the directions of the Twelve Tables,) that the consensus controversiae should no longer be more fictitious: the litigants went out of court, nominally of consensus manus, but returned after a few minutes' absence, deeming that the consensus had in the meantime taken place, and then the rest of the process followed as set down by Caecilius in the text.

1 For this meaning of causa, see I. 158, 3137. In D. I. 8, 6, pr. D. X. 2, 28, the word has the same or an analogous signification.
Assignment of Vindiciae.

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 vindicatiæ 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 līdī et vindicāriōrum, i.e. for 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 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 Courts. 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 manner.

Our ancestors had in use a form, called capiendā judicis, almost identical with that employed in the judicās postulantēs: and this at a later time, after the passing of the Lex Varia, was called a condicio. 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 judex. At the
tionem in personam esse, qua intendimus dare nobis operationem nonnulla enim hoc tempore eo nomine demissioni sit. (19.)

Hae autem legis actio constituta est per legem Siliam et Calpurniam : lege quidem Silia certaz pecuniae, lege vero Calpurnia de omni certa re. (20.) Quare autem haec actio desiderata sit, cum de eo quod nobis dari operet poterimus sacramentum aut per iudicis postulationem agere, vale quitterur.

21. Per manus injecutionem acque de his rebus ageretur, de quibus ut ita ageturum, lege aliqua cautam est, velut indicari legem XII tabularum, quae actio fuisse est, qui ageret sic dicerat: QUOD TU MINI IUDICATUS SIUE DAMNATUS ES SESTERTIUM X present time, however, we apply the name, conductio, improperly to an action in personam in the intentio of which we declare that our opponent ought to give something to us, for now-a-days no demissioni takes place for such purpose. 19. "This legis actio was given by the Leges Siliam 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 for judicis postulationem for that which ought to be given to us. 1.

21. Similarly an action in the form of an arrest (manus iniectio) lay for those cases where it was specified in any lex that this should be the remedy; as in the case of an action upon a judgment which was given by a law of the Twelve Tables. That action was of this 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, debts due on

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1 See IV, 46. Boethius, ad Chr. Top. I, 2, § 10 says, "Vindex est qui haec causam suscipit vindiciam." There is a curious law of the Twelve Tables on this subject, "Ansiduo vindex ait et pro parte legem sui quis vixit vindex est," Tab. I. 4, 4 in which passage autem is to be interpreted permissius, for, as we have already seen, "Vindex ab eo, quod vindice, quomodo est quis praemiu est ubique". 1 I. 157. 2 For an account of this law, see III, 131, 122.
sed puram, id est non pro indicato: velut lex Furia testamentaria adversus cum qui legatorum nomine mortisve causa, plus assibus cepissent, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia adversus faenatorum, ut si suasus excissent, de his reddendis per manus injectionem cum eis ageretur. (24) Ex quibus legibus, et si quae aliae similis essent, cum agebatur, manum sibi depellere et pro se legere agrere liebetat, nam et in ipsa legis actione non adicibat hoc verbis pro indicato, sed nominata causa ex qua agebat, ita dicabat: OB EAM REM EGO THI MANUM INICIO; cum hi quibus pro indicato actioni data erat, nominata causa ex qua agebat, ita inferebant: OB EAM REM EGO THI PRO INDICATO MANUM INICIO, nec me praeterit in forma legis Furiae testamentariae pro indicato verbum inseri, cum in ipsa lege non sit: quod videtur nulla radione factum. (25) Sed postea lege substantive, i.e. not "as though upon a judgment;" for example, the Lex Furia Testamentaria did say against a man who had taken more than a thousand axes by way of legacy or donation mortis causae, in spite of his not being privileged by the lex so as to have the right of taking such larger sum: thus also the Lex Marcia allowed this 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 injectionem. 24. When then an action was brought upon these leges and others, 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 indicato ("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 to whom the action was given "as though 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 based on the Lex Furia Testamentaria the phrase, pro indicato, is inserted, though it does not appear in the lex itself; but that insertion seems founded on no reason. 25. Afterwards, however, permission was given by the Lex Varia 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 actions 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 surety is compelled to give securities for the payment of that which shall be adjudicated.

26. The legis actio per pignoris capionem was for some matters a remedy originating from old custom, for others one framed upon a lex. 27. That (capio) which dealt with military proceeds was the creation of custom. For a soldier was allowed to take a pledge from the paymaster for the due dis-
pecunia quae stipendii nomine dabatur aes militare. Item prop-
ter eam pecuniam libeat pignus capere ex qua egni enemus erat:
quae pecunia dicebatur aes equestre. Item propere eam pecuniam
ex qua hordeum equis erat conparandum; quae pec-
unia dicebatur aes hordiarium. (28.) Lege autem introducta
est pignoris capio velut lege xii tabularum adversus eum qui
hostiam emisset, nec preterum redderet item adversus eum qui
mercedem non redderet pro eo lumento quod idem locas-
set, ut inde pecuniam acceptum in diem, id est in sacrificium
imperderet. Item lege censoria data est pignoris capio public-
canis vectigalium publicorum populi Romani adversus eos qui
aliqua lege vectigalia deberent. (29.) Ex omnibus autem istis
charge 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 equitare.1 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 hordiarium. 28. Pigno-
ris capio was also (sometimes) introduced by lex, as, for
instance, by a law of the Twelve Tables3 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 dopis, i.e.
on a sacrificial feast.4 So also a pignoris capio was given by a
lex cenorit4 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

1 The money for purchasing the
horses of the equites was provided by
the state (Liv. i. 43), that for the
feeding of them by widows; the
pledge therefore would be taken in
the former case, as for aes militare,
from the tribuno curiae, in the
latter from the widow. See Aul.
Cæs. vii. 16.
2 Tab. xii. 1.
3 Dopis was the archaic word for
the sacred ceremonies at the winter
and spring sowing. See Festus, 130.
verb.
4 This is Dickson's suggestion
which Hefferman adopts. Gibbon
proposes "Lex Phâctoria" for a reading;
Mommsen, "Lex praetoria." The
Leges cenorit referred chiefly to
the letting out of the revenues, pub-
lic lands and public works. For the
case of the cenorit in such mat-
ters see D. 50. 16. 292. Varro, de
Q. K. ii. 1.
causis certis verbis pignus capiebatur; et ob id plerique place-
bat banc quoque actionem legis actionem esse. quibusdam
autem non placet: primum quod pignoris capio extra ius
pestiæbat, id est non apud Praetorem, plerunque etiam ab-
sente adversario, cum aliquo ceteris actionibus non alter uti
possent quam apud Praetorem praesente adversario: praeterea
nemito quoque die, id est quon non libeat lege agere, pignus
capi poterat.
30. Sed istae omnes legis actiones paulatim in odium vene-
runt. namque ex nimia subsidia veterum qui tunc inter condi-
derunt eo res perducta est, ut vel qui minimum errasset Ritem
perderet. Itaque per legem Aechtiam et duas Julias subhane
sunt istae legis actiones effectueque est, ut per concepta verba,
id est per formulas litigiose. (31.) Tantum ex duabus causa
permision est lege agere: dammi infecti, et si centumnival
judicium fit, prœnde vel brevi cum ad centumviris itur, ante
words; and hence it was generally held that this was a legis
actio too: but some authorities have dissentied from this 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 got to such a pitch
that a litigant who had made the very slightest error lost his
case.5 Therefore these legis actiones were got rid of by the
Lex Aechtia and the two Leges Juliae, and the result has
been that our litigious process is now carried on by express
phraseology, i.e. by the formulæ. 31. In two cases only
are the litigants allowed to resort to a legis actio, viz., in the
case of anticipated damage, and in that of an action appen-
sing to the centumviral jurisdiction.6 In fact, even at the
present day, when the parties resort to the centumviris, there

1 Censora is used in this sense of
determining or expounding in i. 7.
2 See (K) in Appendix.
3 See (K) in Appendix.
4 See the example in iv. 11.
lege agitur sacramento apud Prætorem urbanum vel peregrinum. Proper danni vero infecti nemo vult leges agere, sed potius stipulatone quae in dicto posita est obligat adversarium. 

The text continues with a detailed discussion of legal proceedings, particularly those involving fictitious actions. It references a variety of historical and legal texts, including works by Gaius and Ulpian, and discusses the nature of fictitious actions and their legal implications.

The discussion includes a detailed analysis of the role of fictitious actions in the legal system, particularly in the context of the Roman law. It explores the concept of fictitious actions and their relationship to the formal and substantive law, as well as their impact on the legal system as a whole.

The text is rich with legal citations and references to key legal figures, such as Gaius and Ulpian, and is written in the style of early modern legal texts. It provides a comprehensive overview of the topic, including historical context and contemporary legal considerations.
actiones, et neque id quod defuncti sui potest intendere suum esse, neque id quod defuncto debet aut potest intendere dare sibi oportere; itaque facio se herede intendit veluti hoc modo: JUDEX ESTO. SI AULUS AGERIUS, id est ipse actor, LUCIO TITO HERES ESSET, TUM SI PARET FUNDUM DE QUO AGITUR EX IURE QUIRITIUM EUS ESSE OPORTERET; vel si in personam agatur, praeposita similiter fictione illa in subiectu: TUM SI PARET NUMERIUM NEGIDIUS AULO AGERIO SERTERIUM X MILIA DARE OPORTERE. (35) Similiter et bonorum empori facio se herede agit, sed interdum et alio modo agere solet, nam ex persona cius cuius bona emerit sumpta intentione convertit condemnationem in suam personam, id est ut

by statutable right, he obtains no direct actions, and cannot claim in his intellito 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 seigning himself heir, he states his intentio somewhat in this fashion: "Let there be a judge. If Aulus Agerius (that is the plaintiff himself) was the heir of Lucius Titus, then should it appear that that estate about which the action is brought is his ex jure Quiritium, &c.; or if the action be one in personam, a similar fiction is prefixed, and the formula runs on: "Then should it appear that Numerius Negidius ought to give to Aulus Agerius 10,000 sesterces." (35) So too the bonorum empori* sues under the fiction of being heir. Sometimes, however, he sues in another way. For commencing with an intentio directed to the person of him

1 That is, no action is specially provided for his claim by the civil law.
2 We have translated Gischen's reading: "Si in personam agatur?"
3 Heffer reads: "vel si quid debeturus L. Titio," which of the two we adopt is immaterial, an action on a debt being of necessity, in personam.
4 "The word oportere," says Paulus, "does not apply to the extent of the judge's power, for he can give larger or smaller damages, but refers to the present value (of the subject matter of the agreement or claim), D. 50. 16. 37. Thus, suppose in a stipulatory contract between S. and T. the clause Quo quidem de rebus oportet were inscriced; 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. 44. 1. 64. 1 and 46. 1. 156.
5 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."
siem legibus only

siem

tert.

siem

SI FURTUM FACTUM ESSE PATEREB AUREAE QUAM OB RER EUM,

SI CIVIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPOR-TERET ET RELIGIUM, item SI PERSECRIVIS FURIAT AGAT, Civitas ci

Romana fingeit. simillier si ex legge Aquilia peregrinos damni

injuriae agat aut cum eo agatur, forum in contempl: JUDEX

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FURTUM FACTUM ESSE PATEREB AUREAE QUAM OB RER EUM,
Parts of the Formula.

For the Formulae in usu conceptae.

...
factum conceptae; formulae, that is to say, in which the introductio 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 is conferred on the iudex of condemning or acquitting. Of this kind is the formula which the patron employs against his freedman who summoned him into court contrary to the Praetor's edict, for it runs: "Let there 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 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 conceptae in factum: as for instance against him who when summoned into court has neither made his appearance nor assigned a deputy; also against 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. 119.

There are, however, cases in which the Praetor publishes both formulae in juss conceptae and formulae in factum conceptae, for instance, in the actions on deposit and on loan; for the formula which is drawn up in this form: "Let there be a iudex. 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, iudex, condemn Numerius Negidius to give or do to Aulus Agerius, unless he restore (the table)," is a formula in juss conceptae, but that which is drawn up thus: "Let there be a iudex: 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, iudex, condemn Numerius Negidius to pay to Aulus Agerius as much

caturn, et denique innumerosiam eiusmodi aliae formulae in albo proponuntur. (47) Sed ex quibusdam causis Praetor et in ius et in factum conceptae formulae proponit, vel ut depositi et commodati. illa enim formula quae ius conceptae est: iudex esto. quod Aulus Agerius apud Numerium Negidium mensam argentem depositit, qua de re agitur, quidquid etiam rem numerum negidium aulo agerio dare facere orportet ex fide bona, eas iudex numerum negidium aulo agerio condemnato, nisi restituat. si non paret, absolvito—in ius conceptae est. illa formula quae ius conceptae est: iudex esto. si paret aulo agerio apud numerium negidium mensam argentem depositisse fanque dolu malo numeri negidii aulo agerio reddat

what is the law applicable to a certain set of facts admitted by both parties.

An example of a formula in jus conceptae is to be found in Cist. pro Rei. Cont. C. 4.

1. If we adopt Beaufort's conjecture, recuperator was the name applied to a person appointed by the Praetor to investigate a case, when such person did not sit alone but in company with two or four others.

Beaufort's Reg. Rom. v. 2. See notes on 1. 66. 1iv. 105. 2. See Just. Inst. iv. 16. 3: D. 2. 4: 24 and 25. From these passages we also perceive that the copy of the MS. has by a mistake written 10,000 for 5000 sesterces in the conclusion of the formula quoted in the text.

3. These are commented on in D. 2. 4.

4. See note on iv. 21. Whether the inductio was in Galus' time required in all cases where neither the summons was obeyed nor bail tendered, or was only sealed in certain causes and actions deposi iudicata, is a disputed point. Heffter's note on the text.

illl in parte formulāe ita est: \( \text{IUDEX NUMERIUM NEGIDIIUS \ AULO AGERIO CONDEMNATIO. SI NON PARET, ABSOLVE.} \)

uncertain, for then in the final part of the formula the wording is: "on this account, \textit{judex}, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding 15,000 sesterces; should it not so appear, acquit him." The other kind is that which is unlimited; for instance, when we are claiming anything as belonging to 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 \textit{condemnatio} runs: "Do thou, \textit{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." But if he who is \textit{judex} in a case condemns, he must condemn in a specific amount, even though no specific amount have been stated in the \textit{condemnatio}. A \textit{condemnatio} 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 \textit{taxatio} has been added,
ne plus est condemnat quam taxatum sit; alias enim similiter litem suam facit. minoria autem cammare ei permissionis est [deo sunt ...]

53. Si quis intensione plus complexus fuerit, causa cadit, id est rem perdit, nec a Praetore in integrum restitutionem praeder quam quisquidam casibus in quibus [actori successu jurist propter iudicium, vel si tam magna causa iuri et articulis, ut etiam constantissimus quisque loco posset, plus autem quatuor modis petitur: re, tempore, loco, causa. re: velit si quis pro x milibus quae ei debentur, xx miliis petierit, aut si is causis 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 intento 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 position by the Praetor, except in certain cases in which [he2] 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, re, tempore, loco, and causa. It is sued for re, as 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 having a share in a particular thing lays his intento for the whole or too large a part of it. It is sued for tempore, as in the case of a man suing before the arrival of the day named or the happening

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Here reddito 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 litus contributo a novitato 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 novitato. Hence reddito in integrum signifies that the plaintiff is freed from the unpleasant effects of the novitato, or in other words, can bring a new action on the original case. See ii. 180, 181. Paulus, s. R. 2, 7.

9. The remainder of this section is translated from the conjectural reading of Heilper, printed in the text above.
nullum si quis genus stipulatus sit, deinde speciem petat, velut si quis parzurum stipulatus sit generativus, deinde Tyrian specialiter petat: quin etiam lex viiiissimam petat, idem iuris est proper ea rationem quam proxime diximus. Idem iuris est si quis generatorem hominem stipulatus sit, deinde nominatim aliquem petat, velut Stichum, quamvis viissimam, itaque sicut ipsa stipulatio concepsa est, ita et intentionem formulae concept debet. (54.) Illud satis appareat in incertiis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversariam dare facere oportaret interdatur, nemo potest plus intende. Idem iuris est, et si in rem incertae partes actio data sit; velut si heres quantum partem petat in eo fundo, quo de agitur, Paretius esse: quod genus actionis in paucissimis causis dari solet. (55.) Item palam est, si quis alius pro alio intenderit, nihil eum periclitari eunque ex integro agere is not demanded. Similarly when a person having stipulated for a slave, sues for a specie; 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 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 incerti formularum 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 petito. 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 when a man lays his intention (by mistake) for one thing instead of another, he is not put in peril thereby, and can sue again,
sequitur quod posuit: nam tota quidem res in iudicium deduct, constingitur autem condemnationis sine, quam index egregi non potest. nec ex ea parte Praetor in integrum restituit: facilius enim rei Praetor succurrat quam acturibus. logum autem exceptis minoribus xxv annorum; nam huius actatis hominibus in omnibus rebus iapsis Praetor succurrat. (58) Si in demonstratione plus aut minus positi sit, nihil in iudicium deductur, et ideo res in integro manet: et hoc est quod dicatur falsa demonstratione rem non perimit. (59) sed sunt qui putant minus recte comprehendi. nam qui forte Stichum et Erotem emerit, recte videtur in demonstrare: QUOD ISO DE TE HOMNEM EROTEM EM, et si velit, de Sticho alia formula ideam agat, quia verum est cum qui duos emerit singulos quoque emisse: idque in maxime Laboal visum est: sed si qui unum emerit de duobus egere, falsum demonstrat. idem et in aliis actionibus obtains what he has so stated: for the whole matter, having been laid before the iudex, is strictly confined to the limits of the condentatio, 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 in the demonstratio a larger or smaller sum than that due be placed, 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 Laboal’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

est, velut commodat, depositi. (60) Sed res apud quodam scriptum invenimus, in actione depositi et denique in ceteris omnibus quibus damnum unusquisque ignorat quin, eum qui plus quam oportet demonstraverit item perdere, velut si quis una re deposita duas res deposisse demonstraverit, aut si est cui pugno mala persuas est in actione iniuriam esse aliam partem corporis percussam sihi demonstraverit. quod an debentur nos credere verius esse, diligentius requiremus. certe cum duce sini depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notavimus, et in ea quidem formula quae in ius concepta est, initio res de qua agit demonstratur, tum designetur, deinde infraetur iuris contentio his verbis: quidquid de iam rem illum mihi dare factum oportet; in ea vero quae

modi sunt and depositi”. 60. We have, however, found it stated by some writers, that in the action on depositi and in all other actions where the consequence is ignominy to one who suffers an adverse verdict, he who has claimed too much in his demonstratio loses the suit. As when a man after making a deposit of one thing has claimed two, or when after being struck on the cheek with a blow of the fist, he has stated in 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, two formulae for an action of deposit, one in jus 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 to account for he or I, whilst in the forum in factum concepta the thing in dispute is described in the factum itself without any demonstratio,” in this form: “Should it appear that he deposited such and such a thing with

1  See note (1) in Appendix. 2 A list of the actions which carried this consequence with them is to be found in IV. 182. 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. 3. 3  IV. 47. 4 The reading is Heftel’s: Gneist has “statim initio intentionibus loco” instead of “ sine demonstratione in ipso intentione.”
in factum concepta est sine demonstratione ipsa intentione res de qua agitur designatur his verbis: si paret illum apud illum rem illum depositisse: dubitare non debemus, quin si quis in formula quaie in factum concepta est plures res designaverit quam depositur, letum perdat, quia in intentione plus po-

61. In bonae fidei incidit libera potestas permittat videtur indic: ex bono et aequo aestimandis quantum aequi restitui debet. In quo et illud continitur, ut habita ratione eius quod invicem adorem ex cadae causa procedere oportet, in iudicium eum cum quo actum est condemnare debeat. (62.) Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandatis, depositis, fiduciae, pro socio, tutela, commodati. (63.) Tamen iudici — — — compensationis ratione habere non ipsius formularum verbis praecipitur; sed qua id bonae fidei iudicio conveniens videtur, idem officio eius conv.

the defendant:” (all this being true) there can 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 intentio1.

61. In actions bonae fidei2 full power is allowed to the judge 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.2 Now the bonae fidei actions are those: actions arising on sale, letting, voluntary agency,3 mandate, deposit, fiduciary agreement to restore, partnership, guardianship, loan. 63. The judge, 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 case is different in the kind of action by which a banker may set-off what he has compelled to sue cum compensatione, i.e. the set-off must be comprised within the wording of the formula. Therefore, making the set-off at the outset, the banker declares in his intendio that the reduced sum is due to him. Thus, suppose he owes Titus 10,000 sestertii and Titus owes him 10,000, his intendio is thus laid by him: “Should it appear that Titus is bound to give him 10,000 sestertii more than he owes to Titus,” 65. Again a bonorum emptor1 ought to bring his action cum deductione, that is to say, for his opponent to be compelled to pay the balance only after the sum has been deducted which is reciprocally due to him on the part of the bankrupt.6 66. Between the set-off declared against a banker and the deduction opposed to a bonorum emptor 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.

1 Hesler and Henschke 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—50. As the whole subject is fully discussed and explained in Sandars’ notes on those sections, we need only refer thereto.
3 See Paulus, S. F. II. 5. 3 and D. 13. 6. 18. 4.
4 See Lord Mackenzie’s Rom. Law, p. 237; D. 44. 7. 5. 25.
5 11. 59, 60.
Compensatio and Deductio.

tricico, vinum cum vino; adeo ut quibusdam placeat non omni modo vinum cum vino, sed triticum cum triticum compensandum, sed in si eiusdem naturae qualitatis sit. in deductionem autem vocatur et quod non est eiusdem generis, itaque si A Titius pecuniam petit bonus empor, et invicem frumentum et vinum Titius debet, deducto quantum id est, in reliquit experimental. (67.) Item vocatur in deductionem et id quod in diem debetur; compensatur autem hoc solum quod praevertit. (68.) Praeterea compensationis quidem ratio in intensione ponitur. quod sit, ut si factura compensativa plus numerum uno intendat argentarius, causa cadat et ob id rem perdatas, deductio vero ad condemnationem ponitur, quo loco plus patenti perculum non intervenit; utique bonorum emptor agentes, qui licet de certa pecunia agat, incerti tamen condemnationem concepti.

69. Qua tamen superius mentionem habuimus de actione against money, wheat against wheat, wine against wine; nay, some 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 bonorum emptor sae A Titius for money and himself in turn owes corn or wine to Titius, after deduction of the value thereof, be 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 intension: the result of which is that if the banker on making his set-off claim too much by a single sestertius, 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 petitio there's; at least when the plaintiff is a bonorum emptor, for although such an one avails for a specified sum, yet he frames his condemnation for an uncertain one.

As we have already mentioned the action which may be brought for the peculium of children under potestas and of slaves, 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 exercitioria and institoria. 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...
cum redditur.ideo autem exercitiora actio appellatur, quia exercitor vocatur ais qui quemcottidianas navis quasestus pervenit. Institoria vero formula tum locum habet, cum quis tabernae aut cauilibet negotiationi filium servumque etiam quumlibet estraneum, sive servum sive liberum, praeposuerit, et quid cum co eis rei gratia cui praepositus est contractum fieret. ideo autem institoria appellatur, quia qui tabernae praeposuit institor appellatur. quae et ipsa formula in solidum est.

72. Praeterea tributoria queque actio in patrem dominumque pro filis filiabusve, servis ancillibus constituta est, cum filius servusve in pecuniar merce sciente patre dominumque negociature. nam si quid cum eo eius rei aequo contractum est, ibi Praetor in diei ut quidque in his mercibus erit, quodque inde receptum erit, against him (the owner). The reason why the action is called exercitiora is because the name exercitor is given to the person to whom the daily profits of a vessel accrue. The formula institoria lies, 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 institoria 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 actio tributoria, 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 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 arising therefrom, shall be divided between the father or master, if anything be due to him, and the 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 of the creditors that his share is smaller than it ought to be, he gives this creditor the action called tributoria.

73. In addition to the above, an action has been introduced "relating to the peculium and to whatever has been spent on the business 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 applied 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 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 sestertii, for instance, which your slave has borrowed from Titius, he have paid five to a cre-
Actio de peculio et de in rem verse.

que sestertia solverit, reliqua vero quinque quotidie modo consum- 
sertis, pro quinque guidum in solidum dammari debita, pro ceteris 
vero quinque alienis, quatuor in peculo sit: ex quo sollicit ap-
parab, si tota decem sestertia in rem huma versa fuerint, tota decem 
sestertia Titium consuevi posse. Sic enim non est actio qui de 
peculo depe eo quod in rem patria dominio verso sit agitur, 
tamen dux habet condemnationes. Itaque ipsum quam ea acti-
tione agitur ante dispicer solet, an in rem patria dominio verso sit, 
 nec alter ad peculii aciesationem transit, quam si ad nihil 
in rem patria dominio verso intelligator, aut non totum. Cun 
aest quaterit quantum in peculo sit, ante deductur quod patri 
dominio quiue in potestate eius sit a primo servio debetur et 
quod superest, hoc solum peculinam esse intelligentur, aligando 
tamen id quod ei debet filius servus qui in potestate patria 
dominio est non deductur ex peculio, velut si est cui debet in 
huius ipsius peculio sat.

ditor of yours, and spent the other five in some way or other, 
you ought to be condemned to make good the whole of the first 
five, but as to 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 spent on the business 
of the father or master, yet it has two condemnationes. There-
fore the iudex before whom the action is tried ought first to 
sert whether anything has been spent on the business 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 spent on the father's or 
master's business. When, however, the 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 in his potestas 
is first deducted, and the balance alone is reckoned as peculium.
Still, sometimes, what a son or slave owes to a person in the 
potestas of his father or master is not deducted, for instance, 
when he owes it to a person in his own peculium.

1 That is, debts owing by a servus 
ordinarius to his servus servorum are 
not reckoned in the calculation. If 
the amount had been deducted as 
due to the peculium, it would, when 
paid, have been again in the peculium 
of the ordinarium, and thus the de-
duction would have been nugatory.

Rules for selecting the action.

74. Ceterum dubium non est, quin est que qui insin patris 
dominioe contrassisset, quique institutor vel exercitoria formula 
competit, de peculio aut de in rem verso agere possit. Sed 
nemo tam stultus erit, ut qui aliqua illa se actionem sine dublo 
solidum consequi possit, in differentiam se deduct probandi 
in rem patria dominio verso esse, vel habere filium servum 
peculium, et tantum habere, ut solidum sibi soli possit. Is quoque 
cui tributaria actio competit, de peculio vel de in rem verso 
agere possit: sed hic sane plerumque expedit hac potius 
actione ut quam tributaria, nam in tributaria eius solius peculi 
ratio habeatur quod in mercibus erit quibus negotiatur filius 
servus, quodque inde resortum erit, at in actione peculi, 
unius: et potest quisque teria forte aut quarta vel etiam minore 
parte peculi negotiari, maximam vero partem in praestis vel in 
a/ir rebus habere; longe magis si potest aliprobari id quod de-
beatur lutos in rem patria dominii verso esse, ad hanc actio-

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Actio Noxalis.

nem transire debet. nam, ut supra diximus, eadem formula et de peculio et de in rem verso agitur.

75. Ex maleficiis ilorum familias servorumque, veluti si furturn fecerint aut inuiiram commiserint, noxales actiones proditeque sunt, uti liceret patri dominove aut illis assignationem succurrere aut noxae dedere: crat enim iniquum nequitiam eorum ultraipsum corpora parentibus dominabvas danno novias esse. (76.) Constitutae sunt autem noxales actiones aut legibus aut edicto. legibus, velit subi lege xii tabularum, damni inuiiare [velut] lege Aquilia. edicto Praetoris, velut inuiarium et vi bonorum ruptorum. (77.) Omnes autem noxales actiones capita sequuntur. nam si filius tuis servosvse noxas commiserit, quamdiu in tua potestate est, tueam est actio; si in alterius potestatem pervenerit, cun illo incipit actio esse; si sui iuris coeperit business of the father or master. For, as we said above, 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 furturn or injuria, 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 nova: 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 lege or by the edict. By lege, as the action for theft under a law of the Twelve Tables, or that for wrongful damage under the Lex Aquilia; by the edict of the Praetor, as the actions for injury and for 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 in your potestas the action lies against you:

esse, 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 tuis esse coeperit, quod quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa futur. (78.) Sed si filius patri aut servus domino noxam commiserit, nulla actio nascerit: nulla enim omnia inter me et cum 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 nullum in potestate est agi potest. unde queriunt, si alienus servus filiusve noxam commiserit mibi, et est postea in mea esse coeperit potestate, utram intercidat actio, an quiescat, nostri praeceptores intericdcre putant, quia in eum casum deduca sit in quo actio consistere non potuerit, ideoque licet

but if he pass into the potestas of another, the action forthwith lies against that other; if he become sui juris, there is a direct action against himself, and the possibility of giving him up as a nova is at an end. Conversely, a direct action may become a noxal one: for if a potestates has 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 in my potestas. And so, though he may have passed into the potestas of another, or have become sui juris, there can be no action either against him or against the person in 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 into 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

Actio noxalis sequitur personam.
exierit de mea potestate, agere me non posse. diversae scholae auctores, quandum in mea potestate sit, quiescere actionem putant, cum ipse mecum agere non possum; cum vero exierit de mea potestate, tunc eam resuscitari. (79) Cum autem filius
familias ex noxali causa mancipio datur, diversae scholae auctores putant terti eum mancipio dari debere, quia lege xii tabularum causam sit, ne aliter filius de potestate patris exact, quam si ter fuerit mancipatus: Sabinius et Cassius ceterique nostri auedae scholae auctores sufficeri unam mancipationem; crediderunt enim tres lege xii tabularum ad voluntarias mancipationes pertinent.

80. Haece ita de his personis quae in potestate sunt, sive ex contractu sive ex maleficio earum controversia esset. quod vero ad ear personas quae in manu mancipiio sunt, ite ius dictatur, ut cum ex contractu earum ageretur, nisi ab eo cuius iuris subjectae sunt in solidum defendatur, bona qua eum futura

be an action, and that therefore I cannot sue, although the wrongdoer have passed subsequently from under my potestas. The authorities of the other school think that the right of action is in abeyance so long as he is in my potestas, since I cannot bring an action against myself; but that when the person has passed out of my potestas, then it is revived. 79. Again, when a son under potestas is given in mancipium for a noxal cause, the authorities of the opposite school hold that he ought to be given in mancipium thrice1, 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 father2; but Sabinius 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 mancipations.

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 in manus or mancipium are concerned the law is thus stated: if an action be brought on their contract, unless they be defended to the

forent, si eius iuris subjectae non esset, remanet sed cum rescissus capitatis diminutione imperio continenti judicio [tesun 24, lit.]. (81) — quoniam dum xixinus — permium suisse ei mortuos homines dedere, tamen et si quis eum dederit qui fato suo vitam exscesserit, aequo libertate.

82. Nunc admonemus sumus agere posse quemlibet aut suo nomine aut alieno, alieno, veluti cognitório, procuratorio, tutorio, curatorio: cum olum, quae tempore erant legis actiones, in usu suisset auctores nomine agere non liceret, nisi pro populo et libertatis causa. (83) Cognitor autem certis verbis in item coram adversario substitutur, viri autem cognitorem dat: quon

full amount by him to whose authority they are subject, all the property which would have been theirs, if they had not been subject to such authority, must be sold. But when the capitatis diminution is treated as non-existent in an action based on the imperium3, 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.

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 action4 or in defence of freedom5. 83. A cognitor6 then is substituted (for a principal) in a set form of words, in order to carry on a suit, and in the opponent's

1 III. 84, IV. 38.
2 IV. 105—109.
3 These actions are treated of in D. 47—52.
4 That is, as ascensor libertatis; see IV. 14, and note thereon.
5 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. Com. c. 18. Fustus, sub verbs, gives the same definition as in our text; "Cognitor est qui eum fictum suscipit coram coaeusero ext. Procura autem absentia nomine actio fit." A cognitor was always appointed to conduct a suit, a procurator frequently for other business: Paul. S. R. i. 3. 2. 1
mandatum procurator, expressi petest, quia saepe mandatum initio his in obscuro est et postea apud iudicem ostenditur. (85.) Tutores autem et curatores quenumadmodum constituantur, primo commentario rettulimus.

86. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personali convertit. Nam si verita gratia Lucius Titius pro Publio Maevio agat, ita formula concipitur: si paret numerum Negidium Publio Maevio sestertium X milia dare opore, iudex numerum Negidium Lucio Titio sestertium X milia condemn. Si non paret, absolv. In rem quoque si agat, intendit Publi Maevii rem esse exire Quiritium, et condemnationem in suam personali convertit. (87.) Ab adversarii quoque parte si interveniat aliquis, cum quo actio constituatur, intenditur dominum dare opore; condemnationem autem in eius personali convertitur qui iudicium accepit sed cum in rem agit, nihil in intentione factit eius persona 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 iudex. (87.) As to the manner of appointing tutors and curators we have given information in our first commentary.

86. He who seeks in the name of another inserts his principal's name in the intendit, but in the condemnation 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, iudex, 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 intendit that such and such a thing is the property of Publius Maevius ex jure Quiritium, and then in the condemnation 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 intendit is to the effect that "the principal ought to give," but in the condemnation 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
cum quo agitur, sive suo nomine sive alieno aliis quid impedire intendit rem actoris esse.

88. Videamus quousque ex causis suprascriptis cum quo agitur vel hic qui agat cogat sit satisfaciens. (89.) Igitur si verbi gratia in rem tecum agam, sat vis mihi dare decessit, quia enim nunc est te deo quod interea tibi rem, quae ad te pertinent, dubium est, possibilia conciliare, cum satisdatione mihi caveare, ut si victus sis, nec rem ipsum restitutas nec lietus electionem suffeceris, sit mihi potestas aut tecum agendi aut cum sponsoris tuis. (90.) Multoque magis desiderat mihi, si alieno nomine judicium accipias. (91.) Ceterum cum in rem actio simplex est (aut enim per formam petitoriam agitur aut per sponsionem), si quidem per formam petitoriam agitur, illa stipulatio locum habet quae appellatur judicatum solvi:

person against whom the action is brought has no effect on the intention, whether such person be defending his own cause or acting as agent in a suit belonging to another: for the wording of the intention is simply that "the thing is the plaintiff." 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 interposition 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 submit to the damages assessed, 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 stipulation); is employed which has the name judicatum solvi (that the award of the judex shall be paid): but if the latter, that

ment of the award of the judge, the litis aedificat, in case of non-restoration of the subject of the suit, the lis: (2) to secure the attendance of the defendant in court: (3) to prevent any other being done by him to the detriment of the subject of the suit. The plaintiff, if successful, could of course use on his judgment, by processus sibi sole: for instance; but it was more convenient to sue his opponent on his stipulation; and besides, this being sureties, multiplied the chances of obtaining adequate compensation.

See IV. 16 and notes thereon, also 7x. 64 and Cic. in Ferr. II. 1. c. 45 with the commentary of Pseudo Asconius on the passage (p. 191 et seq.).

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.

3 "Praecjudicium," says Zimmern, "in the language of practice, was not exactly a preliminary proceeding in the same sense as actio praecjudicatia, but a decision which might sooner or later be appealed to as a precedent." (Zimmern, traduit par Etienne, Traité des actions, pp. 295, 296.)

There is some difficulty at first sight in comprehending how his victory in the suit benefited
pro Praede Litis et Vindicarium.

ut per eam de re judicetur. unde etiam is cum quo agitur non restipulator: rude autem appellata est pro praede Litis Vindicarium stipulatio, guia in locum praedium succusat; quia olim, cum leges agebatur, pro lite et vindiciis, id est pro re et fructibus, a possessore petitori dabantur praedas. (95.) Ceterum si aput centumviro agitur, summam sponsonion non per formulam petimus, sed per legem actionem: sacramento enim rem provocamus; caeque sponso sestertiis cxxv nummorum fit, subject propter legem — — . (96.) Ipse autem qui in rem agit, si suo nomine agit, satia non dat. (97.) ac nec si per 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 praede litis et vindiciarium, because it was substituted for the praedes, who in olden times, when the proceedings were by legis acta, used to be assigned by the intermedioso possessor to the plaintiff, for the assuring of the litis et vindiciæ, i.e. the thing itself and the profits thereof. 95. But when the action is tried before the centumviri we do not sue for the amount of the sponson by a formula, but by a legis acta; for we challenge the defendant by the sacramental wager; and the sponson arising out of it is to the amount of 125 sestertes, according to the Lex .... 96. In the case of an actio in rem the plaintiff, if suing in his own name, does not furnish sureties. 97. Nay, the plaintiff. He had certainly gained his wager, but the real object of the suit was not the winning of a trifl such as 25 sestertes, but the securing of a transfer to him by his adversary of the lands in dispute. He could not proceed on his judgment, for an actio judicati 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 sestertes, and for this alone could he have brought an actio judicati; if such action had been allowed him at all; but we know that it was expressly refused him, for says Gaulus: "nec enim poenulis est summa sed prejudicials." How then did he proceed? On the stipulation "pro praede litis et vindiciarium," 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. 

cognitorum quidem agatur, ulla satisdatio vel ab ipso vel a dominio desideratur. cum enim certis et quasi sollemnilus verbis in locum domini substitutur cognitor, merito domini loco habetur. (98.) Procurator vero si agat, satisdare lucturum rem dominum habiturum: perculsum enim est, ne iterum dominus de eam re expertatur. quod perculsum non intervenit, si per cognitorum actum fuit; quia de qua re quique per cognitorum egit, de ea non magis amplius actionem habet quam si ipse egerit. (99.) Tutores et curatores eo modo quo et procuratores satisdare debere verba et factum, sed aliqua illius satisdationem remittitur. (100.) Hac in si in rem agatur: si vero in personam, ab actores quidem parte quando satisdari debent querentes, eadem repetemus quae diximus in actione qua in rem agitur. (101.) Ab eius vero parte cum quo agituir, si quidem alieno nomine aliquis intervenit, even though a suit be brought by means of a cognitor, no sureties are required either from him or his principal. For since the cognitor is put into the place of the principal in words of a formal and almost solemn character he is fairly regarded as occupying the position of the principal. 98. Hence when a procurator brings an action, he is ordered to furnish sureties that his principal may ratify his proceedings for there is the risk that the principal may again sue for the same thing. But 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 must; 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 answer to those who want to know when sureties ought to be furnished on the part of the plaintiff. 101. As to the case of a defendant,—when a man defends in another’s name, sureties must always be furnished,

1 IV. 83.
2 Cicero treats the subject of substitutio by cognitorum and procurator.
3 Even at some length in pro Quinct. c. 7, 8.
40.
omnimodo satisfacti debet, quia nemo alienae rei sine satisfac
tione defensor idones intelligitur. sed si quidem cum cogui
tore agatur, dominus satisfacire inbetet; si vero cum procurature,
ipse procurator. idem et de tutore et de cunctore iuris est.
(102.) Quod si proprio nomine aliquis iudicium accepist in
personam, certa ex causis satisfaci solet, quas ipse Praetor
significat. quorum satisfactionum duplex causa est. nam aut
propter genus actionis satisfatur, aut propter personam, quia
suspectum. propter genus actionis, velut indicati depesive,
cum aut de moribus mali oris agetur: propter personam, velut
si cum co agitur qui deoexerit, cuiusve bona a creditoribus
possessa proscriptave sunt, sive cum eo herede agitur quem
Praetor suspectum assestaverit.

103. Omnia autem iudicia aut legimmo iure consistent aut
because no one is considered competent to take up another's
case unless there be sureties; but the furnishing thereof will
be laid on the principal, when the proceedings are against
cognitor, whilst if they be against a procurator, the pro-
curator 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 untrustworth-
ily 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 de moribus mali oris; on
account of the person when the action is against one who
has squandered his property, 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.

103. All actions before iudices are either founded on the
statute law or based on the imperium of the Praetor.

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imperio continentur. (104.) Legima sunt iudicia quae in
urbe Roma vel intra primum urbis Romae milliarium inter
omnes cives Romanos sub uno iudice accuritar: etque e
lege Julia judiciaria, nisi in anno et sex mensibus indicata,
fuerint, expirant. et hoc est quod vulgo dicitur, e lege Julia
item anno et sex mensibus mori. (105.) Imperio vero con-
tinentur recuperatoria et quae sub uno iudice accuritar in-
veniente peregrini persona iudicat aut liigatior. in eadem
causa sunt quaeque urbe extra primum urbis Romae milliarium
tam inter cives Romanos quam inter peregrinos accuritar.
ideo autem imperio continenti iudicia dicuntur, quia tamet
valent, quam diu qui ea praeposita imperio habebit. (106.)

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, wherein all the parties are Roman citizens;
and these, according to the provisions of the Lex Julia Judici-
aria, expire unless a decision be pronounced upon them
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 Judiciaria. 105. In the other class are com-
paened actions before recuperatores, and those which are heard
before a single iudex, when a foreigner is concerned either as
iudex or litigant. In the same category are all actions heard
beyond the first milestone from the city of Rome, whether the
parties in them be citizens or foreigners. These actions are
said to be "based on the imperium," because they are effectual
only during such time as the Praetor who granted them
remains in office (retains his imperium). 106. If then the

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1 Temp. Augusti.
2 D. 49. 7. 7. From the following passages it will be seen that the
suffering an action to die, if done
willfully, was sometimes equivalent
to fraud or delict, D. 4. 2. 18. 1.
and D. 43. 3. 1.
3 Recuperatores were possibly, at
their original induction, 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 dele-
gates 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 just quidem, even
when both parties were Roman citi-
zens. See also notes on l. 39, iv.
46.

20—2
Et si quidem imperio continentis judicio actum fuerit, sive in rem sive in personam, sive ea formula quae in factum concepta est sive en quae in ius habet intentionem, postea nihilominus ipso iure de eadem re agi potest. et idem necessarium est exceptio rei judicatae vel in judicium deductae. (107) at vero si legitem judicii 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 judicium deductae. (108) Alia causa fuit olim legio actionem, nam quasi de re actum semel erat, de ea postea ipso iure agi non actione resorted to be one “based on the imperium,” whether it be in rem or in personam, and whether it have a formula the intentio whereof is in factum or one whereof the intentio is in ius, 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 judicium deductae. (107) But if proceedings in personam by action based on statute law 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 be a personal action in factum, another action may nevertheless according to the letter of the law be afterwards brought upon the same facts, and therefore the exceptio rei judicatae or that in judicium deductae is necessary. (108) In olden times the case was different with the legio 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

1 IV. 45. 2 III. 181. 3 An obligation is said to be destroyed ipso jure in two cases: firstly when there had already been a judgment in a legitimate judicium, in which case 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, (bulfulio 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 judicio by proof of the payment: this latter case is however foreign to the topic Galuis is here discussing. See Théra, vi. p. 145.

potent: nec omnia ita, ut nunc, usus erat illis temporibus exceptionum. (109) Ceterum potest ex lege quidem esse, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse. nam si verbi gratia ex lege Aquilia vel Ovinia vel Furia in provinciis agatur, imperio continentiur judicium: idemque iuris est et si Romae apud recuperatores agamus, vel aput unum iudicem interveniente peregrini persona. et ex diverso si ex ea causa, ex qua nobis edicto Praetoris datu actio, Romae sub uno iudice inter omnes cives Romanos accipiatur judicium, legitimum est.

110. Quo loco admonendi sumus, eae quidem actiones quae ex lege sitas consulti profesiones, perpetuo solvere Praetorem accommodare : eas vero quae ex propris iurisdictione pendent, plenunque in sua amano dare. (111) aliquando at all of exceptio 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 or Ovinia, or Furia, the action will be one “based upon the imperium,” and the rule is the same if we bring an action at Rome before recuperatores, or before one judge when there is a foreigner connected with the suit. So, conversely, if in a case where an action is granted under the Praetor’s edict the trial be at Rome before a single judge 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 those actions which arise from a lex or from senatusconsulto, but in general to grant those which spring from his own special jurisdiction only within one year. (111) Sometimes, however, the Praetor in
Actions which lie for or against an heir.

Omnia judicia esse absolutoria.

alia similis inventur actio. (113) Aliquando tamen eiam ex contractu actio neque heredi neque in heredem competit, nam adstitulatoris heros non habet actionem, et sponsoris et fide promissoris heros non tenetur.

114. Superest ut dissipiamus, si ante rem indicatam est cum quo agitur post acceptum iudicium satisfactiactori, quid officio iudicis conveniat: utrum absolvire, a iudice potius damnare, qua iudicii accipienda tempore in causa satis, ut damnari debeat, nostri praetoros absolvere cum debere existimant: nec interesse cuius generis iudicium. et hoc est quod volgo dicunt Sabino et Cassio placeat omnia indicia esse absolutoria. De bonae fidei iudicis autem idem sentiunt diversae scholas autore, quod in his quidem iudicis liberum est.

115. Sometimes, however, even an action on a contract does not lie for or against the heir of a party for the heir of an adstitulator has no action, and the heir of a sponsor or fidepromissor is not bound.

116. The next point for our consideration is this: supposing after the matter has been submitted to the iudex, but before the defendant make satisfaction to the plaintiff, what is the duty of the judec? Ought he to acquit, or rather to condemn him because at the time when the matter came before the iudex he was in such a plight that he ought to be condemned? Our authorities hold that the iudex ought to acquit him; and say that the nature of the action is a matter of no importance. And hence comes the common saying, that Sabinius and Cassius held that all issues before a judec that Sabinius and Cassius held "that all issues before a judec allow of acquittal." The authorities of the opposite school hold the same opinion with regard to actions bonae fidei.

...
officium iudicis. tantumdem eliam de in rem actionibus potuit
- [carit. 17 lin.].

115. Sequitur ut de exceptionibus discipiamus. (116.)
Comparatae sunt autem exceptiones defendendorum conum
gratia cum quibus agitur: ssepe enim accidit, ut quis iure
civili teneatur, sed iniquum sit cum iudicio condemnandi, velut
si stipulatus sit a a pecuniun tamquam credendi causa
numeraturus, sicut numeraverim. nam cum pecuniun a te peti
posse certum est; dare enim te oporent. cum in stipulatu
teneris: sed quia iniquum est te eo nomine condemnandi. placet
per exceptionem doli mali te defendi dehende. item si pactus

because in these the discretion of the jura 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 ex-
ceptions. Exceptions then are provided for the pur-
opose 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
pretense that I am about to pay you money by way of loan,
and then do not so pay it. In such a case it is clear that
the money can be sued for from 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 excep-
tio doli mali. So also if I have made a pact with you not to

1 A defendant might reply to the plaintiff's demand in three dif-
ferent ways: (1) by a denial of the facts alleged, which is styled by
later writers his contestatio necesse negare; (2) by asserting facts which
destroyed the right of action, non jure, although that might originally
have been well-founded, such facts for instance as payment real or bi-
dious, (oblatio or acceptatio); of such
replies the jure as a matter of course
took notice, without any express de-

1 See note on III. 89.
2 From a passage in the Fragmenta
De Jure Public., § 8, it would appear
that it was a somewhat serious of-
fense to purchase a re libertatis, for
by an edict of Augustus a penalty of
so assartia was imposed, besides the

1 A latter kind was founded on a par-
ticular state of facts for which there
was no nominate exception in the
edict, it would be in jure concepta:
since it was, if we may coin a term,
then a special exception praescrip-

fuero tecum, ne id quod mili debes a te petam, nihilominus
id ipsum a te petere possimus dare mili oportere, quia obli-
gatio pacto convenit non tollitur: sed placet dehende me
petendum per exceptionem pacti conveni repelle. (117.) In
his quoque actionibus quae non in personam sunt exceptiones
locum habent. velut si metu me coegeris aut dolo induceris,
mi rem aliquam misciendo dem. nam si eum rem a me
petas, datur mihi excepio per quam, si metus causa te facisse
vel dolo mala arguero, repelleris. item si fundum hirgisum
sciens a non possidente emeris eumque a possidente petas,
 opponitur tibi exceptio, per quam omnino summoweres.

118. Some exceptions are published
by the Praetor in his edict, some he grants on cause
being shown: but all of them are founded either on iure or


legibus vel ex his quae legis vicem optinent substantiam capiunt, vel ex jurisdictione Praetoris proflita sunt.

119. Omnes autem exceptiones in contrario concepientur, quae adformat is cum quo agitur. nam si verbi gratia res dolo male aliquid actorem facere dicit, qui forte pecuniam petit quam non numeravisti, sic exceptio concepitur: si in ea re nihil dolo male auli agerii factum sit neque fiat. item si dicitur contra pactium pecunia peti, in concepitu exceptio: si inter aulum agerium et numerium negidium non convenit ne ea pecunia petatur. et denique in ceteris causis similiter conscipti solet. ideo simile, quia omnis exceptio obicietur quidem a reo, sed ita formule inseritur, ut condicionali faciat condemnationem, id est ne alter index eum cum quo agitur condemnet, quam si nihil in ea re quae de agitur dolo actu factum sit; item ne alter index eum condemnet, quam si nullum pactum conventum de non petenda pecunia factum erit.

enactments having the force of leges, 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, 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 condemnatio conditional, i.e. that the judex is not to condemn the defendant unless nothing have been done fraudulently on the part of the plaintiff in the matter in question; or again that the judex is not to condemn him unless no agreement have been had that the money should not be sued for.

120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae. (121.) Peremptoriae sunt quae perpetuo valent, nec evitari possunt, velut quod mutus causa, aut dolo male, aut quod contra legem senatus consultum factum est, aut quod res indicata est vel in iudicium deducta est, item pacti convenit quo pactum est ne omnino pecunia peteretur. (122.) Dilatoriae sunt exceptiones quae ad tempus nocent, veluti illius pacti convenit quod factum est verbis gratia ne intra quinquennium peteretur: finito enim eo tempore non habet locum exceptio, cui similis exceptio est litis divisae et rei residue. nam si quis partem rei peferit et intra eiusdem praetoriam reliquiam partem petat, hae exceptione removetur, quae appellatur litis divisae. item si qui cum eodem plures lites habeat, de quibusdam egerit, de quibusdam distulerit, ut ad alios judices cant, si intra eiusdem praetoriam de his quae ita distulerint egat, per hanc exceptionem quae appella-

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 mutus causa, or dolo male, 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 judex", 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 divisae, and that rei residue. 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 exception styled litis divisae. 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

1 4. 116. 2 4. 56.
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 goes 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. 124. Exceptions are dilatory not only in relation to time, but also in relation to the person; of which latter kind are cognitary exceptions; as in the case of a person who, though incapacitated by the edict from nominating a cognitor, nevertheless employs one to carry on an action, or in that of a person who has the right of nominating a cognitor, but nominates a person who is unfit for the office; for if the exceptio cognitoria be pleaded, then supposing the principal be disqualified from nominating a cognitor, he can in person carry on the action; but if the cognitor be disqualified 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 contempt 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 position 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 replicatio, because by means of it the effect of the exception is rolled back again and united. Thus, for example, supposing I have agreed with you 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 you meet me with an exception that you ought to be condemned to pay me “if there has been no agreement that I should not sue for the money,” this exception pacti consenti 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

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1 IV. 134.  
2 IV. 85.  
3 This is not the ordinary meaning of distincture, but that it here bears the sense we have assigned to

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exceptione can tene per errorem non fuit usus, in integrum restitueri servandae exceptionis gratia: dilatoria vero si non fuit usus, an in integrum restitueri, quae est.

126. Interdum eventit, ut exceptio quae prima facie iusta videtur, in iudice nocet actori. Quod cum accidisset, alia adiectio opus est adhuc ad unius actus gratia: quae adiectio replicatio vocatur, quia per eam replicatur atque resolvitur eis exceptionis. Nam si veri iudicis pacti sim tecum, ne pecuniam quam mihi debes a te pereasu, definde postea in contrarium pacti sumus, id est ut petere mihi licet, et si ait tecum, excepsius, ut in iudice auscumentem, si non convenit ne eam pecuniam pereamus, novet mihi exceptio pacti conveni; namque nihilominus hoc venum manet, etiam si postea in contrarium pacti sumus. Sed quia in quantum est me excludi exceptione, replicatio mihi catur ex posteriori pacto hoc modo:

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It is obvious by reference to Theophrastus, who (evidently translating this sentence) writes: et \[ \delta \] 

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1 See note on IV. 85.
ground of the subsequent agreement, thus: "If it have not been subsequently agreed that he may sue for the money." Again suppose a banker seek to recover the price of a thing which has been sold at auction, and the exception be raised against him, that the purchaser is to be condemned to pay only "if the thing which he purchased have been delivered." 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 pays the price, the banker is relieved by a replication to the following effect: "Or if it has been announced at the outset that the thing is not to be delivered to the purchaser unless the purchaser has paid the price." If sometimes it happens that a replication in its turn, 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 duplicatio. 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 triplicatio. 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 praelectiones which are employed for the benefit of the plaintiff. 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 them on the termination of each year or month, there is a present obligation that the money for that period shall be paid, whilst as to the future years an obligation is held to be continued, 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 praelection: "Let that amount which is already due be the matter of suit." Otherwise, if we have proceeded without this praelection, that is, by the formula...
320. **Prescriptiones.**

tone egeriuni, ea solicet formula qua incertum petimus, quibus intento his verbis concepta est: QUIDQUID PARET NUMERIUM NEGIDIIAM AULO AGERIO DARE FACERE OPORTERIT, totam obligat in, id est etsum laterum in hoc indicium despectum, et quantumvis in oblataeae fuerit, utmne id solum consequitur, quod lite contentatem tempore praestare oportet, idque removeretur posta agere volente. Item si verbi gratia ex empto agamus, ut nobis fundus mancipio detur, debemus illa praescribere: EA RIS AGATUR DE FUNDO MANCIPANDO: ut postea, si velimus vacuam possessionem nobis tradiri, de tradenda ex vel ex stipulato vel ex empto agere possimus, nec si non praescriamus, totius illius iuris obligatio ills incerta actione: QUIDQUID ERAM REM NUMERIIUM NEGIDIIAM AULO AGERIO DARE FACERE OPORTET, per lite contentationem consumitur, ut postea nobis agere volentibus de vacuo possessione tradenda nulla supersit actio. (132.)

_Praescriptiones autem appellatas esse ab eo, quod ante formulas praescribantur, plus quam manifestum est._

through which we sue for an uncertain sum, and the _intento_ 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 contentatio_, 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; we ought to prefix this prescription; "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 prescribe, the binding force of the whole engagement is destroyed by the _litis contentatio_ 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. (133.) That presecriptions have their name from the fact of their being prefixed to formulae is more that evident.

133. Sed ets quidem temporibus, sicut supra quoque indiciumus, omnes prescriptiones ab actore profieecissent, ulla autem quasi demandam et pro reo opponebantur, quibus illa erat prescriptio: EA RIS AGATUR: SI IN EA RE PRAECLIDICUM HEREDITATI NON PIAT: quae nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis allo genere indicii praecidricum facit, velut cum res singulas petat; exit enim quinum por unus portis petitionem majoreti questioni de ipsa hereditate praecidricari, quae etiam his temporibus et, unde petitor, exceptio hanc in rem comparatur .......... (134.) Ab actore autem vel nunc presecriptions quandam specialis suae est quas supra enumerassimus additanda sunt .......... si v. gr. dominus servit titularis et stipulatio eius agere velit, in quae et praesentes et futurae obligaciones ex pacto insunt, forte si illa convien-

14. At the present day, as we have also stated above, all presecriptions proceed from the plaintiff, but in olden times some of them were set up by the defendant. Such was the presecription which ran thus: "Let this be the question tried: provided only that there be thereby no prior decisions 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 a suit for individual portions of it; for it would be unfair to allow the more important question as to the inheritance itself to be prejudiced by the petty 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 presecriptions 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

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1 IV. 170.
2 The whole of the passage in brackets is translated from Heffer's manuscript readings, given in the text above. This has been suggested to Heffer by various passages in the Digest, viz. D. 44. 21, D. 51. 44, D. 121. 40 and D. 48. 1. 166. 4 IV. 92.
Præscriptiones.

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set, ut ex peccatia quae in stipulatum deducit est mensura V Hs. refundentar: intentioni adorit ioco demonstrationis ita presup- hendens est: et ex agitur quod Chrysogonus Lucii Sei servus actio de Numero Negidio tristis Hs. stipulatus est conveniuntque inter eos, ut ex ea peccatia mensura V Hs. refundentar culpa rei dies fuit. Deinde intensione formulae determinatur in cui dari operet; et sane domino dari operet: quo servus stipulat, at in praescriptione de pacto quæuis quod secundum naturalen signaturen verum esse debet. (135) Quacunque autem diximus de servis, eadem de ceteris quoque personis quae nostro iuri subjectae sunt dicta intelligemus. (136) Item admonendi sumus, si cum ipsa aegamus qui incertum promiserit, arrangement having been, for example, that out of the money forming the subject of the stipulation five sestertia should be repaid monthly; a prescription ought to be inserted prior to the plaintiff's intentio and in the place of a demonstratio, to this effect: "Let this be the matter of suit, viz. that since the plaintiff, Chrysogonus, the slave of Lucius Titius, stipulated for 300 sestertia to be paid him by Numerius Negidius, and an agreement was entered into between them that out of that money five sestertia should be repaid monthly, which in fulment is now due." Then in the intentio 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 prescription that the question as to the pact is raised, which pact ought to be truly described 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 un-

1 So, 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 stipulationibus inesse credamus." 10, 12, 1. 40.
2 This is Heftin's explanation of norme: see his note ad locum. In the prescriptio, 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.

Præscriptiones. Interdicts.

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ita nobis formulam esse propositam, ut praescriptio inserta sit formulæ loco demonstrationis, hoc modo: JUDEX ESTQ. QUOD AULUS AGERIUS DE NUMERIO NEGIDIUS INCERTUM STIPULATUS EST, MODO CUIUS REI DIE FUIT, QUOD CUIUS OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPERET ET RELIQUA. (137) Si cum sponsore aut fideiussore agatur, praescriberi solet in persona quidem sponsoris hoc modo: EA RES AGATUR, QUOD AULUS AGERIUS DE LUCIO TITIO INCERTUM STIPULATUS EST, QUOD NOMINE NUMERIIUS NEGIDIUS SPONSOR EST, CUIUS REI DIE FUIT; IN PERSONA Vero fideiussoris: EA RES AGATUR, QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE SUA ESSE IUSSET, CUIUS REI DIE FUIT; deinde formula subi- citur.

138. Superest ut de interdictis dispiquam. (139) Certis igitur ex causis Praetor aut Proconsul principaliter auctoritatem suam finundi controversiis interponit. quod tum maxime facit, certain value, our formula is so set forth that in it a prescrip-tion takes the place of the demonstratio, thus: "Let there be a judeex. 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 fideiussor, there is usually in the case of a sponsor a prescription in this form: "Let this be the subject of the action. Inasmuch as Aulus Agerius stipulated for something uncertain from Lucius Titius, in respect whereof Numerius Negidius was sponsor, whatever amount be now due, &c." and in the case of a fideiussor: "Let this be the subject of the action. Inasmuch as Numerius Negidius became fideiussor for Lucius Titius, whatever amount be now due, &c." Then follows the formula.

139. We now have to discuss the subject of interdicts. 139. In certain cases then the Praetor or Proconsul inter-
poses his authority at the outset to bring disputes to a con-
clusion: and this he does more particularly in suits about
possession or quasi-possession, 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. 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 possession innocently," or that something be not done on sacred ground." Hence all interdicts are named either restitutary, exhibitory, or prohibitory. 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 *receptores*, and there, upon the issuing of formulae, investigation is made whether anything has been done contrary to the Praetor's edict or whether anything has not been done which he ordered to be done. And sometimes a penalty accompanies the action, sometimes it does not: therein a penalty is attached, for instance, when the proceedings are by *spolia*; there is no penalty, for instance, when an *arbitrator* is demanded. In prohibitory interdicts the course of proceeding is always by *sponsio*, in restitutary or exhibitory interdicts sometimes by *sponsio*, sometimes by the formula called *arbitraria*.

3. Interdict is here used as a general term, including decrees also. 
4. That is to say, against the *edita percutiunt*, 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, 101, 13. 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.

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et modo cum poena agitetur, modo sine poena: cum poena, velut cum per sponsionem agitur; sine poena, velut cum arbitreretur, et quidem ex prohibitoris interdictis semper per sponsionem agi solet, ex restitutionibus vero vel exhibitoriis modo per sponsionem, modo per formam agitare quae arbitraria vocatur.

142. Principalis *igitur* divisio in eo est, quod aut prohibitoriam *sunt* interdicta, aut restitutiona, aut exhibitoria. (143.) Sequens in eo est divisio, quod vel adispiscendae possessionis causa comparata sunt, vel retinenda, vel recuperanda.

1.4. Adispiscendae possessionis causa interdictum accommodat honorum possessio, cuius principium est *quorum bonorum*: eiusque vis et potestas habeat, ut quod quisque ex his bonis quorum possessione aliqui data est pro herede aut pro possessor possideret, id eci honorum possessione data est restitutur. pro herede autem possidere videtur tam est qui heres...
est, quam is qui putat se heredem esse: pro possessore is pos-
sidet qui sine causa aliquam rem hereditatim vel etiam totam
hereditatem, sciens ad se non pertinentem, possidet. Ideo autem
ad piscendae possessionis vocatur, quia et tamen utile est qui
nunc primum contatur ad piscis rei possessionem: itaque si quis
adaptus possessionem amiserit, desinit ei id interdictum utile
esse. (145.) Bonorum quoque emptori similiter proponitur in-
terdictum, quod quidam possessorium vacat. (146.) Item ei
qui publica bona emerit, eiusdem conditionis interdictum pro-
punitor, quod appellantur sectorium, quod sectori vocantur
qui publice bona mercantur. (147.) Interdictum quoque quod
appellantur Salvianum ad piscendae possessionis comparaturum est,

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 in-
heritance, knowing that he has no claim to it. The interdict
is styled ad piscendae possessionis, because it is only available
for a man who is now for the first time endeavouring to obtain
possession of a thing1; and therefore if after obtaining pos-
session 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 a bonorum emptor2, which some call by the
name interdictum possessorio. 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 sectorium is
given, because those who buy property sold for the benefit
of the state are called sectors. 147. The interdict also which
is called Salvianum is provided for the purpose of obtaining

1 Hence "resitutatur" 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 12. 248—258, passim.
2 111. 85.
3 No trace of this interdict is to be found in the sources: probably
because the later and more general interdict, "Non vi fiat ei qui in pos-
sessionem minus erit," D. 43. 4, was found to be a sufficient protec-
tion for bonorum emptores, and so the other fell into disuse. Zimmern
asserts that the old interdict, as well as that termed sectorium, was framed
upon the interdict quorum bonorum. 1. See Pseudo-Asconius on Cic. in
Cist. in Verr. 11. 1. 82 and 11. 1. 67. Festus
says, "Cisce et qui sectant dicentur, et qui emunt suas pecuniam." In 2 Phel.
26, Cicero calls Antony
Pompeii sector, and in § 29 of the same
name he spells of money
"quom pro sectione debatas." For
further information see Heleneccias,

148. Retinendae possessionis causa solet interdictum reddi,
cum ab utraque parte de proprietate aliquis rei controversia
est, et ante queriur, uter ex litigabundis possidere et uter
petere debeat, cuius rei gravitas comparata sunt uti possidetis
e utrubi. (149.) Et quidem ut possidetis interdictum de
fundi vel aedium possessione redditum, utrubi vero de renum
mobilem possessione. (150.) Et si quidem de fundo vel aedi-
bus interdictur, eum potorem esse Praetor iubet qui eo tem-
pore quo interdictum redditor nec vi nec clain nec precario
ab adversario possidet: si vero de re mobili, tune eum poti-
orem esse iubet qui maiore parte eius anni nec vi nec clain
nec precario ab adversario possidet: idque satis ipsius verbis

1 A full account of these inter-
dicts is to be found in Savigny's
Treatise on Possession (Perry's trans-
lation), Book IX, §§ 49, 51. See
also D. 43. 17, D. 43. 36.
2 Precario is thus defined by
Savigny (On Poss. p. 355). -- "Who-
ever permits another to enjoy pro-
erty (i. e. to enjoy natural posses-
sion), or to enjoy an easement, retains
to himself the right of recalling per-
mision at will, and the juridical re-
lation arising from the transaction is
called precario." This name had
its origin in the fact of the permi-
sion itself being usually obtained by
a pror; this prayer, however, is
not essential, and even a tacit per-
mission is sufficient.
Dulas says: "Precario possidere
videtur non tantum qui per epi-
stolam, vel quamque alia ratione
interdictorum significatur. (151.) At in utram interdicto non
solum sua cuique possessio prodest, sed etiam alterius quam
fustum est ei accedere, velut eius cui hares extiterit, eiusque
a quo emerit vel ex domitione aut dolis stione accipit.
Itaque si nostrae possessioni incuncta alterius iusta possessione
exsuperat adversarii possessionem, nos eo interdicto vincimus,
nulum autem propriam possessionem habebi accessio temporis
nee datur nec dari potest; nam et quod nullum est nihil acce-
dere potest. sed et si vitiosam habebat possessionem, id est ant
viam clam aut precario ab adversario adquiritam, non datur;
nam et possessio sua nihil prodest. (152.) Annus autem retor-
sus numerat, itaque si tu verbi gratia anni mensibus possessione
est prioribus v, et ego vii posterioribus, ego potior ero qua-
ntitate mensium possessionis; nec tibi in hoc interdicto prodest,

stated in the ancient wording of the interdict. 151. But in
the interdict utrubi a person is not only proffited by his own
possession, but also by that of any other person which law-
fully accures 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 d. 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 farther, if he have a tainted possession, i.e. one
acquired by violence, clandestine, or sufrance on the part
of his opponent, no accession is allowed: for his own pos-
session does not count for him. 152. The year is reckoned
backwards; therefore if you, for example, have been in pos-
session for the first five months of the year, and for the
last seven, I shall be in the latter position by the amount of
the months of my possession: nor will it be of service

hoc sibi concessi postulavit, sed et
is qui nullo voluntate inducit, pati
tienc tamen domino possidet. 151. A.
C. v. 6. 11. See also D. 43. 16. t.
The interdict is given in full in D.
43. 17. 1.
2 Instead of the words "qua-
litate . . . possessio est," Heffer reads
"pseudidet vero plurimum mensium
possessionis causa ibi in hoc inter-
dicto acquiri eti mem possessione
s. i.e. a man is understood to
have had possession for the major
part of the year, who has had pos-
session only for two months, pro-
vided the opponent's possession,
which has continued for the residue
of the year, be nulla, and so not
to be reckoned; see D. 46. 16. 156.
D. 43. 26. 1.
3 "possessione" does not mean
the same as possidere, the former
expression denoting the mere act
of detention, the latter that the de-
tention is protected by means of inter-
dicts; hence a tenant is "in posses-
ion," whereas his landlord "pos-

sessione. See Savigny On Possession,
translated by Perry, bk. 1. 87.
Savigny holds that possession
is acquired by a conjunction of these
elements, (1) the physical power of
dealing with a thing, and of pre-
venting others from it, (2) a know-
ledge 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 re-
divisive possession and we have
merely detention. The first two
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 deiecit," by means of which the ejector is compelled to restore the possession of the thing, provided only he who was ejected did not get the possession from his adversary by violence, clandestinity, or sufferance.

The reading of this passage which Heffter suggests agrees with Savigny's view. His reading is: "Unde etiam placuit ut quominum possidemus animo solo, quando vobisremus reversi abi rei possee nesciamus videmur." 1

1 It. 89. 94.

Although we can retain possession merely having the power of reproduction of the original factum, which Gains calls "by mere will," or animo 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.

4 This is really explained in Savigny's Tractatus, Bk. IV. 842; where the amount of violence necessary to found a claim for its benefit, and the question of self-redress are also entered into.

The interdict ran: "si illi restituas," i.e. "Restore to him that from which you have ejected him." 4

There is another reading after accusa alterem, and if we adopt it, the passage will run: "provided the person ejected did not get possession as against the other by force, clandestinity, or sufferance." There is much to be said for this reading, for 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.

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 he 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

2 See Savigny's Tractatus, p. 331.

The possessor who was ejected by any of the three modes named, could immediately possess himself, and if his original possession was considered by the law to have never been disturbed. See Paulus, J. R. Y. 6. 7. 4

3 See Savigny's Tractatus, p. 344, Clc. pro Tullio, c. 44 Clc. pro Cenc. c. 32.

4 It is not improbable, as Heffter suggests, that Gains in this last part is speaking of the interdict unde et the wrong-doer. The worduros does appear in the law, and the fact that the heirs were liable is stated in D. 42. 16. 3. 48, D. 43. 16. 3. pr., D. 43. 16. 3. 18.
which, our patron, being our two possessors, has been employed to these addresses, and desires that the thing be not done, and the defendant is he who attempts to do it. 160. The double are such as the interdicts Utipossidetis 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 taking possession of 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 libertas shall be produced 1 to whom his patron wishes to appoint his services, the matter is brought sine periculo res ad exitum perducitur, modo cum periculo. (163.) Namque si arbitrato postulaverit est cum quo agitur, accept forum quam appellatur arbitratoria. nam indigit arbitrio si quid resituit, et exhibeit, id sine poena exhiberet vel resituit, et ita absolvit: quod si nec resituit neque exhibeat, quia est in re est condemnatur. sedactorque sine poena expertur cum eo quom neque exhibere neque resituisse quicumque potest, nisi cum illius causa et oppositum fuerit. diversae quidem scholarum auctoribus placent probandum cum illicia juris et arbitrarii, quasi hic ipso confessus videatur, restituere se vel exhibere debere. sed alio in utrum, et recte: namque sine utio timore ne superaret arbitrum quisque postulare potest. (164.) Ceterum observare debet qui sed arbitrarii pete, ut statim petatur, antequam ex his exeat, id est antequam a Praetore discessit: sese min poterius non induciatur. (165.) In quo si arbitrarii non peterent, sed to a result sometimes without risk, sometimes with risk. 165. For if the defendants have demanded an arbitrer, he receives the formula of the kind called arbitratio; and then, if by the award of the judge 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, too, takes proceedings against a man who is not under obligation to produce or restore anything without making himself liable to any penalty, unless a suit for columnata 2 be instituted against him. The authorities of the opposite school think, however, that a defendant who has demanded an arbitrer is barred from instituting a suit for columnata, since by the very fact (of demanding an arbitrer) 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 arbitrer without being under any apprehension of losing his case. 164. He who wishes to demand an arbitrer, ought to be careful to do so before going out of court, that is, before he leaves the Praetor's presence; for if people make the demand at a later stage, it will not be granted. 165. Hence, the interdict," says Ulpian, "was to defend liberty and to prevent free men from being held in restraint, but it answered the purpose specified in the text also. D. 43. 29-1. IV. 99.
tacitus de iure exierit, cum periculo res ad exitum per-
ducitur, nam actor provocat adversarium spones-
se: nisi centra edictum Praetoris non exhibeant aut non re-
stituatur; ille autem adversus sponsionem adversarii resti-
pulatur, deinque actor quidem sponsonis adversarii resti-
pulatur; ille hoc invicem restitupationis. sed actor spon-
sionis formulae subiecit et allius iudicium de re restituenda vel
exhibenda, ut si sponsione vicerit, nisi ei res exhibatur aut
restitutatur adseriatius quanti ea res sit condemnata—[decretum 48
linae].

166. Postquam iugum Praetor interdictum reddidit, primum
litigatorum alterius res ab eo fructum liciendo rei tantisper
in possessione constiterit, si modo adversarii suo fructaria stipu-

if the defendant do not ask for an arbitrer, 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 spon-
son: “Unless he have not failed to produce or restore in
violation of the Praetor’s edict:” and the latter again makes a
restitupation 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 restitupation. But the plaintiff tacks
on to the formula in claim of the sponson another precept
for an issue to decide on the obligation (of the defendant)
to restore or produce, so that if he succeed in his sponson,
and the thing he not produced or restored, [his opponent shall
be condemned for the value of the thing].

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

which stipulations were tacked on to the sponsonis and really contained
the gist of the case.

Hence in his Tractatus de Possessu
(Deo 4, § 36), Savigny says
that unless the defendant on an
interdict admitted the plaintiff’s de-
mand, the process on the interdict
became identical with that in an
ordinary action.

See Cic. pro Caecina, 8, pro Tull.

1 Hellweg suggests the reading
which we have translated within the
brackets: it is obvious that the sen-
tence must have ended in some such
manner.

It will be observed that the pro-
ceedings are identical with those de-
scribed in IV. 92: the sponson being
in both cases prejudicial only and
intended to lead up to a decision on
the stipulation, pro praecl titris et
stripulationis in the one case, de re
restituenda vel exhibenda in the other,
dum me judicatum sit, adversarium quidem et sponsionem et restituationem suas quam cum eo feci condemnavit, et conveniunt ad sponsionem et restituationem quam mecum factae sunt absolvit. Et hoc amplius si apat adversarium meum possessionem, qui est fructus licitatioe vicini, nisi restituet mihi possessionem, Cæselliano sive secutorio judicio condemnaverit. (167) Ergo is qui fructus licitatioe vicini, si non probat ad se pertinentem possessionem, sponsionem et restituationem fructus licitatioe summam poenae nomine solvere daret præterea possessionem restituiere neboe: et hoc amplius fructus quos inerrae percepit reddat. Summa enim fructus licitatioe non pretium est fructuum, sed poenae nomine solvitur, quod quis alienum possessionem per hoc tempus retinet et facultatem revendi nasci conatus est. (168) Ille autem qui fructus licitatioe vicini est, si non probabit ad se pertinentem possessionem, tantum sponsionem et restituationem summam poenae nomine debet. (169) Almoendani tamen sumis liberum esse ei qui fructus licitatioe vicini erit, omnes fructuyaria stipulatione, sicut Cæselliano, condemnavit mei opponens to pay the amounts of the sponsio and restitulation which I entered into with him, and consequently acquits me from the sponsio and restitulation 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 Cæsellian or secutorio action, unless he restore the possession to me. 167. Therefore the successful bidder for the fruits is ordered to pay the amount of the sponsio and restituation and of his bid for the fruits by way of penalty, besides restoring the possession, in case he do not prove that the possession belongs to him: 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 penalty for a man's attempting to retain during such (inter-regiate) 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 sponsio and restituation. 169. We must, however, bear in mind that who is beaten in the bidding for the fruits is at liberty, even though no fructuaria stipulation has 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 Cæsellian or secutorio action: and for this purpose a special form of proceeding has been provided, called judicium fructuum, by means of which the plaintiff can obtain security for the payment of the award of the judex. 170. This action is called "secutorio" as well as the other, because it follows upon success in the sponsio, but it is not properly called Cæsellian also. 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 judicium, dispensatio, damnationem, or for legacies left by damnation in some cases it is allowable to enter into a sponsio, as for example, in suing upon the loan of an ascertained sum, or for an agreed amount, but in the case of an ascertained loan the sponsio

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1 IV. 91.
2 IV. 9. 25. 25.
3 III. 137.
4 III. 210, 216.
5 II. 201—208, 281.
6 II. 134.
7 Constitution was one of the Paci Priovatis, mentioned in note (1)
is allowed for a third part, in the case of an agreed amount it may be for a half. 172. But if the risk neither of a spon- 
sion 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 examination of an oath, “that the traverse is not pleaded 
vexatiously”1; hence, since heirs and those who are esteemed 
as heirs2 are never liable to penalties3, and since the penalty 
of the sponsum is generally remitted in the case of females and 
majors, 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 
such as the action of furtum manumfactum for four-fold, of 
furtum nec-manumfactum for double, those of furtum conceptum 
and oblatum for three-fold; for in these and some other cases 
the action is for more than the simple value, whether the 
defendant traverse or admit the claim. 

in the Appendix. 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 one owed by the man him-
self or by another person. A con-
stitutum would render actionable a 
promise which previously was a 
mero modum postulis not giving rise 
to an action, and the process pro-
vided for its recovery by the Praeto-
rian edict was that named in the text, viz. the actio constitutissimae 
personae. See Paul. § 71, 2. 
1 Paulus, S. R., ii. 1. D. 12. 2. 44. 
2 From Cio. pro Ren. Amer. c. 23 
we learn that in earlier times the 
penalty for falsely taking the oath de 
calumnia, was binding on the fore-
head with the letter K (for Kalum-
nia); and Helwicus thinks this pe-
nalty was inflicted whether the per-
jury took place in a civil or criminal 
action. See Hein. Antiq. iv. 16. 
3 So Bonorum possessores; ii. 119 
seqq. 
4 Another reading is “jure civil 
non amplius obligati sint” the 
meaning of which is the same as 
that of “poenis nunquam obligati 
sunt.” 
5 III. 189-191.

174. Actoris quoque calumnia coelectur modo calumniae 
indicio, modo contrario, modo ireurando, modo resti-
pulatione. (175.) Et quidem calumniae indicium adversus omnes 
actiones locum habet, et est decimae partis causae; adversus 
interdicta autem quartae partis causae. (176.) Librum est 
illâ cum quo agitur aut calumniae indicium opponere, aut 
textum exigere non calumniae causa agere. (177.) 
Contrarium autem indicium ex certis causis constitutur: 
vult si in unum agatur, et si cum maiore eo nomine aga-
tur, quod dictum ventris nomine in possessionem missa dolo 
malo ad alium possessionem transulisse; et si quis eo no-
mine agat, quod dict se a Praetore in possessionem mis-

1 See Sanders' notes on Inst. iv. 
2 Similar to that referred to in iv. 
174. 3 
3 III. 174. 
4 This was when a woman on the 
death of her husband claimed succe-
sion for a child of whom she said she 
was entitled. In such a case, as we 
see, interim-possession of the prop-
erty claimed was given to her. See 
D. 3. 2. 15-19, D. 25. 5, D. 25. 6, 
D. 29. 2. 30. 1.
Proceedings arising out of Calumnia.

sum ab alio quo admissum non esse sed adversus in iuriam quiadem actionem decimae partis datur; adversus vero duas istas qui amet coercitio est per contra-rium iudicium: nam calumniae iudicio x. partis nemo damnatur, nisi qui intelligat non recte se agere, sed vexandi adversarii gratia actionem instituat, potiusque ex indicis errore vel iniquitiae victoriam sperat quam ex causa veritatis; calumnia enim in adiectu est, sicut furti crimine. contrario vero iudicio omni modo damnatur actor, si causam non tenuerit, licet aliqua opinio inductus crediderit se recte agere. (179.) Utique autem ex quibus causis contrario iudicio agere potest, etiam calumniae iudicium locum habet: sed alterius tantum iudicio agere permetitur, qua ratione si insinuandum de calumnia exactum fuerit, quemadmodum calumniae iudicium non datur, ita et contrarium non dari debet. (180.) Restipulationis quoque poena ex certis causis fieri solut: et quemadmodum contrario

a grant of possession, his entry has been opposed by some one or other. When the action of calumnia is in reply to an actio injuriarum 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 of the two in the actio calumnia of a man is never inflicted 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 judge than through the merits of his cause: for calumnia like furteum lies in intention. 179. 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. Undoubtedly in all cases where we can proceed by cross-action, the judicium calumnier insert 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, as much as the judicium calumnier is not (allowed). 180. The restipulatory penalty is also one only applicable to certain special cases: and just

indicio omnimodo condemnatur actor, si causam non tenuerit, nec requiritur un sciens non recte se agere, ita etiam restipula- tionis poena omnimodo damnatur actor. (181.) Sane si ab actore et restipulationis poena petatur, et neque calumniae iudicium opponitur, neque iurisuradi religio inimicit: nam contra-rium iudicium in his causis locum non habere palam est.

182. Quibusdam iudiciis damati ignominiosi sunt, velut furti, vi honorum raptorum, iurianum; item pro sociis, fiduciae, tutelae, mandati, depositi. sed furti aut vi honorum raptorum et iurianum non solum damati notatur ignominia, sed etiam pacti: idque in edicto Praetoris scriptum est. et recte: plurimum enim interest utrum ex delito aliquis, an ex contractu de- litori al. et Praetor illa parte edicti id ipsum notat, nam con-

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 he is condemned to pay in every instance. 181. Clearly, if a restipulatory penalty be claimed from the plaintiff, no action of calumnia 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 for theft, robbery with violence, injuries; also those in respect of partnership, 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.

1. The plaintiff in the original ac-
thor, i.e. the defendant in the cross-action.
2. The meaning of this paragraph is 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 those remedies, and that he cannot employ first one and then another. The doctrine agrees with that in § 179.
3. See 13. 2. 6. 3.
4. The latter portion of the section is filled in according to Heffer's con-
jectural reading.
tractus separavil a delictis, ad eorum si quis alieno nomine conven-
nitur, velut procuratorio, as ignominia liber erit. Idem est si quis
fiduciarius nomine iudicio convenitur, etenim et hic pro allo
dannatur.

183. In summa sciendum est cum qui aliquem in ius vocare
vult et cum eo ugere, et cum qui vocatus est naturali ratione ac
lege iustum persovam habere debeat, quare etiam sine permissoni
Practoris nec liberis cum perennibus constitutum actio, nec patrono
et liberis, si non imperialis venia edicti, et in eum qui adversus
eas agent humane statutur. (184) Quando autem in
ius vocatus fuerit adversarius, ni eo die finitus fuerit negotium,
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 fiduciary, because he
too is condemned to pay on behalf of another.

183. In conclusion, be it known that both who wishes to
summon another into court and sue him and he who is
so summoned ought upon principles of equity as well as law
to have a status invested with full legal attributes. Hence,
therefore, without permission of the Praetor no action can be
brought by children against their parents; nor between a pa-
tron and his liberis unless special exemption be granted them
from the rule of the edict; and should any one act in con-
travention of these regulations a pecuniary penalty is imposed
on him. 184. When a defendant has been summoned to
court, unless the business be concluded on the day of sum-

1 The subject of infamia or igno-
nimia is treated of in D. 3. 2. See
especially 3. 2. 1. 3. 2. 4. 5. 3. 2. 6.
and 3. 2. 7.
2 Naturali ratio here means equi-
table as opposed to civil law, civil
law being denoted by the word lex.
See II. 64, 66, 67 and D. 4. 4. 8.
The phrase personam habere is iden-
tical with personam aliquam susti-
niturs, agent, eufers, etc., which occur
in Cicero, q. g. in Pro Sulla, 2. Pro
Quintico, 13. The rule laid down in
this section is approved of in D. 4.
4. 12. See also D. 5. 4. 1—4 and
13—25.
3 The section from this point to its
conclusion is translated from Her-
ter's conjectural reading.
4 The penalty was 5,000 sestercies,
also D. 2. 4. 4.
inviás obligare nobis possumus, praeterquam si Praetor aditus
permittit.

pel to furnish vadimonium to us against their will, save in
cases where the Praetor allows them to be brought before
him.

1 That is to say, in order to se-
eure their attendance at the trial by
means of a vadimonium the plaintiff
must first obtain leave from the Prae-
tor to summon them for the prelimi-
mary proceedings.
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, adjuratorum gentiliumque in AD pecunias ejus potestas esto" (Tab. 8. 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 expressing the combination of positive rights and authority possessed by the head of the household, the paterfamilias. Maine thinks that manus was the old word for household, the paterfamilias. We may conclude then that potestas was not the archaic word expressing the combination of positive rights and authority possessed by the head of the household, the paterfamilias. Maine thinks that manus was the old word for household, the paterfamilias.

But whatever was the archaic term, and whether there was one at all or not, potestas in the classical jurisprudence was the word used to express the rights and authority exercised by the paterfamilias over the persons of the familia, just as dominion denotes his power over the inanimate or unintelligent components of the same.

Mancipium, which originally means man-taking (mancum capturum), 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 Gaius, IV. 131); and, for the rights thereby acquired; 2d, for the object of the mancipatio, the thing to be transferred; 3d, for a particular kind of transferable objects, viz. slaves, in whom it is applied, so says a law of the Digest (D. 1. 5. 4. 3), because "ab hostibus manum capiuntur," although 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.

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 of the possessor of the potestas; so mancipius became a technical term implying the power exercised over free persons whose services had been transferred by mancipatio; and manus, originally almost identical with mancipium, was limited to the one case of power over a wife.

On the subject of mancipium read Mühlenerh's Appendix on I. 23, in Heinecci's Syntagmata, pp. 159, 160.
(E). On Arrogation and Adoption.

The process of arrogatio resembled the passing of a law, and took place at the Comitia Centuriata. Legislative sanction was required for so solemn an act as the assumption of the family of the arrogator in that of the arrogatus (see I. 197) 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 "patres omnia." (Tac. Ann. iii. 38), and arrogation naturally prevented vacancies occurring.

This method of adoption per populum was practically obsolete after the empire was established. In Cicero's time it seems to have been frequently employed, and in the Pro Domn. c. 20, we have a passage containing the form of words used: "Crede enim, quampam in illa adoptione legitime factum est nihil, tamen e casu interrogatum, Antoninis esse, ut in E. Fonteium vitne necessque potentatem 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 leges clientiuser apud pontifices, ut mens est, adopterem, &c." (Hist. I. 16).

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' Syntagma, i. xi. pp. 143-152, Milinkovich's edition, and Sandurs' Justinian, pp. 114, 115.

(C). On Tutors.

Tutors may be thus tabulated according to their species:

I. Testamentarii...
   (a) Optivi, §§ 154.
   (b) Dativi, §§ 114.
   (c) Agnati, §§ 145.
II. Legitimi...
   (a) Patroni, §§ 165.
   (b) Quasi-patroni, §§ 175.
III. Fiduciarii...
   (a) Manumissores liberarum personarum, §§ 166.
   (b) Liber liberi patrum, §§ 172.
IV. Cessici (§6), §§ 168.
V. Dativi (a magistratibus dati)...
   (a) Pracisti, §§ 176-184.
   (b) Atiziani, §§ 185-197.

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 persona siete juris. In Gaius' time the notion that women were incapable at any age of managing their affairs was exploded (§ 190), and therefore the tutor of a woman, in many cases, had to appropriate her ancillarum 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 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 (§ 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 tutela legitima above, we are told that the tutor had great power to compel forbearances (§ 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 tutor's legitime of the aggregate over women were abolished in Gaius' time, presumably the same remarks would have applied to them.

A. Tutoris testamentarii were allowed by the law of the Twelve Tables: "ut inagens super pecuniam tutelamine quasi reti jus est." Hence this class might be called legiones equally with the succeeding, but to avoid confusion the two are marked by different appellations.

B. Tutoris legitimi are of three kinds:

I. The agenti of one to whom the paterfamilias had appointed no testamentary guardian. The clause of the Twelve Tables which authorized the agenti to act is lost, but Gaius is explicit in his statement that their authority is based on the Tables (§ 165).

II. The patroni and their children (§ 165b) by implication arising from the wording of the Tables. The son very properly succeeds his father as tutor, since if 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 (§ 172). If, however, the manumittor were a stranger, he would not be a tutor legitima, but only a tutor fiduciarius: (§ 166); and again, the children of a tutor legitima of this class, which we may call the class of quasi-patroni, would be tutoris fiduciarii (§ 173). The father is allowed to have tutela legitima, because when he manumitted the son as a preliminary to emancipation by himself, he is regarded as retaining in some degree his potestas (§ 140), and although emancipation dissolved 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 in 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 potestas or quasi-patroni, 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 manumittor be a woman, for, as above observed, the coercive powers of a tutor legitima were great, and those of a tutor fiduciarius nil.

C. Tutoris fiduciarii are of two kinds:

I. Manumittors of free persons manumitted to them by a parent or emancipator. Such persons have only the tutorship of the nominal character, because when manumission 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 (§ 141).

II. Children of quasi-patroni, whose case we have discussed just above.
D. *Tutore contici.* 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. *Tutore delectus.*—

I. *Praetorius,* given by the praetor for various reasons (38 B.C.—184), 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 time.

II. *Attitum,* tutors appointed by the magistrate in cases where a minor or woman has no tutor at all.

(D). 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 Halâfiz's *Analysis of the Civil Law.*

I. Natural modes of acquisition.

(a) Occupancy.
   (1) Of animals. *Inst.* ii. 66, 67, 68.
   (2) Of property of the enemy. *Inst.* ii. 69.
   (3) Of things found. *Inst.* ii. 18 and 39.

(b) Accession.
   (1) Natural.
      (a) The young of animals. *Inst.* ii. 19 and 37.
      (b) Alluvion. *Inst.* ii. 70.
      (c) Islands rising in the sea or a river. *Inst.* ii. 72.
      (d) Channels deserted by a river. *Inst.* ii. 23.

(c) Industrial.
   (1) Specification. *Inst.* ii. 79.
   (2) Conjunction of solids. *Inst.* ii. 126.
   (4) Commixtion of solids. *Inst.* ii. 128.
   (5) Backlings. *Inst.* ii. 73.
   (6) Writing. *Inst.* ii. 77.
   (7) Painting. *Inst.* ii. 78.

(g) Mixed.
   (1) Planting. *Inst.* ii. 74.
   (2) Sowing. *Inst.* ii. 75.

(c) Tradition (delivery). *Inst.* ii. 65.

(1) On sale. *Inst.* ii. 41.

(2) On gift. *Inst.*

II. Civil Modes of acquisition. *Inst.* ii. 4.

(A) Universal.

(1) Succession on death.
   (1) By testament (hereditatis). *Inst.* ii. 98.
   (2) By law (hereditatis). *Inst.* ii. 98.
   (3) By the edict (bonorum possessio). *Inst.* ii. 98.
   (4) By fecio commissum. *Inst.* ii. 248.

(1) Arrogation. *Inst.* ii. 98, iii. 83.
(2) Conventio in manum. *Inst.* ii. 98, iii. 83.
(3) Bankruptcy. *Inst.* ii. 98, iii. 77.
   (1) Voluntary (ceatio bonorum). *Inst.* ii. 78.
   (2) Involuntary (ceatio bonorum).

(1) Adlittio bonorum liberatalion serandum causas. *Inst.* i. 6, ii. 11.

(c) Cestio in jure hereditatis. *Inst.* ii. 85.

(B) Singulars—


(2) *Cesiio in jure.* *Inst.* ii. 22.

(1) Usucapio. *Inst.* ii. 41.

(1) *Donatio proprius.* *Inst.* ii. 7, 2.

(2) *Donatio improperius.*
   (1) Propter nuptias. *Inst.* ii. 7, 3.
   (2) Mortis causa. *Inst.* ii. 7, 1.

(f) Succession on death.


(2) Fideo commissum singularius. *Inst.* ii. 260.

(E). On the *causes rendering a Testament invalid.*

When a testament would not stand, it might be either:

1. *Intestatum,*
   2. *Non jure factum,* owing to some original defect:
   3. *Imperfectum,* if a child be omitted or disinherited without cause; if the testator have not testamentum factum: or if the heir have it not:
   4. *Nulla momenti,* if a child be omitted or disinherited without cause: if the testator have not testamentum factum: or if the heir have it not:
   5. *Ruptum,* by an agnation or quasi-agation: by a subsequent testament: by revocation or destruction:
   6. *Destitutum,* or *inutilius,* through a capillo diminutivo of the taster, or through no heir appearing under it:
   7. *Nulla momenti,* when no heir appears under it:
   8. *Recisium,* when a quarta ineficacii is sustained. See *Inst.* ii. 18.
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>
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<tbody>
<tr>
<td>Per Vindicatio</td>
<td>Per Damnatio</td>
<td>Sine mari</td>
<td>Per Praeceptum.</td>
</tr>
</tbody>
</table>

FOUR. Direct bequest. Simple charge Charge upon Direct bequest to the legatee, upon the heir, the heir in a peculiar form. to one of several joint-heirs.


Subject. Property or Anything Property of Property of

fund Quiritium whatever, whether the testator or the testator, of the testator, or belonging to the heir, to the heir, the heir, or a stranger; in existence or future.
Dismissing these Praetorian obligations, we will briefly indicate the species included under the genera numbered 1, and 11. above.

Contracts stricti juris (1. 1, above) were either verbal or literal. The verbal being the stipulations so fully described by Gaius (III. 92—137); the literal obligations being the conventus, chirographum and syngraphum, as to which he also says enough (III. 154—156) to render further particulars unnecessary in this place.

The obligations from delict (1. 2, above) are divisible, as Gaius tells us (III. 183—189), arising either from iura, rei finum, damnum, in quibusdam datu, or injuria.

As to the iura consuetudinis, gyrum (1. 3, above), Gaius says but little, and that little indirectly and inferentially (c. II. 91). We stated above that these gyrum included two important branches, quasi-contracts and quasi-delicts; of the former subdivision we may bring forward especially the instances of Negligentum, and business transacted for a man without his knowledge or consent, whereby a jurial relation arises, which is described in detail by Mackeldoy in his Systema Juris Romani, §§ 460—466; and nolitum toto, touched upon by Gaius slightly, but as to which Mackeldoy also gives full information in §§ 468—470, and Lastly, componunt reiunum, a community of interest entailed upon two or more persons without agreement of their own, for which we shall again refer the reader to Mackeldoy, §§ 464—467.

The quasi delicts are chiefly injurious acts of slaves or descendants for which the master or ascendant is bound to make reparation, some of which are named by Justinian in Inst. iv. 1, and 2; and the act of a judex, qui legem sanata facit (Gai. iv. 52) is another instance. Another 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 or by falling on a passer-by or his property works him damage.

The other gyrum are obligations arising from the contracts of our sours, such as solicaria, remedied by the actions of quasi prist (IV. 70), excotions and instilatoria (IV. 54), tribuloria (IV. 52), de peculo, de vir in rem versa (IV. 173), or from the delicts of our sons and slaves or mischief committed by our cattle, remedied by the actions mexiton and de pernici. (IV. 72—80 and Inst. Inst. iv. 5 and 8.)

We now need only specify the chief contracts falling under Class ii. above, and the pacta giving rise to an action, and our enumeration of obligations is compleated.

Real contracts, then, are usuim, a loan where the borrower has not to return the identical thing lent, but an equivalent: consolvitur, a loan where the borrower has to return the identical thing he has received: deposita, 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 sequestratio, the placing of a thing in the hands of some person till its ownership is decided by a real delict. In each of these there are certain contracts, which for want of a more specific name of styled consolvitum; and by the Roman lawyers are ranked in four subdivisions, viz., Do ad do, Do ad Pactum, Pactum ad Pactum, etc.; and the first of which, though called inominative, has a name, consolvitum.

Consensual contracts are Employ Venitio, Locatio Conductio, Societas and Mandato, treated of by Gaius (III. 135—161), Ephesius, or a lease perpetual on condition of the regular payment of a rent, and Superestam, a lease of a similar character, but referring only to the building on a particular plot of land, but not affecting the land, and therefore terminated by the destruction of the building.

The contracts described as real or consensual are house 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-contacts and quasi-deeds.

_Pacta_ adjeta et _pacta_ legitima (see t. 4. above) still remain to be mentioned. The former are agreements attached to bona fide 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 agreements that on the purchaser selling again what he has bought, the vendor shall have a right of pre-emption, &c. &c. (see Mackeldey, § 419). _Pacta_ legitima are of various kinds, but the chief are the _pacta domus_ and that of _de dicto constituenda_. These again are too minute in their nature to be discussed in an elementary treatise, and we refer the reader desirous of information to Mackeldey, §§ 420–428.

(K). On the _Decemviri_ Centumviri, _Lex_ Pinaria, _Lex_ Adullus, _Leges_ Julianae.

A. The _Decemviri_ utilitas judiciandae.

From the time of the _XII_ Tables _decemviri_ seem always to have existed in the Romam state, a fact which is indicated by Livy (iii. 55) in the words he quotes from a law of the consulship of Valerius and Horatius: "_ut qui tribunis plebis aequilbus judicibus decemviri constituerent eis caput jovis sacrum esse, familia ad aedem Ceresi Liberatemque veneri iret._" Livy tells us that the original _decemviri_, by whom the _XII_ Tables were drawn up, themselves exercised judicial functions "singuli ille crono quoque die in aedem Ceres et Liberato." When the consular government was re-established a new government was re-established, a new government was re-established, _decemviri_ were still kept in existence, and, according to Heffer, had cognizance of almost all suits up to the date of the institution of the Praetor's office in 497. Until that event Heffer also holds that there was no giving of a _judex_, except in cases where the law specially provided for suits being conducted _pro judicii postulatione_ grounding his opinion on Tab. L. 1. 7: "_XII pagina, in commodo in quo non merito causam coniecto, quin permittat_ ambo presenta post _merendam presentium_ stilem adiecto_" so that the _decemviri_ had what in later times was styled _cognitio extraordinaria_ in all sacramental cases.

B. The _Lex_ Pinaria.

This _lex_ enacted about B.C. 450, 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 magistrate 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. 20) which seems to refer the institution of _decemviri_ to the same period as that of the _quattuor viri venirum_, &c., the words being: "_unde quin exest necessitas magistratus qui hostae pro cesso, decemviri utilitias judiciando sunt constituere. Eodem tempore et quattuor viri etc._" But as we know from Livy that the office existed previously, we must admit that the strict meaning of _utilitias_ should not be pressed, but that we ought rather to understand that some new function was conferred on the _decemviri_; and _hasta_ 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 will, however, necessitate our placing the _Lex Pinaria_ in the year 368 B.C. instead of 350 B.C., because Pomponius says the _quattuorviri_ were instituted at the same time as the _triennviri capitales_, and the date of their institution is B.C. 368; but, first, we are not bound to consider that Pomponius is accurate to a few years in his very sketchy account; and, second, if we be there is no valid reason for the commonly-received opinion that B.C. 350 is the date of the _Lex Pinaria_.

C. The _Lex_ Adullus. Gaius says that by this law and the _Lex_ Piatius the _leges_ _aeternae_ were abolished, save in two cases, viz. actions referring to _damnum inferius_, and actions tried before the _centumviri_. Those who wish to know exactly how much was effected by the _Lex Adullus_ and the _Lex Piatius_ respectively, should consult Heffer's _Observations_, pp. 18–41, a portion of his work too long for transcription here. The result he arrives at are these: the _Lex Adullus_ 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 or citizenship should be left to the _decemviri utilitas judiciandae_, and that all other cases which had previously been sued out_ per judicii arbitrio_ or _per communum_ 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 165 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: _quae sum_ centumvirdinalibus, in qua _usus_ isumque, _tutelae_; _genilitatam_, _agnationem_, _alluvionem_, _circumalluvionem_, _neuromencipiam_, _pantiam_, _liminum_, _stillicidiorum_, _testamentorum_, _castaerumque_ _recum iam_ _jum vacantur_. (De Ord. i. 38.)

E. The _Lex_ _Julia_. In the reign of Augustus important changes in the constitution of the _centumviri_ courts took place. The _decemviri utilitas judiciandae_ had all some slight original and independent jurisdiction left to them, but the _Julius_ laws gave them a new _function_, that of presidents of the _centumviri_, to act as the office previously held by ex _quinquarii_. The _centumviri_ was at the same time, or soon after increased to 180, and they were divided into two or four tribunals, _some_ (_see above_), 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 _Julius_ 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 praetor_. Others have denied this statement; but there is very little evidence either way.

F. The _Form of Process_ in a _Centumviri_ Case. 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, _sponsio_, 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.

1 See Cic. pro Circillio, 323; pro Deo, 28.
2 See Festus, sub verbo.
3 Heffer maintains that application could in some cases be made to the _Praetor_ _Peregrinus_. See _Obi_, p. 39.
Appendix.

(L). 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.

Arrangements for holding the court were, however, first briefly noted. The nature and extent of the jurisdiction of those higher officials by whom all points of pleading and technical preliminaries were decided.

It is sufficient to take up this narrative at the time when the Praetors were the supreme judges, invested with that twofold legal authority which is described by the technical words jura et imperium. (See III. 18.) Two functions were comprised in the jurebus: one that of issuing decrees, the other that of assigning a iudex (judicet 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 iudicet Publicum, 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 formal at the sittings de plano than at those pro tribunali, where all those cases were argued 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 counsel. Thus 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, I have pleaded, often have I acted as iudex, often have I sat in theComitium. The Praetor's court was closed on certain days, for, as is well known, there were due fati, due nefasti and due interdicta. On the former days, says Varro, "the Praetor could deliver his opinions without offence, on the days of fati, the Praetor was forbidden to enter his courthnotes Do, Diuo, Addito!" consequently on those days no suits could be heard. The business before the court was distributed methodically over the day; thus on one day postulations only would be taken, on another cognitiones, on a third decrees, on a fourth manuscripts, and so on, an arrangement perfectly familiar to the practising English lawyer, who takes care to provide himself with the case lists 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.

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 jure vocatio. In old times this in jure vocatio was of a very primitive character. The plaintiff obtained an audience before the judge, who he brought 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 head and striking them on the face, the whole being done in such a way as to please. 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 disallowed. 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 responso, 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 actio adiuvatica. This moved from the plaintiff, and was in effect the actual commencement of the case itself. It is 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 actio in jure was issued, or after its issue he might informally and out of court state his demands, and his opponent, or tell him the form of action he intended to adopt. Which ever 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. to make a formal demand of a formula.

No particular phraseology or formal language was imposed upon the plaintiff in the publication of the actio. 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 actio adiuvatica and the deductio in judicium) for "actio apicis futuras hodie demonstravit" he promised himself at the outset.

Of course such dangers 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 was affected 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 was immediately made or at a later period, the Praetor was not bound to declare such refusal by a decretum, but could if he chose simply pay no attention to the application. Hence, during the régime of thelex iurium the importance of strict and precise compliance with the rules of pleading for the conclusion of ill-drawn or badly-worded pleading on the part of the

1 See Horae, Sat. 1. 67. 24, and Philo
deo, Casarum, xii. 18. 25.

2 See Plutarch, Pers. 4. 8. 10.

3 See Cicero, de Oratore, xi. 5.

4 See Cicero, de Oratore, xi. 5.

5 See Cassius Dio, 55. 5. 10.

6 See Cicero, de Oratore, xi. 5.

7 See Cassius Dio, 56. 5. 3. 9.

8 See Cicero, de Oratore, xi. 5.

9 See Cassius Dio, 56. 5. 3. 9.

10 See Cicero, de Oratore, xi. 5.
plaintiff was failure, or to use the technical phraseology, causa caduca. During the
formality period there was not so much risk of this mishap, for the Praetor himself used
then the judgement was not final in his court proceeding.
In case the defendant were in fault, his vadimonia would be said to be datum, and the plaintiff
be authorized to sue him or his bail (which he pledged) ex stipulatione, for the amount stated in the
vadimonia form. Another means of securing attendance in court was a sponsio, entered
by the parties themselves without the intervention of securitis, and then on default of appearance: a
missio in praesentatione was granted. This was given by the Praetor's edict, and enabled the plaintiff to be put
in position of the defendant's goods. Such was the process by which ease was taken on the one hand
to prevent frivolous and vexatious actions, and on the other to bring the parties to judgment of issue, or to that stage where a formula could be
granted. For this purpose the forms were:—The Praetor
having taken his seat in court, ordered the list of all the actions that had been entered and demanded
were to be brought before him, and the parties to be called into court. His object in doing this
was to dispose of the vadimonia 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 into
my bail, where art thou who hast cited me? see here I am ready to meet thee 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 thou shouldst make transfer of them to me.' This colloquy being
ended, the next step was for the plaintiff to make his petition to the
Praetor. These the Praetor could refuse, in
some cases at once, in others upon cause shown. Supposing he was assented to the
postulation, he granted a formula, but first heard both parties upon the application.
the case was stated by whom the formula was to be drawn up.
Various other technicalities attached to the vadimonia. Two or three
only need be specified. In the first place, as we have seen, bail might be
exacted upon entering into a vadimonia; but it might also be entered into
without any bail or surety, and then it was termed praetorius vadimonia.
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 the event of vadimonia datum. If the defendant answered to his
bail, he was said vadimonia sideris; if he forfeited his recognizance, vadimonia deserunt, if the day of
appearance were put off, vadimonia differe was the technical phrase.
The consequences that ensued upon the vadimonia being entered into were as follows: where the two parties appeared in person upon the day
fixed, the object of the vadimonia being thus secured, the vadimonia
time was not called into the case, and the pleadings went on in the regular way, which
will presently be described: If, however, one of the other of them failed
to appear when the Praetor directed their case to be called on (citeret), the result, in case the plaintiff were in fault, was that he lost his case,
(amicus caduca), but the judgement was not final in his court proceeding.

remitted to him in the formula. A few words, then, upon the nature and extent of the jurisdiction of the júdex will not be out of place. The júdex was a private person, not a trained lawyer; his position with reference to the parties was a combination of arbitrator and jurymen; because he was entrusted with what in effect was the settlement of the matter in dispute between the parties; jurymen, 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. These, however, were more limited. Yet, though he was bound by the law of the forum to try the question of fact, this was not 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 prætor or præses: and in later times, if not in the days of Cicero, he was also able to obtain advice from a consullus who sat on benches near him. (Anil. Gell. Nov. III. xiv. c. 2.) And, further, his decisions upon legal points were subject to the control and review of the prætor, who might annul the sentence, and either refuse to execute it or, if necessary, send it for a further hearing.

At 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 jurius. For he was able to add pleas in equitable actions (actus bonae fidei). The iudex and the cuniprudentes 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 could obtain no difficulty in making his decision.

The cause then was called on, and the parties were summoned into court. In judicio. On their appearance, the oath of cunatus was administered to them, and when that had been taken, the advowee (patrocinium) was expected to open the cases of their clients. This they did with a very short outline of the facts. After this brief narrative, called causam collocavit.

1 The matter was now in judicio, as opposed to the previous enquires, which were scopulare. Were it necessary to try to find corresponding English terms, one might perhaps think of "attaining the forum", or "in flash, in Flures." 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 inibitio cautelae; the action effectuated by the peticuta cautelae (tit. 36, 37, and D. 46, 12, 19); the plaintiff's power of interrogating in jure, (not very unlike the modern common-law interrogatories); confessions and acknowledgments; the method by which the parties were to begin the proceedings before the prætor; the forum and remedia actio, or the various ambitio of the actions (D. 19, 17, 19). The actions of law, as we have them explained in Gellius, were to be divided into seven, with the exception of the Damnum servantum, which are the only ones that were ever actually used. (Tit. 36, 17, 19.) The iudex himself, upon his taking his seat, had to swear to do his duty faithfully and legally. He did this in the Digest it is called causam conjunctio. D. 40, 17, 1.

2 A list of judges selected from the body of plebeius was drawn up by each praetor on the commencement of his year of office. He was then supposed from this list to have made his own selection (c. prae leg.) Strictly speaking, the plebeius nominated the judges, but the indefiniteness of his selection was necessary. Cic. de orat. ii. 70.

3 This matter was confided entirely to questions of law; for as to matters of fact, the iudex was to rely upon his own observation and judgment, or the fact of him, to decide about res hòa. Cic. de orat. ii. 70. The importance and varied work of the iudices are evidenced by the fact that the title of a book of the Digest, containing upwards of 48 books, is devoted to the judges, D. 4, 2, 4.

4 "Ultra id judicis in quaestione deficit exterrit argentum" (postuleret Legibus non posuerit). D. 19, 3, 18.

5 Cic. de orat. ii. 70. The iudex himself, upon his taking his seat, had to swear to do his duty faithfully and legally. He did this in the Digest it is called causam conjunctio. D. 40, 17, 1.

6 This matter was confided entirely to questions of law; for as to matters of fact, the iudex was to rely upon his own observation and judgment, or the fact of him, to decide about res hòa. Cic. de orat. ii. 70. The importance and varied work of the iudices are evidenced by the fact that the title of a book of the Digest, containing upwards of 48 books, is devoted to the judges, D. 4, 2, 4.

7 Cic. de orat. ii. 70. The iudex himself, upon his taking his seat, had to swear to do his duty faithfully and legally. He did this in the Digest it is called causam conjunctio. D. 40, 17, 1.

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