THE COMMENTARIES OF
GAIUS
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 unwearyed 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 1856.
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-Justinianic 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 name 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 responsendi. 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 responsa, will show that there is in Gaius, as his Commentaries also evince, an
unreadiness to give his own opinion upon contested questions, a strong inclination to collect and put side by side the views of opposite schools, and a constant anxiety to treat a legal doctrine from an historical rather than a judicial point of view. In Ulpian and Paulus, and men of that stamp, we meet with decisive and pithy opinions upon legal difficulties, an abundant proof of firm self-reliance and indifference to opposite views, and a lawyer-like way of looking at a doctrine as it affects the case before them, rather than accounting for its appearance as a problem of Jurisprudence or Legislature; with them it is the matter itself which is of primary importance, with Gaius it is the clearing up of everything connected with the full understanding in the abstract of the subject on which he is engaged. To this peculiar turn of his mind we are probably indebted for his keen appreciation of the help which history affords to law, and for the large amount of reference to archaic forms and ceremonies which proceeds from his pen.

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

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 *potestas* and *manus*, who can act alone and who require some legal medium to render their acts valid. In fact, the main object of the whole of this first part is to render clear to his hearers how those who are of free birth stand, not only in relation to those who are not, but in relation to the law. Hence there is no attempt at explaining the nature of Law and Jurisprudence, no classification of the parts of Law, no aiming at philosophical arrangement and analysis, but a simple declaration of the Roman law as it affects its subjects, men, illustrated of course by historical as well as by technical references. Hence 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 *Latinus* 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 fidei commissa; last come obligations, which are discussed as incorporeal things not capable of transfer by manetpation, in jure esse, 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 peregrini to the existing legal institutions of Rome, the other the constant references to the effect of the establishment of the Praetorian courts, with their equitable interpretations and fictions, upon the old Civil Law. A few words upon these two points will not be out of place. There is a chapter in Mr 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 peregrini were affected.

Mr Merivale tells us then “that great numbers had gained their footing as Roman Citizens by serving magistracies in the Latin towns, but the Roman rights to which they had attained were still so far incomplete that they had no power of deriving an untaxed inheritance from their parents. Hence the value of citizenship thus burdened and circumscribed was held in question by the Latins. Nerva and Trajan decreed that those new citizens, as they were designated, who thus came in, as it was called, through Lattiam, 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 Bœcking’s short but valuable Annotation ad Tabulas systematas 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 *Perigrini* 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 shown 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 *vivo voce* filling-up, or by reference to notes taken by some one of his auditors.¹

¹ After this conclusion had been come to by the Editors they had the satisfaction of finding their views borne out by an excellent monograph published only a few months back by Dr Dernburg of Halle, of which they have since made free use. Die Institutionen des Gaius, ein Compendium in zwei bd. 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 transeamus ad fidecommissa. Et prius de hereditatibus depositis," 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 sponoris non tenetur, fidejussoris autem heres tenetur;" the identity of phraseology rivetting 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 Heffter's variations and suggestions, for upon that book Heffter is the leading authority. Gneist's edition, as is well-known, is a recension of all the German editions prior to 1857, the date of its publication. The chief of these editions we ought perhaps to enumerate; as to the others the reader will find full information in the preface to Böcking's fourth edition, published at Leipzig in 1855. The Editio Princeps of 1820 was brought out by Göschen, 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 Göschen in 1824. It is of this edition that Böcking remarks: "Hujus exempli quam diu nostris non satis honor, nunquam pretium diminuet." Death interrupted Göschen 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. Heffter's elaborate commentary and carefully emended text of the fourth book bears 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
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filled in conjecturally where lacunae appeared in the manuscript. In the troublesome task of verifying these italics we have depended on the reprint of the Verona MS. itself, which Böcking published in 1866. In the preface to this work, written by Göschen, the date of the MS. is referred to a time anterior to the age of Justinian: a conclusion in which Niebuhr and Koppe coincide.

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

In the translation we have adhered as literally to the text as possible, preferring to explain difficult passages in notes rather than to paraphrase them.

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

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

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

Cambridge, March 1870.

THE COMMENTARIES OF GAIUS.

BOOK I.

DE JURE GENTIUM ET CIVIL.

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

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. Quæ singula qualia sint, suis locis proponemus.

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

3. Lex est quod populus iubet atque constituit. Plebiscitum
est quod plebs iubet atque constituit. Plebis autem
a populo eo disat, quod populi appellatione universi cives
significantur, connumeratis eiam patriciis; plebis autem
appellatione sine patriciis ceteri cives significantur. Unde olim
patricii dicebant plebiscitis se non teneri, quia sine auctoritate
corum facta essent. sed postea lex Hortensia lata est, qua
catum est ut plebiscita universum populum tenerent. itaque
eo modo legibus exsequata sunt.

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

2. Now rules of law consist of leges, plebiscita, senatus-
consultis, 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 populus1 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 leges2.

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

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

6. Ips autem edicendi habent magistratus populi Romani.
sempiam illum in edictis duorum Praetorum, urbani
et peregrini: quorum in provinciis jurisdictionem Praesides
est, habent; item in edictis Aedicularum eturium, quorum
jurisdictionem in provinciis populi Romani Quaestores habent;
nam in provinciis Caesaris omnino Quaestores non mittuntur,
et ob id hoc edictum in his provinciis non proponitur.

4. A senatusconsultum is what the senate directs and estab-
lishes, and it has the force of a lex, although this point was at
one time disputed1.

5. A constitution of the emperor is what the emperor estab-
lishes by his decree, edict, or rescript,2 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 peregrinus,3 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 (Aedil-
itan) edict is not promulgated therein.

1 Theophilus says that the force of
laws was given to Sesta, by the
Lex Hortensia: Thes. lib. 1. p. 11.
2. 5. But see Niebuhr's remarks on
this law, Lectures on Roman History,
3 Decretum = a decision given by
the emperor in his capacity of judge.
Rescriptum = a general constitution.
4 In the imperial times the pro-
vinces were divided into two classes,
province imperatoris or Caesar, and
province prefectus or Gallus, governed
by legis
1—2
De Jure Divinom.

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

De Condicionem Homomum.

9. Et quidem summa divisione de iure personarum haec est, quod omnem hominem aut liber sunt aut servit.


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 lex 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 proconsules senatoriae, governed by proconsuls nominated by the senate. This division was done away with about the middle of the 3rd century.

1 The jurists 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 permittam est" refer. See D. i. 2. 47.

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

3 Austin discusses the signification of "person," natural or legal, in Lecture 13.

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

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

12. Rursus libertinorum tria sunt genera: nam aut cives Romani, aut Latinii, aut dediticorum numero sunt. de quibus singulis dispiciamus; ac prius de dediticis.

De dediticis vel legge aelia sentia.

13. Lege Aeilia Sentia cavetur, ut qui servis a dominis poenae nomine vincendi sunt, quibusve stigmata inscripta sint, deinde quibus ob noxam quassio tormentis habita sit et in ea noxa fuisse convicis sint, quique ut ferro aut cum bestis depugnaret traditi sint, inae ludum custodiamve convexi fuerint, et postea vel ab eodem domino vel ab alio manumissi, eisdem conditionis liberis, eius conditionis sunt peregrini dediticii. [De peregrinis dediticis.

14. Vocantur autem peregrini dediticii hi qui quondam adversus populum Romanum armis susceperunt, deinde, ut victi sunt, se dediderunt. (15.) Huius ergo turpitudinis servos quocumque modo

et cuiuscumque aetatis munissos, etiam pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo deductitutum numero constitut intellegemus.

16. Si vero in nulla tali turpitudine sit servus, munissos modo cives Romanos, modo Latinos fieri dicemus. (17.) Nam in cuius persona tra haec concurrent, ut maior sit anno-

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

De manumissione vel causa probacione.

18. Quod autem de aetate servii requiritur, lege Aelia Sentia introductum est. nam ea lex minores xix annorum servos non aliter vobis munissos cives Romanos fieri, quam si vindicta, aput 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, censu, or testamento, such an one becomes a Roman citizen: but if any one of these qualifications be wanting he will be a Latin.

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

1 "Pleno iure" = "ex iure Quiritium," i.e. not merely "in bonis," for the signification of which terms see II. 42. Compare also § 17, below. For further information as to dediticii see III. 74; Ulp. I. 11.

2 See Lord Mackenzie's Roman Law, p. 310, and Cicero pro Tibullis, 8. The name was subsequently applied to officers holding an analogous position in the provinces. Ulpian, l. 132; cf. Plin. Ep. III. 20.

6 Civis Romani and Latini.

Lawful causes for Manumission: 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 Recuperators, 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 a insolvent master in his will that he was left free and an heir.
22. \textit{...manumissi sunt, Latini Juniani dicuntur}: Latin ideo, quia adsimulati sunt Latinis coloniariis; Juniani ideo, quia per legem Juniam libertatem acceperunt, cum eis servii viderentur esse. (23.) Non tamen illis permittit lex Junia nec ipsis testamentum facere, nec ex testamento alieno capere, nec tutores testamento dari. (24.) Quod autem diximus ex testamento cos capere non posse, in intellegendum est, ut nihil directo hereditatis legatorum nomine cos posse capere dicamus; aliquinque per fideicommissum capere possunt.

25. Hi vero qui deditiorum numero sunt nullo modo ex testamento capere possunt, non magis quam qui liber peregrinus.

22. \textit{...are manumitted are called Latini Juniani}:
Latin i because they are put on the same footing with the Latin colonists; \textit{Juniani} because they have received their liberty under the Lex Junia, whereas in former times they were considered to be slaves. 23. The Lex Junia does not, however, allow them either to make a testament for themselves, or to take anything by virtue of another man's testament, or to be appointed 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 \textit{fideicommissum}. 25. But those who are in the category of \textit{dediticii} 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 \textit{dediticii} is of the lowest kind, nor is access to Roman citizenship allowed them by any lex, senatus-consulatum, 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. Latinis 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

1 The general sense of the former words at the beginning of this paragraph no doubt was that those who were manumitted, though not fulfilling all the three conditions of § 17, were Junian Latins. Read ili. 56.
2 The Latin colonists here meant are not the inhabitants of the old Latin towns (whose franchise is called \textit{majus Latinum} by Niebuhr), who had full civil rights by the Julian law; but the colonists and inhabitants of the towns of Cisalpine Gaul, who were raised to the rank of Latins by a law of Cn. Pompeius Strabo; the bulk of the population, however, being debarred from \textit{comitium}, and those who held magistracies alone receiving Roman citizenship. See note on l. 93. This franchise Niebuhr calls \textit{minus Latinum}, \textit{Hist. of Rome}, Vol. ii. pp. 77–78.
3 Lex Junia Norbiana, A.D. 19.
4 In ancient times slaves manumitted irregularly only held their liberty on sufferance. Their masters could recall them into slavery, hence \textit{olim servi videlicet usque}.
5 Ulpian, l. 12.
6 I. 144.
7 II. 146.
this in the presence of not less than seven witnesses, Roman citizens of the age of puberty¹, and have begotten a son, and this son has attained the age of one year, shall be allowed, if they please, to apply, in virtue of that law, to the Praetor, or in the provinces to the governor, and adduce proof that they have married a wife in accordance with the provisions of the Lex Aelia Sentia, and have a son a year old; and if he before whom the case is proved, shall declare that it is as they say, then both the Latin himself, and his wife (if she be of the same condition), and their son (if he also be of the same condition), are ordered to become Roman citizens². For this reason do we add with reference to their son, "if he also be of the same condition," because if the wife of the Latin be a Roman citizen, the child born from her is a Roman citizen by birth in virtue of a recent senatusconsultum, which was enacted at the instance¹ 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 senatusconsultum², enacted in the consulship of Pegasus and Pusio, to those also who were manumitted and made Latins when over thirty years of age³. 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. If a slave belong to any man both in bonis and ex jure Quirini⁵, when manumitted, (by this same owner, that is

1. The comitia or senate in early imperial times still legislated in appearance, but their legislation was according to the emperor's suggestion. The comitia being incommodious 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 senatusconsultum were at the instance of the prince. See Austin, Vol. II. p. 390 (p. 234, third edition).
2. A.D. 75.
3. Who were Latins, that is to say, by failure of one or other of the conditions marked (2) and (3) in § 7 above.
4. In the 17th and 20th lines of the missing 39, Gieschen proposes a reading founded on the appearance of the MS., which at that point is somewhat more distinct, as follows: "By the Lex Julia it was enacted that if a Latin had expended not less than a fifth of his patrimony in the construction of a house at Rome, he should obtain the Quirinal right." From Ulpián, III. 1. a portion of the missing paragraph 34 may be thus supplied: "A Latin obtains Roman citizenship by a ship, if he build one of not less than 10,000 modii burden and uses it for carrying corn to Rome for six years."
Hindrances to Manumission.

sus, ab eodem scilicet, et Latins fieri potest et ius Quiritium consequi.

36. Non tamen cuique valenti manumittere licet. (37.) nam est qui in fraudem creditorum vel in fraudem patroni manumittit, nihil agit, quia lex Aelia Sentia inedit libertatem.

38. Item eadem lege minori xx annorum domino non altior manumittere permittitur, quam si vindicta aput consilium iustae causa manumissionis adprobata fuerit. (39.) Iustae autem to say,) he can both become a Latin and obtain the "Jus Quiritium" (i.e. become a Roman citizen).

36. Moreover the law does not allow any one who chooses to manumit; 37. For he who manumits with the view of defrauding his creditors or his patron 4 effects nothing, since the Lex Aelia Sentia bars the gift of freedom.

38. Likewise by the same law a master under twenty years of age is not allowed to manumit except by vindicta 4, (after) a lawful cause for manumission has been proved before the council. 39. 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 Latinitas 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 libertio, 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 attendant being his original master. See Ulpian, l. 4.

2 See Ulpian, 1. 17–21, for a complete list of the cases where manumission is not allowed.

3 The patronus is the former master of a libertinus. The jura patrocinii were:

(a) Obligations: duties attaching upon the libertinus by operation of law, e.g. to furnish room 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 patron to the goods of the libertinus. (39.) 39 et seq.

(c) Operae: 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 Theophillus nor in the fragments of Ulpian, and it need hardly be said that in matters of historical information upon the old Roman law, Justinian's treatise is valueless. Niebuhr and Gossen think the passage should have the following collocation of words, "non altior vindicta manumittere permittitur quam si aput, &c."
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. 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 12 as 3, "ex antecedenti numero," and so for other cases.

The lost portion of the MS. contained a further provision of the lex, that the slaves to be liberated should be mentioned by name, and that if the testator had nominated more than the number allowed by law, those whose names stood first on the list should be liberated in order, until the proper number had been completed. Testators having adopted the plan of writing the names in a circle to evade this regulation, the interpretation of § 46 was brought to bear against them. Utilian, t. 25.
gentes animadvertere possimus dominis in servos vitae necisque postestatem esse, et quodcumque per servum adquiritur, id domino adquiritur. (53.) Sed hoc tempore neque civibus Romanis, nec ullo alio hominibus qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire. Nam ex constitutione sacra tissimae Imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eisdem Principis constitutionem coercetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad fana deorum vel ad status Principum confugium, praecipit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. Et utrumque recte fit; male enim nostro iure uti non debemus:

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. 366 (p. 383, third edition), on the question of slavery being according to natural law or not.

5. Ac prius dispiciamus de ipsis qui in aliena potestate sunt.

6. In potestate iisque sunt servi dominorum. quae quidem potestas juris gentium est: nam apud omnes peraque

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

48. Next comes another division of the law of persons. For some persons are sui iuris, some are subject to the jus (authority) of another. 49. But again of those persons who are subject to the authority of another, some are in potestas, some in manus, some in mancipium. 50. 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 iuris.

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

52. Slaves, then, are in the potestas of their masters, which potestas is a creature of the jus gentium, for we may perceive

Sui juris, alieni juris. Potestas.

sit, ut qui creditorum fraudandorum causa manumissi sint liberi non sint [37.], etiam hoc ad peregrinos pertinent (senatus ita censuit ex auctoritate Hadriani); cetera vero iura eius legis ad peregrinos non pertinent.

48. Sequitur de iure personarum alia divisione, nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subjectae. (49.) Sed rursus carum personarum, quae alieno iuri subjectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt. (50.) Videamus nunc de iis quae alieno iuri subjectae sint: si cognoverimus quae istae personae sint, simul intellegemus quae sui iuris sint.

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

52. In potestate itaque sunt servi dominorum. quae quidem potestas juris gentium est: nam apud omnes peraque

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. 53. 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
54. Ceterum cum apud cives Romanus duplex sit dominiunum, nam vel in bonis vel ex iure Quiritium vel ex utroque iure cuissaque servus esse intellegitur, ita denuo servum in potestate domini esse dicemus, si in bonis eius sit, etiam si simul ex iure Quiritium elasdem non sit. nam qui nadum ius Quiritium in servo habet, est potestatem habere non intellegitur.

55. Item in potestate nostra sunt liberi nostri quos instis nuptii procreavimus. quod ius proprium civium Romanorum est. fere enim nulli ali sunt homines, qui tam in filios suos habent potestatem, qualem nos habemus. idque divas Hadrianus edicto quo proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. nec me praetul Galaturn gentem credere, in potestatem 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. II. 49. 41.

2. By jus naturae sunt legatae nuptiae is meant a marriage contracted and established by the special forms prescribed by the jus civitatis; but the jus naturae, on the other hand, is not necessarily meant an illegal marriage, for this sometimes denotes the contract which, though not completed according to all the prescribed forms of the jus civitatis, is valid according to the jus gentium. This was an important distinction in reference to the causae probandi.

56. Habent autem in potestate liberos cives Romanii, si cives Romanus uxores duxerint, vel etiam Latinus peregrinus cum qui quis cominibus habeat. cum enim cominibus id efficiat, ut iure patriae conditionem sequuntur, eventi ut non solum cives Romanit, sed et in potestate patris sint. (57.) Unde et veterum quibusdam concedi solet principalibus constituitionibus cominibus cum his Latinis peregrinis quas primas post missionem uxores duxerint, et qui ex eo matrimonio nascuntur, et cives Romani et in potestate parentum sunt.

58. Scirent autem est non omnes nobis uxores duter libere: nam a quaramand nuptii abstinere debemus.

56. Roman citizens then have their children in their potestas if they have married Roman citizens or even Latin or foreign women with whom they have cominibus. For since cominibus has the effect of making children follow the condition of their father, the result is that they are not only Roman citizens by birth, but are also under their father's potestas. 57. Hence by the Imperial constitutions there is often granted to certain classes of veterans cominibus with such Latin or foreign women as they take for their first wives after their dismissal from service; and the children of such a marriage are both Roman citizens and in the potestas of their ascendants.

58. Now we must bear in mind that we may not marry any woman we please, for there are some from marriage by whom we must refrain.

1. Cominibus est uxoris duxendum etiam uxoris duxendum. Cominibus habet cives Romanii cum cives Romani; cum Latinis autem et peregrinis e a s o c o n v e n e n t e s s i u s c u m servis nullum est cominibus. Ulpian, v. 3–5. The double aspect of cominibus, viz. as it affected status, and as it related to degrees of relationship, also had an important bearing on the causae probandi; as far as the former is concerned, cominibus existed as an unexpired right between all free persons, but only as a privilege (and therefore requiring proof) between Latins and foreigners,

2. Galatiae does not here tell us what were the rights of a father having 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 peculiar droit de mariage and quasi-castitas, for which see D. 14, 6, 2, and Sandars' Justinian, D. 339. Read also Maine, pp. 145–146.

3. Nuptiae and matrimonium seem to be used indiscriminately by Galatiae. 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 convivium est, velut inter patrem et filiam, vel matrem et filium, vel avum et neptem: et si tales personae inter se coe- rint, nefarias atque incestas nuptias contraxisse dicens. et haec adeo ha sunt, ut quamvis per adoptionem parentem liberorumve loco sibi esse coeperint, non possunt inter se matrimonio coniungi, in tanti, ut et dissoluta adoptione idem iuris man- nent: itaque eam quae nobis adoptione filiac aut neptis loco esse coeperit non poterimus uxor um ducere, quamvis eam emancipaverimus.

60. Inter eas quoque personas quae ex transverso gradu cognatione iunguntur est quaedam similis observatio, sed non tanta. (61.) Sane inter fratrem et sororem prohibita sunt nuptiae, sive eodem patre cademque matre nati fuerint, sive alterius 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 convivium between them, for instance, between father and daughter, or mother and son, or grandfather 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 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

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1 Ulpian, v. 6.
2 Ibid.
3 i. 7. Whether they be of the whole or half blood.
non utique: nec ob id in potestate eius sunt, sed quae sunt

65. Aliquando autem evitit, ut liberi qui statim ut nati sunt

66. Itaque si Latinus ex lege Aelia Sentia uxore

duxerit, et si Latinus ex Aelia Sentia uxore

duxerit, et si Latinus ex Aelia Sentia uxore

67. Item si civis Romanus Latinam aut peregrinam uxorem

duxerit per ignorantiam, cum eam civem Romanam esse

duxerit per ignorantiam, cum eam civem Romanam esse

68. Item si civis Romana per errorem nupta

69. Item si civis Romana per errorem nupta

1 Ulpian, iv. 2. Sine patria according to the second derivation is

Causae Probatio.

mero est, in sua conditione permanet, et ideo filius, quamvis
fat civis Romanus, in potestate patris non redigitur. (69.)
Item si Latina peregrina, quem Latinum esse crederet, sup-
serit, potest ex senatusconsulto filio nato causam erroris probare,
et ita omnes sint cives Romani, et filius in potestate patris esse
incipit. (70.) Idem ibi enim est, si Latinus per errorem
peregrinam quasi Latinam aut cive Romanum et legi Aelia
Senia uxorem duxerit. (71.) Praeterea si civis Romanus, qui
se credidisset Latinum, dixisset Latinam, permittit ex filio
nato erroris causam probare, tamquam si ex legi Aelia Senia
uxorem duxisset. Item si qui hic cives Romani essent, pere-
grinas esse esse credidissent et peregrinas uxorres duxissent,
permittitur ex senatusconsulto filio nato causam erroris probare:
quo facto peregrina uxor civis Romanam fil et filius quoque ita
non solum ad civitatem Romanam pervenit, sed etiam in potes-
tatem patris redigatur. (72.) Quaequeque de filio esse diximus,
adem et de filia dicta intellegemus. (73.) Et quantum ad
erroris causam probandam 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.
69. Likewise if a Latin woman be married to a foreigner,
thinking him to be a Latin, she can, by virtue of the senatus-
consultum, 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 Senia, 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,
his 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 Senia. 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
of error, it matters not of what age the son or daughter
be. 74. Likewise in the case of a foreigner... (who)
had married, and after the birth of his son had obtained Roman
citizenship in some other way, when afterwards the question
was raised whether he could prove a cause of error, the
emperor Antoninus declared in a rescript that he could as well
prove a cause as if he had remained a foreigner. Whence we
gather that a foreigner too can prove a cause of error.
75. 76. 77. 

1 The rest of this paragraph is
corrupt, but it seems plain that Gaius
goes on to say, that although in
proving a cause of error the age of
the child is immaterial; yet it is not
so when a Junian Latin applies to
the Praetor in virtue of the Lex Aelia
Senia, for his claim is not entertain-
ed unless the child is above one
year of age.

2 §76 is so corrupt that any trans-
lation of it must be mere guess-work.
The commencement of §76 is also
mutilated, but obviously Gaius is
speaking of the case of a Roman
marrying a woman of a nation with
which there is comitia. See 1. 56.
Romana peregrino non sit, qui nascitur, licet omni modo peregrinus sit, tamen interiuncte conubii iustus filius est, tamquam si ex peregrina eum procreasset. hoc tamen tempore et senatusconsulto quod auctore divo Hadriano factum est, eodem non fuerit conubium inter civem Romanam et peregrinem, qui nascitur iustus patris filius est. (78.) Quod autem diximus inter civem Romanam peregrinumque matrimonio cum qui nascitur, peregrinum [desunt 11 lin.].

§ 79. Adeo autem hoc ita est, ut [desunt 3 lin.] sed etiam, qui Latini nominatur: sed ad alios Latinos pertinent, qui proprios populos propinquaque civitates habebant et erant peregrinorum numero. (80.) Adem ratione ex contrario ex Latino et cive Romana qui nascitur, cives Romanus nascitur. fuerunt tamen qui putaverunt ex lege Aelia Sentia contracto matrimonio Latinum nasci, quin videtur 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.

8. But when we said that on a marriage taking place between a Roman woman and a foreigner, the child is a foreigner...

8c. 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 contracted in accordance with the Lex Aelia Sentia, the child is a Latin, because it is considered that conubium is granted between them in that case by the Leges Aelia Sentia and the Lex Aelia Coeca.

The rule that the child in this case should follow the condition of the father rather than that of the mother is anomalous; and Grimm raises the same question, which is raised above, no doubt on the same principle. See Ulpian, v. 8, and D. 1. 5. 24.

This paragraph again is altogether in confusion. Probably what is implied by it is that except in the case touched by the Lex Mensa, the child of a marriage without conubium follows his mother's condition by the jus gentium. Then follows the further explanation, that as marriages without conubium are all liable to this incident, it matters whether the Latins concerned are technical Latins (Julians), or actual Latins by birth, "aliae Latinos" as Gaius terms them, who, as we now learn, were classed among the foreigners.

Junia, and conubium always has the effect that the child follows the condition of the father; but that when the marriage is contracted in any other way the condition of the child is that of the mother. Nowadays, however, he is a Roman: inasmuch as we adopt this rule by reason of a senatusconsultum, in which it is laid down that the child of a Latin man and a Roman woman is in every case a Roman citizen by birth. Thus agreeably to these principles this rule is also stated in the senatusconsultum (passed) at the instance of the late emperor Hadrian 8, 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 les, or anything equivalent to a lex, may have changed in any instance the rule of the jus gentium. 84. Thus, for example, by a senatusconsultum of Claudius, a Roman woman who cohabited with another person's slave with the master's consent, might herself...
conditum.

coitis, ipsa ex proponitur liberta permaneret, sed servum procerac: nam quod inter eam et dominium ipsius servi conveneret, ex senatusconsulto ratum esse iubetur. sed postea divus Hadrianus iniquitate rei et ineleetiea iuris motus restituit iuris gentium regulam, ut eum ipsa mulier liberae remans, liberum pariet. (85) Ex leg...ex ancilla et libero poterat liberis nasci: nam ea lege cavetur, ut si quis cum aliena quam credidam liberam esse coepit, si quidem masculi nascantur, liberis sint, si vero feminae, ad eam pertinent cuius mater ancilla fuerit. sed et in his specie divus Vespasianus inelegania iuris motus restituit iuris gentium regulam, ut omni modo, etiam si masculi nascantur, servi sint eis cuius et mater fuerit. (86) Sed illa pars eiusdem legis salva est, ut ex libera et servo alieno, quem sciendum 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 ius 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 cohabited 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 ius 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,

...Itaque apud quos tales lex non est, qui nascitur iure gentium matris conditionem sequitur et ob id liber est.

87. Quibus autem casibus matris et non patris conditionem sequitur qui nascitur, idem casibus in potestate eum patris, etiam si civis Romanus sit, non esse plus quam manifestum est. etideo superius retulimus, quibusdam casibus perser- reorem non iusto contracto matrimonio senatum intervenire et emendare vitium matrimonii, eoque modo plerumque efficere, ut in potestatem patris filius reddatur. (88) Sed si ancilla ex cive Romano conceperit, deinde manumissa civis Romana facta sit, et tunc pariet, licet civis Romanus sit qui nascitur, sit a patre eius, non tamen in potestatem patris est, quia neque ex iusto coitu conceptus est, neque ex ullo senatusconsulto talis coitus quasi iustus constituitur.

89. Quod autem placuit, si ancilla ex cive Romano conce- who have no such law, the child by the jus gentium follows the mother's condition, and therefore is free.

87. Now in all cases where the child follows the condition of the mother and not of the father, it is more than plain that he is not in the potestas of his father, even though he be a Roman citizen; and therefore we have stated above that in certain cases, when by mistake an unlawful marriage has been contracted, the senate interferes and makes good the law in the marriage, and thus generally causes the son to be brought under his father's potestas. 88. But if a female slave conceives by a Roman citizen, be then manumitted and made a Roman citizen, and then bear her child, although the child is a Roman citizen, just as much as his father is, yet he is not in his father's potestas, because he is neither born from a lawful cohabitation, nor is such a cohabitation put on the footing of a lawful one by any senatusconsultum.

89. The rule, however, that if a slave woman conceive by a

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2. See as to this word integritas, Austin, Loc. XXX. p. 741 (P. 557, third edition).
3. Whether the Lex here referred to is the Lex Aelia Senta or some later Lex, or whether it is the Senatus-consultum above specified, is a moot point among commentators, but not of sufficient importance to be examined at length. It is certainly improbable that so accurate a writer as Cicero should have used Lex and Senatusconsultum as convertible terms.
5. Senatus here meaning the Legislature by a senatusconsultum. The senate never interfered in cases of this sort (reversus probatio) directly, and as a court or body. Indirectly no doubt it did, i.e. by the publication of an enactment on the particular subject.
peril, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit: nam hi qui illegitimae concepiuntur, statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberis sunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. at hi qui legitimae concepiuntur, ex conceptionis tempore statum sumunt. (93.) Itaque si cui mulieri civi Romana praegnanti aqua et igni interdictum fuerit, eoque modo pergrina fiat, et tune pariatur, complures distinguunt et putunt, si quidem ex iustis nuptis conceperit, cive Romano. ex ea nasci, si vero volgo conceperit, peregrinum ex ea nasci. (91.) Item si qua mulier civis Romana praegnans ex senatusconsulto Claudiano ancilla facta sit ob id, quod alieno servorum denuntiante domino eius, complures distinguunt et existimant, si quidem ex iustis nuptis conceperit, cive Romanum

Roman citizen and be then manumitted and bear her child, such child is free born, is based on natural reason. But 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

1 Ulpián, v. 10.
2 It was a rule of Roman law that no one could lose his citizenship without his own consent. The interdict from fire and water brought about the result which justice required but the law could not effect. The culprit by being debarred from the necessary of life was driven to inflict on himself banishment, and with it loss of citizenship. "Id autem ut esset faciebat, nom adempta civitatis, sed tecti et arane et ignis interdiciones faciebat." Cic. pro Dom. 30.

37. 160.

ex ea nasci, si vero volgo conceperit, servum nasci eius est illud. (91.) Item peregrina quoque si volgo conceperit, deinde civis Romana facta sit, et pariatur, cive Romanum pariatur; si vero ex peregrino, cui secundum leges moresque peregrinorum coniuncta est, videtur ex senatusconsulto quod auctore dito Hadriano factum est peregrinus nasci, qui patri eius civitas Romana quiescit sit.

93. Si peregrinus cum liberis civitate Romana donatus fuerit, non alter fili in potestate eius siben, quam a Imperator eos in potestate redderet. quod ita demum est factum, si causa cognita esse aminaverit hoc filiis expedire: diligentius atque exactius enim causam cognoscit de impuberibus absensibusque, et haec ita edicto divi Hadriani significatur. (94.) Item si quis cum uxore praegnante civitate Romana donatus sit, quamvis est qui nascitur ut supra diximus, civis Romanus sit, tamen in potestate

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 the 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 if, 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 absentees. 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 the potestas of his father: and this is laid down by a

patris non fit: idque subscriptione divi Hadriani significatur. quia de causa qui interlegit uxorem suam esse praecunctam, dum civitatem sit et uxori ab Imperatore petit, simul ab eodem petere debet, ut eum qui natus erit in potestate sua habeat. (95) Alia causa est eorum qui Latinii sunt et cum liberis suis ad civitatem Romanam perveniant: nam homin in potestate junt litteris. quod ita quibusdam pergerint [desunt lin. 4].

(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. 95. The case is different with those who are Latins and with their children attain to Roman citizenship, for their children come under their potestas. Which right (has been extended) to certain foreigners. . . . 96. When they who discharge the duties of a magistrate obtain Roman

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1 Subscription 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, 2, and Dindorf, Manuale Latinitatis, sub verbo, § 3.

2 As stated in the note on § 2, Niebuhr held that the natio Latium meant the franchise of the old Latin towns: whilst the minus Latium was the franchise of the colonists north of the Po. The Julian law gave civitas to all the old Latin towns, and therefore according to Niebuhr's notion, the minus Latium long before Gaia's time had become obsolete; the only Latin franchise remaining being the minus. Mommersen, 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 Gaia's 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 civitas was conferred on those who held office in the common, and on their wives, parents, and children; whilst in the case of the minus Latium, the full civitas was conferred on the magistrates alone and not on his relations. See Mommessen, Die Stadtrechte der Lat. Gr. Sulpicians, and Caius, 4, 79. 121. 111. 36.

3 With Mommesen's view of the subject agrees the account given by Appian (de Bell. Civ. ii, 16) of the settlement of the city of Novo Compo by Caesar. Whereas 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 civitas. So also Asconius has a passage (Pison. p. 13, edit. Orell.) which may be translated: *Pompey gave to the original inhabitants the jus Latii, so that they might have the same privilege as the other Latin colonists, viz., that their members by holding a magistracy should attain to the Roman citizenship.* The passage in Livy xli. 8, refers to the old jus Latii, which was turned into full civitas by the Lex Julia, but it is well worth reading.

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33 Adoption.

minus latum [Latium] est, cum hi tantum qui vel magistratum vel honorem gerunt ad civitatem Romanam perveniant. idque compluribus epistulis Principum significatur 1 lin. 97. Non solum tamen naturales liberis, secundum ea quae dictius, in potestate nostra sunt, verum et hi quos adoptamus.

98. Adoptione autem duobus modis fit, aut populi autoritate, aut imperio magistratus, vel ist Praetoris. (99) Populi aut- oritate adoptamus eos qui sui iuris sunt: quae species adoptionis dicitur advocatio, quia et qui adoptat rogatur, id est interrogatur an velit eum quem adoptaturus si instim situm siti illum esse; et qui adoptatur rogatur an id fieri putiatur; et populus rogatur an id fieri iubet. Imperio magistratus adoptamus eos qui in potestate parentium sunt, sic primo gradum liberorum opimant, quae est filius et filia, sive inferiorem, quae est nepos, neptis, pronepos, pronepis. (100) Et quidem illa adoption quae per populum fit nasquam nisi Romae fit: at haec

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1 1, 3.
2 Ulpius, viu. i—3.
3 See Appendix (d).
etiam in provinciis aput Praesides earum fieri soleat. (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 aput populum adoptari aliquando prohibitum est, aliquando permittum est. Nunc ex epistula optimi Imperatoris Antonini quam scripsit Pontificibus, siusta causa adoptionis esse videtur, cum quibusdam condicioibus permittum est. apud Praetorem vero, et in provinciis aput Proconsulem Legatumve, cuissumque actatis adoptare possunt.

103. Illud vero utiusque adoptionis commune est, quia et hi qui generare non possunt, quales sunt spadones, adoptare possunt. (104.) Feminae vero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent. (105.) Item si quis per populum sive apud Praetorem vel apud Praesidem provinciae adoptaverit, potest eundem alii 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. 102. 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. 104. But women cannot adopt in any way, inasmuch as they have not even their actual children in their potestas. 105. 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

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1 Ulpian, VIII. 4, 5. 2 Justinian, cod. 2, 1, 7. 3 Ibid. 8, 15. 4 Ibid. 8, 7. 5 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 plena, the old law remained in force. In the other kind (minuta plena) 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. For an explanation of adoptio, see II. 47 et seq.
family of her husband, and gained the position of a daughter. Therefore it was provided by a law of the Twelve Tables, 1 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 flamen, 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 coemptioni by means of a manuspatio, i.e. by

2 Tab. vi. 1. 4. 3 Ulpian, xii. Servius thus describes a part of the ceremony used in the marriage of a Flamen and Flaminica. "Two seats were joined together and covered with the skin of 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 Dildo's words, was said to be locata to her husband." See Servius on Aen. iv. 104. 357. Tacit. Ann. iv. 10.

114. But a woman can make a coemption not only with her husband, but also with a stranger: whence a coemption is said to be made either with intent of marriage or with fiduciary intent. For she who makes a coemption with her husband, to be in the place of a daughter, is said to make coemption with the intent of marriage: but she who makes a coemption with her husband or a stranger for any other purpose, for instance to get rid of her guardian, is said to have made coemption with fiduciary 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 coemption with their authorization: then being transferred through manuspatio by the coemptionator to such person as she

per manuspationem, id est per quandam imaginariam venditionem, adhibitis non manum quam verum testibus, civibus Romanis pulebris, item librigente, esse sibi emin mulierem, culus in manus convenit. (114) Potest autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo: unde a matrimonii causa facta coemptionis dictur, aut fiduciaciae causa. (115) Quod est tale: sic quia velit quos habeat tutores repone, ut alium nainsciscatur, in sui mandatu coemptionem facit; deinde a coemptionatore rea 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 liberens, (herein), he into whose manus the woman is coming buys her for himself with an act. 114. But a woman can make a coemption not only with her husband, but also with a stranger: whence a coemption is said to be made either with intent of marriage or with fiduciary intent. For she who makes a coemption with her husband, to be in the place of a daughter, is said to make coemption with the intent of marriage: but she who makes a coemption with her husband or a stranger for any other purpose, for instance to get rid of her guardian, is said to have made coemption with fiduciary 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 coemption with their authorization: then being transferred through manuspatio by the coemptionator to such person as she

out the woman's wishes, interfere and compel them (l. 100). The guardian, then, sells the woman to the coemptionator by manuspatio. The coemptionator has her in his manus, and by a second manuspatio he transfers her into the manuspatio of the person she desires to have as guardian (l. 123). From the manuspatio she is freed by emancipation, and so, by mere operation of law (l. 160) at once has the manumissor as her

''tutor fiduciarius.'
preferences, and by him manumitted by vincula, she thenforth 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
testimonial (certain persons excepted), unless they had made a
coopmtio, been retransferred by mancipatio 2, and manumitted.
But the senate, at the instance of the late emperor Hadrian,
abolished this necessity of making a coopmtio 115 b. But
it even if it be for fiduciary purpose that a woman has made a
coopmtio 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 manu 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

1 In ancient times the agnati were
heirs-at-law to a woman, and their
succession could not be directly set
aside. The method adopted was
to break the agnatic bond by re-
moving the woman from her family
by the process described in the text.
She then stood alone in the world
“caput et fines familie, i.e. having
no agnati to prefer a claim against
her, could freely dispose of her pro-

2 Remanicipatio is the technical
word for a woman mancipated out
of manum. Remanicipatam Gallus
Aelius sit quae mancipata sit ab
ei cui in manum convenit.” Focus
sub verbo.
3 On this subject generally see
Mommaen’s History of Rome (Dick-
HOMINEM EX IUNX QUIRITIIUM MEUM ESSE A10, ISQUE MEHI EMPTUS EST HOC AERE AENEÆQUE LIBRA: DEDICE AERE PERCUTIT LIBRUM, IDQUE AES DAT ET A QUO MANCIPIO ACCIPIT, QUASI PRETI LI LOCO. (120.) EO MODO ET SERVILES ET LIBERAE PERSONAE MANCIPANTUR. ANIMALIA QUOQUE QUAE MANCIPII SUNT QUO IN NUMERO HABENTUR BOVES, EQUIS, MULI, ASIIS; ITEM PRÆEDIA TAM URBANA QUAEM IQI ET IPSA MANCIPII SUNT, QUALIA SINT ITALICA, CODIMEN MODO SOLENT MANCIPARI. (121.) IN EO SOLO PRÆCedin MANCIPATIO A CETERRUM MANCIPATIONE DIFFERT, QUOD PERSONAE SERVILES ET LIBERAE, ITEM ANIMALIA QUAE MANCIPII SUNT, NISI IN PRÆSENTIA SINT, MANCIPARI NON POSSUNT: ADEO QUIDEM, UT EUM QUI MANCIPIO ACCIPIT ADPREHENDERE ID IPSEM QUOD EF MANCIPIO DATUR NUNCESSIT SIT: UNDA ETIAM MANCIPATIO DICIUT, QUIA MANU RES CAPITUR. PRÆEDIA VERO ABSENTIA SOLENT MANCIPARI. (122.) IDEO AUTEM AES ET LIBRA ADLIBEBIT, QUIA OLIA AERIES TANTUM NUMMIS UBERTANT; ET ERANT ASSES, DUPONDII, SEMISSES ET QUADRANTES, NEC ULIS ANEUS VOL AGENTES QUÆRITIIUM; 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 MANCIPATION. 120. IN THIS MANNER PERSONS, BOTH SLAVES AND FREE, ARE MANCIPATED. SO ALSO ARE ANIMALS WHICH ARE RES MANCIPII, IN WHICH CATEGORY ARE ROCKETED OXEN, HORSES, MULES, ASSES; LIKewise SUCH ESTATES, WITH OR WITHOUT HOUSES ON THEM, AS ARE RES MANCIPII, 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 mancipii, 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 mancipation 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 NUMMUS IN USU CAT, SIQUT EX LEGE X1 TBABULARUM INTELLEGERE POSSUMUS; CORUMQUE NUMMORUM VIS ET POTESAS NON IN NUMERO CAT, SED IN PONDERE NUMMORUM. VENITI ASSES LIBERAE ERANT, ET DIPONDII TUM CRANT BILLORES; UNESTIUM DIPONDII DICTUS ET QUADRUPOLO PONDUS; Quid NOMEN ADHICU IN USU RETINERAT. SEMISSE QUAEQUE ET QUADRANTES PRO RATA SELECT PORTIONE LIBRÆ AERIS HABEBANT CERTUM PONDUS. ITEM QUI DABANT DILUM PECEMUM NON ADHIBEBANT EAM, SED APPENDERANT. UNDE SERVI QUAES PERMISSITOR ADMINISTRATIONE PECEMUM DISPENSATORI APPELLATI SUNT ET ADUC APPELLANTUR. (123.) SI TAMEN QUANTUM ALIQUIS, QUI RERVM COEMPIONEM EMNS MANCIPATIS DISTET: CA QUIDEM QUAE COEMPIONEM FACTI, NON DEDICATUS IN SERVIUM CONDITIONEM, A

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1. Probus Tab. II. I. 1.

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The full significance of his "being ordered to be free," will be better understood after reading it. 186, 187, &c.

Read notes on 1. 137, 138, and 181, 186.

The reading proposed by Huschke is adopted: "Qua re vero conempione emus mancipatis distet, instead of Guicci's: "Quare cita conempionem feminam emus mancipaturn." Huschke says with truth that no satisfactory meaning can be got out of the latter.
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Ulpian,

Potestas.

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Ulpian,

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Potestas.

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The

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Property

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was

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1. 90. Ulpian, x. 3.

2. Ulpian, x. 4.
although for the while he becomes a slave of the enemy, yet by virtue of the *jus postlimitis* his authority over his descendants is merely suspended; for those taken by the enemy, if they return, recover all their original rights. Therefore, if he return, he will have his descendants in his *potestas;* but if he die there, his descendants will be *sui juris;* but whether from the time when the ascendant died amongst the enemy, or from the time when he was taken by the enemy, may be disputed. If too the son or grandson himself be taken by the enemy, we shall in like manner rule that, by virtue of the *jus postlimitis,* the *potestas* of the ascendant is merely suspended. 130. Further, male descendants escape from their father’s *potestas,* if they be admitted flameis of Jupiter, and female descendants if elected vestal virgins.

131. Formerly also, at the time when the Roman people used to send out colonies into the Latin districts, a man who by command of his ascendant set out for a Latin colony was regarded as exempt from *patris potestas,* since those who thus abandoned Roman citizenship were received as citizens of another state. 132. *Emancipationes quoque desinent liberi in posestatem parentium esse. sed filius quidem tardius demum emancipatione vel i vero liberi, sive masculini sivei sive feminini, una *mancipatio* exent de parentium *potestate:* ex omnibus auribus tribus *mannicipationibus* loquitur, his verbis: *si pater filium in unum habebit, filius a patre liber esto. eas res habebit. mancipiat pater filium alium;* nisi eum vindicta manumittit: *co facto revertitur in potestatem patris.* is ex omnibus mancipat vel edidem vel alio; set in usu est edidem mancipari; isque eum postea simul et vindicta manumittit: *quo facto reversus in potestatem patris sui revertitur. tunc tertio pater eum mancipat vel edidem vel alio;* set hoc in usu est, ut edidem mancipat: *cuique mancipationem desinit in potestate patris esse,* ei tamen nondum manumissus sit, set adhuc in causa mancipii [Liv. iv. 24].

132. Descendants also cease to be in the *potestas* of ascendants by emancipation. But a son indeed ceases to be in his ascendant’s *potestas* after three emancipations, other descendants, male or female, after one: for the Law of the Twelve Tables only requires three emancipations 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 emancipates the son to some one or other, who manumits him by *vindicta;* this being done, he returns into his father’s *potestas: he manumits him a second time, either to the same man or to another, but it is usual to emancipate him to the same: and this person afterwards manumits him by *vindicta in the same manner,* which being done he returns again into his father’s *potestas;* then the father a third time emancipates him either to the same man or to another; but it is usual to emancipate him to the same: and by this emancipation he ceases to be in his father’s *potestas,* although he is not yet manumitted, but is in the condition called *mancipium* "........

regarded as having never been absent. See D. 45. 13, especially ll. 4 and 12, where the technicalities of the subject are discussed and examined.

1 Justian declared they should be *sui juris* from the time of the capture. Inst. i. 12. 5.

2 Ulpian, x. 5. Taciti Ann. iv. 16. 3 Notes on l. 72. l. 98. See Cic. pro Circern. cap. 35. patro dones. 132.

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Emancipation of descendants.

133. Liberum autem arbitrium est ei qui filium et ex eo nepotem in potestate habebit, filium quidem de potestate dimitititur, nepotem vero in potestate retineat; vel ex diverso filium quidem in potestate retineat, nepotem vero manumittere; vel omnes sui iuris officere, autem de primo dicit esse intellegemus.

134. Praetore parentes libris in adoptionem datur in potestate eos habere desintur; et in filio quidem, si in adoptionem datur, tres manumissiones et duas intercidentes manumissiones proinde finunt, ac fieri solent cum ea eum pater de potestate dimitit, ut sui iuris efficiatur. Deinde aut patri remancipatur, et ab eo is 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; or to make both sui iuris. And we must bear in mind that the same principles apply to the case of a great-grandson.

134. Further, ascendants cease to have their descendants in their potestas when they are given in adoption: and in the case of a son, if he be given in adoption, three manumissions 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 remanicipated to his father, and from the father the adopter claims him before the Praetor as being his son, and the father putting in no

person in mancipium is in a servile position, the manumittor would have been his patronus and so have had extensive claims on his inheritance ([I. 167, II. 59, &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 mancipium, and then emancipated. We have a right to say that he was ultimately brought under a potestas and not left in a mancipium, on account of the express statement of 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 manumission. The person who manumitted him out of potestas had, however, claims on his inheritance, but claims not so extensive as those over that of an emancipated slave. The friendly plaintiff spoken of above would in most cases be the actual father, in order to keep the property in the family.

This is the "cessio in iure," mentioned above; the father has in mancipium, but the claimant demands potestas over him. The father collusively allows judgment to go against himself, and thus the claimant obtains a more extensive power than the father possesses at the time the cessio is made. Hence the process resembles a Recovery in old English Law, where although the

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

135. A child conceived from a son once or twice emancipated, although born after the third mancipation of his father, is nevertheless in the potestas of his grandfather, and therefore can be either emancipated or given in adoption by him. But a child conceived from a son who has gone through the third mancipation, is not born in the potestas of his grandfather. 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 demand is claimed and got by default of the tenant's warrantor. See Example.

1 I. 133.
2 I. 89.
3 "In tertia mancipazione." The preposition in implies that he has gone through the form of emancipation, but not yet received manumission, that he is in the third mancipation.
in eis potestatem: si vero is, dum in mancipio sit, decesserit, sui iuris est. (135 a.) Et de — — — — — licet — — — — —

[1 lin.] ut supra diximus, quod in filio facit tres mancipationes, hoc facit una mancipatio in nepote.

136. Mulieres, quae manus in manu sit, nisi aetatem becerint, pote late parentis non liberantur: iuxta secundum Flaminia Dialis et Tuberonis auctore, ut haec quod ad suam tantum videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenisset. Sed mulieres quae aetatem becerint mancipationem potestate parentis liberantur: nec interest, an in viri sui manu sit, an extranei: quae manus hae solac loco filiarum habeantur quae in viri manu sunt.

137. [3 lin.] remanicipatione desinunt in manu esse, et non ex mancipatione manumissae fuienti, sui iuris effectu, nisi nihilo magis potest cogere, quam filia patrum. Set filia quidem mancipatione, he falls into his potestas, whilst if the father die in mancipium he becomes sui iuris. 135 a. .......... as we have said above, 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 coempito. This rule is confirmed in the case of the wife of a Flamen Dialis 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 coempito 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 remanicipatio to be in manus, and when after the remanicipatio they are manumitted, they become sui iuris. .......... can no more compel him, than a daughter can her father. But a daughter, even though

nulla modo patrem potest cogere, etiam adoptiva sit: hae autem virum repudio missae proinde compellere potest, atque si ei manus narrationis habetur.

138. Hi qui in causa mancippii sunt, quia servorum loco habeantur, vindicata, censu, testamento manumissae sui iuris iunt. (136) Nec tamen in hoc casu lex Aelia Sentia locum habeat. itaque nihil requirimus, cius actatis sit qui manumittit, et qui manumittit: ac ne illud quidem, a patrono creditorum, manumissae habeat. Ac ne numeras quidem leges Furiae Caninia in loco in his personas locum habeat. (140) Quin etiam invito quoque eo cius in mancipii sunt censu libertatem consequi posse, excepto eo quem pater ex legem mancipio dedicat, ut sibi remanicipet: nam quodammodo

adopted, can in no case compel her father; but the other (the wife) when she has had a letter of divorce sent to her can compel her husband as though she had never been married to him.

138. Those who are in the condition called mancipium, since they are regarded as being in the position of slaves, become sui iuris when manumitted by vindicata, censu or testament. 139. And in such a case the Lex Aelia Sentia does not apply. Therefore we make no enquiry as to the age of him who manumittit, 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 Canina has no application to such persons. 140. Moreover they can obtain their liberty by censu even against the will of him in whose mancipium they are, except when a man is given in mancipium by his father with the understanding that he is to be remanicipated to him: for then the father is regarded as

1 "Republio missae." A messenger or letter is sent to the other party to the marriage, seven witnesses of the age of puberty being called together to hear the instructions given to the messenger, or the contents of the letter. Warnkoenig, ii. p. 99.

2 i Can compel her husband to release her from manus, although a daughter cannot compel her father to release her from potestas: the reason being that the husband by the mancipientum has failed to fulfill his share of the compact.

3 1. 132.

4 1. 17.

5 1. 17.

6 1. 38.

7 1. 57.

8 1. 47."

"Republio missae." A messenger or letter is sent to the other party to the marriage, seven witnesses of the age of puberty being called together to hear the instructions given to the messenger, or the contents of the letter. Warnkoenig, ii. p. 99.
tunc pater potestatem propriae reservare sibi videatur eo ipso, quod mancipio recipit. Ac ne is quidem dicere invito eo cuius in mancipio est censu libertatem conseque, quem pater ex noxali causa mancipio dedit, velut qui fori eius nomine damnatus est, et sum mancipio actori dedit: nam hunc acto pro pecuniis habet. (143.) In summa admodum sumus, adversus eos quos in mancipio habemus nihil nobis contumelios facere licere: a quoque iniuriam actionem tendit. Ac ne diu quidem in eo iure detinentur hominum, set plerumque hoc fit dicis gratia uno momento; nisi scilicet ex noxali causa manciparentur.

142. Transcensus nunc ad aliern 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 tenentur. videmus igitur quae in tutela vel in curatone sint: ita enim intellegimus ceteros 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 obtain his liberty against the will of the person in whose mancipium he is, unless his father has given him in mancipium for a noxal cause, for instance, when the father is mulcted on his account for theft, and gives him up to the plaintiff in mancipium: for the plaintiff has him instead of money. Finally, we must observe that we are not allowed to inflict any indignity on those whom we have in mancipium, otherwise we shall be liable to an action for injury. And men are not detained in this condition long, but in general it exists, as a mere formality, for a single instant; that is to say, unless they are mancipated for a noxal cause.

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

1 He intends to give up indeed his potestas as actual father, but to resume potestas as an adopting father. See note on l. 132. 2 l. 75, 79. 3 l. 73, 224.
meae tempore in potestate mea sit, nepotes quos ex eo habe
non poterint ex testamento meo habere tutorum, quamvis in potestate mea fuerint: scilicet quia mortuo me in patris sui potestate futuri sunt. (147.) Cum tamen in compluribus aliis causa postumi pro iam natis habeantur, et in hac causa placet, non minus postumis, quam iam natis testamento tutors dari possent. si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra sint. hos eiam heredes instituere possimus, cum extraneos postumos heredes instituere permissionem non sit. (148.) Uxor quae in manu est proinde acsi filiae, item
nunui quae in fili manu est proinde ac nepi tutor dari potest. (149.) Rectissime autem tutor sic dari potest: LUCUM TITIUM LIBERIS MEIS TUTOREM DO, sed et si ita scriptum sit: LIBERIS MEIS VE UXORI MEO TITIUS TUTOR ESTO, recte
datum intelligitur. (150.) In persona tamen uxoris quae in manu est recepta est eiam tutoris optione, id est, ut eicat 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.

Moreover, in many 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.

148. A tutor can be given to a wife in manus exactly as to a
daughter,1 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

...
159. Est autem capitis diminutio prioris capitis permutatio, quia tribus modis accidit: nam aut maxima est capitis diminutio, aut minor quam quidam medium vocat, aut minima.

160. Maxima est capitis diminutio, cum aliquis simul et civitatem et libertatem ammittit: quae — — — — — — — qui ex patria (34 iva); item feminae liberae ex senatusconsulto Claudianae ancillae sunt eorum dominorum, quius libitos et denunciantibus nihil minus cum servis coeit.

161. Minor capitis diminutio est, cum et civilitas quidem ammittit, libertas vero retinetur: quod accidit ei qui aqua et igni interdictum fuerit.

162. Minima capitis diminutio est, cum et civitas et libertas servitutem recipiant.

159. Capitis diminutio is the change of the original capitis and occurs in three ways: for it is either the capitis maximus, or the minor, which some call medius; 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 those masters with whose slaves, in spite of their wish and warning, they have cohabited.

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

162. The minima capitis diminutio is when citizenship and

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1 Ulpian, XI. 9–15. Status and caput are not identical in Roman law; a slave is often said to have status, but it is also affirmed of him that he has "nullum caput." Austin is of opinion that "status and caput are not synonymous expressions, but that the term caput signifies certain conditions which are capital or principal; which cannot be acquired or lost without a mighty change in the legal position of the party." Caput necessarily implies the possession of rights: status generally implies the possession of rights, but may imply mere obnoxiousness to duties, e.g. the status of a slave. See Austin, Lecture XII.

2 This is Huschke's emendation, his complete filling up of the passage being "quae patriae gentium violato peregrinis populis per patriam patrum deuentur." For information as to the pater patriae, consult a classical dictionary, or read pp. 16–18 of Kent's International Law (Abdy's edition), Cit. pro Cis.

3 Livy, I. 245, 32.

4 Ulpian, I. 94; XI. 11.

5 I. 90, 128.
tas retinuet, sed status hominis commutatur. quod accedit in his qui adoptantur, item in his qui coemptionem faciunt, et in his qui mancipio dantur, quique ex mancipiatione mancipiuntur; adeo quidem, ut quotiens quisque mancipietur, sed remancipetur, totiens capite diminuiatur. (163.) Nec solum maioribus diminutionibus ius adqunitionis corrupitur, sed etiam minima et ideo si ex duobus libris alterum pater emancipaverit, post obiit eius neuter alteri adqunitione iure tutor esse poterit.

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

165. Ex eadem iure duodecin tabularum libertorum et libertarum tutela ad patronos liberumque eorum pertinet, quae et ipsa legitima tutela vaestur: non quia nominatim eii iure de his tutela exercetur, sed quia perinde accepta est per interpretationem, atque si verba legis introducta esset, co quin ture, quod hereditates libertorum libertarnique, si intestat decessor, iussaret 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 coemption, and with those who are given in mancipitum, and with those who are manumitted after mancipitation: so that indeed as often as a man is mancipicated or remanicipated, 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, where 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

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1 Excerpt from the Digest of Ulpian, discussing the rights of agnates and the tutelage of freedmen and freedwomen in Roman law. The passage above is translated from Latin to English for clarity.

2 The argument is: 1. The agnates who have the inheritance, also have the tutelage. (a) Therefore the inheritance and the tutelage, the benefit and the burden, devolve on the same persons. 2. Now the patrons have the inheritance by the express words of the law. 3. Therefore they also have the tutelage. 4. The argument is: 1. The agnates who have the inheritance, also have the tutelage. (a) Therefore the inheritance and the tutelage, the benefit and the burden, devolve on the same persons. 2. Now the patrons have the inheritance by the express words of the law. 3. Therefore they also have the tutelage. 4. Ulpian, XI. 5. The manumitter might be owner both in bonis, and "ex iure Quiritium," or he might only have the title "in bonis." (See II. 40.) For by reading I. 54, we see that if the legal ownership was separated from the beneficial, the beneficial owner, i.e. the owner in bonis, having the potestas, had the power of manumission. The general rule in the case of tutelages which were for the profit of the tutor as well as the pupil, was that the benefit (the right of inheritance) should go with the burden (the tutelage proper), but in this paragraph Ulpian is pointing out an exception. Ulpian, XI. 19.
etiam a te manumissa, Latina, fieri potest, et bona eius ad me pertinent, sed eius tutela sibi competit: nam ista legem Iunia cavetur. Itaque si ad eos cuissus et in bonis et ex iure Quiritium ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertinent.

168. Agnatis, qui legitimi tutores sunt, item manumissoribus permissonem est feminarum tutelam aliique in iure cedere: pupillorum autem tutelam non est permissonem cedere, quin non videtur onerosa, cum tempore pubertyis finitum. (169.) Is autem qui ceditur tutela cessicius tutor vocatur. (170.) Quo mortuo aut capitae diminuto revertitur ad eum tutorem tutela qui cessit, ipse quoque qui cessit, si mortuus aut capitae diminutus sit, a cessicio tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habuerit. (171.) Sed quantum ad agnatos pertinentibus, nihil hoc tempore de cessio tutela queritur, cum agnatorum tutelae in feminis leges Claudia sublatae sint. (172.) Sed fiduciarios quoque quidam putare

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 Iunia. 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, inasmuch as it must terminate at the time of puberty. (169.) He to whom a tutelage is thus ceded is called a tutor cessitius: 170. And on his death or capitae diminutio the tutelage returns to him who ceded it. So too, if the man himself who ceded it die or suffer capitae diminutio, the tutelage shifts from the cessicius and reverts to him who had the claim to the tutelage next in succession to the cessor. 171. But so far as relates to agnates, no questions now arise about cessician tutelage, inasmuch as the tutelages of agnates over women were abolished by the Lex Claudia. 2. 172. Some, however, have held that fiduciary tutors also have not power
to cede a tutelage, since they have voluntarily undertaken the burden. But although this be the rule, yet the same must not be laid down in respect of an ascendant who has given a daughter, granddaughter, or great-granddaughter in mancipium to another on condition that she be remanicipated to him, and has remanicipated 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 remanicipated to him out of mancipium. 3. 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

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1 "Also" i.e. in addition to the two classes of legiteri already named in §§ 158-62. Conf. L. 175.
2 Ulpian, XI. 22.
3 L. 172.
4 D. 26. 4.
locum permisi senatus tutorem petere, veluti ad hereditatem adeundam. (177.) Idem senatus censuit et in persona pupillii patroni fili. (178.) Leaque lege Julia de maritandis ordinibus ei quae in legittima tutela pupillii sit permittitur dotis constituta eae gratia a Praetore urbano tutorem petere. (179.) Sane patroni filius ei insani impubes sit, libertae officiarius tutor, at in nulla re autore fieri potest, cum ipai nihil permittitum sit sine tutoris autoritate agere. (180.) Item si quae in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituta eae gratia tutorem petere. (181.) Quibus casibus salvae manere tutelam patrono patronique filio manifestum est. (182.) Praeterea senatus censuit, ut si tutor pupillii pupillaeve suspectus a tutela remocus sit, sive ex iusta causa fuerit excusatus, 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. 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. 179. For the son of a patron undoubtedly becomes the tutor of a freedwoman, even though he be under puberty, and yet he can in no instance authorize 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 mad or dumb person, she is by the senatusconsultum 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

senate has ruled that if a tutor of a pupil, male or female, be removed from his tutorship as untrustworthy, or be excused on some lawful ground, 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, but it is usual for such an one to be appointed, where proceedings have to be taken by legal (as opposed to praetorian) action.

Supposing a person to have no tutor at all, one is given him, in the city of Rome by virtue of the Lex Atilia, by the Praetor Urbanus and the major part of the Tribuniae of the

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sibius provinciarum ex lege Julia et Titia. (186.) Et ideo si cui testamento tutor sub condicione aut ex die certo datu sit, quamdiu condicio aut dies pendet, tutor dari potest; item si pure datum fuerit, quamdiu nemo heres existat, tandem ex his legibus tutor putendus est; qui desinit tutor esse postea quam quin ex testamento tutor esse cooperit. (187.) Ab hostibus quoque tuteore capto ex his legibus tutor datus; qui desinit tutor esse, si is qui capitus est in civilitatem reversus fuerit: nam reversus recipit tutelam iure postliminii.

188. Ex his apparat quot sint species tutelarum. si vero quæranamus, in quor generis haec species deducantur, longa erit disputatio: nam de ea re valde veteres dubitaverunt, nescio diligentiae huius tractatuum executi sumus et in edicti interpretatione, et in his libros quos de Quinto Mucio fecimus, hoc sufficient to make this remark only, that some have held that there are five classes, as Quintus Muclus; others three, as Servius Sulpicius; others two, as Laboe; whilst others have thought that there are as many classes as species.

189. 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 not 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 fates. 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

1 This Q. M. Senecula (son of Pub. M. Senecula) is the man of whom Pomponius speaks as the earliest systematic writer on the Civil Law, and whom Cicero styles the most erudite, acute, and skilful lawyer of his day, "juris peritorum elogiamcitavimus, docuediam juris peritissimum." See D. i. 2. 41. Cic. de Orat. i. 39. For a memoir of Servius Sulpicius Rufus see Cicero, Brutus, c. 41, and for Antilius Laboe, D. i. 2. 47. 2 For an account of the various kinds of tutelae see Appendix (C). 3 I. 55. 4 T. 144. 5 See Livy, xxxiv. 2; Cic. pro Marcello, c. 47; and Ulp. xi. 1.
Tutelae legitimae.

... hereditas referatur ad caussam; sed tamen plerique quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contractat, maritum autorem esse in vet antilium eius puibere.

194. Tutela autem liberantur ingenuae quidem trium libere iure, libertimae vero quattuor, si in patrum liberorum eius legitima tutela sint. nam et certe quae alterius generis tutores habent, velut Atilianos aut fiduciarios, trium liberorum iure liberantur. (195) Potent autem pluribus modis librania alterius generis habere, veluti si a femina manumissa sit: tunc enim e lege Atilia petere debet tutorem, vel in provincia e lege Julia et Titia: nam patronae tutelas liberarum suorum libertarum genero non possunt. Sed et si sit a maeaco manumissa, et autore eo computationem fecerit, deinde remanipata et manumissa sit, patronum quidem habere tutores desinit, incipit autem habere cum tutores a quo manumissa est, qui fiduciarius in tutelage as they are with us: but yet they are generally in a position analogous to tutelage; for instance, a law of the Bithynians orders that if a woman make any contract, her husband or son over the age of puberty shall authorize it.

194. Freedwomen are freed from tutelage by prerogative of three children; freedwomen by that of four, if they be in the legitimate tutelage of a patron or his children. For the other freedwomen who have tutors of another kind, as Atilia or fiduciary, are also freed by the prerogative of three children.

195. Now freedwomen may in various ways have tutors of a different kind (from legitimate), for instance if she have been manumitted by a woman; for then she must apply for a tutor in accordance with the Lex Atilia, or in the provinces in accordance with the Lex Julia et Titia: for patronesses cannot hold the tutelage of their freedmen or freedwomen. Besides, if she have been manumitted by a man, and with his authorization have made a testament, and then been remanicipated and manumitted, she causes 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

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1 Ir. 122. Ulpian, xl. 25. uses iudicium and actio as inter-
changeable terms.

2 It should be noticed that Gaius

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This privilege was conferred by the Lex Papia Poppaea, A.D. 10.
dicitur. Item si patronus sine filius eius in adoptionem se dedit, debet scrib e loco Atilla vel Tibia tutorem petere. Simili
mer ex idem legibus petere debet tutorum liberta, si patronus
decedit nec ullam vinilis sexus liberorum in familia relinquit.

196. Mascule quando puberes esse cooperint, tutela liberatur. 
Puberem autem Sabinius quidem et Cassius atqueque nostrri prae-
ceptores cum esse putant qui habuit corporis puberatem ostensi-
dum, hoc est qui generare potest; sed in his qui pubescere 
non possunt, quales sunt spadones, eam acetam esse spectandam, 
cuius acetas puberes fiunt. sed diversae scolae auctores 
annis putant pubertatem aetatem, id est cum puberem 
esse existimandum, qui XIII anni explevit—[24 lineae.]

or his son have given himself in adoption, she ought to apply 
for a tutor for herself in accordance with the Leges Atilla and 
Tibia. 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 1. Now Sabini and Cassius and the rest 
of our authorities2 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 Ulpius, cit. 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 Pro-
cius 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 Procuans 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 Graunti, et Distat de Prop., 
Jur. Civ. § 45; Hoffman's Historia Juris, 
Pt. i. p. 312; Moscow, de retili Sub. 
Ad Prop.; Hugo, Rechtsgeschichte, 
translated into French by Jourdan, 
Tomo. II. §§ 374—379. Gibbon, c. 44.

* Fourteenth year if a male, twelfth if a female. Just. i. 22.

197. ...1 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. 200. 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 lex, but who are ap-
pointed 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. i. 22 and 23, 
and Ulpius, cit. 48, 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 Sactus = to find sureties (third 
party), and not to enter into a 
personal bond. The law as to sure-
tees (fidepromissores and 
fidepromissora) will be found in Just. i. 22; 
and iv. 88—102.
BOOK II.

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

2. *Summa itaque rerum divisio in duas articulas deducitur: nam aliquae sunt divini iuris, aliquae humani.*

3. *Divini iuris sunt veluti res sacrae et religiosae.*

4. *Sacrae sunt quae Diis superioris consecratae sunt; religiosae, quae Diis manibus refectae sunt.*

5. *Sed sacrum quidem.*

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

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

3. Of the divini iuris class are things sacred or religious.

4. Things sacred are those which are consecrated to the Gods above: things religious those which are given up to the Gods below. 5. Now land is considered sacred when made so by authority of the Roman people: for it is consecrated by the passing of a lex or the making of a senatusconsultum in respect of it.

6. On the other hand, we 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. But 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,
Res corporales et incorporales.

aliquis hæc exsistat, nullius in bonis sunt. (10.) Hæ autem res quæ humani juris sunt, aut publicae sunt aut privatae. (11.) quæ publicæ sunt, nullius in bonis esse credentur; quæ autem universitatis esse credentur. Privata autem sunt, quæ singularum sunt.

12. Quædam praeterea res corporales sunt, quædam incorporales. (13.) Corporales hæc sunt quæ tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique alicia res immemorabiles. (14.) Incorporales sunt quæ tangi non possunt: quæbus sunt quæ in iure consistunt, sunt hereditas, usufructus, obligations quoque modo contractae. nec ad rem portent, quod in hereditate res corporales continerit; nam et fructus qui ex

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

12. Further some things are corporeal, some incorporeal. 13. Corporeal things are those which can be touched, as a field, a man, a garment, gold, silver and, in a word, other things immoveable. 14. Incorporal 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 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 "tangible" signifies in Roman law that which is perceptible by any sense, according to the Stoic notion that all senses are modifications of that of touch. Hence "acts" are corporeal things according to this classification.

1 Urban and rustic estates mean respectively lands with or without buildings on them: the situation of which is from town or country, as immaterial: cf. D. S. 8. 1. From the epitome of Gaius (II. 1, § 1) 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 littifatum (turning the droppings from your roof into your neighbour's premises), of windows, drains, raising a house higher, or restraining another from raising, and of lights, (l. e., that a man is so to build that he do not block out the light from a neighbouring house. The rights over rustic estates are those of way, or of road whereby animals may pass or be led to water, and of channels for water; and these also are incorporeal. These rights whether over rustic or urban estates are called servitudes.

2 Res mancipii: it is clear, were such things as were objects of interest and value in the eyes of the early possessors of Roman citizen rights, as probably of those who laid the foundations of ancient Rome. Hence we see, firstly, how small in number were these objects: secondly, that they were such only as had a value to 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.

13. (The first six lines are supplied from Ulpian, xii. 1). All things are either mancipi or nec mancipi. Res mancipi are |
The text appears to be a Latin document discussing Roman law, specifically the transfer of property and ownership. It includes terms such as "mancipii," "mancipio," and "mancipation," which are central to understanding Roman property law.

For instance, the text mentions the transfer of property ("cessio in jure") and the conditions under which it can occur. It also discusses the nature of "mancipii," which are certain types of property that can be transferred.

The text includes references to legal authorities and principles, such as "Cic." (Cicero) and "Ulpian," a noted Roman jurist. It also mentions "res mancipii," which are things that can be transferred.

The document seems to be an academic or legal text, possibly from the 19th century, considering the formatting and style of the text.
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 mancipationes. For when we can do the business by ourselves in the presence of our friends, there is no need to seek its accomplishment in a more troublesome manner before the Praetor or the governor of a Province. 26. But if a res mancipi have been passed neither by mancipation nor cessione in jure...... 27. Finally, we must take notice that nectum is peculiar to Italian land; there is no nectum of provincial land; for land admits of the application of nectum only when it is mancipi, and provincial land is not mancipi.

17. 11 et seqq.
28. Most probably Gains went on to say that when a res mancipi was merely delivered, the man who received it had it in bona only, and not as juris quidem. See D. 10. 3. 31. 33 and D. 13. 6. 20. 7.
29. The meaning of nectum is given by Varro (de L. L. vii. 105): ‘Nectum Mamilianus scribit, omne quod per libram et aedem geritur, in quo sint mancipia. Nectum, quae per aedem euntur, aut obligentur, praetor quae mancipia daret. Hoc veris esse ipsum verum ostendit, de quo

bus vicini officiatur ceteraque similia iura constituere velit, pactiobus et stipulationibus id efficere potest; quia ne ipse quidem praedia mancipationem aut in iure cessionem recipiat. 32. Et cum ususfructus et hominum et ceterorum animalium constituti possit, intelligere debemus horum ususfructum etiam in provinciis per in iure cessionem constitui posse. 33. Quod autem diximus ususfructum in iure cessionem tantum recipere, non est temere dictum, quamvis etiam per mancipationem constituit possit eo quod in mancipanda proprietate detrahit potest: non enim ipsae ususfructus mancipatur, sed cum in mancipanda proprietate dedicatur, eo fit, ut apud alium ususfructus, aput alium proprietas sit. 34. Hereditas quoque in iure cessionem tantum recipit. 35. Nam si is ad quem ab intestato legitimo iure pertinent hereditas in iure eam aliique ante additionem cedat, id est ante quam heres exterrit, perinde et heres est cui in iure cesserit, ac si ipse per legem ad hereditatem.

neighbor's lights be interfered with, and other similar rights, he can only do it by acts and stipulations, because even the lands themselves do not admit of mancipation or cessio in jure. 32. Also, since it is possible for an usufruct to be established over slaves and other animals, we must understand that usufruct over them can be established by cessio in jure even in the provinces. 33. When, however, we said that usufruct 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 usufruct itself is not mancipated, although the result of its being withheld in mancipating the property is that the usufruct is left with one person and the property with another. 34. An inheritance also is a thing which admits of cessio in jure only. 35. For if he to whom an inheritance on an intestacy belongs by statute law make 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

vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenuit, debita vero persunt, excepto modo debitoris hereditarii lucrum faciant: corpora vero eius hereditatis perinde transunt ad eum cui cessa est hereditas, ac si ea singula in iure cessa essent. 36. Testamento autem scriptus heres ante aditum quidem hereditatem in iure cedendo eam aliique nihil agit; postea vero quam adierit si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinent hereditas, si post obligationem in iure cedat. 37. Idem et de necessariis hereditibus diversae scholae auctores existant, quod nihil videlicet interesse utrum aliquis adendo hereditatem fiat heros, an invitus existat: quod quale sit, suo loco apparet. sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem. 38. Obligations quoque

law to the inheritance: if, however, he makes 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 void act: whilst if he cedes 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 heredem necessarium does a void act when he makes cessio in jure of the inheritance. 38. Obligations, in what-

1.11. et seq.
2. Slaves and animals are res mancipi; therefore by the principle implied in § 31, the usufruct of them can be conveyed by cessio in jure. Further, the cessio in jure may take place even in the provinces; for movables res movendi sunt res mancipi in aliq. partes, and only in Italy only.

4. Ni. 179. 119. 57.
Ownership ex jure Quiritium and in bonis.

modo contractae nihil corum recipiunt. nam quod mihi ab aliquo debitur, id si velit liberi debendi, nullus corum modo quibus res corporales ad alium transferantur id efficere possunt; sed opus est, ut inhente me tu ab eo stipuleris: quae res efficit, ut a me liberetur et incipiat tibi tener: quae dictur novatio obligations. (39) sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

40. Sequitur ut adinomeamus apud peregrinos quidem unum esse dominium: id aut dominus quisque est, aut dominus non intellegitur. Quo illo etiam populus Romanus clima utebatur: aut enim ex iure Quiritium unusquisque dominus est, aut non intellegebatur dominus. set posta divisionem acceptum dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. (41) nam si tibi rem mancipi neque mancipati 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 obligation1.

39. But without such novation you cannot bring a suit in your own name, but must sue in my name as my cognitor or procurator2.

40. The next point for us to state is that amongst foreigners there is but one kind of ownership: thus a man is either owner (absolutely) or is not regarded as owner (at all). And this rule the Roman people followed of old, for a man was either owner ex jure Quiritium, or he was not regarded as owner. But afterwards ownership became capable of division, so that one man might be owner ex jure Quiritium, another hold in bonis. 41. For if I neither mancipate nor pass by cessio in jure, but merely deliver to you, a res mancipi, the thing becomes yours indeed in bonis but remains mine ex jure 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 jure Quiritium, just as though it had been mancipated or passed by cessio in jure. 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.

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.

1 III. 176. 
2 A cognitor is an agent appointed in court and in the presence of the other party to the suit: a procurator is appointed by mandate, and the opposing party has not necessarily any knowledge of his appointment till the time comes for him to act. iv. 83. 84.
45. Set aliquando etiam maxime quis bona fide alienam rem possidet, nam quum tamen illi usucapio procedit, vult ut qui rem furtivam aut vi possessam possidet; nam furtivam lex xii tabularum usucapi prohibet, vi possessam lex Julia et Plautia. (46.) Item provinciali praedica usucaptionem non recipiunt. (47.) Item inibus mulieris quae in agnatum tutela erat res mancipii usucapi non poterant, praeterquam si ab ipso tutori autore traditione essent: idque in lege xii tabularum cautum erat. (48.) Item liberos homines et res sacras et religiosas usucapi non posse manifestum est. 49. Quod ergo vulgo detur furtivum rerum et vi possessionem usuaptionem per lege xii tabularum prohibit esse, non eo pertinent, ut non in quirque per vim possidet, usucaptionem.

45. But sometimes, although a man possesses a thing most thoroughly in good faith, yet usucapion will never run for him, for instance, if a man possess a thing stolen or taken possession of by violence: for a law of the Twelve Tables forbids a stolen thing to be gotten by usucapion, and the Lex Julia and Plautia does the same for a thing taken possession of by violence.

46. Provincial lands also do not admit of usucapion. 47. Likewise, in olden times the res mancipii of a woman who was in the tutelage of her agnates could not be gotten by usucapion, except they had been delivered by the woman herself with the authorization of her tutor: and this was so provided by a law of the Twelve Tables. 48. It is clear also that free men and sacred and religious things cannot be gotten by usucapion.

49. The common saying, that usucapion of things stolen or taken possession of by violence is prohibited by the law of the Twelve Tables, does not mean that the thief himself or possessor by violence cannot get by usucapion (for usucapion does not avail for him on another account, namely that he possesses in bad faith) but that no one else has the right of usucapion, even though he buy from him in good faith. 50. Whence, in respect to moveable things, it does not easily happen that usucapion will avail for a possessor in good faith, because he who has sold and delivered a thing belonging to another, commits a theft: and the same rule holds also if it be delivered on any other ground. Sometimes, however, it is otherwise; for if an heir thinking that a thing lent or let to the deceased or deposited with him is a part of the inheritance, has sold or given it away, he commits no theft. Likewise, if he to whom the usufruct of a female slave belongs, thinking that her offspring is also his, sells it or gives it away, he commits no theft, for theft is not committed without the intent of stealing. It may happen in other ways also that a man may without the taint of theft deliver a thing belonging to another to a third person, and cause it to be gained through usucapion by the possessor. 51. A man may also obtain possession without

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1 Tab. viii. 17.
2 The two requisites of a possession which will enable usucapion, are bona fide and mutus causum. The latter is deficient in the present example, for although the goods are in the possession of an innocent alienee, yet they came to him from one wrongly possessed. See § 49 below.
3 In the case of provincial lands the dominium was reserved to the Roman people, therefore obviously no private holder could avail himself of usucapion to acquire dominium.
4 Cic. pro Flacco, c. 84. Cic. ad Att. i. 5.
5 Tab. v. i. 2.
6 Any other ground than sale, see.
7 D. 41. 3. 10. p. 97. We see from this that the Roman lawyers excused mistakes of law as well as fact. The reason why this particular mistake was excused is shown in D. 41. 3. 35. The usufructuary supposes he has a right to the fructus of the usufruct, because the usufructuary of a flock of sheep has a right to the young of that flock.
Honi fide possession.

alieni potest aliquis sine vi possessionem nasci, quae vel ex
negligentia dominii vacet, vel quia dominus sine successore
decesserit vel longo tempore afuerit. nam si ad alium bonam
fide accipientem transliteri, poterit usucapere possessore; et
quamvis ipse qui vacantem possessionem nactus est, intelligat
alienum esse fundum, tamen nihil hic bona fide possessor: ad
usucapiem nocet, cum inprobita sit eorum sententia qui
putaverint furtivum fundum fieri possesse.

52. Kurzus ex contrario accidit, ut qui sciat alienam se
possidere usucapiam: veluti si rem hereditarium cuius
possessionem heres nondum nactus est, aliquis possederit: nam ei
concessum est usucapere, si modo ea res est quae recipit
violation 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 usucaption: 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 bonfide possessor's gaining it by usucaption, inasmuch
as the opinion of those lawyers has been set aside who thought
that land could be the subject of a theft.

52. Again, in the converse case, it sometimes happens that
he who knows that he is in possession of a thing belonging to
another may yet acquire an usucptive 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 usucaption, provided only it is a thing which ad-
mits of usucaption. This species of possession and usucaption is
called pro herede. 52. And this usucaption has been al-
lowed to such an extent that even things appertaining to the
soil are acquired by usucaption in one year. 54. The reason
why in this case the usucaption 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
usucaption, and that of one year. For a law of the Twelve
Tables ordered that things appertaining to the soil should
be acquired by usucaption 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 usucaption, yet the usucaption of one year re-
mained established in respect of all the items of inheritances,
even those connected with the soil. 55. And the reason why
so unfair a possession and usucaption have been allowed at all
is this: that the ancient 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 Gali. Lib. st. Institute. Laws 36 and 38, which
are also very similar to §§ 50 and 52, are noted as taken from Gali. Lib. II.
Rerum quodcunque rerum auctorum.
2 The first taker is deficient in bona fide, but not so the second.
On the principle laid down in B. 44 the possession of the first is sufficient
to establish jus titus causas when the
transfer is made to the second. Hence the second has both the re-
quisites of civitas possessio (possession,
that is to say, which will enable usucaption), viz. jus titus causas and bona
fide.
3 In the case of a vacant inheritance, that is, one of which the heir
had not yet taken possession, the Ro-
man law permitted any one to enter and in time to acquire an usucative
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 Gains's phraseology it was an
"improba possessio et usucapium."
Observatio fuit, et ut credores haberent a quo suum consequentur. (56.) Hace autem species possessionis et usucapios etiam legitima vocatur: nam scientias quisque rem alienam lucratificat. (57.) Sed hoc tempore etiam non est lucrativa. nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapios revocarentur; et ideo potest heres ab eo qui rem usucapit, hereditatem petendo perinde eam rem consequite, atque si usucapta non esset. (58.) et necessario tamen herede extanto ipso iure pro herede usucapi potest.

59. Ad huc etiam ex aliis causis scientias quisque rem alienam usucapit. nam qui rem aliquid idicet causa mancipio deederit vel in iure cessit, si eadem ipse possederit, potest usucapere, anno siclicet, etiam soli si sit quae species usucapios dicitur usureceptio, quia id quod aliquando habituus recipimus per was paid in those times, and that the creditors might have some one from whom to obtain their own. 56. This species, then, of possession and usucapion was also called lucratice (profitable); for a man with full knowledge makes profit out of that which belongs to another. 57. At the present day, however, it is not profitable, for at the instance of the late emperor Hadrian a senatusconsultum was passed, that such usucapios should be set aside: and therefore the heir by suiting 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 necessarius1 usucapio pro herede can by force of 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 cession in iure of it, by way of fiducia2, provided he himself have the possession of the same, can acquire it by usucapion, and that too in one year3, even though it appertain to the soil. This species of usucapion is called usureceptio.

usurapationem. (60.) Sed cum fiducia contractur aut cum credito pignoris iure, aut cum amico, quod minus nostrae res aptar cum esset, si quidem cum amico contracta sit fiducia, sine omnibus modis purgativus usus recepto; si vero cum creditore, soluta quidem pecunia omni modo competit, nondum vero soluta ita demum competit, si neque conducerit eam rem a creditor debitor, neque precario rogaverit, ut eam rem possiderire liceret; quod causa lucratice usucapio competit. (61.) Item si rem obligatam sibi populus venderider, anque dominus possedere, concessa est usureceptio; sed hoc casu praediam bienio usureceptit. et hoc est quod volgo dicitur ex praedial because we take back by usucapion what we have had once before. 60. But since a fiduciary contract is usually entered into either with a creditor by way of pledge, or with a friend for the purpose of more completely securing such property of ours as he has in his hands; if the assurance be made with a friend, usureceptio is in all cases allowable; but if with a creditor, then after payment of the money it is universally allowable, but before payment usureceptio lucratice1 is only allowed in case the debtor has neither hired the thing from the creditor1, nor asked for its possession by way of precarium.2 61. Likewise, if the populus have sold a thing pledged to it, and the original owner keep possession, usureceptio is allowed, but in this case if the subject of the pledge be land3, it is usurecepted in two years. And hence comes the common saying that

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1 Savigny (Treatise on Possession, p. 23) takes this as an example of the rule. "Nam sibi causa possessionis staturum potest." The whole of the passage pp. 49-51 is worth reading in this context.

2 A hirer has no juridical possession, but is regarded as agent for the lessor having then no possession. D. 13. 6. 8; D. 41. 2. 3-20. See Savigny, On Possession, translated by Perry, p. 260.

3 With reference to the matter here stated Savigny says, "Whoever simply permits another to enjoy property or an easement retains himself the right of revocation at will, and the juridical relation thence arising is called Praedium." See Savigny, On Possession, p. 355, where the learning on the subject of praedium and the interdict connected with it is set out at length.

4 Praedium is any thing attached to or connected with the land, sometimes the word is used antithetically to persona. See D. 43. 20. 1. 43; and as to Praduator in the sense used in this paragraph see Clc. pro Balbo, c. 20, and In Verr. ii. 1. 54.

Varro says that praedium properly signifies land pledged: de L. L. v. 40. So also does Pauco-Aequium in his commentary on the passage from the Verrine orations quoted above.
62. Accidit aliquando, ut qui dominus sit alienandae 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 dotis causa vel in iure cessum vel usucapium. quod quidem istius utram ad Italica tantum praediam, an etiam ad provincialia pertinent, dubitatur.

64. Ex diverso agnus furiosi curator rem furiosi alienare potest ex lege xi tabularium; item procurator, id est qui liber administratio permissa est; item creditor pignus ex pactione, quamvis eius ea res non sit. sed hoc forsitum exideo videatur possession is unsecured from a praedictura. For he who buys from the people is called a procurator.

65. It sometimes happens that he who is owner has not the power of alienating a thing, and that he who is not owner cannot 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 cession 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 alienate the property of the madman; a procurator likewise (can alienate what belongs to another), i.e. a person to whom absolute management is intrusted: a creditor also by special agreement may alienate a pledge, although the thing is not his own. But perhaps this alienation 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.

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

68. 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-
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, hae commodi 70. nunquam communis est qui ab utraque parte fluminis prope ripam praeda possiderit, si vero non sit in medio flumine, ad eos pertinent qui ab ea parte quae proxima est luxa ripam praeclaram habet.

73. Practerea id quod in solo nostro ab aliquo aedificium est, quamvis ille suo nomine aedificaverit, iure nostrali nostro fr, qua superficies solo cedit.

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

75. Iadem contingent 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

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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 exception diem muti. 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 estribo 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 Poss., p. 193): so that the good title to the land would not have cured the bad title to the materials. If he had not possession, and if the house were not demolished, there is great doubt whether he had any remedy at all. D. 43. 1. 7. 12; D. 5. 3. 28.
Title by accession.

77. Eadem ratione probatum est, quod in chartulis sive membranis meis aliquid scripsis, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt. Inque sicut ego eos libros casque membranae petam, nec inspiciens scripturae solvam, per exceptionem doli mali summoveri potero. (78.) Sed si in tabula mea aliquid pinxit velut imaginem, contra probatur: magis enim dictum tabulam picture cedere, eius diversitas etsi idonea ratio redditur, certe scendum hunc regulam si a me possidente patem imaginem tuam esse, nec solvam pretium tabulae, poteris per exceptionem doli mali summoveri. At si tu possessas, consequens est, ut utilis mihi actio adversum te dari debet: quod casu nisi solvam impensam

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 upon 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, 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 utile ought to be allowed me against you in which you have been treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another. As such an one was treated equitably in one case, he probably would be in another.

Title by specification.

picture, poteris me per exceptionem doli mali repellere, utique si bona fide possessor fueris. Iliam palam est, quod siue tu subripuisse tabulam sive alius, competit mihi furi actio.

79. In alis quoque spectacula naturalis ratio requiritur: prorsus si ex uvis aut olivis aut spicis meis vinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id vinum aut oleum aut frumentum, in tum, item si ex auro aut argento meo vas aliquod feceris, aut ex meis tabulis navem aut armamentum substellium fabricaveris; item si ex linea mea vestimentum feceris, vel si ex vino et melo meo mulsum feceris, sive ex medicamentis meis emplastrum aut collyrium feceris: quaeritur, utrum tum sit id quod ex meo officieris, an meum. quidam materia et substantiam spectandum esse putant, id est, ut

7*. The principles here stated are fully set out and in very similar language in D. 41. 7. 7, which passage forms part of a long statement from another treatise of Galen, viz. the Liber Reorum quotidinariae sive Aurearia.
Alienation by woman and pupils.

cuius materia sit, illius et res quae facta sit videatur esse; idque maxime planit Sabino et Cassio. ali vero eius esse putans qui fecerit; idque maxime diversae scholae auctoribus vixim est; sed cum quoque cuius materia et substrata fuerit, furit adversus eum qui subripuerit habere actionem; nec minus adversus eundem condicionem ei competere, quia extintae res, licet vindicari non possint, condici tamen furtibus et quibusdam alius possessorum possunt.

DE PUPILLIS AN ALIQUID A SE ALIENERE POSSUNT.

8o. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem mancipi alienare posse; nec mancipi vero feminam quidem posse, pupillum non possus. (81.) Ideoque si quando mulier mutuum pecuniam aliqui sine tutoris auctoritate dederit, qui facta sua accipiens, cum scilicet ra pecunia res nec mancipi sit, contrahit obligationem. (82.) At to belong to him to whom the materials belong; and this opinion served 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 an additional 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.

8o. 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, inasmuch as money is a res nec mancipi.

1 To which school Cassius himself belonged.
2 See inj. 90.
3 Ulp. XI. 37.
4 Mutilate is one of the contracts perfected by delivery in cases where delivery passes the property: hence in this instance the mutuum is binding, money being a res nec mancipi, and therefore capable of transfer by mere delivery. II. 8o. See inj. 90.

Authorization of the Tutor.

Si pupillus idem fecerit, qui cum pecuniam non factic accipiens, nullam condicionem facit. unde pupillus vindicare quidem numeros suos potest, si eum intende suos esse. Quirillum esse: nulla fidei consumtus vero ab eum repetere potest quas possisset. unde de pupillo quidem quiserit, an numeros quae mutuos dedit, ab eo qui accepti bona fide alienatos petere possit, quoniam in scilicet condicionem est nec posse facere videatur. (83.) At quoniam quocumque mancipi sit, nec mancipi multius et pupillus sine tutoris auctoritate solvi possunt, quoniam meliorem conditionem subiisse etiam sine tutoris auctoritate concessum est. (84.) Itaque si debitor pecuniam pupillo solvet, factum quidem pecuniam pupilli, sed ipse non liberatur, quia nulla 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 quae Quirillum: 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 all obligation without the

1 The case is one of bona fide alienation, and it is only well fide alienation or consumption which draws with it the necessity of making compensation.
2 Solvitur means to discharge an obligation. It is difficult to fix upon a precise equivalent in English, because the solvitur spoken of in this paragraph may be either dama faveor, or pro praetore.
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 obligatione, quia res nee mancipi, ut proxime diximus, a se dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accurati pecuniâ; at si non accurati, sed habere 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 postestate manu mancipiöve habemus; item per eos servos in quibus usumfructum habemus; item per homines liberos et servos alienos quos bona sese possidemus, de quibus singulis diligenter dispensariam.

87. Igitur quod liberri nostri quos in postestate habemus, item quod servi nostri mancipio accipiant, vel ex traditioone mancipis, sive quid stipulentur, vel ex aliquotiet causa ad-auctoritate 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 deli mali.

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 nee 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 acceptatio, 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, quae solet, quia ipsae non posseadiem. (91.) De his autem servis in quibus tantum usunfructum habemus ita placeat, ut quia quid ex re nostra vel ex operiis suis adquiratur, id nobis adquiratur; quod vero extra eas causas, id ad dominum propriiatis pertinet. Itaque si iste servus heres institutus sit legatunave quo id datum fuerit, non nihil; sed domino propriiatis adquiritur. (92.) Idem placet de eo qui a nobis bona fide possidetivit, sive liber sit sive alienus servus. quod enim placet de usufructu, idem probatur etiam de bona fide possessor. itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinent, sive liber est 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: usufructuarius vero usucapere non potest, primum quia non possidet, sed habet ius tenendi et fruendi; deinde quia se itioned, because we do not possess the persons themselves1.

With regard to slaves in whom we have merely an usunfruct, the rule is that whatever they acquire by means of our substance or their own labour is acquired for us2: 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 usunfructuary also holds good as to a possessor in good faith. 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 usucapion, since he thus becomes master, he can acquire by his means in every case: but an usunfructuary cannot get by usucapion, firstly because he does not possess but has the right of usunfruct, and secondly because he knows the slave to be

1 Savigny points out (Prattica en Pratentius, p. 220) 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 usunfructuary through the slave in whom he had the usunfruct (91). Guin, consistently with himself, raises a doubt as to the last named case in § 94.
2 Ulpius, XIX, 21.
3 Ibid.

another's. 94. On the following point a question arises, viz. whether we can possess and get an usunfructive title to anything by means of a slave in whom we have the usufruct, since we do not possess the slave himself. There is, however, no doubt that we can both possess and get by usucapion by means of a man whom we possess in good faith. But in both instances we are speaking with a reference to the qualification which we laid down just above, viz. that it is only what they acquire by our substance or their own work, which is acquired for us. 95. Hence it appears that in no case can anything be acquired for us by means of free men whom we neither have subject to our authority nor possess in good faith, nor by the slaves of other men in whom we have neither usunfruct 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 person1.

1 According to D. 41. 2. 8 and 41. 12. 49. It is quite clear that the usunfructuary could acquire through the slave in whom he had the usufruct. It may be that the law as laid down in those passages by Paulus and Papirius was not so laid down until after Guin'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 undeveloped 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
96. In summa sciendum est iis qui in potestate manu mancipiave sunt nihil in iure cedi posses, cum enim iisarum personarum nihil sum esse possit, conveniens est scilicet, ut nihil sum esse per se in iure vindicare possint.

97. Hactenus tantisper admonuissse sufficit quemadmodum singulæe res nobis adquirantur, nam legatorum ius, quo et ipso singulas res adquirimus, opportunitas alio loco reperimus. Videamus itaque nunc quibus modis per universitatem res nobis adquirantur. (98.) Si cui heredes facti sumus, sive eius bonorum possessionem petierimus, sive eius bona emerimus, sive quem adrogaverimus, sive quam in manum ut uxorern reciperimus, eius res ad nos transcvent.

99. Ac prius de hereditatis disipicianis, quamrump duplex condicio est: nam vel ex testamento, vel ab intestato ad nos pertinent.

96. Finally, we must know that nothing can be passed by esse in iure to those who are in potestas, manum 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 manum 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 (voluntatem), when the agent is self-appointed (negativa orum iutorum). See Sav. On Poss. pp. 230-256.

1. 11. 191 et seqq.
2. 111. 37
3. 111. 77

100. Et prius est, ut de his disipicianis quae nobis ex testamento obviarent.

101. Testamentorum autem genera initio due fuerunt, nam aut calatis comites faciendae, quae comitia bis in anno testamenti faciendis destinata erant, aut in proculnctu, id est cum bellii causa ad pagum ibant: procarctus est enim expeditus et armatus exercitus. alterum itaque in pace et in odio faciebant, alterum in proculnctum exituri. (102.) Accessit deinde tertium genus testamenti, quod per aed et libram agitur. Qui quae calatis comites neque in proculnctu testamentum fecerat, is si subita morte urgentibus, amico familiaris suum [id est patrimonium suum] mancipio dabat, eumque rogabat quiut quique post mortem suum daret vellet. quod testamentum dicitur per aed et libram, scilicet quia per mancipationem pervenit. (103.) Sed

1. Et testamentum est mens e non teste testamento, in id sollemniter factum ut post mortem rostrum valenti. Ulp. xx. 11.
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 pro circius.

3. Ulpian, xx. 2.

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the two first-mentioned kinds of testament have fallen into disuse: and that alone is retained in use which is solemnized for aeternam. 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 with the coin, and gives that coin to the testator by way of price, as it were. The testator next, holding the tablets of the testament, speaks thus: “These things, just as they are written in these tablets of wax, I so give, I so bequeath, and I so claim your evidence, and do you, Quirites, so afford it me!” And this is called the nuncupatio: for to nuncupare is to declare openly: and whatever the testator has written in detail on the tablets of his testament, he is regarded as declaring and confirming by this general statement.

105. Amongst the witnesses there ought not to be any one who is in the potestas either of the familiae emptor or of the testator himself, since in imitation of the old law all this business which is done for the purpose of making the testament is regarded as taking place between the familiae emptor and the testator: because in olden times, as we have just stated, he who received the familia of the testator in mancipium was in the place of heir. Therefore the evidence of members of the same family was refused in the matter. 106. Hence also, if he who is in the potestas of his father be employed as familiae emptor, his father cannot be a witness: neither can he who is in the same potestas, his brother for

1 Ulpian, xx. 7.
2 Ibid. 3.
3 Ibid. 4. 5.
instance. And if a filius familias make a testament regarding his causans pietatem\(^1\) after his dismissal from service, his father cannot properly be employed as a witness\(^2\), 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 tribunes: 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 tribune, 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\(^3\).

\(^1\) Ulpius, xx. 10. The testament orius pietatem is originally meant property of the pater familias held on his sufferance by the son or slave, and which he could take from them at his pleasure. Testamentum causans data from the time of Augustus: soldiers in potestate patris were by enactment of that emperor allowed to have an independent property in their acquisitions made on service, and the rule that the property of a son was the property of the father (II. 87) was set aside in this case. If the testament were made during service, no formalities were needed (II. 100); hence the words “post missionem” are inserted in the text.

\(^2\) Marcellus, with whom Ulpius apparently agrees, held that a father could be made witness to a testament of a filius familias respecting his causans pietatem. See D. 28. 1. 20.2.

\(^3\) The transaction, as Gaius tells us (II. 105), was still regarded as one between the testator and the filius familias 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 II. 108, which Justinian subsequently transformed into a law. Tit. II. 10. 10.
flaccimus, multieribus etiam coemptione non fata testamentum facere permitted, si modo maiores facerent suis videtur xii tutore autore; scilicet ut quae tutela liberaret non essent ita testari debent. (113.) Videtur ergo melioris conditionis esse feminae quam masculi: nam—masculius minor annorum xiii testamentum facere non potest, etiam si tutore autore testamentum facere velit; femina vero post xii annos testamenti faciendi insanescitur.

114. Igitur si quæramus an valid testamentum, inprimis advertere debemus an qui id fecerit habuerit testamenti factionem: deinde si habuerit, requirerimus an secundum iuris civilis regulam testator sit; exceptis militibus, quibus propter nimiam inopportunitatem, ut diximus, quomodo velit vel quomodo posseit, permittitur testamentum facere.

Hadrian (as we stated above also), allowed women to make a testament, even though they had not entered into a coniunctio, 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 desire 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 facio: then, if he had it, we shall enquire whether he made the testament according to the rules of the civil law: except in the case of soldiers, who, as we have stated, on account of their great want of legal knowledge, are allowed to make a testament as they will and as they can.

1. I. 115 c. 2. For the circumstances under which women are freed from tutela see § 94. 3. Ulpian, xx. 17, 18. 4. Testamenti facio is used in three senses: (1) The legal capacity of being a witness to a will; (2) The legal power of making a will; (3) The legal power of taking under a will:

115. Non tamen, ut hunc civiliter validum testamentum, sufficit ea observatio quam supra exposuimus auctoritate vindicat et de testibus et de nuncupationibus. (116.) Ante omnia requirendum est in instituto heredis sollemnius non facta sit: nam aliter facta institutione nihil proficit familiar testatoris iniuriam, testesve sive adhibere, sive nuncupare testamentum, ut supra diximus. (117.) Sollemnis autem instituto hace est: Titus Heredem esto. sed et illa iam comprobata videtur: Titum heredem esse iubeo. ut illa non est comprobata: Titum heredem esse volo. set et illae a plerisque ineptae sunt: heredem instituo, item heredem facio.

118. Observandum praeterea est, ut si mulier quae in tutela sit faciat testamentum, tutoris auctoritate facere debet: aliquin inutiliter iure civiliter testatur. (119.) Praeter tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti honorum possessionem pollicetur: et si nemo sit ad quem ab intestato iure legitime pertinere.

115. 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 has 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."

118. 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 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
neat hereditas, velut frater eodem patre natus aut patruus aut fratris filius, in potestatem scripti heredes retinere hereditatem. nam idem iuris est et si alia ex causa testamentum non valeat, velut quod familia non veniret aut nunucipationis verba testator locutus non sit. (120) Sed videamus an non, etiamsi frater aut patruus extant, potiores scriptis heredibus habeatur. rescripto enim Imperatoris Antonini significavit, eum qui secundum tabulas testamenti non fuerit facta bonorum possessionem petierint, posse adversos eos qui ab intestato vindicant hereditatem defendere se per exceptionem dolii mali. (127) quod sane quidem ad mensuram pertinent certum intestacy by statuteable right\(^1\), as a brother born from the same father, or a father's brother, or a brother's son, the written heirs will in such a case retain the inheritance\(^2\). The rule is the same if the testament be invalid from other causes, as for instance, because the familia has not been sold, or because the testator has not spoken the words of nuncipation\(^3\). (126) But let us consider whether or not, supposing a brother or father's brother exist, they will be considered to have a better title than the written heirs. For it is laid down in a rescript of the emperor Antoninus, that those who claim possession of goods in accordance with a testament not made in due form, can defend themselves by an exceptio dolii mali\(^4\) against those who claim the inheritance by intestacy\(^5\). (121) That this (rescript) 

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\(^1\) *Legato juris* by right based on the law of the Twelve Tables, or some subsequent lex.

\(^2\) *Liber, 112.* Uplin, xxii. 6. The wording here is rather loose; a *bonorum possessor* could not be heir, for the heir is marked out by law, and if the law did not recognize a person in that capacity, the pretor's grant of *bonorum possessio* was unable to give him hereditary title, although it did give him the benefits of heirship. Hence "hereditarius" should have been "rex hereditarius," or "bons testatoris."

*The Roman law of inheritance was so very meagre, omitting for instance all reference to cognates, and disregarding the rights of emancipated children, &c., that the pretors found themselves obliged to supplement the law by those grants of *bonorum possessio*, whereby they sometimes prevented an inheritance becoming ownerless, and in other cases left the bare name of heir to the person marked out by law, but gave the practical benefits of the succession to one more justly entitled either on natural grounds, as for instance by relationship, or on account of the expressed wish of the testator, when the testator did not pass over some person on whose appointment the law insisted."

\(^3\) *See on this point D. 37. 11. 1.*

\(^4\) *Liber, 114. 116.*

\(^5\) *The rules about prateritia* (see

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*Præteritum of a suus heredit.*
scilicet quia statim ab initio non constituerit institutio. sed diversae scholae auctores, siquidem filius mortis patris tempore vivat, sane impedimento eum esse scriptis hereditibus et illum ab intestato heredem fieri conficiuntur: si vero ante mortem patris intercessus sit, posse ex testamento hereditatem adiri putant, nillo iam filio impedimento: quia scilicet existimant non statim ab initio institutum filio praeterito. 

(124. Ceteras vero liberorum personas si praeteritio testator, valet testamentum: praeteritiae ait personae scriptis hereditibus in partem adrecens: si sibi instituit sint in virilim; si extranei, in dimidiam. id est si quis tres verbi gentia filios heredem insti- tuerit et filiam praeterierit, filia adrecendo pro quarta parte fit heres; plasuit enim cum tuebamus esse pro ea parte, quia eiam ab intestato eam partem habitation esset: at si extraneus ille heredes instituerit et filiam praeterierit, filia adrecendo ex dimidia parte fit heres. Quae de filia diximus, eadem et de...

possessio deae omnium liberorum personis, sine masculini sine feminini sexus, dicta intellegemus. (125.) Quod ergo est? licet feminae sequendum et quae diximus scriptis hereditibus dimi-
dinam parum tantum detachant, tamen Praetor eas contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repellantur: et effecturam sine per-bac bonorum possessionem, ut nihil inter feminas et masculas interesse; (126.) sed nuper Imperator Antoninus significavit rescripto suas non plus nancient feminas per bonorum possessionem, quam quod ille adrcendscendi consequentur. quod in emancipatis feminis similiter obtinet, scilicet ut quod adrcendscendi iure habituac essent, si suas fussent, id ipsum etiam per bonor-
um possessionem habant. (127.) Sed si quidem filius a patre exhereditur, nominatio exhereditari ante — — — — potent

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 testa-
ment, by which means the stranger heirs are debarred from the entire inheritance; and through this possession of goods, the effect would be that no difference would exist between men and women. 126. But lately the Emperor Antoninus has decided by a rescript that women who are state heredes, 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 attach-
ment if they had been state heredes. 127. But if a son be disinherited by a father, he must be disinherited by name.”...... A man is considered to be disinherited by name,

1 "That they are to have no more by the aid of the praetor than is given to them by the jus creavit.” Cf. Theo-
philus, ii. 75. 5. These points and the amending rescript of Antoninus are noticed at considerable length in the Code 6. 38. 4, and we perceive that the matter still gave rise to con-
troversy even in Justinian’s time. That emperor effected a final settle-
ment of the dispute by a rescript of the date 531 A.D.

2 Bede 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 cadutos),”

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1. Ulp. xxii. 17.

2. Bede 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 cadutos).
Exheredarii nominatim autem exheredarii videtur sive ita exheredarii: Titius Pius meus exheres esto, sive ita: Pius meus exheres esto, non adiecit proprio nomine. (128.)

Masculorum ceterorum personae vel feminini sexus aut nominatim exheredarii posunt, aut inter ceteros, velit hoc modo: ceteri exheredarii sunt: quae verba post institutionem heredum adici solent, sed hisa sua sunt bona civilis. (129.) Nam Praetor omnes viriles sexus, tum filius quam ceteros, id est nepotes quoque et pronepotes nominatim exheredarii habet, feminini vero inter ceteros: quia nisi fuerint tuis exheredati, promittit eis contra tabulas honorum possessionem. (130.) Postumi quoque liberi vel heredes instituti debeat vel exheredarii. (131.) Et in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis, sive femininis sexus sive masculinis, praedicto, velut quidem testamentum, sed potes agnatione 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 prose, such as "ceteri exheredarii 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, 15) children so disinherited could bring the ipreferendae insufficientiamentum, "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. 21, 22.

Postumae rumpitur, et ea ratione totum informatur: ideoque si mulier ex qua postumus aut postuma sperabant abortum fuerit, nihil impedimento est scriptis heredibus ad hereditatem audendum. (132.) Sed feminini quidem sexus postumae vel nomination vel inter ceteros exheredarii solent. dum tamen si inter ceteros exheredentur, aliquid eis legatur, ne vidantur per oblivionem praeterita esse: masculos vero postumos, id est filium et dinaeques, placabit non alter rete exheredari, nisi nominationeexheredentur, hoc sedili modo: quicquid mihi filius gentius fuerit, exheres esto. (133.) Postumorum loco sunt et hi qui in sui heredes locum succedendo quasi adnuascendo sunt parentibus sui heredes. ut esse si filium et ex eo nepotem regitente in postestate habeas, quia filius gradum praecedit, is solus ina sui heredis habet, quomvis nepos quoque et nepitis ex eo in cadem postestate sini; sed si filius mens is made void subsequently by the agnation 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, miscarries, 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-agnation. For instance, if any man have in his poletas a son and a grandson or granddaughter by 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 aognatio is merely meant the fact of becoming an agnatus, which might be either by birth or adoption, or, as in the present case, by conception, for when there is a testament the child follows his father's condition and his rights vest at the time of conception (1, 80). Therefore the testator passes over a suus heres, as the child's rights extend back into the testator's lifetime.

3 See Ulp. xxv. 31; Cic. De Ord. 1, 57; and Pro Cæcin. c. 25.
me vivō morītūr, aut quīlibet ratione exspectō de potestate meae, ineptīt negotii necipisse in eis locum succeedere, est modo ita sua rerum heredum quasi adgnatōne nuncius (134). Ne ergo est modo rumpt mihi testamentum, siat eum sit fīlium vel heredem instituere vel exheredare nominātum debeo, ne non tūr fūsium testamentum, ita et neptem necipisse ex eo necesse est mihi vel heredem instituere vel exheredare, ne forte, me vivō filio mortuo, succedendo in locum eius negotii necipisse quasi adgnatique rumpt testamentum: idque legem Junia Velleia praeviam est; quae simūl occurret, ut tili tantam postumā, id est virilis sexus nominātum, feminīnī vel nominātum vel inter ceteros exheredantur, dum tamen isti qui inter ceteros exheredantur aliquid iōgetur. 135. Emancipatōs liberōs inre civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes sed Praetor omnes, tam feminīnī quam masculīnī sexus, si heredes non instituuntur, exheredari iubet, virilīs sexus filios et ulterioris

if my son die in my lifetime, or depart from my potestas by any means, the grandson or granddaughter at once succeeds into his place, and so obtains the rights of a suo heres by quasi-aquatanum. 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-aquatanum: and this is provided by the Lex Junia Velleia: wherein there is also a direction, that these quasi-aquatans 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. 1 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 potestas: and if they put in a claim it will not be allowed. For they are barred by their 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.

gradus nominatīum, feminīnī vero inter ceteros. quosdē neque heredes instituti fuerint, neque ita, ut supra diximus, exheredant, Praetor promittit eis contra tabulas honorum possessionem. (135a.) In potestate patre constitutione, qui inde nati sunt, nec in accipienda honorum possessione patri concurrent qui posuer eos in potestate habere; aut si pediur, non impetrantur, namque non eis patrem suum prohibētur. nec differunt emancipati et sui. 136. Adoptiti, quandem tenentiur in adoptionem, naturalium loco sunt: emancipati vero a patre adoptivo neque inre civili, neque quod ad edictum Praetoris pertinet, inter liberos numera re. (137.) qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quandque quidem sint in adoptiva familia, extraneorum numero habeantur. eum vero emancipati fuerint ab adoptivo patre, tune incepiant in ea causa esse qua futuri essent, si ab ipso naturali patre emancipati fuissent.

1 Ulpian, xxviii. 25. Since the father can have them in his potestas, it has to be explained how they can be emancipati. It should be noticed that Hasbelle is strongly inclined to leave out this passage as a corrupt interpolation.

2 Therefore the praetor will grant
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 postritis of an ascendant by authority of the Praetor¹, his testament is in all cases invalidated by this quasi-agnation of a suis 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 daughter², 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 suis heredesis³. 141. A son also who is manumitted after a first or second manumission⁴, invalidate a testament previously made, since he returns into his father's postritis. 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. 37. 13. 5: p. 11, 2. 1 L. 69, 99. 2 p. 115 c. 3 If they be already instituted in the testament it must be as extremi 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," Justinian 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 named, they must have been named in another character. 4 p. 128-129. ¹ 1 L. 67.
an non existerit: hoc enim solum spectatur, an existere potuerit. Ideoque si quis ex posteriori testamento quod iure factum est, aut nulliter heres esse, aut vivo testatore, aut post mortem eius antequam hereditatem adiret decesserit, aut per creationem exclusus fuerit, aut condicio sub qua heres institutus est defectus sit, aut proper caelatam ex lege fulla summorum fuerit ab hereditate: quibus causibus patet familia intestatus mortuir: nam et prius testamentum non valet, ruptum a posteriori, et posterius acque nullas vires habet, cum ex eo nemo heres existerit.

145. Alio quoque modo testamenta iure facta ineffectuari, velut cum is qui fecerit testamentum capit dimittatur sit, quod quisque modis accidit, primo commentario retatur est. (146.) Hoc autem casu initia ferei testamenta dicemus, cum aliquo quis et quae rumpantur initiavit; et quae statim ab initio non iure facta 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. Therefore if any one appointed under the later and duly made testament, either refuse to be heir, or die in the lifetime of the testator, or after his death but before entry on the inheritance, or be excluded by credio, or fail to fulfill some condition under which he was instituted heir, or be debarred from the inheritance by the Lex Julia by reason of celibacy: in all these cases the paterfamilias dies intestate, for the earlier testament is void, being invalidated by the later one: and the latter 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 diminutionem. In what ways this comes to pass has been explained in the first Commentary.

146. But in this case we shall say that the testaments become ineffectual, although, on the other hand, those which are invalidated are also ineffectual, and those which are illegally made from the very beginning are ineffectual: and those too which have been duly made, and afterwards become ineffectual through capitis diminutionem, might just as well be called invalidated. But as it is plainly more convenient to distinguish particular cases by particular names, therefore some are said to be made illegally, others to be invalidated after being legally made, or to become ineffectual.

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

1. See Appendix (E).
in the same case the heir being a minor, the Praetor will grant bonorum possessionem to him 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 from them. But in this case the hereditas was cum re and the bonorum possessionem was sine re. See III. 56. Ulpian, xxviii. 32.

1 In §§ 143, 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 such intestacy.

132. Heirs are called either necessarii, or sui et necessarii, or intestati. The possessor, however, is here not a minor, but an agnatus. But probably there is here no reference to this distinction. Ulp. xxviii. 7.

1 It may very well happen that one man is heir according to the civil law, and another bonorum possessio according to the Praetor's act. 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 here, but the Praetor will grant bonorum possessionem to the son; hence the hereditas here is sine re, the bonorum possessionem is cum re. (See § 132.) Again the Praetor allowed only a limited term 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 Interdict Quo rum Bonorum (iv. 144) was attached to it, and if they failed to apply within the time, the bonorum possessionem would be granted to applicants of the class which came next in order of succession, if it were a case of intestacy, or to the heirs ab intestato in the case of neglect of application on the part of 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 from them. But in this case the hereditas was cum re and the bonorum possessionem was sine re. See III. 56. Ulpian, xxviii. 32.

132. Heirs are called either necessarii, or sui et necessarii, or intestati. The possessor, however, is here not a minor, but an agnatus. But probably there is here no reference to this distinction. Ulp. xxviii. 7.
153. Necessarius heres est servus cum libertate heres institutus; ideo sic appellatur, quia, sive velit sive nolit, omnimodo post mortem testatoris proinus liber et heres est. (154.) Unde qui facultates suas suspectas habet, solet servum primo aut secundo vel etiam ulterior gradu liberum et heredem instituere, ut si creditoribus situs non futur, potius hujus hereditis quam ipsum testatoris bona venerate, id est ut ignominia quae accidit ex venditione honorum hune potius heredem quam ipsum testatorem contingat; quamquam apud Fufidius Sabino placeat eximendum cum esse ignominia, quia non suo viti, sed necessitate iuris honorum venditionem pateretur: sed ait iure utinam. (155.) Pro hoc tamen incommodo illud ei commodum praestatur, ut ea quae post mortem patroni sibi adquirerit, sive ante honorum venditionem sive postea, ipsi

153. A necessary heir is a slave instituted with a grant of liberty: so called from the fact that whether he desire it or not, he is in all cases free and heir at once on the death of the testator. 154. Therefore a man who suspects himself to be insolvent generally appoints a slave free and heir in the first, second, or even some more remote place, so that if the creditors cannot be paid in full, the goods may be sold as those of this heir rather than of himself: that is to say, that the disgrace arising from the sale of the goods may fall upon this heir rather than the testator himself: although Sabinus, according to Fufidius, 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. And although the goods when sold only pay a part

reserventur, et quamvis pro portione bona venierint, iternum ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit adquisitum, velit si Latinus adquisierit, locupletior factus sit; cum ceterorum hominum quorum bona venierunt pro portione, si quid postea adquirant, etiam saepius corum bona veniri solent.

156. Sui autem et necessarii heredes sunt velut filius filiave, nepos neptisve ex filio, deinceps ceteri, qui modo in potestate mortis fuerint. sed uti nepos neptisve suas heres sit, non sufficit cum in potestate avi mortis tempore fusse, sed opus est, ut pater quoque eius vivo patre suo desierit suas heres esse, aut morte intercessit aut qualibet ratione liberatus potestate: tum enim nepos neptisve in locum sui patris succedunt. (157.) Sed sui quidem heredes ideo appellantur, quia domentic heredes sunt, et vivo quoque parente quodam modo domini

of the debts (pro portione venierint), yet his goods will not be sold a second time on account of the inheritance, unless he has acquired something in connection with the inheritance; for instance, if he be a Latin and have been enriched through acquisitions he has made: although when the goods of other men will only pay in part, if they acquire anything afterwards, their goods are sold over and over again.

156. Heirs sui et necessarii are such as a son or daughter, a grandson or granddaughter by a son, and others in direct descent, provided only they were in the potestas of the dying man. But in order that a grandson or granddaughter may be suas 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 suas 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

2. The phrase "Sabino apat Fufidius" is an ambiguous one. As Fufidius probably lived about A.D. 156, and Sabinus we know was consul in A.D. 80, 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 opus is used in each of these senses are collected in Smith's Diet of Roman and Greek Biography and Mythology, in the article on Pexes, Uneas, q. v.

3. This is called the beneficium separabili by later writers.

4. The word si should be repeated: velut si, si Latinus adquisierit, locupletior factus sit. So also in il. 235. 111. 56.
Beneficium abstinendi. Heredes extranei.

existimatur. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii vero idem dicuntur, quia omnino, sive velint sive nonint, tam ab intestato quum ex testamento heredes sunt. (158) sed his Praetor permittit abstinere se ab hereditate, ut potius parentis bona venant. (159) Idem iuris est et in uxoris persona quae in manu est, quia filiae loco est, et in nunc quae in manu fili est, quia nepitis loco est. (160) Quin eum similitur abstinendi postratam facit Praetor etiam [mancipit, id est] ei qui in causa mancipi est, cum liber et heres institutus sit; cum necessarii, non etiam suos heres sit, tamquam servus.

161. Ceteri qui testatoris iuri subjici non sunt extranei heredes appellantur, inque liberis quoque nostri qui in post-extend1. 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 like a slave he is a heres necessarius, not suus also.

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

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 class1.

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 abstaining2 meddle with the goods of the inheritance, or if one who is allowed to deliberate3 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 Papianus, D. 38. 6. 7, gives another derivation: "suis haec curam et ipse facit in potestate" i. e. the ascendant had him in his potestas and so he was not "belonging to him," just as land or a chattel was also suum, 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 abstinendi; and so the disgrace of the sale (§ 154.) fell on the memory of the deceased and not on themselves.

2 1. 158. "Suis also," i. e. necessarii et suos.

This clause explains why a mancipated person should be appointed free and heir. A person in causa mancipii is technically a slave. 1. 153.

1 Tit. 188.
2 Sc. a heres suus et necessarius. 1. 158.
3 Sc. a heres extraneus. 1. 162.
164. Extraneis heredibus solet creto dare, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis fine summoveantur. Ideo autem creto appellatur, quia cernere est quasi decernere et constituisse.

165. Cum eigo in scripsum sit: HERES TITUS ESTO: adicere debemus, CERNITQUE IN CENTUM DIERIBUS PROXIMUS QUIBUS SCES POTERISQUE. QUOD IN ITA CREVERIS, EXHERES ESTO.

166. Et qui ita heres institutus est si velit heres esse, debeat intra diem cretonis cernere, id est haec verba dicere: QUOD ME PUBLICUS MARVUUS TESTAMENTO SUO HEREDEM INSTITUIT, HAM HEREDITATEM ADEO CERNIQUE. Quodsi ita non creverit, in toto tempore cretonis excluditur: nec quicquam proficit, si pro herede gerat, id est si rebus hereditariis tamquam heres utatur. (167.) At is qui sine cretone heres institutos sit, aut

To extraneous heirs creto 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 creto because the verb cernere means to deliberate, as it were, and decide. 164. When, therefore, the clause has been written, "Titus be heir," we ought to add, "and make thy creton within the next hundred days after thou hast knowledge and ability. But if thou dost not thus make creto, he be disinherit." 166. And if the heir thus instituted desire to be heir, he ought to make creton within the time allowed for creton, i.e. speak the words, "Inasmuch as Publius Marvus has instituted me heir in his testament, I enter on that inheritance and make creton for it." But if he do not thus make creton, he be debarred at the expiration of the time limited for creton. Nor is it of any avail to 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 creton,

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

170. Now every creton is tied down to some fixed time. For which object a hundred days seems a fair allowance: but
Cretio continua et vulgaris.

171. Et quamvis omnis cretio certis diebus constriurat, tamen alta cretio vulgaris vocatur, alia certorum dieum: vulgaris illa, quam supra expositum, id est in qua adecutur haec verba: quibus scier poterterque; certorum dieum, in qua detractis his verbis cetera scribuntur.

172. Quam cretionem magna differentia est, nam vulgari cretione data nulli dies computatur, nisi quibus scierit quique se heredem esse institutum et possit cernere. certorum vero dieum cretione data etiam nescienti se heredem institutum esse numerament dies continuo; item e quoque qui aliquis ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres institutus est, tempus numeratur, unde melius et aptius est vulgari cretione uti. (173.) Continua haec cretio vocatur, quia continuo dies numeratur sed quia

nevertheless, at civil law, either a longer or a shorter time can be given, though the Praetor sometimes abridges a longer time. 

174. Sometimes we make two or more degrees of heirs, in this manner: "Lucius Titius be heir, and make thy cretion within the next hundred days after thou hast knowledge and ability. But if thou dost not so make cretion, be disinherited. Then Maevius be heir, and make thy cretion within a hundred days. and so we can substitute successively as far as we wish." 175. And it is in our power to substitute either one person or several in the place of one; and on the other hand, either one or several in the place of several. 176. The heir, then, instituted in the first degree, by making cretion for the inheritance becomes heir, and the substitute is excluded; but by not making cretion he is excluded, even though he act as heir, and the substitute succeeds into his place. And so, if there be several degrees, the same thing happens to each successively in like manner. 177. But if cretion be given without disinheriting, i.e. in the words, "If thou dost not exercise cretion, then let Publius Maevius be heir," this difference is discovered, that if the heir first named, neglecting his cretion, act as heir, the substitute is admitted

1 2 n. 165.
admittitum, et sunt ambo aequis partibus heredes. *quod si neque cernat neque pro herede gerat, sane in universum sum-
movetur, et substitutus in totam hereditatem succedit. (178.)
Sed quidam, quidem placuit, quondam 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 admittit substitutum: olim vero placuit, etiam super-
ante cretione posse cum pro herede gerendo in partem substi-
uatur et amplius ad creationem reverti non posse.

179. Liberis nostris inipuberibus quos in postestate habemus
non solum ita, ut supra diximus, substituere possumus, id est
ut si heredes non exitierint, alius nobis heres sit; sed eo am-
plius, ut etiam si heredes nobis exitierint et adhuc inipuber
mortui fuerint, sit ipsis 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
deballed 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
creation.

179. We can substitute to our descendants under the age
of puberty whom we have in our postelas, 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 (xxix. 34) calls this *im-
perfectissima cretio.* He also mentions a
constitution by which *gitta pro her-
rate* 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 par-
agraph would point to the latter con-
cclusion.

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

*FILIIUS MEUS MIHI HERES ESTO. SI FILIIUS MEUS MIHI HERES
NON ERIT SIVE HERES ERIT ET PRIUS MORTIUR QUAM IN SUAM
TUTELAM VENERIT, SEIUS HERES ESTO. (180.) Quo casu si qui-
dem non exitierit heres filius, substitutus patri fit heres: *si vero*
heres exitierit filius et ante pubertatem deceverit, ipsi filio fit
heres substitutus. quamobrem duo quodammodo sunt testa-
menta: alid patri, alid fili, tamquam si ipse filius sibi here-
dem instituisse; aut certe unum est testamentum duarum here-
ditatem.

181. Ceterum ne post obitum parentis peculio insidiarum
subiectus videntur pupillus, in usu est vulgarum quidem sub-
stitutionem palam facere, id est eo loco quo pupillum heredom
instituimus: nam vulgaris substituto ita vocat ad hereditatem
substitutum, si omnino pupillus heres non exitierit: quod
accidit cum vivo parente moritur, quo casu nunc substituti
maleficium suspicari possimus, cum scilicet vivo testatore
omnia quae in testamento scripta sint ignorantur, illam autem
thus: "Titius, my son, be my heir. If my son shall not be-
come 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 ascendant, 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 appendage to a testament of the ascendant, and
cannot exist otherwise.
substitutionem per quam, etiamsi heres extirrit pupillos et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, casque tabulam proprio lino propriaque ceri consignamus; et in prioribus tabulis cavemus, ne inferiores tabulae vivo filio et adhuc inpube aperiatur. Sed longe futus est utrumque genus substitutionis separatim in inferioribus tabulis consignari, quod si eis consignata vel separatae fuerint substitutione, ut diximus, ex priori possit intelligi in altem [alter] quoque idem esse substitutus.

182. Non solum autem heredibus institutis impuberibus liberis, ita substituere possimus, ut si ante pubertatem mortui fuerint, sit is heres quem nos voluerimus, sed etiam exheredatis, itaque eo casu si quid pupillo ex hereditatibus legislatave aut donationibus propinquorum adquirit fuerit, id omne ad substitutum pertinent. (183.) Quaeque cumdiximus de substitutione impuberum liberorum, vel heredum institutorum vel exheredatorem, eadem etiam de postumis intelligimus.

184. Extraneo vero heredi in substituere non but the substitution whereby we call in the substitute if the pupi 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.

185. 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 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 fiduciariam to deliver over our inheritance either wholly or in part: the nature of which rule we will explain in its proper place.

186. 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 Stichius, 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 cession 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
Apportionment of slaves at heirs.

si vero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu novi domini adire hereditatem debet, et ea ratione per eum dominus fit heres: nam ipse alienatus neque heres neque liber esse potest. (189) Alienus quoque servus heres institutus, si in eadem causa duraverit, iussu domini hereditatem adire debet; si vero alienatus fuerit ab eo, aut vivo testatore aut post mortem eius antequam adeat, debet iussu novi domini cernere. si manumissus est antequam adeat, suo arbitrio adire hereditatem potest. (190) Si autem servus alienus heres institutus est vulgari creatione data, ita interdicitur dies creatiois cedere, si ipse servus scierit se heredem institutum esse, nec ullum impedimentum sit, quominus certiorum domini 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 free1. 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 legacies2. 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 vindicatio, by damnatio, sinendi modo, or by preceptum.

193. We give a legacy by vindicatio 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 vindicatio. 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 vindicatio. The legacy “by vindicatio” is so called because after the inheritance is entered upon, the thing at once becomes the property of the legatee ex iure Quiritium:

1 The due appointment of an heir is the foundation of the whole testament (t. 110); if the appointment be invalid the testament fails utterly; but if a legacy fail the residuary of the testament stands good. The appointment of the slave as heir, in the present case, is valid, but for juridical reasons he inherits for the benefit of another: the gift of liberty is regarded as a legacy, and therefore the impossibility of its being received, is, by the above principle, a matter of minor importance, not at any rate causing the inheritance to fail.

2 Legatum est quod legi modo, id est imperative, testamento relin-
Per vindicationem.

Quiritium res legatarii fit; et si eam rem legatarius vel ab herede vel ab alio quoque qui eam possidet petat, vindicare debet, id est intendere eam rem quam ex iure Quiritium esse. (105) In eo vero dissentiant prudentes, quod Sabinius quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditum hereditatem patente fieri legaturi, etiam si ignotum sibi legatum esse dimissum, et postea quam sciens et repudiaverit, tum perinde esset atque si legatum non esset: Nerva vero et Proculus ceterique illius scholae auctores non aliter patuam rem legatarii 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 suisset Latinus per vindicationem coloniae: deliberent, inquirerent, decurrerent an ad se velint pertinere, proinde ac si uni legatus esset. (106) Eae autem sola e per vindicationem legaturur recte quae ex iure Quiritium ipsius testatoris sunt. sed eas 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. 105. 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 be 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 Pius Antoninus, we seem rather to follow the rule of Proculus: for when a Latin had been left as a legacy by vindication to a colony: "let the decuriones," he said, "consider whether they wish him to belong to them, in the same manner as if he had been bequeathed to an individual." 106. 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 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. 107. 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. 1 Now the most advantageous form is a legacy by damnation: by which kind even the property of another can be bequeathed, as will appear below. 108. 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 pactis (optimo) vel bis legatum est, periinde sit acto iure legatum exesse." Ulpian, xxiv. 11, 15. 2 11. 203.
quis rem suam legaverit eamque postea alienaverit, pleisque putant, licet ipso iure debeatur legatum, tamen legatum petentem per exceptionem doli mali repeti quasi contra voluntatem defuncti petat. (198.) Illud constat, si duas pluribus per vindicationem cadem res legata sit, sive concumtum sive disjunctum, si omnes veniant ad legatum, partes ad singulos pertinent, et deficientis portionem collegiariadrescere. concumtum autem ita legatur: TITIO ET SIS HOMINEM STICHUM DO LEGO; DISJUNCTUM ITA: LUCIO TITO HOMINEM STICHUM DO LEGO. SEIO EUNDENM HOMINEM DO LEGO. (200.) Illud quaeritur, quod sub condicioe per vindicationem legatum est, pendent condicioe cumin esset. Nostri praecipuas heredis esse putant exempla statuientes, id est eius servus qui testamento sub aliqua condicioe liber esse iussus est, quem constat interes heredis servum esse. sed diversas scholae auctores putant nullius interim can rem esse; quod multo magis dicunt de eo quo sine conditione pure legatum est, antequam legatarius admittat legatum.

201. Per damnationem hoc modo legamus: HERRS MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO, sed et si dato scriptum sit, per damnationem legatum est. (202.) Quia gener legati etiam aliena res legari potest, ita ut heres redimere et praestare aut aeditationem cius dare debent. (203.) Quia quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut fructus qui in illo fundo natum erant, aut quod ex illa ancilla natum erit. (204.) Quod autem ita legatum est, post aditum hereditatem, etiam pure legatum est, non ut per vindicationem legatum continuo legatario acquiratur, sed nihilominus heredes est. idea legaturius in personam agere debet, id est intendere heredem sibi dare opor- tere: et tum heres rem, si mancipii sit, mancipio dare aut in iure Cedere possessionemque tradere debet; si nec mancipii sit, sufficit si tradiderit. nam si mancipii rem tantum tradiderit, more strongly as to a thing left simply without condition, before the legatee accepts the legacy.

205. 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.”

206. 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. In 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 offsprings which shall be born from a certain female slave. 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 casio 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. 119 et seq.
2 Ulpian, lib. 1, c. 18.
3 II. 24.
nec mancipaverit, usucapione dumtaxat pleno iure fit legatorii: finitur autem usucapio, sit supra quaere diximus, mobilium quidem rerum anno, earum vero quasi solo tenetur, binnio. (205.) Est et alia differentia inter legatum per vindicationem et per damnationem: si enim aedem res duobus pluribusque per damnationem legata sit, si quidem conjunctim, plane singulis partes debentur sic ut in per vindicationem legato. si vero disiunctim, singulis solida res debetur, ut sic cet heres alteri rem, alteri ascessionem eius praestare debet, et in coniunctis deficitens portio non ad collegatarium pertinet, sed in hereditate remanet. 206. Quod autem diximus deficientis portionem in per damnationem quidem legato in hereditate retinet, in per vindicationem vero collegatarium accrescere, admonendi sumus ante legem Papiam iure civilii ut remanisse: post legem vero Papiam deficientis portio caduca fit et ad eos pertinent qui in eo testamento liberos habent. (207.) Et quamvis prima causa sit in

mancipating it, it only becomes the legatee’s in full title by usucapion; and usucapion, as we have also said above, is completed in the case of moveable things in one year, but in the case of those connected with the soil in two. 205. There is also another difference between a legacy by vindication and one by damnation: for supposing the same thing be bequeathed to two or more persons by damnation, if it be conjointly, clearly equal portions are due to each as in a legacy by vindication; but if disjointly, the whole thing is due to each, so that in fact the heir must give up the thing to one and its value to the other. Also, in conjoint legacies, the portion of one who fails to take does not belong to his co-legatee, but remains in the inheritance. 206. But as to our statement that the portion of one failing to take is retained in the inheritance in the case of a legacy by damnation, but accrues to the co-legatee in the case of one by vindication: we must be reminded that it was so by the civil law before the Lex Papia: but that now, when the Lex Papia 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
ex res hereditis esse coeperit, quae est esse sit legatum. et plerique putant inutile esse: quid ergo est? licet aliquis eam rem legaverit quae neque eius suam fuerit, neque posse hereditis eius unquam esse coeperit, ex senatusconsulto Nero-niano proinde videatur ac si per damnationem reliqua esset. (213.) Sic autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet hereditis eo usque, donec is heres tradendo vel mancipando vel in iure cedendo legatarii eam fecerit; ita et in sinendis modo legato iure est: et ideo nullus quoque legatis nomine in personam actio est quidquid heredem ex testamento dare facere oportet. (214.) Sunt tamen qui putant ex hoc legato nonvideri obligatum heredem, ut mancipet aut in iure cedat aut tradat, sed sufficiere, ut legatum rem sumpsere patientur; quia nihil ultra ei testator imperavit, quam ut sinat, id est patiatur legatarium rem sibi habe. (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 cestio in iure: so also is the law regarding a legacy sinendis modo: and therefore in respect of this legacy also the action is personal: "whatsoever 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 cestio in iure, 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

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1 Ulp. xxiv. 11. 9. Gaius probably intends the latter half of this paragraph to be a denial of the doctrine of the "plerique" of the first half: but if so, he wound his sentence so badly that he omitted the very one under discussion, and that only.

2 IV. 2.

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Per praelectionem. 141

dissensio in hoc legato intervenit, si tandem rem duobus pluribus disjunctione legati: quidam putant utriusque solidum dehberi, sicut per damnationem: nonnulli occupantis esse meliorum conditionem aestimant, quia cum in eo genere legati damnetur heres patientiam praestare, ut legatarius rem habeat, sequitur, ut si priori patientiam praestiterit, et is rem sumpsere, securus sit adversus eum qui postea legatum petierit, quia neque haber rem, ut patiatur eam ab eo sumi, neque dolo malo feert quominus eam rem habearet.

216. Per praelectionem hoc modo legamusi: LUCIUS TITIUS HOMINEM STICHUM PRACRIPTO. (217.) Sed nostri quidem praeceptors nulli alii eo modo legari posse putant, nisi ei qui alius ex parte heres scriptus esset: praecipere enim esse praecipuum sumere; quod tantum in eius personam procedit qui alius ex parte heres instinitus est, quod est extra portionem hereditatis praecipuum legatum habituum sit. (218.) Ideo-

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1 He is ordered to take "in advance." "In advance" must mean before he takes some other benefit: now an ordinary legatee takes nothing but his legacy, and therefore praecipito must refer to an heir, the only legatee whom we can conceive as taking another benefit in addition to his legacy.
que si extraneo legatum fuerit, inutili est legatum, adeo ut Sabinus existimaverit ne quidem ex senatusconsulto Nerono posse convallescere: nam eo, inquit, senatusconsulto ea tantium confirmantur quae verborum visio iure civili non valent, non quae propter ipsam personam legatarii non debentur. sed Julianus ex Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum; nam ex verbis etiam hoc casu acceiderit, ut iure civili inutili sit legatum, unde manifestum esse, quod eadem allis 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 praecentores quod ita legatum est nulla ratione putant posse consequi cum iis ita fuerit legatum, praecepta quidem iudicium familias eriscundae quod inter heredes de hereditate eriscunda, id est dividenda accipi solet: officio enim iudicis id

218. Therefore, if the legacy have been left to a stranger, the legacy is void, so that Sabinus thought it could not even stand by virtue of Nero's senatusconsultum: for he says, by that senatusconsultum those bequests alone are upheld which are invalid at the civil law through an error of wording, not those which are not due on account of the very character of the legatee. But Julianus, according to Sextus, thought that the legacy was in this case upheld by the senatusconsultum: because from the following consideration it was plain that in this case too the wording caused the invalidity of the bequest at the civil law, viz. that the legacy could be validly left in other words, as for instance, (by vindication or damnation) 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 iudicium familias eriscundae, which is usually employed between heirs for the purpose of "eriscandat," i.e. dividing the inheritance: for it appertains to the

contineri, ut et quod per praecessionem legatum est adiudicetur. (220.) Unde intellegimus nihil aliud secundum nostro praecettorum opinionem per praecessionem legari posse, nisi quod testatoris sit nulla enim alia res quam hereditaria deductur in hoc iudicium: inquit si non sum rem co modo testator legaverit, iure quidem civili inutili erit legatum; sed ex senatusconsulto confirmabitur. aliquo tamen caso etiam alineam rem per praecessionem legari posse tantum: veluti si quis cum rem legaverit quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia solvere eam rem, ut possit praeceptare is cui ita legatum sit. (221.) Sed diversae solvae auctores putant etiam extraneo per praecessionem legari posse prouinde ac si in scribatur: Titius hominemstichum capito, superveniunt auctores si praecessionem

duty of the jude to assign also a legacy by preception. 222. We perceive from this, that according to the opinion of our authorities, nothing can be left by preception, except property of the testator: for nothing but what belongs to the inheritance can be the matter of this action. If then the testator have bequeathed in this form a thing not his own, the legacy is invalid at the civil law: but will be upheld by the senatusconsultum. In a special case, however, they admit that another man's property can be left by preception; that is to say, if any one have bequeathed a thing which he has given in manus to his creditors fiduciare causa: for they think the heirs can be compelled by the executive power of the jude to release the thing by payment of the money, so that he to whom it is so left may take it in advance. 222. But the authorities of the other school think that a legacy can be left by preception even to a stranger, just as if the wording were thus: "Let Titius take the man Stichus," the syllable praecessionem being added superfluously: and therefore that such a

1 "Also," i.e. in addition to his proper function of dividing the inheritance.
2 Sec. of Nero, ii. 107.
3 Originally it was customary to transfer to the creditor the property in a subject by mancapitation, with a promise, however, by the creditor, at the moment of mancapitation, to deliver the property back. "Factum de mancapitatione, fiduciaria." Savigny, On Dualism,translated by Perry, p. 216.
4 Dirksen, sub verbo, § 2. A. Officium = materi partes, etcendo.
**Actio familiaris ergestudica.**

**Lex Furia and Lex Voconia.**

Asque libertatus erogare, nec quicquam heredi relinquere propter quam inane nomen heredes; itaque lex eit tabulam permettere videbatur, qua cavetur, ut quod quisque de re sua testatum est, id rationem habeatur, his verbis: \textit{ut legatam vitare res, ita jus esto quare qui scripti heredes erant, ab hereditate se abstinent; et idcirco plebiestatis morte-bantur.} (225.) Itaque lata est lex Furia, qua, excepta personis quibusdam, ceteris plus mille asibus legatorum nomine mortis causa capere permittat non est sed et haec lex non perfect quod voluit, qui enim verbi gratia quique miliam aeris patrimonium habebat, potest quinque hominibus singulis millibus asses legando totum patrimonium erogare. (226.) Ideo postea lata est lex Voconia, qua cunctam est, ne cui plus legatorum nomine mortis causa capere liceret quam heredes caperent. ex qua leges plane quidem alicui utique heredes habere videbantur; sed tamen fere vitium simile nasce-

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 Furia\(^6\) was passed, whereby it was forbidden for any person, certain exceptions however being made, to take more than a thousand \textit{asses} by way of legacy or donation \textit{mortis causa}. But this law did not accomplish what it intended. For a man who had, for instance, a patrimony of five thousand \textit{asses}, could expend his whole patrimony by bequeathing a thousand \textit{asses} to each of five men. 226. Therefore, afterwards, the Lex Voconia\(^4\) was passed, whereby it was provided, that no one should be allowed to take more by way of legacy or donation \textit{mortis causa} than the heirs took. Through this law the heirs seemed certain to have something at any rate; but yet a

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1. [Text Fragment]
2. [Text Fragment]
3. [Text Fragment]
4. [Text Fragment]
5. [Text Fragment]
6. [Text Fragment]
batur: nam in multis legatoriorum personas distributo patrimonio poterant adeo heredi minimum reliquere, ut non expedit heredi huius luci gratia totius hereditatis onera sustinere. (227.) Lata est itaque lex Falcidiae, qua caustum est, ne plus ei legare licent quam dodrans. itaque necesse est, ut heres quartam partem hereditatis habeat. et hoc nunquam iure utimur. (228.) In libertatis quoque dandis nimium licentiam conpescuit lex Furia Caninia, Sicut in primo commentario retulimus.

DE INUTILITER RELICTIS LEGATIS.

229. Ante heredis institutionem inutiliter legatur, sicut quia testamenta vim ex institutione heredis accipiant, et ob id velur caput et fundamentum intelligitur totius testamenti heredes institutio. (229.) Fasi ratione nec libertas ante heredias institutionem dari potest. (230.) Nostri praeceptores nec tutorum eo loco dari posse existimabant: sed Labeo et Proculus mischief almost similar to the other ares: 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 Falcidiae 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 Labeo and

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1 p. 39. Ulpian, XXIV. 32. 3 Ulpian, XXIV. 45. 4 L. 24. 5 Ibid. 4. 20.

Invalid legacies. Legacies poenae causa.

232. Post mortem quoque heredis inutiliter legatur; id est hoc modo: cum HERES MEUS MORTUIS ERIT, DO LEGO, AUT DATO. Sit autem recte legatur: CUM HERES MORIETUR: quia non post mortem heredem relinquuit, sed ultimo vitae eius tempore. Rursus ita non potest legari: PRIDE QUAM HERES MEUS MORIETUR, quod non petitas ratione receptum videtur. (233.) Eadem et de libertatis dicta intellectuamos. (234.) Tutor vero an post mortem heredes dari possit quarentibus eadem foris aut poterit esse quaestio, quae de eo agitatur qui ante heredum institutionem datur.

DE POENAE CAUSA RELICTIS LEGATIS.

235. Poenae quoque nomine inutiliter legatur, poenae autem nomine legari videtur, quod coercendi heredis causa relinquitur, quos magis heres aliquando faciat aut non faciat; velut quod id legatur: SI HERES MEUS FILIAM SCAM TITIO IN MAG.

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

235. A legacy by way of penalty is also invalid. Now a legacy is considered to be by way of penalty, which is left for the purpose of constraining the heir, to prevent him doing or not doing something: for instance, a legacy in these terms: "If my heir shall bestow his daughter in marriage on Titus,

1 Ulpian, XXIV. 16. 2 p. 234. 3 Ulpian, XXIV. 17.
Legacies to an uncertain person invalid.

TRIMONIUM COLLOCATERIT; X MIIA SEIO DATO; vol ita: SI FELI- LIA TITIO IN MATRIMONIUM NON COLLOCATERIS, X MIIA TITIO DATO. sed et si heres verbi gratia intra inveniun monu- mentum sibi non fecerit, x Titio duci iussit, poenae nomine legatam et. et desinque ex ipsa definitione multas similas species propriis fugere possumus. (236.) Nec libertas quidem poenae nomine dari potest; quamvis de ea re fuerit quasistem. (237.) De tutore vero nihil possimus quaerere, quia non posset datione tutoris heres compelli quidquid facere aut non facere; ideoque nec datur poenae nomine tutor; et si datur fuerit, magis sub condicione quam poenae nomine datur videbatur.

238. Incertae personae legatum inutiliter relinquitur. incerta autem videtur persona quam per incertam opinionem animo suo testator subject, velut si ita legatam sit: qui PRIMUS AD FUNUS MEUM VENERIT, EI HERES MEUS X MIIA DATO.

let him give ten thousand sesterces to Scius." or thus: "If you do not bestow your daughter in marriage on Titius, give ten thousand to Titius." And also, 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. 239. Now an uncertain person is considered to be one whom the testator brings before his mind without any clear notion of his individuality, for instance, if a legacy be given in these terms: "Let my heir give ten thousand sesterces to him who first

... 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.

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Legates under the potestas of the heir.

Legatus under the potestas of the heir.

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

242. Ac ne heres quidem potest institui postumus alienum: est enim incura persona. (243.) Cetera vero quae supra dixerimus ad legata proprium pertinent; quamquam non inmerito quibusdam placeat poenae nemine hereditem institui non posse; nihil enim interit, utrum legatum dare inbeatur heres, si fecerit aliquid aut non fecerit, an coheres et adiciatur; quia tam coheredes adlectione quam legati datione compellitur, ut aliquid contra propositum suum faciat.

244. An el qui in potestate sit eius quem heredem instituimus recte legemus, quaeritur. Servius recte legati probat, sed evanescre legatum, si quo tempore dies legatorum cedere soleat, adiunct in potestate sit; ideoque sive pure legatum sit et vivo testatore ille potestate heredes esse desideret, sive sub condicione et ante conditionem in acciderit, debere legatum. Sa-

a wife who was married without omnium is a posthumous stranger in regard to his father.

242. A posthumous stranger cannot even be appointed heir: for he is an uncertain person.

243. 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, as 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.

Sabinius 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 under a condition, because we cannot be indebted to those who are in our potestas any more under a condition than unconditionally.

245. On the contrary, it is allowed that a legacy can validly be given to you, payable by one under your potestas who is instituted heir: yet if you become heir through him, the legacy is inoperative, because you cannot owe a legacy to yourself: but if the son be emancipated, or the slave manumitted or transferred to another, and become heir himself or make another heir, the legacy is due.

246. Now let us pass on to fideicommissa.

1. Il. 238.
2. Il. 239, 237, 238.
3. Ulpian, xiv. 58.
4. "Cedere diem significant faci-
247. Et prius de hereditatibus videamus.

248. Inprimis igitur scendum est opus esse, ut aliquis heres recto iure instituatuir, eisquae fidei committatur, ut eam hereditatem alii restituat: aliquinqua in testamento in quo nemo recto iure heres instituatuir. (249.) Verba autem utilia fideicommissorum haece recte maxime in usu esse videntur: PETO, ROGO, VOLO, FIDEICOMMITTO: quae prionde firma singula sunt, atque si omnia in unum congrega sint. (250.) Cum igitur sciiscimus: LUCIUS TITUS HERES ESTO, POSSIMUS ADIECERE: ROCO TE, LUCI TITI, PETOQUE A TE, UT CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, GAIO SEIO REDDAS RESTITUAS.

possimus autem et de parte restituenda rogare; et liberum est vel sub condicione vel pure relinquere fideicommissa, vel ex die certa. (251.) Restituta autem hereditate is qui restituit nihilominus heres permanet; et vero qui recipit hereditatem, aliando heredis loco est, aliquando legatarii. (252.) Oblia autem nec heredis loco erat nec legatarii, sed potius emptorin, tunc enim in suo erat ei qui restituebatur hereditas nummo uno eam

247. 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 fideicommiss 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 fideicommiss 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

hereditatem dicas causa venire; et quae stipulaciones inter vindicorum fideicommisarios et emptorum interposui solent, itaem interpersonas inter heredem et eum qui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo qui restituebatur hereditas, ut quocumque hereditario nomine condemnatus fuerat, sive quid aliis bona fide dedisset, eo nomine indemissis esset, et omnino si quis cum eo hereditario nomine agetur, ut recte defendecurum: ille vero qui recipiebat hereditatem invicem stipulabatur, ut si quis ex hereditate ad heredem pervenisset, id sibi restitueretur; ut etiam pateretur eum hereditatiae actiones procuratorius aut cognitoris nomine exequi.

253. Sed posterioribus temporibus Trebellius Maximo et Annae Senecae Consulibus Senatusconsultum factum est, quo cautum est, ut si qui hereditas ex fideicommissa causa restituta sit, actiones quae iure civili herediti et in heredem competenter et in eum darentur ex fideicommissio restituta esset hereditas.

was delivered over: and the same stipulations which are usually entered into between the vendor and the purchaser of an inheritance, were entered into between the heir and the person to whom the inheritance was delivered over, i.e. in the following manner: the heir on his part stipulated with him to whom the inheritance was delivered over, that he should be indemnified for any amount in which he was mutilated 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 cogitator.

1 iii. 92 et seqq. 2 iv. 83, 84.
post quod senatusconsultum desierunt iliae cautiones in usu haberi. Praetor enim utiles actiones ei et in eum qui recepit hereditatem, quasi heredi et in herede dare coepit, atque in edicto proponitur. (254.) Sed tursus quia heredes scripti, cum aut totem hereditatem aut paene totem plerumque resituiere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur fideicommissa, Pegaso et Pusione Consilii senatoris censuit, ut ei qui rogatus esset hereditatem resituiere perinde liceret quartam partem retinere, atque c leges Falcidia in legatis retinendi iuxta conce- ditur. ex singulis quoque rebus quae per fideicommissum rellinquuntur eadem retentio permissa est. per quod senatusconsultum ipse onera hereditaria sustinet; ille autem qui ex fideicommissio reliquant partem hereditatis recipit, legatarii partiarii loco est, id est eius legatarii qui pars honorum legatur. quae species legati partitio vocatur, quia cum herede legatarius par-

was 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 utiles actiones for and against the receiver of the inheritance, as if they were for and against the heir, and these are set forth in the edict. 254. But again, since 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 Pusio 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 Ptolemaic law in respect of legacies. The same retention is also allowed in the case of individual things left by fideicommissum. By this senatusconsultum the heir himself sustains the burdens of the inheritance, whilst he who receives the rest of the inheritance by virtue of the fideicommissum, is in the position of a partitary legatee, i.e. of a legatee to whom a portion of the goods is left. Which species of legacy is called partitio, because the legatee shares (partitur) the inheritance with the heir. The

result of this is that the same stipulations which are usually entered into between the heir and the partitty legatee, are also entered into between him who receives the inheritance by way of fideicommissum and the heir, i.e. that the gain and loss of the inheritance shall be shared between them in proportion to their interests. 255. If then the written heir be asked to deliver over not more than three-fourths of the inheritance, the inheritance is thenceforth delivered over in accordance with the senatusconsultum Trebellanum, 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 Trebellanum. 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,
partem restitmere rogetur: nam et hoc cas de quarta parte eius partis ratio ex Pegasioni senatusconsulto haberi solet.

250. Potest autem quisque etiam res singulas per fideicommissum relinquere, velit fundum, hominem, vestem, argentum, pecuniam; et vel ipsum hereditem rogare, ut aliqui restituant, vel legatarium, quamvis a legatorio legari non possit. (261.) Item potest non solum propria testatoris res per fideicommissum relinquui, sed etiam heredis aut legatorii aut cuiuslibet alterius. itaque et legatarius non solum de ea re rogari potest, ut cam aliqui restituant, quae ei legata sit, sed etiam de alia, sive ipsius legatorii sive aliena sit. sed hoc solum observandum est, ne plus quosque rogetur aliqui restitueret, quam ipse ex testamento ceparet; nam quod amplius est inutiliter relinquatur. (262.) Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est, aut ipsum redimere et praestare, aut estimationem eius solvere. sic tuus est, si per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum

the fourth of that part according to the senatusconsultum Pegasianum.

260. A man can also leave individual things by fideicommissum, as a field, a slave, a garment, plate, money: and 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 re-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-
Fideicommissary gifts of freedom.

Relictam dominus non vendat, extingui fideicommissum; sed alium esse causan per damnationem legati.

263. Libertas quoque servo per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legatarius. (264.) Nec interest utrum de suo proprio servo testator rogat, an de eo qui ipsius heredes aut legatarii vel etiam extranei sit. (265.) Itaque et aliquus servus redimi et manumitter debet, quod si dominus cum non vendat, saepe extinguitur libertas, quia pro libertate pretii computatio nulla intervenit. (266.) Qui autem ex fideicommissu manumitteri non testatoris fit libertus etiam si testatoris servus sit, sed eius qui manumittit. (267.) At qui directo, testamento, liber esse inebetur, velut hoc modo: Stichus servus meus liber esto, et Stichus servum meum legitimum esse iubero, is ipse testatoris fit libertus. Nec alius ullus 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 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. 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. 265. Now he who is manumitted in accordance with a fideicommissum, does not become the freedman of the testator, even though he be the testator's slave, but the freedman of the person who manumits him. 267. But he who is ordered to be free by direct bequest in a testament, for instance, in the following words: "Let my slave Stichus be free," or, "I order my slave Stichus to be free," becomes a freedman of the testator himself; no one, however, can have liberty directly by virtue of a testament.

Fideicommissa and legacies contrasted.

268. Multum autem different quae per fideicommissum relinquuntur ab his quae directo iure legantur. (269.) Nam ecce per fideicommissum etiam natus hereditas relinquique potest: cum aliquo legatus nisi testamento facto inuile sit. (270.) Item intestatiss moriturus potest ab eo ad quem bona eius pertinent fideicommissum aliqui relinquere: cum aliquo ab eo legari non possit. (271.) Item legatum codicillis relinquere non aliter valet, quam si a testatore confirmati fuerint, id est nisi in testamento ceverit testator, ut quidquid in codicillis scriptum id ratum sit: fideicommissum vero etiam non confirmati codicillis relinquique potest. (272.) Item a legatario legari non potest: sed fideicommissum relinquique potest, quin etiam ab eo quoque cui per fideicommissum relinquimus rursus aliis per fideicommissum re

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.

268. Things left by fideicommissum differ much from legacies left directly. 269. For, as an instance, an inheritance can be left by fideicommissum even by a nos; whilst on the contrary, a legacy, unless a testament be made, is invalid. 270. Also a man about to die intestate can leave a fideicommissum chargeable on him upon whom his goods devolve: although, on the contrary, a legacy cannot be charged upon such an one. 271. 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. 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

1 Ulpian, ii. 10.
2 Ulpian, ii. 11. Lit. "no calculation of price instead of liberty." For the alteration of this rule see Just. Inst. i. 24. 2.
3 Ulpian, ii. 7, 8.
4 Such a freedman is called libertus orcinus. Ulpian, ii. 7, 8.

1 Ulpian, ii. 25.
2 Justinian assimilated legacies and fideicommissa in all respects. See Just. Inst. ii. 20. 3.
3 Ulpian, xxx. 5. D. 22. (Lib. iii.) 31. pr.
4 The law regarding codicils is to be found in Just. Inst. ii. 25. See Sanders' Justinian, p. 349. A codicil confirmed would become part of the testament, and the legacy thus become binding.

2 ii. 265, 261.
lique rei libertas: (272.) Item servo alieno directo libertas daret non potest: sed per fideicommissum potest. (273.) Item codicilli nemo heres institui potest neque ex heredarii, quamvis testamento confirmati sint. ut hic qui testamento heres instituit est potest codicillis regari, ut cui hereditatem alii totum vel ex parte restituant, quamvis testamento codicilli confirmati non sint. (274.) Item mulier quae ab eo qui centum annos aetatis census est per legem Voconiam heres instituit non potest, tamen fideicommisso relietab sic hereditatem capere potest. (275.) Latinis quoque qui hereditates legataque directo iure legi Junia capere prohibetur, ex fideicommisso capere possunt. (276.) Item cum senatusconsulto prohibitum sit præOptum servum minorem annis XXX liberum et heredem instituere, plerisque posse nos iubere liberum esse, cum annorum XXX erit, et rogare, ut tunc illi restitutur hereditas. (277.) Item 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. Latinis 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.

277. Likewise, although we cannot institute after the death of him who becomes our heir another heir to take his place, yet we can ask him to deliver over to another, when he shall be dying, the inheritance wholly or in part. And since a fideicommissum can be given even after the death of the heir, we can produce the same effect also if we word our bequest thus: "When Titius, my heir, shall be dead, I wish my inheritance to belong to Publius Maevius." By each of these methods, both the first and the second, Titius leaves his heir bound to deliver over a fideicommissum. 278. Moreover, we sue for legacies by means of a formula: but we proceed for fideicommissa, at Rome before the Consul, or the Praetor, whose special jurisdiction is over fideicommissa, in the provinces before the governor. 279. Likewise, judgment is given regarding fideicommissa at any time in the city; but regarding

intors, to avoid the operation of the Lex Atilia Sentia, had probably appointed slaves under thirty, not as heirs immediately, but to 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 parum testimotum, parum intestitum dedecere potest," for there would be an intestacy from the time of the testator's death to that when the heir became thirty years old: or if we consider that the heir ab intestato might occupy during the interval, then the S.C. confines us by the equally trite maxim: "Semel heres, sempiter heres.

1 II. 164, 267. 2 Ulpian, xxv. 11. 3 See by the censors, The law is referred to by Cicero, in Verres, 11. 1. 52, Ero Biber, c. S. and De Repub. III. c. 160. Another provision of the law is mentioned in ll. 276. 4 I. 25, 22. 5 I. 18. It was not by a senatusconsultum but by a Lex Atilia Sentia that men were forbidden to immediatly make a slave under thirty: still there need be no contradiction between this passage and 1. 18. Testi
Fideicommissa and legacies contrasted.

284. Each year a new difference, even the non sunt.

285. For instance, foreigners could take fideicommissa; and this was almost the first instance of fideicommissa. But afterwards this was forbidden, and now a senator consulitum has been enacted, at the instance of the late emperor Hadrian, that such fideicommissa are to be claimed for the fideicommissa. Unmarried persons also, who by the Lex Julia are debarred from taking inheritances and legacies, were in olden times considared 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 considared capable of taking fideicommissa in full. But after-wards the senator consulitum was forbidden to take fideicommissa as well as inheritances or legacies. And these were transferred to those persons named in the testament who have children, or if none of them have children, to the populus, just as the rule is regarding legacies and inheritances. 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 senator consulitum which was made at

2 ii. 105.
3 ii. 101.
4 ii. 33.
5 In the first case the legacy is due, but there is a payment to excess; in the second case no legacy is due, at all.
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*. 289.

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

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

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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 want-

2 III. 156. Ulpian, XXII. 14.

3 I. 157.
Sui heredes.

deinceps liberorum personis dictum intelligimus. (3.) Uxor quaeque
quaes in manu est sua heres est, quia filius loco est; item nurus
quaes in filii manu est, nam et haec nepitis loco est, sed ista demum
erit sua heres, si filius eius in manu erit, cum patre moritur,
in postale eius non sit. idemque dicamus et de ea quaes in nepotis
manu matrimonii causa sit, quia prænotis loco est. (4.) Postumi
quaes, qui sive parente nali essent, in postale eius futuri
forent, sui heredes sunt. (5.) Idem iuris est de his quorum nomine
ex leg. Aelia Sentia vel ex senatusconsulto post mortem patris
causa probatur: nam et hi vivo patre causa probata in potes-
titate eius futuri essent. (6.) Quod etiam de eo filio, qui ex
prima secundae mancipatione post mortem patris manumit-
titum, intelligimus.

7. Ignor cum filius filiave, et ex altero filio nepotes nep-
tesve 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.4
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 grandson matrimonii causa5
because she is in the place of a great-granddaughter. 4. Post-
humous children also, who, if they had been born in the life-
time of the ascendant, would have been in his potestas, are sui
heredes. 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 Sentia or the senatusconsultum: for these too,
if cause had been proved in the lifetime of the father, would
have been in his potestas.6 6. Which rule we also apply to a son
who is manumitted from a first or second mancipation after the
deth of his father.7

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 por-
tion 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 simulta-
neously 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 stirpes, so that a son
should receive one-half of the inheritance, and two or more
grandsons by another son the other half: also that if there were
grandsons by two sons, and from one son one or two perhaps,
from the other three or four, one-half should belong to the one
or two and the other half to the three or four.

9. If there be no sua heres, then the inheritance by the
same law of the Twelve Tables belongs to the agnates.10 Now
these 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 same sex. Brothers

1 11. 159. 2 i. 24 et seqq.; l. 67 et seqq. 3 l. 114.
4 1. 141—143; l. 134, 135.
5 1. 156. Tabula v. i. 4: "Si ab intestato mortuus aut sua heres
necessit, adgratus proximus familiam habeat."
6
therefore born from the same father are agnates one to another
(and are also called consanguinei); 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 fraters patriloci, i.e. the sons of two brothers,
who are usually called consorxiini. And on this principle evi-
dently 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 succes-
sion: 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.

14. With reference to women, however, one rule has been
established in this matter of law as to the taking of their in-
heritances, another as to the taking of goods of others by them.
For the inheritances of women devolve on us by right of agna-
tion, equally with those of males: but our inheritances 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 legiti-
mate heirs. A mother, however, or a stepmother, who by con-
etio in manum 1 has gained the rights of daughter in regard to
our father, stands in the place of sister to us.

15. If the deceased have a brother and a son of another
brother, the brother has the prior claim, as is obvious from
what we have said above, because he is nearer in degree. But
a different interpretation of the law is made in the case of sui
heredes 2. 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

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1. 11. 10. 2. 1. 108, 115. 3. 11. 4. 11.
heredes esse. (20.) Ideam iuris est, si ideo liber non sint in potestate patris, quia sint cum eo civitate Romana donati, nec ab Imperatore in potestate redacti fuerint. (21.) Item agnati capitum diminuti non admittuntur ex ea legem heredatam, quia nomen agnationis capitum diminutione perimitur. (22.) Item proximo agnato non adeunte hereditatem, nihil magis sequens iure legitimo admittitur. (23.) Item femineae agnatione vacuamque consanguineorum gradum excedunt, nihil iuris ex legem habent. (24.) Similiter non admittuntur cognati qui per feminini sexus personas necessitidine iunguntur; adeo quidem, ut nesci inter materem et filium filiamque ultra eurque hereditatis cajiendae ius cepat, praeter quam si per in manum conventionem consanguinitatis iura inter eos constiterint.

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

heredes. 20. The rule is the same if children be not in the potestas of their father, because they have been presented with Roman citizenship at the same time with him, and have not been placed under his potestas by the emperor. (21.) Likewise, agnates who have suffered capitum diminutio are not admitted to the inheritance under this law, because the (very) name of agnation is destroyed by capitum diminutio. (22.) Likewise, when the nearest agnate does not enter on the inheritance, the next in degree is not on that account admitted, according to statute law. (23.) Likewise, female agnates who are beyond the degree of consanguinity have no title under this law. (24.) So also cognates, who are joined in relationship through persons of the female sex, are not admitted; so that not even between a mother and her son or daughter is there any right of taking an inheritance devolving either the one way or the other, unless by means of a covertis in manum the rights of consanguinity have been established between them.

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

heritae

inter suos heredes iuris est an portio in capita. inaeduli
tamen placuit in capita dividendum esse hereditatem. itaque
quotquot erant ab utraque parte personae, in toto portiones
hereditas dividit, ita ut singuli singulas portiones ferant.

17. Si nullus agnatus sit, eadem lex xii tabularum gentiles
ad hereditatem vocat, qui sint autem gentiles, primo commentario restitutus. et cum ilic admonuerimus totum gentilicium
iuris in desuetudinem abisse, supervacuum est hoc quoque loco
de ea re curiosius tractare.

18. Haecemus lege xii tabularum finitae sunt intestatorum
hereditates: quod ius sequazmodium strictum fuerit, palam
est intelligere. (19.) Statim enim emancipati liberi nullum ius
in hereditatem parentis ex ea lege habent, cum desicerint sui
inheritance should be divided per stirpes, as is the rule amongst
sub heredes1, or rather per capita. It has, however, for some
time been decided that the inheritance must be divided per
capita. Therefore, whatever be the number of persons in the
two branches together, the inheritance is divided into that
number of portions, so that each one takes a single share.

17. If there be no agnate, the same law of the Twelve
Tables calls to the inheritance the gentiles2; and who the gentiles
are we have informed you in the first Commentary. And since
we told you there that the whole of the laws relating to gentiles
had gone into disuse, it is superfluous to treat in detail of the
matter here.

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

11. See 3 Tah. v. 1. 5, "Si agnatus nec
cati, gentiles familiam nancint." 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 com-
mentary. The subject being one of
merely antiquarian interest, it will
perhaps be sufficient to quote the
following passage from Cicero, To-
pic. 6: "Gentiles sunt, qui inter se

eodem nomine sunt. Non est satis
Qui ab ingenuis orandi sunt. Ne id
qui desinit satis est. Quorum majorum
nemo servitutem servivit. Abst
etiam nunc: Qui capitis non sunt de-
minuit. Hoc fortasse satis est." Festus
also says: "Gentiles dicitur
et ex eodem genere ortus, at quis
similis nomine appellatur, ut sic Cin-
cius: Gentiles mihi sunt qui meo
nomine appellantur."
Praetorian emendations of this strictness.

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 suis heredes also, i.e. those who were in the potestas of their father, claim with them. 27. Agnates, however, who have suffered capitii 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 capitii diminutio; but in a third degree, on the ground of nearness of blood: for although by the capitii diminutio they have lost their stautable right, they surely retain the rights of cognition. If, therefore, there be another person who has the right of agnation unimpaired, he will have a prior claim, even though he be in a more remote degree. 28. The rule is the same, as some think, in the case of an agnate, who, when the nearest agnate declines the inheritance, is not on that account admitted by statute law. But there are some who think that such a man is called by the Praetor in the same degree as that in which the inheritance is given by the law to the agnates.

1 "Quia civilis ratio civilia quidem jurum cognoscere potest, naturalia vero non potest." 1. 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 might after all get nothing from the inheritance, for instance he might be related to the deceased in the third degree of blood, and so be excluded by cognates who were of the first or second.
3 Sc. Tab. v. l. 4.

Bonorum possessio.

certe agnatae quae consanguineo gradiam excessum tertio gradu vocantur, id est si neque suis heres neque agnatus usus crit. (29) Eodem gradu vocantur etiam eae personas quae per femininis sex personas capito minas sunt. (31) Liberi quoque qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur. (32) Quos autem Praetor vocat ad hereditatem, hi heredes ipsos quidem iure non fund. nam Praetor heredes fiunt non patres: per legem enim tantum vel simul iuris constitutione heredes sunt, veluti per sanitate constituto et constituenda principatum: sed eis si quidem Praetor del bonorum possessionem, loco hereditam constituamur.

33. Adhuc autem alios etiam complures gradus Praetor facil in bonorum possessione danda, quam id agit, ne quis sine successore moriatur. de quibus in his commentariis cognoscere non agnat. 31. Hoc solam admonuisse sufficit [desunt fin. 36].

26. Female agnates who are beyond the degree of consanguinitate are undoubtedly called in the third degree, i.e. when there is no suis 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 1...

1 At this point several lines of the MS. are illegible; but the substance of the missing portion can be gathered from Ulpian, Title xxviii.
Interdict Quorum Bonorum.

— item ab intestato heredes suos et agnatos ad bonorum possessionem vocant. quibus casibus beneficium eius in eo solo videatur aliquum utilemin habere, quod is qui in bonorum possessionem petit, interdicto cuius principium est QUORUM BONORUM uti possit, eius interdicti quae sit utilitas, suo loco proponemus. illoquum remota quoque bonorum possessione ad eos hereditas pertinent iure civili.

34. 

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

Bonorum possessione is either contra tabulam testamenti, or secundum tabulam testamenti, or ad intestato.

The reason why heirs entitled at the civil law took advantage of the second-named possession is given in § 34. The same possession was also granted in certain cases to those who could not claim according to strict law. See Ulpian, xxvii. 6. Gaius, ii. 119.

The possessione contra tabulam, or a considerable number of them, have been named already by Ulpian, and a resume of them is also to be found in Ulpian, xxvii. 2–4.

The possessiones ab intestato are enumerated in Ulpian, xxvii. 7.

It may be useful to contrast the Praetorian system of succession with that of the Twelve Tables.

TWO TABLES.

I. Sui heredes.

(a) Sui heredes.
(b) Emancipated children. § 26.
(B. P. "unde liberti").

II. Agnati et consanguinei.

(a) Agnati capitale dementi. § 27.
(b) Agnati. § 29.
(c) Agnati successiones. § 28.
(d) Liberi in adoptivi familiaris. § 31.
(e) Cognati. § 39.
(B. P. "unde cognati," or "proximatis causis").

III. Gentiles.

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 tablets," 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 suis heredes do not care to sue for the possession of the goods, being content with his testamentary 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 suis heredes. 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 using hereditas to signify "the inheritaments," rather than "the inheritance."
proximis cognatus petírit, sīne re habébit bonorum possessió-
nem propter eandem rationem. (38.) Sunt et alií quidam simi-
les causis, quorum alíquos superiore commentary tradimus.

39. Nunc de liberorum bonis videamus. (40.) Olim ita-
que licebat liberto patronum suum in testamento præcīrire:
nam ita dēnum lex xxi tabulārum ad hereditatem libertī voca-
bat patronum, si intestātus mortuus esset libertas nullo suo
herede relicta. Itaque intestático quoque mortuo liberto, si is
suum heredem reliquerat, nihil in bonis eius patroni iuris erat.
et si quidem ex naturalibus libris aliquem suum heredem reli-
quisset, nulla videbatur esse querela; si vero vel adoptivus
filius filiave, vel uxor quae in manu esset sua heres esset, aperte
iniqua erat nihil iuris patrono superesse. (41.) Qua de causa
postea Praetoris edicto haec iuris iniquitas emendata est. sive
enim faciat testamentum libertus, sibi et à testari, ut patrono
suò partem dimidiam bonorum suorum reliquiat; 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.

39. Now let us consider about the goods of freedmen.

40. Formerly then a freedman might pass over his patron in
his testament; for a law of the 'Twelve Tables' called the
patron to the inheritance of a freedman, only if the freedman
had died intestate and leaving no suus heres. "Therefore, even
when a freedman died intestate, if he left a suus heres, his
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
in equitable 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 dimidiarum bonorum possessio.

42. Postea lege Papia aucta sunt iam patronorum quod ad locupletiores libertos periscr. 
Cantum est enim ea lege, ut ex bonis eius qui sestertiorum nummorum centum milliun
plus in re quan tres liberors habeat, sive testamento facto sive intestato mortuus erit,
virilis pars patrono detrueatur. itaque cum unum filium unanime
filiam heredem reliquerit libertus, periíde pars dimidiam patrono
deberetur, ac sī sine ullo filio filiae moreturus; 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
doughter-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 heres. 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 disinherited they in no way bar the
patron. 42. Afterwards by the Lex Papia the rights of
patrons in regard to wealthy freedmen were increased. For it
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 patrimonium 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 debeatur; si tres reliquias, repellitur patronus. [Lusca vacua.]

43. In bonis libertinarum nullum iniuriam antiquo iure patrocinii, cum enim hae in patronorum legitima tutela essent, non aliter sicut testamentum facere poterant quam patrono auctore. Itaque sive auctor ad testamentum faciendum factus erat, neque tutum, quanto vellet, testamentum sibi relinquit, de se queri debebat, qui id a liberta importaret poterat, si vero auctor ei factus non erat, clam tunc hortatur morte eius opiolat: nam neque suum heredom liberta relinquit qui posset patronum a bonis eius vindicandis repellere. (44.) Sed postea lex Papia cum quattuor liberrum iure libertas tutela patronorum liberaret, et eo modo inferret, ut iam eius patroni tutoriis auctoritate testari possent, prosperet, ut pro numero libertorum quos superstites liberta haberet virillis pares patrono debèatur—ex bonis eius, quae omnia—-—-iuris [s. 1. n.] ad patronum pertinent.

when he leaves two heirs, male or female, a third part is due: when he leaves three the patron is excluded.

43. As to the goods of freedwomen, the patrons suffered no wrong under the ancient law. For since these women were under the tutela legitima of their patrons, they obviously could not make a testament except with the authorization of the patron. Therefore, if he had lent his authorization to the making of a testament, and that amount which he wished for had not been left to him, he had himself to blame, since he could have obtained this from the freedwoman. But if he had not lent her his authority, he took the inheritance even more surely on her death; since a freedwoman could not leave a suos heres to exclude the patron from his claim upon her goods.

44. But afterwards, when the Lex Papia had exempted freedwomen from the tutela of their patrons by prerogative of four children, and so had empowered them thenceforth to make a testament without the authorization of their patron, it provided that a proportionate share should be due to the patron, determined by the number of children whom the freedwoman had surviving.

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45. Quae autem diximus de patrono, eadem intelligatur et de filio patroni, item de nepote ex filio, et de pro nepote ex nepote filio nato prognato. (46.) Filius vero patroni, item nepis ex filio, et proneptis ex nepote filio nato prognato, quamvis idem ius habeat, quod lege xii tabularum patronae datum est, Praetor iames vocat tutores masculini sexualis patronum liberos: sed filia, ut contra tabulas testamenti liberti vel al intestata contra filium adoptivum vel successorum numerus dimidiae pars honorum possessionem petat, trium liberorum iure legi Papia consequitur: aliter hoc ius non habet. (47.) Sed ut ex bonis libertae svel quattuor liberis habentis virillis pars ei debetur, liberrum quidem iure non est comprehensum, ut quidem putant. sed tam menstruata liberta mortua, velba legis Papiae factum, ut ei virillis pars debetur, si vero testamento facto mortua sit liberta, tale ius ei datur, quale datum est patronae tribus liberis honoratis, ut praemde honorum possessionem habeti.
Claims of a Patroness on the Goods of a Freedwoman.

180 Claims of a Patroness on the goods of a Freedman.

quam patronus liberique contra tabulas testamenti liberti habent: quamvis parum diligentier et pars legis scripta sit. (48) Ex his appareat extraeores heredes patronorum longe remotum ab onani co iure in, quod vel in intestatorum bonis vel contra tabulas testamenti patrono competitor.

49. Patronae olim ante legem Papiam hoc solum ius habeant in bonis libertorum, quod etiam patronis ex lege xii tabularum datum est, nec enim ut contra tabulas testamenti, in quo pretendentiae erant, vel ab intestato contra fuium adoptivum vel axorem nunnam honorum possessionem paris dimittit pe
terent, Praetor simul ut patrono liberique eius concessit. (52) Salut postes lex Papia duobus liberis honoratissimae ingeniae patronae, libertinae tribus, eadem iure dedit quae ex edicto Praetoris patroni habent. trium vero liberorum iure honoratissimae ingeniae patronae ea iura dedit quae per eandem legem pa-

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 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 sung 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 freedborn patroness having two children, or a freedwoman patroness having three, almost the same rights which patrons have by the Praetor’s edict. Whilst to a freedborn patroness having the prerogative of three chil-

dren it gave the very rights which are given by that same law to a patron, although it did not give the same privilege to a freedwoman patroness. 51. But with respect to the goods of freedwomen, if they die intestate, the Lex Papia gives no new privilege to a patroness having children. If, therefore, neither the patroness herself, nor the freedwoman have suffered capitis diminuto, the inheritance belongs to the former by the law of the Twelve Tables, and the children of the freedwoman are excluded: which is the rule even if the patroness have no children: for, as we have said above, women can never have a 

1 Paragraphs 46, 47 are filled in conjecturally by Gaest and others; whether correctly or not seems doubtful: at any rate the style of the Latin is very different from that gene-

rally employed by Gaius. For the matter contained in these two paragraphs see Ulpian, xxix. 5.

2 Ulpian, xxxix. 6, 7.

3 Ulpian, xxix. 5.

4 Ulpian, xxxix. 6, 7.

1 III. 47.

2 II. 161.
53. Eadem lex patronae filiae liberis honoratæ—patroni iura dedit; sed in hisus persona etiam unius filli filiaeve his sufficere.

54. Hactenus omnia ex iura quasi per indicem tetigisse satis est: alioquin diligentior interpretatio propriis commentariis exposita est.

55. Sequitur ut de bonis Latinorum libertinorum displicamus.

56. Quae pars iuris ut manifestior fact, admonendi sumus, de quo alio loco diximus, eos qui nunc Latini Iuniani dicuntur olim ex iure Quiritium servos suisse, sed auxilio Praetoris in libertatis forma servari solitos; unde etiam res eorum peculiari iure ad patronos pertinere solita est: postea vero per legem Iuniam eos omnes quos Praetor in libertatem delibaret liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse vult, atque si essent cives Romani ingenii qui ex urbe Roma in Latinas colonias deducti Latinorum coloniarii esse cooperant: 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 our view 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 Iunian Latins, were formerly slaves ex iure Quiritium, but by the Praetor's help used to be secured in the semblance of freedom: and so their property used to belong to their patrons by the title of peculium: but that afterwards, in consequence of the Lex Junia, all those whom the Praetor protected as if free, began to be really free, and were called Iunian 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: Iunians, for the

1 1. 32.

1 The legitima arietatis 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 iuris. 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 suit, census, or testament. If the Lex Africam Sententiarum had not been passed, there might perhaps have been a legitima arietatis of the goods of freedmen manumitted when under thirty years of age, but as that lex had forbidden such freedmen to be cives Romani, except in special cases, here again the rules of the Twelve Tables were inadmissible. See n. 17.
Nam cives Romani liberti hereditas ad extraneos heredes patrio nullo modo pertinet: ad filium autem patrocinii nepotesque ex filio et progenies ex nepote filio nato progenitis omnimodo pertinet, etiamsi a pariete fuerint exheredati: Latinorum autem bona tamquam peculia servorum etiam ad extraneos heredes pertinet, et ad liberum manumissoris exheredatos non pertinent.

59. Item cives Romani liberti hereditas ad duos pluresve patronos aequaliter pertinet, licet dispar in eo servo dominium habuerint: bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus fuerit. 60. Item in hereditate cives Romani liberti patronus alterius patroni filium excludit, et filius patrii alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patronum et ad alterius patroni heredem simul pertinent quod qua parte ad ipsum manumissore pertinere. 61. Item si unius patroni tres forte liberi sunt, et alterius unum, hereditas cives Romani liberti in capite dividitur, id est tres frates 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 his ascendant: whilst the goods of Latins belong, like the peculia of shares, 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 manumittor 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

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 manumittor 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 consulsip of Lupus and Largus, the senate decreed that the goods of Latins should devolve; firstly, on him who freed them; secondly on the descendants of such persons (manumittors), not being expressly disinherited, according to their proximity: and then, according to the ancient law, should belong to the heirs of those who had freed them. 64. The result of which senatusconsultum some think it 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 Pegasus 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 Latins. 187

emancipatus filius patroni praetertatur, quamvis contra tabulas testamenti parentis sui bonorum possessionem non peterit, tamen extraneis heredibus in bonis Latinorum potior habitetur. (66.) Item filia ceterique quos exhereditae ilicire civili fasore inter ceteros, quamvis id sufficiat, ut ab omni hereditate patris sui sammovior, tamen in bonis Latinorum, nisi nominat a parente fuerint exhereditati, potior erunt extraneis heredibus. (67.) Item ad liberos qui ab hereditate parentis se abstinerunt, bona Latinorum pertinent, quamvis ...

of his patron: whilst the goods of Latins, even by this senatusconsultum, belong to extraneous heirs as well, if no children of the manumitter prove a bar. Likewise, in regard to the inheritance of a freedman who is a Roman citizen, no disinheritance of prejudice to the children of the manumitter, whilst in regard to the goods of Latins, it is stated in the senatusconsultum itself that a disinheritance made expressly does prejudice. It is more correct, therefore, to say that the only effect of this senatusconsultum is that the children of a manumitter, who are not expressly disinherited, are preferred to the extraneous heirs. 65. Therefore, even the emancipated son of a patron, when passed over, is considered to have a better claim to the goods of Latins than the extraneous heirs have, notwithstanding that he may not have sued for the possession of the goods of his parent "against the tablets of the testament." 66. Likewise, a daughter and all others who are allowable at the civil law to disinherit by a general clause, although this proceeding is sufficient to debar them from all the inheritance of their ascendant, yet have a claim to the goods of Latins superior to that of extraneous heirs, unless they have been expressly disinherited by their ascendant. 67. Likewise, the goods of Latins belong to descendants who have declined to take up the inheritance of their ascendant, although...

1 Gisbern imagines that if the Latinas were filled up, the sense would be: "The goods of a Latin are divided among the children of the manumitter in proportion to their shares in the inheritance, provided these children be the sole heirs and no stranger be conjoined with them." The case of a stranger being conjoined with them is considered in the next paragraph.

2 See S. C. of Lupas and Largus. As no mention of an equal division being enjoind by the S. C. is to be found in the portion of the text preserved to us, it must have occurred in the fragmentary paragraphs 68 and 69. The S. C. took away the goods of the Latin from the extraneous heirs, in favour of children not expressly disinherited. A clause therefore would be needed in the law to say how these should be divided, whether according to the portions in which the children had been appointed heirs, (if they were appointed,) or equally. The text tells us the law declared for equality of division.
Descendants of a Patroness have no claim.

71. Aliquando tamen civis Romanus libertus tamquam Latinius mortuir, veluti si Latinius salvo iure patroli ab Imperatore ius Quintium consecutus fuerit: nam ita divus Traianus constituit, si Latinius invito vel ignarante patrone ius Quintium ab Imperatore consecutus sit: quibus casibus dum vivit iste libertus, ceteris civibus Romaniae libertis similis est et iustos liberos procreat, mortui antem Latini iure, nec ei liberti eun heredes esse possunt; et in loc tantum habet testamenti factionem. uti patronum heredem instituit, eique, si heres esse noluerit, alium substituere posset. (72.) Et qua sae constitutione videbatur effectum, ut nuncquam isti homines tamquam cives Romani morerentur, quamvis eo iure postea usi essent, quo vel ex lege Aelia Sentia vel ex senatusconsulto cives Romanissensent: divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti factundii, ut qui ignorantem vel recusante patrone ab Imperatore ius Quintium conscia essent, si eo iure postea usi essent, quo ex consulatu: 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 ancestor, 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. Sometimes, however, a freedman who is a Roman citizen dies as a Latin; for example, if a Latin have obtained from the Emperor the jus Quintium with a reservation of the rights of his patron: for the late Emperor Trajan made a constitution to this effect, to meet the case of a Latin obtaining the jus Quintium from the Emperor against the will or without the knowledge of his patron. In such instances, the freedman, whilst he lives, is on the same footing with other Roman citizens, and begets legitimate children, but he dies subject to the rules of a Latin, and his children cannot be heirs to him: and he has the right of making a testament only thus far, that he may institute his patron heir, and substitute another for him in case he decline to be heir. 73. Since then the effect of this constitution seemed to be that such men could never die as Roman citizens, although they had afterwards availed themselves of the means whereby, either according to the Lex Aelia Sentia or the senatusconsultum, they could become Roman citizens; the late Emperor Hadrian, moved by the want of equity in the matter, caused a senatusconsultum to be passed, that those who had obtained the jus Quintium without the knowledge or against the will of their patron, if they

1 1. 59. 
2 Sc. the S. C. referred to in 67–73. See particularly §§ 69, 70.
praeclare non satis in ea re legis latorem voluntatem suam verbis expressisse.

77. Videamus autem et de ea successione quae nobis ex emptione bonorum competit. (78.) Bonae autem vacuit aut vivorum aut mortuorum. vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur; item eorum qui ex lege Julia bonis cedunt; item indicatorium post tem-

on this point the author of the law has not clearly expressed his intention in words.

77. Now let us consider that succession which belongs to us through the purchase of a man's goods (emptio bonorum). 78. The goods which are sold may belong either to living or dead persons: living persons, for instance, when men conceal themselves with a fraudulent intent, or are not defended in their absence; likewise, when men make a cession bonorum according to the Lex Julia; likewise, the goods of judgment-

in its most comprehensive sense. See 1. 45, and note on 11. 14.

1 Elites = like other Civis Romanis
libert. Testamenti factio is here used


1 See Mackeldy, p. 456. § 4.

Vivorum bonorum 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 nuncum (i.e. by provisional manipulation 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 (addicere) to him: (2) On failure to meet engagements made in any other way, a judgment had first to be obtained and then, if after thirty days' delay payment was not made, the additio followed, as in the first case. An additio was at once carried off and imprisoned by his creditor, but a space of 60 days was still allowed during which he might be redeemed by payment of the debt by any friend who chose to come forward; and to afford facilities for such redemption a proclamation of the amount and circumstances of the debt was made three times, on the mandamus, within the 60 days. If no payment were made within this time, the additio became final; the debtor's civitas was lost, and the creditors might even kill him and sell him beyond the Tribunal. If there were several creditors, the law of the Twelve Tables, quoted by A. Gel-

lius was applicable: "Vivorum mandinis partes secans; si plus minus sequantur se e. sine fidelizado." A. Gel. xx. 1. 49.

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

Niebuhr is of opinion that additio of the debtor's person was done away with by the Lex Paulli, A.D. 424; see Hilt. of Roma, III. 142; Smith's edition, 184.
pus, quod eis partim lege xii tabularum, partim edicto Praetoris ad expediendum pecuniam tribuantur. mortuorum bona venient velut eorum, quibus certum est neque heredes neque bonorum possessores neque ullam alium iustum successorem existere. (79) Si quidem vivi bona veniant, iubet ea Praetor per dies continuos xxx possideri et prescribi; si vero mortui, post dies xv postea iubet convenire creditoris, et ex eo numero magistrum creari, id est cum per quem bona veniant, iacue si vivi bona veniant, in diebus pluribus veniri iubet, si mortui, in diebus postea; non vivi bona xxx, mortui vero xx emptori addici iubet, quae autem tardius viventium bonorum venditio completi iubetur, illa ratio est, quia de vivis curandum erat, ne facila bonorum venditiones patenterur.

debtors, after the expiration of the time which is granted them, in some cases by a law of the Twelve Tables, in others by the Praetor's edict, for the purpose of raising the money. The goods of dead persons are also sold; for example, those of men to whom it is certain that there will be neither heirs, bonorum possessores, nor any other lawful successor. 79. 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. 80. 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.

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1  IV. 21, see xii. Tab., Tab. iii. 13.
2  iii. 32. 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, Laichmann and Hufnagel, as Gneist himself states in a note.

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80. Neque autem bonorum possessorum neque bonorum emptorium rei pleno iure funt, sed in bonis efficiuntur; ex iure Quiritium autem in demum adquiruntur, si usqueperunt. interdum quidem bonorum emptorium item plane in quod est municipium esse intelligitur, si per eos aedilicus bonorum emptorius addicitur qui publice sub hasta vendant [deest i. 31].

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81. Item quae debita sunt et culae fuerunt bona, aut ipse debuit, aut non possessor bonorum emptor ipso iure debent aut ipsi debent: sed de omnibus rebus utilibus actionibus et conventiuntur et exercitationibus, quas inferius proponemus.

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

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1 Bonorum possessorum = those whom the Praetor recognizes as successors, although they have not the hereditas at the Civil Law, Cist. iv. 24; iii. 32. Gallus at this point digresses for an instant into the law of intestate or testamentary succession.
2 ii. 47.
3 A manucepta according to Festus and Aemius Pelianus was the representative of a body of publicans in partnership; and where taxes were bought or hired by them from the state, this person attended the auction and made the bargain for the body (societas) by holding up his hand; hence the name. On the censor at the sale recognizing a particular manucepta as a purchaser, the legal consequence was that the full dominiun was transferred to him for the body, whether the subject of the sale were a re manucepta or a re nec manucepta.
4 iv. 24, 35. See note on ii. 78.
Liability of the adopter for the adopted.

85. But, on the other hand, a debt owing by him who has given himself in adoption, or by a woman who has made conventio in manum, attaches upon the coemptionator or the adopting father himself, if it be an inheritable debt, and he is liable for it by direct proceedings, since such adopting father or coemptionator becomes heir personally (su nominem): and he is not directly liable who has given himself to be adopted, nor is the woman who has made conventio 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 conventio remain bound, being freed by the capitulis dimissio, yet an utile actio is granted against them, the capitulis dimissio 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.

86. Likewise, if a man to whom an intestate inheritance belongs by statute law, make cessio in jure of it to another before exercising his creation or acting as heir, he to whom the cession is made becomes heir in full title, just as if he had himself been called to the inheritance by law. But if he make the cession after he has taken up the inheritance, he still remains heir, and will therefore be liable personally to the creditors: but he will convey the corporeal property just as if he had made cession of each article separately: the debts, however, perish, and thus the debtors to the inheritance are profited.

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1. Sc. by the coemptionator or adopting father. 2. scilicet. 3. proh. 4. ex. 5. praeceps. 6. autos. 7. nullam. 8. ad. 9. capitulis. 10. utile. 11. 74. 12. 54. 13. 164. 14. 164. 15. 38. 16. 38. 17. 36. 18. 36.
nunt in iure cedendo, quartiur, nostri praecipitores nihil eos agere existimant: diversae scholae auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim interesse, utrum aliquis cerneendo aut pro herede gerendo heres fiat, an juris necessitate hereditatis adstringatur. [lit. munus.]

88. Nunc transassum ad obligaciones, quasarum summa divisio in duas species deducitur: omnis enim obligatio vel ex contractu nascitur vel ex deficto.

89. Et prior videamus de his quae ex contractu nascentur, harum quattuor genera sunt: aut enim re contransiitur obligatio, aut verbis, aut litteris, aut consensu.

90. Re contrahitur obligatio velut mutui datione. quaer pro and a necessarius hæres can effect anything by a cession in iure, is disputed. 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, or by acting as heir, or whether he be compelled to (enter upon) the inheritance by necessity of law.

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

90. An obligation is contracted re, for example, by the giving of a mutuum. 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 time the future, but others of like nature shall be restored to us; whence also the transaction is called mutuum, because what is so given to you by me becomes yours from being mine.

90. vi. 4, 5. This is not a case of contract at all, but of what is called quasi-contract. Justinian (VI. 4, 5) divides obligations into four classes, the classes additional to those of Galus being quaestus, quasi-ex contractu.

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 his trouble. An obligation therefore arises such as would have arisen had the one party contracted to do the act and the other to indemnify or reward.' A quasi-delict, on the other hand, is an incident by which damage is done to the obligee (though without the negligence or intent 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, although after such refusal there is no doubt a delict. So Galus himself says elsewhere: 'Obligationes aut ex contractu nascuntur, aut ex maleficio, aut propter quodam iure ex variis causarum figuris.' D. 44, 7, 1, 11.
Verbal Obligations or Stipulations.

92. *Verbis obligatio* fit ex interrogazione et responsione, velut: *dari spondes?* SPONDEO; *dabes?* DABIO; *promittis?* PROMITTO; *fide promittis?* FIDE PROMITTO; *fide tubes?* FIDE TUBEO; *facies?* FACIAM. (93.) Sed haec quidem verborum obligatio: *dari spondes?* SPONDEO, propria civium Romanorum est, et ulla vero iuris gentium sunt; itaque inter omnes homines, sive cives Romanos sive peregrinos, valent. et quanvis ad Graecum vocem expressae fuerint, velut hoc modo: *dòveres; dòvo; ὁμολογεῖ; ὁμολογῶ; πίστα κελεύς; πίστας κελεύω; πονήσει; πονήσει*; etiam haec tamen inter cives Romanos valent, si modo Graecis sermonibus intellectum habent, et e contrario quanvis Latinum enuntiantur, tamen etiam inter peregrinos valent.

92. An obligation *verbis* 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 *fidepromisor*? I do become *fidepromisor*. Do you become *fidiusius*? I do become *fidiusius*. 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 pertain 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: *dòveres; dòvo; ὁμολογεῖ; ὁμολογῶ; πίστα κελεύς; πίστας κελεύω; πονήσει; πονήσει*, 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. III. 114.

1. See from *verbatim*.
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 alleged to which a verbal contract might be unilaterial in form, i.e. in which no question need precede the promise. These were (1) *debit data*, 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, (2) a promise made by a freedman to his patron and confirmed by oath. III. 83. Ulp. vi. 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.

1. See III. 122, note.  
2. Gaullus uses the verb stipuler here for the first time, without having defined it; the stipulator is the interrogator in an obligation, while stipulator therefore signifies to ask for an answer.

As to the derivation of the word stipulatio there are many theories: Paulus connects it with stipula, an old adjective signifying firm (S. R. V. 7. 1); Festus and Varro with stigma, a coin (Varro, de Ling. Lat. V. 185). Isidorus with stipula, a straw, because, he says, in olden times the contracting parties used to break a straw in two and each retain a portion, so that by reuniting the broken ends "sponsum must stipulate" (Orig. Verbo. 24, § 50).

3. II. 2-4.

nam atque peregrinos quid juris sit, singularem civitatem iura requirentes aihad in alia leges regerimur.

97. Si id quod dari stipulatum tale sit, ut dari non possit, inutilis est stipulatio: velut si quis hominem liberum quem servum esse crederat, aut mortuum quem vivum esse crederat, aut locum sacrum vel religiosum quem putabat esse humanus iuris, nisi dux stipuleret. (97.) Item si quis rem quae in rerum natura non est aut esse non possit, velut hippocentumurum stipulatum, aequo inutilis est stipulatio.

98. Item si quis sub ea conditione stipulatur quae existere non potest, veluti si digito cælum tetigerit, inutilis est stipulatio. sed legatum sub impossibili conditione refique nostri praecessores proinde valore putant, ac si ea condicio idicita 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.

97. If that which we stipulate 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 humani juris. 97 a. Likewise if any one stipulate for a thing which does not exist or cannot exist, for instance a centaur, 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

with 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.

101. 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 promisor. 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
In valid Stipulations.

sane inutilis est. (101.) Quaecumque de morte diximus, eadem et de capitis diminutione dicta intelligimus.

102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatur erit non respondeat: velut si sestertia a te dari stipuler, et tu numnum sestertium vel millia promittis; aut si ego pure stipuler, tu sub condicione promittas.

103. Praeterea inutilis est stipulatio, si ei dari stipulumur cuius iuri subjecti non sumus: unde illud quae situm est, si quis sit et ei cuius iuri subjectus non est dari stipulatur, in quantum valeat stipulatio. nostris praecipitores putant in universum valere, et proinde ei soli qui stipulatum sit sollicit debere, atque si extranei nomen non adieicisset. sed diversae scholas auctores dimidium et debere existimant, pro alia - [decant 4 lin.]

104. Item inutilis est stipulatio, si ab eo stipuler qui iuri meo stibiatus est, vel si in me stipulatur, sed de servis et de his qui in mancipio sunt illud praeterea illi observetur, ut non solum

have said about death we shall also understand to be said about capitis diminution.

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

persons who cannot stipulate.

105. Mutum neque stipulari neque promittere posse placet est. Quod et in surdo receptum est: quia et in qui stipulator verba promittentis, et qui promitteri, verba stipulantis exaudire debet. (106.) Furius nullum negotium gerere potest, quia non intelligit quid agat. (107.) Pupillus omne negotium recte gerit: ita tamen ut tutor, scribi tutoris auctoritates necessaria sit, adhibeat, velut si ipse obligaret: nam alienum sibi obligare etiam sine tutoris auctoritate potest. (108.) Iadem iuris est in feminis quae in tutela sunt. (109.) Sed quod diximus de pupillis, utique de eo verum est qui iam aliquem intellectum habet: nam infans et qui infantii proximus est non multum a furioso differt, quia huius actatis pupilli nullum intellectum habet: sed in his pupillis per utilitatem benignior iuris interpretatio facta est.

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. II. 89.
3. I. 137; II. 89.
4. That is, although they have little or no understanding, their stipulations or promises backed by the tutor's authorization are binding.
110. We can, however\(^1\), 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 \textit{adstipulator}.\(^2\)

An action then will equally lie for him and payment can as properly be made to him as to us, but whatever he has obtained he will be compelled to deliver over to us by an \textit{actio mandati}\(^3\).\(^4\)

But the adstipulator may even use other words than those which we use. Therefore if, for example, I have stipulated thus: Do you engage that it shall be given? He may adstipulate thus: Do you become \textit{fidepromissor} for the same? or: Do you become \textit{fidejusior} for the same? or \textit{plus verò}\(^5\).

Like wise, he can stipulate for less, but not for more. Therefore if I have stipulated for ten sestertia, he can (ad)stipulate for five, but he cannot do the contrary. Likewise, if I have stipulated unconditionally, he can (ad)stipulate under a condition; but he cannot do the contrary.

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\(^1\) "Hoc \textit{futurum} respectu ad \S\ 192."

\(^2\) Gneist. In \S\ 193 it is stated that no man can stipulate for the benefit of another, to which statement the doctrine of adstipulators is at first sight opposed.

The subject here discussed, viz. "De adstipulatoribus," is entirely omitted from the \textit{Instituta} of Justinian; perhaps because one of the leading principles connected with the \textit{adstipulator}, viz. that a right of action should not pass to the heir of the stipulator (which in fact was one of the chief reasons for adstipulators being employed at all) was destroyed by imperial enactment. See Cod. 4. 11, where the old rule: "\textit{Ab hereditatis non incipere actiones nec contra haereditatis est}" is especially condemned.

\(^3\) Ill. 117. 155 et seqq.

\(^4\) Ill. 115. We may stipulate with the principal, and the adstipulator may stipulate with a surety (\textit{fidepromissor} or \textit{fidejusior}); or we may stipulate with the surety, and he stipulate with the principal.

\(^5\) II. 87.

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111. Pro eo quoque qui promittit solent ali obligari, quorum alios sponsores, alios \textit{fidepromissores}, alios \textit{fidejusiores} appellamus. \(\S\) 116. "Sponsor in interrogatib: \textit{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. \S\ 114. But as to this matter of law some peculiar rules are observed. For the heir of the adstipulator can bring no action.\(^6\) Likewise, a slave who adstipulates effects nothing, although in all other cases he acquires for his master by stipulation.\(^7\) The same is generally held with regard to one who is in \textit{mancipium}: for he too is in the position of a slave. But he who is in \textit{potestas} of his father does a valid act, but does not acquire for his descendant; 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 descendant's \textit{potestas} without a \textit{capitis diminutio}, for instance, by that descendant's death, or because he himself has been instituted Flamen Dialis. The same rule we shall adopt with regard to a woman in \textit{potestas} or in \textit{manus}.\(^8\)

115. For the promiser also others are frequently bound, some of whom we call \textit{sponsores}, some \textit{fidepromissores}, some \textit{fidejusores}. \(\S\) 116. A sponsor is interrogated thus: Do you engage that the same thing shall be given? a \textit{fidepromissor}:...
Sponsors, Fidepromissors, Fidejussors.


118. Sponsoris vero et fidepromissoris similis condicio est, fideiusures valet dissimilis. (119). Nam illi quidem nullis obligationibus accedere possunt nisi verborum; quamvis interdum ipsa qui promiserit non fuerit obligatus, vehtit si fidei/pommissorem pupillus sine tutoris autoritate, aut quilibet post mortem suas dari promiserit. ut illud quaestur, si servus aut peregrinus spoponderit, an pro eo sponsor aut fidepromissor obligetur.

Do you become fidepromissor for the same? a fidejussor? Do you become fidejussor for the same? But by what name those should properly be called who are interrogated thus: Will you give the same? Do you promise the same? Will you do the same? is a matter for our consideration.

117. Sponsors, fidepromissors, and fidejussors we are in the frequent habit of taking, whilst providing that we be carefully secured. But an adstitulator 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 adstitulator 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 mandati for its delivery over.

118. The position of a sponsor and fidepromissor is very much the same, that of a fidejussor very different. 119. For the former cannot be attached to any but verbal obligations: although sometimes the promiser himself is not bound, for instance, if a woman or a pupil have promised any thing without authorization of the tutor, or if any person have promised that something shall be given after his death. But if a slave or a foreigner have made the promise, it is questionable whether

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1 From this section it would almost appear as if the notion of a comitatus juriis existed in Roman jurisprudence, so as to warrant the belief that there was something like foreign international law. See III. 96. 2 IV. 113. 3 IV. 95. IV. 22. 4 En solidarité, to use a corresponding French term. See as to bonds in solidarity upon guarantees 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 sint, partes petere, eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus solvendo non sit, non angustor omni eorum, quotquot erant. Cum autem lex Furia tantum in Italia locum habent, consequens est, ut in provinciis sponsores quoque et fidepromissores prionde ac fideiussores in perpetuo teneantur et singuli in solidum obligentur, nisi ex epistula divi Hadriani hi quoque adiuvani vidantur. (122.) Praeterea inter sponsores et fidepromissores lex Apuleia quandam societatem introdixit, nam si quis horum plus sua portione solvent, de eo quod amplius dederit adversus ceteros actionem habet. Lex autem Apuleia ante legem Furiam latam 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 Furia tantum in Italiam vales, 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 fidepromissors also, as well as fideiussors, are bound for ever, and each of them for the full amount, unless they too are to be considered relieved by the epistle of the late emperor Hadrian. 122. Further the Lex Apuleia introduced a kind of partnership amongst sponsors and fidepromissors. For if any one of them has 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

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1 This is Hicher's reading. He connects the Lex Pompeia with the Undertür Lex, spoken of by Festus
124. Sed beneficium legis Corneliae omnibus communi est, qua lege idem pro eodem aput eundem eadem anno velitur in ampliore summan summan obligari creditas pecuniae quam in xx millia; et quamvis sponsor vel fidepromissor in ampliam pecuni, numen, velut si sestertium c. millia se obligaverit, non tamem tenet. Pecuniæ autem creditum dicimus non solum eam quam credendi causa damsum, sed omnem quam tunc, eam contrahitur obligatio, certum est debitum iri, id est quae sine aliqua condicione deducitur in obligacionem, itaque et ea pecunia quam in die certam dari stipulamur eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea leges significantur. itaque si vinum vel frumentum, et si fundum vel hominem stipulumur, haec lex observanda est. (125.) Ex quibusquam tamen causis permitit ea lex in infinitum satis accipere, veluti si deis nomine, vel eis quod ex testamento tibi debeatur, aut iussu iudicus satis accipiatur. et adhaec lege vicemina hereeditationem caviur.

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 29,000 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 security for an unlimited amount; for instance, if surety be taken in regard to a dies, or for something due to you under a testament, or by order of a iudex. And further, it is provided by the Lex

Vicesima Hereditationem 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 fidejussors, 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 adstitulator. For their obligation, like that of the adstitulator, 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 mandati against him for the purpose of recovering it. And further than this, sponsors by the Lex Pubilia have an action peculiar to themselves for double the amount, which is called the actio debentis.

128. An obligation litteris arises in the instance of nostimn transcripticiis. a nomen transcripticium occurs in two ways,
LITERAL OBLIGATIONS.

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sonam, vel a persona in personam. (129.) A re in personam transcriptio fit, veluti si id quod te ex emptione causa aut conductionis aut societatis mihi debeas, id expressum tibi tulero. (130.) A persona in personam transcriptio fit, veluti si id quod mihi Titius debet tibi ad expressum tuleris, id est si Titius te delegaverit mihi. (131.) Alia causa est eorum nominum quee arcaria vocantur. In enim re, non litterarum obligatio consistit: quique non alteri valeat, quam si numerata sit pecunia; numeratio autem pecuniarum rei, non litterarum facit obligationem. qua de causa recte dicens arcaria nominis nihilum

either from thing to person, or from person to person. 129. A transcription from thing to 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 nominis 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 disgraceful. The entries were first roughly made in day-books, called adversaria or calendaria, and were posted at stated periods in ledgers, called colleti expressi et accepti. Nomen was the general name for any entry, whether on the debtor or creditor side of the account. When any one keeping books entered a sum of money as received from Titius, he was said forre or forre 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 forre expendum Titius, that is, to charge it to the debit of Titius. If it could be proved that an expendum had been set down with the debtor's consent, the absence of a corresponding acceptum in the debtor's ledger was immaterial, as such absence only arged 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 Mucius, having his reasoning on a passage of Theophilius, holds that a contract litteris is never an original contract, but always operates as a novella or some subsequent obligation. See Heinan. Antipat. iii. 38. 34. Cle. de Off. iii. 14. 49.

1. A case supposed is that Titius owes me, say, 100 aurei and you owe Titius the same amount; it simplifies matters therefore if Titius, who has to receive 100 and pay 100, remove himself from the transaction altogether by remitting your debt to him and making you, with my consent, a debtor to me in his own stead.

NOMINA ARARIA, SYNGRAPHS, CHIROGRAPHS.

Facere obligationem, sed obligationis factae testimonium praebere. (132.) Unde proprie dicetur arcaris nominis etiam peregrinos obligari, quia non ipse nominis, sed numeratione pecuniae obligantur: quod genus obligationis iuris gentium est. (133.) Transcriptici vero nominis an obligentur peregrini, merito quærum, quia quovismodo iuris civilis est talis obligation: quod Nerva placuit. Sabino autem Cassio visum est, si a re in personam fiat nomen transcripticum, etiam peregrinos obligari; si vero a persona in personam, non obligari. (134.) Praeterea litterarum obligatio fieri videtur chirograff et syngraph, id est si quis debere se aut daturn se correctly that nomina araria 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 araria, 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 transcriptica is justly disputed, because an obligation of this kind is in a manner a creature of the civil law; and so Nerva thought. But it was the opinion of Sabinus and Cassius, that if the entry were from thing to person, even foreigners were bound; but if from person to person, they were not bound. 134. Further, an obligation litteris is considered to arise from chirographs and syngraphs, i.e., if a man state in writing that he owes or will give something; provided only there be no stipulation made

n.b. 1 A chirograph is signed by the debtor only, a syngraph by both debtor and creditor. Chirographs and syngraphs were not mere proofs of a contract, but documents on which an action could be brought. A simple memorandum, which was good only as evidence, was termed a syngraph. In Justinian's time chirographs were regarded as identical; but see his regulations and the time within which an excepto non numerante pecunia could be brought in Jus. iii. 11. Mühlbruch for some inexplicable reason considers nomina araria identical with syngraphs and chirographs; although the word transcripticus in § 134 shows 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 araria the remark occurs, etiam peregrinos obligari, the claim being plainly implying that these are not peculiar to foreigners and therefore something different from syngraphs and chirographs.
Consensual Obligations.

135. Consensu fiunt obligationes in emptionibus et venditionibus, locationibus conductionibus, societatibus, mandatis.

136. Ideo autem Ætis modis consensu diemius obligationes contrahit, quia neque verborum neque scripturarum nulla proprietas desideretur, sed sufficit e contrario negotium gerunt consensisse. unde inter absentes quoque tanto negotia contrahuntur, veluti per epistolam aut per interiunctionem, cum aliquo verborum obligatio inter absentes fieri non possit. (137.) Item in his contractibus alteri obligatur de eo quod alteri alteri ex hinc et aquo praestare oportet, cum aliquo in verborum obligationibus alius stipulatur, alius promittat et in nominibus alius expensus 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 of either words or of writing is required, but it is enough if those who are transacting the business have come to an agreement. Therefore, such matters are contracted even between persons at a distance from one another, for example, by letter or a 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.

If there be, the obligation is verbis, and the document becomes a contract, not absolutely conclusive, but only available as evidence.

The old contracts based on the civil law were unilateral, the new contracts by consent, spingere 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. Mackelden (Syst. Juv. Rom. p. 843) divides obligations ex contractu into two classes, obligations naturales and obligations civiles, the former giving

absent expensum ferri potest, eti verbis obligatio cum absente contrahit non possit.

139. Empiito et venditio contractatur cum de preio convenerit, quamvis nonem pretium numentum sit, ac ne arra quidem data fuerit. Nam quod aequum nomin datur argumentum est emptionis et venditionis contractae.

140. Premiit autem certum esse debet: aliquin si ita inter eos convenerit, ut quanti Titius rem aestimaverit, tanti sit empta, Labeo negavit ullam vim hoc negotium habere; quam sententiam Cassius probat: Offilius etiam emptionem petit 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 Offilius says there is a buying and selling, and Proculus follows his opinion.

141. Likewise the price must consist of coined money. For whether the price can consist of other things, for instance, whether a slave, or a garment, or a piece of land can be the

rise to an exception only, and not to a direct action, the latter provided with an action. These obligationes civiles again split up into two subdivisions, viz., obligatio civium (or a gens a gens) and obligatio praetorii: civil obligations (in the strict sense) are of two kinds, (a) those alien from natural law and founded on the strictest civil law, e.g. stipulations and promises, (b) those called jure civil compovolta, i.e. received from the jus gentium into the civil law and therein protected by an action; to this last species he regards all real and consensual contracts, and all the pacta semper and praetorii 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, vale quae rerum. nostri praecipues putante ut forum in aliqua re possit consistere pretium; unde illud est quod vulgo putant per permutationem rerum emptionem et venditionem contrahant, quam speciem emptionis et venditionis vetustissimam esse; argumentoque utuntur Gracco poeta Homero qui alia parte sic ait:

"Enven ar olyvnto katyrkomecevo Aymov, 
Allo piw xalwv. allo d' olwia sthrps, 
Allo d' wnou, allo d' avthoi biaov, 
Allo d' apyrapadoov.

Diversae scholae auctores dissentiunt, aliunque esse existimant permutationem rerum, aliaem emptionem et venditionem: alioquin non posse rem expediri permutatis rebus, quae videtur re venisse et quae pretii nomine data esse; sed rursus utranque videri et venisse et utranque pretii nomine datum esse absurdum videri. Sed ait Caelius Sabinus, si rem Titio venalem habente, velut 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 Acheans 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 Caelius Sabinus says, if when Titius has a thing for sale, for instance a piece of land, I take it, and give a slave, say, for the price; the land is to be regarded as sold, and the

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

142. 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. Whereof, 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, 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.

1 This is not a mere dispute about words, like so many of the points debated between the Sabellians and Proclusians. 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 Sabellians could have been victorious in their argument, and got the lawyers to admit that in 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 want of a neat specified beforehand; it is not manus or covenant, because it is not gratuitous, there being an implication that a mere will eventually be paid; hence the remedy can only be an actio praecipitata poetae; for an account of which see Sandman Justinian, p. 413.

3 The contract in this case is one of the inominative real contracts.
145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis queri solet utrum emptio et venditio contrahatur, an locatio et conductio. veluti si quas res in perpetuum locata sit, quod eventit in praedialis municipium quae ex leges locatur, ut quandam id vectigal praestetur, neque ipsi conductori neque heredi eius praecedent aureatur; sed magis placuit locationem conductionemque esse.

146. Item si gladiatores ea leges tibi tradiderim, ut in singulis qui integri exierint pro sodore denarii xx mihi darentur, in eos vero singulos qui occisi aut debilitati fuerint, denarii milli:

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

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De utdeo, dec.—therefore it 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 Bullman, p. 93. 1 D. 19. 2. 2. 1.

1 This locatio in perpetuum et emphyteusis was by JUSTINIAN made a distinct kind of contract, subject to rules of its own. See Inst. lib. 24. 3, and the notes on pp. 214, 215 of Sandars' edition of the Institutes. Also read Savigny, On Possession, pp. 77—79; D. 6. 2.

From these authorities and others we learn that emphyteusis was a comparatively modern contract, a lease of lands by a private individual or corporation to a private individual; whereas the older agris veneficiis was always a lease proceeding from a corporation. The leases of agris veneficiis were not always perpetual, but sometimes for a term of years. The emphyteutic leases made by a private individual were always hereditary. Hence they were closely analogous to the fee simple mentioned by Bruttan (see Nichols' translation of Bruttan, 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 agris facturis.

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quæritur utrum emptio et venditio, an locatio et conductio contrahatur. et magis placuit eorum qui integri exierint locationem et conductionem contractam videri, at eorum qui occisi aut debilitati sunt emptionem et venditionem esse: idque ex accidentibus apparat, tamquam sub condicione facta cuiusque venditione aut locatione. iam enim non dubitatum, quin sub conditione res veniri aut locari possint. (147.) Item quaeritur, si cum auriface mihi convenit, ut is ex auro suo certe ponderis certasque formae anulos mihi faceret, et acciperet verba gratia denarios cc, utrum emptio et venditio, an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem et venditionem contrahit, operarum autem locationem et conductionem sed pleisque placuit emptionem et venditionem contrahit. atqui si mecum aurum i dedero, mercede pro opera constitueta, convenit locationem et conductionem contrahit.

148. Societatem coire solemus aut totorum bonorum, aut unus aliquus negotii, veluti mancipiorum 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 were under condition. For there is now no doubt that things can be sold or let under a condition.

147. Likewise, 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 to all our property, or as to one particular matter, for instance, the purchase or sale of slaves.
149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucraret, minorem damni praestet. quod Quintus Mucius etiam contra naturam societas esse certavit; sed Servius Sulpicius, citius praevalidit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, qui lucrui partem capiat, si modo opera eius tam pretiosa videatur, ut eorum sit cum hac pactione in societatem admittit. nam et ita posse coire societatem constat, ut unius pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit: saeppe enim opera aliquis pro peccnia valent. (150) Et illud certum est, si de partibus lucrui et damni nihil inter eos conveniret, tamen acquiri ex partibus commodum et incommodum inter eos commune esse. sed si in altero partes expressae fuerint velut in

149. 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 loss1. This Quintus Mucius says is in fact irreconcileable with the nature of partnership: but Servius Sulpicius, 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 undoubtedly 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 too 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. 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. It is said that a partnership is also dissolved by a capitis diminutio, because on the principles of the civil law a capitis diminutio is held to be equivalent to death: but if the partners consent

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1 D. 17. 5. 30. Servius in this passage ascerts to the doctrine of Mucius, holding that Mucius meant that there could not be a different apportionment of gain or loss on a balance of accounts he would have been wrong; but as he never implies that Mucius held such a view, Gaius is, as it seems to us, giving an unfair account of Mucius' rule in the present passage.

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

2 1. 128; III. 101.
sent in societatem, nova videtur incipere societas. (154.)

154. Item si cuius ex sociis bona publica aut privata venirent, solvitur societas. sed hoc quoque casu societas de qua loquimur nona consentio contrahitura modo; juris enim gentium obligations contrahere omnes homines naturali ratione possent.

155. Mandatum consistit sine nostra gratia mandemus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, et inter nos obligatio et invictam alteri tenebimus, idque indicium eum in id quod petat te mihi bona sile praestare obportere. (156.) nam si tua gratia tibi mandem, superexcursum est mandatum; quod enim tu tua gratia facturus sis, ei ex tua sentientia, non ex meo mandatu facere videtur: in quo si otiosum pecuniam domi te habere tibi dixeris, et ego te hortas fuerim, ut eam fenareres, quamvis eam ci mutuum dederas a quo servare non poteris, non tamen habebis mecum to be partners still, a new partnership is considered to arise.

156. Likewise, if the goods of any one of the partners be sold publicly or privately, 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).

157. 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 me." (157.

158. But if I give you a commission for your own benefit, the mandate is superfluous: for what would you 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 shall still 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;

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; if you would not have lent the money to Titius, unless the mandate had been given to you.

159. It is certain that if a mandate be given for the doing of something contrary to morality, no obligation is contracted; for instance, if I give you a mandate to commit a theft or injury upon Titius.

160. 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.

161. 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,
161. Cum autem est cui recte mandaverit egressus fuerit mandatum, ego quidem ex eum cum eo habeo mandati actionem, quatenus mea interest impleris eum mandatum, si modo implere potuerit: at ille mecum agere non potest. Itaque si mandaverint tibi, ut verbi gratia fundum mihi sestertiis cemeris, 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.1

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

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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.

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1 Although there could be no payment in the case of a mandate, yet on the completion of the work, the fuller or tailor, to take the example in the text, had a claim enforceable by action for his expenses and loss of time, and the liberal construction of the amount of these always made a homerus fuller action would ensure the workman a due recompense.
mines et alienos servos quos bona fide possidemus adquiritur nobis; sed tantum ex duabus causis, id est si quid ex operis suis vel ex re nostra adquirant. (165) Per cum quoque servum in quo ususfructum habemus similiter ex duabus istis causis nobis adquiritur. (166) Sed qui nundam ius Quiritium in servo habet, licet dominus sit, minus tamen ipsis in ea re habere intellegitur quam ususfructum et bona fidei possessor. Nam placet ex nulla causa ei adquiri possit adeo ut ei nominatim ei dari stipulatus fuerit servus, mancipio nomine eius acceperit, quidam existimant nihil ei adquiri.

167. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accepisse illi soli adquirit, veluti cum ista stipulatur: titto domino meo dari spondes? aut cum ista mancipio accepi: hanc rem ex iure quiritium lucii titii domini mei esset aeo, eaque ei emita est hoc aere aenea.

free men and the slaves of other people whom we possess in good faith: but only in two cases, viz. if they acquire any thing by their own work or from our substance. 165. Acquisition is also in like manner made for us in these two cases by a slave in whom we have the usufruct. 166. But he who has the mere jus Quiritium in a slave, although he is owner, yet is considered to have less right in this respect than an usufruary 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 Titus? or when he receives in mancipium, thus: I assert this thing to be the property ex iure Quiritium of my master Lucius Titus; 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 in the next paragraph; the Sabinians "nostri praecipitores".
2 For excepto see iv. 15 seqq. both this dispute and that mentioned.
fiere, ut patiaris haec verba me dicere: QUOD EGO TIBI PROMI-
METER, HABESNE ACCEPTUM? ET TU RESPONDEAS: HABERO. (170.)
Quo generique, ut diximum, tantum haec obligations soluturur quae
ex verbis consistunt, non estiam ceterae: conscientiam omnem visus est verbis factam obligationem posse alliis verbis dissolvi.

dum et id quod ex alia causa debentur potest in stipulationem
deducere et per acceptationem imaginaria solutione dissolv.
(171.) Tamen nullus sine tutelae auctore acceptum facere non
potest; cum aliquum solvi et sine tutelae auctoritate possit.
(172.) Item quod debitor pro parte recte solvi intelligitur:
an autem in partem acceptum fieri possit, quas tuum est.

173. Est etiam alia species imaginarii solutionis per aet et
librare, quod et ipsum genus certus in causis reperient est,
veluti si quid co nomine debentur quod per aet et librare
gestum est, sive quid ex iudicati causa debitor.
(174.) Ad-

be done by your allowing me to say these words: Do you
acknowledge as received which that I promis 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

1 The form of words by which
this was done is to be found in Ju-
tinian, Inst. 59, 2, and is there called
the Aquilian stipulation. The in-
venter, Aquilius Gallus, was a con-
temporary of Cicero. The Aquilian
stipulation acted as a novation. See
§ 176 below.

2 11, 84 is

3 An instance of actual payment
per aet et librare is to be found in
Lucy, VI. 24.

4 Lucius is a reading suggested by Huschke, who has
subsequently stated his preference
for salut legi mensi jurisdam.

5 The mention of salutum, however,
agrees very well with what is said in
the preceding paragraph, that a con-
tact solemnized per aet et librare
is dissolved by the same process, as
Cicero tells us (De Off. III. 40).

6 170. 201.

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
judgement is not properly one of the
obligations admitting of acceptation
per aet et librare, as we see from
§ 175.
et in, si certum sit, quidam et de eo quod mensum constat intelligendum existimant.

176. Praeterea novatione tollitur obligation, veluti si quod tu mihi debes a Titio dari stipulatus sim. nam interveniunt novae personae nova nascitur obligation, et prima tollitur translate in posteriorem: adeo ut inimicum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur. veluti si quod mihi debes a Titio post mortem eius, vel a muliere pupillio sine tutoris auctoritate stipulatus fuero, quo casum rem amitto: nam et prior debitor liberatur, et posterior obligation nulla est. non idem iuri est, si a servo propinque adhuc obligatus tenetur, ac si postea a nullo stipulatus fuisse.

(177.) Sed si eadem persona sit a qua postea stipuler, in 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 Titius that what you owe me shall be given me by him. For by the introduction of a new person a new obligation arises, and the original one is dissolved by being transferred into the later one: so that, sometimes, although the later stipulation be void, yet the original one is dissolved by reason of the novation; for example, if I stipulate with Titius for payment by him after his death of what you owe me, or with a woman or a pupil without the 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 consensual, but that by which it was superseded was always a stipulation; the original contract further might be natural, civil, or praetorian, and the superseding contract too might be binding either civilly or naturally. These points are clearly laid down by Ulpian, see D. 46. 2. 1. 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 effectual.

2 III. 115.

3 III. 179. This passage is at first sight confused, but it may be thus interpreted. Supposing a new condition to be inserted, the question arises, whether is there an immediate novation or a novation conditional? If there be an immediate novation, the old agreement is swept away altogether, and the new agreement is only to be carried out on fulfillment of the condition; so that if the condition fail, the promise will get nothing at all. This view Gaius at once discards. The novation is, according to him, presumptively conditional, and so if the condition fail, the old obligation remains intact according to the letter of the civil law. But admitting this view to be correct, all that, as yet has been shown is that an action will be granted, and not that the plaintiff will succeed, for he may be met by an exception of delictum publicum or postea concurrens, because the defendant may allege that the intent of the parties was to abolish the old certain obligation and introduce a new conditional one in its place. This question Gaius leaves unsettled. It can only be decided by the circumstances of each particular case; and so we may sum up his views thus: the presumption is that it is the novation which is conditional, an action will therefore be granted on the old agreement when the condition fails, but the presumption may be rebutted by showing that it was not the novation, but the second stipulation that was conditional.

The latter part of the paragraph informs us that Servius Sulpicius maintained the doctrine of which Gaius disapproves, viz., that the novation was immediate; and that he regarded from a like point of view a stipulation made with a slave, considering it to work an absolute novation, and so destroy the pre-existent obligation, without, however, being
The meaning of the term *litis contestatio* is thus given by Festus:

"Contestari est cum utrique reas dicit, Festes esto. Contestari licet quod non ordino judicio utrque paria est, sed inter duas causas: 1st, where he evidet, referring to the obligatio of a new after award. D. 19. 1, 3, 11.

The differences in procedure between *judicia legem* and *judicia imperio constitutorum* are to be found in Gaes, 11, 303–309. Mühlennach (in his notes on Heinsius, 17, 6, 27) gives, in substance, the following account of the origin of the appellate law 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 by discretion and by the direct authority (imperium) of the magistrates: and although in later times this discretion of the magistrates was restrained within well established 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 *leges*. 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 shall therefore, 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 

**Actions on delict.**

I cannot afterwards, 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 judicatæ* or *in judicium deducitur*. Now what are actions based on statute law, and what are actions founded on the *imperium*, we shall state in the next commentary.

182. 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 executory was said to have *imperium nemorum* or *imperium* in *sorea*, one like the Praetor, &c., who could both adjudge and carry into execution, possessed *imperium ministrum*, i.e. a combination of *potestas* and *jurisdiction*; for *jurisdiction*, sometimes called *nobilis*, is the attribute of a magistrate who can only investigate, and must apply to other functionaries to carry out his decisions: thus a *judge* had *jurisdiction* only. See Hennequin, *Antep. Rom.* p. 637, 638, Mühlbeck's edition, D. 2. 1. 3.

2 IV. 107.

3 IV. 106, 125. The first exception is to the effect that the matter has already been adjudicated: the second that it was handed beyond the *delictus* and that thus there has been a novelty. In this last-mentioned it is obviously immaterial whether the court has yet arrived at a judgment or not. See for a curious case connected with this exception, *Cic. de Orat. I. 37,*

4 Besides the methods of dissolving an obligation already mentioned there were (1) *compensation* and *defectio*, the setting off of what the creditor owes to the debtor, in order to lessen or extinguish the debt, *see* IV. 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 its fulfillment not yet undertaken by either party.

5 It must be noticed that all the

unur, veluti si quis furum fecerit, bona rapuerit, damnun
dedemit, injuuim commiserit: quorum omnium rerum uno ge-

era consuet obbligatio, cum ex contractu obligationes in III

genera deductantur, sicut supra exposimus.

183. *Furtorum autem genera Servius Sulpicius et Masarius Sabinius III esse dixerunt, manifestum et nec manifestum, conceptum et oblatum: Laboe do, manifestum, nec manifestum; nam conceptum et oblatum species potius actionis esse furto
coharentes quam genera furtorum: quod sane verius videtur, sicut inferius apparebit.* (184.) Manifestum *furtum* quidam id esse dixerunt quod *diem* in reprehendit, aliis vero ulterior, quod co loco reprehenditur ubi fit: velut si in oliveto olivare, in vineto uvarum furum factum est, quamdiu 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 four kinds. 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 §§ 182–235 are civil actions on delict. *Furtum, ra-

pina, etc.* were also punishable criminally, but with this fact we have at present nothing to do.

1 They all arise *ex*

2 Ibid. 89.

3 Ibid. 186. 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 Sabinius given by Audis Cellius, *ibid.* 18 are: "Qui alienum rem adiectavit, cum id se invicem domino facere judicaret, debere, ficti tenetur," and "Qui alienum tacens licet faciendo causa sustulit, ficti contrectantur, sive se in his set in alio, sive se in his set in aliin, sive se in his set in alio, sive se in his set in aliin," Gaius implies that this or something like it is his definition in §§ 195, 197 below.
vincento fur sit; aut si in domo furturn factum sit, quandiu in ea domo fur sit, aliud adsue ulterius, consequentem furtum esse dixerunt, donec perferret eo quo perferre fur destinasset. aliud adsue ulterius, quandoque cum rem fur tenens visus fuerit; quae sententia non optimus. sed et illorum sententia qui existimaverunt, donec perferret eo quo fur destinasset, deprehensam furtum manifestum esse, improba est, quod videbat aliquem admittisse dubitionem, ut ens dixit etiam plurium circiter spatio id terminandum sit, quod eo pertinent, quia saepe in aliis civilitatibus surreptas res in alias civitates vel in alias provincias destinat fur perferre. ex dubius tamen superioribus opinionibus alterutra adprobatur: magis tamen plerique posteriorum probant. (185.) Nec manifestum furtum quod sit, ex iis quae diximus intelligitur: nam quod manifestum non est, id nec manifestum est. (186.) Conceptum furtum dicitur, cum apat aliquum testibus praestibus furivis res quaseta et inventa est; or is a theft be committed in a house, so long as the thief is in the house. Others have gone still further, and said that a theft is manifest until the thief has carried the thing to the place whither he intended to carry it. Others still further, that it is manifest if the thief be seen with the thing in his hands at any time; but this opinion has not found favour. The opinion, too, of those who have thought a theft to be manifest if detected before the thief has carried the thing to the place whither 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 

3 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

Furtum oblatum, prohibitum. Penalties. nam in eum proprim actio constibitum est, quamvis fur non sit, quae appellatur concepti. (187.) Oblatum furtum dicitur, cum res furiva tibi ab alipuo oblata sit, eaque aput te concepta sit, utique si ea mente data tibi fuerit, ut aput te potius quam aput eum qui dederit concepientur, nam tibi, aput quem concepta est, propriosa adversus eum qui optulit, quamvis fur non sit, constituita est actio, quae appellatur oblati. (188.) Est etiam prohibiti furti adversus eum qui furtum quacere volentem prohibuerit.

189. Poena manifesti furti ex lege xii tabularum capitalis erat, nam liber verberatus addicetur eit cui furtum fecerat; (utrum autem servus efficercer ex addictione, ad judicati

out against him, even though he be not the thief, called the actio concepti. 187. A theft is called oblat, 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 oblati. 188. There is also an actio prohibiti furti against one who offers resistance to a person wishing to search.

189. The penalty of a manifest theft was by a law of the Twelve Tables capital. For a free man, after being accused, 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
Penalties of Furthum.

locO constittueretur, veteres quae erant) servum aequo verberratum et suo desidient. postea impedita est aperitus poenae, et tamen ex servi persona quam ex liberi quadrupli actio Praetoris edicto constituit est. (190.) Nec manifesti furri poena per legem xii tabularum dupli inrogatur; quam etiam Praetor conservavit. (191.) Concepti et oblati poena ex lege xii tabularum tripli est; quae similiiter a Praetore servatur. (192.) Prohibiti actio quadrupli ex edicto Praetoris introducta est. lex autem ex nomine nullam poenam constituit: hoc solum praecipit, ut qui quae rerum veliti, adus quae rat, lintoeo circvus, lanced habens; qui si quid inveniret, lubat id lex furtem manifestum esse. (193.) Quid sit autem lintoeum, quis est? sed verius est consati genus esse, quod necessarie partes tegeterunt. 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 non-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 that a man wishing to search should search naked, girt with a lintoeum and holding a dish; and if he found any thing the law ordered the theft to be regarded as manifest. 193. Now what a lintoeum may be is a moot point; but it is most probable that it was a kind of cincture with which the private parts were covered.

whom payment of the debt was tendered was compelled to accept it: the dealers retained their praenomen, cognomen, tribe. See Heinecc. Annal. Rom. ii. 49. § 5. 1 If the master declined to pay the penalty for his slave, he could give him up as a nauta. IV. 75. 2 See Maine's ingenious explanation of the wide difference in the ancient penalties of furtem manifestum and non manifestum. Ancient Law, p. 379. 3 Tale. vili. 15. 4 The lintoeum is called lictum sometimes, e.g. in Festus: "Lansae et licito dilecitur apud antiquos, quis qui furtem quae rerum in domo aliena, licio circuus intrabit, lancedae ante osculo touchat. propriet matrumpatfamilias aut virgillum praesentam." 1 Festus in the passage just quoted assigns a third reason. Other authoe adopt that first given in the text, and say that the dish was carried on the head and supported by both hands. See Heinecc. Annal. IV. 1. § 19.

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 for be of such a size or character that it can neither be introduced by stealth nor placed on the dish. On this point, at any rate, there is no dispute, that the law is satisfied whatever be the material of which the dish is made. 194. Now, since the law orders that a theft shall be manifest under the above circumstances, there are writers who maintain that a theft may be regarded as manifest either by law or by nature; by law, that of which we are now speaking; by nature, that of which we treated above. But it is more correct for a theft to be considered as manifest only by nature. For a law can no more cause a man who is not a thief to become manifest, than it can cause a man who is not a thief to all to become a thief, or one who is not an adulterer or homicide to become an
homicida sit: at illud sane lex facere potest, ut perinde aliquis poena teneat atque si furtum vel adulterium vel homicidium admisisset, quamvis nihil eorum admiserit.

195. Furtum autem fit non solum cum quis intercipienti causa rem alienam amoveret, sed generaliter cum quis rem alienam invito domino contracta. (196.) Itaque si quis re quae apud eum deposita sit utatur, furtum committit. et si quis utendam rem acceperit eamque in alium usum transulerit, furti obligatur. veluti si quis argentum utendam acceperit, quod quasi amicos ad coenam invitaturos rogaverit, et id peregre secum tulerit, aut si quis ego sum gestandi gratia commodatum longius secum aliquo duxerit; quod veteres scriptorum de eo qui in acem perduxisset. (197.) Placuit tamen cos qui rebus commodatis aliier uteren tur quam utendas accepsisset, ita furtum committere, si intelligent id se invito domino facere, eumque, si intellectissest, non permisssum; et si permisssum crederent, extra adulteror or homicide: 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 has 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 makes use of a thing which has been deposited with him, he commits a theft. And if any one has received a thing to be used, and convert it to another use, he is liable for theft. For example, if a man has 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 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.

1 See note (1) in Appendix.

1 See Justinian's reasons for giving an opposite decision in Inst. iv. 195. However, it was considered not to be a theft of the owner's property, because he had not dealt with the things against his will, nor in an act 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

# States of fact constituting Furtum. Plagium.

furti crimen videri: optima sana distinctione, quia furtum sine dolo malo non constitor. (198.) Sed si credat alius in vito domino se rem contracere, domino autem volente id fiat, dicturi furtum non fieri, unde illud quiessestum est, cum Titius servum seum soliciterit, ut quasdam res mili subipseret et ad eum perferret, et servus id ad me pertulerit, ego, dum volo Titium in ipso delicio reprehendere, permissurum servus quasdam res ad eum perferre, utrum furti, an servi corrupti indicius tenetur Titius mili, an neutro: responsum, neutro eum teneri, furti idea non quid non invito me res contracereit; servi corrupti idea quod detergent 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 auctoritus mens subtrea subtrahit. (200.) Aliquando
States of fact constituting Furtum.

etiam suae rei quisque furum committit, veluti si debitor rem quam creditori pignori dedit subtraxerit, vel si bona fide possessori rem meam possidenci rem, unde placuit eum qui servum suum quem aliis bona fide possidebat ad se reversum celaverit furum committere. (201.) Rursus ex diverso interdum rem alienam occupare et usucapere concessum est, nec creditur furum fieri, velut nos hereditarias quam non prius nactus possessionem necessarii heredes esse; nam necessario herede extante placuit, ut pro herede usucapi possit. debitor quoque qui suae rem creditori mancipaverit aut in Iure cessaret detinet, ut superiore commanturo retulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur qui ipse furturn non fecerit; qualis est cuuis ope consilio furturn 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 creditor, or if I take by stealth my own property from a possessor in good faith. Therefore, it has been ruled that a man commits a theft who, on the return of his own slave whom another possessed in good faith, conceals him. Conversely, again, we are sometimes allowed to take possession of another's property and acquire it by usucaption, and no theft is considered to be committed, the items of an inheritance, for example, 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 usucaption pro herede. A debtor also who retains the possession of a pledge which he has made over to his creditor by manipulation or cessio in furum, can, as we have stated in the preceding commentary, possess it and acquire it by usucaption without committing theft.

203. 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.

2 II. 204.

2 See II. 9, 72, 68. In the first and second of those passages it is stated that the possestio pro herede of a stranger is tolerated only when the heir is "necessary" (II. 153), but that seems to be implied in the passage II. 58 and that now before us.

5 II. 59, 60.

est qui numinos tibi excussit, ut eos alius surripertet, vel obstitit tibi, ut alius surripertet, aut ores aut boves tuae fugavit, ut alius eum excipiet; et hoc vetere scripturum de eo qui pannu rubro fugavit armentum. Sed si quid per lasciviam, et non data opera, ut furturn committeretur, factum sit, videmus unam utilissimam devotionem Aquiliani aetius dari debest, cum per legem Aquiliam quae de damage lata est etiam culpa postuerit.

203. Furti autem aetius ei competit cuius interest rem salvam esse, licet dominus non sit; itaque nec dominus alter competet, quam si cur interdet rem non perire. (204.) Unde constat creditorem de pignore subreperto furri agere posse; adeo quidem, ut quamvis ipse dominus, id est ipse debitorem, eum rem subripuerit, nihilominus creditori competit actu furti. (205.) Item si fullo poliendae curandave, aut sarcinor Sarciendae 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 granted, since by the Lex Aquilia which was passed with reference to damage, culpable negligence 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 thus again it does not lie for the owner unless he have an interest that the thing should not perish. 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. Likewise, if a fuller have taken garments to smooth or clean, or a tailor to

By whom the Actio Furti can be brought.

1 The meaning of the passage is this: "in the case supposed there is no actio furri; the point therefore which we shall have to consider in any particular instance is whether a constructive Aquilian action will lie." Utile has been explained above in the note on II. 78. The action would be utilis and not directis, because the direct action could only be brought when the damage was done corporis corporis, III. 619.

2 III. 211.
mercede certa acceperit, caque furto amiscit, ipse furti habet actionem, non dominus; quia dominii nihil interest ex non perisse, cum iudicio locati a fullone aut sargizator sum& persequi possit, si modo est fullo aut sargizator ad rem praestandum sufficat; nam si solvendo non est, tunc quia ab eo dominus sum& conseque non potest, ipsi furti actio competit, quia hoc casu ipsius interest rem salvam esse. (206.) Quae de fullone aut sargizatore diximus, cadaem transferemus et ad eum cui rem commodavimus: nam ut illi mercedem capiendo custodiam praestat, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare. (207.) Sed is apud quem res deposita est custodium 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 act 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 wilfully1: hence, if the thing which he ought
to restore be stolen from him, he is not liable to an action of deposit in respect of it, and thus he has no interest that the thing should be safe; therefore he cannot bring an action of theft, but that action lies for the owner. 208. Finally, we must observe that it is a disputed point whether a child under puberty commits a theft by removing another person's property. It is generally held that as theft depends on the intent, he is only liable to the charge, if he be very near puberty, and therefore aware that he is doing wrong. 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 improbus fur. But the Praetor has introduced a special action in respect of this delict, which is called the aditio vi honorum raptorum, and is an action for fourfold2 if brought within the year, and for the single value if brought

1 The depositary is only liable for dolus, the text says. The general rule in contracts was that the person benefited was liable for culpa legis, i.e. for even trivial negligences, whilst the person on whom the burden was cast was only liable for culpa iuris, gross negligence. Dolus imports a wilful injury; culpa an unintentional damage, but one caused by negligence. The depositary would be liable for dolus and culpa iuris, Gaius, therefore, is not speaking with strict accuracy when he says the depositary is liable only "ui quid ipse dolo fecerit," but perhaps he had in his thoughts the well-known maxim, culpa iuris dolae aut peractae, in which case his dictum is correct. For some useful remarks on the subject of culpa see Sandars' edition of the Institutes, pp. 496, 497. See also Jones, On Bailments, pp. 5-54.

2 Probably Gaius is not writing technically when he uses the expression "pubertati proximnm." The sources, however, sometimes speak of a child under seven as infantii proximnm, and one between seven and fourteen as pubertati proximnm. See Savigny, On Possession, p. 180, n. (b).
Damni injuria. Lex Aquilia, c. i.

annum simpli, quae actio utilis est, et si quis unam rem, licet minimam, rauperit.

210. Damni injuriae actio constitutur per legem Aquiliam. cuius primo capite cautum est, ut si quis hominem alienum, canave quadrupedem quaeo quadrupedum numero sit, injuria occidevit, quem ex res in eo anno plurimi fuerit, tantum domino dare damnetur. (211.) Is injuria autem occidere intelligitur cuius dolo aut culpa id acciderit, nec ulla alia legem damnum quod sine injuria datur reprehenditur: itaque injunus est qui sine culpa et dolo malo casu quodam damnum committit. (212.) Nec solum corpus in actione huius legis aestimatur; sed sane si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque aestimatur; velut si servus mens ab aliquo heres institutus, ante quam iussu meo hereditatem cerneret, occisus after the year: and is available1 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 Aquilia,2 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

\[\text{\textsuperscript{1}}\] We have several times already come across the word \textit{utilis} derived from \textit{utilis}, but \textit{utile} here is the more common adjective derived from \textit{utile}.

\[\text{\textsuperscript{2}}\] 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 \textit{Lex Aquilia} was a plebeian measure, and Thelphus assigns it to the time of the secession of the plebe. probably meaning that to the Junicium, 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. 8.

Computation of Damages.

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fuerit; non eum tantum ipsum pretium aestimatur, sed et hereditatis amissae quantitates. item si ex gemelli vel ex comodis vel ex symphonicis unus occissus fuerit, non solum occisus sit aestimatio, sed eam amplius quaque computatur quod ceteri qui supersunt deprecati sunt. idem iuris est etiam si ex pari miliarum unam, vel etiam ex quadrigis equorum unum occidetur. (213.) Cuius autem servus occisus est, is liberum arbitrium habet vel capitalis crimine remur facere eum qui occidit, vel hac lege damnum persequit. (214.) Quod autem adjectum est in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT, illud efficit, si clodum puta aut luscum servum occidit, qui in eo anno integer fuerit, ut non quanti moris tempore, sed quanti in eo anno plurimi fuerit, aestimatio fiat. quo fit, ut quis plus in futuro consequatur quam ei damnum datum est.

one, be slain before he has made creation for the inheritance at my command. For not only the price of the man himself is computed, but the amount of the lost inheritance also. So too if one of twins or one of a band of actors or musicians be slain, not only is the value of the slaughtered slave taken into account, but besides this the amount whereby the survivors are depreciated. The rule is the same if one of a pair of mules or of a team of horses he killed. 213. A man whose slave has been slain is free to choose whether he will make the slayer defendant on a capital charge or sue for damages under this law. 214. The insertion in the law of the words “the highest value the thing had within the year” has this effect, that if a man have killed a lame or one-eyed slave, who was whole within the year, an estimate is made not of his value at the time of death, but of his best value within the year. The result of which is that sometimes a master gets more than the amount of the damage he has suffered.

\[\text{\textsuperscript{1}}\] 11. 164.

\[\text{\textsuperscript{2}}\] Capitellum does not necessarily mean “capital” in our sense of the word, but signifies “affecting either the life, liberty, or citizenship and reputation.” See Dittrich \textit{ubi verbo.}

The law under which the criminal suit could be brought in the present case was the \textit{Lex Cornelia de incendio} (52 B.C.), the penalty under which was interdiction from fire and water, consequently loss of citizenship. Heinsius, iv. 18, 58. According to the Code (III. 35. 3), a master whose slave had been killed could bring both a criminal and a civil suit.
215. Capite secundo in adstituatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur. (216.) Qua et ipsa parte legis damnui nomine actionem introduci manifestum est, sed id caveri non fit necessarium, cum actio mandai ad eam rem sufficeret; nisi quod ea lege adversus infirmitatem in duplum agitur.

217. Capite terto de omni cetero damno cavetur, itaque si quis servum vel eam quadrupedem quae pecunia numero est vulneraverit, sitae eam quadrupedem quae pecunia 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, damnun iniuriam datum hacte parte vindicatur, si quid enim usum aut ruptum aut fractum fuerit, actio hoc capite constituitur; quamquam poterit sola rupti appetatio in omnes causas sufficiere: ruptum enim intelligitur quod quoque modo corruptum est. unde non somum usque aut rupta aut fracta, sed etiam scissa.

215. In the second clause (of the Aquilian law) an action is granted against an adstipulator who has given an acceptation\(^1\) 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 mandate\(^2\) would suffice, save only that under this (the Aquilian law) the action is for double\(^3\) against one who denies his liability.

217. In the third clause provision is made regarding all other damnum. Therefore, if any one have wounded a slave or a quadruped included in the state 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 damages, 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, 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 comma 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 formula\(^4\) 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 utilis actiones\(^5\) are granted: for instance, if a man have shut up another person's slave or beast and starved it to death, or driven a beast of burden so violently as to cause its destruction: or if a man have persuaded another person's slave to go up a tree or down a well, and

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1. III. 110.
2. III. 169.
3. III. 111.
4. IV. 9, 171.
5. See note on 11. 278.
Injur. 250

arborem ascenderet vel in putumum descendere, et is ascenden
dendo aut descendendo ceciderit, et aut mortuis fuerit aut
aliaque parte corporis laesus sit. item si quis alienum servum de
ponte aut ripa in flumen proierit et is suffocatus fuerit, tum
hie corporae suam damnum dedisse eo quod proierit, non diffi-
ciliter intelligi potest.

220. Injur. autem committitur non solum cum quis pugno
pulsatus aut fuste percussus vel etiam verberatus erit, sed et si
cui convicium factum fuerit, sive quis bona alienus quasi de
bitoris sciens cum nihil debere sibi proscripsit, sive quis
infamiam alienum libellum aut cærnam scripsit, sive quis
mattrem familiae aut praetextatum adsecutus fuerit, et denique
alis pluribus modis. (221.) Pati autem iniuriam videmur non
solum per nosmet ipsos, sed etiam per liberos nostros quos 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
causéd the damage with his body in asmuch 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 adver-
tises 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. 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

dentiae habemus; item per uxores nostras quamvis in manu
nostri non sint, itaque si velati filiae mæte quae Titio nupta
est iniuriam faceris, non solum filiae nomine tunc agi iniuria-
rum potest, verum etiam utique et Titii nomine. (222.) Servo
autem ipsi quidem nulla iniuria intelligenti fieri, sed domi-
per eum fieri videtur: non tarnen istem modis quibus
etiam per liberos nostris vel uxores, iniuriam pati videmus, sed
ita, cum quid atrocios commissum fuerit, quod aperte in con-
sumelam domini fierividetur, veluti si quis alienum servum ver-
beraverit; et in hunc casum formula proponitur. at si quis servo
convicium fecerit vel pugno eum percerreisset, non proponit
ulla formula, nec temere pretiâ datur.

223. Poena autem iniuriarum ex lege xii tabularum propter
membrum quidem ruptum talio erat; propter os vero fractum
aut coelium trecentorum assium poena erat statuta, si libero
fractum erat; at si servo, ct. propter cetera vero iniurias xxv
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
daughter who is married to Titus, 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 Titus. 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 lashed the slave of another, and
a formula is set forth1 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 reason2.

223. By a law of the Twelve Tables3 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 assæ was ap-
pointed, if the sufferer were a free man, and 150 if he were a

1 For the different significations
of the word iniuria see Justinian,
iv. 4 pr., a passage which is in
great measure borrowed from Paulus.
2 An explanation of the word con-
vicium is given by Ulpian in D. 17,
10. 15. 42: "Convicium autem de-
tur vel a concitacione vel a convent,
hoc est, a collatione vocant, quam
etiam in annis compleures vocet
committitur, convicium appellatur,
quid convocantium." Hence convici-
um 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. obtinuit from the Praetor an
order for possession and leave to ad-
vertise, by making false representa-
tions to that magistrate.
4 Praetextatus signifies under the
age of puberty, as at the age of four-
ten the aquis viriles was assumed and
the aquis praetextatae discarded.

1 Sc. in the edit.
2 That is to say he has neither an
action framed on any known formula,
or even one "praescriptus verbi,"
unless there be some special circum-
stances of aggravation.
3 Tab. VIII. l. 2, 3, and 4.
Assum poena erat constitueta, et videbantur illis temporibus in magna paupertate satis idoneae iustae pecuniæ poenae esse.

224. Sed nunc alio lice utinam, permittituri enim nobis a Praetore ipsius iniuriam aestimare; et iudex vel tanti condemnat quanti nos aestimaverimus, vel minoris, proinde illi visum fuerit. sed cum atroce iniuriam Praetor aestimare soleat, si simul constiterit quantae pecuniæ nomine fieri debet vandilodion, hae ipsa quantitate taxamur formulam, et iudex quantis possit vel minoris damnare, plurumque tamen propter ipsius Praetoris auctoritatem non audet minuere condemnationem. 225. Atrix autem iniuria aestimatur vel ex facto, velut si quis ab aliquo vulneratus aut verberatus justiusbusse caesus fuerit; vel ex loco, velut si cui in theatro aut in foro iniuria facta sit; vel ex persona, velut si magistratus iniuriam passus fuerit, vel senatoribus ab humili persona facta sit iniuria.

Slave. For all other injuries the penalty was set at 25 asses. And these pecuniary penalties appeared sufficient in those times of great poverty. 224. But now-a-days we follow a different rule, for the Praetor allows us to assess our injury for ourselves; and the 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 “atrocious,” if he at the same time have settled the amount of vandilodion1 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 condemnation2. 225. Now an injury is considered “atrocious” either from the character of the act, for instance, if a man be wounded, or flogged, or beaten with sticks by another; or from the place, for instance, if the injury be done in the theatre or the forum; or from the person, for instance, if a magistrate have suffered the injury, or it have been inflicted by a man of low rank on a senator.

\[\text{2 IV. 184.} \quad \text{2 IV. 51.} \quad \text{2 IV. 39. 43.}\]

**BOOK IV.**

**Superest, ut de actionibus bynunari.**

1. Si quaeritur, quot genera actionum sint, verius videtur duo esse: in rem et in personam. nam qui IIII esse dixerunt ex sponsione generibus, non animadverterunt quidam species actionum inter genera se retulisse. (2) In personam actio est


2. *Sponsiones* belong to the time of the formulary method of suit, therefore the explanation now given of them will hardly be intelligible to a reader who is not acquainted, at least in outline, with the nature of the formulas, which is discussed somewhat later in this book.

When a controversy was raised on any point, whether of fact or of law, one of the litigants might challenge the other in a wager (sponsio) "in its esset," i.e. that if it were as the challenger asserted, the challenged should pay him some amount specified: and generally, but not always, there was a restipulatio or counter-wager, that if it were not as the challenger stated, the challenger should pay the same amount to the challenged.

The origin of these *sponsiones* is referred to by Heffer to a period subsequent to the passing of the Lex Silla (iv. 13), which brought into use the condition de pecunia certa credita, for it is evident that by the introduction of a sponsio an obligation of any kind whatever might be turned into an equivalent pecuniary engagement, and so be sued upon under that Lex.

The notion of the wager was obviously derived from the old actio...
Actions in personam and in rem.

qua agimus quoties cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est contundendum, id est cum intendimus dare, facere, praestare oportere. (3.) In rem actio est, cum aut corporem rem intendimus nostram esse, aut id aliud nobis competere, velit utendi, velit utendi frondi, endi, agendi, aquamve ducendi, velit alias tollendi vel prosipiciendi. Item actio ex diverso adversario est negativa.

4. Sic itaque discremis actionibus, certum est non posse nos formemiscis 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 debt, that is, when we assert in the intento that he ought to give or do something, or perform some duty. 3. The action is one in rem, when in the intento we assert either that a corporeal thing is ours, or that some right belongs to us, as, for example, that of usufruct, or right of passage for cattle, of conducting water, of raising one's buildings, or of view and prospect. So on the other hand the opposite party's action is (also in rem, but) negative.

4. Actions, therefore, being thus classified, it is certain that

Hoffer defends his introduction of the fourth class by saying that the words of Gaisser only state that there were four classes of actions distinguished by their various connection (or want of connection) with spon- sions, and not that all classes of actions were comprised in a specious. See Hoffer's Observations on Gaius, iv. pp. 86-89.

1. See a. conditio.

2. See a. vindicatio.

3. Savigny says that Dam, in the strict terminology of the formulun system, means to transfer property et jure (amidst); whilst facere, on the other hand, embraces every kind of act, whether juridical or not, and hence comprises, amongst other things, dare, solvere, numeraire, annulare, redare, nov facere, curare ut fiat. Cf. D. 22. 175, 189, 218.
agimus. (8.) Poenam tantum consequitur velut actionis furti et iniuriarum, et secundum quorumdam opinionem actionis vi bonorum raptorum; nam ipsius rei et vindicatione et condicio nobis competit. (9.) Rem vero et poenam perseveri velut ex his causis ex quibus adversus infrantem in duplum agimus: quod accidit per actionem judicati, depensi, damnii iniuriae legis Aquiliae, et rem legatarum nomine quae per damnationem certa relictae sunt.

10. Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sunt ex vi ac potestate constant; quod ut manifestum fiat, opus est ut prius de legi actionibus loquamur.

11. Actiones quas in usu veteres habuerunt legis actiones apppellabantur, vel idem quod legibus proditae erant, quippe tunc edicta Praetoris quibus complures actiones introducere arising out of a contract. 8. We obtain a penalty only, as in the actions furti¹ and iniuriarum¹, and, according to the views of some lawyers, in the action vi bonorum raptorum¹, for to recover the thing itself there lies for us either a vindication or a condonation. 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 judicati¹, depensi¹, damnii iniuriae under the Lex Aquilia¹, and for the recovery of legacies where certain specific things have been left (by the form) per damnationem¹.

10. Moreover, there are some actions which are framed upon a lega action, whilst others rest on their own special force.² In order to make this clear we must give some preliminary account of the leges actions.

11. The actions which our ancestors were accustomed to use were called leges actiones², either from the fact of their being declared by leges, for in those times the Praetor's edicts,

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1 See D. 43. 27, where, however, the old law is only referred to, not quoted.
2 According to Varro (De Ling. Lat. V. § 180, P. 70), Müller's edition, the name sacramentum was derived from the place of deposit, a temple (in sacrum); for it would seem that in the most ancient times the deposit was actually placed in the hands of the magistrate, and that the practice of giving sacrum instead was an innovation of a later age.
3 An action, that is to say, under the Lex Silla. See note on IV. 1.
Poema Sacramenti.

quia victus erat summam sacramenti praestabat poenae nomine; 
evque in publicum addebat praedaque eo nomine Praetori 
dabantur, non ut nunc sponsiis et restitupationis poena lucro 
cedit adversario qui vicerit. (14.) Poena autem sacramenti aut 
quingeneria erat aut quingeneria. nam de rebus mille aecis 
plurisve quingentis assibus, de minoris vero quingantima assi 
sbus sacramentum contederebat; nam ita leges tabularum 
cautum erat, sed si de libertate hominis controversia erat, et si 
pretiosissimus homo esset, tamen ut i. assibus sacramentum 
contenderetur, eadem leges cautum est favoris causa, ne 
satisfactione onerarentur adscitores. (15.) [Nunc admonentis summis, 
istas omnes actiones certis quisquidem et solemnibus verbis 
reason, and on account of the restitupation whereby the plainti 
f 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 spousial and 
restitupatory 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 aeces or 
more, the deposit would be five hundred, but when it was 
less, it would be fifty; for thus it was enacted by a law of the 
Twelve Tables1. 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 aeces, with the view of 
favouring such suits2, and in order to prevent the asserters of liberty3 
being burdened with excessive security. 15. We must now 
be reminded that all these actions were of necessity carried on 

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1 See note on 11. 27.
2 That this was the form of the ancient action against an auctor who 
was present in court is clear from 
Cicero pro Cael. c. 19, pro Mun. 
c. 12.

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17—2

Preliminary proceedings before the Praetor.

propi debussae. Si verbi gratia in personal 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 consent4 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 judex, and the Praetor: fixed a day for them to come and receive one. Afterwards, on their reappearance in court, a judex was assigned from the number of the decemvirs on the thirtieth day5: and this was
Xviris xxx index: idque per legem Pinariam factum est; ante eam autem legem non dabatur index. Illud ex superioribus intelligimus, s.i. de re minoris quam m acriis agdebitur, quinquagenario sacramento, non quingenario eos contendere solitosuisse. Postea tamen quam index datur esse, comprehendimus dieum, ut ad iudicem venirent, denuntiantur. Deinde cum ad iudicem venerant, ante quam apud eum causam petulant, solentur breviter ei et quasi per iudicem rem expolere: quae dicetur causae collectio, quasi causae suae in breve coactio.

16. Si in rem agdebitur, mobilia quidem et movendi, quae so done in accordance with the Lex Pinaria; for before the passing of that lex, it was not the practice for a júdex to be assigned. From what has been stated above, we have gathered that when they 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 júdex 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 júdex, their custom was, before they argued out their cause, to set forth the matter to him briefly; and, as it were, in outline: and this was termed causae collectio. Being, so to speak, a brief epitome of each party's case. 16. If the action were one in rem, the process by which the claim used to be made in court for movable and moving things

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1 See note (K) in Appendix.
2 This translation is in accordance with Heffer's emendation of nonnum; Holling reads utiis; Huschke, who has filled up the preceding lacuna differently from Heffer, supplies ille e ducto victo.
3 See note (L) in Appendix.
4 In later times there was another form of proceeding, vix ex jure, which is the one specially contained by Cicero in pro Mar. c. 12. The process (technically called manus contentious) is fully described in both its forms by Aulus Gellius, xxi. 16, the sum of whose observations may be thus given: "By the phrase manus contentious is meant the claiming of a matter in dispute by both litigants in a set form of words and with the thing itself before them. This presence of the thing was absolutely necessary according to a Law of the Twelve Tables commencing: Si qui in jure manum consequatur (Tab. iv. 1, 8), and the proceedings (predictio, manus corrupta) must take place before the praetor. Hence we see that in olden times the praetor must have gone with the parties to the land, when land was the subject of dispute, although moveables may possibly, and probably, have been brought by them to him. Gellius proceeds: "But when from the extension of the Roman territory and the increase of their other business, the praetors found it inconvenient to go with the parties to distant places to take part in these proceedings, a practice arose

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modo in his aderit addivide posset, in iure vindicabatur ad hunc medium. qui vindicabat festucam tenebat. deinde ipsum rem adprehendebant, velut hominem, et, dictabat: HUNC EGO HOMINEM EX JURE QUEMQUE MEUM ESSE AIDO SUCUM SUXAM CAUSAM SICUT SEDEBAM. EXECE THE VINDICATAM IPSUM: et simul hominum festucam imponebat. adversarius eadem similar dicebat et sic dicabat. cum uterque vindicasset, Praetor dicebat: MITTITE AMBO HOMINEM. Illi mittitabat. qui prior vindicaverat, ila alterum interrogabat: POSTULU ANNO DICAS QUA EX CAUSA VINDICAVERIS. Ille respondebat: TUS PEREGR SICUT VINDICATAM IPSUM. deinde qui prior vindicaverat dicebat: QUANDO TUS INJURIA VINDICAVESTI, D AERIES SACRAMENTO

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 that his opponent replied: "I have fully complied with the law inasmuch as I have touched him with my wand." Then the first claimant said: "Inasmuch as you have made a claim without law to support it, I challenge you in a deposit of five hundred asses." And

1 For this meaning of causam, see 1. 1. 9, 1. 10, 1. 12. In D. 1. 6, 11, 11. 12, 1. 21, 1. 22, 1. 22. 1. 21; D. 8. 3. 28, the word has the same or an analogous signification.
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 vindicatio 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 'litis et vindicurio,' 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 cloak 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 sapiendi judicia, almost identical with that employed in the judicis postulatio; and this at a later time, after the passing of the Lex Varia, was called a conditio. And it was with propriety so called, for the plaintiff used to give notice to his opponent to be in court on the thirtieth day for the purpose of taking a jüdex. At the
tionem in personam esse, quae intentium dare nobis operari: nulla enim hoc tempore eo nomine denuntiatio sit. (19.) Haece autem legis actio constituta est per legem Sillam et Calpurniam: legum quidem Silia certius pecuniae, legum vero Calpurniae de omnibus certae re. (20.) Quare autem haece actio desiderata sit, cum de eo quod nobis dari oportet postuerimus sacramentum aut per judicis postulationem agere, valde queritur.

21. Per manus injectionem acque de his rebus agebatur, de quibus ut in agetur, legum aliae, causa est, velut indicari legum eum tabularum, quae actio est. Igitur, qui agabet sic dicitur: QUOD TUI MINI JUDICATIS SVIÉ DVMNATVS ES SESTERTIUM X present time, however, we apply the name, conductio, improperly to an action in personam in the intention of which we declare that our opponent ought to give something to us, for now-a-days no denuntiatio takes place for such purpose.

"This legis actio was given by the Leges Sillae and Calpurniae, being by the Lex Silla applicable to the recovery of an ascertained sum of money, and by the Lex Calpurniae 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 actio pro judiciis postulationem for that which ought to be given to us.

21. Similarly an action in the form of an arrest (manus injecio) 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, a debt due on judgment;" and at the same moment he laid hold of some part of his body; nor was he against whom the judgment had been given allowed to remove the arrest and conduct his action for himself, but he named a protector (vindex), who managed the case for him; a defendant who did not name a protector was taken off by the plaintiff to his house and bound there.

22. Afterwards certain leges extended the action per manus injectionem "as though upon a judgment" to other cases against particular individuals: for instance, the Lex Publilia did so against him for whom a surety (sponsus) had paid money, if he had not repaid it to the surety within the six months next after it had been paid for him: so, too, did the Lex Furiae de Sponsu against him who had exacted from a surety (sponsus) more than his proportion of a debt; and in fact many other leges allowed an action of the kind in various cases.

23. Other leges again allowed in certain cases actions per manus injectionem, but (made)
sed puram, id est non pro iudicato: velut lex Furia testamentaria adversus cum qui legatorum nomine mortisve causa, plus ex assibus cepissent, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia adversus fænamentores, ut si usuras excissent, de his reddenis per manus injectionem cum eis ageretur. 

(24.) Ex quibus legibus, et si quae aline similes essent, cum agebatur, manum sibi depellere et pro se legere agebat, nam et in ipsa legis actione non adiciabat hoc verbum pro iudicato, sed nominata causa ex qua agebat, ita dicebat: ob eam rem ego tibi manum inicium; cum hi quibus pro indicato actio data erat, nominata causa ex qua agebant, ita interfecerant: ob eam rem ego tibi pro iudicato manum inicium, nec me praeterit in forma legis Furia testamentariae pro iudicato 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 aces by way of legacy or donation mortis causa, 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 for manus injectionem. 

24. When then an action was brought upon these leges and others like them, the defendant was at liberty to remove the arrest and conduct his action for himself, for the plaintiff did not in the legis action add the phrase pro iudicato ("as though upon a judgment"), but specifying the reason why he sued, went on thus: "on that account I lay my hand on you:" whereas they to whom the action was given "as though 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 iudicato, 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 for 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 sureties for the payment of that which shall be adjudicated.

26. The legis actio for 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 disbursement, because they seem to treat of a somewhat different matter, viz., arrest of a defendant who refused to appear in court at all, whereas the present subject of our author is the arrest of one who had appeared in the original action, had lost it, and had then evaded payment of the judgment laid on him. For the same reason Hor. Sat. 1. 9. 74 and the well-known passages from Plautus (Curtius, and Astoria) are not brought forward.
pecunia quae stipendi nomine dabatur aes militare. Item prop-
ter eam pecuniam libebat pignus cabere ex qua eis emendis,
 curet: quae pecunia dicebatur aequitate. Item proprier eam
pecuniam ex qua hordeum equis erat comparandum; quae pe-
cunia dicebatur aequo horidarium. (28) Lege autem introduc-
est pignoris capio velut lege xii tabularum adversus eum qui
hostiam emisset, nec pretium redderet: item adversus eum qui
mercedem non redderet pro eo lumento quod ideo locase-
t, ut inde pecuniam acceptum in desem, id est in sacrificium
imponderet. Item lege censoria data est pignoris capio publica-
canis vectigalium publicorum populi Romani adversus eos qui
aliqua lege vectigalias deberen. (29) Ex omnibus autem ipsis
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 as equestre. So also could these soldiers take a pledge for
the money necessary for the purchase of provender for
their chargers, and this was called as equestri. 28. Pige-
noris capio was also (sometimes) introduced by lex, as, for
instance, by a law of the Twelve Tables 2 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 thereon from a dopis, i.e.
on a sacrificial feast 3. So also a pignoris capio was given by a
lex censoria 4 to the farmers of the public revenues of the
Roman people against those who owed taxes under any lex.
In all these cases the pledge was taken with a set form of
rule words; and hence it was generally held that this was a legis
actio too: but some authorities have dissentia 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 (leges) 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.
All these legis actiones, however, by degrees fell into
discredit, for through the extensive 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
cause. Therefore these legis actiones were got rid of by the
Lex Achillia and the two Leges Julia, and the result has
been that our litigious process is now carried on by express
phraseology, i.e. by the formulae. 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 centumvirial jurisdiction. In fact, even at the
present day, when the parties resort to the centumviri, there

1 The money for purchasing the
horses of the equites was provided by
the state (Liv. i. 59), that for the
feeding of them by widows; the
pledge therefore would be taken in
the former case, as for aes militare,
from the tribunus militum, in the
latter from the widow. See Au.
C. vi. 10.
2 Tab. xii. 1.
3 Dope was the archaic word for
the sacred ceremonies at the winter
and spring sowing. See Festus, s.vb
verb.
4 This is Dickson's suggestion,
which Heffer adopts. Gibbon pro-
poses "lex Praetoria" for a reading;
Mommers, "lex praedatoria." The
leges centuriae referred chiefly to the
letting out of the revenues, public
lands and public works. For the
care of the censores in such mat-
ters see D. 50. 16. 58. Varro, de
R. R. ii. 1.
5 Censor is used in this sense of
determining or expounding in 1. 7.
6 See (K) in Appendix.
7 See (K) in Appendix.
8 See the example in iv. 11.
leagatur sacramento apud Praetorem urbanam vel peregrinarum.
propter damni vero infecti nemo vult lege agere, sed potius ad
satisfacione quae in dicto proposita est obligat adversarium for
magistraturn, quod et commodius iniis et pecunia est. per pignoris
[desunt 24 lin.] apparat. (22) Item in ea forma quae publica
cano proponitur tales fictio est ut quanta pecunia olim, si pignor
captum esset, id pignor est a quo captum erat laeere deberet,
tantam pecuniam condemnaret. (33) Nulla autem formula ad
conditionem fictionem expressiturn. sive enim pecuniam sive
rem aliqua certam debeat, nobis petamus, eam ipsam dari
nobilis opertere intendimus; nec ullam addignandum condi-
tionis fictionem, itaque simul intelligimus eas formulam quisquis
pecuniam aut rem aliquam nobis dare opertere intendimus, sua
vi ac potestate valere. sua legem nature sunt actiones
commodi, fiduciae, negotiorum gestorum et aliae innumera-
bles.

34. Habemus adhuc alterius eliam generis fictiones in qui-
busdam formulam: velut cum is qui ex dicto bonorum posses-
sonem petit fictio se herede agit, cum enim praetorius hui et
non legitime succedat in locum defuncti, non habet direas
fictivum condition. 

Thus we understand at once that those
formulas in the intentio of which we declare that money or some
thing "ought to be given to us" avail of their own special
force. The same characteristic belongs to actions on loan, on
fideius pactum, on gratious services, and to other actions
innumerable.

35. We have besides actions of another kind in some
formulas: for instance when a person claims possession of goods
by the edict under the fiction that he is the heir. For since he
succeeds to the position of the deceased by praetorian and not

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1 vi. 65.
2 Heffer has endeavored to fill
up the break of 24 lines occurring at
this point; his suggested reading
may be translated to this effect: "At
the present day there is no proper
leag actio in the form for pignoris
consis, but only a fictitious process
employed in certain actions: a result
brought about by the Lex Justinian.
Those fictions there are many,
attaching to statales and civil
actions. For there are actions so
based on a fictitious leg actio,
that we insert in the condictum
the amount or act which our opponent
would have had to give or perform,
if the leg actio provided for the
pur-
pose. Hence we do not sue directly
and upon the actual obligation, but
indirectly upon the de springing
from the supposed leg actio. It is
to be remembered, however, that we
cannot now-a-days sue upon a
leg actio in all cases where the
old legal system allowed a process
by real leg actio, but only when the
leg actio is of the form for pignoris
consis. This appears from the
formulae themselves, which the
Praetor has set forth, in his call,
for instance," etc. &c. (as in the text).

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1 art. § 59.
2 See Mackenzie's Roman Law,
3 P. 37. This topic of fiction is of im-
4 portance as an introduction to the
5 learning relating to the formulary
6 system. Hence it is that Gaius has
7 thought it necessary to give an elab-
8 rate account of the old leg actio
9 system. He has, almost entirely
10 obsolete in his day, and to
11 explain the connection between one
12 of the leg actio actiones and fiction
13 on the one hand, and the influence
14 of fictions in pleading upon the for-
15 mulary system on the other. The
16 subject of fictions has been analyzed
17 very minutely and explained most
18 thoroughly by Savigny in his Stat.
19 des Roms, 60, (see the French
20 translation by Guicciardini, Traité du
droit Roman, v. & c. pp. 76–84.)
21 Zimmer too has given a short chap-
22 ter on the same subject as intro-
23 ductory to the formulary system, (see Zim-
24 mer translated by L. E. F. Zimmer,
25 Traité des Actions: une partie, section ii.
26 Art. premier § 1 p. 140.) The whole
27 of Savigny's short chapter should be
28 studied as explanatory of the sections
29 of Gaius numbered from 34 to 60,
30 and also as explanatory of the vast
31 extension of pleading by the intro-
32 duction of what were called
33 actiones, through the advantage,
34 which the use of fictions offered. One
35 part however deserves special notice
36 her, viz, where he points out the differ-
37 ence between actiones fictiles and
38 actiones utiles. "Uti's actio et
39 fictio fictile," says he, "were
40 originally exactly equivalent." Gaius
41 using the term actio et Ulpian
42 the term fictia. But there was this
43 difference between them, that whereas
44 the expression of a fiction directly expresses
45 the form of procedure actually adopted, fictile
46 expresses the very essence of the
47 thing it self, that is to say, the ex-
48 tension of an institution owing to the
49 practitioners' wants.
actiones, et neque id quod defuncti sui potest intendere suum esse, neque id quod defuncto debetatur potest intendere dare sibi oportere; itaque facta se herede intendit veluti hoc modo: IUDEX ESTO. SI AULIUS AGERIUS, id est ipse actor, LUCIO TITO HERES ESSET, TUM SI PARET FUNDUM DE QUO AGITUR EX IURE QUIRITIUM EIUS ESSE OPORTERE; vel si in percursor agatur, praeposita simulat ficione illa in substantia: TUM SI PARET NUMERIUM NEGIDIUM AULO AGERIO SERTERIUM X MILA DARE OPORTERIT. (33.) Similiter et bonorum empori facta se herede agit. sed interdum et allo modo agere solet, nam ex persona eius cuius bona emerit sumpta intentione convertit condemnationem in suum personam, id est ut by statute right, he obtains no direct actions; and cannot claim in his intentio either that what belonged to the deceased is "his own," or that his adversary "ought to give him" that which was owed to the deceased; therefore settling himself heir, he states his intentio somewhat in this fashion: "Let there be a j u d e x. If Aulus Agarius (that is the plaintiff himself) was the heir of Lucius Titius, then should it appear that that estate about which the action is brought is his ex iure 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 Agarius 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 Goechen's reading: "si in personam agatur." Heffer reads: "vel si quid debeatur L. Titio," which of the two we adopt is immaterial, an action on a debt being of necessity, in personam.

3 The "word oportet," says P aut a, "does not apply to the extent of the J u d e x'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 Qua sim vel iudex dare facere oportet were inserted; then in case of any dispute between the parties, the claim would be restricted to the actual sum, that was due, or that the thing was worth at the time when the contract was made. See D. 44. 3. 14. 1 and 44. 1. 154. "Hence," says S a v i g n y, Traité du droit R o m. (translated by Guénéau, 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." (35.) Again, Roman citizenship

Rutilian, Servian and Publician Actions. 273

quod illius esset vel illi dare oportet, eo nomine adversarius huic condemnatur: quae specie actionis appellatur Rutiliana, quia a Praetore Publico Rutilio, qui et honorum venditionem introduxisse dicitur, comparata est superior. autem species actionis qua facta se herede bonorum empori agit Serviana vocatur. (36.) Eiusdem generis est quiue Publiciana vocatur. datur autem haec actio ei qui ex iure Quiritium suam esse intendere, fingitur rem usucipisse et ius, et quasi ex iure Quiritium dominus factus esset, intendit hoc modo: IUDEX ESTO. SI QUUM HOMINEM AULIUS AGERIUS EMIT, ET SI EX TADITUS EST, ANNO POSSIDÆ, TUM SI EUM HOMINEM DE QUO AGITUR RIES EX IURE QUIRITIUM ESSE OPORTERET & RELIGIUA. (37.) Item civitas Romana

whose property he has bought, he changes the condemnation so as to direct it to his own person, that is, he says that his opponent ought to be condemned to himself on account of what belonged to him (whose property he has bought); or on account of what he was bound to give to him. This form of action is called Rutilian, because it was framed by the Praetor Rutilius, who is also said to have been the inventor of the proceeding called bonorum venditio. The form of action first named, in which the bonorum empori sues under the fiction of being the heir, is called Servian. (36.) Of the same kind is that action known as Publician. This is granted to him who has not yet completed his usucaption of something delivered to him on lawful grounds, and having lost the possession seeks to recover the thing. For inasmuch as he cannot declare that the thing is his ex iure Quiritium, he is by fiction assumed to have completed his usucaption, and thus, as though he had become owner ex iure Quiritium, his intentio runs in this manner: "Let there be a j u d e x. If Aulus Agarius has possessed for a year the slave whom he bought and who was delivered to him, then if it should appear that that slave, about whom this action is brought, is his ex iure Quiritium, &c. (37.) Again, Roman citizenship

1 III. 77.

2 The author of this law is generally supposed to be the Praetor C. 4.

3 Publicius mentioned by Cleauro in pro Client. c. 45. The peculiarities

of the action are discussed by S a n d e r s in his notes on Just. Inst. IV.

4 11. 41.
Fictions.

Peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, velit si futurum factum peregrinus et cum eo agatur, formula in concipitur: JUDEX EST. SI PARET OPE CONSILIJO DIONIS HERMUL LUCIO TITIO FURTUM FACTUM ESSE PATEREB AUREA QUAM OB REM EUM, SI CVIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPORTERET et religin. item si peregrinus furti agat, civitas ci Romana fingitur. similiter si ex lege Aquilia peregrinus damni injuriae agat aut cum eo agatur, facta civitate Romana judicium datur. (38.) Praeterea aliquando fingimus adversarium nostrum capite diminutum non esse. nam si ex contractu nobis obligatus obligatave sit et capite diminutus deminutave fuerit, velit mulier per coemptionem, masculus per adrogationem, desinit iure civili

...is by a fiction ascribed to a foreigner, if he sue or be sued in some case for which an action is granted by our laws, provided only it be just that such action should be extended to a foreigner: for instance, if a foreigner commit a theft and an action be brought against him, the formula is framed thus: "Let there be a judge. Should it appear that a theft of a golden goblet has been committed on Lucius Titius with the aid and counsel of Dio Hermaeus, for which matter, were he a Roman citizen, he would have to make satisfaction for the loss as though he were a thief." &c. Again, if a foreigner bring an action for theft, Roman citizenship is by fiction ascribed to him. Similarly, if a foreigner sue under the Lex Aquilla for damage done contrary to law, or if he be sued on such account, an action is granted to him on the fiction of his having Roman citizenship.

38. Besides this we sometimes feign that our adversary has not suffered a capite diminutio. For in any one man or woman, he bound to us on a contract, and undergo capite diminutum, as in the case of a woman by exemplo or in that of a man by arrogation, such person is no longer bound to us at

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1 There is an example of this fiction in Cic. De Ferr. II. 2. 12, "Judiciis haec sendunt qui civisset Romani suum, si Siculi essent, quam Steno Legibus daret operarios. Qui Siculi, si civisset Romani essent, etc.
2 He was not the actual thief, but only an accomplice; but he was liable to an action just as though he were the actual thief. Hence praesumere is here used in precisely the same signification as in the phrase pro jussu: II. 9. 27, 24, 45. 4 infra.
3 I. 169.
4 I. 113.
5 I. 59.

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Parts of the Formula.

Debere nobis, nec directo intendere possunt dare cum cavo oportere; sed ne in poetostrum eius sit ius nostrum corrupture, introducet est contra cum cavo actio utile, resciscia capitis diminutiones, id est in qua fingitur capite diminutus deminutus non esse.

39. Partes autem formularum hae sunt: demonstratio, intentio, adiudicatio, condemnatio. (40.) Demonstratio est ea pars formularum quae praecipue idem inseritur, ut demonstretur res de qua agitur. velut haec pars formularum: QUOD AULUS AGERIUS NUMERO NEGIO DOMINEM VENDITIT. item haec: QUOD AULUS AGERIUS APUD NUMERIO NEGIO DOMINEM DEPOSITIT. (41.) Intentio est ea pars formularum quae actor desiderium suum concludit. velut haec pars formularum: SI PARET NUMERIO NEGIO AULO AGERIO SEXTERTIUM et MILIA DARE OPORTERE.

item haec: QUIDQUID PARET NUMERIO NEGIO AULO AGERIO DARE FACERE OPORTERE. item haec: SI PARET HOMINEM EX IURE QUIRITIUM AULI AGERII ESSE. (42.) Adiudicatio est the civil law, nor can we declare directly in our intentio that he or she "ought to give," but to prevent either of them having the power of destroying our right, an usus abit has been introduced against them, in which their capita diminutio is set aside, in which, that is to say, there is a fiction that they have not suffered any capita diminutio.

39. Now the parts of a formula are these, the demonstratio, the intentio, the adiudicatio and the condemnatio. (40.) The demonstratio is that part of a formula which is inserted for the express purpose of having the matter described about which the action is brought; for example, this part of a formula: "Inasmuch as Aulus Agerius sold a slave to Numerius Negidius:" or this: "Inasmuch as Aulus Agerius deposited a slave with Numerius Negidius." (41.) The intentio is the part of a formula in which the plaintiff declares his demand: for instance, this part of a formula: "If it appear that Numerius Negidius ought to give to Aulus Agerius 10,000 sesterces;" or this: "whatever it appear that Numerius Negidius ought to give or do for Aulus Agerius;" or this: "if it appear that the slave belongs to Aulus Agerius ex iure Quiritium." (42.) The adiudicatio is that part of a

1 III. 84.
2 IV. 78 (note). 3 IV. 82.
4 A short and clear exposition of the nature of a formula is to be found in Sandars' Introductions to the Institutes, pp. 63–67. See also Lindley's Jurisprudence, App. p. xxxv.
5 These examples are well selected,
est ea pars formulae qua permitteur iudici rem alieni ex
litigatoriobus adjudicare: velut si inter coheres familiae erici-
cundae agatur, aut inter socios communi dividuandu, aut
inter vicinos finium regundorum. nam illis igitur: QUANTUM
ADJUDICARE OPORRT, IUDEX TITIO ADJUDICAT. (43.)
Condemnatio est ea pars formulae, qua iudicii condemnandi ab-
solvente potestas permittur, velut haec pars formulae:
NUMERIUM AULO AGERIO SESTERTIUM X
MILLA CONDEMDA. SI NON PARET ABSOLVE. item haec: IUDEX
NUMERIUM AULO AGERIO DUMTAXAT X MILLA CON-
DEMDA. SI NON PARET ABSOLVETI. item haec: IUDEX NUMERI-
RIUM AULO AGERIO [X MILLA] CONDEMDAM ET RELI-
QUA, UT NON ADJUDICAT. (44.) Non istam istae omnes partes
formula in which the iudex is permitted to adjudicate some-
ting to one of the litigants, as in the suit between coheirs for
partition of the inheritance, or between partners for a division
of the partnership effects, or between neighbouring proprietors
for a setting out of their boundaries. For in such cases this
part of the formula runs: “Let the iudex adjudicate to Titus as
much as ought to be adjudicated!” 43. The condemnatio is that
part of a formula in which power is granted to the iudex to con-
demn (i.e. mule) or acquit: for instance, this part of a formula:
“Judez, condemn Numerius Negidius to pay 10,000 sesterces
to Aulus Agerius; if it do not appear (that the circumstances
put forth in the intentio are true) acquit him;” or this: “Judez,
condemn Numerius Negidius to pay to Aulus Agerius a sum
not exceeding 10,000 sesterces; if it do not appear (that the
circumstances set forth in the intentio are true) acquit him;” or
this: “Judez, condemn Numerius Negidius to pay 10,000 ses-
terces to Aulus Agerius,” &c.; without the addition. 44. All

being examples of the intentions of
the three most common forms of ac-
tion, viz. the first an intentio suitable
for an actio in personam of the char-
acter described as certae condemnatione,
the second for an actio in personam of the class insectae condem-
natione; the third for an actio in rem.

1 See just. Inst. 17. 4.-7; Ulp.
XIX. 16.
2 IV. 46 et seq.
3 Heffter and Göschon read “ut
non adjudicat: si non paret, ab-
solvit.” the MS. being illegible
at this point. Dirksen, however,
thoughly objects to this addition,
on the ground that the condemnatio
always contained an express direc-
tion to the iudex to condemn or
acquit. It is perhaps presumptuous
to dispute with such authorities as
Heffter and Göschon, but we must
say that Dirksen’s objection to their
reading seems unanswerable; for we
find it expressly stated by Paulus
“qui damnare potest, est absolventi
quaque potestatem habet,” D. 47.
1. 3. Galen, too, says himself in IV.
144 “valgo dictae omnia judicia
cess absolutionem.”
4 See for a short explanation of
the nature of the formula praejudicialis,
5 The subject of des is discussed
in Ulp. vi. See also Mackenzie’s
Roman Law, p. 105.
6 The reading: “item adjudicatio
vel condemnatio sine demonstratione
vel intentione nullas vires habet,” is Göschen’s. Heffter leaves stand-
ing in his edition the corrupt form
“item condemnatio sine demonstra-
tione vel intentione nullas vires habet,” but admits in a
note that no sense can be got out of it.
7 IV. 37.
8 That is, the question at issue is

simul inveniuntur, sed quaedam inveniuntur, quaedam non in-
veniuntur. certe intentio aliquando sola invenitur, sicut in praec-
judicalibus formula, quas est qua quae inveniuntur aliqvis libertus
sit, vel quanta dos sit, et aliae complures demonstratio autem
et adjudicatio et condemnatio multis excusae inveniuntur, nihil
enim omnia sine intentione vel condemnatione valet; item
condemnatio vel adjudicatio sine demonstratione vel intentione
nullas vires habet, vel id numquam solae inveniuntur.
45. Sed cas quidem formulis in quibus de iure (quaritur in
ius conceptus vocamus. quales sunt quibus intendimus nos-
strom esse aliquem iure in quae Quiritium, aut nostis dare
operter, aut pro price damnum decidere operter; in
quibus iuris civilis intentio est. (46.) Ceteras vero in factum
these parts, however, are not always found together in the same
formula, but some appear and some do not appear. Of a cer-
tainty the intentio is sometimes found alone, as in praecjudi-
ca formulae, such, for instance, as that wherein the matter in issue
is whether a man is a libertus, or that where it is what is the
amount of a dos, and many others. But the demonstratio, the
adjudicatio and the condemnatio are never found alone: for the
demonstratio is utterly useless without an intentio or a condem-
natio, and so too a condemnation or adjudicatio is of no effect
without a demonstratio or an intentio; therefore these are never
found alone.
45. Now those formulae wherein the issue is one about a
right, we call in ius conceptus. Of this kind are those in which
we lay our intentio to the effect that something is ours ex iure
Quiritium, or that some one ought to give us something, or
ought to pay damages as for a fortunam. In these the intentio
is one of the civil law. 46. All other formulae we style in


Formulae in Factum conceptae.

conceptas vocamus, id est in quibus nulla talis intentionis conceptio est, sed initio formulae nominato eo quod factum est, addicentur ea verba per quae indici dammanti absolvente potestas datur. Qualia est formula qua utitur patronus contra libertum qui eum contra edictum Praetoris in ius vocat; non in ea ista: recuperators sint. Si paret illum patro- num ab illo libertvo contra edictum ilius praetorius in ius vocatum esse, recuperators illum libertum illi patrono sestertium x millia condamnare. Si non paret, absolvite, eterna quoque formulae qua sub titulo de in ius vocando propositae sunt in factum conceptae sunt; vehit adversus eum qui in ius vocatus neque venerit neque vindicem dedet; item contra eum qui sit exmerit eum qui in ius vo-

factum conceptae; formulae, that is to say, in which the intention 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 judex of condemning or acquitting. Of this kind is the formula which the patron employs against his freedman who summons him into court contrary to the Praetor's edict, for it runs: "Let there be recuperators! 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 recuperators condemn the said freedman to pay to the said patron 10,000 sesterces; should it not appear so, let them acquit him." The other formulae which are set forth under the title de in jus 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.

There are, however, cases in which the Praetor publishes both formulae in jus conceptae and formulae in factum conceptae, for instance, in the actions on deposit and on loan; for the formula which is drawn up in this form: "Let there be a judex. Inasmuch as Aulus Agerius has deposited a silver table with Numerius Negidius, from which transaction this suit arises, whatever Numerius Negidius ought in good faith to give or do to Aulus Agerius on account of this matter, do thou, judex, condemn Numerius Negidius to give or do to Aulus Agerius, unless he restore (the table);" is a formula in jus concepta; but that which is drawn up thus: "Let there be a judex: should it appear that Aulus Agerius has deposited with Numerius Negidius a silver table, and that this through the fraud of Numerius Negidius has not been restored, do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius as much

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

An example of a formula in jus concepta is to be found in Cist. pro Ritu. Cons. 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.

2 See Inst. iv. 16. 3. D. 2. 4. 24 and 25. From these passages we also perceive that the copier of the MS. has by a mistake written 10,000 for 5000 sesterces in the con- dominio of the formula quoted in the text.
3 These are commented on in D. 2. 4.
4 See note on iv. 21. Whether the vindex was in Galus' time required in all cases where neither the summons was obeyed nor bail tendered, or was only tendered in centenarial cases and actions deperiti et indemnati, is a disputed point. Heftei notes a list of.
4 iv. 20. See note 1 in Appendix.
ESSE, QUANTO EA RES ERIT, TANTAM PECUNIUM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET, ABSOLVET.—in factum concepta est. similes etiam commodati formulae sunt. 48. Omnium autem forumulorum quae condemnationem habent ad pecuniarium aestimationem condemnationi concepta est. Haque etiam corpus aliquod petitionum, veluti fundimiento, hominem, vestem, aurum, argum, index non ipsum rem condemnat cum quo actu est, sed eis hiber solabat, sed aestimatio re pecuniam cum condemnat. 49. Condemnatio autem vel certae pecuniae in formule ponitur, vel incerta. 50. cerata pecuniae in ea formula qua certam pecuniam petimus; nam illi ima parte formule in est: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SIS- TERTIUM X MILIA CONDEMNATA. SI NON PARET, ABSOLVET. 51. certae vero condemnabili pecuniae duplicem significacionem habet, est enim una cum aliqua præfinitione, quae velgo dictur cum taxatione, velut si incertum aliquid petimus; nam money as the thing in dispute shall be worth: should it not so appear, acquit him;” is a formula in factum concepta. There are similar formulae for loan also.

48. The condemnation of all the formulae which have one is drawn with a view to pecuniary compensation; therefore, although we be suing for some specific article, as for instance, for a field, a slave, a garment, gold, silver, the judex does not condemn the defendant (to restore) the thing itself, as was the custom in old times, but condemns him to pay money according to the valuation of the thing. 49. The condemnation is drawn in the formula for a sum certain or for a sum uncertain. 50. It is for a sum certain in the formula by which we sue for a sum certain, for at the end of the formula there occurs the direction: “Do thou, judex, condemn Numerius Negidius to pay to Aulus Agersius a sum not exceeding 10,000 sestertii; should it not so appear, acquit him.” 51. The condemnation may be for a sum uncertain in two different senses. For there is one kind with a definite maximum prefixed, which is generally styled cum taxatione; for instance, when we are suing for something

1. So called because the word annum occurs in it; as in the instance here given and that in iv. 43. Festus gives another explanation, connecting taxat and taxation with tangit. See Festus, sub voc. If we regard duobus taxat as two words, we might accept Festus’ definition, translating

The phrase is found in Cic. de Orat. ii. 75. “Quid si, quum pro altero diis, item suam facias.” From the passage in the text it would appear that a judex was liable for a wrong decision given through ignorance, as well as for one through fraud; but it is to be remembered that skillful jurists were appointed to assist the judex; see Aus. Gell. xii. 15. Note (L) in Appendix.
ne plus quam taxatum sit, alius enim similiter liem suam facit. minoria autem damnare ei permission est [de sunt 7 fere h.]

53. Si quis intentione plus complexus fuerit, causa cadit, id est rem perdit, nec a Praetore in integrum restitutione, praeter quam quidemdam casibus in quibus [actori succurreret propter adatem, vel si tam magna causa uti erroris iteraverit, ut etiam constantissimus quisque loci possed, plus autem quatuor modis petitur: re, tempore, loco, causa. re: velit si quis pro x miliibus quae ei debentur, xx milia petierit, aut si est 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 intentio more (than is due to him), he fails in his cause, i.e. he loses the thing he is suing for, and cannot be restored to his former position by the Praetor, except in certain cases in which the 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 causae. 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 who having a share in a particular thing lays his intentio 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

\[1\] Here rectius in integrum—have the right of bringing a new action on the old facts. As soon as a litigated matter had arrived at the lis contributa a novitio took place, and the defendant was no longer under obligation to fulfil 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 novitio. Hence rectius in integrum signifies that the plaintiff is freed from the unpleasant effects of the novitio, or in other words, can bring a new action on the original case. See Inst. 150, 181. Paulus, S. R. 2. 7.

\[2\] The remainder of this section is translated from the conjectural reading of Heßler, printed in the text above.

\[3\] Caesa cadamis aut loco, aut summa, aut tempore, aut qaualitate. Loco, allia; summa, plus: tempore, repetendo ante tempus: quaque ejusdem speciei rem melancon poscullantes. Pauli, S. R. 1. 10. See also Just. Inst. IV. 6. 32, where the attentions effecte by Zeno's constitution are specified, with the exception of that in respect of a plus petio tempore, which was that a plaintiff should have to wait twice as long as he originally would have had to wait, and pay all costs. C. 3. 10. 1.

parte res est, totam rem, vel maiorem ex parte quam esse intendit, tempore vel quae ante diem vel conditionem petiert. locus plus petitor: velit si quis id quod certo loco dari promissum erat, aliis locis, sine commensuratione eius loci, verbi gratia si in stipulatione ilia erat: X MILIA CAPUAE DARE SPONDEBAS? DARE SPONDAS, dein delectantis loci mentione x milia Romae pure intendit: SI PARTUR NUMERUM NEGIDII AUO AGERIO X MILIA SE DARE OPORTEREA, plus repetere enim intelligitur, quia promissorii pars intentione utilitatem admittit, quam habet, si Capua non pettas. Si quis tamen ex loco agat, qui dari promissum est, potest petere id etiam non adiecto loco. (53a.) Causa plus petitur, velit si quis in intentione tollat electionem debitoris quam id habet obligationis iure. velit si quis ita stipulatus sit: SESTERTIUM X MILIA AUT HOMINEM STICHIUM DARE SPONDEBAS? dein delectantis ex his petit; nam quamvis petit quod minus est, plus tamen petere videtur, quia potest adversarius interdum facilis id praestare quod non petitur, similiter of the condition fixed. It is sued for loco, as in the case of a man suing in some other place for the money which it had been promised should be paid in a particular place, without referring to the place so specified: for instance, suppose the stipulation had been in this form; "Do you engage to give me 10,000 sesterces at Capua?" "I do so engage." then the plaintiff, omitting all mention of the place fixed on, were to lay his intentio at Rome in the general form, thus: "Should it appear that Numerius Negidius is bound to give to Aulus Agerius 10,000 sesterces." For the plaintiff is assumed to be suing for too large an amount, because by this ordinary intentio he deprives the promiser of the advantage he might have had by the payment being made at Capua. If, however, the plaintiff bring his action in the place where it was promised that the money should be given he can sue for it even without adding the name of the place. (53a.) It is sued for causa, as in the case where a creditor in his intentio deprives his debtor of that right of election which he has by virtue of the obligation between them; as when a stipulation is worded thus: "Do you promise to give 10,000 sesterces or your slave Stichus?" and thereupon the creditor claims one or the other of these: now here although he may actually sue for that of smaller value, yet he is regarded as suing for the larger, for it might be that his opponent could more easily give that which
si quis genus stipulatus sit, deinde speciem petat, velut si quis parzuram stipulatus sit generaliter, deinde Tyrian specialiter petat: quin etiam liceat vitiassem petat, idem iuris est propter eam rationem quam proxime diximus. Idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, velut Stichum, quamvis vitissimum, itaque sicut ipsa stipulatio concepta est, ita et intentio formulæ concepti debet. (54.) Illud satis appareat in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversarium dare facere oportet et intendar, nemo potest plus intender. Idem iuris est, et si in rem incertae partis actio data sit; velut si heres quantum partem petat in eo fundo, quo de agitur, faret ipsum esse: quod genus actionis in paucissimis causis dari solet. (55.) Item palam est, si quis adiud pro alio intenderit, nihil eum periciliari eumque ex integro agere is not demanded. Similarly when a person having stipulated for a gave, sues for a species; as when the stipulation has been for purple cloth generally, and the action is specifically for Tyrian cloth: now here although he may be suing for that which is of least value, yet for the reason we have just stated, the rule is the same. So too is it when the stipulation has been for a slave generally, and the suit is brought for a particular slave, viz. Stichus, although he is really of the least value. Hence as the stipulation has been worded, so ought the intentio of the formula to be drawn. 54. Of this there is no doubt, that in what are called incerti formulæ too large an amount cannot be sued for, because when a definite amount is not sued for, but the intentio 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 intentio (by mistake) for one thing instead of another, he is not put in peril thereby, and can sue again.

1 IV. 83, 84.
2 IV. 55.
3 IV. 122. By Zeno's constitution, referred to in note on IV. 53, the juror was allowed in such a case to augment the amount in giving his decision.
4 So, from the Prætor.
5 We have translated Haschke's reading: Heffer's is "velut potest heres, quantum partem petat in eo fundo quo de agitur necesse est."
est, velut coammodati, depositi. (6a) Sed nos apud quosdam scriptum invenimus, in actione depositi et denique in ceteris omnibus quibus damnatus unusquisque ignorinim notatur, eum qui plus quam oportet demonstraverit litter perdere, velut si quis una re deposita duas res deposisse demonstraverit, aut si est cui pugno male percutta est in actione inferius esse aliam partem corporis perussum sibi demonstraverit. quod an debemus crederegetText

1. 3. 41 is perhaps the passage referred to.
in factum concepta est sine demonstratione ipsa intentione res de qua acturus designatur his verbis: si partem illum apud illum rem illum deposite, sibi non debentum, quin si quis in formula quae in factum composita est plures res designavit quam depositerit, habeat perdas, quia in intentione plus po-
[desunt 48 lin.]

61. In bonae fidei iudicis libera potestas permittit videtur indicex bono et aequo aestimandi quantum acti et restituit debet. In quo et illud continuat, ut habeta ratione eius modi quod inviter adorem ex eadem causa procedere oporteret, in rei qualis cum quod actum est condemnare debet. (62.) Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutela, commedati. (63.) Tamen iudici — — — compensationis rati-

1 Heffer and Huschke are both of opinion that the matter here missing was similar to that contained in Just. Inst. iv. 6. 36—39.

2 The distinction between actions stricti juris and bonae fidei is treated of in Just. Inst. iv. 6. 48—50. As the whole subject is fully discussed and explained in Saunders' notes on those sections, we need only refer thereto.

3 See Paulus, S. R. ii. 5. 3 and D. 13. 6. 18. 4.

4 See Lord Mackenzie's Rom. Law, p. 237; D. 44. 7. 4. pa.

5 11. 59. 60.

tinieri creditur. (64.) Aliis causa est illius actionis qua argentarius experiri: nam est cogitetur cum compensatione agere, id est ut compensationis verbis formulae comprehendatur. utque argentarius ab initio compensatione facta minus intendit sibi dare opertere. ecce enim si sestertium x milia debeat Titio, atque vi xx debitassit Titus, in fine intendit: si paet Titum x milia dare opertere amplius quam aequo Titio debet. (65.) Item—bonor-

us rem emportum cum deductione ager debet, id est ut in hoc solum adversarius condemnetur quod superest, deducto eo quo indi-

vicei ei defraudatoris nomine debetur. (66.) Inter compensationem autem quae argentario interponitur, et deductionem quae obicitur bonorum emporti, illa differentia est, quod in compen-

sationem hoc solum vocatur quod eodem generis et naturae est. veluti pecunia cum pecunia compensatur, triticum cum

consonant with the notion of a bonae fidei action. 64. The case is different in the kind of action by which a banker seeks to have 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 intentio that the reduced sum is due to him. Thus, suppose he owes Titus 10,000 sesterces and Titius owes him 20,000, his intentio is thus laid by him: “Should it appear that Titius is bound to give him 10,000 sesterces more than he owes to Titius,” 65. Again a bonorum emporti ought to be defined to the balance only after the sum has been deducted which is reciprocally due to him on the part of the bankrupt. 66. Between the set-off declared against a banker and the de-

duction opposed to a bonorum emport 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 [77.]

2 As to the meaning of this passage there has been much discussion; but the eii which we have taken into our text instead of aii (before defraudatoris) is a suggestion of Huschke. The meaning will then in our opinion be, that where the same man is at once a debtor and creditor of the bankrupt estate, he must not be compelled to pay what he owes in full, and receive for that due to him only a dividend, but that set-off must first be made and then a dividend be paid to him on the balance due.
Compensatio and Deductio.

triticum, vinum cum vino: adeo ut quibusdam placeat non omni modo vinum cum vino, altricium cum triticum compensandum, sed ita si eiusdem naturae qualitatisque sit. in deductioem autem vocatur et quod non est eiusdem generis. itaque si a Thio pecuniam petat honorem empor, et invicem frumentum at vinum Thio debet, deducto quoti id erit, in reliquis expetitur. (67.) Item vocatur in deductioem et id quod in diem debetur; compensatur autem hoc solum quod praesenti die debetur. (68.) Praetor ex compensatio quidem ratio in intentione ponitur: quo fit, ut si facta compensatio pluss nummo uno intendat argentarius, causa cadat et ob id rem perdat, deductio vero ad condonament demolished ponitur, quo loco plus petenti periclum non intervenit; utque honorum emptor agent, qui licet de certa pecunia agat, incerti tamen condonamentem concept.

69. Quia 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 honorem emptor sue 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 intention: the result of which is that if the banker on making his set-off claim too much by a single sestercius, he fails in his cause, and so loses the whole matter at issue. But a deduction is placed in the condonament; 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 sues for a specified sum, yet he frames his condonament for an uncertain one.

69. As we have already mentioned the action which may be

Exercitorian and Institorian Actions.

qua in peculium filiorumfamilias servorumque agatur, opus est, ut de hac actione et de ceteris quae corundum nomine in parentes dominove dari solet diligentius admoenum.

70. Imprimis itaque si iussu patris dominove negoicium gestum erit, in solidum Praetor actionem in patrem dominumve comparat, et recte, quia qui ita negoicium gerit magis patris domine quam filli service fidem sequitur. (71.) Eadem ratione comparatius duas alias actiones, exercitoriam et institoriam. tunc autem exercitoriam locum habet, cum pater dominusve filium servumve magistrum navi praeposuerit, et quod cum eo eius rei gratia cui praepositor fuit negoicium gestum erit. cum enim ea quoque rei ex voluntate patris dominive contrahit videatur, accipistim Praetori visam est in solidum actionem dari, quin etiam, licet extraneum quis quemquamque magistrum navi praeposuerit, sive servum sive liberum, tamen ea Praetoria action in brought for the peculium of children under patres 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 exercitorium and institorium. 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

1 See Paulus, S.R. II. 5. 2. 2 Owe, i.e. on account of the bankrupt estate, not of course on his own account; in the latter case no deductio would be allowed. See D. 13. 6. 18. 4. Paulus, S.R. II. 12. 3 gives a like rule as to deposition. 4 IV. 57. 5 Probably in the part of the MS. which immediately precedes iv. 61; for this, as we stated in a tinius's work the peculium and the note thereon, corresponds to Inst. iv. 6 actions relating to it are referred 6. 36—39 and in that part of Inst. text.
cum redditor. ideo autem exercitio actio appellatur, quia exercitio vocatur ad quem cottidianus navis quasque pervenit. Institoria vero formula tum locum habet, cum quis tabernae aut callibet negotiationi filium servumque at etiam quumlibet extraneum, sive servum sive liberrum, praeposuerit, et quidcum eo eius rei gratia cui praeposuit est contractum fieret. Ideo autem institoria appellatur, quia quis tabernae praeposuit institor appellatur, quae et ipsa formula in solidum est.

72. Praeterea tributoria quaque actio in patrem dominumque pro filiis filiabusve, servis ancilabusve constitutia est, cum filius servasve in pectorari morae sciente patre dominus negotiator, nam si quidcum eos eius rei causa contractum erit, ideo Praetor ius dicti, ut quidquid in his mercibus erit, against him (the owner). The reason why the action is called exercitio is because the name exercitio is given to the person to whom the daily profits of a vessel accrue. The formula institoria lies, whenever a person has placed his own, 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 if any contract have been entered into with such trader on account of such business, the rule ordained by the Praetor is, that all the stock comprised in the peculium and all profit arising therewith, 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 one 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 to the profit of the father or master, as for example, when the son or slave has borrowed money and with it paid his father's or master's creditors, or propped up his ruinous buildings, or purchased corn for his household, or bought an estate or anything else that was wanted. Therefore if out of ten sexterni, for instance, which your slave has borrowed from Titius, he have paid five to a cre-
Actio de pecullio et de in rem versa.

que sedentia solverit, relictua vero quinque quotiesque in solidum dammini dedet, pro ceteris vero quinque alius, quatuor in peculio sit: ex quo solet ap-
parat, si tuta decem sedentia in rem suas versa fuerint, tota decem sedentia Titium consequitur possit. Sed enim non est actio quae de
peculio debere eo quod in rem patria dominii versus sit agitur, tamen duas habet condemnationes. Itaque jubes utrum quae a actio
forme agitur ante dispicer solet, in in rem patria dominii versus sit, nec aliter ut peculiis ascensionem transit, quam si et nihil
in rem patria dominii versus intelligatur, aut non totum. Cum
autem quaeritur quantum in peculio sit, ante deductur quod patri
dominio quique in potestate eius sit a filio servi debetur, et
good superest, hoc solum peculium esse intelligatur, alinan
tamen id quod et debet filius servus qui in potestate patriis
dominis est non deductur ex peculio, velut si et cui debet in
nullis ipsius peculio sit.

74. Ceterum dubium non est, quin est quippe qui in suis patriis
dominio contrassei, exiice institutoria vel exerexitior formula
competit, de peculio aut de in rem verso agere possit. Sed
nemo tam stupitus erit, ut qui aliqua illarum actionum sine dubio
solidum consequii possit, in difficultatem se dedicat probandi
in rem patria dominio versus esse, vel habere filium servum
dominium, et tantum habere, ut solidum sibi solvi possit. Is quaque
cui tributaria actio competet, de peculio vel de in rem verso
agere potest: sed haec sana plurumeri expedite hac potius
actione ut quam tributaria, nam in tributaria eius solius peculiis
ratio habitur quod in alterum est qui quisque negotiatori filius
servus, quodque inde receptum erit, at in actione peculiis,
totius: et potest quisque teria forte aut quarta vel etiam minore
parte peculiis negotiari, maximum vero partem in praeditis vel in
aliis rebus haberet; longa magis si potest aliparad if quod de-
debetur totum in rem patria dominii versus esse, ad hanc actio-

Rules for selecting the action.

74. Now there is no doubt that he who has entered into
a contract (with a son or slave) at the bidding of the father or
master, and who can avail himself of an institutio or
exercitior formula, may also bring the action styled de peculio
aut de in rem verso. But no one who could recover the
whole amount by one of the first-named actions, would be
so foolish as to involve himself in the difficult task of proving
that expenditure had been made on the business of the father
or master, or that the son or slave had a peculium, and that
so great that he could be paid his debt in full from it. Again,
his that for whom an actio tributaria lies, can do no more
by the actio de peculio vel de in rem verso: but for this man
by the actio de peculio vel de in rem verso is let to the latter rather than
to the tributarian action. For in the tributarian action so
much only of the peculium is taken into consideration as is
comprised in the stock-in-trade of which the son
slave is trafficking, or has been taken therefrom as profit,
and it is only possible for a man to traffic with a third, or
fourth, or even a smaller part of his peculium, and to have the larger
part invested in land or other property. Still more clearly
ought the creditor to have recourse to this action if it can
be proved that what is owed was altogether spent on the

1 That is, debts owing by a servus
ordinarius to his servus viciarius are
not reckoned in the calculation. If
the amount had been deducted as
due to the scribano, it would, when
paid, have been again in the peculium
of the ordinarius, and thus the
deduction would have been nugatory.
Actio Noxalis.

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

75. Ex maleficis filiorum familias servorum, veluti si fortum fecerint aut iniuriam commiserint, noxales actiones pridie sunt, ut liceret patri dominio aut illis ascensitatem succerre aut noxas dedere: erat enim iniquam nequitiam cum ultraipsum corpora parentibus dominibus damnosam esse. (76.) Constitutione sunt autem noxales actiones aut legibus aut edicto legibus, veluti furti lege xii tabularum, damnii iniuriae [velut] lege Aquilia. edicto Praetoris, veluti iniuriam et vi bonorum ruptorum. (77.) Omnes autem noxales actiones capita sequuntur, nam si filius tuus servus noxam commiserit, quamdiu in tua potestate est, tecum est action; si in aliorum potestate pervenerit, cum illo incipit action esse; si sui iuris coeperit business of the father or master. For, as we said above, the same formula deals both with the familia and with outlays for the father's or master's profit.

75. The wrongful acts of sons under potestas or of slaves, such as furto 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 leges or by the edict. By leges, 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:

1 I. 73.
2 Nova est corpus quod noculis, id est, servus, nox. ipsum maleficium. In ix. 8. 1. See Festus, sub verbo noxia. The terminology of Justinian does not accord with that of Gaius, who in §§ 77 and 78 below uses nova where according to Justinian's rule we should have habita.
3 Tab. xiv. 1. 2, where the word nova is used in the sense affixed to it by Justinian.
4 III. 210.
5 D. 9. 4. 43.
6 But if he pass into the potestas of another, the action forthwith with 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 potestas 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

1 I. 99.
2 I. 160.
exerit de mea potestate, agere me non posse. diversae scholae auctores, quandu in mea potestate sit, quiescere actionem putant, cum ipse mecum agere non possim; cum vero exerit de mea potestate, tunc eum resuscitari. (79.) Cum autem filius familias ex noxali causa mancipio datur, diversae scholae auctores putant, ter eum mancipio dari debebem, quia lege xii tabularum cauitum sit, ne alius filius de potestate patriis excit, quam si ter fuerit mancipatus: Sabinius et Cassius ceterique nostrae scholae auctores sufficerāe anum mancipationem; crediderunt enim tres lege xii tabularum ad voluntārias mancipationes pertinent.

8o. Haece ita de his personis quae in potestate sunt, sive ex contractu sive ex maleficio eorum controversia est. quod vero ad causas personae in manu mancipi va sunt, iterius diceretur, ut cum ex contractu eorum ageretur, nisi ab eo eius iuris subjectae sint in solidum defendantur, bona quae eorum 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.

8o. 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

1 I. 132. 140. 2 Tab. IV. 1. 3.

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 potestas is treated as non-existent in an action based on the imperium3, 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 actions 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—58. 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 hар-
mandatum procurator, expressi petet, quia saepe mandatum initio illius in obscuro est et postea aptat indicem ostendit. (86.)
Tutores autem et curatores quemadmodum constituuntur, primo commentario rettulimus.

86. Qui autem alieno nomine agit, intentionem quidem ex persona dominii sumit, condensationem autem in suam personam conversit. nam si verit gratia Lucius Titius pro Publio Maevio agat, sua formula concipitur: si PARET NUMERIUM NEGIDII PUBLIO MAEVI SESTERTIUM X MILIA DARE OPORTE, IUDEX NUMERIUM NEGIDII LUCIO TITIO SESTERTIUM X MILIA CONDEMN. SI NON PARET, ABSOLVE. in rem quoque si agat, intendit Publi Maevi rem esse ex iure Quiritium, et condensationem in suam personam conversit. (87.) Ab adversarii quoque parte si interveniat aliquid, cum quo actio constiuitur, intenditur dominium dare opotere; condensationi autem in eius personam convertitur qui judicium accept. sed cum in rem agit, nihil in intentione facit 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. 

86. He who uses in the name of another inserts his principal's name in the intentio, but in the condemnationo 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 sestu. to Publius Maevius, do thou, iudex, condemn Numerius Negidius to pay the 10,000 sestu. to Lucius Titius: should it not so appear, acquit him.” If again the action be in rem, he lays his intentio that such and such a thing is the property of Publius Maevius ex iure 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 intentio 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

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1. 144 et seqq.
2. Such a person was called negatorem gesture, and the obligation between him and the person he represents is of the class styled quasi ex contractu. See App. (1).
cum quo agitur, sive suo nomine sive alieno aliisque judicio interveniant: tantum enim intenditur rem actoris esse.

88. Videamus nunc quisbus ex causis is cum quo agitur vel hic qui agit cogatur satisfande. (89.) Iguitur si verbi gratia in rem tecum agam, satis mihi dare defese. quia enim visum est te deo quod interea tibi rem, quae ad te pertinente dubium est, possis concedere, cum satisfactione mihi cavere, ut si victus sis, nec rem ipsam res tuis nec litis aequiparationiis suferias, sit mihi potestas aut tecum agendi aut cum sponsoris tuis. (90.) Mulioque magis debes satisfandae mihi, si alieno nomine judicium accipias. (91.) Ceterum cum in rem actio dupla sit (aut enim per formulam petitoriam agitur aut per sponsionem): si quidem per formulam petitoriam agitur, illa stipulatione locum habet quam appellatur judicium solvi:

person against whom the action is brought has no effect on the intent, whether such person be defending his own cause or acting as agent in a suit belonging to another: for the wording of the intentio is simply that "the thing is the plaintiff." 88. Let us now see under what circumstances he who is sued or he who suits is under the necessity of finding sureties. 89. If, then, to take an example, I bring an action in rem against you, you must furnish me with sureties. For since you are allowed to have the interim-possessory 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 not 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 my action in rem to be brought in two different forms (for proceedings are taken either by a petition formula or by a stipulation); is employed which has the name judicatum solvi (that the award of the judge shall be paid) ; but if the latter, that

si vero per sponsionem, illa quae appellatur pro prae decrelitis et vindicatam. (92.) Petitoria autem formula haec est qua actio intendit rem suam esse. (93.) Per sponsionem vero hoc modo agimus. provocamus adversarium tali sponsione: si homo quo de agitur ex iure quiritium meus ess, sesterios xxv nummos dare spondes? deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere, quae formula ita demum vincimus, si probavimus rem nostram esse. (94.) Non tanen hace summa sponsionis exiguit: nec enim poenalis est, sed praetudicius, et propter hoc solum fit, stipulation which is called pro prae decrelitis et vindicatam. 92. A petition formula is one in which the plaintiff claims the thing to be his own. 93. The mode of procedure by sponsion is as follows. We challenge our adversary in a sponsion running thus: "if the slave who is the subject of this action be mine ex iure Quiritium, do you engage to give me 25 sesterces?" Then we serve him with a formula, in the context of which we assert that the amount of the sponsion is due to us: and under this formula we are victorious only on our proving that the thing is ours. 94. The amount of this sponsion is not, however, in any case exacted: for it is not penal but praetudical, being introduced for the sole

ment of the award of the judge, the litis aequiparationiis, in case of non-resti-

tation of the subject of the suit, the

litis: (2) to secure the attendance of the defendant in court: (3) to prevent any acts being done by him to the detriment of the subject of the suit. The plaintiff, if successful, could of course use on his judgment, by praelection, for instance; but it was more convenient to sue his opponent on his stipulation; and besides, the fact of there being sure-
ties, multiplied the chances of ob-

taining adequate compensation.

1 "Judicatum solvi" was also a concept in Roman law, referring to the right of a party to require satisfaction from another in case of default. It was a form of pecuniary obligation, similar to modern concepts such as a promissory note.

2 "Praelection" in Roman law refers to the right of a plaintiff to demand the presence of the defendant at the trial of the case, and in case of default, to obtain satisfaction from another person in the same case. It was a form of security for the plaintiff.

3 "Praetudicius" in Roman law meant a security or guarantee given to the plaintiff in case of default by the defendant. It was a form of security, similar to modern guaranty or suretyship.
Stipulatio pro Praecl Litis et Vindiciarum.

the plaintiff. He had certainly gained his wager, but the real object of the suit was not the winning of a trifile such as 25 sesterces, but the securing of a transfer from him by his adversary of the lands in dispute. He could not proceed on his judgment, for an actio judicata was not intended to transfer possession, and it was what his opponent now wrongly withheld from him. Besides, although it had been decided that the field was his, the verdict he had obtained was one for 25 sesterces, and for this alone could he have brought an actio Judgment, if such action had been allowed him at all; but we know that it was expressly refused him, for says Gaian: "nec enim poenalis est summa sed praecjudicialis. How then did he proceed? On the stipulation pro praecel litis et vindiciarum, 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.

Sureties in suits alieno nomine.

cognitorem quidem agatur, utltra satisfacide vel ab ipso vel a domino desideratur. cum enim certis et quasi sollemnilbus verbis in locum dominii substituatur cognitor, merito dominii loco habetur. (98.) Procurator vero si agat, satisfacere libentur ratam rem dominum habaturum: periculum enim est, ne iterum dominos de re expetatur. quod periculum non intervenit, si per cognitorem actum fuit; quid de qua re quisque per cognitorem egent, de ea non magis plam actionem habet quam si ipse egreint. (99.) Tutorum et curatorum e modo quo et procuratores satisfacere debere verba edicti faciunt, sed aliquando illia satisfacere remittitur. (100.) Hace in si in rem agatur: si vero in personam, ab actoribus quidem parte quando satisfacere debent quaerentes, eadem repetamus quam diximus in actione qui in rem agitur. (101.) Ab eius vero parte cum quo agiatur, si quidem alieno nomine aliquid interveniath.
omnimodo satisfacit debet, quia nemo alienae rei sine satisfactione defensor idoneus intelligitur. sed si quidem cum cognitore agatur, dominus satisfaciatur ibetur; si vero cum procuratore, ipse procurator. idem et de tutore et de cunctore juris est. 

(102) Quod si proprio nomine aliquis Iudicium acceptum in personam, certa ex causis satisfaci solet, quis ipse Praetor significet. quorum satisfactionem duplex causa est. nam aut propter genus actionis satisfatur, aut propter personam, quia suspectis sit. propter genus actionis, velut indicati depensive, aut cum de moribus mulieris agitur: propter personam, velit si cum eo agitur qui decoherit, cuisseve bona a creditoribus possessa proscriptuare sunt, sive cum eo herede agatur quem Praetor suspectum acstimaverit.

103. Omnia autem iudicia aut legitimo iure consistunt 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 a cognitor, whilst if they be against a procurator, the procurator himself must provide them. The latter is also the rule applying to a tutor or curator. 102. On the other hand, if a man be defendant on his own account in an action in personam, he has to give sureties in certain cases wherein the Praetor has so directed. For such furnishing of sureties there are two reasons, as they are provided either on account of the nature of the action, or on account of the untrustworthy character of the person. On account of the nature of the action, in such actions as those on a judgment or for money laid down by a sponsor2 or that de moribus mulieris3 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 judices are either founded on the statute law or based on the imperium of the Praetor.

impero continentur. (104) Legitima sunt iudicia quae in urbe Roma vel intra primum urbium Romanorum inter omnes cives Romanos sub uno iudice accipiuntur: eaque lege Julia iudiciaria, nisi in anno et sex mensibus indicata fuerint, exprimant. et hoc est quod vulgo dicitur, e lege Julia litem annu et sex mensibus mori. (105) Imperio vero continentur recuperatoria et quae sub uno iudice accipiuntur interveniente peregrini persona iudicis aut litigatoris. in eadem causa sunt quaecumque extra primum urbium Romanorum tam inter cives Romanos quam inter peregrinos accipiuntur. ideo autem imperio contineri iudicia dicuntur, quia tamquam valent, quandiu iis qui e praecipit imperium habebit. (106.

Of the former kind are those which are heard before a single judex 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 Iudiciaria, 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 Iudiciaria1. 105. In the other class are comprised actions before recuperatores2, and those which are heard before a single judex, when a foreigner is concerned either as judex 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

1 Temp. Augusti.

2 D. 46. 7. 2. From the following passages it will be seen that the suffering an action to die, if done willingly, was sometimes equivalent to fixed or deter, D. 4. 2. 18. 4 and D. 43. 8. 3.

3 Recuperatores were possibly, at their original institution, delegates chosen from two nations at variance as to some right or question, to act as umpires and arrange the dispute amicably. Hence the name was subsequently applied to persons who had a function analogous to that of a judex in cases where foreigners were concerned. In accordance with the original notion of their being delegates chosen by different parties, they would in all cases be more than one in number; and so the name came to be applied to others who sat (two or more together) to decide cases connected with the jus gentium, even when both parties were Roman citizens. See also note on 1. 59. 19. 46.

D. 3. 46. 5. D. 3. 52. D. 42. 5.

106. If then the
Et si quidem imperio continenti iudicio acutum 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 ideo necessaria est exceptio rei judicatae vel in iudicium deductae. (107) at vero si legito iudicio in personam actum sit ea formula quae iuris civilis habet intentionem, postea iure de eadem re agi non potest; et ob id exceptio supervacuatu est. si vero vel in rem vel in factum actum fuerit, ipso iure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicatae vel in iudicium deductae. (108) Alia causa fuit olim legio actionam, nam quae de re actum semel est, de ea postea ipso iure agi non action resorted to be one "based on the imperium," whether it be in rem or in personam, and whether it have a formula the intentio whereas if in factum or one where 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 iudicium 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 iudicium deductae is necessary. 108 In olden times the case was different with the leges actiones, for when once an action had been tried about any matter, there could not according to the letter of the law be another action on the same facts: and there was not any employment at all of 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 Aquilae or Ovinas, 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 iudex 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 iudex 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 senatusconsulta, but in general to grant those which spring from his own special jurisdiction only within one year. 111. Sometimes, however, the Praetor in

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1 IV. 45.
2 III. 101.
3 An obligation is said to be destroyed ipso jure in two cases: firstly when there had already been a judgment in a legium 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, (colutio 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 historic cases here discussing. See Thoms, vi. p. 173.
4 III. 310.
5 Nothing is known about this law.
6 The Lex Furia de Sponsis; for this lex is stated in II. 174 to be applicable to Italy only as a matter of corone, and therefore if carried into effect in a province must have been a title in the edict of the praetor of that province, and so not "statutable," but "based on the imperium."
7 Note on IV. 105.
8 Either as iudex or litigant; see IV. 109.

tamen ipse quoque Praetor in actionibus imitatur: usus legimus: quales sunt eae quas Praetor bonorum possessoris ceterisque qui heredis loco sunt accommodati. futuri quoque manifesti actio, quamvis ex ius Praetoris jurisdictione prehisciretur, perpetuo datur: et mentio, cum pro capitali poena pecuniaria constituita sit. 

112. Non omnes actiones quae in aliquem aut ipso iure competunt aut a Praetore dantur, etiam in heredem neque competere nec Praetorem dare, velit futuri, vi honorum raptorum, injuriarum, damnii injuriae: ad hereditibus actio suasmodi actiones competent nec denegantur, excepta injuriam actione, et si quin his actions imitates the precedent of the statutable actions. for instance, in those actions which he grants to bonorum possessores2 and others who occupy the position of heir. The actio futuri manifesti3 also, though issuing from the jurisdiction of the Praetor himself, is granted at any time; and very properly, since the Praetor’s pecuniary penalty has been imposed instead of the capital penalty (of the Twelve Tables). 

112. Not every action which is either maintainable at strict law or granted by the Praetor against any one, is equally maintainable or granted against his heir. For there is a firmly-established rule of law that penal actions on delicts do not lie against the heir (of the offender), nor will the Praetor grant them, for instance the actions futuri, vi bonorum raptorum, injuriarum, damnii injuriae: but actions of this kind lie for the heir (of the person aggrieved) and are not refused to him, except the action injuriam4 and any other action that may resemble

113. Sometimes, however, even an action on a contract does not lie for or against the heir of a party; for the heir of an adstipulator has no action, and the heir of a sponsor or fidepromissor5 is not bound. 

114. The next point for our consideration is this: supposing after the matter has been submitted to the judec, 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 judec he was in such a plight that he ought to be condemned. Our authorities hold that the judec ought to acquit him: and that the nature of the action is a matter of no importance. And hence comes the common saying, that Sabinus and Cassius held that “all issues before a judec that Sabinus 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,
Exceptions.

115. The next matter for our consideration is that of exceptions. Exceptions then are provided for the purpose of protecting defendants; for it frequently happens that a man is liable according to the civil law, and yet it would be inequitable that he should be condemned in the suit: for instance, if I have stipulated for money from you on the 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 exceptio dolli mali. So also if I have made a pact with you not to sue you for that which you owe to me, I can nevertheless sue for that very thing from you by the formula "that you ought to give me," because the obligation is not removed by the agreement made between us; but it is held that I ought, if I sue, to be repelled by the exceptio pacti conventi. Exceptions are also resorted to in actions which are not in personam, as for example if you have compelled me by fear, or induced me by fraud to give you something by manipulation; for if you sue me for that thing, an exception is granted me, by which you will be defeated if I prove that you acted with the intent of causing fear or with fraud. Again, if you have with full knowledge purchased from a non-possessor an estate which is subject to a possessor, an exception is opposed to you by which you will be completely defeated. 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 leges or

1 A defendant might reply to the plaintiff's demand in three different ways: (1) by a denial of the facts alleged, which is styled by later writers this contestatio non negativer (2) by asserting facts which destroyed the right of action for jus, although that might originally have been well-founded, such facts as: (a) payment of debt, (b) sale or bequest; (c) suit, these replies the praetor as a matter of course took notice, without any express direction in the formula, that he should do so: (3) by asserting facts which did not destroy the right of action for jus, but on account of which the Praetor allowed a defense, quia iniquum est et condicta sua: and of these the praetor could take no notice, unless the cognizance of them was by the formula expressly given to him. Such facts, included in a formula by means of a special clause were exceptiones. See Mackley, Syst. Juris Rom., § 299 n. p. 290. Exceptions then were equitable defenses, creatures of the forum, and not in existence during the period of the legis actionis.

2 See Cic. de Invent., I. 34. 20, de Off. III. 14. 15.

When Iid quid mihi debes a te petas, nihilominus id ipsum a te petere possum dare mihi opertere, quia obligatio pacto convenita non tolitur; sed placet dehore me petentem per exceptionem pacti convenit repellit. (117.) In his quoque actionibus quae non in personam sunt exceptions locum habent. velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam menciop dem; nam si eam rem a me petas, datur mihi excepto per quam, si metus causa te fecisse vel dolo malo argueris, repellereis. Item si fundum hisagogium sceis a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omnino summoveris. (118.) Exceptiones autem alias in edicto Praetori habit propositas, alias causa cognita accommodat. quae omnes vel ex

fuero tecum, ne id quod mihi debes a te petas, nihilominus id ipsum a te petere possum dare mihi opertere, quia obligatio pacto convenita non tolitur; sed placet dehore me petentem per exceptionem pacti convenit repellit. (117.) In his quoque actionibus quae non in personam sunt exceptions locum habent. velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam menciop dem; nam si eam rem a me petas, datur mihi excepto per quam, si metus causa te fecisse vel dolo malo argueris, repellereis. Item si fundum hisagogium sceis a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omnino summoveris. (118.) Exceptiones autem alias in edicto Praetori habit propositas, alias causa cognita accommodat. quae omnes vel ex
enactments having the force of leges, or else are derived from his own jurisdiction.

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 a lex or senatus-consultum, or that the matter has been already adjudicated upon, or laid before a iudex, and so also that an agreement has been made that the money should not be sued for under any circumstance. Exceptions are said to be either peremptory or dilatory. Those are peremptory which are available at all times, and which cannot be avoided, for example the exception motus causae, 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 iudex, and so also that an agreement has been made that the money should not be sued for under any circumstances. Dilatory exceptions are those which are good defences for a certain time only, as that of an agreement having been made to the effect that money should not be sued for, say, within five years; for on the expiration of that time the exception is no longer available. Similar to this is the exception litis dividuae, and that res 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 dividuae. And so too, if he who has several suits against the same defendant have brought some and postponed others, in order that they may go before other iudices, and then pursue those others which he had postponed within the time of office of the same Praetor, he is met by the exception.

119. Omnes autem exceptiones in contrarium consciptum, quam additis est cum quo agitur. Nam si verbi gratia res dolo malo aliquid actorem facere dicit, qui forte pecuniæ petit interm non numeravit, sic exception consciptum: si IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT, NEQUE FIAT. Item si dicitur contra pactioen pecunia peti, in consciptum excepsio: SI INTER AULUM AGERIUM ET NUMERIUM NEGIDIIUM NON CONVET NE EA PECUNIA PETIETUR, et denique in ceteris causis similiter conscipti solet. Ideo scilicet, quia omnis exceptione obiciitur quidem a reo, sed ita formulis inscriitur, ut condicionalem faciat condemnationem, id est ne alter index eum cum quo agitur condemnet, quam si nihil in ea re quae de agitur dolo actuoris factum sit; item ne alter index eum condemnet, quam si nullum pactum conventum de non petenda pecunia factum erit.

120. Dicitur autem exceptiones aut peremptoriae aut dilatoriae. (121.) Peremptoriae sunt quae perpetuo valent, nec evitari posse, velut quod motus causae, aut dolo male, aut quod contra legem senatusve consultum factum est, aut quod res indicata est vel in iudicium deducta est, item pacti convenit quo pactum est ne omnino pecunia perepetur. (122.) Dilatoriae sunt exceptiones quae ad tempus nocent, veluti illius pacti convenit quod factum est verbi gratia ne intra quinuennium perepetur: finito enim eo tempore non habet locum exceptio, cui similis exceptio est litis dividuae et rei residue. Nam si quis partem rei peferit et intra eiusdem praetorium reliquam partem petat, hac exceptione simmoveret, quae appellatur litis dividuae. Item si quis eum codem plures litibus habebat, de quibusdam egerit, de quibusdam dis- tulerit, ut ad alios iudices cant, si intra eiusdem praetorium de his quae ita distulerit agat, per hanc exceptionem quae appella-

\[^{1} \text{iv. 116.} \]
\[^{2} \text{iv. 106.} \]
\[^{3} \text{iv. 56.} \]
exception called *rei residue*. 123. He then against whom a dilatory exception has been pleaded ought to be careful to put off his action; for otherwise, if he go on with his action after the exception has been pleaded, he will lose the cause. For 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 cognitory 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 one 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 not to sue you for money you owe to me, and that afterwards we make an opposite agreement, i.e. that I may sue you: then I should 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 ground.
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 pay 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." Interdum autem eventum, ut rursum replication quam prima facie iusta sit, sineque reo nocet, quod cum accidat, adiектione opus est auidandi rei gratia, quae duplicatio vocatur. 

Again, if the seller has been ordered to deliver the goods and has not delivered them, the plaintiff may sue, if it appear that he has been discharged of his obligation by the law. We have elsewhere given this by the name of a præscription.

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. Videamus status de praescripti onibus quae recepitae sunt pro actore. (131.) Suspe enim ex una cademque obligatones aliquid iam praestari oportet, aliquid in futura praestatione est, vel cum in singulos annos vel menses certam pecuniam stipulati facerimus: nam finitis quibusdam annis aut mensibus, huius quidem tempore pecuniam praestari oportet, futurum autem annorum sane quidem obligatio contracta intellegitur, praestatio vero adiice nulla est. Si ergo velimus id quidem quod praestari oportet petere et in judicium dedisse, futurum vero obligationis praestationem in incerto relinquere, necesse est ut cum haec praescriptione agamus: ea res aciatur cuius rei dies futurum sic sine haec prae scriptio...
Prescriptiones.

133. Sed quis quidem temporibus, sicut supra quoque indicatunus, omnes prescriptiones ab actore proficisciunt. Olim autem quaedam et pro reo opponebantur, quas ilia ex praepscriptio: EA RES AGATUR: SI IN EX ERE PRAEIDICUM HEREDITATI NON FIAT: quae nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis allo genere indicii praecidici hereditatii faciat, velet cum res singulas partes: exist enim iniquum por unus partis petitionem maiori questionis de ipsa hereditate praeindicari, quare etiam his temporibus et, unde petitor, exceptio hanc in rem comparatur .......... (134.) Ab actore autem vel nunc prescriptiones quandam specialis praxet esse qua supra enumeratus adhibendae sunt .......... si v. gr. dominus servit utiles eo stipulatione eius agere velit, in qua et praesentes et futurae obligationes ex pacto insunt, forte si illa conversi-

Prescriptiones autem appellatas esse ab eo, qua ante formulas praescribatur, plus quam manifestum est.

through which we sue for an uncertain sum, and the intentio 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 judge 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 contesdatione, 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 praeascribe, the binding force of the whole engagement is destroyed by the litis contestationem 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 prescriptions have their name from the fact of their being prefixed to formulas is more evident.

1 IV. 170. 2 The whole of the passage in brackets is translated from Heffer's conjunctual readings, given in the text above. This has been suggested to Heffer by various passages in the Digest, viz. D. 44. 1. 31, D. 5. 1, 64, D. 12. 1. 48 and D. 45. 1. 136. 34 IV. 92.
set, ut ex pecunia quae in stipulatum deducis est mensura V H.S. refundentur: intentioni autore loco demonstrationis at praescri- 
bendum est: et res aequar quo Chrysogonus Lucii Seii servus 
actor de Numerio Negidio tres H.S. stipulatus est conventique 
inter eos, ut ex ea pecunia mensura V H.S. refundentur cuius 
rei dies fuit. Deinde intentione formulae determinatur at cui 
dari oportet; et sane domino dari oportet quod servus stipu- 
latur, at in praescriptione de pacto quaeritur quod secundum 
naturalen significacionem verum esse debet. (135) Quaecum- 
que autem diximus de servis, cadem de ceteris quoque personis 
que nostro ini subjicte sunt dicta intelligemus. (136) Item 
amonendi sumus, si cum ipso agamus qui certum promiserit, 
arrangement having been, for example, that out of the money 
forming the subject of the stipulation five sexteria should be 
repaid monthly; a prescription ought to be inserted prior to 
the plaintiff's intention and in the place of a demonstra- 
tio, to this effect: "Let this be the matter of suit, viz. that 
since the plaintiff, Chrysogonus, the slave of Lucius Titius, 
stipulated for 300 sexteria to be paid him by Numerius 
Negidius, and an agreement was entered into between them 
that out of that money five sexteria should be repaid monthly, 
which in talment is now due." Then in the intention of the 
formula the person is specified to whom the payment ought to 
be made: and obviously it is the master to whom the subject 
of the slave's stipulation ought to be given. But it is in the 
prayer 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 
faunda stipulationibus insese credan- 
tur." D. 12, 1, 40. 
2 This is Hefner's explanation of 
"normae; see his note ad locum. In 
the praescription, therefore, what 
really took place between the stipu- 
lating parties is to be described, and 
the name of the slave to be given. 
This transaction having been exa- 
named 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. 

ita nobis formulam esse propositam, ut praescriptione inserta sit 
formula in loco demonstrationis, hoc modo: IUDEX EST, QUOD 
AULUS AGERIUS DE NUMERIO NEGIDIUS INCERTUM STIPULATUS 
EST, MODO CUIUS REI DISS FUIT, QUIQUID OB EAM REM NUME-
RIDIUM NEGIDIUM AULO AGERIO DARE FACERI OPORTET ET RELI-
qua. (137) Si cum sponsore aut fideiussore agatur, praescription 
solet in persona quidem sponsoris hoc modo: EA RES AGATUR. 
QUOD AULUS AGERIUS DE LUCIO TITIO INCERTUM STIPULATUS 
EST, QUO NOMINE NUMERIUS NEGIDIUS SPONSOR EST, CUIUS 
REI DISS FUIT; IN PERSONA VERO FIDEIUSSORIS: EA RES AGATUR. 
QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE 
SUA ESSE IUSSET, CUIUS REI DISS FUIT; deinde formula subi-

certain value, our formula is so set forth that in it a pre-
scription takes the place of the demonstration, thus: "Let there 
be a jude. Inasmuch as Aulus Agerius stipulated for some-
thing 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. 

138. We now have to discuss the subject of interdicts. 
139. In certain cases then the Praetor or Proconsul inter-
posses his authority at the outset to bring disputes to a con-
clusion; and this he does more particularly in suits about
cum de possessione aut quasi possessione inter aliquos contenti- 

dur, et in summa aut iubet aliquid fieri, aut fieri prohibet. 

formulae autem verborum et conceptiones quibus in ea re 

unitur interdicta decreata vacantur. (140) Vocantur autem 

decreta cum fieri aliqua iubet, velut cum praecipit, ut aliquid 

exhibeatur aut restitatur: interdicta vero cum prohibet fieri, 

velut cum praecipit: ne sine vitio possidendi vis fiat, 

neve in loco sacro aliquid fiat, unde omnia interdicta 

aut restitutoria aut exhibitoria aut prohibitoria vacantur. (141) 

Nec tamen cum quid iussert fieri aut fieri prohibuerit, statum 

peractum est negotium, sed ad iudicem recuperantes itur, 

et ibi editis formulis quaeritur, an aliquid adversus Praetoris 

edictum factum sit, vel an factum non sit quod est fieri iussert.

possession or quasi-possession1, summarily ordering something 

to be done or forbidding it to be done. The forms of words 

which he employs for this purpose we call interdicts or 

decrees. 140. They are called decrees when he orders some-

thing 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 interdicts2 are named either re-

stitutory, exhibitory, or prohibitory. 141. The matter is not, 

however, at once concluded when the Praetor has 

commanded or forbidden the doing of something, but the party 

go before a iudex or before recuperantes, and there, upon 

the issuing of formulæ, investigation is made whether anything 

has been done contrary to the Praetor's edict3 or whether

1 For quasi possession see Savigny, On Possession (Perry's translation), pp. 130-134. 

Saez citato=neque ea, neque claus, 


2 Interdict is here used as a general term, including decrees also, for 

exhibitory and restitutory orders are plainly of the latter character. So 

also Justinian says in Inst. iv. 12, 1, judicem. 

3 That is to say, against the actio 

perpetuum, or annual edict, published by every Praetor on 

commencing his duties. Therefore no one was guilty of acting contrary to 

an interdict unless that interdict was in accordance with the terms of the 

annual edict, and this is the meaning of D. 60, 17, 102, pr. The 

interdict was issued on an ex parte statement, and therefore there was a po-

sibility that the Praetor had been misled by false representations as to 

the facts of the case.

et modo cum poena agitur, modo sine poena: cum poena, 

velut cum per sponsoeum agitur; sine poena, velut cum arbi-

ter petitur. et quidem ex prohibitoriis interdictis semper per 

sponsoeum agi solet, ex restitutoris vero vel exhibitoriis modo 

per sponsoeum, modo per formulam agitque arbitaria 

vacatur.

142. Principalis igitur divisio in eo est, quod aut prohibi-

toria sunt interdicta, aut restitutoria, aut exhibitoria. (143) 

Sequens in eo est divisio, quod vel adipiscendae possessionis 

causa comparata sunt, vel retinenda, vel recuperanda. 

144. Adipiscendae possessionis causa interdictum accom-

modatur honorum possessori, cuibus principium est quorum 

honorum: eiusque vis et potestas hanc est, ut quod quisque ex 

his bonus quorum possessione aliqui data est pro herede aut pro 

possessor possideret, id ei cuius honorum possession data est 

restitutur. pro herede autem possidere videtur tam est qui heres 

anything has not been done which he ordered to be done. And 

sometimes a penalty accompanies the action, sometimes it 

does not: there is a penalty attached, for instance, when the 

proceedings are by sponsio; there is no penalty, for instance, 

when an arbi 

ter4 is demanded. In prohibitory interdicts the 

course of proceeding is always by sponsio, in restitutory or 

exhibitory interdicts sometimes by sponsio, sometimes by the 

formula called arbiraria.

142. Of interdicts then the primary division is that they 

are either prohibitory, restitutory, or exhibitory. 143. There 

is another division based on the fact that they are provided 

either for the purpose of obtaining, retaining, or recovering 

possession.

144. An interdict for the purpose of obtaining possession, 

the first words of which are "Quorum honorum," is provided 

for the bonorum possessor5: its force and effect being that 

whatever anyone possesses pro herede or pro possessor out of 

the goods of which the possession has been given to another 

is to be delivered up to that person to whom the possession of 

the goods has been given. Now not only the heir, but also

1 Cf. Cic. pro Sull. 52 and Jus-ti-

nian. Inst. iv. 6, 31, with Sandun's 

notes upon the passage. 

2 III. 34. The words of the in-

terdict are given in full in D. 49. 2, 

1, pr.
any one who thinks himself heir, is held to possess *pro herede,* whilst a possessor *pro possesso* is anyone who possesses without title any item of the inheritance or the whole inheritance, knowing that he has no claim to it. The interdict is styled *adipiscendae possessionis,* because it is only available for a man who is now for the first time endeavouring to obtain possession of a thing; and therefore if after obtaining possession he lose it again, the interdict ceases to be of service to him. 145. So too, an interdict is set forth in the edict for the benefit of a *bonorum emptor,* which some call by the name *interdictum possessorum.* 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 *sectores.* 147. The interdict also which is called *Salvianum* is provided for the purpose of obtaining possession, and the owner of the land employs it with reference to the property of his tenant which the latter has pledged for the rent of his farm.

148. An interdict for the purpose of retaining possession is usually granted when two litigants both lay claim to the ownership of a particular thing, and the first question for decision is, which of them ought to be possessor and which plaintiff? to this end the interdicts *uti possidentes et utrubi* are provided. The interdict *uti possidentes* is granted for the possession of land or a house, the interdict *utubi* for the possession of moveables. 150. And if the interdict be granted for land or a house, the Praetor orders that he is to be preferred who at the time of the grant of the interdict is in possession, provided it be without violence, clandestinity, or sucession on the part of his opponent. This is fully

eque utiur dominus fundi de rebus coloni quas is pro mercedibus fundi pigitori futurus pepigisset.

Hence "restituturus" a few lines above does not mean to restore, but to deliver up, a sense in which the word has been frequently used before, e.g. In 12. 248-258. passim. 1

111. 85.

3 No trace of this interdict is to be found in the sources; probably because the later and more general interdict, "Non vis fati e qui in possessionem minus emit," D. 43: 4, was found to be a sufficient protection for *bonorum emptores,* and so the other fell into disuse. Zimmer

1 A full account of these interdicts is to be found in Savigny's Treatise on Possession (Perry's translation). Book IV. §§ 40-41. See also D. 43: 17. D. 45: 31.

2 *Prercarium* is thus defined by Savigny (On Poss. p. 350). "Whoever permits another to enjoy property (i.e. to enjoy natural possession, to enjoy an easement, retains to himself the right of recalling permission at will, and the juridical relation arising from the transaction is called *prercarium.*" This name had its origin in the fact of the permission itself being usually obtained by a prayer; this prayer, however, is not essential, and even a tacit permission is sufficient. Dwork says: "Pecunia possidere videtur non tantum quia per epistolam, vel quamque alia ratione
Interdictum Utrubi.

Interdictorium significatur. (151.) At in terram interdictum non solum suae sed alterius quam fustum est ei accedere, velut eius cui heres evertit, civesque a quo erectit vel ex domitione facta statione accipere. Itaque si nostrae possessio juxta alterius iusta possessione exsuperat adversarii possessionem, nos eo interdicto vincimus, nullam autem propriam possessionem habentem accessio temporis nec dat ur nec daret potest; nam et quod nullum est nihil accedere potest, sed et si vitiosam habet possessionem, id est aut quia aut precario ab adversario adquisitam, non datur; nam ei possessione nihil prodest. (152.) Annum autem rerum numeratur, itaque si tu verbi gratia anni mensibus possederis prioribus v, et ego veni posterioribus, ego potior ero quantitate mensium possessionis; non tibi in hoc interdito prodest.

stated in the actual wording of the interdict.

in the interdict utrubi a person is not only profited by his own possession, but also by that of any other person which lawfully accrues to him, for instance by that of one whose heir he is, or that of one from whom he has bought the thing or received it as a gift or an assignment of dower. If therefore the good possession which belonged to another when joined to our possession exceed the possession of our opponent, we succeed upon this interdict. But no accession of time is allowed or can be allowed to a man who has no possession of his own: for to that which is a nullity nothing can be added. And further, if he have a tainted possession, i.e. one acquired by violence, clandestinity, or suzerainty on the part of his opponent, no accession is allowed: for his own possession does not count for him. 152. The year is reckoned backwards; therefore if you, for example, have been in possession for the first five months of the year, and for the last seven, I shall be in the better position by the amount of the months of my possession; nor will it be of service

hod hibi concedi postulavit, sed et is qui nullum voluntatis indica, patiencie tamen dominum possident. (151.) At. v. 6. 11. See also D. 43. 26. 1. The interdict is given in full in D. 43. 17. 1.

2 Instead of the words "quantitate...possessio est," Heffer reads "quantidet vero plurium mensium possessionis causa dixit in hoc interdito accipar shall be in the better position by the amount of the months of my possession; nor will it be of service..."
154. Recuperandae possessionis causa solet interdictum dari, si quis vi delectus sit, nam ei proponitur interdictum cuius principium est: unde tu illum vi deiecit. Per quod is qui deiecti cogit ei restituere rei possessionem, si modo is qui deiectus est nec vi nec clam nec precario possidet ab altero acquire possession we have stated in the second commentary: and there is no doubt that we cannot acquire possession by mere will.  

154. An interdict for recovering possession is generally granted when a man has been forcibly ejected. For there is set forth for his benefit the interdict which commences with the words: "Unde tu illum vi 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 su Ferre:

...
Double Interdicts, Uti posseatis and Utrubi.

reum: nam actus est qui desiderat ne quid fiat, reus is qui aliquid facere conatur. (160.) Duplicita sunt, velut uti possidetis interdictum et utrubi. Ideo autem duplicita vocantur, quia par eiusque litigatoris in his condicio est, nec quiescum praeipue reus vel acteur intelligitur, sed unusquisque tam rei quam actoris partes sustinet: quippe Praetor pari sermone cum ueroque loquitur. nam summa conceptio eorum interdictorum haec est: uti non possidetis, quominus sit possidetatis viam fieri velit. Item alterius: utrubi hic homo de quo agitur, apud quem maiores partes in his anni sunt, quominus est eum ducat viam fieri velit.

161. Expositio generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus: et inequam a simplicibus.

(162.) Si igiur restitutum vel exhibendum interdictum redditur, velut ut restitutur ei possesso qui vi defectus est, aut exhibatur libertus cui patronus opera indicere velit, modo 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 uti possidetis and utrubi: which are called "double" from the fact that the position of each litigant in respect of them is the same, and that neither is regarded as being specially defendant or plaintiff, but each sustains the character of defendant and plaintiff at once, inasmuch as the Praetor addresses both in like language. For the general drawing of these interdicts is as follows: "I forbid violence to be employed to prevent you from possessing in the manner you now possess." So also in the case of the other interdict: "I forbid violence to be employed to prevent that man, whether of the two he be, with whom the slave who is the matter of action has been during the greater part of this year, from 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 libertus shall be produced to whom his patron wishes to appoint his services, the matter is brought

sine periculo res ad exitum perdicitur, modo cum periculo. (163.) Namque si arbitrarii postulaveritis est cum quo agitur, acceptum formularum quae appellatur arbitraria. Nam indicet arbitrari si quid restituit vel exhiberit debetur, id sine poena exhibit vel restituit, et ita absolutur: quod si nec restituit neque exhibeat, quanta re est condemnatur. sed actio quoties sine poena expertur cum eo quom neque exhibi neque restituere quicquid optet, nisi collumiae indicet, et oppositum fuit, diversas quidem scholae autoribus pluect prohibendum collumiae indicium cum arbitrarii postulaverit, quasi hoc ipso confessum videatur, restituere se vel exhibere debeba. sed alio in utinam, et recte: namque sine utlo tempore ne superaret, arbitrari quisque postulare potest. (164.) Certum observare debet is qui vel interdictum petet ut statim petat, antequam ex iure exeat, id est antequam a Praetore discedat: sero enim potentibus non indulgetur. (165.) Illoque si arbitrarii non peteretis, sed

1 Sc. by means of a special interdict, "de libero homine exhibendo," which, like our writ of Habenta Corpus, was a process for bringing up the body of a freeman who was under detention. 4 The special object of
tacitus de iure exiurit; cum periculo res ad exitum per-
ducitur. nam actor provocat adversarium sponsione: *Ni§
contra editum Praetoris non exhiberit aut non re-
istuuit: ille autem adversus sponsionem adversarii re-
stipulat. deinde actor quidem sponsionis eiusmodi adversario: idque invicem restitupiones. sed actor spon-
sionis formulae subject et aliud iudicium de re restitienia vel
exhibenda, ut si sponsione victor, nisi ei re exhiberit aut
restitutori adversarius quanti ca res sit condemnari——[desunt 48
lines].

166. Postquam iegur Praetor interdictum reddidit, primum
litigatorum alterius res ab eo fructum licendo rei tantisper
in possเนonem constitutur, si modo adversario suo fructaria stipu-

if the defendant do not ask for an *arbiter*, but go out of court
without speaking, the matter is carried on to its issue “with
risk.” For the plaintiff challenges his opponent with a spon-
son: “Unless he have not failed to produce or restore in
violation of the Praetor’s edict:” and the latter again makes a
restipulation in reply to his adversary’s sponson. Then the
plaintiff serves his opponent with a formula in claim of his
sponson; and the defendant in his turn serves the other with
a formula in claim of his restipulation. But the plaintiff tacks
on to the formula in claim of the sponson another precept
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 be 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

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1 Holloway 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 sponse being
in both cases prejudicial only and
intended to lead up to a decision on
the stipulation, *pro prætsa lites in
sponsionem* in the one case, *de re
restituenda vel exhibenda* in the other,
which stipulations were tacked on to
the sponson and really contained
the gist of the case.

Hence in his *Tractatus on Posses-
sion* (Book IV. § 36), Savigny says
that unless the defendant on an in-
terdict admitted the plaintiff’s de-
mand, the process on the interdict
became identical with that in an or-

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1 The text adopted here is that of
Huschke. Heffer’s varies consider-
ably from it verbally, but only slight-
ly in sense: the chief difference be-
ing that, instead of *fructus dupium
praeclar* Heffer suggests *posterior
restitutorum*, and inclines to trans-
late aut *in* in the earlier part of the pas-
sage “from his opponent,” not “from
the Praetor.” For *tantisper* in the
sense of interim see D. 9. 3. 11, D.
37. 10. 3. 13, and Gaits. 1. 188.

2 This paragraph is corrupt, and
none of the conjectures made by
the editors of the text seem happy
enough to merit insertion.

3 IV. 150.
dum me judicatum sit, adversarium quidem et sponsionis et
restipulationis summas quas cum eo feci condemnat, et conve-
nienter me sponsionis et restipulationis quae mecum factae
sunt absolvit, et hoc amplius si aptar adversarium quem pos-
sessio est, quia fructus lictatione vicit, nisi restitut mili
possessionem, Cascelliano sive secutorio judicio condemnatur.
(165.) Ergo is qui fructus lictatione vicit, si non probat ad se
pertinere possessionem, sponsionis et restipulationis et fructus
licitationis summan poenae nomine solvere a praeterea posses-
sionem restitutur liberetur: et hoc amplius fructus quos
insera percepit reddid. summa enim fructus lictationis non pratum
est fructum, sed poenae nomine solvitur, quod quis alienum
possessionem per hoc tempus retinere et facultatem fruendi
nauisci conatus est. (168.) Alio autem qui fructus lictatione
victus est, si non probat ad se pertinere possessionem, tantum
sponsionis et restipulationis summam poenae nomine debet.
(169.) Admonendi tamen sumus liberum esse ei qui fructus
licitatione victus erit, omissa fructuaria stipulatione, sicut Cas-
celliano sive secutorio judicio de possessione recipienda expe-
ririus, ita separatur et de fructus lictatione aegre: in quam ten
proprium judicium comparatum est, quod appellatur fructuarium,
quod nomine actum iudicium solvit satis accipit. dicitur autem
et hoc iudicium secutorium, quod sequitur sponsionis victoriam;
sed non aequo Cascellianum vocatur. (170.) Sed quia non-
nulii interdicto reddito cetera ex interdictione facere noleant,
atque ob id non poterat res expediti, Prætor — — — — — —
comparavit interdicta [desunt 47 lineae].

171. Sed adversus reus quiem ininitante ex quibusdam causis
dupli actio constituitur, velut si iudicavit aut dispensi cras damni
iniuriae aut legatorum per damnationem relictorum nomine agitur:
ex quibusdam causis sponsionem facere permititur, velut de
pecunia certa credita et pecunia constituta: sed certae qui-
dem credite pecuniar survive partis, constituata vero pecu-
nal stipulatione have been made, to proceed separately for the
amount offered for the fruits, just as he can proceed separately
for the recovery of the possession by the Cascellian or secutory
action: and for this purpose a special form of proceeding has
been provided, called judicium fructuarium, by means of which
the plaintiff can obtain security for the payment of the award
of the judex. This action is called "secutory" as well as the
other, because it follows upon success in the picion, but it
is not properly called Cascellian also. 170. But inasmuch
as some persons, after the interdict had been issued, refused
to conform the rest of their conduct to the spirit of the inter-
dict, and so matters could never be brought to a conclusion,
therefore the Prætor...... provided (other) interdicts......

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 judiciae, dispens.
damnum iniquarum, or for legacies left by damnation: in some
cases it is allowable to enter into a sponson, 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 sponson

1 IV. 91.
2 IV. 10, 21, 25.
3 III. 122.
4 IV. 210, 216.
5 II. 201—208, 209.
6 II. 124.
7 Constitution was one of the Fac-
ta Praetoria, mentioned in note (1)
furtum sciet statim nuz/zquam Praetor it is amount minors, and such in divided viz. to Paul. may the either an heirs special From Paulus, or exaction nudum nor quadrupli, for 5. action, as the one would render actionable this was given to her. See D. 3. 2. 15—19, D. 25. 5, D. 25. 6, D. 29. 2. 30. 1.

niæ partis dimidiae. (172.) Quodsi neque sponsio, neque dupli actionis periculum et quam quo agitur minabantur, et ne statim quidem ab initio pluris quam simili sit actio, permittit Praetor insinuandum exigere non calumniae causa ini- tias ire: unde quia heredes vel qui heredum loco habentur, nesquaman poenis obligati sunt, item feminis pupillisque remitti solet poena sponsionis, ibat modo eos iure. (173.) statim autem ab initio pluris quam simili actio est, velut furti manifesti quadrupli, nec manifesti dupli, concepti et obtati tripli.

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 exaction of an oath, “that the traverse is not pleaded vexatiously.”\(^1\) Hence, since heirs and those who are esteemed as heirs\(^2\) are never liable to penalties\(^3\), and since the penalty of the sponso is generally remitted in the case of females and minors, the Praetor orders such persons merely to take the oath. 173. Examples of actions which from their very outset are for more than the simple value of the thing in dispute are such as the action of furtum manifestum for four-fold, of furtum nec-manifestum for double, those of furtum conceptum and oblatum for three-fold\(^4\); for in these and some other cases

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 mere medium postum not giving rise to an action, and the process pro- vided for its recovery by the Praetor- tian edict was that named in the text, viz. the actio constitutum pecuniae. See Paul. S. P. N. 2.

\(^1\) From Cic. pro Reus. Amer. c. 29 we learn that in earlier times the penalty for falsely taking the oath de "calumnia" was branding on the forehead with the letter K (for Kalum- nia); and Helveticus thinks this penalty was inflicted whether the per- son took place in a civil or criminal action. See Heinlein. Antiq. iv. 16.

\(^2\) See Bonorum possessiones; ii. 119 et seqq.

\(^3\) Another reading is "jure civilis" non amplius obligati sint? the meaning of which is the same as that of "poenis nonquam obligati sunt."

\(^4\) III. 189—191.

the action is for more than the simple value, whether the defendant traverse or admit the claim.

174. Vexations conduct (calumnia) on the part of the plaintiff too is restrained; sometimes by the action of calumnia\(^5\), sometimes by a cross-action, sometimes by an oath\(^6\), sometimes by a restipulation. 175. The action of calumnia is admitted in opposition to all actions whatever, and is for a tenth part of the matter in dispute; or when it is allowed against interdicts, for the fourth part. 176. It is in the defendant's power to elect whether he will reply with the action of calumnia, or require the oath "that the action is not brought vexatiously." 177. The cross-action is applicable to certain special cases; for instance, to that of the actio injuriarae\(^7\), and the proceedings taken against a woman when she is charged with having fraudulently transferred pos- session to another after having been put in possession parentis nominis\(^8\); so also to the case of a person bringing his action on the ground that although he had received from the Praetor

\(^5\) Also see n. to Inst. iv. 16, pp.

\(^6\) Similar to that referred to in iv. 174.

\(^7\) II. 274.

\(^8\) This is when a woman on the death of her husband claimed succe-
Proceedings arising out of Calumnia.

sum ab alio quo admissum non esse, sed adversus inuiuriam quiDEM actionem decima partes datur; adversus vero duas
istas quintae. (178.) Severior autem coercitio est per contra-
rium iudicium: nam calumniæ iudicio x. partis nemo damnatur,
nisi qui intelligit non recte se agere, sed vexandu adversarii
gratia actionem instituit, potiusque ex iudicis errore vel iniqui-
tate victoriam sperat quam ex causa veritatâ: calumnia enim
in adiectu est, sicut fturi crimen. contrario vero iudicio omninum
damnatur actor, si causam non tenuerit, licet aliqua opin-
nione inductus crediderit se recte agere. (179.) Utique autem
ex quibus causis contrario iudicio agere potest, etiam calum-
niæ iudicium locum habet: sed alterum tantum iudicio agere
permittitur, qua ratione si insinuandum de calumnia exactum
fuert, quemadmodum calumniæ iudicium non datur, ita et
contrarium non dari debet. (180.) Restitupationis quoque
poena ex certis causis fieri solut: et quemdummodo 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 one, for in the judicium calumnia a man
is never mulcted in the tenth unless he be aware that he is
bringing his action improperly, and be taking proceedings
for the mere purpose of annoying his opponent, expecting to
succeed rather through the mistake or unfairness of the
fudex than through the merits of his cause: for calumnia like
furtum lies in intention. In a cross-action, on the other
hand, the plaintiff, if he be unsuccessful in his suit, is al-
ways mulcted, even though he were induced by some idea or other
to believe that he was bringing his action properly. 179.
Undoubtedly in all cases where we can proceed by cross-
action, the judicium calumnias can also be employed: but we
are allowed to use only one of the two. According to this
principle, if the oath against vexatiousness have been required,
the cross-action cannot be allowed, inasmuch as the judicium
calumniæ is not (allowed). 180. The restitupatory penalty
is also one only applicable to certain special cases: and just

indicio omnimodo condemnatur actor, si causam non tenuerit,
 nec requiritur actio non recte se agere, ita etiam restitupationis
poenâ omnimodo damnatur actor. (181.) Sane si ab
actore ea restitupationis poena petatur, et neque calumniæ iudicium
opponentis, neque iurisprudenti religio injuquit: nam con-
trarium iudicium in his causis locum non habere palam est.

182. Quibusdam iudiciis damnati ignominiosi sunt, velut
furti, vi honorum raptores, inuiuriam; item pro socia, fiducia,
tudae, mandati, depositi. sed furti aut vi honorum raptores
aut inuiuriam aut solemn damnati notantur ignominia, sed etiam
pacti: idque in edicto Praetoris scriptum est, et recte: plurimum
enim iustum utrum ex delito aliquid, ex contractu debitor sit.

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 restitupatory penalty he
is condemned to pay in every instance. 181. Clearly, if a
restitupatory 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.

183. In some actions those against whom a judgment is
given are branded with infamy, for instance the actions for thief,
robbery with violence, injuries; also those in respect of partner-
ship, fiduciary engagement, guardianship, mandate, deposit.
But not only those condemned for theft, robbery, or injury
are branded with ignominy, but even those who have bought
the plaintiff off, and thus it is laid down, and very properly
too, in the edict of the Praetor: for there is a considerable
difference between the position of a debtor upon a delict and
one upon a contract, a point which the Praetor takes note of

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1 The plaintiff in the original ac-
tion, 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 11, 2, 4, 6, 3.

4 The latter portion of the section
is filled in according to Heffter's con-
jectural reading.

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tractus separavili a delictis, etrum si quis alio nomine convenitur, velut procuratorio, ab ignominia liber erit. Idem est si quis fideiussorio nomine judicio convenitur, etenim hic pro altero damnatur.

183. In summa scindium est cum qui aliquam in ius vocare vult et cum eo agere, et cum qui vocatus est naturali ratione ac lege iustum persovam habere debere, quare etiam sine permessu Praetoris nec liberum cum perennibus constructo actio, nec patrono et liberto, si non imperavit sibi edicti, et in eum qui adversus ea argent posse pecuniarium statuerit. (184.) Quando autem in ius vocatus fuerit adversarius, ni eo die finitum fuerit negotium, in the portion of the edit 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 fideiussor, because he too is condemned to pay on behalf of another.

183. In conclusion, be it known that both he who wishes to summon another into court and sue him and 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 patron and his libertus unless special exemption be granted them from the rule of the edict; and should any one act in contravention of these regulations a pecuniary penalty is imposed upon him. 184. When a defendant has been summoned to court, unless the business be concluded on the day of sum-

Vadimonium. 343

vadimonium ei faciendum est, id est ut promittat se certo die sisti. (185.) Siunt autem vadimonia quiubusdam ex causis puram, id est sine satisfactions, quiubusdam cum satisfactions, quiubusdam.inreiuandam, quiubusdam recuperatoribus suppositis, id est ut qui non siceret, is prositus a recuperatoribus in summan vadimoni condendatur: eaque singula diligenter Praetoris edicto significetur. (186.) Et si quidem indicauit deersive ageret, tantum fit vadimonium, quanti ea res erit; si vero ex ceteris causis, quanti actor inuenerit non adsumisse causa postulare sibi vadimonium promisit, nec tamen pluris quam partis dimidiae, nec pluribus quam sestertium c milibus fit vadimonium. In aequo si centum milium res erit, nec indicauit deusive ageret, non plus quam sestertium quintunquinta milion fit vadimonium. (187.) Quae autem personas sine permessu Praetoris impune in ius vocare non possimus, easdem nec vadimonio

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Vadimonium. 343

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1 The subject of infamia or ignominiis is treated of in D. 3. 2. See especially 3. 2. 1, 3. 2. 4, 5, 3. 2. 6, and 2. 5. 1.
2 Naturali ratione here means equitable as opposed to civil law, civil law being denoted by the word lex. See II. 67, 66, 67 and D. 4. 3. 8. The phrase personam habere is identical with personam aliquam sustiner, agent, sufferer, etc., which occur

3.42 Status

3.42 Status of the plaintiff and defendant.

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3.42 Status

3.42 Status

3.42 Status

3.42 Status

3.42 Status
inviás obligare nobis possimus, 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 him¹.

¹ That is to say, in order to secure their attendance at the trial by means of a vadimonium, the plaintiff must first obtain leave from the Praetor to summon them for the preliminary proceedings.
APPENDIX.


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 furitus est, adquatumur gentiliumque in eo pecuniaque ejus potestas esto” (Tab. 5, l. 7); and what is there denoted by it is evidently a power of superintendence and direction. We may conclude then that potestas was not the archaic word 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 referring to the persons of the household, just as dominium denotes his power over the inanimate or unintelligent components of the same.

Mancipium, which originally means hand-taking (mors capre), 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; 2nd, for the object of the mancipatio, the thing to be received; 3rd, 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 capere”; although the more probable reason for the application of the term is to be found in the fact that slaves were viewed by the Roman lawyers as mere things, and so capable of transfer from hand to hand.

The importance of the term mancipium, so far as regards the historical aspect of Roman law, lies in the fact that from its connection with the word manus we gather a correct idea of the ancient notion of property, which was in effect the dominion over those things only that could be and were actually transferred from hand to hand.

As potestas came gradually to bear a restricted meaning in the law sources, and instead of being a general term for authority of any kind began to signify authority over persons only, and those too such alone as were in the families or poteas, so mancipium became a technical term of the possessor of the mancipia; so mancipium 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 Mühlenbruch’s Appendix on I. 13, in Heberden’s Syntagma, pp. 159, 160.
(F). On Arrogation and Adoption.

The process of arrogatio resembled the passing of a lex, and took place at the Comitia Curatae. Legislative sanction was required for so solemn an act as the absorption of the family of the arrogator in that of the arrogatee (see i. 119) 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 people claimed a right of succession to all vacant inheritances as "parents omnium." (Tac. Ann. iii. 38), and arrogation naturally prevented vacancies occurring.

This method of adoption per populum was practically lost after the empire was established. In Cicero's time it seems to have been frequently employed, and in the Pro Domno, c. 20, we have a passage containing the form of words used: "Credo enim, quanquam in illud adoptio legibus factum est nihil, tanen esse interrotonit, Auncorne esce, sit in te: F. Fortunis vina necesseque potestatem haberet, ut in illo." Augustus, Nero, and other emperors, adopted in this form, viz. by order of the populus; nor was it till after Caligula'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 curiae apud pontifices, ut mens est, adoptarem, &c." (Hist. i. 15).

Adoption, or rather arrogation, by imperial rescript afterwards replaced the older method. The reader desirous of further information on this topic, the principal interest of which lies in its relation to the history of social life in ancient Rome, is referred to Heineccius' Syntagma, t. xi. pp. 143-182, Malinowski's edition, and Sandys' Justinian, pp. 114, 115.

(T). On Tutorship.

Tutors may be thus tabulated according to their species:

I. Testamentarii
   (a) Optivi, § 154.
   (b) Dativi, § 154.

II. Legitimi
   (a) Agnisti, § 165.
   (b) Patroni, § 165.
   (c) Quasi-patroni, § 175.

III. Filii Patris
   (a) Manumissores liberarum personarum, § 166.
   (b) Liber quas liberarum, § 172.

IV. Cesarii, § 168.

V. Dativi (a magistratibus dati)
   (a) Praetorii, §§ 176-184.
   (b) Atillani, §§ 185-187.

Tutela was exercised over minors or women. Those under tutela were placed in that position because, either as a matter of fact or of implication of law, they were incapable of exercising the legal rights which appertained to them as persons sui 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 interpose his authority at the woman's command, and not at his own discretion. (Ulpian, xiv. 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 (§ 192). 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 tutela legitima of the agnati over women were abolished in Gaius' time, previous the same remarks would have applied to them.

A. Tutores testamentarii were allowed by the law of the Twelve Tables; "ut legatus super pecunia tutelae suae ret rat est jus esto." Hence this class might be called legati equally with the succeeding, but to avoid confusion the two are marked by different appellations.

B. Tutores legitimi are of three kinds:

I. The agnati of one to whom the parent familiae had appointed no testamentary guardian. The clause of the Twelve Tables which authorized the agnati to act is lost, but Gaius is explicit in his statement that their authority is based on the Tables (§ 158).

II. The patroni and their children (§ 165) 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 dominum.

III. The manumitter of a free-born person, when that manumitter was the parent familiae himself (§ 175). If, however, the manumitter were a stranger, he would not be a tutor legitimus, but only a tutor fiduciarius (§ 166): and again, the children of a tutor legitimus of this class, which we may call the class of quasi-patroni, would be tutor fiduciarius (§ 175). The father is allowed to have tutela legitima, because when he manumits the son as a preliminary to emancipation by himself, he is regarded as retaining in some degree his manumission, and although emancipation dissolved the tutela, 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 tutela, 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 manumitter accords to his father's position as patronus or quasi-patronus, and consequently to the tutelage attached to that character, yet the tutela is altered in kind to meet the equity of the case. Whether the tutela is of one character or the other is no matter of indifference if the manumitted person be a woman, for, as above observed, the coercive powers of a tutor legitimus were great, and those of a tutor fiduciarius nil.

C. Tutores fiduciarii are of two kinds:

I. Manumitter of free persons manumitted to them by a parent or emancipator. Such persons have only the tutelage of the nominal character, because when manumission is made to a stranger for purposes of manumission, the law implies a trust that the manumitter will not use his position for his own profit (§ 141).

II. Children of quasi-patroni, whose case we have discussed just above.
Appendix.

D. Tutors cont'd. 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. Tutors divisi.—

I. Praetor. given by the praetor for various reasons (38 176—184), and when given, superseding the claim to the authority of the tutor of one of the preceding classes,—deputy-tutors, in fact, for a longer or shorter time.

II. Attorni, 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 Halifax's Analysis of the Civil Law.

I. Natural modes of acquisition.

(a) Occupancy.

(1) Of animals. II. 66, 67, 68.
(2) Of property of the enemy. II. 69.
(3) Of things found. Just. Inst. II. 18 and 39.

(b) Accession.

(1) Natural.

(a) The young of animals. Just. Inst. II. 19 and 37.
(b) Alluvion. II. 70.
(c) Islands rising in the sea or a river. II. 72.
(d) Channels deserted by a river. Just. Inst. II. 23.

(2) Industrial.

(a) Specification. II. 79.
(c) Confusion of liquids. Ibid. II. 27.
(d) Commixtion of solids. Ibid. II. 28.
(e) Banklings. II. 73.
(f) Writing. II. 77.
(g) Painting. II. 78.

(3) Mixed.

(a) Planting. II. 74.
(b) Sowing. II. 75.
(c) Perpetuo fruitum. Just. Inst. II. 35, 36.

(c) Tradition (delivery). II. 65.

(2) On gift. Ibid.

II. Civil Modes of acquisition.

(1) On loan (usufruit, for the same thing has not to be restored). III. 90.

II. Civil Modes of acquisition.

(A) Universal.

(1) Succession on death.

(a) By testament (hereditas). II. 98.
(b) By law (hereditas). II. 98.
(c) By the testator (bonorum passio). II. 98.
(d) By fideicommissum. II. 243.

(2) Arrogation. II. 98, III. 83.

(3) Conventio in manum. II. 98, III. 83.

(B) Singulars—

(a) Mancipatio. II. 22.
(b) Cessio in iure. II. 22.
(c) Usucapio. II. 41.
(d) Donatio propria. Just. Inst. II. 72.
(e) Donatio impropria.

(1) Propter rustiam. Just. Inst. II. 73.
(2) Mortis causa. Ibid. II. 7.

(2) Succession on death.

(a) Legacy. II. 57, 191.
(b) Fideicommissum singularum. II. 260.

(E) On the causes rendering a Testament invalid.

When a testament would not stand, it might be either:

1. Testamenta.

(a) Nulla testamenta (I. 3). owing to some original defect:

(1) Testamentum: by omission of the words of testamentum.
(2) Testamentum: by the omission of the testamentum.
(3) Testamentum: by a testament made by a testamentator, or without the consent of the testamentator.
(4) Testamentum: by one who has no legal right to make a testament.
(5) Testamentum: by a testament made by a testamentator, or without the consent of the testamentator.
(6) Testamentum: by the omission of the words of testamentum.

2. Testamentum: by the omission of the testamentum.

(1) Testamentum: by a testament made by a testamentator, or without the consent of the testamentator.
(2) Testamentum: by the omission of the words of testamentum.

When a testament would not stand, it might be either:

1. Testamentum.

(a) Testamentum: by omission of the words of testamentum.

(b) Testamentum: by the omission of the testamentum.

(c) Testamentum: by the omission of the words of testamentum.

(d) Testamentum: by one who has no legal right to make a testament.

(e) Testamentum: by a testament made by a testamentator, or without the consent of the testamentator.

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(f) Testamentum: by the omission of the words of testamentum.
(F). On the Decuriones.

The decuriones were the members of the senate of a municipium, i.e., of a town which was allowed to manage its own internal affairs. Originally the municipia or burgesses, convened in their general assembly, seem to have held the sovereign power; they elected the magistrates (see Cic. pro Cluentio, VIII.) and they enacted the laws (Cic. de Leg. iii. 161); but the power of the assembly gradually declined, and the senate usurped its functions, directly administering all business, instead of adopting and passing the matters sent up to it by the municipts. The Senate and its members are denoted by different names at different periods of Roman history, originally ord. decurionum (or, in Macrobius, Sat. ii. 3, 11, where there is an anecdote that Caesar found it more difficult to get a decurionibus at Pompeii than at Rome), then ordinarii, finally curiales, and the members curiales or decuriones. During this last period the magistrates of a municipium were nominated by the decuriones, and the functions of government apportioned between the two. The first infringement on the rights of the municipios as a body may be referred to the time of Augustus, who ordered that the right of suffrage at elections should be confined to the decuriones, and from that time the name of municiptis, originally applied to all the inhabitants, is confined by writers on the subject to the members of the Senate or curiae.

As the decuriones were thus invested with so large an amount of power and influence, it may be asked why, in later times it was difficult to find men willing to become members of the corporation, and why had devices to be invented to keep up the numbers of the curiales? For instance, that of allowing legates to give up the name of the decuriones, which they held as a body, to one of their members as a new member of the curia (see Other curiales). The reason is that the absorption of all power by the emperors in later times rendered the office one of intolerable responsibility, and further, that heavy fees attended the enrolment of a new member.

(G). On Caducea and the Lex Papia Poppaea.

The Lex Papia Poppaea introduced important alterations into the law of legacies and lapsed. Let us first consider the old law on the subject.

Previous to the Lex, legates which might have risen from the death or incapacity of the legatee, or from any original invalidity of the bequest, lapsed to the inheritance, and so benefited the heir. But this rule did not immediately apply to co-legates; these only lapsed if both or all the co-legates were unable to take.

Hence if some of the co-legates were able to take, there might be the accretion to the heir. Thus:

1. If the joint-legate had been given disjunctus (in which case the co-legates were styled conjuncti), there was no accrual, for each legatee had from the beginning a title to the whole thing.

2. If it had been given conjunctus (in which case the co-legates were terresi, et certi conjuncti), accrual was generally allowed, i.e., the surviving legatee or legates took the share of their deceased associate, the only exception being in a legacy by damnation, where there was a lapse.

3. If the joint legacy had been given with a specification of the shares to be enjoyed by each legatee, (in which case the co-legates were said to be
Dismissing these Praetorian obligations, we will briefly indicate the species included under the genera numbered I. and II. above:

Contracts stricti juris (1. 1, above) were either verbal or literal. The verbal being the stipulations so fully described by Gaius (iii. 92—127); the literal obligations being the romana, chirographae and syngraphae, as to which he also says enough (iii. 124—134) to render further particulars unnecessary in this place.

The obligations from delict (1. 2, above) are fourfold, as Gaius tells us (iii. 182—186), arising either from furorium, responsum, damnum injurious datum, or injuria.

As to the variae consumna figurae (1. 3, above), Gaius says but little, and that little indirectly and inferentially (e.g. in i. 91). We stated above that these figurae included two important branches, quasi-contracts and quasi-delicts; of the former subdivision we may bring forward especially the instances of Negatorum gestis, business transacted for a man without his knowledge or consent, whereby a jurial relation arises, which is described in detail by Mackelvey in his Sysytema Juris Romani, §§ 450—453; and resitio initialis, touched upon by Gaius slightly, but as to which Mackelvey also gives full information in §§ 453—459, and lastly, commoent substanzia, a community of interest cast upon two or more persons without agreement of their own, for which we shall again refer the reader to Mackelvey, §§ 459—467.

The quasi delicts are chiefly injurious acts of slaves or descendants for which the master or descendant is bound to make reparation, some of which are named by Justinian in Inst. iv. 1, 2, 7; and the act of a judex qui liquidavit suam facit (Gai. iv. 53) is another instance. Another example is that of a man who has left an obstacle on a high way, or kept some thing supposed over one which by proving a nuisance or by falling on a passer-by or his property works him damage.

The other figurae are obligations arising from the contracts of our owns, such as agents, remedied by the actions of quod pactum (iv. 72), etc.

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 completed.

Real contracts, then, are:

Concessional contracts, the surest, are:}

The contracts described as real or concessional are "house fidei," that is, to say, the "judea" who has to decide cases arising out of them may entertain
equitable pleas or answers. So also are the quasi-contracts and quasi-
debts.

Pacta adjecta and Pacta legitima (see t. 4. above) still remain to be men-
tioned. 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 an agreement
on the purchase selling again what he has bought, the vendor shall have
a right of pre-emption, &c. &c. (see Mackelvey, § 419). Pacta legitima are
various kinds, but the chief are the quoniam donativa and that de defete
constitutandi. These again are too minute in their nature to be discussed
in an elementary treatise, and we refer the reader desirous of information
to Mackelvey, §§ 420–428.

(K). On the Decemviri, Centumviri, Lex Pinaria, Lex Aedulina, Lex
Aedularia, Lex Juliae.

A. The Decemviri. judicandi.

From the time of the XII Tables decemviri seem always to have existed
in the Roman state, a fact which is indicated by Livy (xiii. 55) in the words
he quotes from a law of the consuls of Valeria and Horatius: "ut qui
tribunis plebii aequitatis judicibus decemviris concusset, ejus caput iuvit
sacrum esset, familia ad aedem Cereris Libert Liberique venire vellet." Livy
tells us that the original Decemviri, by whom the XII Tables were drawn
up, themselves exercised judicial functions, "singulii d'hrno quoque
dicuntur et pars praetext," until the constitution was re-established. The
office of decemviri was still kept in existence, and, according to Heffter,
had the cognizance of almost all suits up to the date of the institution of
the Praetor's office in 493. Until that event Heffter also holds that there
was no giving of a judex, except in cases where the law specially provided
for suits being conducted per iudicium postulationes, grounding his opinion
in Tab. 1. 1. 7: "XI pagam, in commodo et in suo sace meridium casuum condicto, quem
peremptum hasse praebet post neminem presentem stitun adhibere et"
so the decretum had what in later times was styled cognitio extraordinaria
in all sacramental cases.

B. The Lex Pinaria.

This lex enacted about B.C. 350, effected a great change in the functions
of the decemviri. A large number of actions had already been withdrawn
from their cognizance, and transferred to that of the Praetor; and possibly
because this 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 con-
fined to the particular case entrusted to him. There is indeed a passage
from Pomponius in the Digest (D. 1. 2. 2. 29) which seems to refer to the
institution of decemviri to the same period as that of the quatuor viri viritum,
&c., the words being, "unde quoniam esset necessitas magnus quod hie
praecepto, Decemviri liitos judicandi sunt constituti. Eodem tempore et
quatuor viri etc." But as we know from Livy that the office existed pre-
viously, we must admit that the strict meaning of necessitas should not
be pressed, but that we ought rather to understand that some important
was conferred on the decemviri; and hactenus will then be interpreted as
the sacramental actions for which the Lex Pinaria authorized the Praetor
to call in the decemviri as judex. This explanation will, however,
necessitate our placing the Lex Pinaria in the year 350 B.C. instead of

On the Decemviri, Centumviri, Lex Pinaria, &c. 357

350 B.C., because Pomponius says the quatuorviri were instituted at the
same time as the tribunviri capiteis, and the date of their institution is
B.C. 358; but, first, we are not bound to consider that Pomponius is accurate
to a few years in his very sketchy account; and, second, even if he be, there
is no very valid reason for the commonly-received opinion that B.C. 350
is the date of the Lex Pinaria.

C. The Lex Aedulina. Gaius says that by this law and the two Julian laws
the legal actions were abolished, save in two cases, viz. actions referring
to testamentary disputes and actions tried before the centumviri. Those
who wish to know exactly how much was effected by the Lex Aedulina and
the Lex Juliae respectively, should consult Heffter's Observations, pp. 18–41,
a portion of his work too long for transcription here. The result is that he arrives
at these: the Lex Aedulina 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 cognition of questions touching liberty or citi-
zenship should be left to the decemviri liitos judicandi, and that all
other cases which had previously been sued out per iudicium arbitrii postu-
lacionis or per conscientiam should henceforth be matters of formula; the
Praetor having the jurisdiction thereof and appointing a judex, who must
give a decision within eighteen months from his appointment.

D. The Centumviri. This college consisted of 105 members, three from
each of the thirty-five tribes, and Cicero gives a list, the concluding words
of which imply that it is not an exhaustive one, of their functions:
"centumviri, testes in controversiis, in quibus usus usucapionum, tutelarum, gentil-
licitatis, aequationum, alivium, circumanlium, novarum, nundinarum, pari-
etum, iusnullum, stellitullorum, testamentarum, custodiamentarum, curarum
et tribunalium junvi versus." (De Ordin. 1. 38.)

E. The Lex Juliae. In the reign of Augustus important changes in the
constitution of the centumviral courts took place. The decemviri liitos judi-
candi still had a share of jurisdiction, and the Praetor was invested with
a new function, the praeses of these courts, which was henceforth
exercised by the centumviri, and the office previously held by ex quaestores.
The centumviri was at the same time or soon after increased to 180, and
they were divided into two or four tribuna, (some think more,) in which
some cases sat separately, although in others of more importance the whole
body acted together as judges. Whether much alteration was made by
the Julian laws in their cognizance is a disputed point; some jurists have
held that they could no longer deal with actions in rem, which thenceforth
were all for present; others have denied this statement; but there is very little
evidence either way.

F. The Form of Process in a Constitutional Cause. The plaintiff first
make application to the Praetor Utriusque 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, anserration, however,
feasible to the opposing party, taking the place of the old sacramenta,
forfeitable to the state. The centumviri then convened the centumviri, or
those divisions of them who had to decide the question, according to the
nature of the case. The rest of the process presented no peculiar features.

1 See Cic. pro Cicero, 327 pro Quintus, 20.
2 See Felix, sub verbo.
On the Proceedings in a Roman Civil Action.

Before resorting to law it was usual to endeavour to bring about an amicable settlement of the matters of difference by means of the intervention of friends. If their efforts were unavailing, the dispute was referred to Court, and the first step in the suit was the process termed *in jus vocatio*. In old times this *in jus vocatio* was of a very primitive character. The plaintiff appeared before the defendant, or, if the defendant were absent, before his advocate, and demanded that the defendant should be compelled to appear in court. This demand or *vocatio* was only made at the instance of the plaintiff, and never at the instance of the defendant. The plaintiff was at the same time bound by *in jus vocatio* to plead his cause before the defendant in court, or to obtain his *vocatio* in the course of the proceeding. The plaintiff was, therefore, obliged to prosecute his *vocatio* in the proper course of the *actio* or *causa*, and not to introduce a demand for a *vocatio* without some just cause. Nevertheless, the plaintiff was allowed to make a *vocatio* at any time, even before the *actio* was commenced, on the ground that the law did not require him to make a *vocatio* in order to institute a suit. The plaintiff was, therefore, not bound to *vocatio* his *actio* before the *actio* was commenced, but was allowed to do so at any time before the suit was commenced. The plaintiff was, therefore, not bound to *vocatio* his *actio* before the *actio* was commenced, but was allowed to do so at any time before the suit was commenced.


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plaintiff was failure, or to use the technical phraseology, causa cedebat. During the formal period there was not so much risk of this mishap, for the Praetor himself read them the verdict in the ordinary proceedings. In case of trial for the junctus, till the formula was properly drawn. Thus time and opportunity were given by the court for the correction of all technical omissions and mistakes before trial. Still the plaintiff, even at this period of procedure, did incur the danger we are speaking of, for the trial being at his risk and peril, if eventually it turned out that the formula adopted did not fit in with his cause of action, he failed in his suit.

It is clear then that up to this stage the chief, if not the only active part in the proceedings was played by the plaintiff, and that whilst it was open to the defendant to take advantage of all his opponent's mistakes, he himself was called upon to do nothing, so far as his defence was concerned, before the victorium was settled.

These preliminaries therefore being completed, the plaintiff's next step was vadarii or that is, in a particular and set form of words to pray that the defendant might find sureties to give bail for his appearance in court on a fixed day, generally the day after that following the application. That this form taxed largely the skill and care of the jurists of the day is evidenced by Cicero's words: 1 "Caesar assures that there is no one man out of the whole mass before him who could frame a victorium. "

The form itself is lost, but we may, however, surmise something of its nature from a passage in the oration of Q. Celsus. It seems clear that in the victorium were fixed the day and place when and where the parties were to appear before the Praetor in order to have the formula drawn up, that in cases were the trial was to take place out of Rome the manner of designating a magistrate and a junctus were inserted, and that where a defendant who was living in the provinces claimed a right of trial before a Roman tribunal the name of the magistrate was stated by whom the formula was to be drawn up.

Various other technicalities attached to the victorium. Two or three only need be specified. In the first place, as we have seen, bail might be exacted upon entering into a victorium; but it might also be entered into without any bail or any, and then it was termed praetor's bail; 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 defaulter, or the victorium expired as to the full amount of his victorium in case of non-appearance. If the defendant answered to his bail he was said victorium sidicus; if he forfeited his recognizances, victorium demas; if the day of appearance were put off, victorium differe was the technical phrase. The consequences that ensued upon the application being rejected into were as follows: where the two parties appeared in person upon the day fixed, the object of the victorium being thus secured, the victorium that was rejected, and the proceedings went on in the regular way, which will presently be described: If, however, one or the other of them failed to appear when the Praetor directed their case to be called on (citavit), the result, in case the plaintiff were in fault, was that he lost his case, (causa cedebat), but the judgment was not final and in later cases might prove successful. In case the defendant were in fault, his victorium was said to be decessit, and the plaintiff was authorized to sue him or his bail (which he bailed) ex stipulatu, for the amount stated in the victorium formula. Another means of securing attendance in court was a sponsio, entered into by the parties themselves without the intervention of sureties; and then on default of appearance a missio in praecontum was granted. This was given by the Praetor's edict, and enabled the plaintiff to put in possession of the defendant's goods.

Such was the process by which care was taken on the one hand to prevent frivolous and vexatious actions, and on the other to bring the parties to join issue, or to that stage where a formula could be granted. For this purpose the forms were these.—The Praetor having taken his seat in court, ordered the list of all the actions that had been entered and demanded two days back to be gone through, and the parties to them to be called into court. His object in doing this was to dispose of the victorium and to fix the different judicia. The case, therefore, being called on, supposing both parties were ready, the defendant, in reply to the citation, said: Where art thou who hast put me to my bail, where art thou who hast ceded me: see here I am ready to meet thee; do thou on thy side be ready to meet me. The plaintiff to this replied, Here am I. Then the defendant said, "What sayst thou?" The plaintiff rejoined, I say that the goods which thou possessest are mine, and that thou shouldst make transfer of them to me. This colloquy being ended, the next step was for the plaintiff to make his petition to the Praetor. These the Praetor could refuse, in some cases at once, in others upon cause shewn. Supposing he assented to the postulatio, he granted a formula, but first heard both parties upon the application. At this stage the defendant was allowed to state in what manner he had acted or was acting, or if he had not acted at all, to urge the insertion of some particular plea; the plaintiff on the other hand was entitled to ask for a judicium parum, that is, a simple issue without any special pleas, or for a repugnant plea as was granted, and to this the defendant might rebut (replicavit) and the plaintiff ret-ruct (repudiat), and so on.

These preliminary arguments took place before the tribunal, the technical term for them is ex praebule, that is, a simple issue without any special pleas, or for a repugnant plea as was granted, and to this the defendant might rebut (replicavit) and the plaintiff ret-ruct (repudiat), and so on.

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the evidence was adduced, and at the close of the evidence each advocate made a second speech, urging all that could be said in his client’s favor and commenting on the evidence that had been brought forward. The time occupied by the two speeches was not left to the discretion of the advocates, but limited to so many cles: p. 

When the cause had thus been fairly gone through, the last stage in the judicem was the sentence. Here the judge was not merely limited by the formula, and if he travelled out of it, and either assumed to decide upon what was not before him or touched upon collateral matter, he was said idem movem

ficer, and was liable to a penalty for his mistake. With the announce

ment of his sentence his power and authority in the suit ended. The execution of the sentence rested with the Praetor, but in delay of 30 days was allowed between the sentence and its execution. When that time had expired the sentence became what was called a res judicata, and upon it the successful party could bring his action for twice the amount of money awarded by the judex, and could also obtain a resi in possessum until his opponent’s property was sold, to pay the judgment debt. All this part of the cause was in the hands of the Praetor, whose imperium enabled him to direct proceedings against the party refusing to comply with the decision of a judex.

(M) On the Legis Actio per Judices Postulationem.

The strict nature of the actio sacramentum and the serious risk attaching to it of losing the amount deposited by way of incremantum must have led to devices for withdrawing the settlement of litigious matters from that action and getting them tried in a less strict form, in fact, to the introduction of a process by which recourse to no difficulty in maintaining an action

The cause then was called on, and the parties were summoned into court, in judicet. On their appearance, the oath of caluminius was administra
ted to them, and when that had been taken, the advocate (patrux) was expected to open the cases of their clients. They did this with a very short outline of the facts. After this brief narrative, called causae collectio, the body of the cause was drawn up by each Prae
tor on the commencement of his year of office, the praetor applying to the list the litigants made over to him, or more shortly, the plaintiff’s power of interrogating in juro, (not very fully defined by Cicero), to examine common-law interrogatories; confessions and acknowledgments; the evidence given by the parties to the suit before the Praetor; the forma

and raisces actio and the causa amplia, which comprised the long terms and times of trial at Rome and in the Provinces; and other matters of a similar nature, which would fill the pages of a more exhaustive digest of this subject, it may be

1. A list of judges selected from the

2. The matter was now in judicet, as opposed to the previous enquiries, which, as we have seen, were respectively of an ex visu form and in fuso.

3. It is beyond the scope of this note to dwell at full length on the important sub

ject of Roman Procedure. There are therefore many matters which cannot now be explained; such as the consequences re

2. Wirkman’s of the state constitutum; the re

3. The importance and varied use of the judices are ex

4. Ultra illo quod in judicetia decumare patens ciudex non potest.

5. D. no. 3. 18.

6. In the Digest it is called causae confection.

7. For the evidence I have followed Cic. de Leg. ii. 11, iv. 9, vi. 3.

8. For 2. 1. 11.
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